

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

TREY HARLIN, P.C.
Respondent

and

Case 16-CA-171972

APRIL MCCORMICK, an Individual
Charging Party

Brian Dooley, Esq.,
for the General Counsel.

Trey Harlin, III, Esq.
for the Respondent.

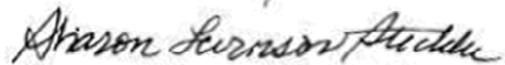
BENCH DECISION AND CERTIFICATION

SHARON LEVINSON STECKLER, Administrative Law Judge. I heard this case on June 14 and 15 in Fort Worth, Texas. On the same day, after the parties rested, I heard oral argument. On June 16, 2017, I telephonically issued a bench decision, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In the complaint, the General Counsel alleged that Trey Harlin, P.C. violated Section 8(a)(1) of the National Labor Relations Act (the Act) by terminating Charging Party April McCormick for protected concerted activities.

For the reasons stated by me on the record, I found that Respondent did not violate Section 8(a)(1) of the Act as alleged. In my bench decision, I included Conclusions of Law and my Order.

In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix," the portion of the transcript containing this decision.¹

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



Sharon Levinson Steckler
Administrative Law Judge

¹ The bench decision appears in uncorrected form at pp. 380 through 419 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as "Appendix" to this certification.

APPENDIX

DECISION

5

STATEMENT OF THE CASE

10 **SHARON L. STECKLER, ADMINISTRATIVE LAW JUDGE.** This case was tried in Fort Worth, Texas on June 14 and 15, 2017. Charging Party April McCormick (here McCormick) filed the charge on March 16, 2016 and General Counsel issued complaint on February 28, 2017. Respondent Trey Harlin P.C. (here Respondent), an insurance defense law firm in Fort Worth, Texas, filed a timely answer and then, on May 12, 2017, filed a first amended answer.

15 The complaint alleges that, about February 19, 2016, Respondent discharged McCormick because she engaged in protected concerted activity. The alleged protected concerted activity was speaking with coworkers about sexual harassment concerns. Respondent admits it terminated McCormick but contends it had legitimate business reasons. According to Respondent, McCormick had been a poor employee for some time, and ultimately was terminated after she pled guilty to theft in Parker County, Texas court on January 25, 2016. Respondent also has provided additional reasons why McCormick was terminated.

20 General Counsel and Respondent orally argued their positions before me at the conclusion of evidence. Section 102.35(a)(10) of the Board's Rules provides that administrative law judges shall have authority "to make and file decisions, including bench decisions delivered within 72 hours after conclusion of oral argument, in conformity with Public Law 89-554, 5 U.S.C. § 557." After considering the evidence and the parties' arguments, I hereby provide a bench decision in this case.

FINDINGS OF FACT

30 I. JURISDICTION

Respondent, at all times material to this case, has been a professional corporation with an office and place of business in Fort Worth, Texas and has been engaged in providing legal services. Law firms are involved in interstate commerce. The Board has long held that law firms sell personal services and commodities, which is a category of trade. According to *Foley, Hoag and Elliot*, 229 NLRB 456, 457 (1977), the Board applies its jurisdictional standards "to employers furnishing intangible services to enterprises to engaged in interstate commerce." The Board has maintained a \$250,000 gross revenue standard for law firms and legal services. *Kaplan, Sicking, Hensen, Sugarman, Rosenthal & Zientz*, 250 NLRB 483, 484 (1980); *Wayne County Neighborhood Legal Services, Inc.*, 229 NLRB 1023 (1977) (*Wayne County I*) and 249 NLRB 1260 (1980) (*Wayne County II*). When a law firm derived revenues in excess of \$50,000 from clients within the State who annual sales of goods or services in excess of \$50,000 outside the State. *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450 (1980). Respondent stipulated that it also received goods and services in excess of \$5000 from other entities, such as AT&T, each of which receives goods and services from points outside the State of Texas.

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

50 I find, and Respondent admits, that Trey Harlin, Respondent's owner is a supervisor within the meaning of Section 2(11) and an agent within the meaning of Section 2(13) of the Act.

II. BACKGROUND

5 As previously noted, Respondent is a law firm, operating in Fort Worth, Texas. Mr. Trey
Harlin is the name partner. Also working with him is his wife, Ms. Melody Harlin, who contracts
services from Melody Harlin PC to Trey Harlin PC. The practice is insurance defense, primarily
for auto accidents. They receive referrals from insurance companies, which pay for the services
to defend the insurance company's clients. The work has a strong emphasis on litigation. Mr.
10 Harlin does the in-person litigation work in court and taking depositions. Ms. Harlin is heavily
involved in discovery, including taking depositions and filing documents. She maintains her
office within Respondent's office.

Respondent also employs legal assistants who perform such work as keeping the
litigation calendar, scheduling for the calendar including mediation, depositions and discovery
15 deadlines, plus the trial calendar itself. One runs billing and notifies the firm employees and
attorneys of needed work. The legal assistants may also draft original answers and discovery
requests. Among the legal assistants at the firm were Josie Gonzalez, Rebecca Menchaca,
Christina Toles and charging party April McCormick.

20 McCormick worked for Respondent from May 2011 until February 19, 2016. When she
was interviewed for the job, Mr. Harlin asked her about convictions and arrests. Her duties
included scheduling, drafting original answers and discovery. After a month in the job, she also
started scheduling depositions, mediation and adding trials to the calendar. She essentially was
hired to take the place of Josie Gonzalez, another legal assistant, who was leaving the job to
25 care for her children. Another legal assistant was Rebecca Menchaca, who wrote up billing
notes. The billing notes were distributed by email and contained reminders of tasks that may
not have been completed or missed. When Respondent rehired Gonzalez in January 2016, it
moved McCormick's scheduling duties to Gonzalez. McCormick received regular raises, usually
of 50 cents per hour, and usually on her anniversary date. She also received bonuses
30 throughout her employment, including Thanksgiving and Christmas of 2015.

Menchaca, Mr. Harlin and Ms. Harlin testified to the family atmosphere they wanted to
provide at the office. They arranged for group outings, and allowed employees to bring their
children and dogs to work. Menchaca even testified that she could not imagine that Mr. Harlin
35 engaged in any sort of inappropriate conduct because he was like a father figure to his
employees.

III. APPLICABLE LAW FOR PROTECTED CONCERTED ACTIVITY

40 As the complaint alleges that Respondent terminated McCormick for the protected
concerted activity of discussing sexual harassment with her coworkers, we first explore the law
of protected concerted activity.

Terminating an employee for protected concerted activity is unlawful. *Citizens*
45 *Investment Services Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005), enfg. 342 NLRB 316
(2004). Where arguably more than one motive exists for discharge, the mixed motive analysis
is applied. The analysis is set forth in *Wright Line*, 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). Under *Wright Line*, the General
50 Counsel must first demonstrate, by a preponderance of the evidence, that the worker's
protected conduct was a motivating factor in the adverse action. General Counsel satisfies this

initial burden by showing: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus. If General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011). The employer cannot meet its
5 burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011); *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). Chairman Miscimarra also suggests, in dissent, that General Counsel must show that the protected concerted activity was a reason for Respondent's actions in a
10 termination for protected concerted activity. *Rainbow Medical Transportation, LLC*, 365 NLRB No. 80, slip op. at 1, fn. 1 (2017).

If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails to show that it would have taken the same action for those reasons
15 regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). An employer fails to meet its rebuttal burden when the evidence shows that it tolerated an employee's shortcomings until the employee engaged in protected activity. *Global Recruiters of Winfield*, 363 NLRB No. 68 (2015) (Hirozawa, concurrence), citing *Diversified Bank Installations*, 324 NLRB 457, 476 (1997).

20 IV. PERTINENT FACTS FOR THIS CASE

McCormick was General Counsel's only witness. She testified that, shortly after she started
25 working for Respondent in 2011, Mr. Harlin sent her some sexually suggestive text messages, some of which she shared with Menchaca and Gonzalez. McCormick did not retain copies of the text messages.

The first instance occurred within a few months of beginning her employment. She told no one
30 except her boyfriend.

The second instance occurred a week or two later, after McCormick attended a baseball game. As this text was received over the weekend, McCormick showed the text to her boyfriend and perhaps her boyfriend's mother. However, McCormick testified that, as soon as she went to
35 work the following Monday, she showed the text exchange of that weekend to Menchaca. According to McCormick, Menchaca said "Oh, my God" several times and looked shocked. While the conversation took place, Gonzalez came in and Mechaca said to Gonzalez, "You have to see these text messages" and then Menchaca handed Gonzalez the phone. Gonzalez read through the texts and asked whether McCormick told Ms. Harlin or Mr. Harlin. Gonzalez warned McCormick not to tell Ms. Harlin, because she believed Ms. Harlin would have
40 McCormick fired. Gonzalez allegedly discussed that Mr. Harlin had an inappropriate relationship with a prior employee. However, with a recorded version of the termination interview, closer in time to the events, McCormick said she showed the text to Menchaca and said to her, "Is this weird or am I just overthinking it?" When Gonzalez saw it, she also commented that it was weird and she did not know what to think of it and came to them because
45 they had worked there longer than she did.

The third incident allegedly occurred about a month or so later, when Harlin shut down the office about an hour earlier than usual to take some of the office staff out for dinner and drinks. This is
50 still in 2011. Menchaca and McCormick left the restaurant at about the same time. Shortly after she left, McCormick allegedly received a text from Mr. Harlin, which stated, "Oh no, you left. I

was hoping we were going to have fun.” McCormick later showed the text to Menchaca, but apparently did not have much conversation about it.

5 Another incident allegedly occurred with an in person statement in the summer of 2012 or 2013. However, McCormick never discussed this event with anyone at work.

10 The last incident allegedly occurred in about September 2015, on a Saturday. Harlin, McCormick and another attorney, Charlie Burgess, were working in the office. When McCormick arrived in the office, Mr. Harlin and Burgess were drinking beer in their respective offices. Harlin instructed her on what he wanted her to prepare. About 10 minutes after she was in her office, Burgess came to her office and said he was leaving. As he left, the front door gave out a large “ding” sound, which could be heard throughout the office. Mr. Harlin called McCormick and asked who arrived in the office. McCormick advised him that Burgess left. Mr. Harlin asked her if the front door was locked, which she said she had done. McCormick maintained that about five minutes later, she heard Mr. Harlin coming down the stairs. When McCormick saw him, Mr. Harlin allegedly was wearing only his undergarments. McCormick said she grabbed her keys and purse and made an excuse she had to leave.

20 McCormick testified that when she got to work on Monday, she told Menchaca about the incident. Menchaca then said, “You shouldn’t be surprised.” She also said something about whether McCormick was willing to do something about it. Mechaca allegedly followed McCormick to the copying room and again asked McCormick what she was going to do about it and she said she did not know.

25 Gonzalez and Menchaca both denied seeing any texts McCormick received before 2016. Menchaca vaguely recalled a conversation in 2011 about a text, but denied seeing it.

30 In about mid-January 2016, an incident occurred in which Menchaca advised Mr. Harlin that she thought McCormick was attempting to steal a winning lottery ticket from her. According to Menchaca, she was at the office when she had a lottery ticket that required scratching off to reveal whether she won anything. McCormick and Ms. Harlin were present while she scratched off the ticket, which revealed Menchaca won \$100. Menchaca said she secured the ticket in her purse and she typically left her purse under her desk, where a heavy box was kept. Her 11-year old son was also at work with her. When they left for the day and she was in her vehicle, 35 Menchaca scoured her purse for the ticket and could not find it. Her description of events here sounded like she was panicking, and she testified that she really needed the money at the time. She sent her son back into the office and McCormick was still present in the office. McCormick went into the office with Menchaca’s son and helped him look for the ticket. McCormick testified that she located the ticket on the floor of Menchaca’s office and returned the ticket to 40 Menchaca’s son. However, Menchaca testified that her son told her that McCormick located the lottery ticket underneath the heavy box. The next morning, McCormick allegedly told Menchaca that she owed her big for locating the ticket. Menchaca took these events and decided that McCormick attempted to steal the lottery ticket. Menchaca then reported the events to Mr. Harlin. Mr. Harlin heard her out. Mr. Harlin did no further investigation of the lottery ticket 45 allegations.

50 At some point, which was not identified, McCormick had concerns about her future with the firm and began taping conversations on her cell phone. She estimated that she taped over 40 conversations. She claimed that Mr. Harlin cursed at her or engaged in name calling. She said her husband was concerned, hence the tapings.

Only two of these recorded conversations were presented at hearing. The first occurred on January 22, 2016. Mr. Harlin, with Ms. Harlin present, called McCormick into his office and explained that McCormick's duties were changing. Josie Gonzalez was rehired and was to perform scheduling work, which had proved very troublesome for McCormick. Mr. Harlin reminded McCormick that that mediations were not set up and items were not on the billing list. He stated she performed well on pleadings. However there were issues raised about McCormick's performance, such as items not on the billing list and "stuff slipping through the cracks." At one point, Mr. Harlin stated that he did not want excuses but wanted to get things done, referring to setting up mediations and depositions. Neither Mr. Harlin nor Ms. Harlin warned McCormick that she could face termination if she continued her poor conduct. Mr Harlin testified that he hoped with Gonzalez's return to the office and reduction in McCormick's duties, McCormick might perform better.

Notably, Respondent presented R. Exhs 3 through 9, which were text messages of conversations between a number of employees and sometimes Ms. Harlin. In the text strings that were presented from 2014 to 2016, the strings demonstrated that McCormick made a number of errors, including failures to book discovery, depositions and mediations, all of which delayed Respondent's litigation practice claims. As it was, Mr. Harlin testified that he had to beg indulgences from courts for continuances when McCormick did not perform her job as required. Nonetheless, he was willing to retain McCormick and see how she performed with turning over the scheduling duties to Gonzalez.

Respondent's texts also demonstrate that McCormick had attendance issues and tardiness problems. She sometimes would leave erratically to take care of personal problems and, in one instance, misconstrued direction from Mr. Harlin about when the office might close an hour early to taking a half-day off.

On February 18, 2016, Gonzalez and McCormick had a conversation about the 2011 texts in which Mr. Harlin supposedly exhibited suggestive behavior, but what was said is controverted. McCormick maintained that Gonzalez started the conversation and asked whether she still had the texts, and McCormick denied having them. Gonzalez testified that she never heard the term blackmail but heard something to the effect of McCormick saying, "I couldn't get fired. I've got these text messages on Trey."

Menchaca had a conversation with Gonzalez about McCormick. Menchaca's version of the conversation was that McCormick told Gonzalez that she could never be fired because she had evidence of Mr. Harlin's sexual harassment from five years before and she would use it. Menchaca used the term blackmail, which Gonzalez did not use.

Menchaca reported what she heard from Gonzalez to Mr. Harlin about mid-afternoon. Menchaca said she did so because did not want McCormick telling any others, that might hurt Mr. Harlin or the reputation of the firm. She also denied that she intended to get McCormick fired.

He then called Gonzalez to his office, with Menchaca present, and asked Gonzalez about the conversation. Gonzalez testified she only provided the statement of what one text was and she did not include the term "blackmail" in her testimony. Mr. Harlin reported that he was upset by the accusation, because he never sexually harassed anyone and has treated his employees like family. He slept on it and advised Ms. Harlin about it when she arrived at work on the afternoon of February 19.

5 During his conversation with Ms. Harlin, he learned that McCormick failed to notify Ms. Harlin about a cancelled deposition a few weeks earlier. At the time McCormick did not notify Ms. Harlin about the change in deposition schedule, Ms. Harlin had travelled from Fort Worth to Dallas to take the deposition. When she found she no longer had a deposition, Ms. Harlin called McCormick to see what was wrong. McCormick denied she was ever notified that the deposition was cancelled. Menchaca, present in the office while McCormick talked with Ms. Harlin on the phone, overheard McCormick's end of the conversation. Menchaca allegedly checked McCormick's email folders, as everyone has access to everyone else's email, and discovered that McCormick allegedly deleted the emails related to the cancellation. On the same day as Ms. Harlin discovered the deposition was cancelled, Menchaca advised Ms. Harlin by text that McCormick and she both received text message about the cancellations. Ms. Harlin failed to advise her husband about the cancellation or deleted emails until February 18. All of the staff have access to each other's email, and the email regarding cancellation was also sent to Mr. Harlin.

15 Also during the conversation on February 19, Ms. Harlin asked Mr. Harlin what happened to criminal charges brought against McCormick in Parker County, Texas, which occurred in August 2015. Ms. Harlin was able to perform a search of the Parker County criminal database and found that, in January 2016, on a complaint from a Wal-Mart store, McCormick pled guilty to an offense of stealing more than \$50 but less than \$500.

20 Within 45 minutes of initiating the discussion with Ms. Harlin, Mr. Harlin called McCormick into his office, with Ms. Harlin present. This conversation was the second recorded tape played in court. Mr. Harlin testified that his voice sounded saddened by the events. We heard the same tape, but his voice sounded more angry than sad. He also sounded like he was tired of McCormick's conduct.

25 After calling McCormick to his office, Mr. Harlin immediately stated that he had issues with her for several years and now Menchaca and Gonzalez said McCormick told them she could not be fired because she had texts from Harlin that were inappropriate, which Mr. Harlin stated was some sort of blackmail. McCormick first denied any idea what he was talking about. When Mr. Harlin repeated the allegation, McCormick denied that she ever said anything about not being able to be fired. Then Ms. Harlin, who admittedly was more concerned about discovering whether McCormick had any text messages, asked about those texts. McCormick stated she had some at the beginning and showed them to Menchaca and Gonzalez. McCormick detailed the incidents on texts and never raised the incident that allegedly occurred in early 2015. She also stated Gonzalez asked her about it when Gonzalez started work again in 2016 but told her she did not have the texts any longer because she had upgraded her phone since then three times.

30 40 The conversation then shifted to McCormick's work record and that Mr. Harlin had decided to terminate her. Mr. Harlin expressed significant frustration with McCormick and the number of chances he had given her and the errors she made on the calendar. Mr. Harlin discussed Ms Harlin's cancelled deposition and deleting an email about it. Ms. Harlin raised that she had discovery due that week and it was never given to Menchaca. Ms. Harlin told McCormick that the discovery was late. Mr. Harlin escorted McCormick to her office to pack her things and she left.

45 50 Respondent put forth a number of defenses. A number of these were discussed in its position statement, GC Exh. 6, dated May 11, 2016, and were reiterated at hearing. I will discuss the main defenses.

5 First, the mistakes McCormick made. Respondent, in its termination conversation with McCormick, told McCormick things had been getting worse. Respondent hired Gonzalez in mid-January and removed duties from McCormick. Mr. Harlin testified credibly that he did not intend to terminate McCormick when he hired Gonzalez to take over the scheduling duties, but had a number of concerns because of McCormick's scheduling problems, including failure to maintain schedules that complies with court requirements for discovery, depositions and mediation. In the termination conversation, Mr. Harlin said he never quantified the mistakes. In preparing for this hearing, Mr. Harlin obtained his business records of text messages from late summer 2014 through McCormick's termination in February 2016. See R. Exhs. 3 through 9. Respondent also presented a summary of errors in table form based upon the texts. R. Exh. 13. What Respondent found with the summary was that McCormick had over 50 absences, tardies or leaving early over a period of approximately 1 ½ years. McCormick was not disciplined for her poor attendance.

15 The summary also quantified the errors and omissions that were detected and reported to McCormick. Although Respondent did not know at the time of termination how many times McCormick made errors, Mr. Harlin apparently believed it to be a worsening situation at the time he terminated McCormick. Mr. Harlin and Ms. Harlin testified that McCormick's performance could improve when she did not have personal problems, but her performance almost from the beginning was a roller coaster ride, that she could be a good employee and then she would take a turn for the worse. The result from McCormick's mistakes was a concern that Respondent would be sanctioned by courts for missing deadlines. More than once Respondent threw itself on the mercy of the courts to obtain continuances and Respondent also had to tell insurance company ACCC, its primary referral source, that it had to obtain continuances because of McCormick's scheduling errors. Mr. Harlin testified to two specific cases in which errors were significant but these were not discussed at the time of termination. Harlin testified he did not raise these cases because he did not pull out every single reason in detail until he made the position statement.

30 Respondent maintains that, because of McCormick's significant errors, it has lost much of its business from ACCC and referrals from ACCC are down to 1-3 per week instead of about 10 per week. Respondent did not provide evidence other than testimony from Mr. Harlin and Ms. Harlin and much of this would have happened after McCormick left. I therefore do not rely upon this reason for termination.

40 In addition, Respondent removed McCormick from scheduling duties because she was making so many errors. Although Mr. Harlin did not raise every mistake in his January 2016 conversation with McCormick, he did tell her that there were errors in November and December and he had been stressed about getting scheduled mediations and depositions. He told her he was worried about things slipping through the cracks. He did not mention in that conversation what, if any, consequences would occur if McCormick did not produce in her new duties.

45 Respondent also raised that McCormick was arrested in August 2015 and pled guilty to theft pursuant to deferred adjudication on January 25, 2016. This is the conviction Ms. Harlin found in the computer on February 19, 2016. According to Mr. Harlin, about a week after McCormick's arrest, he called McCormick into his office and told her he would not allow her to continue to work in his office if a jury determined she was guilty. Burgess, the attorney who officed with Respondent and performed contract work with Respondent, represented McCormick free of charge. Burgess apparently left Respondent to practice criminal law in about November 2015 but continued to represent McCormick. McCormick never advised Mr. Harlin about the deferred

adjudication, although a text message from that day reflects McCormick said she was going to court and could not attend work. Mr. Harlin first learned of the guilty plea on the date of termination. At hearing and in his position statement, Mr. Harlin categorized the guilty plea as a crime of moral turpitude and stated he no longer could trust McCormick to order supplies and receive settlement payments in the office. McCormick testified to the reasons of the circumstances that led to the arrest, which involved some sensitive personal reasons that I will not detail in this decision. On cross-examination, McCormick was not forthright regarding the necessity to plead guilty in deferred adjudication. The Texas state records reflect that she successfully completed the terms of her deferred adjudication. Nonetheless, Mr. Harlin did not mention the guilty plea as a reason for termination at the time of termination.

When Respondent was preparing for hearing, it also obtained McCormick's criminal arrest record. Because Respondent did not have this information at time of termination, I do not rely upon it in making my findings.

Respondent also claims that in mid-January 2016, McCormick attempted to steal a \$100 winning lottery ticket from Menchaca, which further proves McCormick could not be retained. Menchaca reported to Mr. Harlin that she thought McCormick attempted to steal the ticket, as I previously described. Mr. Harlin listened to Menchaca but never questioned McCormick about the incident. This incident was not mentioned in the termination interview either and I do not rely upon it in making my findings about the alleged protected concerted activities.

V. ANALYSIS

A. Parties Positions

Both parties identified the *Wright Line* standard as the correct standard by which the case is analyzed. There the similarities stop.

1. *General Counsel*

General Counsel argues that Respondent's reasons for termination are pretextual and McCormick should be credited. He argued that Gonzalez and Menchaca, as current employees, should not be credited and as they shared their affidavits with each other and with Mr. Harlin, much of their testimony was rehearsed.

Regarding the alleged protected concerted activity on McCormick's part, General Counsel primarily relies upon *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014). He also relies upon *Phoenix Transit*, 337 NLRB 510 (2002). He argues that although McCormick did not expressly ask for assistance in her conversations, the conversations could nonetheless be concerted. Despite McCormick's coworkers turning on her, protected concerted activity cannot be defeated.

Respondent also had shifting defenses, going towards knowledge and inferring animus by timing. Mr. Harlin was aware of McCormick's protected concerted activity and first learned of it on the day of the termination, particularly while McCormick was questioned about the texts and who had seen them and attempting to find copies of them. Respondent's shifting defenses demonstrate pretext and Ms. Harlin, who was present, was not a statutory supervisory nor directly employed by the firm.

Regarding McCormick's poor work quality, Respondent admitted it had no intent to terminate her and only shifted its position to work quality after the discussion of the alleged texts. No one apparently kept track of McCormick's poor work quality.

5 General Counsel also raises a *Burnip & Sims* argument that McCormick was innocent of any wrongdoing and Respondent fired her anyway, without an investigation, which demonstrates Respondent's culpability.

10 Lastly, General Counsel argues that Respondent cannot demonstrate that it would have terminated McCormick regardless of her protected concerted activities.

15 General Counsel requested the usual make whole remedies, plus a new remedy, damages pursuant to the consequential economic harm McCormick received subsequent to an unlawful termination.

2. Respondent

20 Respondent argued its defenses, as stated above. The statement made to Mr. Harlin, from Menchaca and Gonzalez, indicated to him that McCormick did not care about her work and it was consistent with a text message McCormick sent one day in which she said she was at work but she did not intend to work. McCormick never provided evidence in support of her sexual harassment claim, particularly the absence of the texts. McCormick was not consistent in discussing the alleged sexual harassment with her coworkers, and nothing happened with her alleged sexual harassment for five years.

25 Respondent contends that, on the day of termination, McCormick had been recording for over 2 ½ minutes before Mr. Harlin called McCormick to come to his office for what eventually would be the termination. These recordings indicate that McCormick knew her performance was poor and was taping for the proverbial "ace in the hole."

30 B. Credibility

35 I have reviewed my notes and the exhibits and thus, my determinations are based upon consideration of the entire record to date for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303-305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

45 When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006).

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McCormick's testimony on direct was very sure. She testified fairly consistently with her recorded termination discussion about some of the events she believed to be sexual harassment. However on cross-examination, things became rocky and she was hesitant. McCormick, who was in possession of two recorded conversations, initially did not recall that Ms. Harlin was present for the January 22, 2016 conversation. McCormick contended that Mr. Harlin was cursing at her and engaged in namecalling. However, in the two recordings presented, no such conduct was present. Also, in the text messages provided in Respondent's documents during hearing, we see more of an exclamation like, "shit" when McCormick screwed up and not directed towards her personally. McCormick also testified that she only had two or three errors for which she was solely responsible. However, the text messages reveal that McCormick had significantly more than two or three incidents where she made mistakes. McCormick also stated she had concerns about her future at the firm. I attribute some of McCormick's concerns as being aware of her increasing errors, although McCormick denied errors. Even when confronted on cross-examination with a number of Respondent's text messages demonstrating that she made numerous errors, she repeatedly and defiantly insisted that she only had two to three errors that could be attributed solely to her. Because of these denials, I find that some of the testimony regarding the texts and reaching out towards other employees may be shaded.

Regarding the recordings themselves, only two were presented at hearing. Whether McCormick retained possession of those recordings was not established on the record. What was clear was McCormick made over 40 recordings per her phone and was recording even before she was called into Mr. Harlin's office on the day of her termination. I have difficulty believing McCormick's rationale for taping numerous times except to agree with Respondent's argument that she expected something to happen with her employment and banked upon the recordings, which were not presented at hearing, as her ace in the hole. Although it is not unlawful under the Act to tape conversations involving protected concerted activity, I find it unlikely that McCormick's conversation in 2016 with Gonzalez occurred as McCormick reported it: Given the number of times she recorded conversations, somehow that particular conversation, on an issue of importance to her, was not presented.

On cross-examination, Respondent also discredited McCormick about her reasons for termination based upon her appeal after the Region dismissed her charge. McCormick stated that she was terminated because she asked for expenses related to taking mail to the post office in an amount of the low thousands for about a 2-year period. This theory was not put forth by General Counsel, however, as it was clear she acted on her own behalf.

I was very concerned that McCormick also argued on cross-examination about the guilty plea entered leading to her conviction for theft. The criminal records demonstrate that she did so; yet she maintained that she did not understand the significance of the plea.

Lastly, I cannot credit McCormick's claim now that she raised the alleged sexual harassment with Menchaca and Gonzalez for any benefit but her own. McCormick now testifies that she did so with that goal, but as I explain later, the credited record does not support this finding. Further, McCormick testified about a final incident in the fall of 2015 in which Mr. Harlin allegedly showed up in her office in his undergarments and she allegedly told Menchaca the following Monday. I do not rely upon this incident as McCormick never mentioned the incident in her termination interview that was concerned only with the texts. I therefore credit McCormick's testimony when corroborated by the audio tapes, other testimonies, and/or documentary evidence.

Menchaca also provided testimony that was less than credible. Her explanation about the lottery ticket was a series of conclusions not supported by facts. She also testified that McCormick was “narcissitic” and “evil” and had little to back up her testimony except for more conclusions. She also stated that McCormick had stalked ex-boyfriends. She also called McCormick manipulative. She changed her mind about McCormick about the same time as the lottery ticket incident in January 2016. She also said she was tired of McCormick failing to do her work. Nonetheless, I find that Menchaca told Mr. Harlin about the claimed conversation between Gonzalez and McCormick, and I further find that Menchaca likely added in the term “blackmail” when talking with Mr. Harlin, which was like pouring gasoline on an open fire. Menchaca admitted that she obtained her affidavit and showed it to Gonzalez and Mr. Harlin, and she also read Gonzalez’s affidavit as well.

Despite reading Menchaca’s affidavit, Gonzalez testified credibly overall with one impeachment and apparently never used the term blackmail. She appeared not to have the ax to grind against McCormick as Menchaca did. She also spent less time with McCormick, but maintained a friendship with Menchaca throughout the years. Gonzalez credibly testified that, upon returning to work and checking the schedule in 2016, she was surprised to find so much had not been take care of.

Because of McCormick’s erratic work history and the newfound knowledge of a possible threat of blackmail, Mr. Harlin believed he had no choice but to believe the version Menchaca and Gonzalez put forth. Mr. Harlin and Ms. Harlin both testified credibly that Mr. Harlin was the decision maker, deciding to terminate McCormick at the last minute in the interview.

C. Was April McCormick Engaged in Protected Concerted Activity?

Based upon the *Wright* Line analysis previously described, the first step is to determine whether McCormick was engaged in protected concerted activity. Two concepts are at play here: whether the activity was concerted; and whether the activity was protected. However, we must examine whether the activity, the reaching out part, was concerted for mutual aid and protection.

Sexual harassment may be a basis for protected activity. *Unique Personnel Consultants, Inc.*, 364 NLRB No. 112 (2016); *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014). Maintaining that you, as an individual, cannot be fired, is not. But the question is whether the actions were also concerted, for the purpose of mutual aid and protection. I find it was not.

The activity is concerted if it includes a purpose of mutual aid and protection. “. . . [W]hether an employee’s activity is ‘concerted’ depends on the manner in which the employee’s action may be linked to those of his coworkers.” *Fresh and Easy*, supra, slip op. at 3, citing *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984), *Meyers Industries*, 281 NLRB 822, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

The question of whether an employee has engaged in concerted activity is a factual one based upon the totality of circumstances. *Andronaco Industries*, 364 NLRB No. 142, slip op. at 12 (2017), citing *National Specialties Installations*, 344 NLRB 191, 196 (2005) and *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). The inquiry for concerted activity is objective, not subjective, and employees may act in a concerted fashion for any number of reasons, some of which might serve the group or serve the individual. *Kingman Hospital*, 363 NLRB No. 145, slip op. at 10 (2016), citing *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op at 4.

5 Employees are not required to explicitly state a desire to start group action but the circumstances may infer “a concerted objective.” *Unique Personnel*, supra, citing: *Whittaker Corp.*, 289 NLRB 933, 933-934 (1988) and *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951). The employees who are approached, or solicited, are not required to join in the matter, or even have an interest in the matter for the activity to be concerted. *Kingman Hospital*, supra, and cases cited therein. The complaint itself may not be meritorious but may yet be concerted. *Id.*, slip op. at 10. Thus, the analysis should focus on whether the employee activity and matter concerning the workplace or employees’ interest as employees are linked. *Id.*

10 General Counsel recommends that I infer from the circumstances that McCormick’s activities with the text messages demonstrate concerted activity. I do not find that any credited evidence supports a finding that McCormick’s activities were concerted for the purpose of mutual aid and protection as the circumstances do not demonstrate a need to infer a concerted objective. *Whittaker* dealt with concerted activity in a group setting, which is not present here. 15 289 NLRB at 933-934.

20 In terms of the facts relating to the alleged concerted activity, I look towards the conversations as McCormick reported it to the Harlins on the day of her termination. I need not make a finding whether the texts actually demonstrate sexual harassment as the standards allow an employee to have a non-meritorious complaint about the possible issue raised with other employees.

25 McCormick stated she asked Menchaca and Gonzalez about what to think about the texts or whether she was overthinking it. In one instance, she said her boyfriend did not like it and did not know what to think of it. Taking the statements at face value from the recording at the termination interview, McCormick was only considering what she should think about it, and perhaps her boyfriend. It seems the inquiry was to satisfy her boyfriend’s concerns. No evidence reflects that the boyfriend was an employee under the Act. Compare *Andronaco*, supra. Because the standard here is objective, I decline to infer that the mere showing of the texts be carried further to assume that she was reaching out for group action. Instead this appears to be classic water cooler talk. Further, the texts occurred in 2011 and were not at issue again until February 18, 2016. 30

35 Following the requirements of *Meyers*, supra, I look to determine where an individual employee seeks to initiate or to induce or to prepare for group action, as well as individual employees brining up group complaints to the attention of management. This situation here is different than what happened in *Fresh & Easy*, 361 NLRB No. 12. The alleged discriminatee there solicited other employees to sign a piece of paper about a sexual message on the white board to prove the incident occurred. The discriminatee intended to present the information to management; her testimony was corroborated by two other employees. The Board found the intent to report to management, with employees serving as witnesses, was sufficient to demonstrate an employee initiated group action. The facts here do not rise to the level of *Fresh & Easy*, where it is apparent that other employees participated in trying to send a message to management. 40 45

50 Even assuming I credited McCormick’s version of her last conversation with Gonzalez after Gonzalez returned to work in 2016, Gonzalez approached McCormick as to whether she still had the texts. Gonzalez allegedly asked if McCormick still had the texts from five years before, and McCormick denied she had the texts because she switched cellular telephones. Nothing indicates that Gonzalez wanted to know if she still had the texts to initiate, induce or

prepare for group action or bring up any individual complaints, and McCormick's responses did not either.

5 As I previously noted, I cannot make the inference that McCormick sought mutual aid and protection. I look to the recent case of *Unique Personnel Consultants*, 364 NLRB No. 112. The advice the employee sought there was about how to respond to the employer's enforcement of the dress code, which the employee believed to be disparately enforced. The Board emphasized that the conversation between employees was for the purpose to obtain advice for future action and was part of protected concerted activity. *Id.*, slip op. at 3. The Board's decision turns upon seeking advice from fellow employees for future action. In comparison, the statements here have no indication that the questions on what to make of the texts in 2011 was for some future action. *Id.*

15 I also differentiate General Counsel's reliance upon *Phoenix Transit System*, 337 NLRB 510 (2002), *enfd.* 63 Fed. Appx. 524 (D.C. Cir. 2003). First, the Board's findings began with Respondent unlawfully maintaining a confidentiality rule that prohibited employees from discussing sexual harassment complaints among themselves. The alleged discriminatee in *Phoenix Transit* wrote articles in a union newsletter about how the employer handled sexual harassment claims after a sexual harassment investigation on a particular supervisor was closed and the employer's reasons for maintaining confidentiality of that investigation no longer existed. The Board approved the judge's discussion of the protected concerted activity. First and foremost in *Phoenix Transit* was the mode of communication the alleged discriminatee used to reach out to other employees. The judge found that the communications found in a union newsletter have "long been found to be protected, concerted activity." *Id.* at 513, citing *Postal Service*, 241 NLRB 389 (1979). The judge stated the discriminatee used the articles to raise consciousness and indignation among coworkers about the employer's perceived problems in taking action on months-old employee sexual harassment complaints. *Phoenix Transit*, 337 NLRB at 513-514. The communications in this case did not occur in a newsletter and, frankly, given the reliance upon *Postal Service* in *Phoenix Transit*, I cannot find that McCormick's actions were concerted.

35 I also find that another case does not support a finding of concerted activity. Once again an employer initiated a no communication rule and threatened discharges for violations. *Ellison Media Co.*, 344 NLRB 1112 (2005). A female employee urged a male employee to talk to a supervisor about a sexually charged statement. Although the male employee prepared an email describing the problem and intended it to go to the female employee, the male employee accidentally sent the email to the supervisor, who unlawfully threatened both employees with discharge if they continued to gossip. Citing *Mushroom Transportation v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964), the Board again reminded that the conversation had to have an object of initiating or inducing or preparing for group action, or having some relationship to group action in the interest of employees. *Ellison Media*, 344 NLRB at 1113, fn. 6. Here, Board found a common interest in eliminating offensive remarks from the employment environment. *Id.* at 1114. This case demonstrates again that two employees joined together to address a term and condition of employment and actually were taking steps towards a common goal.

45 Because I find no concerted activity, I need not explore the *Wright Line* analysis any further.

50 I also do not find an alternative analysis is needed under *NLRB v. Burnip & Sims*, 379 U.S. 21 (1964). *Burnip & Sims* applies when a terminated employee was at the time engaged in protected activity, that the employer knew it to be so, that the basis of the discharge was an

alleged act of misconduct in the course of that activity, and that the employee was not actually guilty of the misconduct. *MCPC Inc. v. NLRB*, 813 F.3d 475, 488 (3rd Cir. 2016), discussing *Burnip & Sims*, 379 U.S. at 23 and cases cited therein. Also see: *Good Samaritan Medical Center v. NLRB*, ___ F.3d ___, available in Westlaw, 2017 WL 2371738 (1st Cir. May 31, 2017) (agreeing with Board's decision to rely upon *Wright Line* instead of *Burnip & Sims*, and reporting General Counsel has an affirmative obligation to prove the misconduct did not occur). Two aspects concern me here: The first step however, requires that the employee engaged in protected activity. The second aspect is that General Counsel prove the misconduct, here the statement of Gonzalez and Menchaca to be false and Respondent relied upon that statement knowing it to be false. Because I find that McCormick was not engaged in concerted activity, the remainder of the *Burnip & Sims* analysis is moot. Even so, General Counsel is asking that I rely upon credibility determination to prove his case under *Burnip & Sims* and that I will not do.

Conclusions of Law

1. Trey Harlin P.C. constitutes an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6) and (7) of the Act.
2. Respondent has not violated the Act in any way.

ORDER

I recommend that the complaint be dismissed.

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived. I want to thank counsel for the General Counsel and counsel for Respondent for your professionalism in presenting this case. With that, the trial is now closed and we are off the record.