

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**KHRG EMPLOYER, LLC, D/B/A HOTEL  
BURNHAM & ATWOOD CAFÉ**

**Case 13-CA-162485**

**and**

**UNITE HERE LOCAL 1, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT  
OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**TABLE OF CONTENTS**

I. THE JUDGE ERRED BY FAILING TO APPLY A TEST OTHER THAN WRIGHT LINE (Exceptions 1, 2, 3, 4, 5 and 6)..... 3

    A. Demma Was Engaged in Protected Concerted Activity When He Entered the Security Code in Order to Deliver the Petition to the Management as Part of the Union’s Delegation..... 4

    B. Demma’s Conduct is Inextricably Linked With, and Therefore Part of the Res Gestae of, His Protected Concerted Activity..... 6

    C. Pursuant to the Two Part Test Applicable When Motive is Not an Issue, Demma’s Conduct was Not So Egregious so That He Lost the Protection of Act, Therefore His Termination Violated the Act..... 8

    D. While the facts here may not be a perfect fit, applying the Atlantic Steel four-factor test yields the same result: Respondent violated Section 8(a)(1) of the Act when it terminated employee Evan Demma..... 15

II. ASSUMING WRIGHT LINE IS THE APPROPRIATE ANALYSIS THE JUDGE’S WRIGHT LINE ANALYSIS WAS INCORRECT (Exceptions 4, 5, and 6)..... 18

    A. The Judge Failed to Recognize that Palladino conducted a sham investigation...20

    B. The Judge Offered Conflicting Reasoning Regarding Palladino’s Sham Investigation and Respondent’s Failure to Discipline Other Employees Who Followed Demma into Scott’s Office to Present the Petition..... 22

    C. The ALJ Incorrectly Concluded That the Timing of Demma’s Termination Did Not Support a Discriminatory Motive Finding..... 23

    D. The ALJ Improperly Rejected the Disparate Treatment Evidence..... 24

    E. By Incorrectly Concluding that the GC Failed to Sustain His Initial Burden, the ALJ Erroneously Failed to Consider, and Find, That Respondent failed to Carry its Burden..... 26

III. CONCLUSION..... 27

**TABLE OF AUTHORITIES**

*Aluminum Co. of America*, 338 NLRB (2002) ..... 3, 17

*Atlantic Steel*, 245 NLRB 814 (1979)..... 7, 15, 17

*Benjamin Franklin Plumbing*, 352 NLRB 525 (2008) ..... 3

*Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2005)..... 9

*Burger King*, 365 NLRB No. 16, fn 4 (2017)..... 4

*Circle K Corp.*, 305 NLRB 932 (1971) ..... 9

*Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976)..... 8

*Clean Power, Inc.*, 316 NLRB 496 (1995) ..... 5

*Consumers Power Co.*, 282 NLRB 130 (1986) ..... 2, 9, 10

*Coors Container Co.*, 238 NLRB 1312 (1978)..... 17

*Corrections Corp. of America*, 347 NLRB 632 (2006) ..... 18

*Crowne Plaza LaGuardia*, 357 NLRB 1097 (2011)..... 5, 15

*Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669 (2007) ..... 15

*Daimler Chrysler*, 344 NLRB 1324 (2005) ..... 15

*Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994)... 19

*Firch Baking Co.*, 232 NLRB 772 (1977) ..... 9

*Golden State Foods Corp.*, 340 NLRB 382 (2003) ..... 26

*Hoodview Vending Co.*, 362 NLRB No. 81 (2015) ..... 5

*Liberty National Products, Inc.*, 314 NLRB 630 (1994) ..... 4

*Limestone Apparel Corp.*, 255 NLRB 722 (1981)..... 26

*Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966) ..... 4

*Metropolitan Transportation Services*, 351 NLRB 657 (2007)..... 26

<i>NLRB v. Electrical Workers IBEW Local 1229, (Jefferson Standard)</i> , 346 U.S. 464 (1953) .....	4
<i>NLRB v. Transportation Management</i> , 462 U.S. 393 (1983) .....	19
<i>Random Acquisitions, LLC</i> , 357 NLRB 303 (2011) .....	17
<i>Reeves v. Sanderson Plumbing Products, Inc.</i> , 530 U.S. 133 (2000) .....	19
<i>Roemer Indus., Inc.</i> , 362 NLRB No. 96 (2015) .....	3
<i>Stanford Hotel</i> , 344 NLRB 558 (2005) .....	3, 9, 17
<i>Texas Dental Assn.</i> , 354 NLRB No. 57, slip op. at 10 (2009) .....	4
<i>Thor Power Tool</i> , 148 NLRB 1379 (1964) .....	8
<i>Traverse City Osteopathic Hospital</i> , 260 NLRB 1061(1982) .....	17
<i>Triple Play Sports Bar &amp; Grille</i> , 361 NLRB No. 31, slip op. at 3-4 (2014) .....	4
<i>Union Fork &amp; Hoe Co.</i> , 241 NLRB 907 (1979) .....	8
<i>US Postal Service</i> , 250 NLRB 4 (1980) .....	2, 9
<i>Wal-Mart Stores, Inc.</i> , 341 NLRB 796 (2004) .....	16
<i>White Oak Manor</i> , 353 NLRB 795 (2009) .....	6
<i>Wright Line</i> , 251 NLRB 1083 (1980) .....	19

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Respondent admittedly terminated the discriminatee in this case, Evan Demma, because he “used a security code to provide access into the back of the house for non-employees,” which Respondent claims constitutes a breach of safety and security. (GC 7) The only reason Demma used the security code, however, was to deliver a petition to management about poor working conditions for his fellow employees. (GC 3) Therefore, it is impossible to separate the two actions—the delivery of the petition and using the code to enter the area where management’s offices are located. Accordingly, Demma’s discharge is inextricably linked, or, as some cases explain it, part of the “*res gestae*” of the activity that the Administrative Law Judge correctly found clearly constituted protected concerted activity.<sup>1</sup> Because the ALJ erred in flatly rejecting the General Counsel’s argument as to the proper test to apply in this case, the next question, which the ALJ erroneously failed to reach, was therefore whether Demma’s conduct somehow lost the protection of the Act. As explained below, however, the evidence shows that Demma did not lose the protection of the Act, therefore, his termination violated the Act as alleged by the General Counsel, and the *Wright Line* analysis is inapplicable here. However, even if *Wright*

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<sup>1</sup> In this Brief in Support of Exceptions, the Administrative Law Judge will be referred to as the “ALJ”, KHRG Employer LLC, d/b/a Hotel Burnham & Atwood Café, will be referred to as “Respondent;” UNITE HERE, Local 1, AFL-CIO will be referred to as the “Union,” and the National Labor Relations Board will be referred to as “the Board.” Citations to the ALJ’s Decision will be referred to as “ALJD” followed by the page and line numbers specifically referenced. With respect to the record developed in this case, citations to pages in the transcript will be designated as “Tr.” followed by the page number. The General Counsel’s exhibits will be designated as “GC” followed by the exhibit number. Respondent’s exhibits will be designated as “R” followed by the exhibit number.

*Line* is the correct test in this case, the ALJ's application of it is fatally flawed and the Board should nonetheless find that Demma's termination violated the Act.

This brief sets forth the arguments in support of the General Counsel's ("GC") exceptions to the ALJD in two main sections. The first section addresses the GC's first, second, third, fifth, and sixth exceptions which generally address the ALJ's error in rejecting the General Counsel's argument that *Wright Line* is not the appropriate test in this case. The GC consistently advanced the argument that Demma's allegedly unprotected conduct (using his security code to allow the petition delegation to enter the back of the house) was part of the *res gestae* of his clearly protected activity, therefore the only remaining question is whether his conduct lost the protection of the Act. The ALJ, on the other hand, apparently erroneously construed that argument as necessarily meaning that the appropriate analysis is pursuant to *Atlantic Steel*. While the application of *Atlantic Steel* was offered by the GC in the event that it was deemed necessary, that was not, and is not, the GC's main argument. Rather, it was advanced as one way of determining whether Demma's otherwise protected concerted activity was "so egregious as to take it outside the protection of the Act" under cases such as *Consumers Power Co.* 282 NLRB 130, 132 (1986), and *US Postal Service*, 250 NLRB 4 (1980). As a result of these errors, the ALJ incorrectly determined that that Respondent did not violate Section 8(a)(1) when it terminated Demma.

The second section of the brief will discuss the GC's third, fifth and sixth exceptions which deal with the fact that even assuming, *arguendo*, that *Wright Line* is the proper test, the ALJ made several errors that lead to the wrong ultimate conclusion. Specifically, the ALJ incorrectly concluded that the GC failed to establish that Demma's protected conduct was a motivating factor in Respondent's decision to terminate him. Because the ALJ concluded that the

GC did not meet this initial burden, she failed to address whether Respondent adequately established that Demma would have been terminated even absent his protected concerted activity. However, the GC submits that even if the ALJ had properly reached this latter question, Respondent's evidence falls well short, therefore, even under a mixed motive-type *Wright Line* test, Demma's termination still violated Section 8(a)(1) of the Act.

Accordingly, pursuant to Section 102.46 of the Board's Rules and Regulations, the General Counsel, through his attorney Andrea James, files this Brief in Support of Exceptions to the January 27, 2017, ALJ Decision. The General Counsel respectfully requests that the Board find merit as to these exceptions and reject the ALJ's recommendation to dismiss complaint paragraph V and instead find that Respondent unlawfully terminated Evan Demma for his protected, concerted activity in violation of Section 8(a)(1).

**I. THE JUDGE ERRED BY FAILING TO APPLY A TEST OTHER THAN *WRIGHT LINE* (Exceptions 1, 2, 3, 5, and 6)**

It is well-established that where an employee is discharged for alleged misconduct while engaged in protected concerted activity, to find an unfair labor practice the Board must only resolve "the question [of] whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford Hotel*, 344 NLRB 558, 558 (2005), citing *Aluminum Co. of America*, 338 NLRB 20, 21 (2002). Thus, the Board need not apply the normal *Wright Line* analysis in such cases. *Roemer Indus., Inc.*, 362 NLRB No. 96 (2015) (the Board adopted the judge's decision which did not apply *Wright Line* and noted that even if *Wright Line* was applicable, there was no evidence that the General Counsel did not meet its burden); *Benjamin*

*Franklin Plumbing*, 352 NLRB 525, 537 (2008)(*Wright Line* is inapplicable where an employee is disciplined for conduct that is part of the *res gestae* of protected activity).<sup>2</sup>

**A. Demma Was Engaged in Protected Concerted Activity When He Entered the Security Code in Order to Deliver the Petition to the Management as Part of the Union's Delegation**

As an initial matter, the ALJ properly concluded that Demma engaged in protected concerted activity when he along with a group of protestors delivered a petition to hotel management. (ALJD, p. 9 lines 17-19). In doing so, the ALJ correctly rejected Respondent's arguments to the contrary (ALJD, p. 9, lines 6-9) and agreed with the GC.

Perhaps somewhat ironically, however, the ALJ supported this critical initial conclusion that Demma was engaged in protected concerted activity with four cases, none of which primarily utilized the *Wright Line* Analysis. In two of the cases, *Liberty National Products, Inc.*, 314 NLRB 630, n.9 (1994) and *Texas Dental Assn.*, 354 NLRB No. 57, slip op. at 10 (2009), rehearing denied 354 NLRB 957 (2009) the judges only applied *Wright Line* as an alternative analysis because in both cases, the judges found that the terminations were specifically because of the protected activity and therefore motive was not an issue. This is precisely what the GC

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<sup>2</sup> Other Board decisions clearly establish that when employees participate in protected concerted activity while also allegedly engaging in misconduct that causes termination *Wright Line* does not apply. *Burger King*, 365 NLRB No. 16, fn 4 (2017) (the Board found the employer's discipline for employees strike activity unlawful and refused to rely on *Wright Line* as the judge did in her decision); Cf. *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 3-4 (2014) enfd, 629 Fed. Appx. 33 (2d Cir. 2015) (terminations for protected Facebook comments unlawful because employees did not lose the protection of the Act under *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966), and applying *Wright Line* because the Employer also advanced poor work performance to justify the terminations).

asked the ALJ to do here that she rejected: consider the issue of whether Demma was terminated because of conduct that was otherwise protected, and in the alternative, utilize *Wright Line*.

In another case cited by the ALJ on this threshold question, *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1098 (2011) the basic facts are similar to this case and the Board's analysis there is therefore instructive. A group of employees approached a manager to deliver a petition about terms and conditions of employment. *Id.* In that case, however, the Board applied the general framework that the General Counsel advanced to the ALJ that was rejected. *Id.* at 1097. Namely, that the first question is whether the employees were engaged in protected concerted activity, and if so, did they lose the protection of the Act? *Id.* There, since the conduct that the employer claimed prompted the terminations was a physical altercation with the manager, the judge, with Board approval, applied *Atlantic Steel*. *Id.* at 1099. While three of the employees were deemed to have lost the protection of the Act and ten of them did not, no *Wright Line* test was employed. *Id.* at 1101-02. Finally, in the other case cited by the ALJ to find Demma was engaged in protected concerted activity neither the judge nor the Board employed a *Wright Line* test. *Clean Power, Inc.*, 316 NLRB 496 (1995) (petition related to Respondent overworking employees was protected concerted activity and no *Wright Line* analysis).

Clearly, the ALJ properly concluded that Demma was engaged in protected concerted activity and her analysis should have next turned to the question of whether Demma lost the protection of the Act.<sup>3</sup>

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<sup>3</sup> In another somewhat ironic twist, one of the cases cited by the ALJ to support a *Wright Line* analysis, highlights why it is not applicable here. The ALJ cited *Hoodview Vending Co.*, 362 NLRB No. 81 (2015) affirming 359 NLRB 355, 358-359 (2012) where an employee was terminated after discussing job security with another co-worker. The Board noted that if the employees conversation were the sole reason advanced for the discharge, the analysis of the 8(a)(1) violation would be complete, as discussions about job security are protected. *Id.* However, in *Hoodview* the employer asserted an alternate reason for the employee's discharge (conduct that occurred on an entirely different day) which led to an analysis under *Wright Line*. Here, unlike in *Hoodview*, the only proffered reason for Demma's termination occurred during the course of protected activity, thus a dual motive analysis is not appropriate.

**B. Demma's Conduct is Inextricably Linked With, and Therefore Part of the Res Gestae of, His Protected Concerted Activity**

Once the critical first element is established: Demma was engaged in protected concerted activity when he was delivering the petition, the ALJ apparently believed motive was an issue because the act of opening the door to enter the secure area where they intended to deliver the petition, and the protected activity of actually delivering the petition, were somehow severable such that this could be deemed a dual-motive test situation. (ALJD p. 8, lines 25-33; p. 9, line 16-17). These related conclusions, severability of the conduct and the need to apply *Wright Line*, are clearly wrong and should be rejected by the Board.

The instant case is similar to *White Oak Manor*, 353 NLRB 795, 795 (2009) where an employee was discharged after engaging in discussions about the dress code, taking pictures of her co-workers and sharing them in order to show how disproportionately the dress code was enforced. *Id.* There, the Board reasoned that “[t]he use of the cell phone pictures were part of [the employees] overall concerted protected activities” thus, the discharge was unlawful. *Id.* at 799. In *White Oak Manor* one could initially attempt to parse out the employee’s discussions about the dress code from the pictures she took and shared. There, the Employer asserted that it discharged the employee for taking a picture of another employee without permission and sharing it with other employees. *Id.* at 798. However, the Board determined that the pictures were a part of the employees overall protected activities. *Id.* at 801. The Board did not separate the employee’s conversations about the dress code from the action of taking or sharing the pictures. To do so would essentially isolate two inextricable actions. Thus, the Board refused to separate these actions and held that a dual motive analysis under *Wright Line* was unnecessary. *Id.*

Here, Demma’s use of the security code in order to gain access into the back of the house to deliver the petition should be analyzed as one inextricable action. In fact, the ALJ acknowledges the impracticality of separating these two entwined actions. The ALJ noted that “[i]t is undisputed that Demma accessed the secured door and delivered the petition to Scott about working conditions within minutes of each other” (ALJD, p. 10, lines 26-27). The ALJ goes on to reason that the timing of Demma’s termination—two weeks later—cannot be separated from the delivery of the petition and accessing the secured door. (ALJD, p. 10, lines 27-29). But the timing of Demma’s accessing the door and delivering the petition is necessarily close, because of the layout of the facility. Therefore, it is clear that this there is no dual motive for Demma’s termination.

While the ALJ refused to apply the *Atlantic Steel* test finding it inapplicable to Demma’s “nonverbal conduct” (ALJD p. 8, lines 35-36), what is significant about all cases analyzed under *Atlantic Steel* is the inability of the fact finder to parse out the nature of the employee’s outburst from the protected discussion. *Atlantic Steel*, 245 NLRB 814, 816-17 (1979). *Atlantic Steel* cases generally involve employees in some way engaged in discussions about terms and conditions of employment and during the course of these discussions the employee uses vulgar language or resorts to physical violence. In these cases, an employee’s “outburst” is analyzed in the same context as the protected discussion. The offensive language that is often analyzed in these cases is not considered as a separate and independent basis for the ensuing discharge or discipline. The only question is whether the outburst lost the Act’s protection. There is no question of whether the outburst should be analyzed separately from the protected conduct. This is because, much like the case here concerning Demma’s use of the security code, the outburst occurred during the course of the protected conduct. Thus, there is no logical way to separate the two actions.

Indeed, even before the Board announced the specific test in *Atlantic Steel* the Board nevertheless applied a similar test that used the basic analysis that should apply here: did the employees conduct in the course of otherwise protected activity lose the Act's protection? For example, in *Thor Power Tool*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965), the Board found that insubordinate statements made during a grievance meeting were part of the *res gestae* of the grievance process. Similarly, in *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976) a letter from a union steward protesting a job assignment was part of the *res gestae* of the steward's protected conduct. See also *Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979) (grievance processing protected by the Act unless the steward exceeds the line and engages in misconduct so violent to render him unfit for further service). In these cases, because the conduct at issue is part of the *res gestae* of the protected concerted activity there is no dual motive, hence no *Wright Line* analysis.

Accordingly, most appropriate are those cases that look at conduct that is inextricably linked, or, as some cases define it, part of the *res gestae* of protected conduct. Here, the ALJ ignored the obvious direct connection between the protected activity and the alleged unprotected aspect of it and noting only that *Atlantic Steel* did not perfectly fit the facts of this case because it involved a verbal outburst. (ALJD p. 8, Lines 33-35) However, if the ALJ properly accepted the GC's assertion that *Wright Line* did not apply, the ALJ would have conducted a complete analysis using a more appropriate standard and should have reached the conclusion that Demma's conduct did not lose the protection of the Act.

**C. Pursuant to the Two Part Test Applicable When Motive is Not an Issue, Demma's Conduct was Not So Egregious so That He Lost the Protection of Act, Therefore His Termination Violated the Act.**

As noted above, under well-established Board law, because the express motivation for Respondent's termination of Demma was his otherwise protected concerted activity, the proper test involves two questions: 1) whether the activity in question was protected concerted activity, and if so, 2) whether the conduct that occurred during the course of the protected activity lost the protection of the Act. Section I, above; See also, *Consumers Power*, 282 NLRB 130 (1986); *US Postal Service*, 250 NLRB 4 (1980); *Firch Baking Co.*, 232 NLRB 772 (1977). Thus, the only remaining inquiry is whether the conduct is sufficiently egregious to remove the employee from the protection of the Act. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322-1323 (2005); *Stanford Hotel*, 344 NLRB 558 (2005); *Circle K Corp.*, 305 NLRB 932, 933 (1971). Below is an analysis of the relevant facts and how the ALJ should have analyzed them under the proper test to properly conclude that Demma's conduct did not lose the protection of the Act.

As explained in the GC's Post-Hearing Brief to the ALJ, on October 9, 2015, Evan Demma helped organize and participated in the Union's largest demonstration at Respondent's facility (ALJD p. 3, lines 19-21; Tr. 48). During the demonstration Demma and other individuals he knew from the hotel and the Union delivered a petition to hotel general manager Tonya Scott (ALJD p.3, lines 33-37; Tr. 51). To deliver the petition Demma and his guests entered the hotel through the basement entryway where Scott's office was located (ALJD p.4, lines 7-8; Tr. 95). In order to gain access Demma had to use his employee security code to unlock the door (ALJD p.4, line 13; Tr. 57) and the delegation peacefully delivered the petition to manager Scott (Tr. 62).

Respondent admitted, and the ALJ agreed, that Demma was discharged for using his security code and allowing non-employees into Respondent's facility. The action of using his code to allow non-employees into the facility occurred while Demma and these individuals

participated in a delegation to deliver a petition about working conditions for some of Respondent's employees. Although the ALJ failed to acknowledge it, Demma chose the route in question in order to cause the least amount of disruption at Respondent's facility (Tr. 56). In Demma's effort to minimize disruption he simply typed in a code that allowed him and his group to enter the back of the house (Tr. 56). Prior to entering the secured area, the group entered the main entrance of the hotel and made their way downstairs to enter through the locked door (Tr. 56). Thus, it was in the course of delivering the petition that Demma used the code. Upon entering the code, the group continued to deliver the petition and then silently exited the facility (ALJD p. 4, lines 23-26; Tr. 60; 62).

For the reasons that follow, Demma's actions did not remove him from the protection of the Act. First, an Employer's history of tolerating otherwise inappropriate conduct can be used to demonstrate that the same conduct cannot now be considered inherently egregious as to take it outside the protection of the Act. *Consumers Power Co.*, supra at 132 (certain conduct earlier that year not deemed egregious therefore rejecting employer's claim that similar "later conduct so egregious as to lose the protection of the Act . . ."). Here, the record is replete with examples of times when Respondent has openly tolerated the same conduct it now categorizes as a breach of safety and security.

It is worth noting preliminarily that Respondent has described Demma's conduct as significantly more severe than it actually was. For example, the ALJ ignored Respondent's own admission during the hearing that access through the coded door in question was "a bit loose." (Tr. 286) Additionally, there is no rule governing whether employees or managers can give out the code which Demma used on the day in question. (Tr. 289-90) In fact, within a three year time span, the code on the door only changed once. (Tr. 94) And it was possible to reach Scott's

office without entering a code by taking a different route that was more disruptive to Respondent's business. (Tr.56) Thus, Respondent's characterization of Demma's actions as a breach of safety and security was obviously being exaggerated to buttress its unlawful action. However, more telling of just how insignificant access through the door in question was, are the myriad of instances where other employees, not engaged in protected activity, allowed unknown individuals through the same door without discipline. For example, Demma and housekeeping employee Karina Tufino testified to the following; allowing their family members into the secured area unmonitored or witnessing other employees allow their family into the secured area; witnessing vendors and employees leave the secured door propped open unmonitored; and witnessing vendors using the code to access the secured area. (Tr. 84-86; 88; 92-94; 190-91).

Testimony during the hearing reveals that on numerous occasions non-employees have been provided with the code and have used the code to access the back of the house unsupervised. The ALJ incorrectly dismisses these examples and notes that "Respondent was able to trust these nonemployees with the door codes because: (1) they had contracts with the vendors; (2) "usually" the same delivery people made the deliveries; and (3) the delivery people were videotaped while in the secured areas." (ALJD p. 10, lines 41-44) However, when examined closely, this reasoning is flawed, and if anything, supports the GC's assertion that Demma's conduct did not lose the protection of the Act.

First, there is no evidence in the record about the contents of vendor contracts. Thus, the simple notion that a contract exists does not support a finding that a contract protects against the possibility of a security breach. Furthermore, Palladino only testified to having contracts "with certain of these vendors" indicating that Respondent does not have contracts with all of its vendors (Tr. 254). Therefore, there is no evidence that proves that the vendors Demma and

Tufino testified to seeing freely access the back of the house were in fact the vendors Respondent had contracts with. Thus, the ALJ's first contention does not support a finding that Respondent could "trust" all nonemployees using the code in question.

Second, the ALJ's use of the word "usually" in the second reason noted above implicitly admits that the evidence fails to show security as a high priority. That is, if security were such a high priority, it stands to reason that Respondent would want to ensure that it could trust each delivery person. But if the vendor's delivery person changes, even occasionally, as the ALJ's use of the word "usually" clearly indicates occurs, there were at least some occasions where unknown delivery people used the code to gain access into the back of the house. If safety and security were of the utmost concern to Respondent—as they claim it is—then any occasion where unknown individuals accessed the facility would require immediate attention. This laxness in access privileges demonstrates that Respondent seems to only be concerned about safety and security when one of its own employees accesses the area with a delegation in order to deliver a petition about working conditions. Furthermore, Tufino and Demma testified that vendors leave the door propped open and unmonitored (Tr. 92; 94). This action is essentially an invitation to any outsiders, known or unknown, to enter the secured area. Despite how convenient this may be for the vendor, if Respondent was truly concerned about the safety and security of the building Respondent would require vendors to use a safer method. Thus, the ALJ's second contention that Respondent could trust nonemployee delivery people because "usually" the same delivery people delivered food should be rejected as insufficient to support finding the termination was lawful.

Finally, the ALJ asserts that Respondent could trust the delivery people because Respondent was videotaping them while in the secured area and could thus hold them

accountable for any misconduct unlike the “unknown” protestors. (ALJD, p. 10, lines 44-45 – p. 11, lines 1-4) This argument fails for several reasons.

First, there is no evidence suggesting that video footage is monitored 24 hours a day, 7 days a week. Thus, unless another employee witnessed the misconduct and shared it with management, management would have no reason to access the footage. This type of system does not suggest an employer with a particularly high regard for safety and security at its facility such that an employee letting acquaintances enter the area should be so egregious as to warrant termination. Most importantly, this type of system certainly wouldn’t hold anyone accountable for breaching safety and security by misuse of the security code like the ALJ suggests. In fact, Demma specifically testified to witnessing at least 10 occasions where vendors left the door propped open and unmonitored. (Tr. 92; 94) This was a clear breach of safety and security and misuse of the code. However, this action was unknown to management and/or management was never truly concerned about unauthorized access through the secure door. Thus the surveillance video is only as good as the employees monitoring the questionable conduct.

Second, the ALJ mischaracterizes the individuals that entered the hotel with Demma as unknown. (ALJD p. 11, lines 1-4) The ALJ suggests that because they were “unknown” even the video footage would be unhelpful in the event of misconduct. This is simply not the case. Demma testified that a group of about 20 individuals entered the hotel (ALJD, p. 3, line 32; Tr. 53). Five, including Demma, were Burnham hotel employees, all of whom Demma knew through his employment (ALJD p. 3, lines 35-37; Tr. 53-54). About seven individuals worked for the Hotel Monoco which is a Kimpton property just like the Burnham (ALJD, p. 3, lines 37-39; Tr. 96). Demma knew those seven individuals as well. Demma also recalled 2-3 other individuals that worked for another Kimpton property (ALJD, p. 3, lines 37-29; Tr. 96).

Although he couldn't identify them by name, he knew they worked for Kimpton and had encountered them in the past (Tr. 125). Thus 14-15 of the individuals that entered on the day in question were all employed by Kimpton. Therefore, if any misconduct occurred Respondent could just as easily identify this group of individuals just as it could identify the vendors. This is because employees that work for Kimpton properties are arguably much easier to identify than those at a completely different employer like the vendors. As for the remaining 6-7 individuals, Demma also testified to encountering them at the Union hall on past occasions (Tr: 54). Thus, the ALJ has completely mischaracterized the group of individuals as "mostly unknown." (ALJD, p. 11, line 2) In fact, the record proves the complete opposite. Most of the individuals worked for a Kimpton property and the others Demma knew through his involvement with the Union, thus it is woefully incorrect to describe them as "unknown" and use this as a basis to conclude his termination was somehow justified. Even if some of the individuals were unknown to the Employer, they were known to Demma, and if any of them had committed misconduct, the Employer could have learned their identities through questioning Demma. This ability to identify someone who engages in misconduct through questioning is clearly not present where a random individual enters through a door a vendor has propped open, yet the Employer allows the latter conduct to occur regularly.

Accordingly, because Respondent has a clear history of allowing "unknown" individuals into the secured area, Respondent cannot now successfully argue that Demma's actions are so egregious as to take his conduct outside the protection of the Act.

Thus, for the reasons explained above, the ALJ's should have concluded that Demma's termination was based on protected concerted activity and that his action of entering the code in

order to enter the secure area in order to deliver the petition was not sufficiently egregious to lose the protection of the Act.

**D. While the facts here may not be a perfect fit, applying the *Atlantic Steel* four-factor test yields the same result: Respondent violated Section 8(a)(1) of the Act when it terminated employee Evan Demma**

For cases involving confrontations with management that are part of otherwise protected activity, the Board has consistently recognized that employees only lose the protection of the Act by opprobrious conduct. *Atlantic Steel*, 245 NLRB 814, 816-817 (1979). The Board considers four factors to make this determination: "(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 the employer's unfair labor practices." *Id.* While the facts in this case involve an employee's actions and not a discussion, in circumstances involving the delivery of a petition, the *Atlantic Steel* factors are often applied. *See Crowne Plaza LaGuardia*, 357 NLRB 1097 (2011). Counsel for the General Counsel maintains that the application of the *Atlantic Steel* factors to this case reveals that Demma's actions did not remove him from the protections of the Act and a finding of an unlawful termination is appropriate. Specifically, three of four *Atlantic Steel* factors militate in favor of a finding that Demma did not lose the protection of the Act by the routine action of using a code to gain access through a door in order to deliver a petition to management.

In regard to the first *Atlantic Steel* factor, when the alleged outburst occurs in a place that does not disrupt the employer's work processes, then the factor favors protection. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007). The place of discussion may weigh against protection of the Act when the conduct is targeted to disrupt workplace discipline or undermine the authority of a supervisor. *Daimler Chrysler*, 344 NLRB 1324, 1329 (2005). Here, there are

several additional facts that support this factor weighing in favor of the Act's protection. First, Demma testified that he chose the route the group took because it was the least disruptive route. (Tr. 56) Not only did choosing this route avoid interactions with hotel guests, it also prevented any disruption to services being provided in the restaurant. (Tr. 56) The lack of any exposure to customers certainly weighs in Demma's favor. *Wal-Mart Stores, Inc.*, 341 NLRB 796, 808 (2004). In fact, restaurant manager Damien Palladino even confirmed that other routes would have caused more disruption to Respondent's operations. (Tr. 289)

Second, upon entering through the door that leads to the back of the house, the group entered quietly, only spoke to General Manager Tonya Scott, and then quietly exited. (ALJD, p. 4, lines 23-26; Tr. 60) The duration of this interaction in the basement took about five to ten minutes. (ALJD, p. 4, line 21) While there were some servers in the break room during this brief encounter with Ms. Scott, the group did not interact with them. (ALJD, p. 4, lines 22-26; Tr. 62) In fact, Demma did not anticipate encountering servers while delivering the petition given that it was a busy time for the restaurant. (Tr. 61-62). Thus, this very short interaction in the hotel basement was not at all done to disrupt workplace discipline or undermine supervisory authority. In fact, there is no evidence that any type of disruption or undermining of authority occurred. Any suggestion to the contrary is not supported by the facts.

The second *Atlantic Steel* factor also strongly supports the General Counsel's case. As described above, the drafting and delivery of petitions aimed at improving employees' working conditions is a quintessential form of protected concerted activity. In fact the ALJ correctly concluded that Demma engaged in protected concerted activity when he and the others delivered a petition to management concerning their working conditions. (ALJD, p. 9, lines 17-19) Thus for the reasons described in detail above, this factor strongly favors protection.

The third and fourth *Atlantic Steel* factors concern “the nature of the employee's outburst” and “whether the outburst was, in any way, provoked by an employer's unfair labor practice.” *Atlantic Steel*, supra, at 816-817. Although Demma’s actions were not provoked by Respondent’s unfair labor practice, Demma did not engage in any outburst that would result in a loss of the Act’s protection.

The *Atlantic Steel* balancing test is appropriate in circumstances where “an employee is disciplined for conduct that is part of the *res gestae* of protected concerted activities” as is the case here. *Stanford Hotel*, 344 NLRB 558 (2005) (citing *Aluminum Co. of America*, 338 NLRB 21 (2002)). The type of conduct that is typically analyzed under the third factor involves vulgar language used by an employee or an employee’s actions directed to management or the Employer. The Board also analyzes whether this conduct threatens harm to management or damage to Respondent’s premises. *Random Acquisitions, LLC*, 357 NLRB 303, 316 (2011). Here, the analysis requires determining whether Demma’s action of entering a code to allow a group of individuals into the back of the house created a threat of harm to management or damage to Respondent’s premises. Because Respondent historically tolerates the same action on a routine basis, Demma’s actions did not pose a threat of harm to management or damage to Respondent’s premises.

The Board has held that where the Employer has a history of routinely tolerating profanity without any discipline, such conduct would not lose the Act’s protection. *Traverse City Osteopathic Hospital*, 260 NLRB 1061, 1061 (1982) (Employees use of profanity calling fellow employees a “brown nosing suck ass,” while engaging in protected activity, did not cause her to lose the Act's protection where the use of profanity at the employer's facility was not uncommon and had been tolerated in the past); *Coors Container Co.*, 238 NLRB 1312, 1320, 1438 (1978),

enfd. 628 F.2d 1283, 1288 (1st Cir. 1980)(Employees engaged in protected activity did not lose the Act's protection by calling the Respondent's guards "mother fuckers," where the phrase was commonly used at its facility and there was no evidence that any employee had been discharged solely for using obscenities.); *Corrections Corp. of America*, 347 NLRB 632, 636 (2006) (finding no loss of protection based on employee's profanity where similar language was common among supervisors and employees alike). Similar to the cases cited above, here Respondent routinely allowed non-employees access into the back of the house, which Respondent now claims warrants the highest possible form of discipline, termination, without any form of progressive discipline.

If Respondent argues that Demma's actions posed a threat of harm, then this argument is pretext given Respondent's continued tolerance of this same action in the past. The actual reason Respondent terminated Demma was because of his protected activity—namely the delivery of the petition on October 9, 2015. The October 9 delegation can be distinguished from similar delegations in the past because it was accompanied by the Union's largest demonstration at Respondent's facility. (Tr. 48-49). Such a large amount of Union support, would certainly suggest that Respondent's anti-union efforts were inadequate. Thus, Respondent needed to send a message. Based on the facts presented above, three of the *Atlantic Steel* factors lead to the inexorable conclusion that Respondent violated Section 8(a)(1) of the Act when it discharged Demma in retaliation for delivering a petition seeking to improve working conditions for employees.

**II. ASSUMING WRIGHT LINE IS THE APPROPRIATE ANALYSIS THE JUDGE'S WRIGHT LINE ANALYSIS WAS INCORRECT (Exceptions 4, 5, and 6)**

Although the ALJ rejected the GC's assertion that *Wright Line* was not the appropriate test to analyze the facts in this case, assuming that *Wright Line* is the correct analysis to use, the ALJ incorrectly concluded that the General Counsel did not establish a prima facie case.

Under *Wright Line* the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982).<sup>4</sup> Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.*

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<sup>4</sup> The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

Here, the ALJ correctly concluded that Demma engaged in protected activity that Respondent was aware of. (ALJD, p. 9 lines 17-19; 30-32) The ALJ also correctly concluded that Demma's termination constituted an adverse employment action. (ALJD, p. 9, lines 33-34) However, the ALJ incorrectly found that the General Counsel failed to prove the final prong of its burden—that the protected activity was a contributing factor in Respondent's decision to terminate Demma's employment. (ALJD p. 9, lines 38-39)

Based on the facts of this case Respondent's assertion that Demma was discharged for breaching security is pretext. Respondent's discriminatory motive was demonstrated in four major ways: (1) conducting a sham investigation; (2) the timing of Demma's termination; (3) Respondent's failure to discipline other employees for similar security violations; and (4) Respondent's failure to discipline other employees who followed Demma into Scott's office. For the reasons discussed below, the ALJ either ignored examples provided by the General Counsel or failed to give them the weight they deserved.

**A. The Judge Failed to Recognize that Palladino conducted a sham investigation**

The ALJ's dismissal of the fact that Palladino conducted a one-sided investigation is paramount. (ALJD p. 10, lines 14-15; Tr. 286) There were no housekeeping employees interviewed. (ALJD p. 10, lines 14-15; Tr. 286) It is no coincidence that the individuals Palladino left out of the investigation had recently delivered a petition to management complaining about their working conditions. However, Palladino was sure to include in his investigation those employees that had recently sent Demma a slew of e-mails chastising him for engaging in protected concerted activity. (ALJD, p. 6, lines 6-10; Tr. 73-80) While the ALJ noted that Palladino did not have managerial authority over the housekeepers, Palladino testified that Human Resource manager for Kimpton properties Samantha Polk was involved in the

investigation. (ALJD, p. 6, lines 8-10; Tr. 277) Surely Ms. Polk had the authority to involve the housekeeping employees in the investigation as she oversees human resources at all Kimpton hotel properties. (ALJD, p. 2, line 37; Tr. 296)

According to Palladino's testimony he questioned employees who worked the evening that Demma and the others in the delegation presented the petition so he could hear their point of view. (ALJD, p. 6, lines 5-6; Tr. 278) Again, no housekeeping employees were included in this questioning. (ALJD, p. 6, lines 14-15). Palladino claims that he relied on the emails he received from employees in response to his solicitation before making his termination decision. (Tr. 278). However, even after Palladino solicited information from employees, he wasn't sure whether or not the employees who responded actually saw any of the information they were reporting. (Tr. 279) Thus the ALJ is incorrect in concluding that Palladino requested "statements from employees who witnessed the incident on October 9." (ALJD p. 9, line 4) For example, in GC Exhibit 9 employee Tom Krausmann sent an email to Palladino and Polk in response to Palladino's solicitation. Krausmann's email did not indicate that he witnessed any of the events on the date in question. (GC 9). Instead his email merely ridiculed Demma and the other demonstrators for their protected conduct. (GC 9). The email also accused Demma of using the security code without any evidence regarding how Krausmann knew that to be the case. (GC 9) In the emails that followed Krausman's, employees Mimi Holland and Giovanni Ramirez made the same accusation without any indication they had personal knowledge about the events in question. (GC 9) In fact, Palladino testified that employees sitting inside the break room could not see the keypad on the door leading into the employee area. (Tr. 294) However, Palladino seemed unconcerned by this when the time came to terminate Demma.

The emails following these are riddled with anti-union messages. When employees Mimi Holland, Elizabeth Morrissey, Dominique Worsley, and Daneil Lakemacher recount their version of events they explicitly state their dislike and fear of the union and Demma. (GC 9) Thus the emails were personal and attacked Demma and the Union rather than giving a recount of the events the Employer claimed to be carefully investigating. Moreover, Palladino specifically testified that he considered these emails as a part of his investigation which led to Demma's termination. (Tr. 278) Thus, he essentially reviewed a one-sided story along with video footage to conclude that Demma should be terminated. The side of the story Palladino relied on just so happened to be from the viewpoint of anti-union and anti-Demma employees. Thus, this cannot be considered a fair and thorough investigation.

Finally, the ALJ again dismisses the housekeeping employee's report of events explaining that "the investigation did not include them unless a member of the housekeeping staff had been in the employee break room and witnessed the incident of October 9." (ALJD p. 10, lines 20-22) However, this completely contradicts Palladino's testimony that he questioned "whomever worked that evening . . ." (Tr. 278; 305). The ALJ's reasoning is concerning because it dismisses the fact that the investigation did not focus on those involved in the delegation. Instead the focus was on those employees who allegedly witnessed the event, but as explained above, these were the same employees who despised the Union and Demma.

**B. The Judge Offered Conflicting Reasoning Regarding Palladino's Sham Investigation and Respondent's Failure to Discipline Other Employees Who Followed Demma into Scott's Office to Present the Petition**

Additionally, the ALJ makes two conflicting arguments. First, at ALJD p. 10, lines 18-23, the ALJ reasons that Palladino's investigation did not include the housekeeping staff because he had no managerial authority over them. However, at ALJD p. 11, lines 22-24 the ALJ finds

significant the fact that the housekeeping employees were not terminated despite their participation in the protected activity with Demma. The ALJ's reasoning is flawed in that the ALJ first excuses Palladino for conducting a less than thorough investigation given his lack of authority over housekeepers, and goes on to find significant that the housekeeping employees were not also terminated, which would appear to be due to the same lack of authority by Palladino that the ALJ initially relied on. If Demma's actions amounted to a true breach of safety and security, an investigation that involved more than just Palladino's direct reports logically would have been conducted. Moreover, the actual reason housekeeping employees did not receive discipline appears to be because the emails Palladino solicited and used in his investigation singled out Demma as the leader of the protected activity and the main cause for the Union activities in the first place. (GC 9) Thus, by terminating Demma, Palladino could rid Respondent of a key union supporter.

**C. The ALJ Incorrectly Concluded That the Timing of Demma's Termination Did Not Support a Discriminatory Motive Finding**

Contrary to the ALJ's conclusion, the timing of the termination supports the GC's case. On the one hand the ALJ finds that Demma was terminated quickly because the video footage immediately revealed that he was the one who used his access code to lead nonemployees through the secured door. (ALJD, p. 10, lines 29-31). However, the ALJ goes one to note that any additional time it took to investigate was to "determine whether anyone in the group acted in a disruptive manner once they accessed the secured areas." (ALJD, p. 10, lines 32-33) These conclusions are at odds with each other, logic, and a separate reason why the timing supports finding discriminatory motive. First, the same video footage that revealed Demma used his passcode, also demonstrates that no other individuals involved in the delegation were disruptive. Second, the footage shows a group of individuals peacefully walking through the hotel, not

engaged in conversations or physical contact with anyone in the surrounding space. In fact Palladino reviewed the footage over and over, thus it was abundantly clear that no disruption took place. (ALJD, p. 10, lines 1-2; Tr. 265). Palladino claims he did not discipline the other employees involved in the delegation because they did not use their security code (Tr. 266). Therefore, if Palladino's only reason for terminating Demma was because he used the code the investigation should have ended after reviewing the video footage. Thus, the close timing between delivering the petition and Respondent's adverse action support Respondent's discriminatory motive. Moreover, the fact that the Employer did not terminate Demma immediately upon learning he was the one who entered the security code, but instead waited until other anti-union employees complained about his actions, suggests unlawful animus. In other words, the Employer seized upon the anti-union sentiments of the employees obtained during its "investigation" to bolster its claim that the conduct was sufficient to warrant termination, but if merely entering the code was sufficient, it should not have needed this additional time to come to the conclusion that termination was appropriate.

#### **D. The ALJ Improperly Rejected the Disparate Treatment Evidence**

As described above, the record was full of disparate treatment evidence. That evidence can be found through instances where other employees allowed nonemployees into the secured area without punishment and through Respondent's failure to discipline other employees who followed Demma into Scott's office.

Demma testified to multiple instances where other employees left the door propped open (Tr. 93). However, the absence of any evidence of other discipline presented by the Respondent proves the disparate treatment. Additionally, Respondent supplied the passcode to several of its vendors. (ALJD, p. 4, fn. 4; Tr. 251-25) In turn, these vendors use the code and on many

occasions left the secured door propped open and unmonitored. (Tr. 92; 94) The record also established that employees at other Kimpton hotel properties have had unfettered access into the secured area as well. (ALJD, p. 10, lines 36-37; Tr. 175; 219-21) Yet, contrary to how Respondent treated those other employees when they *weren't* involved in protected activity, Palladino considered these same individuals as a threat to safety and security and punished Demma for allowing them into the secured area. (Tr. 265-66) The ALJ dismisses each of these instances and claims they differ from the events that led to Demma's termination. However, as explained above, these instances are no different than the one that prompted Demma's termination, with one glaring exception—as shown above, those other occasions there was a significantly higher threat to safety and security. There, doors were left wide open, thereby serving as an invitation to anyone passing by to walk into the supposedly secure area.

Finally, Demma was the only employee who received discipline for delivering the petition despite the housekeeping employees' involvement in the delegation. The housekeeping employees also allowed the other non-employees into the secured area after Demma entered the door code. However, their willingness to allow non-employees into the secured area went unpunished. Their failure to report or stop the delegation was just as much of a security breach as Demma using the passcode. The ALJ argues that the GC failed to recognize that employee, Mimi Holland did report Demma and the others to Palladino and that the security guard initially stopped Demma and the others from entering the hotel. (ALJD, p. 11, lines 18-21) However, the GC's assertion is not that Respondent failed to punish individuals that had no involvement in the delegation such as Holland or the security officer. The assertion is that, the housekeeping employees *who participated* in the delegation to deliver the petition also allowed non-employees into the secured area and received no discipline. Respondent's failure to discipline those

housekeeping employees underscores Respondent's discriminatory motive against the high profile union supporter: Demma.

The ALJ also notes that not disciplining housekeeping employees involved in the delegation weighs against a finding of discriminatory motive. (ALJD, p. 11, lines 22-26) However, just because Respondent didn't discipline every individual involved in the delegation does not mean Demma's termination was not discriminatory. Respondent does not have to terminate every individual involved in order to establish discriminatory motive. As explained above, Respondent's termination of high profile union supporter Demma was enough to send a clear message to employees that Union activity would not be tolerated. Thus, Respondent's decision to only discipline Demma for the conduct in question weighs in favor of a finding of discriminatory motive.

**E. By Incorrectly Concluding that the GC Failed to Sustain His Initial Burden, the ALJ Erroneously Failed to Consider, and Find, That Respondent failed to Carry its Burden.**

Palladino's sham investigation, the timing of Demma's termination, and disparate treatment all established Respondent's discriminatory motive in discharging Demma. Pursuant to Board precedent, this wealth of evidence of pretext makes it unnecessary to perform the second part of the *Wright Line* analysis, because Respondent did not rely solely on its stated reason, breach of safety and security, when discharging Demma. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982); *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007), citing to *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). Even if the second part of the *Wright Line* test is conducted, Respondent failed to meet its burden. The evidence clearly shows that Respondent would not have discharged Demma in the absence of his protected activity.

Despite this showing, the ALJ did not conduct the second portion of the Wright Line analysis as she should have. If the ALJ had conducted the second part of the analysis, Respondent could not carry its burden of demonstrating that it would have terminated Demma only for using his passcode resulting in a breach of safety and security. Respondent's stated reason for the termination is pretext given that the housekeeping employees that also participated in the delegation were not terminated or disciplined for breaching safety and security. Additionally, as discussed above, Respondent admits that access to the door in question is rather "loose" and Respondent has provided the code to various vendors who have left the secured door propped open and unmonitored. (Tr. 92; 94; 286) This demonstrates Respondent's lack of security and concern related to access through the door in question. Thus, an assertion that Demma was terminated for allowing a delegation through this door is pretext.

Accordingly, the ALJ's ultimate conclusion that Respondent did not violate Section 8(a)(1) when it terminated Demma was in error.

#### **E. CONCLUSION**

Based upon the foregoing, Counsel for the General Counsel respectfully requests that the Board find merit to GC's Exceptions to the Decision of the Administrative Law Judge, conclude that Respondent discharged Evan Demma for his protected, concerted activity in violation of 8(a)(1), and provide all appropriate remedies to Demma for Respondent's unlawful conduct, including offering Demma reinstatement to his position and providing backpay owed.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the **Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge** was electronically filed with the Office of the Executive Secretary of the National Labor Relations Board on March 21, 2017 and that true and correct copies of the document were served on the parties in the manner indicated below:

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