

No. 17-1544
Board Case No. 26-CA-085613

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEE CRAFT

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

VOLUME III

PLEADINGS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

PHILIPS ELECTRONICS
NORTH AMERICA CORPORATION

and

Case 26-CA-085613

LEE CRAFT, an Individual

William T. Hearne, Esq., for the
General Counsel.
Mason C. Miller, Esq., of Somerset, NJ,
for the Respondent.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Memphis, Tennessee, on March 11 and 12, 2013. Lee Craft, an individual, filed the charge in 26-CA-085613 on July 19, 2012, and filed an amended charge on September 28, 2012. On November 30, 2012, the Acting Regional Director for Region 26 of the National Labor Relations Board (Board) issued a complaint¹ and notice of hearing. Generally, the complaint alleges that since January 19, 2012, Philips Electronics, North America Corporation (Respondent) has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers. The complaint further alleges that Respondent terminated Lee Craft (Craft) on January 25, 2012, because he showed and discussed with his coworkers an employee counseling form that he received from Respondent on January 20, 2012.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel² (General Counsel) and the Respondent, I make the following:

¹ All dates are in 2012 unless otherwise indicated.

² For purposes of brevity, the Acting General Counsel is herein referenced as the General Counsel.

FINDINGS OF FACT

During the 12-month period ending October 31, 2012, Respondent sold and shipped goods valued in excess of \$50,000 directly to points located outside the State of Tennessee. During the same 12-month period, Respondent purchased and received goods in excess of \$50,000 directly from points outside the State of Tennessee. Respondent admits, and I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the National Labor Relations Act (the Act).

ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent's Southeast Regional Distribution Center in Memphis, Tennessee, employs approximately 52 employees and serves as a distribution center for Phillips Lighting products. In addition to its regular employees, Respondent also utilizes approximately 48 temporary employees through Adecco, a temporary service. Employees are assigned to one of four departments; Ballast, Professional, Consumer, and Receiving. Respondent's Memphis operations are directed by Regional Distribution Center Manager Sherry McMurrian. During the relevant time period, Gerak Guyot served as Respondent's operations manager and Rolita Turner, Joe Odum, and William Gibson were supervisors at Respondent's facility.

All of Respondent's human resources responsibilities for the Memphis facility are handled by Respondent's corporate office in Somerset, New Jersey. Specifically, Palak Dwivedi in Respondent's corporate office dealt with the Memphis human resources issues during the relevant time period.

B. Relevant Facts

1. Craft's work history

Craft was hired at Respondent's facility as a material handler in February 2003. With the exception of the last 5 days of his employment, Craft was assigned to the Ballast Department. In April 2010, Craft was promoted to a lead position where he was supervised by Gene Blinstrup. Rolita Turner also began her work with Respondent as a warehouse worker and she was promoted to the lead position in 2005. Turner testified that although she and Craft never worked in the same department when they were leads, their working relationship as leads was not problematic.

In October 2010, Blinstrup retired; leaving the supervisor's position open. Both Craft and Turner applied for the position. Turner was selected for the supervisory position and she supervised Craft until he transferred out of the Ballast department on January 20, 2012. Turner testified that after assuming the supervisory position, she concluded that Blinstrup had performed a good deal of the leads' work in addition to his own duties. Respondent conducts a performance appraisal for every employee annually. The employee's work is reviewed with respect to quality, dependability, teamwork, and safety. After supervising Craft for 4 months,

Turner, with the help of McMurrian, completed a performance appraisal for Craft. McMurrian testified that Craft's appraisal score indicated that improvement was needed.

5 On February 9, 2011, Craft received an employee counseling discipline for unsatisfactory performance based on a determination that he had failed to ensure that all orders in the Ballast department were picked, processed, and shipped for 2 weeks and he had failed to inform the supervisor of the issues. On April 14, 2011, Craft received an additional employee counseling for unsatisfactory work based on a determination that he failed to ensure good housekeeping practices. The following month, Craft was given an employee counseling
10 dated May 13, 2011, for unsatisfactory performance. The discipline was specifically issued because of a failure to ship certain packages and orders on May 11 and 12, and for working overtime without first obtaining authorization. On June 21, 2011, Respondent issued Craft an employee counseling for failing to ensure that all deliveries were shipped.

15 McMurrian testified that during the time that Craft worked as a lead, she worked with him to personally coach him on learning his new duties. She recalled that he had struggled with running reports and she personally showed him how to run the necessary reports. She provided him with screen print samples of the transactions for him to use as references when she was not available to help him.
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2. Craft's interaction with employee Kim Coleman prior to his demotion

Kim Coleman began working for Respondent in August 2003 and she became a fulltime employee in January 2004. Craft was already an employee at Respondent's facility
25 when Coleman began her work at the facility. Coleman testified that initially her relationship with Craft had been friendly. After a period of time, however, Craft asked her for a date. She testified that she told him "No" explaining to him that he was beneath her. She recalled that she told him that he was married and she didn't "like his kind." She further testified that she had believed that he just wanted to go out with her in order to belittle her as a single parent.
30 Before Craft became a lead, Coleman had little opportunity to deal with Craft as he worked in the Receiving section and she worked in the Returns sections of the department.

Coleman testified that when Craft became her lead, she felt that he tried to exert control over her and to intimidate her. She recalled that he told her "I run this floor and you're going to do what I ask you to do. I am the boss. They're going to believe what I say."
35 Coleman described Craft as speaking harshly to her and she asserted that he spoke to her in a way that made her feel that she was worth nothing. Coleman recalled that he told her that she did not deserve to be there and his statement to her was "your expiration date is over." He told her that she was going to be fired. Coleman also testified in detail about Craft's comments to her about the clothes that she was wearing, including his specific references to her underwear.
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McMurrian recalled that on July 8, 2011, Coleman came to her office to discuss Craft. Coleman told McMurrian that Craft was harassing her on the floor. Coleman reported that
45 Craft pulled her from her regular job to do other work, yelled at her, and threatened that he would "make sure" that she would lose her job. McMurrian spoke with Craft and explained

to him that Coleman's job was in the Receiving section and she advised him to coordinate with Coleman's supervisor before he pulled her off that job to do other work. McMurrian told Craft that other employees had complaints about him and that he needed to communicate with his team and to work more closely with Supervisor Rolita Turner to understand the demands of the Ballast area.

McMurrian also documented a meeting with employee James Powell on July 10. Powell, who was also a lead in Ballast, reported to McMurrian that during a shift meeting with the Ballast employees, Craft screamed at the employees and threatened to ensure that they would be fired. Coleman testified that she had attended this same meeting and she recalled that Craft told the employees that they would be fired.

On July 15, 2011, McMurrian and Operations Manager Guyot met with Craft. McMurrian told him that she felt that he was not ready for the lead position and that he needed to return to the position of material handler. Craft was also given a written warning that referenced the incident occurring on July 10, 2011. The warning language notes that during a meeting with Ballast employees, Craft threatened and berated the team and acted in a way that was unacceptable. The warning also indicated that other than Craft's not following through with team lead duties, employees Kim Coleman and Uma Jalloh perceived Craft's behavior as harassment. The discipline, that was signed by Regional Distribution Center Manager McMurrian and Operations Manager Guyot, confirmed that after 6 months, Craft had not performed the Team Lead functions and that he would be returned to the position of material handler.

3. Incidents occurring after Craft's demotion

Following the July 2011 demotion, Craft returned to the position of material handler and his pay was reduced \$2.50 an hour. McMurrian testified that even though Craft was no longer in the lead position, the issues remained between Craft and Coleman.

Coleman recalled an incident that occurred after Craft returned to the job of material handler. Craft and Coleman argued as to whether Coleman had placed a skid in the wrong bin. She argued that she had not and Craft argued that she had done so. After she checked for herself, she found that the skid was in the wrong bin. Coleman apologized to Craft and admitted that she had been wrong. She testified that he told her to get on her knees to make the apology. She refused.

On December 22, 2012, Turner telephoned McMurrian while she was away from the facility on vacation. Turner reported that Coleman had come to her alleging that Craft had left some type of recording device next at her work station and that she was very uncomfortable and believed that Craft was trying to record her conversations. McMurrian directed Turner to have Guyot go to Coleman's work station and retrieve the device. In his investigation, Guyot discovered that the device was a Play Station Portable hand-held videogame system. McMurrian recorded in her notes that because cell phones and other such devices were not allowed on the work floor, Guyot told Craft not to have the device on the floor as the company would not be responsible if it were stolen. McMurrian also recorded in

her note concerning this incident that she had previously spoken with Craft in June 2011 about using his cell phone or other devices to record people without their knowledge. Although Craft asserted to McMurrin in the June 2011 meeting that he was only recording notes for himself as a team leader, McMurrin had directed him to use a notepad.

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On December 26, 2012, Turner brought Coleman to McMurrin's office and asked to speak with McMurrin. Coleman told McMurrin that Craft was trying to make people think that he was recording their conversations and phone calls and she told McMurrin that she had experienced enough of Craft's harassment. Coleman reported that Craft appeared to be taking pictures of the product that another employee was sorting. Coleman reported that she was frightened of Craft and that she felt that he was singling her out for criticism. She asserted that Craft had threatened that he was going to get her fired.

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Coleman also told McMurrin about the incident when Craft told her to get on her knees to apologize to him. Coleman further contended to McMurrin that Craft continued to stare at her and to make her feel uncomfortable. McMurrin recalled that Coleman was crying and appeared to be clearly upset in reporting these things to her. McMurrin testified that Coleman reported that she was frightened of Craft and that she feared for her life and her job.

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Following this meeting, McMurrin spoke with other employees about Coleman's allegations. Employee Antonio Edwards reported that Craft had made the statement to him that he (Craft) was going to start making some changes there and he was going to fix it so that "no one had to kiss butt to move up the ladder." McMurrin documented that employee Len Lee opined that Craft had "bad blood" for Coleman. Employee Latoya Hyde opined that Craft had problems with "single women" working on the work floor and she asserted that he treats them differently than other women. McMurrin documented that employee Thelma Halbert reported that she had witnessed Craft's harassment of Coleman. Halbert reported to McMurrin that even though Craft was no longer Coleman's lead, he continued to monitor her work and to tell her what to do.

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After speaking with various employees about Coleman's allegations, McMurrin met with Craft. She told him that Coleman had reported that he had harassed her. Craft testified that although McMurrin had given him specific details, he had not asked for any details. Craft recalled that McMurrin asked him why Coleman would have thought that he was harassing her. He testified that he told McMurrin that he couldn't speak for Coleman; he could only speak for himself. Craft did not testify that he denied the alleged behavior when speaking with McMurrin. In direct examination, however, Craft denied that he had stared at Coleman, watched her work, or threatened her. He denied that he told her to kneel when she apologized to him. He recalled that McMurrin had also told him that employees had alleged that he had threatened management and that he had made comments about replacing management. Craft denied to McMurrin that he had done so.

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4. Craft's participation in preshift meetings

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At the beginning of each work day and at the beginning of the first shift, Respondent

conducts a preshift meeting for all the employees on that shift, including the temporary employees. The meetings are usually conducted by the lead employees; however, supervisors occasionally attend the meetings. The majority of the meetings are devoted to pertinent work-related topics for that day. After Turner became a supervisor in 2010, she implemented an additional segment for the morning meeting that was known as “a minute to shine.” After the leads finished their portion of the meeting concerning work-related topics, individual employees were given an opportunity to speak during the meetings. Turner testified that she initiated the segment to give employees a chance to discuss positive things that had happened in their lives. After its implementation, Craft participated in the “minute to shine” on the average of three times each week. Craft testified that he used this time to try to motivate employees and he often gave speeches and reworked the lyrics of songs to make them applicable to work.

Team Lead Lester Peete testified that for the most part, Craft’s comments were about employees working together and team work. He also confirmed that some of the employees reacted negatively to Craft’s remarks and didn’t understand what he was trying to say to them.

Coleman testified that Craft’s comments were “always” negative toward Respondent during these meetings; stating that managers and supervisors were not doing what they were supposed to do. Coleman recalled that he told employees that he was going to “make things change.” She also recalled that his comments in the meetings were directed toward her, stating such things as “Certain people, you know who I’m talking about. You’re not doing the right thing. You are going to be terminated. Your time is up.”

5. Respondent’s continuing investigation of Craft

On January 3, 2012, Guyot submitted an incident report to McMurrian recommending Craft’s termination. In the memorandum, Guyot described various performance problems in Craft’s work as an hourly employee and as a lead that had been observed. He concluded by stating:

“I fully support Rolita Turner’s decision to demote Craft from Lead back to material handler. Now, in light of all the other incidents Lee has caused, I support the decision to move forward and terminate Lee Craft from Phillips to eliminate the hostile working environment Lee Craft has caused.”

On January 4, 2012, Coleman also provided Respondent with a hand written statement outlining her concerns about Craft. In the statement, Coleman referenced recent problems with Craft, as well as, earlier problems in working with him. She alleged in the statement that Craft asked her for a date and she included her response to him. She reported that Craft continually criticized her and threatened that she would be fired. She alleged that he stared at her throughout the day and she added that she thought that he was trying to record her telephone conversations. She also mentioned an incident occurring as early as 2010 when Craft attempted to have her removed from the facility by a security guard because he observed her using her cell phone.

On January 4, 2012, Craft picked the wrong item when filling an order and an incorrect order was shipped to a customer. On January 16, while deleting a delivery and adding to another shipment, Craft added all new deliveries to one shipment, taking administrative staff several hours to correct and to reprint 318 deliveries.

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6. Respondent's initial decision to terminate Craft

On January 16, 2012, McMurrin met with Operations Manager Guyot and supervisors Joe Odum and William Gibson. McMurrin recalled that they reviewed Craft's personnel file and discussed the fact that they had coached him, as well as having issued disciplinary warnings to him. In a memorandum dated January 16, 2012, McMurrin documented that when she spoke with Craft on December 28, 2011; she told him that his statements that were made during preshift meetings and to other employees were being perceived by employees as working against the company and threatening in nature. In their discussions on January 16, 2013, McMurrin and the supervisors discussed the fact that although they had removed Craft from the lead position, they were continuing to have the same kinds of issues with him. At that point, they decided that he should be terminated and a notice of termination was prepared for Craft. In reviewing the file, however, McMurrin and her managers discovered that Craft had not previously received a final written warning. Because it was Respondent's custom to issue a final written warning prior to a notice of termination, Respondent did not issue Craft a notice of termination. A final written warning was prepared and given to Craft on January 20, 2012.

The final written warning confirms that Craft was given the warning because he had engaged in highly disruptive behavior in the preshift meetings and because he had also engaged in harassing and intimidating behavior towards colleagues and towards management. The warning documents that several employees had reported feeling threatened. McMurrin testified that she included these factors as a reason for the warning based on the reports from employees Lester Peete, Antonio Edwards, and Thelma Halbert who had reported Craft's behavior during the preshift meetings and his behavior toward other employees. She explained that she had also based the warning on Craft's disrespectful behavior to Turner and the harassing and intimidating behavior toward Coleman. McMurrin testified that she had simply found Coleman's version of events more credible than Craft's. The warning further lists his errors in shorting orders on January 14, 2012, and his shipping errors in January 16, 2012.

In addition to giving Craft a final written warning, McMurrin decided to move Craft to the Professional department that was in an entirely different building and where he would be assigned to a male supervisor. When McMurrin met with Craft on January 20, 2013, to give him the final written warning, she informed him of the transfer. Craft was also instructed to stay completely away from Coleman's work area. McMurrin also informed Coleman that Craft had been moved from the Ballast department and assigned to a new supervisor.

7. Circumstances leading to Craft's discharge

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McMurrin testified that although Craft was instructed to stay away from Coleman's

work area, he did not do so. On January 24, and only 4 days after his final written warning, McMurrian received reports from other employees that Craft had taken the forklift from the Professional department and had gone back into the Ballast work area. Coleman testified that Craft came into her work area and while sitting on his forklift, he began to brag about what happened to him. Coleman recalled that Craft stated that McMurrian had done him a favor by moving him because he would no longer have to lift the heavy ballasts. As he was sitting about 10 feet away from Coleman, Craft added that he was “untouchable.” Coleman testified that he was directing his comments to her.

Coleman testified that when Craft was transferred, McMurrian told her that if Craft did anything to harass her, Coleman should let McMurrian know. Both Coleman and Thelma Halbert reported to McMurrian that when Craft came into the department, he showed his disciplinary warning to employees and spoke loudly. Coleman reported to McMurrian that Craft had made the statement that he was “untouchable” and Coleman reported to McMurrian that she had heard from other employees that Craft stated that his warning had been given to him because of Coleman’s filing harassment charges against him. Coleman testified that Craft parked his forklift approximately 10 feet away from her when he was speaking loudly about his transfer and discipline. Employee Fred Smith also confirmed to Supervisor Joe Odum and to McMurrian that Craft had shown his disciplinary warning to him.

McMurrian testified that Craft’s behavior was grounds for termination for two reasons. She said that Craft’s behavior on January 24 and previously violated Respondent’s policy to maintain a harassment free workplace. Additionally, by going back into the Ballast department, Craft had specifically disregarded her directive to stay out of that work area. McMurrian testified that aside from his discussion of his disciplinary notice, Craft engaged in behavior that was sufficient grounds for termination.

C. Whether Respondent Violated the Act

1. The parties’ positions

The General Counsel maintains that Respondent unlawfully terminated Craft because he engaged in protected concerted activity by discussing his January 20 final warning with employees and making statements critical of Respondent’s decision to issue him the final warning. Specifically, the General Counsel alleges in the complaint that since January 19, 2012, Respondent has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers. The complaint alleges that between January 20, 2012, and January 24, 2012, Craft showed and discussed with his coworkers the final written warning that he received on January 20, 2012, and that Respondent terminated him for doing so. Respondent asserts that its decision to terminate Craft was based on his “final act of harassment/intimidation/bullying and his disruptive behavior occurring on January 24, 2012.”

2. Applicable legal authority

As discussed further below, the parties not only disagree about the Craft’s conduct that

triggered his termination, but they also disagree as to Respondent’s motivation in deciding to terminate Craft. In cases where an employer’s motivation is an integral factor in determining the lawfulness of discipline issued to employees the Board utilizes the test that is outlined in *Wright Line*, 251 NLRB 1083, enfd., 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* analysis is based on the legal principle that an employer’s motivation must be established as a precondition to a finding that the employer has violated the Act. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). In its decision in *Wright Line*, the Board stated that it would first require the General Counsel to make an initial “showing sufficient to support the inference that protected conduct was a ‘motivation factor’ in the employer’s decision.” *Wright Line*, above at 1089.

Under *Wright Line*, the General Counsel must establish not only that the employee engaged in protected conduct, but also that the employer was aware of such protected activity and that the employer bore animus toward the employee’s protected activity. *Praxair Distribution, Inc.*, 357 NLRB No. 91, slip op. at fn. 2 (2011); *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). Specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. *North Hills Office Services*, 346 NLRB 1099, 1100 (2006). In effect, proving the established elements of the *Wright Line* analysis creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discipline are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The Board has held that an employer’s restriction on employee communication is overbroad when the restriction is not limited by time or place. *SNE Enterprises*, 347 NLRB 472, 492–493 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007). Furthermore, an employer’s restriction on employees’ discussing confidential information interferes with employees’ Section 7 rights unless the employer can demonstrate a legitimate and substantial business justification that outweighs the employee’s Section 7 interests. *Caesar’s Palace*, 336 NLRB 271, 272 fn. 6 (2001). See also *Westside Community Mental Health Center, Inc.*, 327 NLRB 661, 666 (1999). The General Counsel maintains that Craft was unlawfully terminated because he shared confidential information about his January 20, 2012 warning with other employees.

3. Whether Respondent maintained an unlawful confidentiality rule

Paragraph 4 of the complaint alleges that since January 19, 2012, Respondent has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers. It is undisputed that there is no written policy that prohibits employees from discussing their discipline with other employees. McMurrian also testified that Respondent does not have a policy that prohibits employees

from discussing disciplinary notices. In a sworn affidavit to the Board prior to the hearing, Craft testified that he was not aware of any policy or rule that prohibits an employee from showing or discussing discipline with other employees. Craft further testified that when he received his final written warning, none of the supervisors or managers told him that the warning was confidential; either with respect to the form itself or to discussion about the discipline.

Despite the testimony of both McMurrin and Craft, the General Counsel nevertheless asserts that Respondent unlawfully implemented a policy prohibiting the discussion of discipline on January 19, 2012. In maintaining this assertion, the General Counsel relies on a file summary that is dated January 24, 2012, and signed by McMurrin, supervisors, and employees on January 25, as well as, the wording of Craft's January 25 discharge notice.

In the January 24, 2012 memorandum McMurrin documents that Coleman and Halbert came to her, reporting that Craft was showing his disciplinary form to employees on the floor and they confirmed to her the content of the discipline to her. Coleman reported to McMurrin that Craft had told other employees that the discipline was given to him because she (Coleman) had filed harassment charges against him. She also told McMurrin that Craft had bragged that he was "untouchable" and that management had done him a favor by moving him out of the Ballast area. McMurrin included in the memorandum the information provided by Halbert and by employee Fred Smith about Craft's comments concerning his discipline and his comments about his transfer out of the Ballast department. In referencing the fact that Coleman and Halbert came to her with complaints about Craft's statements and actions, McMurrin adds: "These employees are aware that disciplinary forms are confidential information and should not be shared on the warehouse floor, at any time, much especially during working hours." McMurrin also added "Kim stated that he was purposely showing the write-up which he knows is confidential information so it would get back to her like she was the blame."

Coleman testified that she told McMurrin that the discipline forms were confidential and should not be shared with others. When asked why she made this statement, Coleman admitted that no one ever told her that such discipline was confidential; she had just assumed that it was. She explained that because a discipline is personal for an employee, she assumed that employees should keep it to themselves. Coleman further testified that when she told McMurrin that she thought that Craft was revealing confidential information, McMurrin did not respond that it was confidential or tell her that it was wrong for Craft to show her his disciplinary form. McMurrin's response to Coleman was simply "Why would he want to do that? Why would he want to show that?"

Based on the total record evidence, it appears that Coleman was the individual who appeared to be most concerned that Craft was telling employees about his discipline. Based on her testimony and the information that she reported to McMurrin, Coleman was disturbed by Craft's statements about his discipline and transfer because she believed that he was targeting her as responsible. Thus, while McMurrin may have referenced in the memorandum that Craft showed his disciplinary warning to employees on January 24, as well as the fact that Coleman raised the confidentiality of the discipline, there is no credible record

evidence that Respondent told employees on January 19, 2012, that they were prohibited from sharing and/or discussing their discipline with coworkers as alleged in complaint paragraph 4.

McMurrian included in Craft's termination notice that Craft requested a copy of his write up and he was informed of the confidentiality of the discussion and the form during this meeting. McMurrian testified that Craft raised the issue of confidentiality in his disciplinary meeting and she had assured him that their conversation was confidential. The record supports her explanation as to how confidentiality was raised during the meeting and why she added a reference to confidentiality as she did in Craft's termination notice. Craft specifically denied that he was told in the meeting that the disciplinary form was confidential. He did not testify that McMurrian or any of the managers told him that he could not discuss his discipline. Based on both the testimony of McMurrian and Craft, it is reasonable that when Craft requested a copy of his discipline, he was given assurances that Respondent would maintain the confidentiality of his discipline. I do not find sufficient evidence that Respondent told Craft or any other employees on January 19, 2012, that they were prohibited from discussing their discipline with other employees. Overall, I don't find that the wording in Craft's termination notice as sufficient evidence to prove that Respondent established a prohibitive policy 6 days earlier as alleged in the complaint. Accordingly, I do not find merit to complaint paragraph 4 as alleged.

4. Whether Craft was terminated because of his protected activity

Independent of whether Respondent implemented a policy on January 19, 2012, that restricted employees from discussing their discipline, there remains the issue of whether Respondent terminated Craft because he engaged in protected activity by discussing his discipline with other employees. Specifically, the General Counsel alleges that between January 20, 2012, and January 24, 2012, Craft showed and discussed with his coworkers the counseling form that he received on January 20, 2012. Respondent, however, alleges that Craft was terminated because of his conduct on January 24, 2012.

D. The Application of the Wright Line analysis

1. Whether Craft engaged in protected activity

As discussed above, the first component of the *Wright Line* analysis is establishing that an employee has engaged in protected activity. Although Respondent conducted an investigation prior to issuing Craft the January 20, 2012 warning, there is no evidence that Respondent engaged in any further investigation of Craft's conduct prior to January 24, 2012, when McMurrian received complaints from Coleman and Halbert. The overall record indicates that once Respondent issued Craft the final warning and then transferred him to an area for supervision by a male supervisor, Respondent took no further notice of Craft until January 24, 2012. Respondent asserts that Craft's termination was triggered by his conduct on January 24, 2012, when he came back into the Ballast area and caused a disturbance related to his discipline and transfer. Interestingly, Craft denies that he went into the Ballast area after January 20, 2012. He contends that while he spoke with other employees about the discipline that he had received, he did so between January 20 and 24, 2012, and on

nonworking time in areas other than the Ballast area. Overall, I do not find Craft’s testimony credible in this regard. The total record evidence, including the credible testimony of Coleman and Halbert support a finding that Craft came back in to the Ballast area on January 24, 2012, as documented in McMurrian’s January 24, 2012 memorandum.

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Although the parties disagree with respect to when Craft talked with other employees about his discipline and his transfer, there is no dispute that he did so. As the Board has previously determined, “it is important that employees be permitted to communicate the circumstances of their discipline to their co-workers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense.” *Verizon Wireless*, 349 NLRB 640, 658 (2007). Thus, Craft’s communication to other employees about his discipline and transfer is clearly protected activity.

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2. Respondent’s knowledge of Craft’s protected activity

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Respondent argues that the second prong of the *Wright Line* analysis cannot be met because Respondent had no knowledge that Craft was talking with employees about his discipline prior to January 24, 2012. Respondent argues that inasmuch as Craft denies engaging in protected activity on January 24, 2012, the requisite knowledge cannot be established. I note however, that actions taken by an employer against an employee based on the employer’s belief that the employee engaged in or intended to engage in protected activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity. *Signature Flight Support*, 333 NLRB 1250, 1250 (2001); *U.S. Service Industries, Inc.*, 314 NLRB 30, 31 (1994), enfd. mem 80 F. 3d 558 (D.C. Cir. 1996). Thus, even if I were to credit Craft’s testimony, finding that he did not come back into the Ballast area on January 24, 2012, Respondent believed that he did so, and disciplined him for conduct related to protected activity. Accordingly, I find that Respondent had knowledge that Craft engaged in protected activity.

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3. Whether Craft’s protected activity was a motivating factor in his discharge

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Counsel for the General Counsel relies on the January 25, 2012 discharge notice as a basis for showing that Craft’s discussions about his discipline were a factor in Respondent’s motivation to discharge Craft. The notice specifically describes the violation as:

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Lee Craft is being terminated effective immediately due to disrupting the operation and sharing confidential documentation and information during working hours and continues to use intimidating language towards management. Lee received a final written disciplinary notice warning against these exact behaviors on 1/20/2012. Lee requested a copy of the write up and was informed of the confidentiality of the discussion during the meeting.

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Counsel for the General Counsel also asserts that in McMurrian’s memorandum of January 24, 2012, she focuses on Craft’s discussing his warning notice with other employees while writing that employees are aware that discipline forms “are confidential and should not be

shared on the warehouse floor at any time.” As I have discussed above, I have found that the discussions and concerns about the confidentiality of Craft’s discipline were initiated by employees Coleman and Halbert rather than by the Respondent. McMurrian, however, identified the breach of confidentiality in both her January 24, 2012 memorandum as well as in Craft’s termination notice. Respondent does not deny that Craft was terminated because of his going back into the Ballast department and the statements that he made there to employees. These statements included his discussion about his discipline and his transfer. Thus, as his discussions about his transfer and discipline were intertwined with all of his actions on January 24, 2012, such actions were a motivating factor in Respondent’s decision to discharge Craft. Accordingly, the General Counsel has met the initial burden of showing that protected activity was a motivating factor in Respondent’s decision to terminate Craft. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

4. Whether Respondent would have terminated Craft in the absence of protected activity

Once the General Counsel meets the initial burden of showing that an employee’s protected activity was a motivating factor in the adverse employment, the employer has the burden of demonstrating that it would have taken the same action in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. The total record evidence supports a finding that Respondent has met this burden.

As argued by counsel for the Respondent, the record evidence demonstrates that Respondent had already decided to terminate Craft before he engaged in any protected activity. In a memorandum dated January 16, 2012, McMurrian describes a December 28, 2011 meeting attended by supervisors Odum and Gordon, as well as Craft and McMurrian, Craft was informed that Respondent was investigating an additional report of his engaging in intimidating and harassing behavior. McMurrian documented that she informed Craft of the complaints received from other employees. McMurrian further documented in the report a number of comments and complaints submitted by employees, as well as by Supervisor Rolita Turner. Specifically, McMurrian noted that Turner had reported that Craft had persistently attempted to undermine and belittle her decisions and that he continued to demonstrate a lack of respect for Turner. McMurrian noted that Craft’s disruptive behavior was inappropriate; interfering with operations and it was viewed as unstable as documented by specific named employees. McMurrian concludes:

After many coaching sessions, and disciplinary action, which included a demotion from the Team Lead position, Lee Craft has continued to display intimidating, offensive, and demoralizing behavior. It is in the best interest of the company and the employees of Phillips to terminate Lee Craft’s employment, effective immediately. The intimidating behavior is a violation of company policy. Phillip’s has the responsibility to create a safe environment where offensive and intimidating behavior is not tolerated.

McMurrian concluded the memorandum by noting that the decision to terminate Craft had been made jointly by the distribution manager, the operations manager, and by three

distribution center supervisors.

5 The termination notice that was prepared on January 16, 2012, reflected that Craft was being terminated because of inappropriate behavior and a violation of company policies and procedures. The notice documented that Craft had been removed from the team lead position on July 25, 2011 because of his use of intimidating tactics that were perceived by two female employees as harassment and because he was not performing the tasks required in the team lead position. The January 16, 2012 termination notice further noted that in July 2011, Craft had been informed that if he failed to perform the duties of material handler or if he had 10 further issues with his fellow coworkers, he would be subject to further discipline up to and including termination.

15 As noted above in this decision, Respondent did not terminate Craft on January 16, 2012, as originally intended. Because it was discovered that he had not previously received a final written warning, the termination was converted to a final written warning and he was spared termination. The warning that issued on January 20, 2012 documents that Craft had engaged in inappropriate behavior, unsatisfactory performance, and a violation of company policy/procedures. The final written warning included a reference to two specific performance issues. The warning also referenced that Craft had engaged in highly disruptive 20 behavior in the preshift meetings and that Craft had engaged in harassing and intimidating behavior toward colleagues and towards management. There was no allegation or finding that Craft discussed confidential information or engaged in any other protected activity.

25 Because of Craft's reported behavior toward female employees as well as his female supervisor, Craft was moved out of the Ballast department to a department under a male supervisor. McMurrian credibly testified that he was instructed to stay out of the Ballast department. In transferring Craft into the new department, Respondent gave Craft an opportunity for a fresh start to work with different employees and a different supervisor.

30 On January 24, 2012, McMurrian learned that Craft had not only returned to the Ballast department in violation of her instructions to him, but that he had also engaged in behavior that employees reported as disruptive. In alleging that Respondent terminated Craft because of his sharing information about his discipline with other employees, the General Counsel relies on the wording of Craft's final termination notice. The General Counsel 35 specifically relies on the fact that Respondent referenced Craft's "sharing confidential documentation and information during working hours" in the description of Craft's conduct. As I have indicated above, such wording is arguably sufficient to establish that the General Counsel has met the initial burden of a prima facie case under *Wright Line*. The remainder of the termination notice, however, demonstrates that Respondent would have terminated Craft 40 in the absence of any protected activity.

45 The January 25, 2012 termination notice documents that he was also terminated because of his disrupting the operation and for using intimidating language toward management. Even more significant, however, is the additional language that was included in the termination notice:

Lee received a final written disciplinary notice warning against these exact behaviors on 1/20/2012.

5 There is no dispute that the final warning given to Craft on January 20, 2012, did not
involve any allegation of disclosing confidential information. The language of the warning
reflects that it was issued to Craft for (1) highly disruptive behavior; (2) harassing and
intimidating behavior towards colleagues and management, and (3) for performance issues.
Thus, it is apparent that even in the absence of any protected activity, Respondent terminated
10 Craft because Respondent determined that he had engaged in the same conduct that triggered
his January 20, 2012 notice. More significantly, Craft's conduct on January 24, 2012, was
consistent with the conduct for which Respondent based its earlier decision to terminate Craft
on January 16, 2012, and prior to any alleged protected activity.

15 As discussed above, Craft denies that he came back into the Ballast department on
January 24, 2012, and spoke with employees. Because of this denial, the General Counsel
asserts that while Craft engaged in protected activity; it was simply not on January 24, 2012.
Because of Craft's denial, the General Counsel is forced to argue that Craft discussed his
discipline with employees during the period between January 19, 2012, and January 24, 2012.
I note, however, that neither McMurrian's memorandum of January 24, 2012, nor Craft's
20 termination notice reference any dates of alleged misconduct other than January 24, 2012. In
reaching the decision that Respondent would have terminated Craft in the absence of any
protected activity, I rely in large part on the documentary evidence and the credible testimony
of McMurrian. Based on the information provided by other employees, McMurrian
determined that Craft had disregarded her instructions to stay out of the Ballast department
25 and that he was engaging in the same conduct for which he had previously been warned.

There is no question that Craft's behavior on January 24, 2012, included his comments
to other employees about his discipline and his transfer. As discussed above, Section 7 of the
Act clearly protects employees when they tell other employees about their discipline. Based
30 on the testimony of Coleman, however, it is also apparent that Craft's statements were
arguably motivated to accomplish more than a simple sharing of information with other
employees. Based on her testimony and on the information that she gave McMurrian, it is
evident that Coleman perceived Craft's return to the Ballast department and his statements to
her and to other employees as additional harassment. Ostensibly, Craft's behavior reflected
35 more than simply sharing what Respondent had done to him; it included communicating to
other employees that Coleman was responsible for his discipline and transfer. It is reasonable
that Respondent determined that in his doing so, Craft had again harassed Coleman and
engaged in the same conduct for which Respondent had intended to fire him only 8 days
earlier.

40 It has long been held that an employer violates the Act if it is shown that the
discharged employee at the time engaged in 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. An employer's
45 honest belief, however, provides a defense to a charge of discrimination absent a showing that
the employee did not, in fact, actually engage in the alleged misconduct. *NLRB v. Burnip &*

Sims, Inc., 379 U.S. 21, 22 (1964); *Westinghouse Electric Corp.*, 296 NLRB 1166, 1173 (1989). In the instant case, the evidence is not sufficient to establish that Craft did not engage in the conduct that was reported to McMurrian by his fellow employees. Thus, Respondent has demonstrated that it would have terminated Craft in the absence of any protected activity.

5

Accordingly, I do not find that Respondent terminated Craft in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

10

1. The Respondent, Phillips Electronics North American Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has not violated the Act as alleged in the complaint.

15

On these findings of fact and conclusions of law and on the entire record, I use the following recommended:³

ORDER

20

The complaint is dismissed in its entirety.

Dated, Washington, D.C. June 13, 2013

25

Margaret G. Brakebusch
Administrative Law Judge

30

³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Section 102.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PHILIPS ELECTRONICS
NORTH AMERICA CORPORATION

and

LEE CRAFT

Case 26-CA-085613

**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., June 13, 2013.

By direction of the Board:

Gary Shinnors

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, 1099 14th Street, N.W., Washington, D.C. 20570, on or before **July 11, 2013.**



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570-0001

July 5, 2013

Re: Philips Electronics North America Corporation
Case 26-CA-085613

EXTENSION OF TIME

The due date for the receipt in Washington, D.C. of Exceptions and Supporting Brief is extended to **July 29, 2013.**

Henry S. Breiteneicher
Associate Executive Secretary

cc: Parties

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PHILIPS ELECTRONICS NORTH AMERICA
CORPORATION

Respondent

and

Case No. 26-CA-085613

LEE CRAFT, AN INDIVIDUAL

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Counsel for the Acting General Counsel (herein "General Counsel"), pursuant to Section 102.46 of the Board's Rules and Regulations, files these exceptions to the decision of the Administrative Law Judge in the above-captioned case. The bases for these exceptions are addressed in detail in General Counsel's Brief in Support of Exceptions.

General Counsel excepts to the following findings and conclusions:

1. The Administrative Law Judge's failure to discuss, consider or credit the testimony of General Counsel witnesses Markus Bernard, Lexie Campbell and Sherry Grey.
2. The Administrative Law Judge's credibility findings crediting the testimony of Respondent witnesses Sherry McMurrin, Kim Coleman, and Thelma Halbert.
3. The Administrative Law Judge's finding on page 5, lines 33-34 that Charging Party Lee Craft testified that Sherry McMurrin provided him with specific details of Kim Coleman's claims of harassment at December 28, 2011 investigative meeting.

4. The Administrative Law Judge's finding on page 5, lines 37-38, that Lee Craft did not testify that he denied the alleged behavior toward Kim Coleman in the December 28, 2011 investigative meeting.

5. The Administrative Law Judge's finding on page 6, lines 29-30 that the January 3, 2012 memo prepared by Gerak Guyot concerning Craft described performance problems in Craft's work as an hourly, non-lead employee.

6. The Administrative Law Judge's finding on page 7, lines 37-38 that Lee Craft was reassigned to a different building after his transfer from the Ballast area to the Professional area.

7. The Administrative Law Judge's finding on page 8, lines 1-3, that Sherry McMurrian received reports from employees other than Kim Coleman and Thelma Halbert that Lee Craft returned to the Ballast area on his forklift on January 24, 2012.

8. The Administrative Law Judge's finding on page 8, lines 11-13 and 18-19, that Kim Coleman, Thelma Halbert and Fred Smith reported to Sherry McMurrian that, on January 24, 2012, Lee Craft came to the Ballast area, spoke loudly to other employees and showed employees his warning notice.

9. The Administrative Law Judge's findings on p.10, l. 24 and p.11, l.19, that Respondent did not unlawfully maintain and/or enforce a rule prohibiting employees from discussing discipline with other employees on the basis that discipline forms are confidential information.

10. The Administrative Law Judge's finding on page 12, lines 2-4, that record evidence, including the testimony of Kim Coleman and Thelma Halbert, supports a finding that Lee Craft came back into the Ballast area on January 24, 2012 as documented in McMurrian's January 24, 2012 memo.

11. The Administrative Law Judge's failure to find that Lee Craft previously engaged in protected concerted activity, or that Respondent believed that he had engaged in protected concerted activity, by his statements to other employees critical of management.

12. The Administrative Law Judge's finding on page 14, lines 21-22, that Lee Craft was not engaged in protected activity prior to January 20, 2012 and the failure to find that Respondent's January 16, 2012 decision to discharge Craft (which was rescinded) and January 20, 2012 final warning to Craft was motivated by animus toward Craft's prior protected activity.

13. The Administrative Law Judge's finding on page 15, lines 4-12, that Lee Craft would have been discharged in the absence of any protected activity.

14. The Administrative Law Judge's finding on page 15, lines 14-20, that Respondent's decision to discharge Lee Craft for misconduct was for misconduct by Craft that occurred on January 24, 2012.

15. The Administrative Law Judge's finding that Sherry McMurrin credibly determined that Lee Craft had disregarded her instructions to stay out of the Ballast area and that Craft was engaging in the same conduct for which he had previously been warned on January 20, 2012.

16. The Administrative Law Judge's finding on page 15, lines 27-39, that, when Lee Craft informed employees not only that he had been disciplined but revealed the name of Kim Coleman as his accuser, Respondent reasonably determined that Craft was continuing to harass Coleman and engage in the same conduct for which he was previously warned on January 20, 2012.

17. The Administrative Law Judge's finding on page 16, lines, 2-4, that the evidence was not sufficient to show that Lee Craft did not engage in the conduct reported to Sherry

McMurrian on January 24, 2012, which McMurrian testified formed the basis for her decision to discharge Craft.

18. The Administrative Law Judge's conclusion on page 16, lines 6-7 and 14 that Respondent did not violate the Act by discharging Lee Craft on January 25, 2012.

19. The Administrative Law Judge's decision on page 16, line 21 to dismiss the complaint in its entirety.

With respect to the foregoing exceptions, General Counsel will cite specific references to the record the Brief in Support of Exceptions.

General Counsel submits that the Administrative Law Judge's findings and conclusions are contrary to the record evidence, applicable law and Board precedent and requests that the Board find that Respondent violated the Act by maintaining and enforcing a rule which provides that discipline is confidential and prohibits sharing and/or discussing discipline with other employees and by discharging Lee Craft on January 25, 2012 because of his protected activity and his violation of the unlawful rule.

Dated: July 29, 2013

Respectfully submitted,



William T. Hearne
Counsel for the Acting General Counsel
National Labor Relations Board
Region 15
80 Monroe Avenue, Suite 350
Memphis, TN 38103

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013, a copy of Counsel for the Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on July 29, 2013, a copy of Counsel for the Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge was served via Email on the following:

Mason Miller, Senior Counsel
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Philips Electronics North America Corporation
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Phone: (732)563-3123
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Lee Craft
7467 Nunn Cove
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Email: craftphyllis@ymail.com



William T. Hearne
Counsel for the Acting General Counsel

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Philips Electronics North America,) Respondent)

and)

Lee Craft,) Charging Party)

Case No. 26-CA-085613

MOTION TO EXTEND TIME

Philips Electronics North America ("Philips") hereby files a Motion to Extend the Time to File its Answering Brief to Counsel for the Acting General Counsel's Exceptions to the ALJ's decision, and Cross-Exceptions, if any, until August 27, 2013. It is respectfully submitted that there is proper cause to extend the time to make such filing based on the fact that the undersigned counsel had previously scheduled business travel, training, and an extensive workload, as well as planned vacation time during the relevant time period. This date, I contacted Counsel for the Acting General Counsel to determine if his office opposed this motion, but I have not received a response and I must leave for business travel.

Respectfully submitted,

By: /s/ Mason C. Miller
Mason C. Miller, Esq.
Senior Counsel, Employment & Labor Law
Philips Electronics North America
Office: 732-563-3123
E-mail: mason.miller@philips.com



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Reasons include in-house counsel Mason Miller's previously scheduled business travel, training, and extensive workload, as well planned vacation time during the relevant time period

Case Information

Case Number: 25-CA-085613

Case Name: Philips Electronics North America Corporation

Role: Charged Party / Respondent

Contact Information Edit

mason.miller@philips.com
200 Franklin Sq
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Attached E-File(s)

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I certify that, pursuant to the Board's Rules & Regulations, Sec 102.114, I have served the following parties on this case with this request:

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William T. Hearne
Field Attorney
National Labor Relations Board
Region 15
Subregion 26
80 Monroe Ave., Ste. 350
Memphis, TN, 38103
Phone: (901) 544-0028
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Hearne, William T.
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Lee Craft

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FACSIMILE MESSAGE

Philips Electronics North America Corporation
Legal Department, Employment and Labor Law

To: Gary Shinnors, Executive Secretary

Re: Case No. 26-CA-085613

Fax number: 202-273-4270

From:

Mason C. Miller, Esq.

Senior Counsel, Employment & Labor Law

Philips Electronics North America Corporation

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No. of Pages (incl. cover): 3

Date: August 6, 2013

Comments

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Comments



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570-0001

August 7, 2013

Re: Philips Electronics North America Corporation
Case 26-CA-085613

EXTENSION OF TIME FOR ANSWERING BRIEF AND CROSS-EXCEPTIONS

The due date for the receipt in Washington, D.C. of the Respondent's Answering Brief to the Acting General Counsel's Exceptions, and the Respondent's Cross-Exceptions and Brief in Support of Cross-Exceptions is extended to **AUGUST 27, 2013.**

Henry S. Breiteneicher
Associate Executive Secretary

cc: Parties

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 26

In the Matter of:

**PHILIPS ELECTRONICS
NORTH AMERICA CORPORATION,**

Respondent,

and

LEE CRAFT, AN INDIVIDUAL,

Charging Party.

Case No. **26-CA-085613**

**ANSWERING BRIEF OF RESPONDENT IN OPPOSITION TO EXCEPTIONS
FILED BY COUNSEL FOR THE ACTING GENERAL COUNSEL TO
DECISION OF ADMINISTRATIVE LAW JUDGE**

National Labor Relations Board

MASON C. MILLER, ESQ.
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Attorney for Respondent

STATEMENT OF THE CASE

Respondent Philips Electronics North America (“Respondent,” “Philips” or “Company”), submits this Answering Brief to Acting Counsel for the General Counsel’s Exceptions to the Decision of the Honorable Margaret G. Brakebusch, ALJ. The Counsel for the Acting General Counsel (“General Counsel”) filed exceptions to nineteen of the ALJ’s findings; but, mostly, the General Counsel takes exception with the ALJ credibility findings. In any event, each of the exceptions should be rejected because the evidence and applicable Board law supports the ALJ’s findings.

THE ALLEGED UNFAIR LABOR PRACTICE

On November 30, 2012, the Region issued a Complaint which alleges that “[s]ince January 19, 2012, Respondent has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers.” The Complaint further alleges that “Lee Craft showed and discussed with his coworkers an employee counseling form he received from Respondent on about January 20, 2012” and that “[a]bout January 25, 2012, Respondent discharged its employee Lee Craft” because he shared and/or discussed his Final Written Warning with his coworkers. (GC-1(e)).¹

¹ The record consists of the transcript of the hearing conducted on March 11-12, 2013 (“Tr.”), Respondent Exhibits (“R”) and General Counsel Exhibits (“GC”). Herein, the Decision of the ALJ is cited to as “ALJD.”

DECISION OF THE ALJ

The ALJ conducted a hearing on March 11 and 12, 2013, addressing the charge by Lee Craft (“Mr. Craft”) that Respondent violated Section 8(a)(1) of the Act by terminating him. The ALJ found that during the hearing General Counsel failed to establish that Respondent has maintained a rule that discipline is confidential and employees are prohibited from sharing and/or discussing their discipline with their coworkers. The ALJ also found that General Counsel established a *prima facie* case under *Wright Line*. Then, the ALJ properly found that Philips established that it would have terminated Mr. Craft even in the absence any protected activity. In this regard, significantly, the ALJ recognized that the management team had decided to terminate before he allegedly engaged in protected activity. That is, upon completing its investigation of co-worker Kim Coleman’s December 2011 complaint about Mr. Craft, management decided to terminate Mr. Craft’s employment based on his harassment, intimidation, and/or bullying of his co-workers, as well as his poor job performance and generally disruptive behavior. The ALJ also recognized that, upon further review, management decided to give Mr. Craft one last chance and instead of issuing the previously drafted termination notice, Mr. Craft was issued a Final Written Warning on January 20, 2012. Thus, the ALJ found that management decided to terminate Mr. Craft before/absent the alleged protected activity. (ALJD 13:15-14:22).

Ultimately, the ALJ found that the final decision to terminate Mr. Craft, which was made several days later and after he allegedly engaged in protected activity, was

based on essentially the same reasons as the prior decision to terminate – with the final act of harassment/intimidation/bullying and disruptive behavior occurring on January 24, 2012 when Mr. Craft left his new work area during work time and drove a company vehicle approximately 150 yards to continue the harassment of Ms. Coleman -- whom he had been moved away from based on prior harassment and instructed not to contact. The ALJ found that on that day, Mr. Craft engaged in acts which were reasonably perceived by Ms. Coleman as continued harassment, including that Ms. Coleman was to blame for his receiving the Final Written Warning and his transfer. The ALJ found that this behavior provided the Company with legitimate non-discriminatory, business reasons to terminate Mr. Craft's employment – separate and apart from his alleged protected concerted activity. (ALJD 14:24-16:4).

STATEMENT OF RELEVANT FACTS

Background

Respondent Philips Lighting Company is a division of Philips Electronics North America Corporation, which is a corporation organized under the laws of the State of Delaware. The Philips Southeast Regional Distribution Center located at 3399 East Raines Road, Memphis, Tennessee serves as a distribution center for Philips Lighting products. (ALJD 2:14-26; GC-1(a)-(k); see also Tr. 174:22–176:13).

Philips does not have a written or un-written policy which prohibits employees from discussing disciplinary notices, and the Company has not disciplined anyone else for discussing such notices. Mr. Craft testified that there was no policy and that no one at Philips ever told him that he could not discuss his disciplinary notices. General Counsel

did not produce a single witness to say there was, or even that they believed there was, such a Philips policy. (ALJD 9:40-11:19; GC-2; Tr. 171:6-174:7; 126:21-128:5).

In or about February 2003, Mr. Craft was hired at the Philips Memphis facility as a material handler and for the first few years he was generally meeting expectations. In or about April 2010, Sherry McMurrian, Distribution Center (“DC”) Manager--alleged wrongdoer--promoted Mr. Craft to the position of team lead, where he was supposed to lead other material handlers. Initially, Mr. Craft reported to a male manager, Gene Blinstrup, DC Supervisor, who according to several witnesses generally did not expect much from his team leads, and, in fact, did most of their work. (ALJD 2:32-3:2; Tr. 174:8-21; 176:14-178:2; 437:5-23).

In or about October 2010, after Mr. Blinstrup retired, Rolita Turner (“Ms. Turner”) was promoted from a team lead into the position of DC Supervisor. By all accounts, Ms. Turner expected more than Mr. Blinstrup from the Mr. Craft and the other team leads.² (Tr. 431:21-432:1; 437:5-23). In this regard, Mr. Craft’s job performance as a lead was not meeting the expectations of Ms. Turner and Ms. McMurrian. (Tr. 435:7-438:18). Indeed, in early 2011, Mr. Craft received a Performance Evaluation from Ms. Turner and Ms. McMurrian wherein he received an overall evaluation of “Improvement Needed.” (R-1; Tr. 178:8-180:25; 435:7-438:18). Then, between February and April 2011, Mr. Craft received two verbal warnings from Ms. Turner (which were documented) for

²It is worth noting that Mr. Craft already had some animosity toward Ms. Turner because he had applied for the supervisory position into which she was recently promoted, and, then, repeatedly
(Continued ...)

unsatisfactory job performance, and between May and June 2011 he received four written warnings for unsatisfactory job performance. (ALJD 3:4-19; R-2; R-3; R-4; R-5; R-17; Tr. 182:7-184:6; 185:2-189:11; see also Tr. 318:16-322:18; 438:19-439:3).

Harassing, Threatening, and/or Bulling Behavior by Mr. Craft Prior to Demotion

On July 8, 2011, Mr. Craft's then-subordinate, Kim Coleman ("Ms. Coleman"), complained to Ms. McMurrin that Mr. Craft was harassing her at work.³ Ms. Coleman said, among other things, that Mr. Craft "threatened her and said he was going to MAKE SURE she lost her job if it was the last thing he did" (R-7; Tr. 192:23-195:7). Ms. Coleman testified that when they first started working together in 2003, Mr. Craft had asked her on a date, which she flatly rejected. Ms. Coleman also testified that Mr. Craft made sexual comments about her undergarments, e.g., are you wearing a bra today, and pull your panties out of your butt. Ms. Coleman further testified that Mr. Craft would refer to himself as Long Tongue Lee ("LTL"), and would stick his tongue out to proudly show women the length of it – in an obvious sexual gesture. (ALJD 3:21-4:5; Tr. 336:17-337:17; 340:12-341:7).

Then, on July 10, 2011, another team lead, James Powell, complained to Ms. McMurrin that Mr. Craft was out of control, and that he was threatening and berating his subordinates. At about this time, another subordinate, Uma Jalloh, told Ms. McMurrin

questioned her qualifications for the job. (Tr. 178:3-7; 181:11-182:6; 433:9-434:2; 435:21-436:3).

³Ms. McMurrin testified that there was no HR person at the Memphis facility, so employees came to her with complaints. (Tr. 238:20-22).

that she felt Mr. Craft's behavior constituted harassment. Thus, Mr. Craft received a written warning for "threatening and berating" his subordinates, and failing to perform his duties as a team lead. In this connection, upon review of the numerous instances where Mr. Craft failed to properly perform his job duties, the complaints from his subordinates, as well as his own request to return to his prior position, it was determined that Mr. Craft should be returned to his prior position of material handler, effective August 1, 2011. At that time, Mr. Craft was warned that further infractions would result in disciplinary action up to and including termination. (ALJD 4:7-23; R-6; R-7; R-8; Tr. 189:12-198:2; 338:12-340:11; 341:14-342:24; 343:6-11; 438:19-439:11).

Continued Harassing, Threatening and/or Bullying Behavior After Demotion

After Mr. Craft was returned to the material handler position in August 2011, Mr. Craft's job performance suffered and he continued to engage in harassing, bullying and/or threatening behavior – in continued violation of Company policy. (GC-2a, 2c and 2d). Indeed, in late 2011, Kim Coleman (now a co-worker) again lodged an internal complaint about Mr. Craft. In her complaint, Ms. Coleman reported several incidents of being harassed, threatened, and bullied by Mr. Craft. For example, Ms. Coleman complained that in November 2011, in front of team lead, Thelma Halbert, Mr. Craft directed her to "kneel down [in front of him] and apologize to him," after he found an error she had made on the job. Ms. Coleman testified that she was humiliated and offended by this act of sexual harassment. In addition, Ms. Coleman complained that Mr. Craft repeatedly stared at her and obsessed over her job performance – even though he was no longer a team lead. On one occasion, Mr. Craft attempted to discipline Ms.

Coleman and, then, tried to bully and humiliate her further by seeking a security guard to escort her from the building – which, as a co-worker (or even as a team lead), he did not have the authority or grounds to do. Ms. Coleman complained that Mr. Craft would say things like: “Hey, you laugh now, but your day is coming.” Further, Ms. Coleman complained that Mr. Craft had placed a recording device near her work station, which she believed was there to record her conversations at work – against Company policy.⁴ Ms. Coleman testified tearfully that she feared Mr. Craft. (ALJD 4:25-5:42; R-9; R-16; Tr. 198:11–201:10; 305:17-310:20; 343:12-346:21; 350:6-352:24; 348:4-350:5; 353:11-20; 360:10-361:5; 400:16-401:8).

Upon receipt of Ms. Coleman’s complaint, Ms. McMurrin conducted an investigation. During the investigation, several co-workers, including Uma Jalloh and Marliatu Bah, voluntarily reported that they felt threatened and harassed by Mr. Craft. In addition, Thelma Halbert, team lead, testified Ms. Coleman would confide in her and Ms. Coleman was so upset by Mr. Craft’s harassment that she would cry about it at work. Employee Len Lee opined to Ms. McMurrin that Mr. Craft had “bad blood” for Ms. Coleman. Employee Latoya Hyde told Ms. McMurrin that Mr. Craft had problems with single women (like Coleman) working on the floor and that he treated them differently. (ALJD 4:25-5:42; R-9 through R-14 and R-16 through R-19; Tr. 198:11-214:9; 342:2-

⁴ Ms. McMurrin testified that other employees had complained that in meetings Mr. Craft would use his cell phone and act like he was recording people – in an apparent effort to intimidate or bully others. Ms. McMurrin said she counseled Mr. Craft about this matter. (ALJD 5:1-4; Tr. 305:17-307:3; R-16).

343:5; 434:5-435:6; 453:15-454:2; 458:15-461:13; 477:4-479:4; 482:5-485:24; 486:18-494:7).

Further, Mr. Craft's supervisor, Ms. Turner, reported to Ms. McMurrin that since returning to his prior position, Mr. Craft had repeatedly engaged in disruptive and intimidating behavior, including attempting to "undermine and belittle" her work decisions. Ms. Turner testified emotionally that she feared Mr. Craft. Moreover, several male managers reported that Mr. Craft was interrupting daily pre-shift meetings with religious references, unsolicited singing of nonsensical songs and/or dancing, as well as aggressively blaming others for various matters that might arise during the meetings. (ALJD 5:44-6:23; see also R-11; R-16; R-18; R-19; Tr. 348:4-350:5; 404:11-405:8; 407:24-409:18; 439:4-443:19).

In addition, while the investigation was being conducted, on December 4, 2011, Mr. Craft's job performance failed to meet expectations in that he failed to properly "pick/pack" a customer order, which resulted in a customer complaint. Then, on December 16, 2011, Mr. Craft improperly added new deliveries to a shipment which caused several other employees to spend numerous hours to correct the problem and reissue over 300 customer deliveries. Mr. Craft was interviewed as part of the investigation, but his responses and explanations were found to be less credible than the other employees. (ALJD 6:25-7:4; GC-6; Tr. 80:23-81:11; 216:24-218:3).

Significantly, as a result of the above findings, in mid-January 2012, the Company decided to terminate Mr. Craft's employment finding "it is in the best interest of the Company and employees of Philips to terminate Lee Craft's employment effective

immediately.” (ALJD 7:6-42; R-11, page 2; R-12; Tr. 213:16-10; 215:21-216:23). However, upon further review with the Philips Human Resources and Legal Department, Ms. McMurrin decided to give Mr. Craft one last chance. Thus, instead of issuing the previously drafted termination notice (R-12), Mr. Craft was issued a Final Written Warning on January 20, 2012. Further, with his agreement, Mr. Craft was transferred to another area where he would not work near Ms. Coleman and would now report to a male manager, Joe Odum. Significantly, Mr. Craft was specifically instructed to stay away from the harassed employee’s (Ms. Coleman) work area. (ALJD 7:6-42; GC-6; Tr. 216:24-221:14; 224:10-16).

In addition, Ms. McMurrin advised Ms. Coleman of the remedial action being taken in response to her complaint. Further, Ms. McMurrin instructed Ms. Coleman to contact her if Mr. Craft engaged in any further acts of harassment, bullying or intimidation. (ALJD 8:10-13; Tr. 226:7-227:4; 354:1-355:8).

Final Harassing, Bullying, Intimidating, and/or Disruptive Behavior

Shortly thereafter, on January 24, 2012, Mr. Craft violated the Final Written Warning, and his manager’s directive that he stay away from Ms. Coleman. Indeed, Mr. Craft left his new work area, during work hours, and drove a company vehicle approximately 150 yards to Ms. Coleman’s work area, and engaged in further harassment, bullying and intimidation of Ms. Coleman. (ALJD 7:44-8:26; R-13; R-14; Tr. 221:15-224:22; 355:9-360:8; 494:8-499:5).

In response, Ms. Coleman again complained to Ms. McMurrin about Mr. Craft’s behavior. The Company conducted an investigation and found that Mr. Craft had bragged

in front of Ms. Coleman that he was “untouchable” and that management had done him a favor by moving him away from Ms. Coleman in response to her complaint. Further, Mr. Craft ranted about Ms. Coleman being to blame for his receiving the Final Warning and implied that he would “get even” with Ms. Coleman. (ALJD 7:44-8:26; R-13, R-14; GC-17; Tr. 224:10-227:9; 355:9-360:8).

Under its own policies (and the law), Philips had an obligation to protect Ms. Coleman and others from a hostile workplace. (GC-2(a)-(d); Tr. 229:2-20). Indeed, the Company’s Harassment-Free Workplace Policy provides that:

A core value of Philips Electronics North America is that all employees...are able to function in a positive, productive environment that respects their dignity as human beings and is free of hostile, abusive, humiliating or intimidating behavior. Both the law and Philips prohibit sexual and protected-status harassment...some examples of prohibited behavior: sexual jokes, comments, stories, pictures, looks or touching, whether or not the persons involved believe the conduct to be offensive; racial, ethnic, sexist, religious, ageist, homophobic or other slurs, jokes or put-downs, again, whether or not someone believes them to be offensive; cursing, obscene language, yelling, ridiculing, humiliating, bullying, “in your face” intimidation, regardless of the circumstances or situation.

(GC-2(c) (emphasis added); see also GC-2(a) at pages 14, 15, 19, 20, 60-62; Tr. 43:24-44:16). The Violence-Free Workplace Policy provides, in relevant part, that: “Workplace violence can take many forms including, but not limited to, the following: Intimidating or threatening behavior or statements[;]...threats of bodily harm [; and] Harassment by any means...” The Policy further provides that: “Violations of this policy are serious and will result in disciplinary action, up to and including termination of employment.” (GC-2(d)).

In this regard, if the Company did not take prompt, effective remedial action she would likely have resigned and/or taken legal action against Philips. As Ms. Coleman

and Ms. Turner both testified, they would be compelled to resign if Mr. Craft was returned to work at Philips. (Tr. 360:10-361:5; 444:13-445:24).

Given the above long history of performance and behavioral issues, including threats, harassment, and bullying co-workers and supervisors, e.g., Ms. Turner, the Company decided to terminate Mr. Craft's at will employment relationship, effective January 25, 2012. (ALJD 7:44-8:26; GC-7; Tr. 227:23-230:4; 360:10-361:5; 443:20-445:24).

Ms. McMurrin terminated several other employees at the Memphis facility for the same sort of intimidating, harassing, and/or bullying behavior, including Catha Calhoun; Jessie Pruitt; Sharonda Lewis; and Marliatu Bah. In addition, Ms. McMurrin terminated numerous employees for performance issues alone. (Tr. 230:5-231:24; 311:3-312:10).

ARGUMENT

I. Wright Line Governs The Allegations Of Discriminatory Termination

In her decision, the ALJ applied the applicable *Wright Line* analysis in this case. As recently clarified by the Board, the General Counsel must first make a *prima facie* case by showing that “animus toward [the employee’s] protected activity was a motivating factor in [an adverse employment] decision” based on the following three factors: (1) The affected employee engaged in protected activity; (2) The employer knew of the activity; and (3) The employer bore animus to the affected employee’s protected activity. *Wright Line*, 251 NLRB 1083 (1980); *Praxair Dist., Inc.*, 357 NLRB No. 91, slip op. at *1 n.2 (Sept. 21, 2011). If the General Counsel establishes a *prima facie* case, the employer must then prove that a “legitimate business reason” motivated the action or

otherwise demonstrate that the same action would have occurred even in the absence of the protected conduct. *Id.* at 1088. If the employer makes that showing, the burden shifts back to the General Counsel to “show that Respondent’s defense is pretextual.” *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995).

II. The ALJ’s Credibility Findings are Consistent with the Record Evidence and Should Not Be Overturned (General Counsel exceptions 1 and 2)⁵

As General Counsel properly concedes in his brief, it is well established that the Board should not overturn the credibility findings of an ALJ, especially where, as here, the credibility findings are based on the ALJ’s assessment of the demeanor of the witnesses. (See General Counsel’s Brief (“GCB”) at pg. 22 *citing Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950) *enfd* 188 F.2d 362 (C.A. 3 1951). In this matter, the ALJ specifically stated that she based her decision “[o]n the entire record, including [her] observation of the demeanor of the witnesses....” (See ALJD at page 1). In this regard, the ALJ credited the testimony of Respondent’s key witnesses, Sherry McMurrian (decision-maker), Kim Coleman (harassed by Mr. Craft), Thelma Halbert (witness to harassment) and Rolita Turner (supervisor who felt threatened) based on their demeanor on the stand as well as the supporting record evidence. In this regard, the ALJ was able to see that at least two witnesses, Ms. Coleman and Ms. Turner, became very emotional during their testimony; and the ALJ could determine for herself that their tears and fear of Mr. Craft were genuine. (Tr. 360:10-361:5; 400:16-401:8; 439:4-441:2; 443:20-445:24). Whereas, the ALJ could also see that Mr. Craft’s demeanor and testimony was essentially a scripted, unemotional, blanket denial of any wrongdoing. ((Tr. 104:19-107:5).

The Board should not overrule the ALJ’s credibility determinations as the clear preponderance of all the relevant evidence does not suggest the ALJ erred in such

⁵In its Brief, General Counsel does not seem to specify where he argues in support of exceptions 3-8. Thus, they should not be considered. Nevertheless, if considered, such exceptions are baseless and should be rejected.

determinations. *See Lane Constr. Corp.*, 138 NLRB 1118, 1118-19 (1962) (general statement that “the facts and by my observations of the demeanor of the witnesses” suggested no Act violation “must be construed as meaning that the Trial Examiner had discredited in material respects on both facts and demeanor the only testimony on which a violation of the Act could be based”); *see also Gerson Elec. Constr. Co.*, 259 NLRB at 640 n.1 (1981) (finding ALJ based credibility determinations on witness demeanor when ALJ generally stated that he based his findings upon his “observation of witness demeanor”).

In his brief, General Counsel contends that “the testimony of McMurrin is not supported by the relevant evidence presented at the hearing.” (GCB at 22). This contention is baseless. In fact, the testimony of Ms. McMurrin was largely taken directly from, and/or supported by, the numerous documents that she had created during the relevant time period and which were accepted into evidence by the ALJ. That is, while Ms. McMurrin was testifying she generally had a document in front of her and counsel for Respondent questioned her about the document, and/or had her read the contents of the document into the record. (See Tr. 178:8-230:4; R-1 through R-14; GC-7). Likewise, the testimony of Respondent’s other witnesses was also based largely on documentary evidence – as they too reviewed, and/or read directly from, documents while testifying. (See Tr. 334-361; 431-446). Whereas, there was little, if any, documentary evidence to support the testimony of Mr. Craft. (See Tr. 45-120). In sum, upon an accurate review of the record, the Board should flatly reject General Counsel’s totally unfounded contentions with respect to the testimony of Respondent’s witnesses – especially Ms. McMurrin.

In his brief, General Counsel also contends that the ALJ failed to consider the testimony of Lexie Campbell and Sherry Grey, both of whom were never employed by Respondent. (GCB at 22-23). Again, General Counsel’s contention is baseless. Indeed, according to General Counsel, their testimony supported his “new” argument that Mr. Craft also engaged in protected activity during pre-shift meetings “moment to shine.” As Respondent argued in its Post Hearing Brief, this “new” argument should not be considered, because the Complaint does not make such

an allegation; General Counsel did not make that argument in his opening or during the hearing; and General Counsel did not seek to amend the Complaint. (GC-1(e); Tr. 16:5-14). In fact, the Complaint (and Charge) makes no reference whatsoever to such pre-shift meetings, but, rather, only alleges that the protected concerted activity was when: “Lee Craft showed and discussed with his coworkers an employee counseling form he received from Respondent on about January 20, 2012.” (See GC-1(e), 1(a) and 1(c)). Given this, General Counsel should be barred from making such an argument (or any argument not made in the Complaint). Otherwise, the Company’s “due process” rights would be violated. *See International Baking & Earthgrains*, 348 NLRB No. 76, at *3 (2006) (“Due process requires that a party be on notice of the General Counsel’s contentions”). “[T]o decide the case on a theory neither raised nor litigated – would deny the parties due process of law.” *United Mine Workers of Am.*, 338 NLRB 406, 406 (2002); *see also N.L.R.B. v. Pepsi-Cola*, 613 F.2d 267, 274 (10th Cir. 1980) (“Simply because violations could have been alleged in addition to those in the complaint does not obligate the employer to defend against all possibilities”). “[T]he crucial focus is at all times on whether notice was given which provided the party with an adequate opportunity to prepare and present its evidence.” *N.L.R.B. v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 546 (7th Cir. 1987); *see also Bob’s Casing Crews, Inc. v. N.L.R.B.*, 429 F.2d 261, 263 (5th Cir. 1970). Thus, the Board must reject General Counsel’s last minute attempt to add new allegations to the Complaint. (See GCB at pages 22-23; 33-35).

However, even if such allegations/argument are allowed, a review of the testimony of these witness does not support the argument. Indeed, Mr. Campbell testified that Mr. Craft’s comments during the moment to shine were simply motivational and never “critical of his managers or supervisors” or Philips. (Tr. 34:1-35:23). Further, on cross-examination, Mr. Campbell testified that, at times, Mr. Craft talked about non-work subjects like religion. As to Ms. Gray, her testimony actually supports Respondent’s position in that she testified that Ms. Coleman told her that Mr. Craft was harassing her at work. (Tr. 159:9-22). In any event, Ms. Gray only testified that during the moment to shine Mr. Craft would say things to make people

“smile and cheer up.” (Tr. 162:12-163:16). Ms. Gray did not testify about anything that would be considered alleged protected, concerted activity – and General Counsel doesn’t even seem to make that argument.

As to Mr. Barkus, General Counsel contends that the ALJ should have considered Mr. Barkus’ testimony where he denied that he witnessed Mr. Craft return to the ballast area and harass Ms. Coleman. (GCB pg. 23). However, on cross-examination, such testimony was shown to be irrelevant as Mr. Barkus admitted that his shift started 4 hours after Mr. Craft’s shift and he was late a number of times – which ultimately resulted in his employer ending his assignment at Philips. (Tr. 150:5-151:15). Actually, the only relevant evidence as to Mr. Barkus was Ms. McMurrian’s investigative memo which states that Mr. Barkus said: “something is wrong with that man [Mr. Craft]; I used to work with him somewhere else and he was a problem then and he is still a problem.” (R-14).

In the end, the testimony of Messrs. Campbell and Barkus, as well as Ms. Gray was generally irrelevant and, accordingly, did not warrant mention in the ALJ’s decision. Regardless, the ALJ’s failure to discuss their testimony certainly does not provide a basis to overturn the credibility findings of the ALJ.

III. The ALJ properly found that Philips Did Not Maintain a Rule Prohibiting Employees From Discussing Discipline with Other Employees (General Counsel Exception 9)

In his brief, despite the ALJ’s thorough discussion of this issue; the lack of any credible record evidence to support his argument and the overwhelming evidence to the contrary, General Counsel still contends that Philips has a rule that discipline is confidential and employees are not allowed to share and/or discuss their discipline with their coworkers. (ALJD 9:40-11:19; GCB 24-25). Indeed, in a last ditch effort to salvage this baseless allegation, General Counsel disregards the Complaint and makes a lengthy and convoluted argument based on Respondent’s

investigative memo and the termination notice, both dated January 25, 2012. (GCB at 24-30; R-14; GC-7). Indeed, contrary to the clear and unambiguous language in the Complaint, General Counsel contends that the ALJ “misstates” both the allegation and his position on this issue. That is, the Complaint provides that: “Since January 19, 2012, Respondent has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers.” (GC-1(e) at paragraph 4) (emphasis added). However, despite what the Complaint clearly alleges, General Counsel now argues that Respondent maintained this rule before January 19, 2012. Once again, General Counsel should not be permitted to change the allegations against the Company. *See International Baking & Earthgrains*, 348 NLRB No. 76, at *3 (2006); *United Mine Workers of Am.*, 338 NLRB 406, 406 (2002); *see also N.L.R.B. v. Pepsi-Cola*, 613 F.2d 267, 274 (10th Cir. 1980).

In any event, the ALJ properly found that the credible record evidence, including Mr. Craft’s own hearing testimony and sworn statement to the NLRB, dated November 26, 2012, Philips did not maintain such a policy before or after January 19, 2012. (ALJD 9:40-11:19; Tr. 126:21-128:5; see also Tr. 171:6-174:7). In this connection, despite interviewing numerous Philips employees during the Board’s investigation, at hearing, General Counsel did not produce a single witness to say there was, or even that they believed there was, such a Philips policy. Clearly, General Counsel cannot be allowed to create a rule based on his interpretation of an investigative memo and a termination notice – neither of which were circulated amongst the employees. Given this, the Board should uphold the ALJ’s decision as to this allegation.

IV. The ALJ properly found that Philips' Decision to Terminate Mr. Craft Was Motivated By Legitimate Business Reasons (General Counsel Exceptions 10-18).

The ALJ properly found that Philips established that legitimate business reasons motivated its decision to terminate Craft. (ALJD 13:15-15:39). Indeed, as the ALJ properly recognized, the undisputed hearing evidence showed that management had decided to terminate before he engaged in the alleged protected activity. That is, upon completing its investigation of Ms. Coleman's December 2011 complaint, management decided to terminate Mr. Craft's employment based on his harassment, intimidation, and/or bullying of his co-workers – especially, Ms. Coleman. Indeed, the investigative memorandum dated January 16, 2012, created by Ms. McMurrin provides: "It is in the best interest of the company and the employees of Philips to terminate Lee Craft's employment, effective immediately." (R-11; R-12; Tr. 213:16-10; 215:21-216:23). However, as the ALJ recognized, upon further review, Ms. McMurrin decided to give Mr. Craft one last chance and instead of issuing the previously drafted termination notice, Mr. Craft was issued a Final Written Warning on January 20, 2012. (GC-6; Tr. 216:24-221:14; 224:10-16). Given this, as the ALJ properly found, the Company already decided to terminate Mr. Craft even before (or in the absence of) the alleged protected activity. (ALJD 13:15-15:39).

Ultimately, the ALJ correctly found that the final decision to terminate Mr. Craft, made several days later, was based on essentially the same reasons as the prior decision to terminate – with the final act of harassment/intimidation/bullying and disruptive behavior occurring on January 24, 2012 when Mr. Craft left his new work area during

work time and drove a company vehicle approximately 150 yards to continue the harassment of Ms. Coleman -- whom he had been moved away from based on prior harassment and instructed not to contact. The credible evidence established that on that day, in front of Ms. Coleman, Mr. Craft bragged that he was “untouchable” and that management had done him a favor by moving him to another area as a result of Ms. Coleman’s complaint. Most important, Mr. Craft ranted that Ms. Coleman was to blame for his receiving the Final Written Warning and that Ms. Coleman, and her female managers, were powerless. In addition, Ms. Coleman reasonably believed Mr. Craft would “get even” with her, which included his previously stated goal of getting Ms. Coleman fired by the Company. (R-13, R-14; GC-17; Tr. 224:10-227:9; 355:9-360:8). Under its own policies (and the law), Philips had an obligation to protect Ms. Coleman and others from a hostile workplace. (GC-2(a)-(d); Tr. 229:2-20). In sum, the ALJ properly found, as she stated, that based: “[o]n the entire record, including [her] observation of the demeanor of the witnesses....that Respondent has demonstrated that it would have terminated Craft in the absence of any protected activity.” (ALJD 1:13-15; 13:15-16:4).

In an apparent effort to obfuscate matters, General Counsel argues that the conduct for which Mr. Craft was terminated did not actually occur on January 24, 2012, but instead on January 20. To support his argument, General Counsel points to the testimony of Ms. Coleman and Ms. Halbert and incorrectly claims that “[b]oth Coleman and Halbert testified that Craft made the comments about his warning notice in the Ballast area on the same date he received the January 20 final warning.” (GCB at 31). That is simply not true. Indeed, Ms. Coleman testified that Mr. Craft came back to her area at

some point after he had been moved and indicated that he had been doing the “new” job for some time – e.g., Mr. Craft said: “He don’t have to pick up these heavy ballasts no more like we do.” (Tr. 354:19-355:23). Ms. Halbert also testified that Mr. Craft came over to Ms. Coleman’s area after he was transferred. (Tr. 494:8-496:6). Further, General Counsel’s own questions to Mr. Craft refer to him showing the final warning after January 20th. That is, General Counsel asked Mr. Craft: “Q. “...on those days after January 20th, did you show this January 20th warning notice to any other employees? A. Yes.” (Tr. 92:7-95:16). The only possible basis for General Counsel’s argument is where Ms. Coleman testified that “...I’m assuming he had got a – he had got a wrote-up this particular day.” (Tr. 354:19-355:23). Obviously, Ms. Coleman’s assumption does not establish that Mr. Craft’s continued harassment of her occurred on the date he received the final notice – especially since Ms. McMurrin’s uncontroverted testimony and the documentary evidence shows that the continued harassment occurred on January 24, 2012. (R-14; GC-7; Tr. 224:10-227:9). In any event, even if the continued harassment happened on January 20, which it did not, that is irrelevant – as the credible evidence established that the harassment did, in fact, occur as Respondent’s witnesses testified.⁶

⁶ General Counsel makes some other “factual” arguments which are irrelevant. For example, General Counsel points out that the ALJ found that Mr. Craft was transferred to an “entirely different building,” but the evidence shows there was only a wall separating the two sections of the same building. (GCB at 15; ALJD at 7). General Counsel may be correct here, but it is of no consequence as the relevant fact is that he was moved to another area of the large warehouse on the other side of a wall approximately 150 yards away and instructed to stay away from Ms. Coleman – which he failed to do.

(Id.). Thus, General Counsel's confused argument should be rejected and the ALJ's decision upheld.

Finally, General Counsel attempts to argue that the ALJ erred in finding that Respondent had an "honest belief" that Mr. Craft engaged in the conduct; and that General Counsel failed to show Mr. Craft did not engage in the conduct. (ALJD 15:16:4; GCB 41-43). This too is nonsense. Indeed, the only evidence that General Counsel presented to counter Respondent's "honest belief" that Mr. Craft engaged in the subject conduct was Mr. Craft's scripted denial. (Tr. 104:19-107:5). Whereas, as shown herein, Respondent presented several credible witnesses and numerous supportive documents to establish its "honest belief" that Mr. Craft engaged in the behavior for which he was ultimately terminated. (R-14; GC-6, 7; Tr. 227:23-230:4; 360:10-361:5; 443:20-445:24).

V. Conclusion

For the foregoing reasons, Respondent respectfully requests that the Board adopt the ALJ's decision in its entirety.

DATED this 27th day of August 2013.

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CERTIFICATION OF FILING AND SERVICE

I hereby certify that in accordance with the NLRB's rules pertaining to electronic filings and NLRB Rule 102.114(i), a true and correct copy of the foregoing Brief was timely filed via the NLRB E-filing system, and was served on the following on the date below by undersigned counsel for Respondent via electronic mail on Counsel for the Acting General Counsel at: William.Hearne@NLRB.gov and upon complainant Lee Craft at: craftphyllis@ymail.com

DATED this 27th day of August 2013.

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**Philips Electronics North America Corporation and
Lee Craft.** Case 26–CA–085613

August 14, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On June 13, 2013, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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,¹ and conclusions only to the extent consistent with this Decision and Order.

The General Counsel alleged that the Respondent violated Section 8(a)(1) by 1) maintaining a rule that discipline is confidential and prohibiting employees from sharing or discussing their discipline with their coworkers; and 2) discharging employee Lee Craft because of his protected activity, specifically, sharing and discussing his discipline with his coworkers. The judge dismissed both of the allegations. As discussed below, we reverse and find that the Respondent did maintain an unlawful confidentiality rule.²

¹ The General Counsel 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.

² There are no exceptions to the judge’s findings that Craft engaged in protected activities and that the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983), of showing that those activities were a motivating factor in Craft’s discharge. The judge then found that the Respondent established its affirmative defense under *Wright Line* by showing that it would have discharged Craft even in the absence of his protected activities. For the reasons stated by the judge, we agree with this finding, and we adopt her dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by discharging Craft. No party contends that *Wright Line* is not the appropriate analysis here. After the judge concluded her *Wright Line* analysis, however, she went on to find that Craft’s discharge was also lawful under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Assuming arguendo that *Burnup & Sims* is applicable here, we agree that a violation would not be established under that standard, either.

I. FACTS

Craft worked for the Respondent for several years. During his tenure with the Respondent, he received numerous oral and written warnings—as well as a demotion—for performance deficiencies and acts of misconduct, including repeatedly harassing and intimidating his coworker, Kim Coleman. On January 16, 2012,³ the Respondent decided to discharge Craft for his disruptive, intimidating, and offensive behavior toward Coleman and others. After looking into the matter further, however, the Respondent determined that, for administrative reasons, it had to give Craft a final written warning instead of discharging him.

On January 20, the Respondent gave Craft a final written warning citing Craft for inappropriate behavior, violation of company policy/procedures, and unsatisfactory performance. More specifically, the warning stated that Craft had engaged in “highly disruptive behavior” during preshift meetings and “harassing and intimidating conduct” towards colleagues and management. The warning also stated that several employees reported feeling “threatened” by Craft. Finally, the warning referred to two recent performance deficiencies and stated that if Craft engaged in any further inappropriate behavior, the Respondent would terminate him immediately. In addition to issuing Craft this warning, the Respondent transferred him to another department and instructed him to stay away from Coleman’s work area.

Four days later, employees Coleman and Thelma Halbert notified the Respondent that Craft had violated the stay-away instruction and had engaged in acts of disruption and harassment. Specifically, Coleman told Respondent’s Regional Distribution Center Manager Sherry McMurrian that Craft drove his forklift into Coleman’s work area and, while seated 10 feet away from Coleman, directed various comments toward her. Coleman also reported that Craft showed his disciplinary warning to other employees and loudly stated that he had received the warning because of Coleman’s harassment allegations. Other employees confirmed that Craft had shared his disciplinary warning with them.

To document her conversations with Coleman and other employees, McMurrian prepared a file summary dated January 24. In relevant part, the file summary states that Coleman and Halbert reported to McMurrian that Craft was showing his disciplinary form to employees, and that

Because no exceptions were filed to the judge’s finding that the General Counsel met his initial burden under *Wright Line*, Member Schiffer observes that there is no need to address the judge’s reliance on *American Gardens Management*, 338 NLRB 644, 645 (2002). See *Mesker Door*, 357 NLRB No. 59, slip op. at 2 fn. 5 (2011).

³ All dates refer to 2012.

Craft told other employees that he had been disciplined based on Coleman's accusations that he had harassed her. McMurrian wrote, "These employees are aware that disciplinary forms are confidential information and should not be shared on the warehouse floor, at any time, much especially [sic] during working hours." She added, "Kim [Coleman] stated that [Craft] was purposely showing the write-up which he knows is confidential information"

On January 25, the Respondent discharged Craft and provided him with a discharge notice that states:

Lee Craft is being terminated effective immediately due to disrupting the operation and sharing confidential documentation and information during working hours and continu[ing] to use intimidating language towards management. Lee received a final written disciplinary notice warning against these exact behaviors on 1/20/12. Lee requested a copy of the write up and was informed of the confidentiality of the discussion and form during the meeting.

II. DISCUSSION

The General Counsel alleged that the Respondent, since January 19, has unlawfully maintained a rule that discipline is confidential and prohibiting employees from discussing their discipline with their coworkers. The General Counsel based his allegation on language in the above-mentioned file summary and discharge notice, contending that those documents demonstrate that such a rule did in fact exist and was therefore being unlawfully maintained, even though the Respondent had never formally promulgated such a rule.⁴

The judge found the General Counsel's argument in support of the allegation unpersuasive. First, the judge determined that, even though the file summary referred to Craft's showing his disciplinary warning to some of his fellow employees, McMurrian included this information not because the Respondent prohibits discussion of discipline, but because *Coleman* was disturbed that Craft was broadcasting his warning to others and blaming her for it. Next, the judge found equally unpersuasive the references to confidentiality in the January 25 discharge notice. Here, the judge found that *Craft* raised the issue of confidentiality, and that the Respondent assured him that it would maintain the warning's confidentiality. The judge also observed that the Respondent did not tell Craft that he could not discuss his discipline with

others. Thus, the judge essentially found that McMurrian added the reference to confidentiality in the January 25 discharge notice merely to reflect that Craft had been assured of the confidentiality of the January 20 warning, and that the reference was therefore not evidence of a rule prohibiting employees from discussing their discipline. In sum, the judge found that the wording in the file summary and discharge notice was insufficient to establish that the Respondent "told employees . . . that they were prohibited from sharing and/or discussing their discipline with coworkers as alleged in [the] complaint"

We reverse the judge's dismissal of this allegation. As the Board has previously stated, "[i]t is important that employees be permitted to communicate the circumstances of their discipline to their co-workers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense." *Verizon Wireless*, 349 NLRB 640, 658 (2007). An employer violates Section 8(a)(1) when it prohibits employees from speaking with coworkers about discipline and other terms and conditions of employment absent a legitimate and substantial business justification for the prohibition. See, e.g., *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 7 (2014); *SNE Enterprises*, 347 NLRB 472, 491-492 (2006), enf. 257 Fed.Appx. 642 (4th Cir. 2007); *Caesar's Palace*, 336 NLRB 271, 272 (2001).

The General Counsel argues that the judge's analysis of the file summary and discharge notice was mistaken. We agree and find that, notwithstanding the fact that the Respondent did not have a written rule about discussing discipline, language in the file summary and the discharge notice, reasonably construed, establish that the Respondent was unlawfully maintaining a rule prohibiting employees from discussing their discipline.

First, by her language in the file summary of January 24, McMurrian effectively admitted the existence of such a rule. McMurrian wrote, "These employees are aware that disciplinary action forms are confidential and should not be shared on the warehouse floor at any time" Even if, as the judge found, Coleman raised the issue of confidentiality with McMurrian, McMurrian refers here to a prohibition that both *already* existed and applied to "forms" *in general*—if only in the mind of management. See *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976) (enforcing the Board's finding that an "unwritten policy apparently framed only in the minds of the company officials" was unlawful). There would be nothing for employees to be "aware" of if the Respondent was not maintaining such a rule, nor would Respondent have referred to "forms" in general unless there was a general-

⁴ The Respondent does not have a written policy stating that discipline is confidential or prohibiting employees from discussing or sharing their discipline with their coworkers. McMurrian testified that such a rule does not exist.

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ized rule relating to those forms. McMurrian also referred to Coleman's report that Craft was purposely showing the write-up to other employees even though he *knew* it was confidential. This also suggests that the Respondent was maintaining a rule prohibiting such conduct.

In addition, the January 25 discharge notice referred to Craft's sharing the confidential warning as one of the reasons for his discharge. This indicates that the Respondent believed that Craft had breached an *existing* rule against such behavior.⁵ It is difficult to see how the Respondent can claim that such a rule did not exist and at the same time cite Craft for violating it. In sum, we find that the Respondent maintained an unwritten rule that discipline was confidential and prohibiting employees from discussing discipline on the warehouse floor at any time, and that this rule violated Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondent, Philips Electronics North America Corporation, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule that discipline is confidential and prohibiting its employees from discussing or sharing their discipline with their coworkers.

(b) 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 after service by the Region, post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 26, 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 cus-

⁵ Our colleague contends in his partial dissent that McMurrian merely documented what Coleman told her—i.e., McMurrian's "observation was based exclusively on a statement by employee Coleman, who advised McMurrian that discipline forms are confidential and should not be shared with others." We note, however, that the fact that Coleman believed the Respondent maintained such a policy and that McMurrian never took the opportunity to correct this belief further supports a finding that the Respondent was maintaining an unlawful confidentiality policy.

⁶ 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."

tomarily posted. In addition to physical posting of paper notices, 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. If 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 January 2012.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 26 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 14, 2014

Harry I. Johnson, III,	Member
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Nancy Schiffer	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I agree with my colleagues that employee Lee Craft's discharge did not violate the Act. However, I would also affirm the judge's dismissal of the allegation that the Respondent maintained a rule prohibiting employees from discussing their discipline with their coworkers. It is undisputed that the Respondent has no written rule prohibiting employees from discussing their discipline. Respondent's manager McMurrian testified that the Respondent does not have such a rule in *any* form, and the General Counsel failed to present any witness who contradicted this testimony.

Contrary to the arguments presented by the General Counsel and accepted by my colleagues, I do not believe we can reasonably infer the existence of such a rule from (a) language in the Respondent's January 24 file summary stating that employees "are aware" that discipline is confidential, and (b) language in Craft's discharge notice mentioning that Craft shared "confidential documenta-

tion” with others. In my view, this evidence fails to establish that the Respondent maintained a confidentiality rule.

My colleagues note that the file summary was prepared by Distribution Center Manager Sherry McMurrin to document her conversations with one of Craft’s co-employees, Kim Coleman, among others. Although McMurrin’s summary stated “employees are aware that disciplinary action forms are confidential,” the credited evidence reveals (and the judge found) this observation was based exclusively on a statement by employee Coleman, who advised McMurrin that discipline forms are confidential and should not be shared with others. At the hearing, Coleman testified that no one ever told her that discipline was confidential—this was only her assumption. Moreover, when Coleman told McMurrin that she (Coleman) believed that Craft was revealing confidential information, the record reveals that McMurrin did not state or confirm that disciplinary information was confidential. Rather, after being informed of Craft’s disclosure, McMurrin simply asked, “Why would he want to do that?” It is also relevant that, when Craft was given a final written warning for engaging in “highly disruptive” behavior and for harassing and intimidating others, including Coleman, Craft was *not* told the discipline was “confidential.” However, he was lawfully transferred to another department and was directed to stay away from Coleman’s work area (indeed, he was told not even to look toward the area where Coleman was working), and Craft undisputedly disobeyed the “stay away” instruction. Although Craft showed his final warning to co-employees, he advised several of them that he received the warning because of Coleman’s complaints, and he stated that he was “untouchable” (while parked in his forklift about 10 feet away from Coleman). None of these facts suggest that Respondent maintained or enforced a rule against the disclosure of disciplinary information, but they clearly establish that Coleman—who was Craft’s co-employee and the object of his repeated harassment—had ample justification to advise McMurrin that Craft was inappropriately disclosing “confidential” information.

The discharge notice contained two references to “confidential” information, but the content of the notice—when considered in conjunction with relevant events—likewise fails to establish that Respondent had a rule that prohibited employees from disclosing information about discipline they received. The notice stated:

Lee Craft is being terminated effective immediately due to disrupting the operation and *sharing confidential documentation and information* during working hours

and continu[ing] to use intimidating language towards management. Lee received a final written disciplinary notice warning against these exact behaviors on 1/20/12. Lee requested a copy of the write up and *was informed of the confidentiality of the discussion and form* during the meeting.

(Emphasis added.) As noted previously, and as the judge found, Coleman (the co-employee) communicated *her* belief to Respondent that Craft’s final warning was confidential. The evidence also establishes that Craft engaged in a highly objectionable, egregious course of conduct that included publicly blaming Coleman for his disciplinary warning arising from Coleman’s well-founded complaints about Craft. Although the discharge notice may have been imprecise when describing Craft’s course of conduct as “sharing confidential documentation and information,” this summary fairly describes Craft’s objectionable actions, and does not establish that Respondent had a policy or rule imposing a blanket prohibition against disclosing discipline. To the contrary, as the judge found, “Craft specifically denied that he was told in the meeting that the disciplinary form was confidential,” and Craft “did not testify that McMurrin or any of the managers told him that he could not discuss his discipline.” As to the final sentence in the discharge notice—that Craft “requested a copy of the write up and was informed of the confidentiality of the discussion and form during the meeting”—the judge found, based on the credited testimony, that these were Respondent’s assurances to Craft, *at Craft’s request*, that the disciplinary warning would remain confidential. Also, in a sworn affidavit, Craft testified that he was not aware of any policy or rule that prohibits an employee from discussing discipline with other employees.

In short, this case involves a lawful decision to terminate Craft’s employment, based on a course of egregious harassment and intimidating conduct directed towards co-employees and management representatives. According to the testimony of the discharged employee himself, Respondent maintained no rule prohibiting the disclosure of discipline, and the employee had never been told he was prohibited from disclosing his discipline to others. At most, the record reveals that the Respondent prepared two documents—an internal file summary memo and Craft’s discharge notice—that made general, imprecise references to “confidential” documentation. Neither of these documents was prepared for distribution to employees generally. Moreover, the judge made specific credibility findings establishing that the “confidential” references in these documents had nothing to do with any rule prohibiting the disclosure of discipline. Not only does the record reveal that Craft engaged in highly objec-

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tionable conduct, the evidence reveals that Respondent went to significant lengths to act appropriately in relation to Craft's co-employees and even Craft himself (who received repeated counseling and progressive discipline, including assurances that the *Respondent* would refrain from indiscriminately disclosing information regarding Craft's discipline). In these circumstances, we need more record evidence than exists in the instant case to establish that Respondent maintained or imposed some type of prohibition that constituted restraint, coercion or interference with protected rights.

Accordingly, as to this issue, I respectfully dissent.

Dated, Washington, D.C. August 14, 2014

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

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule that discipline is confidential and prohibiting employees from discussing or sharing their discipline with their coworkers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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The Board's decision can be found at www.nlrb.gov/case/26-CA-085613 or by using the QR

code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



William T. Hearne, Esq., for the General Counsel.
Mason C. Miller, Esq., of Somerset, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Memphis, Tennessee, on March 11 and 12, 2013. Lee Craft, an individual, filed the charge in 26-CA-085613 on July 19, 2012, and filed an amended charge on September 28, 2012. On November 30, 2012, the Acting Regional Director for Region 26 of the National Labor Relations Board (Board) issued a complaint¹ and notice of hearing. Generally, the complaint alleges that since January 19, 2012, Philips Electronics, North America Corporation (Respondent) has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers. The complaint further alleges that Respondent terminated Lee Craft (Craft) on January 25, 2012, because he showed and discussed with his coworkers an employee counseling form that he received from Respondent on January 20, 2012.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel² (General Counsel) and the Respondent, I make the following

FINDINGS OF FACT

During the 12-month period ending October 31, 2012, Respondent sold and shipped goods valued in excess of \$50,000 directly to points located outside the State of Tennessee. During the same 12-month period, Respondent purchased and received goods in excess of \$50,000 directly from points outside the State of Tennessee. Respondent admits and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (the Act).

¹ All dates are in 2012 unless otherwise indicated.

² For purposes of brevity, the Acting General Counsel is herein referenced as the General Counsel.

Alleged Unfair Labor Practices

A. Background

Respondent's Southeast Regional Distribution Center in Memphis, Tennessee, employs approximately 52 employees and serves as a distribution center for Phillips Lighting products. In addition to its regular employees, Respondent also utilizes approximately 48 temporary employees through Adecco, a temporary service. Employees are assigned to one of four departments; Ballast, Professional, Consumer, and Receiving. Respondent's Memphis operations are directed by Regional Distribution Center Manager Sherry McMurrian. During the relevant time period, Gerak Guyot served as Respondent's operations manager and Rolita Turner, Joe Odum, and William Gibson were supervisors at Respondent's facility.

All of Respondent's human resources responsibilities for the Memphis facility are handled by Respondent's corporate office in Somerset, New Jersey. Specifically, Palak Dwivedi in Respondent's corporate office dealt with the Memphis human resources issues during the relevant time period.

B. Relevant Facts

1. Craft's work history

Craft was hired at Respondent's facility as a material handler in February 2003. With the exception of the last 5 days of his employment, Craft was assigned to the Ballast Department. In April 2010, Craft was promoted to a lead position where he was supervised by Gene Blinstrup. Rolita Turner also began her work with Respondent as a warehouse worker and she was promoted to the lead position in 2005. Turner testified that although she and Craft never worked in the same department when they were leads, their working relationship as leads was not problematic.

In October 2010, Blinstrup retired leaving the supervisor's position open. Both Craft and Turner applied for the position. Turner was selected for the supervisory position and she supervised Craft until he transferred out of the Ballast department on January 20, 2012. Turner testified that after assuming the supervisory position she concluded that Blinstrup had performed a good deal of the leads' work in addition to his own duties. Respondent conducts a performance appraisal for every employee annually. The employee's work is reviewed with respect to quality, dependability, teamwork, and safety. After supervising Craft for 4 months, Turner, with the help of McMurrian, completed a performance appraisal for Craft. McMurrian testified that Craft's appraisal score indicated that improvement was needed.

On February 9, 2011, Craft received an employee counseling discipline for unsatisfactory performance based on a determination that he had failed to ensure that all orders in the Ballast department were picked, processed, and shipped for 2 weeks and he had failed to inform the supervisor of the issues. On April 14, 2011, Craft received an additional employee counseling for unsatisfactory work based on a determination that he failed to ensure good housekeeping practices. The following month, Craft was given an employee counseling dated May 13, 2011, for unsatisfactory performance. The discipline was specifically issued because of a failure to ship certain packages and

orders on May 11 and 12, and for working overtime without first obtaining authorization. On June 21, 2011, Respondent issued Craft an employee counseling for failing to ensure that all deliveries were shipped.

McMurrian testified that during the time that Craft worked as a lead, she worked with him to personally coach him on learning his new duties. She recalled that he had struggled with running reports and she personally showed him how to run the necessary reports. She provided him with screen print samples of the transactions for him to use as references when she was not available to help him.

2. Craft's interaction with employee Kim Coleman prior to his demotion

Kim Coleman began working for Respondent in August 2003 and she became a fulltime employee in January 2004. Craft was already an employee at Respondent's facility when Coleman began her work at the facility. Coleman testified that initially her relationship with Craft had been friendly. After a period of time, however, Craft asked her for a date. She testified that she told him "No" explaining to him that he was beneath her. She recalled that she told him that he was married and she didn't "like his kind." She further testified that she had believed that he just wanted to go out with her in order to belittle her as a single parent. Before Craft became a lead, Coleman had little opportunity to deal with Craft as he worked in the Receiving section and she worked in the Returns sections of the department.

Coleman testified that when Craft became her lead, she felt that he tried to exert control over her and to intimidate her. She recalled that he told her "I run this floor and you're going to do what I ask you to do. I am the boss. They're going to believe what I say." Coleman described Craft as speaking harshly to her and she asserted that he spoke to her in a way that made her feel that she was worth nothing. Coleman recalled that he told her that she did not deserve to be there and his statement to her was "your expiration date is over." He told her that she was going to be fired. Coleman also testified in detail about Craft's comments to her about the clothes that she was wearing, including his specific references to her underwear.

McMurrian recalled that on July 8, 2011, Coleman came to her office to discuss Craft. Coleman told McMurrian that Craft was harassing her on the floor. Coleman reported that Craft pulled her from her regular job to do other work, yelled at her, and threatened that he would "make sure" that she would lose her job. McMurrian spoke with Craft and explained to him that Coleman's job was in the Receiving section and she advised him to coordinate with Coleman's supervisor before he pulled her off that job to do other work. McMurrian told Craft that other employees had complaints about him and that he needed to communicate with his team and to work more closely with Supervisor Rolita Turner to understand the demands of the Ballast area.

McMurrian also documented a meeting with employee James Powell on July 10. Powell, who was also a lead in Ballast, reported to McMurrian that during a shift meeting with the Ballast employees, Craft screamed at the employees and threatened to ensure that they would be fired. Coleman testified that

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she had attended this same meeting and she recalled that Craft told the employees that they would be fired.

On July 15, 2011, McMurrian and Operations Manager Guyot met with Craft. McMurrian told him that she felt that he was not ready for the lead position and that he needed to return to the position of material handler. Craft was also given a written warning that referenced the incident occurring on July 10, 2011. The warning language notes that during a meeting with Ballast employees, Craft threatened and berated the team and acted in a way that was unacceptable. The warning also indicated that other than Craft's not following through with team lead duties, employees Kim Coleman and Uma Jalloh perceived Craft's behavior as harassment. The discipline, that was signed by Regional Distribution Center Manager McMurrian and Operations Manager Guyot, confirmed that after 6 months, Craft had not performed the team lead functions and that he would be returned to the position of material handler.

3. Incidents occurring after Craft's demotion

Following the July 2011 demotion, Craft returned to the position of material handler and his pay was reduced \$2.50 an hour. McMurrian testified that even though Craft was no longer in the lead position, the issues remained between Craft and Coleman.

Coleman recalled an incident that occurred after Craft returned to the job of material handler. Craft and Coleman argued as to whether Coleman had placed a skid in the wrong bin. She argued that she had not and Craft argued that she had done so. After she checked for herself, she found that the skid was in the wrong bin. Coleman apologized to Craft and admitted that she had been wrong. She testified that he told her to get on her knees to make the apology. She refused.

On December 22, 2012, Turner telephoned McMurrian while she was away from the facility on vacation. Turner reported that Coleman had come to her alleging that Craft had left some type of recording device next at her workstation and that she was very uncomfortable and believed that Craft was trying to record her conversations. McMurrian directed Turner to have Guyot go to Coleman's workstation and retrieve the device. In his investigation, Guyot discovered that the device was a PlayStation Portable hand-held videogame system. McMurrian recorded in her notes that because cell phones and other such devices were not allowed on the work floor, Guyot told Craft not to have the device on the floor as the company would not be responsible if it were stolen. McMurrian also recorded in her note concerning this incident that she had previously spoken with Craft in June 2011 about using his cell phone or other devices to record people without their knowledge. Although Craft asserted to McMurrian in the June 2011 meeting that he was only recording notes for himself as a team leader, McMurrian had directed him to use a note pad.

On December 26, 2012, Turner brought Coleman to McMurrian's office and asked to speak with McMurrian. Coleman told McMurrian that Craft was trying to make people think that he was recording their conversations and phone calls and she told McMurrian that she had experienced enough of Craft's harassment. Coleman reported that Craft appeared to be taking pictures of the product that another employee was sorting.

Coleman reported that she was frightened of Craft and that she felt that he was singling her out for criticism. She asserted that Craft had threatened that he was going to get her fired.

Coleman also told McMurrian about the incident when Craft told her to get on her knees to apologize to him. Coleman further contended to McMurrian that Craft continued to stare at her and to make her feel uncomfortable. McMurrian recalled that Coleman was crying and appeared to be clearly upset in reporting these things to her. McMurrian testified that Coleman reported that she was frightened of Craft and that she feared for her life and her job.

Following this meeting, McMurrian spoke with other employees about Coleman's allegations. Employee Antonio Edwards reported that Craft had made the statement to him that he (Craft) was going to start making some changes there and he was going to fix it so that "no one had to kiss butt to move up the ladder." McMurrian documented that employee Len Lee opined that Craft had "bad blood" for Coleman. Employee Latoya Hyde opined that Craft had problems with "single women" working on the work floor and she asserted that he treats them differently than other women. McMurrian documented that employee Thelma Halbert reported that she had witnessed Craft's harassment of Coleman. Halbert reported to McMurrian that even though Craft was no longer Coleman's lead, he continued to monitor her work and to tell her what to do.

After speaking with various employees about Coleman's allegations, McMurrian met with Craft. She told him that Coleman had reported that he had harassed her. Craft testified that although McMurrian had given him specific details, he had not asked for any details. Craft recalled that McMurrian asked him why Coleman would have thought that he was harassing her. He testified that he told McMurrian that he couldn't speak for Coleman; he could only speak for himself. Craft did not testify that he denied the alleged behavior when speaking with McMurrian. In direct examination, however, Craft denied that he had stared at Coleman, watched her work, or threatened her. He denied that he told her to kneel when she apologized to him. He recalled that McMurrian had also told him that employees had alleged that he had threatened management and that he had made comments about replacing management. Craft denied to McMurrian that he had done so.

4. Craft's participation in preshift meetings

At the beginning of each workday and at the beginning of the first shift, Respondent conducts a preshift meeting for all the employees on that shift, including the temporary employees. The meetings are usually conducted by the lead employees; however, supervisors occasionally attend the meetings. The majority of the meetings are devoted to pertinent work-related topics for that day. After Turner became a supervisor in 2010, she implemented an additional segment for the morning meeting that was known as "a minute to shine." After the leads finished their portion of the meeting concerning work-related topics, individual employees were given an opportunity to speak during the meetings. Turner testified that she initiated the segment to give employees a chance to discuss positive things that had happened in their lives. After its implementa-

tion, Craft participated in the “minute to shine” on the average of three times each week. Craft testified that he used this time to try to motivate employees and he often gave speeches and reworked the lyrics of songs to make them applicable to work.

Team Lead Lester Peete testified that for the most part, Craft’s comments were about employees working together and team work. He also confirmed that some of the employees reacted negatively to Craft’s remarks and didn’t understand what he was trying to say to them.

Coleman testified that Craft’s comments were “always” negative toward Respondent during these meetings; stating that managers and supervisors were not doing what they were supposed to do. Coleman recalled that he told employees that he was going to “make things change.” She also recalled that his comments in the meetings were directed toward her, stating such things as “Certain people, you know who I’m talking about. You’re not doing the right thing. You are going to be terminated. Your time is up.”

5. Respondent’s continuing investigation of Craft

On January 3, 2012, Guyot submitted an incident report to McMurrian recommending Craft’s termination. In the memorandum, Guyot described various performance problems in Craft’s work as an hourly employee and as a lead that had been observed. He concluded by stating:

I fully support Rolita Turner’s decision to demote Craft from Lead back to material handler. Now, in light of all the other incidents Lee has caused, I support the decision to move forward and terminate Lee Craft from Phillips to eliminate the hostile working environment Lee Craft has caused.

On January 4, 2012, Coleman also provided Respondent with a hand written statement outlining her concerns about Craft. In the statement, Coleman referenced recent problems with Craft, as well as, earlier problems in working with him. She alleged in the statement that Craft asked her for a date and she included her response to him. She reported that Craft continually criticized her and threatened that she would be fired. She alleged that he stared at her throughout the day and she added that she thought that he was trying to record her telephone conversations. She also mentioned an incident occurring as early as 2010 when Craft attempted to have her removed from the facility by a security guard because he observed her using her cell phone.

On January 4, 2012, Craft picked the wrong item when filling an order and an incorrect order was shipped to a customer. On January 16, while deleting a delivery and adding to another shipment, Craft added all new deliveries to one shipment, taking administrative staff several hours to correct and to reprint 318 deliveries.

6. Respondent’s initial decision to terminate Craft

On January 16, 2012, McMurrian met with Operations Manager Guyot and Supervisors Joe Odum and William Gibson. McMurrian recalled that they reviewed Craft’s personnel file and discussed the fact that they had coached him, as well as having issued disciplinary warnings to him. In a memorandum dated January 16, 2012, McMurrian documented that when she

spoke with Craft on December 28, 2011; she told him that his statements that were made during preshift meetings and to other employees were being perceived by employees as working against the company and threatening in nature. In their discussions on January 16, 2013, McMurrian and the supervisors discussed the fact that although they had removed Craft from the lead position, they were continuing to have the same kinds of issues with him. At that point, they decided that he should be terminated and a notice of termination was prepared for Craft. In reviewing the file, however, McMurrian and her managers discovered that Craft had not previously received a final written warning. Because it was Respondent’s custom to issue a final written warning prior to a notice of termination, Respondent did not issue Craft a notice of termination. A final written warning was prepared and given to Craft on January 20, 2012.

The final written warning confirms that Craft was given the warning because he had engaged in highly disruptive behavior in the preshift meetings and because he had also engaged in harassing and intimidating behavior towards colleagues and towards management. The warning documents that several employees had reported feeling threatened. McMurrian testified that she included these factors as a reason for the warning based on the reports from employees Lester Peete, Antonio Edwards, and Thelma Halbert who had reported Craft’s behavior during the preshift meetings and his behavior toward other employees. She explained that she had also based the warning on Craft’s disrespectful behavior to Turner and the harassing and intimidating behavior toward Coleman. McMurrian testified that she had simply found Coleman’s version of events more credible than Craft’s. The warning further lists his errors in shorting orders on January 14, 2012, and his shipping errors in January 16, 2012.

In addition to giving Craft a final written warning, McMurrian decided to move Craft to the Professional department that was in an entirely different building and where he would be assigned to a male supervisor. When McMurrian met with Craft on January 20, 2013, to give him the final written warning, she informed him of the transfer. Craft was also instructed to stay completely away from Coleman’s work area. McMurrian also informed Coleman that Craft had been moved from the Ballast department and assigned to a new supervisor.

7. Circumstances leading to Craft’s discharge

McMurrian testified that although Craft was instructed to stay away from Coleman’s work area he did not do so. On January 24, and only 4 days after his final written warning, McMurrian received reports from other employees that Craft had taken the forklift from the Professional department and had gone back into the Ballast work area. Coleman testified that Craft came into her work area and while sitting on his forklift, he began to brag about what happened to him. Coleman recalled that Craft stated that McMurrian had done him a favor by moving him because he would no longer have to lift the heavy ballasts. As he was sitting about 10 feet away from Coleman, Craft added that he was “untouchable.” Coleman testified that he was directing his comments to her.

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Coleman testified that when Craft was transferred McMurrian told her that if Craft did anything to harass her, Coleman should let McMurrian know. Both Coleman and Thelma Halbert reported to McMurrian that when Craft came into the department he showed his disciplinary warning to employees and spoke loudly. Coleman reported to McMurrian that Craft had made the statement that he was “untouchable” and Coleman reported to McMurrian that she had heard from other employees that Craft stated that his warning had been given to him because of Coleman’s filing harassment charges against him. Coleman testified that Craft parked his forklift approximately 10 feet away from her when he was speaking loudly about his transfer and discipline. Employee Fred Smith also confirmed to Supervisor Joe Odum and to McMurrian that Craft had shown his disciplinary warning to him.

McMurrian testified that Craft’s behavior was grounds for termination for two reasons. She said that Craft’s behavior on January 24 and previously violated Respondent’s policy to maintain a harassment free workplace. Additionally, by going back into the Ballast department, Craft had specifically disregarded her directive to stay out of that work area. McMurrian testified that aside from his discussion of his disciplinary notice Craft engaged in behavior that was sufficient grounds for termination.

C. Whether Respondent Violated the Act

1. The parties’ positions

The General Counsel maintains that Respondent unlawfully terminated Craft because he engaged in protected concerted activity by discussing his January 20 final warning with employees and making statements critical of Respondent’s decision to issue him the final warning. Specifically, the General Counsel alleges in the complaint that since January 19, 2012, Respondent has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers. The complaint alleges that between January 20 and 24, 2012, Craft showed and discussed with his coworkers the final written warning that he received on January 20, 2012, and that Respondent terminated him for doing so. Respondent asserts that its decision to terminate Craft was based on his “final act of harassment/intimidation/bullying and his disruptive behavior occurring on January 24, 2012.”

2. Applicable legal authority

As discussed further below, the parties not only disagree about the Craft’s conduct that triggered his termination, but they also disagree as to Respondent’s motivation in deciding to terminate Craft. In cases where an employer’s motivation is an integral factor in determining the lawfulness of discipline issued to employees the Board utilizes the test that is outlined in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* analysis is based on the legal principle that an employer’s motivation must be established as a precondition to a finding that the employer has violated the Act. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). In its decision in *Wright Line*, the Board stated that it would first require the General Counsel to make an initial “showing sufficient to sup-

port the inference that protected conduct was a ‘motivation factor’ in the employer’s decision.” *Wright Line*, above at 1089.

Under *Wright Line*, the General Counsel must establish not only that the employee engaged in protected conduct, but also that the employer was aware of such protected activity and that the employer bore animus toward the employee’s protected activity. *Praxair Distribution, Inc.*, 357 NLRB No. 91, slip op. at fn. 2 (2011); *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). Specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. *North Hills Office Services*, 346 NLRB 1099, 1100 (2006). In effect, proving the established elements of the *Wright Line* analysis creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discipline are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The Board has held that an employer’s restriction on employee communication is overbroad when the restriction is not limited by time or place. *SNE Enterprises*, 347 NLRB 472, 492–493 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007). Furthermore, an employer’s restriction on employees’ discussing confidential information interferes with employees’ Section 7 rights unless the employer can demonstrate a legitimate and substantial business justification that outweighs the employee’s Section 7 interests. *Caesar’s Palace*, 336 NLRB 271, 272 fn. 6 (2001). See also *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). The General Counsel maintains that Craft was unlawfully terminated because he shared confidential information about his January 20, 2012 warning with other employees.

3. Whether Respondent maintained an unlawful confidentiality rule

Paragraph 4 of the complaint alleges that since January 19, 2012, Respondent has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers. It is undisputed that there is no written policy that prohibits employees from discussing their discipline with other employees. McMurrian also testified that Respondent does not have a policy that prohibits employees from discussing disciplinary notices. In a sworn affidavit to the Board prior to the hearing, Craft testified that he was not aware of any policy or rule that prohibits an employee from showing or discussing discipline with other employees. Craft further testified that when he received his final written warning none of the supervisors or managers told him that the warning was confidential; either with respect to the form itself or to discussion about the discipline.

Despite the testimony of both McMurrian and Craft, the General Counsel nevertheless asserts that Respondent unlawfully implemented a policy prohibiting the discussion of discipline on January 19, 2012. In maintaining this assertion, the General Counsel relies on a file summary that is dated January 24, 2012, and signed by McMurrian, supervisors, and employees on January 25, as well as, the wording of Craft's January 25 discharge notice.

In the January 24, 2012 memorandum, McMurrian documents that Coleman and Halbert came to her, reporting that Craft was showing his disciplinary form to employees on the floor and they confirmed to her the content of the discipline to her. Coleman reported to McMurrian that Craft had told other employees that the discipline was given to him because she (Coleman) had filed harassment charges against him. She also told McMurrian that Craft had bragged that he was "untouchable" and that management had done him a favor by moving him out of the Ballast area. McMurrian included in the memorandum the information provided by Halbert and by employee Fred Smith about Craft's comments concerning his discipline and his comments about his transfer out of the Ballast department. In referencing the fact that Coleman and Halbert came to her with complaints about Craft's statements and actions, McMurrian adds: "These employees are aware that disciplinary forms are confidential information and should not be shared on the warehouse floor, at any time, much especially during working hours." McMurrian also added, "Kim stated that he was purposely showing the writeup which he knows is confidential information so it would get back to her like she was the blame."

Coleman testified that she told McMurrian that the discipline forms were confidential and should not be shared with others. When asked why she made this statement, Coleman admitted that no one ever told her that such discipline was confidential; she had just assumed that it was. She explained that because a discipline is personal for an employee, she assumed that employees should keep it to themselves. Coleman further testified that when she told McMurrian that she thought that Craft was revealing confidential information, McMurrian did not respond that it was confidential or tell her that it was wrong for Craft to show her his disciplinary form. McMurrian's response to Coleman was simply, "Why would he want to do that? Why would he want to show that?"

Based on the total record evidence, it appears that Coleman was the individual who appeared to be most concerned that Craft was telling employees about his discipline. Based on her testimony and the information that she reported to McMurrian, Coleman was disturbed by Craft's statements about his discipline and transfer because she believed that he was targeting her as responsible. Thus, while McMurrian may have referenced in the memorandum that Craft showed his disciplinary warning to employees on January 24, as well as the fact that Coleman raised the confidentiality of the discipline, there is no credible record evidence that Respondent told employees on January 19, 2012, that they were prohibited from sharing and/or discussing their discipline with coworkers as alleged in complaint paragraph 4.

McMurrian included in Craft's termination notice that Craft requested a copy of his writeup and he was informed of the confidentiality of the discussion and the form during this meeting. McMurrian testified that Craft raised the issue of confidentiality in his disciplinary meeting and she had assured him that their conversation was confidential. The record supports her explanation as to how confidentiality was raised during the meeting and why she added a reference to confidentiality as she did in Craft's termination notice. Craft specifically denied that he was told in the meeting that the disciplinary form was confidential. He did not testify that McMurrian or any of the managers told him that he could not discuss his discipline. Based on both the testimony of McMurrian and Craft, it is reasonable that when Craft requested a copy of his discipline, he was given assurances that Respondent would maintain the confidentiality of his discipline. I do not find sufficient evidence that Respondent told Craft or any other employees on January 19, 2012, that they were prohibited from discussing their discipline with other employees. Overall, I don't find that the wording in Craft's termination notice as sufficient evidence to prove that Respondent established a prohibitive policy 6 days earlier as alleged in the complaint. Accordingly, I do not find merit to complaint paragraph 4 as alleged.

4. Whether Craft was terminated because of his protected activity

Independent of whether Respondent implemented a policy on January 19, 2012, that restricted employees from discussing their discipline, there remains the issue of whether Respondent terminated Craft because he engaged in protected activity by discussing his discipline with other employees. Specifically, the General Counsel alleges that between January 20 and 24, 2012, Craft showed and discussed with his coworkers the counseling form that he received on January 20, 2012. Respondent, however, alleges that Craft was terminated because of his conduct on January 24, 2012.

D. The Application of the Wright Line Analysis

1. Whether Craft engaged in protected activity

As discussed above, the first component of the *Wright Line* analysis is establishing that an employee has engaged in protected activity. Although Respondent conducted an investigation prior to issuing Craft the January 20, 2012 warning, there is no evidence that Respondent engaged in any further investigation of Craft's conduct prior to January 24, 2012, when McMurrian received complaints from Coleman and Halbert. The overall record indicates that once Respondent issued Craft the final warning and then transferred him to an area for supervision by a male supervisor, Respondent took no further notice of Craft until January 24, 2012. Respondent asserts that Craft's termination was triggered by his conduct on January 24, 2012, when he came back into the Ballast area and caused a disturbance related to his discipline and transfer. Interestingly, Craft denies that he went into the Ballast area after January 20, 2012. He contends that while he spoke with other employees about the discipline that he had received, he did so between January 20 and 24, 2012, and on nonworking time in areas other than the Ballast area. Overall, I do not find Craft's testimony credi-

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ble in this regard. The total record evidence, including the credible testimony of Coleman and Halbert support a finding that Craft came back in to the Ballast area on January 24, 2012, as documented in McMurrin's January 24, 2012 memorandum.

Although the parties disagree with respect to when Craft talked with other employees about his discipline and his transfer, there is no dispute that he did so. As the Board has previously determined, "it is important that employees be permitted to communicate the circumstances of their discipline to their coworkers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense." *Verizon Wireless*, 349 NLRB 640, 658 (2007). Thus, Craft's communication to other employees about his discipline and transfer is clearly protected activity.

2. Respondent's knowledge of Craft's protected activity

Respondent argues that the second prong of the *Wright Line* analysis cannot be met because Respondent had no knowledge that Craft was talking with employees about his discipline prior to January 24, 2012. Respondent argues that inasmuch as Craft denies engaging in protected activity on January 24, 2012, the requisite knowledge cannot be established. I note, however, that actions taken by an employer against an employee based on the employer's belief that the employee engaged in or intended to engage in protected activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity. *Signature Flight Support*, 333 NLRB 1250, 1250 (2001); *U.S. Service Industries, Inc.*, 314 NLRB 30, 31 (1994), enfd. mem. 80 F.3d 558 (D.C. Cir. 1996). Thus, even if I were to credit Craft's testimony, finding that he did not come back into the Ballast area on January 24, 2012, Respondent believed that he did so, and disciplined him for conduct related to protected activity. Accordingly, I find that Respondent had knowledge that Craft engaged in protected activity.

3. Whether Craft's protected activity was a motivating factor in his discharge

Counsel for the General Counsel relies on the January 25, 2012 discharge notice as a basis for showing that Craft's discussions about his discipline were a factor in Respondent's motivation to discharge Craft. The notice specifically describes the violation as:

Lee Craft is being terminated effective immediately due to disrupting the operation and sharing confidential documentation and information during working hours and continues to use intimidating language towards management. Lee received a final written disciplinary notice warning against these exact behaviors on January 20, 2012. Lee requested a copy of the writeup and was informed of the confidentiality of the discussion during the meeting.

Counsel for the General Counsel also asserts that in McMurrin's memorandum of January 24, 2012, she focuses on Craft's discussing his warning notice with other employees while writing that employees are aware that discipline forms "are confidential and should not be shared on the warehouse floor at any

time." As I have discussed above, I have found that the discussions and concerns about the confidentiality of Craft's discipline were initiated by employees Coleman and Halbert rather than by the Respondent. McMurrin, however, identified the breach of confidentiality in both her January 24, 2012 memorandum as well as in Craft's termination notice. Respondent does not deny that Craft was terminated because of his going back into the Ballast department and the statements that he made there to employees. These statements included his discussion about his discipline and his transfer. Thus, as his discussions about his transfer and discipline were intertwined with all of his actions on January 24, 2012, such actions were a motivating factor in Respondent's decision to discharge Craft. Accordingly, the General Counsel has met the initial burden of showing that protected activity was a motivating factor in Respondent's decision to terminate Craft. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

4. Whether Respondent would have terminated Craft in the absence of protected activity

Once the General Counsel meets the initial burden of showing that an employee's protected activity was a motivating factor in the adverse employment, the employer has the burden of demonstrating that it would have taken the same action in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. The total record evidence supports a finding that Respondent has met this burden.

As argued by counsel for the Respondent, the record evidence demonstrates that Respondent had already decided to terminate Craft before he engaged in any protected activity. In a memorandum dated January 16, 2012, McMurrin describes a December 28, 2011 meeting attended by Supervisors Odum and Gordon, as well as Craft and McMurrin, Craft was informed that Respondent was investigating an additional report of his engaging in intimidating and harassing behavior. McMurrin documented that she informed Craft of the complaints received from other employees. McMurrin further documented in the report a number of comments and complaints submitted by employees, as well as by Supervisor Rolita Turner. Specifically, McMurrin noted that Turner had reported that Craft had persistently attempted to undermine and belittle her decisions and that he continued to demonstrate a lack of respect for Turner. McMurrin noted that Craft's disruptive behavior was inappropriate; interfering with operations and it was viewed as unstable as documented by specific named employees. McMurrin concludes:

After many coaching sessions, and disciplinary action, which included a demotion from the Team Lead position, Lee Craft has continued to display intimidating, offensive, and demoralizing behavior. It is in the best interest of the company and the employees of Phillips to terminate Lee Craft's employment, effective immediately. The intimidating behavior is a violation of company policy. Phillip's has the responsibility to create a safe environment where offensive and intimidating behavior is not tolerated.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

McMurrian concluded the memorandum by noting that the decision to terminate Craft had been made jointly by the distribution manager, the operations manager, and by three distribution center supervisors.

The termination notice that was prepared on January 16, 2012, reflected that Craft was being terminated because of inappropriate behavior and a violation of company policies and procedures. The notice documented that Craft had been removed from the team lead position on July 25, 2011, because of his use of intimidating tactics that were perceived by two female employees as harassment and because he was not performing the tasks required in the team lead position. The January 16, 2012 termination notice further noted that in July 2011, Craft had been informed that if he failed to perform the duties of material handler or if he had further issues with his fellow coworkers, he would be subject to further discipline up to and including termination.

As noted above in this decision, Respondent did not terminate Craft on January 16, 2012, as originally intended. Because it was discovered that he had not previously received a final written warning, the termination was converted to a final written warning and he was spared termination. The warning that issued on January 20, 2012 documents that Craft had engaged in inappropriate behavior, unsatisfactory performance, and a violation of company policy/procedures. The final written warning included a reference to two specific performance issues. The warning also referenced that Craft had engaged in highly disruptive behavior in the preshift meetings and that Craft had engaged in harassing and intimidating behavior toward colleagues and towards management. There was no allegation or finding that Craft discussed confidential information or engaged in any other protected activity.

Because of Craft's reported behavior toward female employees as well as his female supervisor, Craft was moved out of the Ballast department to a department under a male supervisor. McMurrian credibly testified that he was instructed to stay out of the Ballast department. In transferring, Craft into the new department, Respondent gave Craft an opportunity for a fresh start to work with different employees and a different supervisor.

On January 24, 2012, McMurrian learned that Craft had not only returned to the Ballast department in violation of her instructions to him, but that he had also engaged in behavior that employees reported as disruptive. In alleging that Respondent terminated Craft because of his sharing information about his discipline with other employees, the General Counsel relies on the wording of Craft's final termination notice. The General Counsel specifically relies on the fact that Respondent referenced Craft's "sharing confidential documentation and information during working hours" in the description of Craft's conduct. As I have indicated above, such wording is arguably sufficient to establish that the General Counsel has met the initial burden of a prima facie case under *Wright Line*. The remainder of the termination notice, however, demonstrates that Respondent would have terminated Craft in the absence of any protected activity.

The January 25, 2012 termination notice documents that he was also terminated because of his disrupting the operation and for using intimidating language toward management. Even more significant, however, is the additional language that was included in the termination notice:

Lee received a final written disciplinary notice warning against these exact behaviors on January 20, 2012.

There is no dispute that the final warning given to Craft on January 20, 2012, did not involve any allegation of disclosing confidential information. The language of the warning reflects that it was issued to Craft for (1) highly disruptive behavior; (2) harassing and intimidating behavior towards colleagues and management, and (3) for performance issues. Thus, it is apparent that even in the absence of any protected activity, Respondent terminated Craft because Respondent determined that he had engaged in the same conduct that triggered his January 20, 2012 notice. More significantly, Craft's conduct on January 24, 2012, was consistent with the conduct for which Respondent based its earlier decision to terminate Craft on January 16, 2012, and prior to any alleged protected activity.

As discussed above, Craft denies that he came back into the Ballast department on January 24, 2012, and spoke with employees. Because of this denial, the General Counsel asserts that while Craft engaged in protected activity; it was simply not on January 24, 2012. Because of Craft's denial, the General Counsel is forced to argue that Craft discussed his discipline with employees during the period between January 19 and 24, 2012. I note, however, that neither McMurrian's memorandum of January 24, 2012, nor Craft's termination notice reference any dates of alleged misconduct other than January 24, 2012. In reaching the decision that Respondent would have terminated Craft in the absence of any protected activity, I rely in large part on the documentary evidence and the credible testimony of McMurrian. Based on the information provided by other employees, McMurrian determined that Craft had disregarded her instructions to stay out of the Ballast department and that he was engaging in the same conduct for which he had previously been warned.

There is no question that Craft's behavior on January 24, 2012, included his comments to other employees about his discipline and his transfer. As discussed above, Section 7 of the Act clearly protects employees when they tell other employees about their discipline. Based on the testimony of Coleman, however, it is also apparent that Craft's statements were arguably motivated to accomplish more than a simple sharing of information with other employees. Based on her testimony and on the information that she gave McMurrian, it is evident that Coleman perceived Craft's return to the Ballast department and his statements to her and to other employees as additional harassment. Ostensibly, Craft's behavior reflected more than simply sharing what Respondent had done to him; it included communicating to other employees that Coleman was responsible for his discipline and transfer. It is reasonable that Respondent determined that in his doing so, Craft had again harassed Coleman and engaged in the same conduct for which Respondent had intended to fire him only 8 days earlier.

It has long been held that an employer violates the Act if it is

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shown that the discharged employee at the time engaged in 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. An employer's honest belief, however, provides a defense to a charge of discrimination absent a showing that the employee did not, in fact, actually engage in the alleged misconduct. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22 (1964); *Westinghouse Electric Corp.*, 296 NLRB 1166, 1173 (1989). In the instant case, the evidence is not sufficient to establish that Craft did not engage in the conduct that was reported to McMurrian by his fellow employees. Thus, Respondent has demonstrated that it would have terminated Craft in the absence of any protected activity.

Accordingly, I do not find that Respondent terminated Craft in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Phillips Electronics North American Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I use the following recommended³

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. June 13, 2013

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Sec. 102.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL RELATIONS BOARD
REGION 15, SUBREGION 26

**PHILIPS ELECTRONIC NORTH AMERICA
CORPORATION**

and

Case 26-CA-085613

LEE CRAFT, AN INDIVIDUAL

10452 Motions for Reconsideration Under Sec.102.48

The board has said that Philips did maintain an unlawful rule and they enforced that rule upon Lee Craft because it is documented in Lee Craft disciplinary form. How can the board then say that Lee Craft's discharge was lawful because the reason Lee Craft was discharged was because Sherri McMurrian documented that Lee Craft discussed his disciplinary with fellow co-workers, see (22/28 Exb. R-14). Lee Craft submitted documentation (e.g., emails sent to human resources due to there being no human resources on site at the Memphis facility and contacting employee hotline) regarding numerous complaints and concerns that fell upon deaf ears. Lee Craft followed the rules went through the proper chain of command, but Philips allowed Sherri McMurrian and her management staff to engage in unlawful practices on anyone of her choosing. Sherry McMurrian was judge and jury at the Memphis facility and if anyone questioned her they became a target which she included a lot management staff in bullying and unlawful practices. This was and is too much power for Philips to allow Sherri McMurrian to have. She was and is still dangerous because the employees at the Memphis facility know the company supports her in her unlawful practices which intimidate the employees and makes them fearful of losing their jobs.

Judge Margaret G. Barkebusch did not consider the facts at all, she based the entire case on my demeanor not the facts and evidence presented by Bill Hearn of the NLRB (I was told by Mr. Hearn to answer the questions truthfully and not be confrontational on things they may say that are not true). The judge also overlooked Rolita Turner's Testimony of Lee Craft chasing her on the expressway at high rate of speed. Mr. Hearn questioned her regarding if a police complaint was filed and her response was no. He also questioned her regarding what month, date and time this happened to her (Rolita Turner) and she responded she did not remember. Mr. Hearn then questioned Rolita Turner regarding who she did tell, and Rolita Turner responded that she told Sherri McMurrian who is the judge and jury.

Philips has a policy regarding workplace violence. Kim Coleman has violated this policy numerous times. She testified that an employee—Roy—hit her first, and she hit back. This was a lie. The employee Roy never hit her, but she did hit him and they fired him and kept her. In another incident involving another employee Tamera Hamilton, she and Kim Coleman had an altercation which resulted in Tamera Hamilton being fired but nothing was done to Kim Coleman. A harassment complaint was filed against Lee Craft, and once he was made aware of the complaint Lee Craft contacted the Memphis Police Department to find out what his rights were concerning being falsely accused. When he was told the issue was a company matter, Lee Craft contacted the employee hotline and human resources department making them aware of what was said to Lee Craft by management. Sherry McMurrian told Lee Craft there would be a meeting with Lee Craft, Kim Coleman, and management. However, after Lee Craft told the human resources department that he had contacted the police and made a statement on the employee hotline, he was told a couple days later by supervisor William Gordon that the meeting was canceled. Lee Craft contacted human resources again and was told by Palak Dwivedi that management felt like the meeting would be non-productive. If management took this accusation seriously, why was the meeting never held? Lee Craft sent an email explaining to human resources that a lie is nothing for anyone to tell. In the interests of obtaining a fair and honest investigation, Lee Craft also requested for human resources to investigate the issues in person, not on the phone with same people that management fraternized with.

I, Lee Craft, have been falsely accused by Sherri McMurrian, Rolita Turner, Kim Coleman, Thelma Halbert, and Gerak Guyot. Again I was fired based on showing my disciplinary form not harassment allegations to which human resources responded that management felt a meeting would be non-productive for such a serious situation.

Judge Margaret G Barkebusch was biased in her decision, overlooking all the facts and witnesses submitted by Bill Hearn on Lee Craft's behalf. Sherry McMurrian and Mason Miller made a mockery of the judicial system based on lies and last minute documentation submitted. Judge Barkebusch based her decision on Lee Craft's demeanor, stating that he was not credible. How was Lee Craft not credible? He had documentation with dates and times, witnesses, contacted human resources by phone and email, called the company hotline, and also contacted President Ed Crawford regarding the situation. All his requests and concerns fell upon deaf ears, and Philips Electronic North America Corporation allowed the management staff at the Memphis facility along with Human Resources Worker Palak Dwivedi in New Jersey commit defamation of character and use bullying tactics upon Lee Craft and other employees.

I am not afraid of bad people who do bad things, those who commit and unlawful acts and break the law, but what I am afraid of is when good people who witness these things uphold the unlawful actions of the others by not doing or saying anything when help is requested and it is within their power to help. All Lee Craft is requesting is for a fair and impartial party to review the case and look closely at the documentation that was submitted along with witnesses who testified on Lee Craft's behalf. Mr. Hearn cross-examined Sherry McMurrian, Rolita Turner, Kim Coleman and Thelma Halbert, Gerak Guyot, and Lester Peter, and there were several inconsistencies in their testimonies that Judge Margaret G. Barkebusch chose to overlook along with all of Lee Craft's submitted documents and the witnesses that testified on his behalf.

If Judge Margaret G. Barkebusch's ruling—that Lee Craft's discharge was lawful—is upheld, you are telling the people at Philips Electronic North America Corporation and everyone who is employed by any company or corporation that regardless of any evidence submitted the employer has the right to wreak havoc in your life.

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2014 a copy of the request for reconsideration in support of exceptions to the decision of the Administrative Law Judge was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on September 10, 2014, copy of the request for reconsideration in support of exception to the Decision of the Administrative Law Judge was served via Email on the following:

**Mason Miller, Senior Counsel Email: mason.miller@philips.com
Employment & Labor Law
Philips Electronics North America Corporation
200 Franklin Square Dr
Somerset, NJ 08873-4186
Phone(732) 563-3123
Mobile Phone: (347) 712-1556
Fax: (732) 579-4133**



Lee Craft

Gibson no longer worked for Respondent. (Tr. 170). Employees are assigned to one of four departments: Ballast, Professional, Consumer and Receiving. (ALJD 2:17-18; Tr. 175).

III. FACTS CONCERNING THE DISCHARGE OF LEE CRAFT

A. Lee Craft Employment History

Charging Party Lee Craft worked for Respondent from February 2003 until his discharge on January 25, 2012. (ALJD 2:32; Tr. 45-6). With the exception of his final five days of employment, Craft was assigned to the Ballast department throughout his tenure with Respondent. (ALJD 2:32-34; Tr. 46). Craft worked as a lead employee for Respondent in the Ballast department from about April 2010 to about July 25, 2011. (ALJD 2:34-35, 4:13-23; Tr. 48-9). At all other times during his employment, Craft worked as a warehouse associate where his duties included picking orders, operating forklifts and other equipment, and performing other duties as assigned. (Tr. 46-7). At the time Craft started working as a lead, he was supervised by Gene Blinstrup, who ceased working for Respondent in 2011. (ALJD 2:34-35; Tr. 49). In October 2010, Rolita Turner replaced Blinstrup as supervisor. (ALJD 2:40-41; Tr. 49). Turner continued to supervise Craft until he was transferred out of the Ballast department on January 20, 2012. (ALJD 2:40-42; Tr. 50).

From the time he started working for Respondent until February 2011, Craft had not been disciplined for any reason. (Tr. 50). After Turner became his supervisor, Craft received a series of verbal and written warnings for performance issues related to his performance of the lead duties. (ALJD 3:4-14; Tr. 50; RX 2-5). The performance issues cited by Respondent in these warnings all related to either the failure to ensure that orders were shipped in a timely manner and excessive overtime worked by Craft and employees in his area. (ALJD 3:4-14; RX 2-5). On

July 25, 2011,² Respondent issued another written warning to Craft for unsatisfactory performance and demoted him from the lead position to his former warehouse associate position in the Ballast department. (ALJD 4:13-23; Tr. 50-1; RX 6). Other than performance issues, the July 25, 2011 warning notice prepared by McMurrin also states that Craft held a meeting with his team employees on July 10, 2011 where he allegedly threatened, berated and yelled at his team employees. (ALJD 4:15-18; Tr. 189-91; RX 6).³ The warning notice also reads that employees Kim Coleman and Uma Jalloh perceived Craft's behavior toward them as harassment. (ALJD 4:18-20; RX 6). Jalloh did not testify at the hearing and, according to McMurrin, refused to provide any details to her. (Tr. 246-7). Coleman complained to McMurrin that Craft was pulling her off her regular duties on returns and instructing her to pick orders and then criticizing and yelling her when she refused his instructions. (ALJD 3:43-46; RX 7). Coleman admitted that, as her lead, Craft could direct her on what work to perform and that she did not have the authority to refuse to perform work when asked to do so by a lead employee. (Tr. 362-3). Nonetheless, Coleman claimed that Craft's instructions and behavior toward her when she refused his instructions were harassment and McMurrin spoke with Craft about this. (ALJD 3:46-4:5; RX 7).

B. Craft's Participation in the Minute to Shine during Pre-Shift Meetings (Exceptions 1, 11 and 12)

Each work day at the start of the first shift, Respondent holds a pre-shift meeting for employees working on that shift. (ALJD 5:46-6:2; Tr. 30-1, 52, 160-1). Both employees of

² In her decision, the Judge incorrectly states that the date of this discipline was July 15, 2011.

³ McMurrin testified that she received information about the July 10, 2011 meeting from lead employee James Powell. However, Powell did not testify at the hearing about what he actually witnessed. (Tr. 189-91). McMurrin testified that she and Turner spoke with employees who were present at the meeting who corroborated the claims made by Powell but the information they claim they received from these employees was not documented by them or presented as evidence at the hearing. (Tr. 250-2). Employee Kim Coleman claims she was present at this alleged meeting but, despite making other reports about Craft to McMurrin about this same time, her information about this meeting was not documented by McMurrin. (Tr. 343).

Respondent and temporary employees of Adecco attend these meetings. (ALJD 6:1-2; Tr. 30-1, 52-3, 160-1). The employees from all the departments attended the same meeting. (ALJD 6:1-2; Tr. 30-1, 52-3, 160-1). The meetings are held in an open area on the work floor in the Consumer department. (Tr. 417). The meetings are usually conducted by the leads but supervisors occasionally attend and participate in the meetings. (ALJD 6:2-3; Tr. 54, 416-8). The leads from the different departments would discuss work-related matters, such as the work to be performed that day, during the majority of the meeting. (ALJD 6:3-4; Tr. 54, 420). After the leads finished speaking, employees were given the opportunity to speak during what Respondent called, "A Minute to Shine." (ALJD 6:4-7; Tr. 32-3, 54-5, 160-2). Any employee at the meeting, including the temporary employees, could participate in the Minute to Shine by just going up to the front of the group and speaking. (Tr. 55; 422). The Minute to Shine was implemented by supervisor Turner in 2010 after she became supervisor. (ALJD 6:4-7; Tr. 54-5, 465-6). Turner testified that she started the Minute to Shine to give employees a chance to discuss positive things that have happened in their lives. (ALJD 6:7-9; Tr. 441-2). After the Minute to Shine was implemented, employees used the opportunity to speak about work-related matters.

Craft testified that, after the Minute to Shine started, he spoke during the Minute to Shine about three times a week. (ALJD 6:9-10; Tr. 55). Craft did this both when he was still a lead and after his demotion. (Tr. 55-6). Craft testified that, when he spoke during the Minute to Shine, he was trying to motivate employees to do a better job and exhibit teamwork during the work day. (ALJD 6:10-12; Tr. 55-6). Craft said that he would communicate this through speeches or songs, where he would re-do the lyrics of a song to make it applicable to their work. (ALJD 6:10-12; Tr. 56; GCX 3, 4). Craft said that he would use all different types of songs, including popular music and gospel music, during the Minute to Shine. (Tr. 56). Craft said he would also try to bring

some humor to the meeting, such as when he reworked phrases he commonly heard from certain employees into a version of “The 12 Days of Christmas.” (Tr. 59-60; GCX 4). Craft testified that he continued to regularly participate in the Minute to Shine until it was stopped in or around late December 2011. (Tr. 63-4).

Former and current employees who testified at the hearing all testified that Craft was almost always positive when he spoke or performed during the Minute to Shine and that he focused on bringing employees together to do a better job or taking accountability for their work while Kim Coleman characterized Craft’s statements during the Minute to Shine as always negative. (ALJD 6:14-20; Tr. 34-5, 163, 348-50, 422-3). Respondent witness Lester Peete, a team lead, testified that Craft was, for the most part, positive in his statements during the Minute to Shine and that Craft spoke about team work among the employees and employees working together. (ALJD 6:14-16; 422-3). Peete, however, is the only witness, other than employee Kim Coleman, whose testimony on this issue is discussed by the Judge.⁴ Peete’s testimony about Craft’s statements is corroborated by General Counsel witnesses Lexie Campbell and Sherry Grey. Lexie Campbell, a former temporary employee at Respondent’s warehouse, testified that, when Craft participated in the Minute to Shine, Craft tried to be uplifting to bring employees together and to try to get them to work together. (Tr. 32-36). Sherry Grey, also a former temporary employee, testified that Craft’s statements in the Minute to Shine were positive and that he tried to encourage employees to do a good job and take responsibility for their work. (Tr. 160-4).

⁴ General Counsel presented three fact witnesses to corroborate the testimony of Craft: Lexie Campbell, Sherry Grey and Markus Bernard, former temporary employees who worked at Respondent’s warehouse in the Ballast department along with Craft. The Judge’s decision does not reference the names or testimony of any of these witnesses at any point in her decision, such that a reader of the decision alone would not know that General Counsel presented any evidence other than the testimony of Craft.

Kim Coleman was the only other employee who testified about Craft's statements during the Minute to Shine. Coleman initially testified, contrary to the other employees, that Craft was always negative about Respondent and his managers and supervisors when he spoke during the Minute to Shine. (ALJD 6:18-23; Tr. 348-50). The Judge, however, fails to note that Coleman later admitted that Craft sometimes did have positive things to say during the Minute to Shine but that, in her opinion, the things he discussed were negative and not the kinds of things to discuss during the Minute to Shine. (Tr. 368-71). While Turner testified that what Craft discussed during the Minute to Shine was outside of what she intended and that she was aware of what he was discussing during the Minute to Shine, she admitted that, as Craft's immediate supervisor, she never discussed or raised this issue with him at any time before the Minute to Shine period was stopped by Respondent in early January 2012. (Tr. 442, 466-7).

C. Respondent's December 2011 Investigation of Craft (Exceptions 3 and 4)

In late December 2011, Respondent initiated an investigation of Craft after McMurrin met with Coleman and Coleman made several allegations against Craft. (ALJD 4-5; Tr. 199-201). On December 22, 2011, McMurrin received a report from supervisor Turner that Coleman believed that Craft had left a recording device next to the phone on a desk she used during the work day in order to record her phone calls. (RX 16). McMurrin had operations manager Guyot investigate this and he discovered that the "recording device" alleged by Coleman was a Playstation Portable hand-held videogame system⁵ which Craft had set on a desk used by multiple employees in the Ballast department, including Coleman. (Tr. 326-7; RX 16).⁶ The Judge notes that McMurrin documented that she had previously spoken with Craft in June

⁵ Craft admitted that the Playstation Portable game system was his to both Coleman and Guyot. (Tr. 112-5). Craft testified without rebuttal that he had the game system with him at work to use during breaks and that it could not be used to record audio or take pictures. (Tr. 112-5).

⁶ In her testimony, Coleman confirmed that the device examined by Guyot was the same device she claimed Craft left next to her phone to record her conversations and later claimed he used to attempt to take pictures of scrap material she discarded as part of her work. (Tr. 373-5).

2011 about using recording devices on the work floor. (ALJD 4:46-5:4; RX 16). McMurrrian testified that unnamed employees had told her that Craft was holding his cell phone where it would appear he was recording people and that Craft denied that he was attempting to record anyone or any conversations. (Tr. 306-7, 314; RX 16).

Then, on December 26, 2011, Turner brought Coleman to McMurrrian's office and said Coleman needed to speak with McMurrrian. (ALJD 5:6-7; RX 16). In the meeting, Coleman made several allegations against Craft, including that he was harassing her; that he was trying to make her think he was recording her phone calls; that he was threatening to get her fired; that he was taking pictures of her scrap material and questioning her about her work; that Craft told her to get down on her knees and apologize to him after he discovered an error she had made; and that she was in fear for her life. (ALJD 5:6-19; Tr. 200-1; RX 16). On December 27, Coleman contacted McMurrrian after work about statements allegedly made by Craft to lead employee Antonio Edwards. (RX 16). Coleman told McMurrrian that she observed Craft speaking with Edwards and thought the conversation might have been about her. (RX 16). After Craft left, Coleman asked Edwards what he was discussing with Craft because she thought it was about her and Edwards informed her that Craft said that he was going to start making some changes around there and he was going to fix it so no one had to kiss butt to move up the ladder. (RX 16). McMurrrian later confirmed these comments with Edwards. (ALJD 5:22-24; RX 16).

Following this meeting, McMurrrian spoke with several different employees about the allegations made by Coleman. As noted above, Edwards confirmed that Craft told him that he was going start making some changes around there and make it so employees did not have to kiss butt to move up the ladder. (ALJD 5:22-24; RX 16). McMurrrian documented that lead employee Len Lee thought that Craft had "bad blood" for Coleman and employee Latoya Hyde

opined that she thought that Craft had problems with single women working on the warehouse floor. (ALJD 5:24-27; RX 10). Neither Lee nor Hyde testified at the hearing and neither worked in the Ballast department or directly with Craft or Coleman. (Tr. 262, 268). Employee Thelma Halbert told McMurrin that she had observed Craft making comments to Coleman that he was going to get rid of her and that she should have been fired; that Coleman told her that Craft had made other statements to her and that she feared for her safety; that Coleman told her that Craft appeared to be monitoring and taking pictures of her scrap output; and that she thought that Craft did not believe that women should be in charge of the facility. (ALJD 5:27-30; RX 10, 19).

Following these interviews, McMurrin met with Craft about the accusations against him. (ALJD 5:32-33; Tr. 73-77). Supervisors Odum and Gibson were also present. McMurrin told Craft that Coleman had reported that he had been harassing her. (ALJD 5:33; Tr. 74). In her decision, the Judge writes, "Craft testified that although McMurrin had given him specific details, he had not asked for any details." (ALJD 5:33-34). Craft, however, specifically testified that he was not provided any details concerning the allegations of harassment. (Tr. 73-77). Craft testified that he was told only that Coleman had alleged he was harassing her, he was watching her work and she was afraid he might harm her. (Tr. 74, 128-9). Craft specifically denied that he was provided with any details beyond these general allegations. (Tr. 74, 128-9). Craft's testimony on this issue is supported by his December 29, 2011 email to Palak Dwivedi, who works in human resources for Respondent. (GCX 5, p.8) In this email, Craft writes that, in the December 28, 2011 meeting, he was told he was harassing Coleman and that Coleman felt like Craft would harm her but he does not mention any specific allegations which Respondent claims were raised in the meeting. (GCX 5, p.8). McMurrin testified that she discussed Coleman's allegations with Craft but, in her testimony, she does not specify what allegations she actually

raised with him or Craft's specific responses to the allegations of harassment. (Tr. 207). McMurrin goes on to testify that, in the meeting, Craft denied all the allegations against him. (Tr. 207). McMurrin then asked Craft why Coleman would feel afraid of him and Craft responded that he did not know, that McMurrin would have to speak with Coleman and that he could not speak for Coleman. (ALJD 5:36-37; Tr. 74, 207-8). McMurrin then told Craft that she had received reports that he had threatened management and made comments about replacing management. (ALJD 5:40-42; Tr. 75). McMurrin testified that the statements which she felt were threatening toward management were that statements by Craft, including "We have to stop this now," and "We do not need to kiss butt to move up the ladder," which were reported to her by Edwards. (Tr. 267-270). The Judge writes that Craft denied making statements threatening management and about replacing management, but does not note that Craft testified that he denied the statements as attributed to him by Edwards and told McMurrin what he remembered saying to Edwards. (ALJD 5:42; Tr. 75-6). While McMurrin's meetings with other witnesses were documented by her, she admitted that she did not prepare any memo memorializing the December 28, 2011 meeting with Craft following the conclusion of the meeting. (Tr. 280).

D. Respondent's Additional Investigation of Craft (Exception 5)

Following the December 28, 2011 meeting, Respondent continued to investigate Craft. McMurrin had operations manager Guyot prepare a memo, dated January 3, 2012, about issues Respondent had had with Craft prior to that time. (ALJD 6:27-35; Tr. 323-6; RX 17). In this memo, Guyot writes specifically about problems and issues which had occurred when Craft worked as a lead employee. (RX 17). While the Judge writes that Guyot also discussed performance issues Craft had as an hourly employee in the January 3 memo, Guyot testified that

all the performance issues he discussed in the memo concerned Craft's performance as a lead, which is a position he had not held since July 25, 2011. (ALJD 6:27-35; Tr. 323).

Also on January 3, 2012, McMurrian, as part of her investigation, met with lead employee Lester Peete about Craft's speeches and songs during the Minute to Shine period in pre-shift meetings (Tr. 404-5). McMurrian took notes during this meeting and had Peete review and sign the notes at the end of the meeting. (Tr. 404-5; RX 18). McMurrian's interview with Peete, which reflects her continued focus on Craft's statements during the Minute to Shine period of the pre-shift meetings, is not referenced in the Judge's decision. In the notes, Peete describes a meeting the previous week where Craft spoke and did a song where he talked about how he was going make changes at Respondent's facility to make things better and everybody had to look' out for and take care of each other around there. (RX 18). The memo also states that Peete had been trying to get Craft to scale back on singing in the pre-shift meetings because other employees did not appear to understand what Craft was discussing or trying to convey to them. (RX 18). The memo further notes that the leads did not give employees much time to speak during the Minute to Shine anymore because of Craft's actions creating a negative output from the meeting. (RX 18). In his testimony, he stated that Craft was almost always positive and usually had something good to say during the Minute to Shine. (Tr. 406, 422). Peete said that Craft was often speaking about teamwork among the employees and making things better at work. (Tr. 422-3). Peete said that Craft got animated sometimes, such as an instance where Craft spoke after employee James Powell was discharged. (Tr. 406-7). Peete testified that the leads received instructions from management in late 2011 to scale back the Minute to Shine period because employees were standing around after the pre-shift meeting talking about what Craft

said and because of employees, including Craft and Willie Reel, who were referencing religion in the statements they gave during the Minute to Shine. (Tr. 426-9).

On January 4, 2012, Coleman provided a handwritten statement to McMurrin making new allegations against Craft and providing additional details about her prior allegations. (ALJD 6:37-39; RX 9). Coleman alleged that several years prior, when the Ballast department was in a different facility, Craft had asked her out on a date and that she had refused. (ALJD 6:39-40; RX 9).⁷ Coleman alleged that Craft, after he observed her using her cell phone to listen to the radio during work time, attempted to have her removed from the facility by a security guard. (ALJD 6:43-45; RX 9). Coleman did not state the date when this occurred but, in testimony, Coleman said that it had occurred in 2010 prior to Turner becoming a supervisor (which was in October 2010). (ALJD 6:43-45; Tr. 365-8). Coleman also wrote that the statements Craft gave during the Minute to Shine would “always be about me and the Company not doing the right thing and the manager and supervisors not running the facility right.” (RX 9).

Lastly, McMurrin became aware of two performance issues related to Craft’s work. According to Respondent, on January 4, 2012, Craft picked the wrong item when filling an order and the order was shipped to the customer with the wrong item and, on January 16, 2012, Craft made an error on a computer when, in attempting to add a delivery to a different order, added all deliveries for the day to a single order. (ALJD 7:1-4; GCX 6).

While not cited in the Judge’s decision, McMurrin admitted that, despite additional allegations being made against Craft by Coleman, she did not attempt to meet with him or question him about these additional allegations prior to him being issued a final written warning

⁷ The Ballast department was moved from a facility on Mendenhall Road in Memphis, Tennessee, to the present facility in 2007. (Tr. 258)

on January 20, 2012. (Tr. 280). For his part, Craft, in his testimony, specifically denied all the allegations made against him by Coleman. (Tr. 106-7).

E. January 16, 2012 Initial Decision to Discharge Craft (Exceptions 11 and 12)

McMurrian testified that, following this investigation, she and the other members of management decided that Craft should be discharged. (ALJD 7:8-18; Tr. 204) McMurrian prepared a memo dated January 16, 2012 which included the reasons why she and other managers believed that Craft should be discharged. (ALJD 7:17-18; Tr. 204; RX 11). The Judge, in her decision, briefly covers this memo, but leaves out several details which are vital to understanding the motivations for Respondent's decision to discharge Craft.

In the memo, McMurrian first mentions briefly that she and other supervisors had met with Craft on December 28, 2011 and taken evidence from other employees. McMurrian then wrote that she informed Craft that, "the comments he was making in the pre-shift meetings and to other employees were being perceived as him working against the company and were threatening in nature." (ALJD 7:12-14; RX 11). McMurrian specifically cites portions of comments, taken out of context, by Craft, including, "we have to stop this now," and "we do not need to kiss butt to move up the ladder." (RX 11). McMurrian wrote that these comments were "negative, intimidating and demoralizing to the employee's [sic] environment." (ALJD 7:12-14; RX 11). McMurrian also testified that she found these statements, made to other employees, to be threatening toward management. (Tr. 267-70). McMurrian then describes the incident where Coleman alleges that Craft told her to kneel down and apologize to him after he found an error she made. (RX 11). McMurrian writes that Coleman reported the incident to Thelma Halbert after it occurred and Halbert confirmed that she had to get Coleman to calm down before

Coleman would tell her what had happened. (RX 11).⁸ McMurrin then discusses the incident from 2010 when Craft allegedly tried to have Coleman removed from the facility after he observed her using her cell phone to listen to the radio. (RX 11). McMurrin goes on to write that supervisor Turner had reported that Craft was undermining and belittling Turner as his supervisor and mentions issues which date back to when Craft had been a lead. (RX 11).⁹

McMurrin concludes by writing that Craft's "persistent efforts to demoralize the company and representatives of the company are unacceptable. The comments made to other employees and during company meetings are intended to undermine the efforts of the company and management team." (RX 11). McMurrin wrote that Craft was interfering with operations by his disruptive behavior and his interruptions of pre-shift meetings with inappropriate comments, singing and dancing. (RX 11).¹⁰ McMurrin wrote that, despite Craft's prior documented coaching sessions and disciplinary actions, he was continuing to display inappropriate and demoralizing behavior and should be discharged. (ALJD 7:15-17; RX 11). McMurrin testified that Craft was not discharged because he had not previously been provided a final written warning. (ALJD 7:20-22; Tr.215-6; RX 12).

⁸ In her testimony, Halbert said that she actually witnessed the incident and reported to McMurrin that she had seen Craft tell Coleman to kneel down and apologize to him. (Tr. 484-5; 504-5). However, in the various memos McMurrin prepared during the investigation of Craft, including the statement provided by Halbert, McMurrin does not document that Halbert ever informed her that she witnessed the incident and McMurrin testified that no employees informed her that they witnessed the incident (Tr. 315; RX 10, 11, 19). Furthermore, Respondent's attorney at the hearing did not seem to be aware that Halbert would claim that she witnessed this incident when she testified. (Tr. 484-5).

⁹ The January 16, 2012 memo mentions generally that Craft had allegedly undermined Turner but, during her testimony, Turner did not provide any specific details about any undermining conduct by Craft since his demotion from the lead position in July 2011. (Tr. 439-440). Turner admitted that she never produced any notes documenting the occurrences when Craft allegedly engaged in undermining behavior and was not asked by McMurrin to provide a statement for the investigation of Craft. (Tr. 467-8).

¹⁰ McMurrin testified that, in this part of the memo, she was referring to what she described as negative comments by Craft and his speeches and songs during the Minute to Shine. (Tr. 266-7, 274-6). McMurrin admitted that Craft never interrupted the leads during the pre-shift meetings and that he, like other employees, had permission to speak during the Minute to Shine portion of the pre-shift meeting. (Tr. 274-6).

F. January 20, 2012 Final Warning (Exceptions 6, 11 and 12)

On January 20, 2012, McMurrrian met with Craft and issued him a final written warning. (Tr. 79, 217). The final warning notice, prepared by McMurrrian, reads that Craft is being disciplined for several different reasons. McMurrrian first says that Craft has engaged in highly disruptive behavior in pre-shift meetings. (ALJD 7:25; GCX 6). The warning then reads that Craft was using harassing and intimidating language toward colleagues and management. (GCX 6). McMurrrian testified that this included the statements by Craft in and outside the pre-shift meetings to other employees about Respondent and that, to her, it “just seemed like [Craft] was working against what everybody was trying to do instead of trying to work with everyone there, with the supervisor, with the leads, with management.” (ALJD 7:30-33; Tr. 219, ll.13-16). The document also refers to the performance issues discussed above. (GCX 6). McMurrrian decided that, in addition to the warning notice, Craft would be transferred to the Professional department. (Tr. 221). McMurrrian testified that she informed Craft that he should stay away from Coleman’s work area after his transfer, but did not include this instruction in the warning notice. (Tr. 221, 224; GCX 6). Craft started work in the Professional department on the following day. (Tr. 90).

In her decision, the Judge states that the Professional department, where Craft was transferred, was “in an entirely different building.” (ALJD 7:38). The Judge likely based this finding on a statement by McMurrrian where she described the Professional department as being in a “totally different building.” (Tr. 221). However, the diagrams of Respondent’s facility placed in evidence at the hearing and the testimony of witnesses establishes that this finding is in error. A diagram, entered into evidence as Respondent’s Exhibit 13, shows that the departments operated by Respondent are all contained in one large warehouse and the departments are separated only by walls. (RX 13) Craft testified that, when he reported for work, he clocked in at

a time clock near the break room in the Consumer department, and then walked down an aisle that passes through Ballast to get to the Professional department. (Tr. 90-92; RX 13). The returns area where Coleman worked was in the Ballast department next to the main aisle. (GCX 17; RX 13). The Professional department and Ballast department were side-by-side in the warehouse, separated only by a wall. (Tr. 90-2; GCX 17; RX 13). The specific work area to which Craft was assigned to work in the Professional department was about 50 yards away from the entrance to the Ballast area. (Tr. 131). McMurrin admitted in her testimony, that by placing Craft in the Professional department, he would have to pass through the Ballast area every morning and afternoon using the main aisle through the facility. (Tr. 90-2, 285-7). In addition, McMurrin further admitted that, if Craft had an issue with his forklift or other equipment, he would have to use the recharging area, which is located directly across the main aisle from Coleman's work area. (Tr. 90-2, 225; GCX 17; RX 13). Thus, the instruction to stay completely out of Ballast and away from Coleman's work area was an effectively impossible demand placed on Craft by Respondent.

G. The January 24, 2012 Investigation of Craft (Exceptions 7 and 8)

McMurrin testified that, on January 24, she received reports from "multiple" employees that Craft was going into the Ballast area and making statements about his January 20 warning notice. (ALJD 8:1-3; Tr. 224-5; RX 14). In the decision, the Judge writes that McMurrin received reports that Craft had taken the forklift from the Professional department and had gone back into the Ballast work area. (ALJD 8:2-3).¹¹ The Judge states that Coleman testified that Craft came to her work area and, while sitting on his fork lift about 10 feet away from Coleman, bragged that McMurrin had done him a favor by moving him because he would no longer have

¹¹ As described below, only one employee, Coleman, actually made this claim to McMurrin. Despite her testimony that Halbert was present, Halbert does not corroborate Coleman's testimony.

to move the heavy ballasts and said he was untouchable. (ALJD 8:3-8, 13-14, 16-18). The Judge then states that both Coleman and Halbert testified that, when Craft came into the Ballast department, he showed his disciplinary warning to employees and spoke loudly. (ALJD 8:11-13). Finally, the Judge states that employee Fred Smith (who was an employee in the Professional department) informed supervisor Odum and McMurrin that Craft had shown his warning notice to him. (ALJD 8:18-19).

This description by the Judge of the evidence concerning McMurrin's investigation omits the entirety of McMurrin's January 24 memo which reflected the information she received during the investigation. (RX 14). The memo reads first that two employees, Coleman and Halbert, reported that Craft was showing his discipline form to other employees on the work floor and, "[t]hese employees are aware that disciplinary action forms are confidential information and should not be shared on the warehouse floor at anytime, much especially during working hours." (RX 14). McMurrin writes that both employees knew what was on the discipline form which confirmed that Craft had been showing other employees the form. (RX 14). McMurrin also writes that Coleman said she heard from other employees (who she refused to name) that Craft was stating that the discipline was because Coleman filed harassment charges against him. (RX 14).

In the second paragraph, McMurrin describes the incident where Coleman alleges that Craft drove into the Ballast area on his forklift and said, loud enough for everyone to hear him, that he was untouchable, that management had done him a favor by moving him out of Ballast and he would not have to pick up the heavy ballasts anymore. (RX 14). McMurrin also writes that, "Kim stated he was purposely showing the write-up which he knows is confidential information so it would get back to her like she was the blame." (RX 14).

McMurrian then writes that Halbert knew every word on the disciplinary form and that she said Craft had been showing it off to other people in the warehouse. (RX 14). McMurrian wrote that Halbert said a co-worker (who she refused to name) told her that Craft said, "I am glad I was moved, don't have to worry about lifting ballast." (RX 14). McMurrian then wrote that Halbert informed her that Markus Bernard said that something is wrong with Craft; that he worked with Craft somewhere else and Craft was a problem then; and that Craft had been fired from another job for the same problems. (RX 14).

Finally, McMurrian wrote that supervisor Odum approached Fred Smith because he had heard that Craft had shown his warning notice to Smith. (RX 14). Odum reported to McMurrian that Smith said Craft approached him during work time in the Professional department and showed him the discipline form. (RX 14).

The Judge's description of the events between January 20 and 24, 2012 also omits the full testimony of the witnesses at the hearing. Coleman testified that, on the day of his transfer, Craft came to the Ballast area on his forklift from the Professional department, stopped about 10 feet away from her work area and loudly made the statements described above. (Tr. 355-9). Coleman however also testified that Halbert was at the main station with her and Uma Jalloh was also present when Craft engaged in this conduct. (Tr. 359-60, 388). Coleman also testified that she believed that Markus Bernard was present and that Craft may have been speaking with Bernard when he made the statements. (Tr. 384). While the Judge wrote that Coleman testified that Craft showed his warning notice to employees when he returned to the Ballast area, Coleman did not ever make such a claim in her testimony.

As noted above, when McMurrian spoke with Halbert on January 24, 2012, Halbert told McMurrian that she had heard from another unnamed employee that Craft had said he was glad

he was moved and that he did not have to lift heavy ballasts anymore and that Markus Bernard witnessed and commented on Craft's behavior. (RX 14). At the hearing, Halbert testified that she recalled Craft, after he had been up in the office, was walking in the main aisle, waving a piece of paper and saying that the transfer to Professional was a slap on the back since he would not have to worry about ballasts anymore. (Tr. 495-6, 507-8). Halbert testified that, while not documented in the January 24, 2012 memo, she reported this information to McMurrin when McMurrin spoke with her during the investigation. (Tr. 508). Halbert also testified that former temporary employee Markus Bernard was present when Craft made this statement. (Tr. 499; RX 14). Finally, as with Coleman, Halbert did not testify at any point that she actually witnessed Craft in the Ballast department showing his warning notice to other employees.

The one employee identified by Coleman and Halbert as a person who allegedly witnessed Craft's conduct, Markus Bernard, testified at the hearing that, after Craft was transferred, he never witnessed Craft come to Ballast department and make any of the statements attributed to him by Coleman or Halbert. (Tr. 147-9). Bernard also testified that he did not make the statements attributed to him by Halbert. (Tr. 148-9). Bernard testified that he had never worked with Craft at any employer other than Respondent. (Tr. 148-9). Finally, Bernard testified that, if such an incident had occurred when he was not present, he would have heard employees discussing the incident as this was the type of situation about which employees would have discussed with him if he was not there when it occurred. (Tr. 147-8).

Craft, in his testimony, specifically denied that he went to the Ballast department after January 20 and made any loud statements about his warning notice or his transfer. (ALJD 11:44-12:1; Tr. 105-6). Craft testified that, after his transfer, he only went near the Ballast department when he was going to or coming from the Professional department or to go to the recharging area

for work issues related to his equipment. (Tr. 105-6). Craft testified that, on the days following January 20, he discussed and showed his warning notice to approximately 10 employees, including Willie Reel, Rainey McAdory, Darrell Leaks, and Uma Jalloh. (Tr. 92). Craft testified that he only discussed and showed the final warning notice before and after work and during break times. (ALJD 11:44-12:1; Tr. 92). Craft said that he also spoke with some employees while they waited in the Consumer area for the pre-shift meeting to start. (ALJD 11:44-12:1; Tr. 93). Craft testified that he told these employees that Respondent was trying to set him up to be fired for lies; that if it was happening to him, it also could happen to them; and that Kim Coleman was the employee claiming that he was harassing her. (Tr. 94-5).

In addition to discussing his warning notice with employees, Craft testified, without rebuttal, that on January 23, he contacted Ed Crawford, who Craft identified as the President of Respondent, by telephone and email. (Tr. 95-7). Craft said he discussed his situation with Crawford and informed him both in the telephone conversation and in an email early the following morning that management at the Memphis facility was harassing employees and that employees were afraid to speak out for fear of losing their jobs. (Tr. 96; GCX 5, p. 15).

H. Craft is Discharged on January 25, 2012

It is undisputed that, during her investigation on January 24, McMurrian did not attempt to meet with Craft to confront him with these allegations or give him a chance to respond. (Tr. 291). Instead, McMurrian made the decision to immediately discharge Craft. On January 25, McMurrian and Odum informed Craft that he was being discharged and then showed him the discharge notice McMurrian prepared. (Tr. 97-9; GCX 7). The warning notice reads that Craft is being discharged for disrupting the operations, sharing confidential documentation and information during working hours, and continuing to use intimidating language toward

management. (GCX 7). The warning notice goes on to read that Craft had been warned against these behaviors on January 20 when he received a final written warning and, when provided with a copy of the warning notice, “was informed of the confidentiality of the discussion and form during this meeting.” (GCX 7). Following receipt of this notice, Craft was escorted from the facility. (Tr. 97-9).

In her decision, the Judge does not specifically refer to the language of the discharge notice in describing the reasons for Craft’s discharge. (ALJD 8:21-26). Instead, the Judge states that McMurrin testified that Craft’s behavior was grounds for discharge for two reasons: Craft’s conduct on January 24 in the Ballast area and his prior conduct violated Respondent’s harassment free workplace policy and Craft disregarded her directive to stay out of the Ballast area after his transfer. (ALJD 8:21-26). Notably, neither of these reasons is specifically cited in the January 25 discharge notice. (GCX 7). McMurrin testified that her reference to Craft disrupting operations was that he was not in his work area during working hours and was disrupting others from doing their work when he went to the Ballast department and made statements about his final warning and transfer. (Tr. 228). McMurrin said that this also included the claim that Craft was discussing his final warning with employees during work time. (Tr. 228). McMurrin testified that the threatening statements toward management she referenced in the termination notice were the statements Coleman alleged that Craft made when he came to the Ballast department. (Tr. 228).¹² McMurrin also testified that the decision to discharge Craft was also based on his prior discipline on January 20, 2012 for similar reasons and because he was instructed to stay out of the Ballast department after his transfer. (Tr. 229).

¹² McMurrin claimed that the termination notice should have also included the term, “colleagues” and that her failure to include this was an error on her part. (Tr. 228).

IV. THE JUDGE'S CREDIBILITY FINDINGS ARE INCONSISTENT WITH AND CONTRARY TO THE RECORD EVIDENCE AND SHOULD BE OVERTURNED (Exceptions 1 and 2)

General Counsel recognizes that, pursuant to *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3 1951), it is well established that the Board is reluctant to overturn the credibility findings of an Administrative Law Judge especially when credibility findings are based on a judge's assessment of the demeanor of a witness. See *V&W Castings*, 231 NLRB 912, 913 (1977). However, the Board has held that where a judge's credibility resolutions are not based primarily on demeanor, the Board may proceed to an independent evaluation of credibility. *J.N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979). In addition, even where a judge's credibility findings are based on demeanor, such findings are not dispositive when the testimony is inconsistent with "the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *E.S. Sutton Realty Co.*, 336 NLRB 405, 407 fn. 9 (2001) (quoting *Humes Electric, Inc.*, 263 NLRB 1238 (1982)).

In her findings and conclusions, Judge Brakebusch relies primarily on the testimony of Respondent witnesses McMurrian, and to a lesser extent, Coleman and Halbert. The Judge also states that she found certain parts of Craft's testimony not credible, including specifically his denial that he went to the Ballast area on January 24 for any reason. As will be explained in detail in the following sections of this brief, the testimony of McMurrian is not supported by relevant evidence presented at the hearing. In addition, Coleman and Halbert provided inconsistent and contradictory testimony, especially concerning the alleged incident where Craft came to the Ballast area on January 24, which the Judge fails to reconcile.

Most importantly however, General Counsel presented testimony from three witnesses, Markus Bernard, Lexie Campbell, and Sherry Grey, which bears directly on the alleged

misconduct for which Respondent discharged Craft but the Judge fails to make any reference whatsoever to the names or testimony of any of these witnesses in her decision. In particular, Bernard, who was identified by both Coleman and Halbert as a witness to Craft's visit to the Ballast area on January 24, specifically denied that he witnessed Craft in the Ballast area on January 24, 2012 or on any other date following January 20, when Craft received his final warning. Campbell and Grey provided testimony concerning Craft's statements during pre-shift meetings and corroborated Respondent witness Lester Peete that Craft did not disrupt the meetings and that Craft made statements during the meeting which would constitute protected activity. Bernard, Campbell and Grey are all former temporary employees of Respondent through Adecco, which employs the temporary employees and maintains an on-site office at Respondent's facility. (Tr. 27, 135-6, 141-143, 154-6, 234-5). Bernard, Campbell and Grey testified without rebuttal that they had worked at Respondent's warehouse through Adecco on two separate occasions and none were discharged by Adecco at end of their second period of employment. (Tr. 27-8, 135-7, 154-6). While none of the three witnesses were current employees, all three at worked at Respondent's warehouse on two separate occasions and could potentially be rehired for additional periods of employment as temporary employees or hired as permanent employees by Respondent. The Judge's failure to discuss, consider or even reference the testimony of three witnesses, who were testifying against their own pecuniary interest was in error and provides an additional basis for overturning the credibility findings of the Judge. See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978) (where the Board stated that the testimony of a current employee against an employer is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest).

In *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57 (2011), the Board overturned the credibility findings of the administrative law judge where there was record evidence which contradicted the judge's findings and additional record evidence which the judge did not address in the decision. *Id.* at 5-6. In addition, while the judge in that case generally referenced demeanor, the judge did not specifically refer to the demeanor of any specific witnesses. *Id.* at 5; see also *El Rancho Market*, 235 NLRB 468, 470 (1978). In this case, the Judge's findings are directly contradicted by credible record testimony and evidence, these contradictions are not addressed by the Judge and the testimony of three witnesses, which is directly relevant to the issues in the case, is not addressed or discussed by the Judge in any manner. In addition, while the Judge makes a general reference to witness demeanor at the start of the decision, the Judge does not specifically refer to the demeanor of any specific witness as a basis for her credibility findings. Thus, the General Counsel requests that the Board overturn the credibility findings of the Judge and perform an independent evaluation of credibility in this case.

V. RESPONDENT MAINTAINED AND ENFORCED AN UNLAWFUL RULE PROHIBITING EMPLOYEES FROM DISCUSSING DISCIPLINE WITH OTHER EMPLOYEES (Exception 9)

In her decision, the Judge dismissed the complaint allegation that, since January 19, 2012, Respondent maintained a rule that discipline is confidential and prohibited employees from sharing and/or discussing their discipline with their coworkers. (ALJD 9-11). The Judge correctly recognizes that Respondent's employee handbooks do not contain any rule or policy which provides that discipline is considered confidential or that prohibits employees from discussing discipline with other employees. (ALJD 9:44-45; GCX 2). The Judge also notes that Craft testified that he does not recall being told on January 20 that the discharge notice was confidential and that he was not aware of any policy prohibiting employees from discussing

discipline with other employees. (ALJD 10:1-6; Tr. 127). The Judge further states that McMurrin testified that Respondent does not have a policy prohibiting employees from discussing disciplinary notices. (ALJD 9:46-10:1; Tr. 174). The General Counsel asserts that, despite this testimony, the evidence supports a finding that Respondent maintained and enforced an informal or unwritten rule which provided that discipline forms were confidential and which prohibited employees from showing or discussing their discipline with coworkers. The Judge's decision on this issue is in error for several different reasons.

In her decision, Judge Brakebusch writes that “[d]espite the testimony of both McMurrin and Craft, the General Counsel nevertheless asserts that Respondent unlawfully implemented a policy prohibiting the discussion of discipline on January 19.” (ALJD 10:8-10). The Judge later states that, “...there is no credible record evidence that Respondent told employees on January 19, 2012, that they were prohibited from sharing and/or discussing their discipline with coworkers as alleged in complaint paragraph 4.” (ALJD 10:46-11:2). Finally, the Judge states that she did not find sufficient evidence that “Respondent told Craft or any other employees on January 19, 2012, that they were prohibited from discussing their discipline with employees.” (ALJD 11:14-16). The Judge misstates both the allegation as contained in paragraph 4 of the complaint and the General Counsel's position concerning this allegation. The General Counsel does not assert or argue that Respondent implemented the alleged unlawful policy on January 19, 2012 or that Respondent told or informed employees on January 19, 2012 about a policy prohibiting them from discussing discipline with coworkers. Instead, the General Counsel argues that, as evidenced by the written statements of McMurrin in the January 24, 2012 investigation memo and Craft's January 25, 2012 discharge notice, and Respondent's decision to discharge Craft, in part, for sharing confidential documentation and information with

coworkers, the evidence establishes that Respondent **maintained** this unlawful rule and/or enforced this rule against Craft. The Judge's finding that there was insufficient evidence to show that Respondent implemented and informed employees about this policy on January 19, 2012 are in error and should be reversed.

The General Counsel does assert that, despite McMurrin's denials, the January 24, 2012 investigation memo prepared by McMurrin and the January 25, 2012 discharge notice also prepared by McMurrin establish that Respondent maintained and enforced against Craft an unwritten rule that disciplinary notices are confidential information and which prohibits employees from discussing discipline with other employees. McMurrin wrote in the January 24 investigation memo, "These employees are aware that Disciplinary action forms are confidential information and should not be shared on the warehouse floor at anytime, much especially during working hours." (RX 14). McMurrin also wrote, in this same memo, "[Coleman and Halbert] told me what was in the write-up, which confirmed he had to be showing the other employees the form." (RX 14). Finally, Craft's January 25 discharge notice, prepared by McMurrin, reads that Craft was discharged in part for "sharing confidential documentation and information" with other employees and that, after he was provided a copy of the January 20, 2012 final warning, Craft was informed of the confidentiality of the discussion and discipline form. (GCX 7).

Concerning the statements in the January 24 investigation memo, McMurrin testified that Coleman was the person who raised the issue of confidentiality in relation to Craft discussing his discipline with co-workers and she understood that Coleman did this because Coleman thought discipline is confidential. (Tr. 289). Coleman testified that she informed McMurrin that she thought discipline forms were confidential because she thought employees should keep this information to themselves. (ALJD 10:30-34; Tr. 386). Coleman also testified

that, when she informed McMurrin that Craft was discussing his discipline with other employees, McMurrin told her only, “Why would he want to do that? Why would he want to show that?” (ALJD 10:34-38; Tr. 387-8). Coleman said that McMurrin did not inform her that employees are free to discuss discipline with co-workers or correct Coleman’s misunderstanding. (ALJD 10:34-38). McMurrin did not provide any testimony concerning her direct response to Coleman when Coleman provided her with this information.

From this testimony, the Judge concludes that Coleman was the individual most concerned with Craft’s actions in telling employees about his discipline. (ALJD 10:40-41). The Judge then states that, while McMurrin may have referenced in the January 24 memorandum that Craft showed his disciplinary notice to employees and that Coleman raised the confidentiality of the discipline, this evidence does not support a finding that Respondent told employees on January 19, 2012 that they were prohibited from sharing or discussing discipline with co-workers. (ALJD 10:44-11:2).¹³ However, this conclusion ignores McMurrin’s own words as contained in the January 24 memo. McMurrin wrote, “These employees **are aware** that discipline forms are confidential and **should not be shared** on the warehouse floor, at anytime. (RX 14)(emphasis added). McMurrin did not state that employees “believed” or “thought” discipline forms were confidential and should not be shared with co-workers; instead she wrote that they were “aware” of the confidentiality of the discipline forms. McMurrin also wrote that Coleman said Craft was “purposely showing the write-up which he **knows** is

¹³ Throughout this section and other sections of her decision, the Judge repeatedly states that witnesses claimed that Craft returned to the Ballast area on January 24 where he made the comments attributed to him by Coleman and that he showed his warning notice to employees on that same date. (See ALJD 8:22, 8:42, 10:45, 11:41-42, 12:3-4, 12:20, 12:27, 13:9, 15:10, 15:14-15; 15:27) This misstates the testimony of the witnesses. Both Coleman and Halbert testified that Craft made the comments about his warning notice in the Ballast area on the same date he received the discipline, January 20, and Fred Smith’s statement to Odum did not identify the date when Craft allegedly came to him and showed him the discipline form. (Tr. 355, 494-5; RX 14). Craft testified that he showed his warning notice to employees over the course of the five days prior to his discharge. (Tr. 92-95). As explained later in this brief, this misunderstanding of the facts to which the witnesses testified motivated and influenced the Judge’s finding that Craft’s testimony on this issue was not credible.

confidential information...” (RX 14) (emphasis added). Again, McMurrian states that Coleman knew the document was confidential and did not state that Coleman mistakenly believed or thought it was confidential. Lastly, McMurrian never took any steps to correct Coleman or Halbert’s alleged misunderstanding concerning the confidentiality of the discipline forms. The statements as written by McMurrian on January 24 go beyond a reference to Coleman raising the confidentiality of the discipline forms and instead reflect McMurrian’s understanding that discipline forms are confidential and that Craft was engaged in misconduct when he shared the January 20 discipline form and details of the discipline meeting with other employees.

As to the January 25, 2012 discharge notice, where McMurrian wrote that Craft was being discharged in part for sharing confidential documentation and information during work hours and that Craft was informed of confidentiality of the form and discussion during the January 20 meeting, the Judge found that this document also does not support a finding that Respondent maintained an unlawful rule. (ALJD 11:4-19; GCX 7). In finding that the January 25 discharge notice does not provide sufficient evidence that Respondent implemented or established an unlawful rule on January 19, the Judge only discusses the statement that Craft “was informed of the confidentiality of the form and discussion,” while ignoring that Craft was specifically disciplined because he “shared confidential documentation and information” with co-workers. (ALJD 11:4-19; GCX 7). The Judge states that McMurrian testified that she included the reference to Craft being informed of the confidentiality of the final warning form and discussion on Craft’s discharge notice because Craft asked, in the January 20 discipline meeting, if the Employer would keep his discipline confidential. (ALJD 11:6-9).¹⁴ McMurrian testified that she simply reassured Craft that “our discussion was in confidence in that room,”

¹⁴ Craft testified that he did not recall asking this question or being told by McMurrian that managers and supervisors would keep his discipline confidential. (Tr. 133).

and “we don’t go out and talk about his disciplinary action on the floor.” (Tr. 290-1).¹⁵ The Judge states that, because Craft did not testify that McMurrin told him that his final warning was confidential, it is reasonable to find that McMurrin simply assured Craft that managers and supervisors would keep the discipline confidential and this was the reason that she included this statement in his discharge notice. (ALJD 11:9-14).

McMurrin’s testimony and the Judge’s finding on this issue are reasonable only if McMurrin’s statement that Craft was provided with a copy of the warning and was informed of the confidentiality of the form and discussion are taken out of context. Quite simply, if McMurrin’s testimony is assumed to be true, there was no logical reason for McMurrin to put this statement on Craft’s discharge notice as it serves no purpose to inform Craft or any reviewing official why Craft was discharged. The issue of whether managers and supervisors would keep the discipline confidential is completely irrelevant to the reasons for Craft’s discharge. However, when properly considered in context with McMurrin’s statement that Craft was being discharged in part for revealing confidential documentation and information, the inclusion of this information becomes obvious: Craft was, according to the preparer of the discharge notice, told that the January 20 final warning and the information discussed in the discipline meeting was confidential and, by sharing this information with other employees, violated this policy or directive.

Under the Act, employers may not lawfully prohibit employees generally from engaging in protected concerted activity by discussing discipline with other employees. *Cellco Partnership d/b/a Verizon Wireless*, 349 NLRB 640, 658 (2007); *SNE Enterprises, Inc.*, 347 NLRB 472, 492

¹⁵ McMurrin did not explain why, if Craft was the person concerned about the confidentiality of the final warning, his discussion of the final warning with other employees was a basis for discipline or why she felt it necessary to reiterate in the discharge notice that Craft was informed about the confidentiality of the January 20 final warning and the matters discussed in the January 20 discipline meeting.

(2006); *Westside Community Mental Health Center, Inc.* 327 NLRB 661, 666 (1999). Based on the evidence presented, the documents prepared by McMurrian are clear in their meaning and intent: While Respondent did not have a written rule that discipline was confidential information and not to be discussed with other employees, she and management at the Memphis facility maintained such rules and enforced these rules against Craft by discharging him for discussing his discipline with other employees. Thus, the Judge's finding that Respondent did not maintain an unlawful rule which provided that discipline was confidential and that employees were not permitted to share or discuss discipline with co-workers should be reversed. In addition, as the documents establish that Craft was discharged because of Respondent's enforcement of this unlawful rule, Craft's discharge should also be found to be an unlawful enforcement of this rule.

VI. RESPONDENT UNLAWFULLY DISCHARGED LEE CRAFT BECAUSE OF HIS PROTECTED CONCERTED ACTIVITY (Exceptions 10-18)

In her decision, Judge Brakebusch utilized a *Wright Line* analysis to determine whether Craft was discharged because of his protected concerted activities. In cases where the employer's motivation for a personnel action is in issue the Board utilizes the test outlined in *Wright Line*, 251 NLRB 1083 (1980) *enfd.*, 662 F.2d 800 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982). To establish a violation under *Wright Line*, the General Counsel bears the initial burden of showing that protected concerted activity was a motivating or substantial factor in the adverse employment action. The three elements commonly required to support such a showing are: (1) the employee engaged in protected concerted activity; (2) the employer had knowledge of that activity; and (3) the adverse action taken against the employee was motivated by the activity. *Case Farms of North Carolina*, 353 NLRB 257 (2008). If these elements are met, the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Id.* If, however, the

evidence establishes that the reasons given for the employer's action are pretextual - that is, either false or not in fact relied upon - the employer fails by definition to show that it would have taken the same action for those reasons, and no further analysis is required. *SFO Good-Nite Inn*, 352 NLRB 268, 269 (2008).

A. While the Judge Correctly Found that General Counsel Met Its Burdens Under *Wright Line*, the Judge's Factual Findings to Support This Conclusion Are Incomplete and In Error (Exceptions 7, 8, 10-2, and 14)

In this case, the Judge correctly found that Craft, by discussing his discipline with co-workers, was engaged in protected concerted activity. (ALJD 11:6-13). The Judge also correctly found that Respondent was aware of Craft's protected activity or believed that he had engaged in protected activity. (ALJD 12:18-29). Lastly, the Judge correctly found that Craft's discharge was motivated in part by discussing his January 20 final warning with co-workers. (ALJD 13:8-13). Despite these correct legal findings, the facts on which the Judge bases her findings are in error as she misstates the evidence as presented at the hearing.

As noted previously in footnote 13, throughout her decision, the Judge repeatedly states that the conduct cited by Respondent as the basis for Craft's discharge occurred on January 24, 2012 and that this finding is supported by the credible testimony of Coleman and Halbert. (See ALJD 8:22; 8:42; 10:45; 11:41-42; 12:3-4; 12:20; 12:27; 13:9; 15:10; 15:14-15; and 15:27). This misstates the testimony of the witnesses. Both Coleman and Halbert testified that Craft made the comments about his warning notice in the Ballast area on the same date he received the January 20 final warning. (Tr. 355, 494-5). Coleman testified that, on the day Craft allegedly drove his forklift back to the Ballast area and made loud comments about his discipline and transfer, "he had got a wrote-up this particular day." (Tr. 355, ll. 14-15). Halbert testified that Craft had been up in the office and was carrying a piece of paper when he commented about his transfer to Professional. (Tr. 494-5). Neither witness directly testified that any of this conduct

actually occurred on January 24. Furthermore, the January 24 investigation memo does not state that Coleman claimed that Craft returned to Ballast on his forklift on January 24; instead, it merely reports what she claims Craft had done without specifying the date on which the conduct took place. (RX 14). In addition, in the January 24 memo, neither Coleman nor Halbert identify any date when Craft was observed in Ballast speaking with other employees about his final warning and neither testified at the hearing that they ever personally observed Craft on any date showing his warning notice to employees. Lastly, Fred Smith's statement to supervisor Odum, as documented in the January 24 memo, does not identify the date when Craft allegedly came to him and showed him the discipline form and neither Smith nor Odum testified at the hearing. (Tr. 355, 494-5; RX 14). While McMurrian, in her testimony, says that the incidents documented in the January 24 memo occurred on that same day, her assertions about the date are not supported by any of the other testimony or evidence presented at the hearing. Thus, the Judge's finding that all of the actions which Respondent asserts formed the basis for its decision to discharge him occurred on January 24 is contradicted by evidence as presented at the hearing, including Respondent's own witnesses.

To briefly summarize the Judge's factual basis for finding that the General Counsel met its *Wright Line* burdens, the Judge found that, on January 24, 2012, Craft returned to the Ballast area and made loud comments close in proximity to Coleman and spoke with other employees about his discipline. (ALJD 11:35-12:4). The Judge states that, by speaking with other employees about his discipline on that date, Craft was engaged in protected activity. (ALJD 12:6-13). The Judge then states that, even though Craft denied going to the Ballast area on January 24 (which the Judge characterizes as a denial that he engaged in protected activity on that date), Respondent reasonably believed that he had returned to the Ballast area on January 24

and engaged in protected activity. (ALJD 12:17-29). The Judge then states that, because McMurrin identified Craft's discussion of his final warning with co-workers in her January 24 memo and the January 25 discharge notice, Craft's protected activity was a motivating factor in his discharge. (ALJD 12:33-13:13).

As explained at length in this brief, the Judge's factual findings concerning Craft's protected activity are contrary to and not supported by the evidence presented at the hearing. First, Craft not only engaged in protected activity following his January 20, 2012 final warning but had been engaging in protected activity for an extended period of time prior to that date. The witnesses at the hearing testified that Craft had repeatedly spoken with employees about what he perceived to be problems at the facility directly related to the way the facility was managed by McMurrin, Turner and the other supervisors. In one instance, he told lead employee Edwards that he was going to start making changes around the facility and employees should not have to "kiss butt to move up the ladder." (RX 16). Respondent witness Lester Peete testified that, in the pre-shift meetings during the Minute to Shine, Craft spoke about doing what he had to do to make some changes and make things better around the facility and that employees had to work together and look out for each other. (Tr. 415, 422-3; RX 18). Also, in his emails to Respondent human resources representative Dwivedi and President Crawford, Craft wrote about unfair and abusive treatment toward employees by Turner, McMurrin and other supervisors at the Memphis facility. (GCX 5). Craft's actions in showing and discussing his January 20, 2012 final warning with other employees on non-work time were merely an extension of his earlier protected activities.

Second, Respondent was aware that Craft had engaged in these protected activities, as demonstrated by McMurrin's testimony and the documentary evidence presented at the hearing.

In his first email to Dwivedi on October 30, 2011, Craft raised allegations of mistreatment against him and other employees by McMurrin and Turner. (GCX 5, p.1). Respondent was also aware of Craft's statements during the Minute to Shine, as demonstrated by the statement McMurrin secured from lead employee Lester Peete on January 3, 2012. (RX 18). McMurrin also testified that employees had reported to her about Craft's statements and songs during the Minute to Shine in 2011 (Tr. 275-6). Turner testified that she was also aware of Craft's statements during the Minute to Shine during 2011. (Tr. 466-7). During her investigation of Craft starting in December 2011, McMurrin, after receiving information from Coleman, spoke with lead employee Antonio Edwards, who confirmed that Craft said that he was going to start making some changes there and make it so employees do not have to kiss butt to move up the ladder. (RX 11, 16). McMurrin testified that she found that comment and others by Craft to be negative, demoralizing and evidence that he was working against Respondent. (Tr. 269-70; RX 11). Finally, as discussed above, Respondent was aware that Craft was discussing his January 20, 2012 final warning with other employees on dates between January 20 and January 24, 2012.

Lastly, the evidence establishes that Respondent's decision to discharge Craft was motivated by his protected activities. McMurrin's January 24 memo places the greatest emphasis on the allegations that Craft was discussing his warning notice with other employees on unspecified dates after January 20, 2012. (RX 14). As McMurrin stated in the memo, "They told me what was in the write-up, which confirmed he had to be showing the other employees the form." (RX 14). Then, in his discharge notice, McMurrin wrote that Craft was being discharged, in part, for "sharing confidential documentation and information" with other employees. (RX 14).

The evidence in the record further proves that Respondent's decision to discharge Craft was motivated by its demonstrated animus toward Craft's prior protected activities. In the January 16, 2012 memo recommending Craft's discharge, McMurrin wrote that "the comments he was making in the pre-shift meetings and to other employees were being perceived as him working against the company and were threatening in nature." (RX 11). McMurrin said the comments, including, "we have to stop this now," and "we do not need to kiss butt to move up the ladder," were negative, intimidating and demoralizing. (RX 11). McMurrin states that these comments to employees and during meetings are intended to undermine the efforts of the company and management team and are unacceptable. (RX 11). McMurrin then states that Craft was disrupting and interrupting operations by his comments during the pre-shift meetings. (RX 11). Then, in the January 20, 2012 final warning, McMurrin writes that Craft is being disciplined for his "highly disruptive behavior in pre-shift meetings" and his intimidating behavior towards management. (GCX 6). From this document and McMurrin's testimony, the January 20, 2012 final warning was motivated by Craft's protected activities prior to January 20, 2012.

The January 20, 2012 final warning was not alleged as unlawful in the complaint as no charge was ever filed by Craft raising this allegation. On this issue, the General Counsel would ask the Board to take note that the original charge in this case was not filed by Craft until July 19, 2012, immediately prior to the expiration of the 10(b) six-month period for filing charges. However, even when the Board may be unable to remedy unfair labor practices established by the record evidence but which are time-barred pursuant to Section 10(b) of the Act, the Board may still rely on evidence of the time-barred unfair labor practices to show a history or pattern of animus by an employer toward employee Section 7 rights. The Supreme Court held that, "When

occurrences with the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices...earlier events [occurring outside the six-month limitations period] may be utilized to shed light on the true character of matters occurring within the limitations period,” and Section 10(b) “does not bar...evidentiary use of anterior events.” *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411, 416 (1964); see *Monongahela Power Company*, 324 NLRB 214 (1997); *Commercial Cartage Company*, 273 NLRB 637, 647 (1984). In this case, the Judge was in error by finding that there was no evidence that Craft had engaged in any protected activity prior to January 20, 2012; by failing to find that Respondent had demonstrated animus toward Craft because of his protected activities prior to January 20, 2012; and by failing to find that his January 20, 2012 final warning was motivated by his protected activities. (ALJD 14:20-22, 15:10-12).

B. The Judge Incorrectly Determined that Respondent Would Have Discharged Craft in the Absence of his Protected Activity (Exceptions 12-18)

Despite her finding that Craft’s discharge was motivated by his protected activity, the Judge found that Respondent met its burden to show that it would have discharged Craft in the absence of his protected activity. (ALJD 13-16). The Judge first writes that, on January 16, 2012, McMurrian and the other management personnel had made a joint decision to discharge Craft for several different reasons. (ALJD 13:23-14:11). The Judge writes that, in the January 16 memo recommending Craft’s discharge, McMurrian stated that Craft had engaged in intimidating and harassing behavior towards Coleman and management; that supervisor Turner reported that Craft had repeatedly attempted to undermine and belittle her decisions and demonstrated a lack of respect for her; and that he had interfered with operations and engaged in disruptive behavior by his statements during pre-shift meetings and to other employees. (ALJD 13:23-35). As noted in the previous section, this first decision to discharge Craft (which led to

his January 20, 2012 final warning) was motivated in large part by Craft's protected activities. The evidence also establishes that the other reasons cited by McMurrin in the January 16 memo were pretextual and not supported by any credible or corroborated evidence. As explained at length earlier in this brief, Coleman's allegations of harassment by Craft were either discredited (including her claims that Craft was recording her conversations or photographing her work) or not corroborated (including her claim that Craft said she needed to get on her knees and apologize to him) at the time of the investigation.¹⁶ As to Coleman's claims of general harassment, neither Coleman nor Halbert ever provided any specific details about these incidents or dates when the incidents occurred. As to Turner's claim that Craft belittled and undermined her, the only specific examples offered by Turner in her testimony to support this claim were that Craft would not come to her with complaints and was going directly to McMurrin and Dwivedi (which Craft had been directed to do after making complaints through Respondent's employee hotline). Turner testified that she never documented any incident where Craft belittled and undermined her. McMurrin testified that she did not document her interview with Turner for the investigation of Craft. (Tr. 439, 467-8).

The Judge then notes that Respondent did not discharge Craft as intended because it had not first issued him a final warning. (ALJD 14:13-22). The Judge states that the January 20, 2012 final warning reads that Craft was being issued the discipline because of his highly disruptive behavior in pre-shift meetings; because of his harassing and intimidating behavior toward colleagues and toward management; because "several" employees had reported feeling threatened and two performance issues for incidents on January 4 and January 16. (ALJD 14:16-

¹⁶ Recall that at the time of the investigation, Halbert's claim that she witnessed this incident was not documented by McMurrin and McMurrin testified only that Halbert informed her that she found out about the incident after Coleman told her what had happened. Only at the hearing did Halbert suddenly recall for the first time that she witnessed the incident.

22). Again, as established in the previous section, this final warning was motivated in large part by Craft's protected activity and the claims that employees felt threatened are not supported by the evidence. As to the performance issues, considering that these were not referenced or cited by McMurrin in her January 16, 2012 memo recommending Craft's discharge, these incidents were not part of the stated reasons for the original decision to discharge Craft. (RX 14).

The Judge then writes that, even though McMurrin wrote that Craft was being discharged in part because he shared confidential documentation and information with other employees, Respondent would have discharged Craft in any event for the other reasons as stated in the discharge notice. (ALJD 14:30-40). The Judge states that McMurrin credibly testified that Craft was discharged because he disrupted the operations, used intimidating language toward management and violated her unwritten instructions when he returned to the Ballast area on January 24 to make comments near Coleman and show his warning notice to employees in the Ballast area. (ALJD 14:42-45). As explained previously, the Judge's finding that all of Craft's alleged misconduct occurred on January 24 is not corroborated by Respondent's other witnesses or any documentary evidence and was in error. In addition, while Coleman claimed that both Halbert and Markus Bernard witnessed Craft's actions in the Ballast area, Halbert did not corroborate Coleman's version of events in any manner and Markus Bernard, whose testimony was ignored by the Judge, specifically denied that the incident occurred. Also, neither Coleman nor Halbert testified that they witnessed Craft in the Ballast area showing or discussing his warning notice with employees and McMurrin did not document that either witness saw Craft showing his warning notice to employees in the Ballast area. (RX 14). Lastly, Fred Smith, the only individual who claimed that Craft showed him the final warning during working time, did not testify at the hearing and Respondent did not present other evidence to authenticate Smith's

signature on the January 24, 2012 memo. Thus, the reasons cited by McMurrin for Craft's discharge were either unlawful or not supported by the record evidence and thus pretextual.

The Judge then states that McMurrin's decision to discharge Craft is also supported by the statement in the discharge notice which reads that Craft "received a final written disciplinary notice warning against these exact behaviors on 1/20/2012," where Craft was disciplined for disruptive behavior and intimidating behavior toward colleagues and management. (ALJD 14:44-15:2). The Judge concludes that Craft's conduct on January 24 was consistent with the conduct on which Respondent based its earlier decision to discharge him on January 16 and which occurred prior to any protected activity. (ALJD 15:8-12). Again, as explained previously, the record evidence establishes that Craft had engaged in protected activity prior to January 16, 2012; that Respondent was aware of this prior protected activity; that Respondent decided to discharge and issue a final warning to Craft because of this protected activity; and the other reasons cited by McMurrin in her January 16, 2012 memo as a basis for discharging Craft were pretextual.

The Judge then states that, because Craft denied that he returned to the Ballast area on January 24, the General Counsel is "forced to argue that Craft discussed his discipline with employees during the period between January 19, 2012 and January 24, 2012." (ALJD 15:14-18). The Judge notes that "neither McMurrin's memorandum of January 24, 2012 nor Craft's termination notice reference any dates of alleged misconduct other than January 24, 2012." (ALJD 15:19-20). The Judge concludes, based on the documentary evidence, McMurrin's testimony and the information provided by other employees, McMurrin determined that Craft disregarded her instructions to stay out of the Ballast department and that he was engaging in the same conduct for which he had previously been warned. (ALJD 15:20-25). However, as

explained previously, the January 24 memo, except for a reference to the date at the top of the page, does not specify that Coleman, Halbert or Smith informed McMurrin that Craft's actions took place on January 24. In addition, both Coleman and Halbert testified at the hearing that the alleged incident where Craft made comments about his warning occurred on the date he was disciplined and transferred to the Professional department, identified as January 20. In addition, neither Coleman nor Halbert testified at the hearing that they personally witnessed Craft in the Ballast department on January 24 or any other date discussing his warning notice with other employees. Lastly, Smith did not testify at the hearing and McMurrin did not testify that she spoke directly with Smith about claim that Craft discussed his warning notice with Smith during working hours in the Professional department. In sum, the only evidence to support the Judge's conclusion that Craft was in the Ballast area on January 24 is McMurrin's assertion that the events described in her January 24 memo occurred on that date and McMurrin's notation on the January 25 discipline form, under "Date of Incident" that the incident occurred on January 24. Thus, the Judge's finding that Craft returned to the Ballast department on January 24 is not supported by the credible evidence and is actually contradicted by two of Respondent's own witnesses.

The Judge goes on to note that, when Craft discussed his discipline with other employees, on January 24 or any other date, he informed employees that Coleman was the accuser who as responsible for his discipline and transfer. (ALJD 15:35-36). The Judge states that, by informing employees about Coleman's identity, he was going beyond and arguably motivated to accomplish more than "simply sharing what Respondent had done to him." (ALJD 15:29-32, 34-36). The Judge concludes that, as Coleman perceived the revelation of her name to other employees as additional harassment, it was reasonable for McMurrin to determine that Craft

was again harassing Coleman and engaging in the same conduct for which he had previously been disciplined. None of Respondent's witnesses testified at the hearing, or claimed during McMurrin's investigation, that Craft threatened, disparaged or attempted to incite employees to retaliate against Coleman when he revealed her name. In addition, the Judge does not argue that, by revealing Coleman's identity to other employees, Craft engaged in any conduct which would cause him to lose the protection of the Act. In this case, Craft's revelation of Coleman's name to other employees when he discussed his January 20 final warning with them was part and parcel of his protected activity. Respondent's decision to discipline Craft in part because he told other employees the name of his accuser would thus also violate the Act.

The Judge then references the Supreme Court's decision in *NLRB v. Burnip & Sims, Inc.*, 379 U.S. 21, 22 (1964), where the Court held that that an employer violates the Act if it is shown that a discharged employee engaged in protected activity, the employer knew it was protected activity, that the employee engaged in an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of the misconduct. The Judge then notes that the Court held that an employer's honest belief that an employee engaged in misconduct when also engaged in protected activity provides a defense to a charge of discrimination absent a showing that the employee did not, in fact, engage in the alleged misconduct. *NLRB v. Burnip & Sims, Inc.*, 379 U.S. at 22; *Westinghouse Electric Corp.*, 296 NLRB 1166, 1173 (1989). The Judge states that the evidence in this case is not sufficient to establish that Craft did not engage in the misconduct reported to McMurrin by other employees and which Respondent asserts was the basis for Craft's discharge. (ALJD 15:41-16:3). However, as explained above, the evidence presented at the hearing demonstrates that Craft did not engage in the misconduct attributed to

him by Respondent and that the Judge's conclusion that the General Counsel presented insufficient evidence to show that he did not engage in misconduct is in error.

The evidence also establishes that Respondent did not have an honest belief that Craft actually engaged in the misconduct attributed to him. Respondent, by McMurrin, had already demonstrated hostility toward Craft's protected activity by disciplining him on January 20, 2012 for complaints Craft expressed to other employees which McMurrin testified were negative, demoralizing and seen as working against Respondent and its management team. Then, when faced with accusations that Craft had engaged in additional misconduct which could lead to his discharge, McMurrin engaged in a sham investigation of Craft. Following reports of misconduct by Craft, McMurrin spoke directly only with Coleman, who had made prior spurious accusations against Craft, and Halbert, Coleman's close friend and confidante. McMurrin made her decision to discharge Craft solely on the allegations made by Coleman and Halbert and a second-hand report from supervisor Odum. McMurrin admitted that she did not inform Craft about the accusations against him or provide him with an opportunity to explain or deny the alleged misconduct. Despite Halbert informing McMurrin that Markus Bernard allegedly observed Craft's conduct, McMurrin did not attempt to question Bernard about Craft. In addition, McMurrin did not attempt to speak with any other employee or temporary employee working in the Ballast area to corroborate the claims made by Coleman and Halbert. The Board has held, "The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain" are clear indicia of discriminatory intent. *Bantek West, Inc.*, 344 NLRB 886, 895 (2005) citing *K&M Electronics, Inc.*, 283 NLRB 291 fn. 45 (1987). The Board has further held that an employer's failure to conduct a fair or meaningful investigation or provide the accused an opportunity to respond to

Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PHILIPS ELECTRONICS
NORTH AMERICA CORPORATION

and

Case 26-CA-085613

LEE CRAFT

ORDER DENYING MOTION¹

On August 14, 2014, the National Labor Relations Board issued its Decision and Order in the above-captioned proceeding,² in which it found, among other things, that the Respondent did not violate Section 8(a)(1) by terminating the employment of Charging Party Lee Craft. Thereafter, the Charging Party filed a motion for reconsideration of the Board's decision in this regard. Assuming, without deciding, that the Charging Party has complied with the Board's Rules and Regulations,³ and having duly considered the matter, we find that the Charging Party has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.

IT IS ORDERED, therefore, that the Charging Party's motion for reconsideration is denied.

Dated, Washington, D.C., November 25, 2014

Philip A. Miscimarra, Member

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² 361 NLRB No. 16.

³ Cf. *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 1 fn. 1 (2014) (considering pro se Charging Party's exceptions even though they did not comply fully with the Board's Rules and Regulations).