

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

McCARTHY LAW PLC

and

Case 28–CA–175313

KEVIN WAYNE HARDIN, an Individual

and

Case 28–CA–181381

DANIELLE RAE JONGEWAARD, an Individual

Lisa J. Dunn, Esq., for the General Counsel.
Kerry S. Martin, Esq., for McCarthy Law PLC.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. The General Counsel alleges that two individuals¹ were discharged by McCarthy Law PLC (Respondent) in retaliation for their protected, concerted activity.² In addition, the General Counsel alleges that employee concerted activity was the object of spying, interrogation, unlawful rules, and threats.³

Respondent is a law firm located in Scottsdale, Arizona. It specializes in debt settlement. The firm was founded in 2010 by managing partner Kevin McCarthy (McCarthy). In 2016, eight attorneys⁴ and several paralegals were employed under the direction of Ashley Tuchman (Tuchman), director of litigation. Paralegal Hardin, whose suspension and discharge are in dispute here, reported to Tuchman.

Marketing manager Todd Westover (T. Westover) runs the client acquisition team. His sister Kelli Westover (K. Westover) is supervisor of the client acquisition team. Intake specialist Jongewaard, whose written warning and discharge are at issue, reported to K. Westover.

¹ These individuals are Kevin Wayne Hardin (Hardin) and Danielle Rae Jongewaard (Jongewaard). Hardin filed the unfair labor practice charge and amended charge in Case 28–CA–175313 on May 2 and 4, 2016, respectively. Jongewaard filed the charge in Case 28–CA–181381 on August 1, 2016. The consolidated complaint was issued on October 6, 2016, and was amended further at hearing.

² An alternate legal theory for Hardin’s discharge is that he was allegedly discharged as a result of unlawful surveillance of his email. (Par. 4(z)). An alternate theory for Jongewaard’s discharge alleges that she was discharged for violation of an unlawful rule. (Par. 4(v)).

³ The hearing was held in Phoenix, Arizona on various dates in October 2016 and February 2017. The parties agree that the Board has jurisdiction of these consolidated cases.

⁴ One attorney, Garrett Charity, worked from Los Angeles. The other attorneys worked in Scottsdale.

Respondent’s operations team is composed of McCarthy; Tuchman; T. Westover; K. Westover; as well as Joan Dibella (Dibella), senior negotiator; office and human resources manager Alyda Dickson (Dickson), who is McCarthy’s sister; and Melissa Radabaugh (Radabaugh), manager of litigation support.⁵ The operations team meets on a weekly basis to discuss administrative matters such as hiring, departures, success in signing new clients, settlements for the week, status of cases in litigation, and special projects.⁶

On the record as a whole,⁷ and after thorough consideration of briefs filed by the General Counsel and Respondent, the following findings of fact and conclusions of law are made.

I. Discharge of Hardin; Alleged Threats, Interrogation,
Surveillance, Impression of Surveillance
Case 28–CA–175313

A. Facts

1. Background

Hardin began working for Respondent in April 2013 as a paralegal. On April 26, 2016, he was discharged. Consistent with Respondent’s practice, no reason for the discharge was given at the time Hardin was fired. The stated reason at hearing was violation of Respondent’s moonlighting prohibition. No other reason was proffered at any time. The General Counsel urges, however, that Hardin was discharged because of his protected concerted activity or alternatively as the result of unlawful surveillance of his work email account.

When Hardin was originally hired in April 2013, he supervised one employee. Hardin’s job duties at that time involved reaching out to potential clients in the mortgage mediation practice regarding “short sales” of property.⁸ In January 2016, Hardin’s job was changed. From that time forward, Respondent did not consider Hardin to be a supervisor. Rather, he occupied a

⁵ Radabaugh initially worked in Scottsdale but currently works from the Denver, Colorado area.

⁶ With the exception of Radabaugh, who is not alleged to be a supervisor or agent, the parties agree that the members of the operations team are supervisors of Respondent within the meaning of Sec. 2(11) and agents of Respondent within the meaning of Sec. 2(13) of the Act.

⁷ Specific credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to the factual findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief. There are actually few critical credibility disputes. In general, it is noted that Respondent witnesses McCarthy, T. Westover, K. Westover, Dickson, Tuchman, and Dibella, who were called pursuant to Federal Rule of Evidence 611(c) over the course of the first three days of hearing, were highly credible, open, thoughtful and precise. Generally, when in conflict with other witnesses, their testimony has been credited.

⁸ According to Wikipedia, “A short sale is a sale of real estate in which the net proceeds from selling the property will fall short of the debts secured by liens against the property. In this case, if all lien holders agree to accept less than the amount owed on the debt, a sale of the property can be accomplished.”

niche role in marketing Respondent's Fair Credit Reporting Act⁹ (FCRA) services. He was classified as a paralegal in this FCRA marketing position.

5 Hardin initially signed an employment contract with Respondent on April 12, 2013. This employment agreement provided that Hardin would not moonlight or compete with Respondent.¹⁰ Pursuant to that agreement, Hardin reported to Respondent at the time of hire that his outside activities included catering and entering competitions for his company "Smokin Aces Barbeque" and consulting with mortgage bankers and brokers through his company Hardin Enterprises, LLC. He also reported unpaid teaching for the Arizona Department of Education.
10 McCarthy approved the teaching and barbeque activities. As to consulting, he wrote, "Since you aren't active in the other biz, can you stay out of unless and until opportunity arises, then address it." Hardin wrote back that he was completing an engagement for Hardin Enterprises but did not expect any further business that summer.

15 Since about January 2015, Hardin has held an Arizona real estate agent license. Section 8.3 of his 2016 employment agreement provides, "Employee is a licensed real estate agent. Employee will not work as a buyer agent or listing agent for a client without prior approval from the firm." Initially, he "hung" this real estate license with MCM Realty. Hardin explained that this affiliation allowed Respondent to have a licensed real estate agent within the mortgage
20 mediation practice so Respondent could easily share in the commissions on short sales.¹¹

On January 8, 2015, after discovering that Hardin's LinkedIn profile indicated a "job change" to MCM Realty, McCarthy texted Hardin, "Something I should know?" Hardin texted back that he and McCarthy had discussed the matter six months earlier "as a way to earn more
25 money per short sale." In other words, this affiliation eased Respondent's claiming a part of the commission "on top of our fee." McCarthy texted that he did not recall the discussion. However, McCarthy texted back, "I am not angry or mad or upset. By the way just trying to understand. I think I get it." Subsequently, Hardin moved his real estate license to Arizona Property Solutions and then to its current position at Conway Real Estate.
30

Since July 2015, Hardin has possessed a National Mortgage Licensing System (NMLS) mortgage loan officer license.¹² Section 8.3 of Hardin's 2016 employment contract provides, "Employee is a licensed mortgage loan officer. Employee will not originate or market mortgage loans without prior approval from the firm." According to Hardin, Arizona law requires that a
35 mortgage loan licensee be sponsored and employed by a licensed mortgage broker or banker. Thus, from July 2015 to January 2016, Hardin "parked" his NMLS license with Jeffrey D. Lira

⁹ FCRA, 15 U.S.C. §1681 et seq., ensures accuracy and fairness in credit reporting.

¹⁰ Sec. 8.3 of the 2013 employment agreement stated, "No Moonlighting or Conflicting Employment. Employee shall not moonlight, except as approved in writing by Employer, and Employee shall not work for any competing law firms or for any other marketing businesses working for competing law firms."

¹¹ McCarthy testified that although a law firm may share a real estate commission, the paperwork proceeds more easily if the firm has a licensed real estate agent.

¹² At times, the mortgage loan officer license was referred to as a "loan originator license." In the context of this record, it would appear that the terms "loan originator license" and "mortgage loan officer license" are the same license.

(Lira), a licensed mortgage broker. Hardin testified that he had to complete an employment package with Lira because Arizona law requires that a mortgage loan officer “be a W2’d employee of the sponsoring broker.”¹³

5 In late 2015, due to decline in the business of mortgage mediation focusing on short
 sales, loan modifications, and foreclosures, Respondent determined that Hardin’s primary duties
 would change. Initially, in October, November, or December 2015, according to Hardin, he and
 McCarthy discussed Hardin taking over credit repair services pursuant to FCRA. In this
 connection, according to Hardin, it was determined that Hardin should affiliate his NMLS
 10 mortgage loan officer license with a national company rather than with solo practitioner Lira.
 This was due to contemplation that in January 2016, Hardin would begin working in the FCRA
 litigation practice marketing credit repair services. The idea, according to Hardin, was to, “find a
 mortgage company that would benefit us on the [FCRA] where I could leverage the credit repair
 for those that had had foreclosures, loan mods, et cetera. And declines [i.e., rejections] from loan
 15 officers is a good source.”

 After researching national mortgage loan companies, Hardin located LoanStar Home
 Loans, LLC (LoanStar). On April 26, Hardin would be discharged. The asserted reason for
 discharge was violation of the moonlighting provision of his contract by affiliating with
 20 LoanStar.

 In any event, from February 4 to June 6, 2016, Hardin “parked” his NMLS mortgage loan
 officer license with LoanStar. Hardin explained that he did not intend to actually originate loans
 as a LoanStar mortgage loan officer while working for Respondent, “but I still needed to keep
 25 my credential given the work we were doing with the firm clients.” Hardin further testified that
 he did not handle any mortgage loans for LoanStar. Nevertheless, Hardin was paid for five hours
 of work per week.¹⁴ In Hardin’s view, he simply “hung” his NMLS mortgage loan officer license
 there. Hardin testified that it was absolutely necessary for him to have a loan officer license
 because he spoke,

30 . . . to consumers about NMLS matters, national mortgage licensing matters.
 We’re talking about foreclosure. We’re talking about deficiency. We’re talking
 about how their loan originated, et cetera. Since I did not pass the bar, I had no
 exemption from having an NMLS when I had mortgage conversations with
 35 clients.

 Hardin testified that after January 2016, he not only handled FCRA credit report errors
 but he also continued short sale work. Hardin explained that he accepted employment from
 LoanStar as an outside loan officer and payment for that job was to be based entirely on what

¹³ Administrative notice is taken of Arizona Revised Statute 6-991.04 B which provides, in relevant part, “On issuance of the license, the superintendent shall keep the loan originator’s license until a mortgage broker or mortgage banker licensed pursuant to this chapter or a consumer lender employs the loan originator and the employer provides a written notice that the employer has hired the loan originator. . . .”

¹⁴ Although Hardin did not originate loans for LoanStar, he gave in-house presentations on FCRA.

Hardin sold for LoanStar. Hardin agreed that nothing in the LoanStar employment agreement noted Hardin’s employment with LoanStar as a FCRA liaison between Respondent and LoanStar. According to Hardin, he told McCarthy in December 2015: “And then when I found LoanStar was willing to [have me as an affiliate], I presented it back to [McCarthy] and he said –
 5 told me to move forward.” This testimony is somewhat vague in that there is no indication whether Hardin told McCarthy that he would be affiliating with a national company or specifically told McCarthy he was going to affiliate with LoanStar. Moreover, McCarthy credibly denied that he had ever heard of LoanStar until the day Hardin was discharged. McCarthy’s denial is credited.

10 Hardin testified that generally the firm was aware of his affiliation with LoanStar. Specifically, he believed that Michele Swinick (Swinick); Tuchman; Dickson; Joon Kee (Kee), lead attorney on FCRA; and McCarthy knew of his affiliation. Any knowledge held by employees Swinick or Kee was not supported by anything more than this general assertion and,
 15 in any event, would not be attributable to Respondent.

As to Dickson’s and McCarthy’s knowledge, Hardin testified that Dickson scanned his LoanStar agreement to him. Hardin testified that all incoming facsimile and scan transmissions are sent to Dickson. Dickson then forwards the transmission to the appropriate person. On
 20 January 19, according to Hardin, Dickson forwarded at least two transmissions to him. One was at 5:40 a.m. and one was at 12:33 p.m.¹⁵ According to Hardin, one of these transmissions was from LoanStar conveying an offer of employment as an “Outside Sales Senior Loan Officer (part-time working 29 hours or less).”

25 Actually, the email was from the scanning machine at the firm. Dickson credibly explained that all emails originating from the scanning machine state, “Message from KMBT_C224.” The documents produced by the General Counsel bear this message. Dickson further explained that all scanned documents are sent by email to the individual making the scan. Dickson’s name is used as the default email originator for the scanning machine. Dickson
 30 testified that she did not personally send the email and did not see it. Hardin agreed that it was possible he scanned these documents to himself. Dickson credibly testified that she had not seen the emails or the attached scanned LoanStar application or contract.¹⁶ Thus, it is not possible to find that Dickson had knowledge of Hardin’s affiliation with LoanStar through these scanned documents.

35 Of course, McCarthy knew that Hardin was a licensed real estate agent. Based on texting on January 8, 2015 regarding Hardin’s affiliation with MCM, McCarthy learned that Hardin “hung” his realtor’s license with an entity other than Respondent, that is, with MCM. McCarthy learned of this affiliation through LinkedIn – not through conversation with Hardin. McCarthy

¹⁵ The 5:40 a.m. transmission did not have a subject line but showed an attached pdf: “SKMBT_C22416011912400.pdf.” The 12:33 subject line stated, “Message from KMBT_C224.”

¹⁶ Hardin testified that he was not aware that Dickson’s name was used as a default for the scanning machine and did not recall that faxed documents were automatically received by the receptionist. Dickson fully explained Respondent’s fax and scanning procedures. Her testimony was logical and thorough showing a high degree of knowledge. Her testimony is credited.

also knew that Hardin was a licensed mortgage loan officer. McCarthy credibly testified that he was not aware that Hardin was working and training at LoanStar.¹⁷ Not only is his assertion regarding lack of knowledge plausible given the prior lack of communications regarding MCM, McCarthy also testified credibly that he did not have any knowledge of LoanStar. Hardin's testimony is too vague to warrant a finding that he told McCarthy about the specific affiliation with LoanStar. Thus, it is found that until the day of Hardin's discharge, McCarthy did not have knowledge of Hardin's affiliation with LoanStar.

Further documentary evidence relied upon for knowledge of LoanStar is similarly unavailing. The General Counsel offered a January 12, 2016 text between Hardin and McCarthy in which McCarthy asked Hardin if he was "getting any traction" selling the firm's FCRA services to the mortgage industry. Hardin responded that he had another appointment with a mortgage lender and would be happy to see his first referral. Hardin agreed there was no mention of LoanStar in the entire email string. This email does not afford a basis for finding that Respondent knew of LoanStar.

Hardin testified that Tuchman was aware of his affiliation with LoanStar. He did not elaborate how Tuchman became aware of the affiliation. This bare assertion is accordingly given no weight as it affords no basis to find knowledge. Tuchman testified generally in an open, credible manner. Her testimony that she was not aware of Hardin's affiliation with LoanStar is credited. Tuchman and Hardin agreed that they were congenial colleagues and friends. Given Tuchman's denial and the vagueness of Hardin's testimony, it is found that Tuchman had no knowledge of his LoanStar affiliation. Accordingly, it is found on the record as a whole and based upon the credible testimony of McCarthy, Dickson, and Tuchman, that Respondent did not have knowledge that Hardin was affiliated with LoanStar.

2. TINYpulse Survey

Respondent utilizes an employee survey portal known as TINYpulse. On a weekly basis, employees and managers receive an email inviting them to comment anonymously to a specific question about the workplace. The portal also features a "Cheers for Peers" component in which employees and management can praise specific employee performance. Since February 28, Dickson and McCarthy have been the sole administrators of the anonymous TINYpulse comments. Sometimes they reply by email to the anonymous comments "blindly," that is, not knowing to whom they are replying. The reply goes through TINYpulse and the recipient of the reply gets an email from TINYpulse reporting that there is a reply. At the weekly operations team meeting, Dickson presents the results of the previous week's employee comments.

¹⁷ The General Counsel asserts that Respondent knew of Hardin's employment with Lira and LoanStar. This assertion is based on Hardin's testimony, "That was a verbal conversation that we had over a period of a month." Hardin also testified that he and McCarthy spoke about moving from Lira to a more visible national company. However, there is no evidence that Hardin told McCarthy that he would move to LoanStar or make the move as a paid employee of LoanStar. No specific conversation was elicited and McCarthy credibly denied knowledge. It is impossible to find knowledge based on such a broad, general assertion.

Hardin testified that he commented to each survey question. In fact, on February 26, he emailed McCarthy that, "I know it is confidential, but I wanted you to know I've never missed a response, and I think I'm over 80 responses." Hardin had never been disciplined for any of these TINYpulse comments. Prior to February 28, managers Radabaugh, Dibella, K. Westover, and Tuchman were also able to access and respond to TINYpulse comments. Pursuant to an email suggestion from Hardin, the pool of administrators able to access and respond was limited to Dickson and McCarthy only. Hardin was not disciplined for making this suggestion.

On Wednesday, April 13, the TINYpulse question was, "How cohesive is the management team? Can you provide specific examples?" Ten comments were received. Nine of these comments were in the positive 7-10 range. One comment ranked cohesion of the management team as "1." It was accompanied by a four-paragraph comment, submitted anonymously, as follows:

I do not mean this to be disrespectful or sarcastic. What management team?

Mr. McCarthy is rarely here. When here, stays in his office and [from] the occasional hello in the morning is clear that he does not want to have an actual conversation. Not sure what Mr. Westover does. Ms. Tuchman, I believe, part of a "management team" but rarely in the office.

When we have monthly meetings, they are run by [senior negotiator] Joan [Dibella]. I think Joan processes debt settlement and credit repair. I don't remember any manager actually presenting at a monthly meeting.

Do we have an org chart?

Although Hardin never admitted to Respondent that he sent this comment, at hearing he testified that he authored and sent it. He testified that in conversation with McCarthy he denied that it was his comment because it was supposed to be anonymous.

Hardin testified that prior to writing this TINYpulse comment, he made other suggestions or requests to Respondent. For instance, at an unspecified date in 2015, he asked that Swinick receive a pay raise. There is no evidence whether this request was acted on. At another time, Hardin questioned McCarthy about "who supervises that person" at the firm and soon thereafter, this information was incorporated into the firm's letterhead. In around May 2015, Hardin also questioned McCarthy specifically about "what is my chain of command." McCarthy responded and Hardin was not disciplined. Hardin explained that throughout his employment, he raised this issue "a few times relating my time in the military about having a chain of command and the lack of an organizational chart." Hardin was not disciplined regarding these comments.

3. Hardin's Conversations with Co-Workers

Hardin testified that he did not discuss sending his mid-April TINYpulse comment with any other employee. No other employee asked him to send it. However, he claimed that he did

discuss the themes raised in this TINYpulse comment with other employees.¹⁸ For instance, Hardin testified that he spoke with Kee a handful of times in 2016. The last such conversation was around April 20, 21, or 22, thus post-dating his mid-April TINYpulse comment. However, it is the only conversation contained in the record. Hardin testified that the other five conversations were similar. Hardin agreed that he did not take Kee's issues to McCarthy or anyone else in management.

During the April 20, 21, or 22 conversation, Hardin recalled that Kee came to his office after 5 p.m., threw his hands in the air saying, "I just can't do this." Hardin explained that Kee vented and they talked for 30-40 minutes. Kee told Hardin he was frustrated because Dibella and Radabaugh had stopped supporting him on the FCRA paperwork. Kee also voiced frustration with McCarthy because McCarthy would not talk to him and Tuchman was not helping him either. Hardin referenced lack of an organizational chart to show lines of authority. Hardin did not suggest any specific action and Hardin did not tell Kee that he was going to take any action. He just let Kee "vent" and then told him not to whine but to "man up."¹⁹

Hardin recalled that most of his prior similar conversations with Kee were in Hardin's office and the door to the office was usually open. Hardin thought that Dickson, whose office was about 15-20 feet away from his office, was usually still in her office. Specifically, Hardin recalled that prior to his conversation with Kee on April 20, 21, or 22, he had seen Dickson "in and out of her office a couple of times during that same period" and he spoke to her just before Kee came into his office. This specificity regarding Dickson's presence was not offered for previous conversations with Kee.

Kee agreed that he and Hardin tended to speak in the late afternoon in Hardin's office. Kee thought that they closed the door when they were speaking. No other employees were involved in their conversations. Kee agreed that one topic of conversation was availability of management. Kee felt that Tuchman, his direct supervisor, was not in the office much of the time. Kee recalled voicing general complaints about support for the attorneys. Kee recalled that Hardin may have raised the issue of lack of an organizational chart. Kee testified that Dickson's office is around the corner, maybe 15 or 20 feet from Hardin's. Kee testified that Dickson was normally at the office in the late afternoon. Kee could not recall specifically whether Dickson was present in the office at the time of any of his conversations with Hardin.

¹⁸ Additionally, Hardin testified that he brought up many of these topics with McCarthy and Tuchman throughout his employment going back to 2013 and 2014. In May 2015 Hardin raised concerns with McCarthy about lack of an organizational chart or clear chain of command. In mid to late April 2016, Hardin also spoke with Tuchman about her unavailability. Tuchman corroborated that around this time Hardin expressed his desire for her mentorship and guidance

¹⁹ On redirect, Hardin answered "Yes" to questions regarding whether his conversations with Kee included the fact that McCarthy was rarely present, the fact that McCarthy did not want to have an actual conversation, that there was uncertainty regarding what T. Westover did, that Tuchman was part of the management team but rarely in the office, that monthly meetings were run by Dibella, and whether there is an organizational chart. Hardin did not volunteer these topics on direct or cross examination. There is no evidence that his recollection was exhausted when these leading questions were asked nor were any objections lodged to this line of questioning. These answers are given little weight, accordingly.

Dickson agreed that she usually worked late. She testified that she was not aware of any conversations between Hardin and Kee about McCarthy or management of the firm. She was not aware of any conversations between them about lack of an organizational chart or the role of Dibella in leading monthly meetings. Hardin did not raise any issues about his or other employees' working conditions to her nor did Hardin tell her that employees were unhappy with their working conditions. Similarly, McCarthy testified that he did not recall Dickson telling him about any conversation she overheard around this time between Hardin and Kee about management.

Dickson's denial of knowledge of these conversations is credited. In general, Dickson was a thoughtful, serious witness. She was initially called by the General Counsel as an adverse witness. She carefully assessed each question and answered questions explicitly and, when required, with nuance. Dickson's precision as a witness when contrasted to the more general and vague testimony of Hardin, affords a reliable basis for determining whether she heard Hardin and Kee talking.

Moreover, it is noted that Dickson's lack of knowledge is consistent with Hardin's and Kee's testimony. That is, even if Dickson was present in her office when any of these conversations took place and even if Hardin's door was open, there is no evidence that Hardin and Kee were speaking loudly enough for Dickson to hear, there is no evidence that Hardin could commonly hear Dickson's voice from his office and there is no evidence that Dickson could regularly hear Hardin's voice from his office. There is no evidence regarding ambient sound or equipment in the area. Moreover, as between Hardin and Kee, regarding whether Hardin's door was open or closed during their conversations, it is more likely that Kee would have a better recollection because he was the one entering another office. Similarly, it is more likely that an individual who walked into an office to vent would close the door behind him. Thus, based on the surrounding circumstances, logical inferences, and the evidence of record, it is found that Hardin's door was closed during his conversations with Kee and that Dickson did not overhear the conversation. Because it is found that Dickson did not hear the conversation, she could not have relayed it to McCarthy. Thus, it is found that neither McCarthy nor Dickson had any knowledge of the conversations or content of the conversations between Hardin and Kee.

Hardin also testified that he spoke to Swinick. Hardin testified that his conversations with Swinick were "daily, hourly" and "sporadic." The conversations were in her office which was directly across from McCarthy's office. She complained of conflicts with Dickson, McCarthy, and Dibella. Hardin advised Swinick not to be distracted because he did not want her work on the short sales to suffer. Swinick also told Hardin of problems with coworkers. As to coworker issues, he told her not to worry and directed "her to stay out of it." These conversations were usually in Swinick's office across the hall from McCarthy's office.²⁰

²⁰ On redirect, Hardin was asked: "[y]ou discussed the lack of Mr. McCarthy being present at the office?" "[t]hat Mr. McCarthy didn't want to have an actual conversation?" "Uncertainty with respect to what Mr. Westover does?" "That Ms. Tuchman is rarely there?" "And that the monthly meetings were run [by] Joan [Dibella]?" Hardin answered affirmatively to each of these questions. None of these facts were elicited on direct and there was no showing that Hardin's recollection was exhausted. Although this

Continued

There is no evidence regarding whether McCarthy was present in his office during these conversations and there is no evidence whether Swinick's and/or McCarthy's doors were open or closed. Hardin testified that in 2015 he took some of Swinick's issues to McCarthy including Swinick's desire to make more money. In 2016, Hardin reported additional issues with Swinick's attendance to McCarthy. Hardin was not disciplined regarding these reports. Certainly, as to asking for a raise from Swinick, Respondent presumably had knowledge. However, in 2015 Hardin was Swinick's supervisor. Evidence from this period is irrelevant to the issues here.

4. Respondent's Reaction to the Four-Paragraph TINYpulse Comment; Alleged Impression of Surveillance; Alleged Surveillance

Around April 20, when he was notified by the TINYpulse system that the April 13 comment period was closed, McCarthy reviewed all the comments to the survey, including the negative four-paragraph comment. As was usual, the TINYpulse comments, including the four-paragraph comment, were discussed in the following weekly operations meeting. After the meeting, Tuchman met with McCarthy to discuss the four-paragraph TINYpulse comment further. They tried to narrow down the field of employees who might have written it. Hardin was one of the names McCarthy mentioned to Tuchman. They also discussed McCarthy responding to the four-paragraph TINYpulse comment. On Saturday, April 23, McCarthy replied by email to the comment, without knowing the origin of it, a "blind" response, i.e., not knowing who would receive his reply:

Kevin [McCarthy] replies: Wow! You certainly seem less than happy with the firm. Why are you still working here? If I were as unhappy as you seem to be, I would leave. If a friend sent me this note describing his co-workers, I would encourage him to leave and seek work with a firm that he enjoyed. Life is too short to be so unhappy.

Hardin received this response. He did not discuss the response with any other employees.

On Monday, April 25, around 2 or 3 p.m., McCarthy and T. Westover met with Hardin in McCarthy's office. McCarthy showed Hardin the TINYpulse comment. Hardin asked if McCarthy thought former employee Swinick had written the TINYpulse comment. McCarthy said he did not believe the comment was from Swinick. Rather, McCarthy told Hardin, he thought Hardin had written the comment. Hardin confirmed that McCarthy stated that he and T. Westover "were pretty sure I wrote it." Hardin also recalled that McCarthy asked him if he wrote the TINYpulse comment. It is undisputed that Hardin denied that the TINYpulse comment was his. According to Hardin, McCarthy repeatedly asked him if he wrote the TINYpulse comment and Hardin continued to deny that he wrote it. Hardin explained at the hearing that he denied that he wrote the TINYpulse comment because it was supposed to be confidential.

testimony is suspect because Hardin was led, it is also noted that there is no evidence regarding whether the doors were opened or closed and there is no evidence regarding presence or absence of management personnel in the area. Thus, this evidence is afforded little weight and cannot be utilized to find Respondent had knowledge of the conversations.

Hardin and McCarthy agree that McCarthy referenced an employee list and told Hardin he did not think any of the other employees on the list had written the TINYpulse comment. McCarthy and T. Westover testified that they told Hardin that the TINYpulse comment was not a “firing” offense. T. Westover further recalled that McCarthy stated that he just wanted to talk with Hardin about the TINYpulse comment because it was contrary to Hardin’s usual way of acting. McCarthy, T. Westover, and Hardin agree that McCarthy stated he just wanted to have some dialogue with Hardin in order to move forward.

McCarthy told Hardin that there was a process to essentially clear him. McCarthy explained that he could send a second response to the TINYpulse comment while the three of them were together and then access Hardin’s email to see if McCarthy’s response showed up in Hardin’s inbox. Although Hardin did not testify whether he agreed to this test or not, according to McCarthy, Hardin agreed..

According to Hardin, after he denied that he sent the TINYpulse comment, McCarthy showed him a list of timestamps for TINYpulse messages. McCarthy pointed to the timestamp for the four-paragraph TINYpulse comment and told Hardin it was at exactly at that time that Hardin had responded. McCarthy said, “I don’t know how we move forward on this.” Hardin responded, “we just move forward. It’s confidential information.” Hardin agreed that a second response was sent to the TINYpulse comment. “He retyped that into the system. He opened up my personal email, moved the monitor to me, and said see, you just got an email. Then he clicks on it, and it took him to that response.” Hardin testified that he continued to deny that he authored the TINYpulse comment. According to Hardin, McCarthy suggested that to move forward, perhaps Hardin might be willing to apologize at a company meeting on the following day. Hardin could not recall if he answered this suggestion or refused the request. McCarthy denied making such a suggestion.

For the second blind response to the TINYpulse comment, McCarthy wrote “I was hoping for a response from you.” According to McCarthy, Hardin agreed to this test and gave McCarthy his email password to access Hardin’s work email account. And, indeed, the second blind response to the TINYpulse comment triggered a TINYpulse message to appear in Hardin’s inbox saying that he had a message. T. Westover also recalled this test result. At this point, according to McCarthy, Hardin asserted that someone must have hacked into his email account.

McCarthy recalled asking Hardin how they could move forward beyond this. McCarthy did not recall what, if anything, Hardin responded. McCarthy’s recollection was that Hardin said very little. McCarthy did not recall bringing up a firm-wide meeting on the following day. He did not recall suggesting that Hardin attend such a meeting. He denied that he would have suggested to Hardin that he apologize to everyone at the firm-wide meeting on the following day. It is found that McCarthy’s denial of the suggestion is more plausible. Rather the evidence suggests that shaming is inconsistent with the firm’s philosophy and McCarthy’s openness to making changes suggested by Hardin and others.

At the conclusion of the meeting, both Hardin and McCarthy agree that Hardin was told to go home and think about the meeting for the next 24 hours. Hardin was requested to call McCarthy on the following day around 3 p.m. McCarthy suspended Hardin’s access to the email

system and requested his security card. Hardin and McCarthy agree that there was no mention of LoanStar, outside employment, or moonlighting during this meeting.

5 After meeting with McCarthy on Monday, April 25, Tuchman (“AT” and referred to in the email as “Ash”) and Hardin (“KH”) texted as follows:

KH Mon, Apr 25, 4:17 PM

10 Ash, you have been my friend, mentor and confidant. You know things about me that I would tell no one else. It may seem like Kevin [McCarthy] and Ali [Dickson] have overwhelming evidence I wrote those things, I did not. I am not sure how to recover from this, given Kevin [McCarthy] tells me that he and Todd [Westover] are the only ones on my side. I care more about how you feel. I didn’t do this.

15 AT Mon, Apr 25, 5:03 PM

20 I have no idea about “only ones on your side”. I don’t think anyone is on any side. I just want you to be happy so you can succeed. I’m not sure how to respond to the idea that you were “set up”. Do you really think someone hacked into your email, clicked on tiny pulse and wrote something²¹ in a convoluted scheme to get you fired? Ultimately, whatever happens I hope to remain your friend and help in anyway I can. I’m not terribly hurt by the tiny pulse. I care more that you are happy so we can all work together efficiently.

25 KH Mon, Apr 25, 5:04 PM

I know, absolutely ridiculous alternative of hacking, but I got nothing else, other schizophrenia. Very bizarre.

30 AT Mon, Apr 25, 5:18 PM

I don’t think anyone is going to believe the scheme but I know Kevin really likes you and thinks you are a great marketer and did not expect that your response would be you didn’t write it.

35 KH Mon, April 25, 5:19 PM

Well, I can’t believe anyone would think I would. That was more surprising than anything.

40 AT Mon, Apr 25, 6:46 PM

Let me flip it and ask you – who do you think would go through that to set you up?

KH Mon Apr 25 7:01 PM

To have that conversation is to put someone else through this. Not going there. It is supposed to be an anonymous system. If someone really wanted to set me up,

²¹ For ease of understanding, the original text message wording, “some that,” has been changed to “something.”

they would have said a hell of a lot worse on it. What was in that message is a joke. It's like someone in high school wrote it. Its like someone went on my laptop while I was out of the office and vented on it because they are too pussy to do it directly and figured they would get away with it.

5 If I had a beef, after three years, do I strike you as someone that would not say any of that to anyone's face?

I have spent the rest of the day thinking about it and I am just not going to defend myself anymore. I denied it. I am on record. I am caught in the middle of a pissing match and someone's hurt feelings

10 It's in Kevin's hands. I don't even know how I come back from something like this. I become the office asshole. With the exception of Carol, I have never had a cross thing to say to anyone there. Ok, maybe Michele and I are at odds but that is her problem

15 Look, if he bounces me, it leaves a whole lot of shit for you to pick up after me and you know how poorly I am organized. I will help you with whatever you need.

AH Tue Apr 26, 8:32 AM

REDACTED

20 I think it's a matter of if you want to be bounced or not. If you don't want to then²² u might have to suck it up.

KH Tue, Apr 26, 10:45 AM

What is there for me to suck up? The embarrassment? Loss of trust?

25 REDACTED

AT Tue, Apr 26, 11:47 AM

Saying you wrote it

30 KH Tue, Apr 26, 2:59 PM

No comment

35 As this conversation reflects, Tuchman and Hardin maintained a cordial, friendly relationship. Tuchman's testimony in generally was lacking in bias and is credited.

Because McCarthy felt that Hardin had lied during the April 25 meeting, McCarthy decided to search Hardin's email. McCarthy explained that on two other occasions when he discovered employee deceit, he had made further investigation and found cause for discharge. Thus, his conclusion that Hardin was being untruthful led him, according to his past practice, to make further investigation. McCarthy's search of Hardin's email took place around noon on Tuesday, April 26. McCarthy found the LoanStar employment agreement signed by Hardin dated January 19, 2016, accepting a position as an Outside Sales Senior Loan Office (part-time, working 29 hours or less).

²² The original text message use of "than" has been changed to "then" for ease of understanding.

McCarthy decided to discharge Hardin for accepting another job while employed by Respondent. He made this decision around lunch time on April 26. McCarthy did not consult anyone regarding the decision. In McCarthy's view, the second job violated section 8.3 of Hardin's 2016 employment agreement.

5

McCarthy was not aware of any other employee who had violated the moonlighting provision. Although Hardin testified that at an unspecified time in December 2015 he told McCarthy that he had found a position with LoanStar, McCarthy did not recall this. As previously found, this testimony was too vague to warrant a finding that Hardin told McCarthy specifically about the affiliation with LoanStar. Further, both McCarthy and Dixon credibly denied prior knowledge of this affiliation.

10

McCarthy discharged Hardin by phone on April 26. McCarthy told Hardin that his employment was terminated and he should contact Dickson regarding severance arrangements and retrieving his personal belongings. Neither Hardin nor McCarthy testified that there was any discussion of employment with LoanStar or moonlighting during the discharge discussion.

15

Hardin's employment agreement, section 8.3, contains a prohibition against moonlighting or conflicting employment as follows:

20

Employee shall not moonlight, except as approved in writing by Employer, and Employee shall not work for any competing law firms or for any other marketing businesses working for competing law firms. Employee is a licensed real estate agent. Employee will not work as a buyer agent or listing agent for a client without prior approval from the firm. Employee is a licensed loan officer. Employees will not originate or market mortgage loans without prior approval from the firm.

25

Around 5 or 6 p.m. on Wednesday, April 27, Tuchman and Dickson met to discuss Hardin's termination. Dickson stated that Hardin might be offered some leeway from the terms of the non-compete clause. She also said that Hardin had made an appointment to retrieve his belongings. Later that evening, Tuchman and Hardin met at a bar. Tuchman expressed her sorrow that they would no longer be working together.

30

35

B. Analysis

1. Alleged Unlawful Discharge of Hardin

The General Counsel alleges that Respondent's discharge of Hardin on Tuesday, April 26, violates Section 8(a)(1).²³ In the mixed motive context of this case, the Board applies the burden shifting analysis set forth in *Wright Line*²⁴ in determining whether an employee's

40

²³ Consolidated complaint par. 4(o) (unlawful discharge allegation based on concerted activity) and alternative pleading 4(z) (unlawful discharge based on unlawful surveillance and unlawful search of email account).

²⁴ 251 NLRB 1083 (1980), *enfd* on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455

discharge is unlawful. Thus, the General Counsel must prove by a preponderance of the evidence that the employee’s protected activity was a motivating factor in discharging the employee. The General Counsel’s evidence must show that the employee engaged in protected activity, the employer knew about the protected activity, and the employer had animus toward the protected activity. If the General Counsel meets this burden, the burden shifts to the employer to show that it would have discharged the employee even absent the employee’s protected activity. An employer does not meet its burden merely by showing that it had a legitimate reason for its action. Rather, it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct.²⁵

a. General Counsel’s Prima Facie Showing

(1) Protected Concerted Activity

Section 7 of the Act endows employees, inter alia, with the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.” Section 8(a)(1) of the Act provides that it is an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7.” To demonstrate that individual conduct is concerted, the activity must “be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself.”²⁶ Moreover, concerted activity includes circumstances in which an individual employee seeks to induce or prepare for group action.²⁷

Both the “concertedness” element and the “mutual aid or protection” element are analyzed objectively. That is, an employee’s subjective motive for taking action is not relevant to whether the action was concerted.²⁸ The analysis for concertedness focuses on the manner in which an employee’s individual actions may be linked to those of his coworkers.²⁹ “The concept of mutual aid or protection focuses on the *goal* of concerted activity. . . .”³⁰

Discharge of an employee because the employee engaged in concerted activity for mutual aid or protection violates Section 8(a)(1) of the Act.³¹ Further, where concerns expressed by an

U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To the same effect, see also, *Praxair Dist., Inc.*, 357 NLRB 1048, n. 2 (2011), cited by Respondent.

²⁵ See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016), citing authorities.

²⁶ *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

²⁷ *Meyers II*, supra, 281 NLRB at 887.

²⁸ *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014).

²⁹ *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984) (there is no indication that Congress intended to limit Sec. 7 protections to situations where employee’s action combines in any particular way).

³⁰ *Fresh & Easy*, supra, 361 NLRB No. 12, slip op. at 3 (emphasis in original), citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

³¹ See generally, e.g., *Lou’s Transport*, 361 NLRB No. 158, slip op. at 2 (2014), citing authorities, enfd 644 Fed. Appx 690 (6th Cir. 2016).

individual are a logical outgrowth of concerns expressed by a group, the individual action may be concerted where employees have acted as a group on prior occasions or where their employer believed the employees were acting as a group.³² Finally, *Meyers II* teaches that individual efforts may be deemed concerted if there is an effort to induce group action.³³ If it appears from the conversations themselves that no group action of any kind is intended, contemplated or referred to, the Act’s policies are not affected.³⁴

Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere “griping.”³⁵

Respondent argues that the conversations that Hardin had with Kee and with Swinick do not constitute protected concerted activity because there was no effort to initiate or induce group action. Thus, Respondent asserts that writing the TINYpulse comment was not engaged in with or on the authority of other employees but solely by and on behalf of Hardin himself.³⁶ With regard to conversations with Kee, Respondent notes that Kee testified that he did not share Hardin’s concerns about availability of management. Further, Respondent characterizes Hardin’s TINYpulse comment as an expression of Hardin’s individual gripes or complaints about the availability of management as it affected Hardin’s unique situation. Respondent notes it is undisputed that Hardin did not talk with any employees other than Kee prior to sending the TINYpulse comment and it is undisputed that Hardin did not tell Kee or any other employee that he was preparing the comment. Thus, Respondent argues that Hardin never acted on the authorization of other employees or attempted to induce group action.

On the other hand, the General Counsel asserts that Hardin’s actions in speaking with Kee and Swinick constitute protected concerted activity because his TINYpulse comment was a logical outgrowth of the concerns of a group. The General Counsel also notes that on prior occasions Hardin had discussed these issues with Respondent. Thus he had complained to Tuchman about her lack of availability and had questioned McCarthy about lack of information of the firm’s chain of command and supervisory structure.

The evidence fails to support a finding that Hardin engaged in concerted activity for mutual aid or protection. Initially, it is found that the evidence regarding Hardin’s conversations

³² *Mike Yurosek & Son, Inc.*, 310 NLRB 831 (1993), affirming and adopting, 306 NLRB 1037, 1038–1039 (1992); enfd 53 F.3d 261 (9th Cir. 1995).

³³ *Meyers II*, supra, embracing the view of “concertedness” exemplified by *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 684 (3d Cir. 1964).

³⁴ *Mushroom Transportation*, supra, 330 F.2d at 685.

³⁵ *Id.*

³⁶ Respondent relies on *Meyers I*, supra. Respondent also cites to *Report of the Acting General Counsel Concerning Social Media Cases*, GC Memo OM 11-74 (Aug. 8, 2011) noting that at a minimum an employee must seek to induce group action in order for his action to constitute concerted activity.

with Swinick do not support a finding that Hardin was acting in concert with Swinick. The conversations were described in only the vaguest terms and no dates were given. It is unclear whether the conversations took place while Hardin was Swinick’s statutory supervisor or whether the conversations took place after January 2016 when Hardin was no longer a statutory supervisor.³⁷ No specifics were provided. According to Hardin, these conversations were about Swinick’s unspecified conflicts with other employees and management. The evidence does not indicate that these conversations involved anything more than personality conflicts between Swinick and other individuals. Hardin routinely told Swinick that her complaints were about matters extraneous to her job and she should ignore the matters and get on with her own work. There is no evidence that the conversations dealt with any specific terms and conditions of employment of any employees. Thus, not only is there no showing that Hardin’s actions in writing the TINYpulse comment were linked to Swinick in any way, there is also no objective showing that the goal of their conversations was to improve the lot of employees.

Moreover, the evidence regarding Hardin’s conversations with Kee are similarly flawed as vague, undated, and lacking in evidence of any preparation for group action. Prior to writing the TINYpulse comment, Hardin spoke with employee Kee on a handful of occasions about various working conditions. However, the General Counsel did not provide specific evidence regarding these conversations. Rather, Hardin’s testimony regarding a post-TINYpulse comment conversation is in evidence as a template for the pre-comment conversations with Kee. It is undisputed that at no time during these conversations was group action discussed. On the contrary, during the template conversation, Hardin told Kee to “man up” and to quit “whining.” The General Counsel’s evidence regarding Hardin’s discussion with Kee, if accepted in the manner of a template for pre-TINYpulse comment conversations, indicates that they discussed various topics including the unavailability of management, lack of an organization chart, and other work matters. Although the two did not agree on all of these matters, that is not fatal to the General Counsel’s case.³⁸ There is no evidence that Hardin solicited Kee’s support on any of these perceived problems and there is no evidence of preparation for group action on these topics.

The General Counsel claims that Hardin’s TINYpulse comment was a logical outgrowth of common concerns. However, this assertion stretches existing precedent to its breaking point. In *Mike Yurosek*, supra, the Board held that it would find individual action to be concerted where the evidence supports a finding that the concerns expressed by the individual are the logical outgrowth of the concerns expressed by a group. The facts distinguish *Mike Yurosek* from those present in this case.

Thus, in *Mike Yurosek*, assembled employees were told their schedule was being changed and they must clock out at a certain time of day and no later. During the meeting, one of the employees protested that by clocking out at the specified time, “we” would not have enough time to complete our work. A few weeks later, a different supervisor asked the same employees to

³⁷ Although Hardin testified that he continued to act as Swinick’s statutory supervisor throughout 2016, there is no such contention from Respondent.

³⁸ See *Fresh & Easy*, supra, slip op. at 4 (“[C]oncertedness is not dependent on a shared objective or on the agreement of one’s coworkers with what is proposed.”), citing cases.

work an extra hour after the previously-stated clock-out time. The employees refused and without performing the extra work, clocked out as a group. This supervisor told them not to clock in on the following morning. On the following day, the assembled employees waited as a group and were asked why they had refused to work overtime. The employees responded that they were not allowed to clock out after a certain time per prior order. The employees were discharged en masse. The Board found that the individual actions were based on the individual concerns expressed by one employee (“we” would not have enough time to complete our work) and were the logical outgrowth of the concerns expressed by the group. The Board provided a further rationale for finding concerted activity, noting that the employees were treated as a group by the employer at all times. Thus, the Board held that the employer believed the employees were engaged in concerted activity.

Here, there is no record evidence that Hardin voiced group concerns. His TINYpulse comment is written in first person singular. In none of his conversations with management did Hardin voice any group concerns using “we” or any other plural voice. Moreover, Hardin was not a part of a known group or treated as a group as in *Mike Yurosek*. Thus, the General Counsel’s reliance on *Mike Yurosek* as supporting a finding that Hardin’s activities were the logical outgrowth of the concerns expressed by a group is unavailing.

There is thus no evidence of concertedness. Accordingly, the General Counsel has failed to show by a preponderance of the evidence that Hardin was engaged in concerted activity.

(2) Knowledge of Protected Concerted Activity

Moreover, assuming that Hardin engaged in protected concerted activity, the General Counsel has failed to present evidence that Respondent had knowledge of any conversations that Hardin had with Kee or any other of his fellow employees concerning his working conditions. Literally, the TINYpulse comment is written in first person singular: “I do not mean” “I believe” “I think” “I don’t remember” Thus, the comment alone does not provide evidence of knowledge and does not allow an inference of knowledge of concerted activity.

Although the General Counsel avers that Dickson overheard at least the April 20, 21, or 22 Kee-Hardin conversation, there is no evidence that she had the opportunity to hear that conversation between Kee and Hardin and it has been previously found that she did not. Aside from the absence of certainly that Dickson was actually present in a nearby office, the record contains no evidence that if she were present, she might have overheard that conversation. There is no evidence regarding surrounding circumstances such as ambient noise, equipment (scanner, printer, fax) noise, HVAC noise, housekeeping noise, or sound proofing of offices. Thus, it is found that she did not hear it.

Compounding these problems of proof, Kee and Hardin gave conflicting evidence regarding whether their conversations were generally behind closed doors or open doors. As previously found, it is more likely that the doors were closed. If the doors were closed, assumedly no one could have overheard them.

Thus the evidence fails to afford a basis for finding an opportunity to overhear the April 20, 21, or 22 conversation. Further, Dickson credibly testified that she did not hear such conversation or conversations and her testimony has been previously credited. Moreover, as to the handful of other conversations that Kee and Hardin testified about, there is absolutely no evidence that Dickson was present when those occurred and Dickson credibly denied overhearing any such conversations.

Thus, there is an absence of proof that Dickson was present and had the opportunity to overhear the conversation between Kee and Hardin. Absence of knowledge of the concerted activity is fatal to the General Counsel's case.

(3) Animus to Protected Concerted Activity

In February 2016, Hardin raised a criticism of the numerous managers entitled to TINYpulse administrative rights. His criticism was taken seriously, without animus, and the number of managers with administrative rights was reduced. On prior occasions, Hardin also raised lack of an organizational chart and unavailability of management. Respondent took no adverse action against Hardin due to any of these complaints or suggestions.

Likewise, there is no showing of animus regarding the TINYpulse comment. Hardin was called into a conference with T. Westover and McCarthy on April 25. He was questioned about authorship of the TINYpulse comment at that time. If at that time Respondent had knowledge that Hardin had engaged in protected concerted, the reaction on April 25 might indicate animus to the protected concerted activity. However, there is no evidence of such knowledge. Moreover, immediately after the meeting, Hardin and Tuchman texted over the course of the evening. There is no evidence of animus in their texts. As the record does not support such a finding of knowledge, it is impossible to infer or bootstrap a finding of knowledge from the fact that Hardin was called into a meeting and questioned about the TINYpulse comment.

Thus, in summary, the record does not support a finding that Hardin engaged in protected, concerted activity. Assuming such activity, the record does not support a finding that Respondent knew Hardin was engaged in protected, concerted activity. Finally, there is no evidence of animus. The General Counsel has failed to show by a preponderance of the credible evidence that any protected activity engaged in by Hardin was a motivating factor in his discharge. Therefore, it is recommended that the complaint allegation regarding discharge of Hardin be dismissed.

b. Respondent's Showing that it Would Have Discharged Hardin in Any Event

Were it necessary to continue the *Wright Line* analysis, the stated reason for Hardin's discharge is violation of section 8.3 of his employment agreement. It would be found that Respondent would have taken the same action in the absence of protected activity. Without knowledge of protected activity, it is not possible to find that protected activity was a motivating factor for the discharge. The moonlighting provision states that "Employee shall not moonlight . . . and Employee shall not work for any competing law firms or any other marketing businesses

working for competing law firms.” The provision acknowledges that Hardin is a licensed mortgage loan officer and a licensed real estate agent. Respondent was aware that Hardin possessed these licenses.

5 McCarthy formed a reasonable belief that Hardin was lying when Hardin denied authorship of the TINYpulse comment. On two other occasions when McCarthy discovered employee deceit, he had made further investigation and found evidence of theft. Thus, his conclusion that Hardin was being untruthful led him, according to his past practice, to make further investigation. Pursuant to McCarthy’s search of Hardin’s email, he found that Hardin had
10 an employment contract with another company in violation of his moonlighting commitment to McCarthy. This is a legitimate, non-pretextual ground for discharge. Although Respondent has not discharged other employees for moonlighting, this is not surprising given the size of the firm. Thus, Respondent has shown by a preponderance of the evidence that discharge for moonlighting would have occurred in any event.

15

2. Alleged April 18 Threat

The General Counsel alleges that on April 18, McCarthy threatened employees engaging in protected activity by inviting them to quit.³⁹ McCarthy’s April 23 blind response regarding the
20 TINYpulse comment sent by Hardin stated, in relevant part, “Why are you still working here? If I were as unhappy as you seem to be, I would leave. If a friend sent me this note describing his co-workers, I would encourage him to leave and seek work with a firm that he enjoyed.” It was signed by McCarthy.

25 Of course, if, in response to employee Section 7 activity, an employer tells employees to resign or invites employees to quit, the employer conveys a message to employees that their support for union or other concerted activity and their continued employment are not compatible.⁴⁰ Thus, such statements in response to union or protected activity implicitly threaten discharge of the employees and violate Section 8(a)(1) of the Act.⁴¹ As noted, the TINYpulse
30 comment is worded in first person singular. Nothing in the comment suggests that the writer was speaking on behalf of anyone but himself. Looking at the entire context of this exchange, there is no evidence that McCarthy or anyone else in Respondent’s firm could have been aware that the writer of the TINYpulse comment was looking toward group action. The TINYpulse comment is purely individual. Thus, it is recommended that the allegation that Respondent threatened Hardin because of Hardin’s protected concerted activity be dismissed.

35

3. Alleged April 25 Impression of Surveillance; Alleged Surveillance

The General Counsel alleges that on April 25, McCarthy alone or McCarthy and T.
40 Westover together, created an impression of surveillance.⁴² Specifically, the General Counsel points to McCarthy’s using the work email and TINYpulse systems to repeatedly demonstrate

³⁹ Consolidated complaint, par. 4(h).

⁴⁰ *Chinese Daily News*, 346 NLRB 906, 906, 919 (2006).

⁴¹ *McDaniel Ford, Inc.*, 322 NLRB 956 fn. 1, 962 (1997).

⁴² Consolidated complaint, par. 4(i)(1); 4(j)(1).

that Hardin was the author of the mid-April TINYpulse comment. There is no dispute that while Hardin was in his office, McCarthy accessed the work email system and TINYpulse to test whether Hardin was the author.

5 An impression of surveillance is created when, under the circumstances, an employee could reasonably conclude from the statement in question that his protected activities are being monitored.⁴³ Although the statement that Respondent thought or “was pretty sure” Hardin had sent the TINYpulse comment would reasonably lead an individual to conclude that his
10 TINYpulse anonymity had been breached, no evidence has been presented that Hardin was engaged in protected, concerted activity or that Respondent had knowledge of any such activity. Thus it is recommended that this allegation be dismissed.

The General Counsel further alleges that Respondent engaged in surveillance during the April 25 meeting by making conspicuous and persistent efforts to confirm its suspicion that
15 Hardin authored the TINYpulse comments.⁴⁴ The General Counsel notes that Respondent checked the timestamp of Hardin’s TINYpulse email and sent a second blind reply to the TINYpulse comment while monitoring Hardin’s email. The allegation fails for the same reason that the impression of surveillance failed. That is, without any knowledge of protected concerted activity of its employees, Respondent cannot have made the timestamp and email reply findings
20 for the purpose of spying on its employee’s concerted activity.⁴⁵ Accordingly, it is recommended that this allegation be dismissed as well.

4. Alleged April 25 Interrogation

25 The General Counsel alleges that on April 25, 2016, McCarthy and T. Westover interrogated employees about their concerted activities.⁴⁶ There is no dispute that on that date, McCarthy asked Hardin whether he authored the TINYpulse comment.

30 Questioning employees about protected activity is unlawful if, under the totality of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise rights guaranteed by the Act.⁴⁷ Factors such as the place and method of the interrogation, the identity of the questioner, the background of the questioning, and the nature of the information sought are relevant to this analysis.⁴⁸

⁴³ *Sam’s Club*, 342 NLRB 620 (2004), citing *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998), *enfd.* 8 Fed.Appx. 180 (4th Cir. 2001).

⁴⁴ Further amendment of consolidated complaint granted Feb. 13, 2017, par. 4(w).

⁴⁵ The General Counsel alleges that Hardin’s discharge was not only an unlawful discharge because it was in retaliation for his protected concerted activity but also because it was based on information obtained as a result of the alleged unlawful surveillance and the alleged unlawful search of Hardin’s work email account. As it has been found that neither unlawful surveillance nor unlawful search of Hardin’s work email account was present, it is further found that his discharge was not in response to unlawful surveillance or search of his email account.

⁴⁶ Consolidated complaint, par. 4(i)(1); 4(j)(1).

⁴⁷ *Rossmore House*, 269 NLRB 1176, 1177–1178 & fn. 20 (1984), *affd.* sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

⁴⁸ *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 (2009), *enfd.* sub nom. *Mathew*

Continued

Because there is not a preponderance of the evidence that Hardin engaged in protected activity in writing the TINYpulse comment and there is not a preponderance of the evidence that Respondent knew of any protected concerted activity, it cannot logically be found that questioning Hardin about the TINYpulse comment constituted unlawful interrogation. Questioning employees about activity which is not protected cannot reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Thus, it is recommended that the allegation of interrogation be dismissed.

5. Alleged April 25 Threat of Discharge

After questioning Hardin about the TINYpulse comment, McCarthy told Hardin to go home and think about the meeting for the next 24 hours. The General Counsel alleges that sending Hardin home in the context of taking his security card and locking him out of its systems was an unlawful threat of discharge.⁴⁹ For the same reason that no interrogation, surveillance, or impression of surveillance have been, it is found that sending Hardin home to think about the meeting in the context of taking his security card and locking him out of the systems does not constitute an unlawful threat of discharge. This is the case because there is no evidence that Respondent was aware that Hardin had engaged in any protected concerted activity. It is recommended that the allegation of threat of discharge be dismissed accordingly.

6. Alleged April 26 unlawful search of Hardin's work email account

The General Counsel alleges that on April 26, 2016, Respondent unlawfully searched Hardin's work email account.⁵⁰ McCarthy testified that he searched Hardin's email on April 26 because he was concerned about Hardin's truthfulness. In McCarthy's view, Hardin had certainly authored the TINYpulse comment. Hardin's refusal to admit authorship raised questions about Hardin's credibility. McCarthy explained that in the past, he had discovered other unspecified employees in lies and further investigation had revealed that these employees were engaged in theft from the firm. Thus, McCarthy searched Hardin's email to determine if Hardin was engaged in misconduct.

For the same reasons that the allegations of threat, surveillance, and interrogation have been found lacking in merit, this allegation is also defective. Initially, it is noted that there is no evidence that Respondent's employees have an expectation of privacy of their email accounts.⁵¹ Thus Respondent acted lawfully in conducting a search of Hardin's work email account unless

Enterprise, Inc. v. NLRB, 771 F.3d 812 (D.C. Cir. 2014); *Norton Audubon Hospital*, 338 NLRB 320, 320-321 (2002).

⁴⁹ Consolidated complaint, par. 4(k). In general terms, the General Counsel relies on *Alternative Energy Applications, Inc.*, 361 NLRB No. 139 (2014) (it is unlawful to threaten discharge for engaging in protected concerted activity).

⁵⁰ Further amendment of complaint, granted Feb. 13, 2017, par. 4(x).

⁵¹ In fact, in a portion of the consolidated complaint which was settled, par. 4(d)(4), the following employee language appears: "Employees have no right of personal privacy in their use of [Respondent's] computer and electronic communication systems. . . ."

the search was conducted in retribution for protected concerted or union activity. Here, there is no evidence that Respondent knew or suspected that Hardin was engaged in protected concerted activity. Accordingly, the record indicates that McCarthy’s April 26 search of Hardin’s email was not due to an unlawful concern regarding employee protected concerted activity and it is recommended that this allegation be dismissed.

7. Alleged Unlawful Adverse Action

The General Counsel alleges that on April 25, Respondent unlawfully suspended Hardin, locked him out of its systems, and took his security card.⁵² McCarthy agrees that on April 25, he met with Hardin, suspended him, temporarily locked him out of the systems, and asked Hardin for return of his security card on April 25. Respondent claims it took this action solely for legitimate business reasons related to Hardin’s denial of authorship of the TINYpulse comment. Without proof of protected concerted activity/ knowledge of that activity, and animus toward the activity, the actions of suspension, locking Hardin out of its systems, and asking for return of his security card do not violate the Act. Thus, it is recommended that this allegation be dismissed.

II. Warning and Discharge of Jongewaard Alleged Unlawful Rules and Threat Case 28–CA–181381

A. Facts

1. Background

Jongewaard, a non-attorney, began working for Respondent as a client acquisition specialist on October 6, 2015. At that time, there were two other non-attorney client acquisition specialists, both of whom had left Respondent’s employment by the end of 2015. After a written warning in June 2016, Jongewaard was discharged for poor performance on July 22, 2016. Supervisor K. Westover recommended Jongewaard’s written warning and discharge.

Respondent obtains business from prospective clients through internet contacts, online chats on the firm’s website, and telephone calls. The telephone calls are answered by the intake team. The chats and internet contacts are distributed to the intake team by K. Westover. Beginning in February 2016, attorneys Sarah Schade (Schade) and Jacob Hippensteel (Hippensteel) as well as alleged discriminate Jongewaard comprised the intake team. K. Westover supervised only Jongewaard. Schade and Hippensteel were supervised by Tuchman.

On hire, Jongewaard’s annual base salary was \$30,000 with additional bonus compensation calculated each month. The base salary was raised to \$35,000 in 2016. The client intake specialist group bonus pool available to Jongewaard was three percent of the firm fees earned by the client intake specialist group less cancellations and monthly salary. Each client signed by a specialist entitled the specialist to one share in the bonus pool. Jongewaard was also promised a \$25,000 bonus after one year service.

⁵² Consolidated complaint, pars. 4(l), (m), and (n).

Respondent’s letter of hire to Jongewaard explained how the monthly bonus might work under the heading, “how we think it will go.” This section of the letter indicated that from an annual base salary of \$30,000, which is a monthly base salary of \$2500, Jongewaard might receive estimated earnings of \$2500 in October and November 2015, \$3000 in December 2015, \$3500 in January 2016, \$4000 in February 2016 and an additional \$1000 each succeeding month up to \$9000 in the month of September 2016.

K. Westover was on the interview committee that hired Jongewaard as an intake specialist in October 2015. As K. Westover explained it, Jongewaard’s compensation structure has a base salary plus a bonus. Initially, the bonus was based on 3 percent of the fees earned by the firm for her intake work. In June, the bonus was changed to 3 percent of the amount of debt Jongewaard brought in by her intake work.

Client leads originate through the internet, chats, and phone. K. Westover assigns the internet and chat leads equally to one of the three client intake specialists. The phone-in calls ring first to a “primary” number and then on the second ring, they ring to all three members of the client intake team. The “primary” designation is rotated. In 2016, Hippensteel handled primary duty from 7 a.m. to 10 a.m. Jongewaard was the primary team member from 10 a.m. to 1 p.m., according to K. Westover, the busiest time, “peak hours,” because it encompassed many potential client’s lunch time when they would be free to call. Schade was “primary” from 1 p.m. to 4 p.m.

In October and November 2015, Jongewaard’s earnings, in fact, were just as the letter of hire estimated. That is, she earned no bonus and was paid her monthly base salary. In December 2015, Jongewaard earned a small bonus. In January 2016, Jongewaard earned a bonus of \$792.14. In February 2016, her bonus was \$1075.09. There was no bonus in March. In April, her bonus was \$1307.29. In May, June, and July, Jongewaard earned no bonus. Thus, Jongewaard’s actual earnings did not keep pace with “how we think it will go.” There is no dispute that the mortgage mediation work, the source of many leads, was decreasing during this time.

2. Jongewaard’s Discussions with Co-workers

In March 2016, Jongewaard testified that she began speaking with Schade and Hippensteel: “. . . we were very upset about the leads we were getting and not bonusing and the hostile work environment that we had around us.” Jongewaard testified she spoke mostly with Schade after a first conversation between the three of them. Jongewaard and Schade’s conversations were in Schade’s office, the bathroom, or the parking garage. In March, Jongewaard also had a long conversation, about an hour, with Hippensteel in the parking garage. Their conversation was about lack of leads and the level of compensation. According to Jongewaard, Hippensteel also voiced concern: “It was very hostile. He didn’t, he thought it was impossible; he thought it was ridiculous.”

According to Jongewaard, she and Schade also discussed the fact that members of management were constantly slamming doors, in numerous meetings, and the employees did not know what was happening. This was during the period from March through the end of

Jongewaard's employment. These conversations were in Schade's office or the bathroom. Further, Jongewaard testified that she and Schade communicated by text about various matters at work including bonuses.

5 3. Jongewaard's Discussions with Management

10 Throughout 2016, Jongewaard was worried that the potential bonus structure set out in her employment offer would not be realized leaving her with only the base salary. Beginning in January 2016, Jongewaard began complaining to K. Westover that she was not receiving bonuses as set out in the offer letter and she could not make a living on the base salary alone. These discussions were in K. Westover's office. No one else was present. Generally, Jongewaard told K. Westover:

15 How upset I was that the offer letter was nothing like what was happening, not making the money that was supposedly we were supposed to make, there was no portal,⁵³ the leads were drying up, it was more difficult to get the leads and how unhappy everybody was there.

20 According to K. Westover, in early 2016, Jongewaard complained on several occasions to K. Westover her concern about not making her bonus. She did not complain to K. Westover about her base salary. She did not tell K. Westover that her base salary was not enough to live on. Further, K. Westover testified that Jongewaard did not tell her that no one in client intake was happy or the employees were upset they were not getting paid what they were promised. Jongewaard told K. Westover that her spousal support was ending. At this point, Jongewaard's bonuses were based on the amount of debt she brought in. Jongewaard told K. Westover that she would have to sign 20 customers a month to earn a bonus. K. Westover testified that Jongewaard's conversations were about Jongewaard's personal situation and did not include concerns for other intake specialists.

30 Jongewaard explained that in further meetings with K. Westover, she told her that "it was impossible for all of us to be making close to a million dollars a month [in intake]." According to Jongewaard, K. Westover responded that if McCarthy thinks it's possible, it is. Jongewaard recalled that in some of these conversations K. Westover urged Jongewaard to "hang in there" and told her that the portal would be implemented soon and new student loan repayment plans were also being considered.

40 In any event, due to Jongewaard's concerns, in June, K. Westover lowered Jongewaard's goal of bringing in \$1 million of debt a month to \$750,000 a month. K. Westover explained that the goal was just that. It was not a requirement and no discipline attached for failure to meet the goal.

Jongewaard testified that she also spoke to T. Westover in May or June in her work area a couple times when he was walking by that area. Jongewaard told T. Westover that she was

⁵³ Jongewaard explained that the portal was a proposed modification to the website designed to allow potential clients to self-qualify online.

worried because she was only getting “maybe seven calls a day, if that.” T. Westover advised her to “hang in there because the portal will be up and running soon.” In agreement, T. Westover testified that Jongewaard did not talk to him about any other employee’s pay. He further stated that Jongewaard did not complain to him about the bonuses she was making or the lack of
 5 bonuses in general of any other employee. Jongewaard never spoke to him about a hostile work environment or voiced complaints about any employees of the firm. T. Westover recalled that he usually passed through the office to say good morning to everyone. At those times, he testified that Jongewaard would “launch into her personal problems.”

10 T. Westover described the workplace as an interactive environment in which employees coordinate their work. T. Westover has never told Jongewaard or any other employee that they could not talk with each other or visit in each other’s offices or cubicles. There are no surveillance cameras or listening devices in the work place of which T. Westover knows. There is no policy prohibiting discussing pay. Employees are not forbidden from getting together in
 15 groups to have conversations.

Jongewaard testified she spoke with Dibella starting in February or March 2016 through the end of her employment. In these conversations, Jongewaard testified that she told Dibella that, “I couldn’t make it on my base salary, and we weren’t getting the leads, and it was harder
 20 and harder to sign people up. . . .” Jongewaard recalled Dibella’s standard answer being to reassure her that she was guaranteed \$55,000 at the end of her first year of employment. This figure results from adding the base \$30,000 to the \$25,000 bonus.

Dibella testified that she spoke with Jongewaard. Many of their conversations were about
 25 personal matters. Jongewaard complained to Dibella about her ex-husband, losing spousal support, child custody issues, and similar matters. Dibella testified that such conversations were “almost every other day or so.” She stated that Jongewaard usually asked for advice about these personal matters. Dibella testified that Jongewaard did not tell her that employees on the client intake team were unhappy about their pay, lack of bonuses, or working conditions in general.
 30 Dibella denied that Jongewaard ever had any discussion with her about group or other employees’ terms and conditions of employment. Dibella recalled that on one occasion, Jongewaard complained that both Hippensteel and Schade were getting more signings than she was. Dibella responded that it was because Jongewaard was not sitting at her desk by the phone. She was missing phone calls.
 35

Finally, Jongewaard also spoke with Tuchman in May 2016 in Tuchman’s office. No one else was present. Jongewaard told Tuchman that she was “very unhappy” working for Respondent because the promises in her letter of employment were not happening. According to Jongewaard, Tuchman told her if she was that miserable, she should look for a job elsewhere. In
 40 July, Tuchman and Jongewaard spoke again. According to Jongewaard, Tuchman asked how Jongewaard was doing and whether she had been looking for another job. Jongewaard responded that she had not looked for another job and was going to stay at least one year with Respondent. Tuchman testified that Jongewaard spoke to her about pay issues but Tuchman testified that these discussions were about “the amount of money she was working at as it related to personal
 45 things going on in her life, but not other employees.” Jongewaard did not tell Tuchman that there were group concerns. Jongewaard did not complain to Tuchman about other employees’

bonuses. Jongewaard did not tell Tuchman that other employees were unhappy with their employment or viewed their situation as a hostile work environment.

5 After describing the conversations above with K. Westover, T. Westover, Dibella, and
Tuchman, Jongewaard was asked, “And when you complained about bonuses, who were you
complaining about? Whose bonuses?” Jongewaard answered that she was complaining about,
“Mine, Sarah and Jacob’s.” Returning to the conversation with K. Westover, Jongewaard revised
the conversation to indicate that she complained that “we” were not getting leads. Similarly,
10 regarding T. Westover conversations, Jongewaard revised her prior testimony to “we” need to
get quality leads and regarding Dibella, Jongewaard revised her prior testimony to “Sarah, Jacob
and I were not bonusing as we were told. . . .”

Jongewaard also testified that on more than one occasion, including on the day before her
15 termination, she told Dibella that K. Westover “was cherry-picking the leads and taking the big
amounts for herself so McCarthy Law didn’t have to pay us.” On the day before her termination,
and after speaking with Schade and Hippensteel about the situation, Jongewaard reported to
Dibella that K. Westover had signed a \$240,000 lead and questioned why K. Westover got the
lead, “if we were starving and barely make it.” According to Jongewaard, Dibella was furious
and said she would look into the matter. K. Westover recalled that this lead came through over
20 the weekend. T. Westover asked her to follow up on the lead over the weekend. She called the
contact number and left a voice mail. K. Westover did not know whether the potential client was
ever signed by Respondent.

Dibella recalled Jongewaard bringing to her attention a claim that K. Westover had taken
25 a potential lead for over \$200,000. Jongewaard complained to Dibella that K. Westover did not
need the money but Jongewaard did. Jongewaard continued that she needed the money because
she was getting no spousal support. Dibella told Jongewaard she would find out what happened.
She denied that she indicated to Jongewaard that she was mad or upset about K. Westover’s
30 action as reported by Jongewaard. Dibella followed up by speaking to K. Westover who told her
that it was an after-hours call and at T. Westover’s request, she had called the potential client.
Neither Dibella nor K. Westover knew whether the client had been signed. Dibella testified that
she relayed this information to Jongewaard.

35 During the week of June 6, Jongewaard initiated a conversation with K. Westover. They
spoke in K. Westover’s office with the door closed. No one else was present.

I told her that it was just impossible to make any money and it was just miserable
there; we weren’t getting any leads. And I even showed her, mathematically, how
40 it was impossible for us to reach that number every month and how we were all
like me, Sarah [Schade] and Jacob [Hippensteel], were just, you know, dying in
there.

K. Westover denied that Jongewaard made any reference to other employees in any of
their conversations. K. Westover’s testimony is credited. As an adverse witness called at the
45 beginning of the hearing, K. Westover generally exhibited an earnest concentration to truthfully
answer the leading questions propounded to her. She gave great thought to each question and

reflected before answering. On the other hand, Jongewaard's testimony in general was unfocused and unresponsive in some instances. Based on this credibility resolution, it is found that Jongewaard did not specify that other employees were involved in her bonus concerns.

5 Further, the record reflects that Jongewaard's pay calculations were unique to her. As attorneys, Schade and Hippensteel did not have the same pay basis. Moreover, Jongewaard had been reminded earlier in her testimony that she needed to testify about other employees. After testifying using the singular voice, she was asked: "[W]ho were you complaining about? Whose bonuses?" Such an explicit reminder to Jongewaard weakens her subsequent testimony and
10 reinforces the testimony of Respondent's witnesses who uniformly testified that Jongewaard complained to them of her personal circumstances.

4. June Discussions With Dibella

15 Jongewaard testified that she and the employees to whom she spoke felt that management was watching them when they spoke to each other. Jongewaard also testified that she was certain Dibella was watching because she told Jongewaard in March that the office was not a social club but a working office. In a May or June conversation in Dibella's office, Jongewaard testified that
20 Dibella said, ". . . we are not a social office and [McCarthy] doesn't like it when we're talking amongst ourselves." No one else was present during this five to ten minute closed-door conversation. Whether in March, May, or June, Dibella denied making such a statement. In fact, she claimed that the office is rather social. Every Friday, she brings in bagels or cake and everyone meets in the kitchen to share. Dibella's office is directly across the hall from Schade's.
25 However, Dibella estimated she spent about 80 percent of her time in the office with her door closed.

Dibella testified that she absolutely never told Jongewaard she could not talk to any other employee at the firm or that she was forbidden from talking about salary or bonus or any other term and condition of employment. She occasionally saw Jongewaard in Schade's office but did
30 not know what they were discussing. Dibella was a straight forward, highly credible witness and her denial is credited over Jongewaard's testimony. As is apparent, it is necessary and normal for the intake team specialists to communicate with one another. Thus, it strains credulity to envision a rule which did not allow communication. Dickson denied that Respondent had any policy that employees could not talk about their terms and conditions of employment with one another. As
35 mentioned before, Dickson was a thoughtful, highly credible witness.

5. Written Warning

40 K. Westover testified that beginning in March, Jongewaard, "starting having some health issues, there were a lot of things going on in her life, personally. And she just, she had a hard time. She didn't follow up. She was gone a lot." K. Westover knew this because Jongewaard told her these things. "We talked every day or so." Jongewaard was worried that because her spousal support was ending and she would not be able to maintain her lifestyle. She also told K.
45 Westover that she wasn't signing as many clients and was afraid she would not be able to earn a bonus. During this period, K. Westover also observed Jongewaard raising her voice, "yelling," and slamming down the phone. According to K. Westover, Jongewaard never spoke about other

employees. “It was all about her.”

In operations meetings in April, May, and June, Dickson reported TINYpulse comments from employees complaining that Jongewaard was in a bad mood, slamming the phone, 5 slamming the desk, slamming doors and drawers. A second anonymous comment read by Dickson at another meeting claimed that Jongewaard was negative and had a bad attitude.

In an operations meeting on Monday, June 13, K. Westover reported that she had observed that Jongewaard’s signings each month were continuing to decrease, that Jongewaard 10 was being discourteous to potential clients, and distracting other employees in the office. K. Westover proposed a written warning and the team decided that this warning would be appropriate. On Thursday, June 17, K. Westover gave Jongewaard the written warning. Dickson was present during the meeting. Reasons for the warning were listed as decline in performance and signings, negative attitude about work, and disruptive, irregular behavior adversely affecting 15 employees and potential clients. Corrective action required was:

- Other than breaks and lunch, be at work station and prepared to take incoming calls and get follow-ups done
- Hit goal of \$750,000 debt each month in clients assigned to me
- Address concerns/issues with supervisor
- Disruptive behavior must stop immediately

During her meeting with Jongewaard, K. Westover denied telling Jongewaard that Jongewaard did not understand the expectation for working at the firm. She denied telling 25 Jongewaard that she would never fire her. Jongewaard did not tell K. Westover that the \$750,000 goal was unattainable. Jongewaard did, however, tell K. Westover that the warning was just a paper trail so K. Westover could fire her. K. Westover denied telling Jongewaard that she could not speak to her coworkers or raise concerns about working conditions with management or her coworkers. K. Westover testified that she told Jongewaard to be at her desk in order to fulfill her 30 work duties of sending emails and picking up the phone.

Throughout her employment, Jongewaard received Cheers for Peers through the TINYpulse system. The last such comment she received was on June 22 stating, “Danielle you’re doing so awesome lately! I can tell in your attitude you’re just doing better and being really 35 friendly and I think even though everyday can be so different, you’re doing a fantastic job.” Jongewaard thought that K. Westover sent this Cheer because all of her coworkers and friends she asked said they did not send it. Jongewaard thought the wording sounded like K. Westover and related to the terms of her written warning of June 17.

Jongewaard testified that she felt she was being watched by management. Jongewaard referred to hearing that there were cameras throughout the work space. Jongewaard testified that many times when she spoke with Hippensteel or Schade she hid behind their office doors or met them in the parking structure or in bathrooms on floors of the building not occupied by Respondent. The General Counsel did not allege such surveillance and there is no evidence that 45 such surveillance systems or cameras. Jongewaard’s testimony is based on “hearing” about such equipment but not sighting such equipment. Both Dickson and K. Westover testified that there

were no video cameras or listening devices in Respondent's workplace. To the extent it is necessary to assess credibility on this matter, Dickson and K. Westover's testimony is credited in this regard.

5 On occasion, K. Westover had seen Jongewaard speaking to Schade in Schade's office. K. Westover did not know what they were discussing. K. Westover denied telling Jongewaard that she could not talk with Hippensteel or Schade and, in fact, testified that there were many reasons why these individuals would need to talk with each other in order to carry out their duties for Respondent. K. Westover denied telling Jongewaard that the firm had a rule that
10 employees could not go to the restroom together. She denied telling Jongewaard that she could not take a break. K. Westover testified that she did not ever penalize Jongewaard for missing a phone call.

15 Similarly, Dickson testified that Respondent did not have a policy prohibiting employees from taking breaks or going to the bathroom together, did not prohibit employees from bringing complaints to management, and did not prohibit employees from talking to one another in the workplace. As HR manager, Dickson testified she would have been aware of any verbal policy from a manager. Further, Tuchman testified that she did not ever tell Jongewaard that she could not go to the rest room with Schade. Tuchman stated that such a prohibition would have been
20 absurd. She would never tell another adult such a thing. Tuchman testified there was no such rule. Tuchman was unaware on any policy or practice of spying on employees. Tuchman was unaware of any cameras at the firm. Tuchman testified she had never told any employee that they could not talk about their salary, benefits, bonuses, or working conditions with their coworkers.

25 Dickson testified that Jongewaard did not present her with complaints about employee working conditions or complaints of a hostile working environment. Nor did Jongewaard complain to Dickson about her bonus situation or employee unhappiness generally about receiving or making bonuses. Dickson testified that Jongewaard did not complain that employees were not allowed to talk with each other about the terms and conditions of their employment.
30 Dickson recalled speaking to Jongewaard about issues with potential clients and, maybe a handful of times, speaking to Dickson about personal issues.

6. June, July Discussions with Tuchman

35 According to Jongewaard, on an unspecified date in June, Schade and Jongewaard had a conversation in the third floor bathroom of Respondent's offices. Schade and Jongewaard spoke to each other from separate stalls about how miserable they were with management and not getting bonuses and leads drying up. When Jongewaard came out of her stall, Dickson was standing there. Schade and Jongewaard left the bathroom. Schade, who was identified as a
40 corroborating witness for the General Counsel's case, was not called to testify. Failure of the General Counsel to call Schade to corroborate Jongewaard's testimony regarding what was discussed in the bathroom between Jongewaard and Schade weakens the General Counsel's case.⁵⁴

⁵⁴ See, e.g., *Stabilus, Inc.*, 355 NLRB 836, 340 n. 19 (2010); see also, *C & S Distributors*, 321 NLRB 404 fn.2 (1996), citing *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995).

Dickson agreed that she overheard a conversation between Jongewaard and Schade in a public bathroom at the firm. As client intake specialists, they were required to specify whether a lead came via internet, phone, or chat. Dickson testified that Jongewaard and Schade were discussing the fact that they always reported “internet” as the lead source rather than stating where the lead had in fact come from. Dickson deduced that this inaccurate source reporting meant that Tuchman, who brought in a lot of clients through networking efforts, was not being credited for her work. Dickson interjected, addressing Jongewaard and Schade, that she used to answer phones and it was important to accurately report the lead source.

Dickson also repeated the conversation to K. Westover who said she would bring up the need for accurately reporting lead sources with Jongewaard. K. Westover confirmed that Dickson made such a report to her. Dickson’s testimony is credited. Given that Schade was not called as a witness and given Jongewaard’s uncorroborated and vague testimony regarding the discussion including dissatisfaction with management, bonuses, and lack of leads is discredited.

About a week after she was overheard in the bathroom, according to Jongewaard, Tuchman spoke to Jongewaard in Tuchman’s office and told her that she and Schade could not go to the bathroom at the same time anymore. Tuchman credibly denied that she would ever tell another adult, much less Jongewaard whom she did not supervise, that she could not go to the bathroom with a co-worker. Tuchman explained that there would have been no reason for her to express “such a ridiculous sentiment.” Tuchman’s testimony is credited. Tuchman was a highly believable witness whose testimony was balanced with some deference to employees as well as an expectation of competence from employees and management.

According to Jongewaard, in May 2016, she spoke to Tuchman telling her, “that I was very unhappy working there. . . . [Tuchman replied] that if I was that miserable, I should look for a job elsewhere. . . . And she pretty much told me I should probably look for something else.”

Tuchman testified that in July 2016, Jongewaard came into her office for a private talk. Jongewaard asked if she could speak to Tuchman as a friend and then closed the door. Jongewaard told Tuchman she had received a written warning from K. Westover and she was worried that she would be fired. Jongewaard asked Tuchman what she could do. Tuchman asked Jongewaard if she was happy working for Respondent. Jongewaard responded that she was. Tuchman advised Jongewaard to tell Dickson that she was happy and really wanted to do her job and be a better employee. Jongewaard complained that she was not making enough money. Tuchman responded, “If you’re not making the money you want to here, you certainly have to do what you have to do for you and your family. . . you have to do what you have to do make things work out for your life.”⁵⁵

⁵⁵ When called to testify by the General Counsel pursuant to Rule 611(c), Tuchman was asked, “Q: And you told Ms. Jongewaard -- or -- Jongewaard if she was that miserable working at McCarthy Law she should look for another job, correct? A: Yeah, in so many words.” The recitation above uses the words as Tuchman testified on direct when called by Respondent.

7. Discharge of Jongewaard

5 K. Westover's office is near Jongewaard's work area. During July, K. Westover could hear Jongewaard being rude to potential customers, slamming doors and banging the phone down. K. Westover heard Jongewaard being impatient with clients. She sometimes called Jongewaard into her office and told her she was being impatient and needed to explain the process more fully. As part of her job, K. Westover routinely listens to phone conversations with prospective clients in order to train and monitor the intake team. K. Westover also noted that Jongewaard was visiting other employees during work time and keeping them from doing their work. K. Westover called Jongewaard into her office to listen to the call with her. They listened to a portion of the call and K. Westover forwarded the call to Jongewaard to finish listening. K. Westover advised Jongewaard to be patient and kind to potential clients.

15 At the July 12 staff meeting, Dickson read a letter from a firm client in which the client praised Jongewaard's "amazing" communication skills. The client was very pleased with Jongewaard's service.

20 In July, Dickson, while in her office, overheard a conversation between Hippensteel and Jongewaard while the employees were in Hippensteel's office, about eight feet from Dickson's office. Jongewaard, who was standing in the hall by Hippensteel's office door, told Hippensteel that he had two incomes and she only had one. She said she needed a particular client transferred to her. Dickson followed up that same day to find out what had happened. She told K. Westover about the incident and what she thought she had heard and K. Westover was able to listen to the phone calls that originated the disputed client.

25 Thus, K. Westover became aware that Jongewaard, while the designated "primary," transferred a call to Schade. Schade was not at her desk and the call went to voice mail. When the caller rang again, Jongewaard transferred the call to Hippensteel. Hippensteel spent 25 minutes with the customer who eventually signed on as a client with \$250,000 of debt. When Jongewaard found out about the amount of the debt, she asked Hippensteel to give the client to her because he had two incomes at his house and she had only one. Hippensteel did as Jongewaard requested. According to K. Westover, this was when she determined that Jongewaard's performance was not going to improve. Rather, Jongewaard was motivated by leads with a large amount of debt and was prioritizing her time for fast turnaround. Jongewaard did not testify about this incident. Jongewaard did not deny the incident and as mentioned, Schade and Hippensteel were not called as witnesses. Thus, K. Westover's un rebutted evidence regarding this incident is credited.

40 K. Westover looked at Jongewaard's production figures and noted that there had been no improvement. Following this incident, K. Westover met with the operations team and recommended that Jongewaard be terminated for her performance.

45 Jongewaard was called into K. Westover's office on July 22. Dickson was present. K. Westover told Jongewaard, according to Jongewaard, "we're letting you go because things are not working out." When Jongewaard asked for a further explanation, K. Westover responded that she could not tell her anything further. Jongewaard turned to Dickson for an explanation and

Dickson said the company did not have to provide an explanation. Then, when asked if TINYpulse was discussed, Jongewaard testified that K. Westover told Jongewaard that there had been complaints from other employees.

5 According to K. Westover, the reason for Jongewaard’s termination was her performance. According to K. Westover, Jongewaard’s concerns were personal. K. Westover did not recall hearing that on the day prior to her discharge, Jongewaard had complained to Dibella that K. Westover had assigned herself a large volume client. Similarly, Dibella denied that
10 Jongewaard complained to her that K. Westover “cherry picked” the leads. K. Westover denied that Jongewaard spoke on behalf of any other employee. K. Westover denied that during the termination discussion Jongewaard reported that she had been told she could not use the bathroom or leave her desk. In fact, K. Westover did not recall talking with Dibella the day prior to discharging Jongewaard. In any event, no specific reason was given to Jongewaard for her
15 discharge.

 Dickson, who was also present at the discharge meeting, denied that K. Westover brought up any TINYpulse complaints about Jongewaard and denied that Jongewaard claimed she was being discharged so the firm would not have to pay her a \$25,000 bonus. K. Westover and
20 Dickson were highly credible witnesses. Overall, their testimony was consistent and thorough and it is concluded that their collective version of the meeting is more accurate than
Jongewaard’s.

 Respondent’s cause for termination of Jongewaard was performance. One other intake specialist was discharged for performance reasons. After a few months with Respondent, this
25 employee “was not producing. He wasn’t bringing clients in. He wasn’t following up. He wasn’t getting back to them. We had phone calls from people saying that he said that he was going to send them something and he didn’t. So it was fully performance based.”

B. Analysis

30 1. Alleged Unlawful Rule Prohibiting Employees Talking to Co-Workers and Alleged Impression of Surveillance by Telling Employees They Could Not Talk to Co-Workers

 The General Counsel alleges that about May 2016, Dibella orally promulgated an overly-
35 broad and discriminatory rule which prohibited employees from talking to their coworkers at the facility.⁵⁶ The General Counsel further alleges that when Dibella told employees they could not talk to their coworkers this created an impression that concerted activities were under surveillance.⁵⁷ The General Counsel asserts that Jongewaard’s testimony should be credited
40 because it is consistent with the written warning which Jongewaard received in June citing her for a “negative attitude about work” and “disruptive, irregular behavior adversely affecting employees and potential clients.” The General Counsel argues that direction given to Jongewaard in June to address concerns with her supervisor is also consistent with Jongewaard’s testimony.

⁵⁶ Consolidated complaint par. 4(p)(1).

⁵⁷ Consolidated complaint par. 4(p)(2).

Jongewaard's testimony was that Dibella told her, "we are not a social office and [McCarthy] doesn't like it when we're talking amongst ourselves." Dibella's denial of the statement attributed to her, that the firm is not a social club and McCarthy does not like it when employees talk "amongst themselves," has been credited. The General Counsel's argument is rejected. In fact, it is readily apparent that the intake team had to communicate in order to function properly. Because Dibella's denial is readily plausible and has been credited based on Dibella's demeanor, it is recommended that the allegations of an unlawful rule prohibiting employees from talking to each other and impression of surveillance be dismissed.

2. Alleged Unlawful Rule and Alleged Threat

The General Counsel alleges that about June 2016 Tuchman orally promulgated an overly-broad and discriminatory rule prohibiting employees from using the bathroom facilities at the same time.⁵⁸ The complaint further alleges that in mid-July, Tuchman threatened employees who were engaged in concerted activities to quit their employment.⁵⁹ As mentioned above, Tuchman was a highly credible witness. Her testimony that she would never presume to tell an adult when they could or could not go to the bathroom is highly believable and credited. Thus, based on demeanor, it is found that no oral rule was promulgated regarding employees using the bathroom facilities at the same time.

As to the alleged threat, the conversation described by both Jongewaard and Tuchman involved Jongewaard's private family matters and Jongewaard's personal unhappiness. Both Jongewaard and Tuchman testified that Jongewaard described only her own personal situation and not that of any other employees. Jongewaard did not talk with Tuchman about other employees' bonuses. Tuchman testified that when Jongewaard continued to complain that she was not making enough bonus money, she told Jongewaard, "you have to do what you have to do make things work out for your life." In context, those words cannot be reasonably construed as an explicit invitation to quit employment linked to protected activity. Moreover, assuming for the sake of argument that the words might constitute a veiled threat, there is no evidence that the statement was repeated to other employees. Thus, were the words to be seen as a veiled threat, the impact was de minimus and does not warrant a remedial order. Accordingly, it is recommended that the allegations of Tuchman promulgating an unlawful rule and making an unlawful threat be dismissed.

3. Alleged Unlawful Written Warning 4. Alleged Unlawful Discharge of Jongewaard

The General Counsel asserts that a written warning given to Jongewaard on June 17, 2016, was due to her protected, concerted activity.⁶⁰ The General Counsel also asserts that Jongewaard's discharge on July 22 was due to her protected, concerted activity.⁶¹

⁵⁸ Consolidated complaint par. 4(q)(1).

⁵⁹ Consolidated complaint par. 4(q)(2).

⁶⁰ Consolidated complaint pars. 4(r) and (u).

⁶¹ The General Counsel also claims that Jongewaard was disciplined and discharged for violating the orally promulgated, overly-broad and discriminatory rule which prohibited employees from talking to

Continued

5 These allegations are appropriately analyzed pursuant to the burden shifting analysis set forth in *Wright Line*.⁶² Thus, the General Counsel must prove by a preponderance of the evidence that the Jongewaard's protected activity was a motivating factor in her written warning and discharge. The General Counsel's evidence must show that the employee engaged in protected activity, the employer knew about the protected activity, and the employer had animus toward the protected activity. If the General Counsel meets this burden, the burden shifts to the employer to show that it would have disciplined and discharged Jongewaard even absent the employee's protected activity. An employer does not meet its burden merely by showing that it had a legitimate reason for its action. Rather, it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct.⁶³

15 Respondent claims that the General Counsel has failed to establish a prima facie showing of activity, knowledge, and animus. Thus, Respondent argues that Jongewaard did not ever attempt to initiate or induce any group action. Rather, the record reflects, according to Respondent, that Jongewaard's constant complaining about personal matters disrupted her colleagues work causing one to request a move away from Jongewaard. Respondent notes that no corroborating witnesses were called by the General Counsel. Indeed, Hippensteel, Schade, and Bennett were not called to testify. Thus, Respondent requests that an adverse inference be drawn that they would not have supported Jongewaard's testimony.⁶⁴ There was no explanation for failure to call Schade, Hippensteel, or Bennett. In agreement with Respondent, it is found that failure to call these potentially corroborating witnesses weakens the General Counsel's case.⁶⁵

25 a. General Counsel's Initial Prima Facie Showing

(1) Protected Concerted Activity

30 Activity by a single individual for her personal benefit is not concerted activity.⁶⁶ The record as a whole indicates that Jongewaard was extremely unhappy in her personal life and complained about these personal matters to members of management. Jongewaard also complained to some members of management about her inability to earn bonuses.

their coworkers at the facility. Consolidated complaint par. 4(v). The rule allegation has been dismissed on credibility grounds. It is therefore unnecessary to analyze this alternative discharge allegation.

⁶² 251 NLRB 1083 (1980), enfd on other grounds, 662 F.2d 899 1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To the same effect, see also, *Praxair Distribution, Inc.*, 357 NLRB 1048, fn. 2 (2011), cited by Respondent.

⁶³ See *Boothwyn Fire Company No. 1*, 363 NLRB No. 191, slip op. at 7 (2016), citing authorities.

⁶⁴ Respondent cites *International Automated Machs., Inc.*, 285 NLRB 1122, 1123 (1987) (adverse inference may be drawn from failure to call individual who may be reasonably viewed to be favorably disposed to the party), enfd 861 F.2d 720 (6th Cir. 1988).

⁶⁵ See, *Stabilus*, supra, 356 NLRB at 340 fn. 19 (2010); see also, *C & S Distributors*, supra, 321 NLRB 404 fn.2.

⁶⁶ See, e.g., *Adelphi Inst.*, 287 NLRB 1073, 1073–1074 (1988) (employee who asked co-worker whether he had ever been put on probation was not engaged in concerted activity because he did not seek to initiate, induce, or prepare for group activity).

However, according to Jongewaard, she also discussed her working conditions and her inability to earn bonuses with her colleagues Schade and Hippensteel. Jongewaard testified, albeit without their corroboration, that she spoke to her co-workers about her unhappiness with working conditions and that they expressed similar concerns. Neither Schade nor Hippensteel testified and there is no explanation for failure of the General Counsel to call them.

Although there is no evidence that any of these conversations were engaged in with the object of initiating or inducing or preparing for group action, it is unnecessary for the General Counsel to make such a showing because conversations about vital terms and conditions of employment such as wages are considered “inherently” concerted.⁶⁷ Thus, it is found that Jongewaard was engaged in concerted activity.

(2) Knowledge

Respondent claims that management had no knowledge that Jongewaard engaged in any protected activity. Indeed, management witnesses testified that Jongewaard spoke frequently to them of personal problems and unhappiness. Respondent argues that it had no reason to believe that Jongewaard spoke for her co-workers and could not infer from her statements that any group action was contemplated. In agreement, it is found that no knowledge is evident on the record. Jongewaard’s initial testimony about her conversations with management were couched in the first person singular.

K. Westover testified at length when she was called by the General Counsel as an adverse witness. She thoroughly explained the bonus system applicable to Jongewaard’s pay calculation as well as rotation of phone calls and assignment of leads. As an adverse witness, K. Westover assessed the leading questions permissibly propounded and responded in a thoughtful manner. For instance, K. Westover was asked, “She [Jongewaard] indicated to you that she wasn’t making enough to live, correct?” K. Westover responded, “She was — no. That — she didn’t ever say she didn’t have enough to live on. She was — her spousal support was ending and so she was nervous about just money in general and making all her ends meet.”

K. Westover’s testimony indicated a genuine personal appreciation of Jongewaard and Jongewaard’s ability to perform well as a client intake specialist. The principle credibility conflict between K. Westover and Jongewaard was whether Jongewaard voiced her concerns in the singular or plural voice. K. Westover firmly answered the question, “Did Ms. Jongewaard ever come to you and present grievances to you on behalf of the intake team, saying, ‘Our bonuses are unfair’ or anything like that?” Answer: “ No, because — no. Whenever she — was she was all personal. It was all about Danielle when I was speaking with Danielle. She never spoke on behalf of anybody else.” Given the need to revise Jongewaard’s testimony from

⁶⁷ *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (discussion between two employees about vital terms and conditions of employment such as wages is “inherently” concerted activity), enf. denied in part, 81 F.3d 209, 214 (D.C. Cir. 1996) (theory of inherently concerted activity is “nonsensical” and “limitless” and has “no good support in the law.”); see also, *Hoodview Vending Co.*, 362 NLRB No. 81 (2015), affirming and adopting 359 NLRB No. 36, slip op. at 4 (2012) (employee who spoke to a co-worker about job security was engaged in “inherently” concerted activity).

its original singular to the plural and given K. Westover’s highly credible testimony, as between the two of them, it is found that Jongewaard did not indicate that she was speaking on behalf of other employees. Thus, in agreement with Respondent, it is found that there was no knowledge of Jongewaard’s “inherent” concerted activity.

5

(3) Animus

Respondent also claims there is no evidence of animus towards the conduct alleged to be protected activity. The General Counsel asserts that animus is evidenced by the June 17 written warning which references Jongewaard’s “negative” attitude and her “disruptive, irregular behavior adversely affecting employees.” The warning also noted that “disruptive behavior must stop immediately.” The General Counsel argues that such language constitutes a veiled reference to protected concerted activity.⁶⁸

Under the circumstances of this case, however, the statements in the warning letter may not be treated as evidence of animus. The undisputed evidence indicates that Jongewaard was banging phones, slamming doors, and yelling at potential customers. Jongewaard did not deny this testimony nor did she testify that she uniformly sat at her work station while she was the primary intake specialist. As there is no evidence of knowledge of Jongewaard’s inherently protected activity, the record further indicates that these activities (banging phones, slamming doors, yelling at potential customers, and failure to stay at her post) were the sole reason for the written warning. Thus, it is not possible to find the words used in the warning letter constitute a veiled reference to protected activity.

Without evidence of knowledge or animus, there is not a preponderance of the evidence showing that Jongewaard’s inherently concerted activity motivated either her written warning or her discharge.

b. Respondent’s Burden to Show it Would Have Discharged Jongewaard in Any Event

30

It is found that even if a prima facie case of discrimination were shown, Respondent has sufficiently proven that it would have warned and discharged Jongewaard in any event. Respondent asserts that it had legitimate, non-pretextual business reasons for the warning and discharge; that is, on-going and uncorrected performance problems. Respondent’s argument is accepted. Jongewaard’s slamming and banging behavior was reported by employees and observed by management. Her lack of patience with potential clients was observed by management. A legitimate business model for an employee whose bonus structure is based on answering the phone is to require that the employee be available to answer and courteous when answering. Jongewaard did not fulfill this legitimate expectation. Her behavior in forwarding a client on two occasions and then claiming the client after someone else signed the client indicates that she was unwilling to perform her duties in a professional manner. Thus, Respondent has shown that it would have discharged Jongewaard in any event.

35
40

⁶⁸ The General Counsel cites *Skyline Lodge*, 305 NLRB 1097 fn. 1 (1992), enfd 983 F.2d 1068 (6th Cir. 1992); *Inova Health System*, 360 NLRB No. 135, slip op. at 5 (2014); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enfd 519 F.3d 373 (7th Cir. 2008).

CONCLUSIONS OF LAW

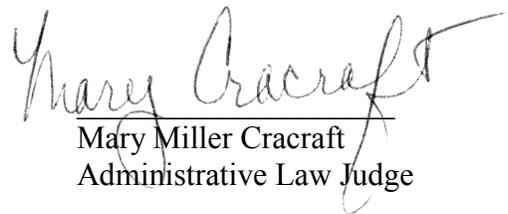
- 5
1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
 2. Respondent did not violate the Act as alleged in the consolidated complaint, as amended.

ORDER

10 On these findings of fact and conclusions of law and on the entire record, it is recommended that the consolidated complaint, as amended, be dismissed.

Dated, Washington, D.C. June 30, 2017

15


Mary Miller Cracraft
Administrative Law Judge

20