

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

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NATIONAL CAPTIONING INSTITUTE, INC.	)	
	)	
Respondent,	)	
	)	Case No. 16-CA-182528
and	)	16-CA-183953
	)	16-CA-187150
NATIONAL ASSOCIATION OF BROADCAST	)	16-CA-188322
EMPLOYEES & TECHNICIANS –	)	16-CA-188346
COMMUNICATIONS WORKERS OF	)	
AMERICAN, AFL-CIO,	)	
	)	
Charging Party.	)	

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**RESPONDENT’S ANSWERING BRIEF TO CROSS EXCEPTIONS**

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**RESPONDENT’S ANSWERING BRIEF TO CROSS EXCEPTIONS**

**I. INTRODUCTION**

Respondent, National Captioning Institute, Inc. (“NCI”), by and through undersigned counsel, submits in this Answering Brief to present in detail and in chronological order the evidence that proves (1) Hall’s and Lukas’ terminations were for legitimate business reasons and not pretextual (Cross-Exception 3); (2) Hall’s June 15 discipline that included discipline for spreading inaccurate and personal medical information about another employee was proper and would have been issued to a non-Union adherent (Cross-Exceptions 1&2); and, (3) neither Hall nor Lukas is entitled to any remedy, let alone consequential damages because they are not authorized under Section 10 of the Act (Cross-Exception 4) and GC presented no evidence regarding such damages or of any mitigation efforts.

Hall’s and Lukas’s terminations were part of NCI’s reorganization associated with the closing of NCI’s facility in Dallas. NCI was initially accused of closing and announcing the closing of the Dallas facility in response to its learning of the Union organizing effort. Over many months

of investigation, NCI produced overwhelming evidence showing that the discussions about closing the Dallas facility dated as far back as 2013 and that the final proposal to close the Dallas facility was made months before NCI had any knowledge of the Union organizing effort.<sup>1</sup>

Just as there is no causal connection between the Union organizing effort and the Dallas facility closure, there is no causal connection between Lukas' and Hall's terminations and their Union activity. When the evidence is viewed in context and in chronological order, including Hall's misconduct in the six months preceding her termination; NCI's personnel quartile ranking system that assesses such traits as dependability, reliability, work ethic, captioning accuracy, and interpersonal relationships;<sup>2</sup> and, that *all* of Hall's and Lukas' coworkers, including the known leaders of the organizing effort, were retained as remote employees or granted their first choice in the reorganization, it is obvious that Hall's and Lukas' disciplines and terminations were based on legitimate business concerns and implemented fairly without regard for their respective Union sympathies.

## II. THE EVIDENCE

### A. DALLAS FACILITY CLOSURE

Closing the Dallas facility was first considered in 2013 as part of the discussion concerning the California facility lease that was approaching its expiration date.<sup>3</sup> With the Dallas facility lease due to expire in February 2017, in early 2015, Jill Toschi, President and COO, renewed her evaluation of the options for the Dallas facility.<sup>4</sup> In December 2015, Toschi made the decision to close the Dallas facility because: (1) changes in technology had rendered much of NCI's infrastructure obsolete;<sup>5</sup> (2) changes in technology afforded NCI the opportunity to expand the

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<sup>1</sup> See, R1.

<sup>2</sup> R 46; TR 320.

<sup>3</sup> TR. 341-342

<sup>4</sup> TR. 343. Options for the Dallas facility included renewal, a new lease/location, purchase of a facility, or closure.

<sup>5</sup> TR. 343

number of its remote captioners;<sup>6</sup> (3) changes in the Federal Communications Commission (FCC) law that drove up competition and workload but that drove down prices for captioning services<sup>7</sup> necessitated a reassessment of resource allocation; (4) successful recruiting in the Dallas region proved difficult and was exacerbated when the nearby court reporting school closed;<sup>8</sup> and, (5) NCI's clients that had always required the steno-captioning under their contracts be performed in-house were becoming more amenable to allowing remote captioners, thus, creating less of a need for in-house steno-captioners such as Hall.<sup>9</sup> For these business reasons, the decision was made to close the Dallas facility. A revaluation of personnel resources was necessary to achieve the objectives of the closure. The latter evaluation resulted in the terminations of Hall, Lukas and Tomy Duke.

#### B. MARIE HALL WAS A DISRUPTIVE POOR PERFORMER

Marie Hall was a steno-captioner who started with NCI in April 2001. In June of 2015, Hall had requested permission to work remotely from San Antonio for six months.<sup>10</sup> Despite her poor performance history<sup>11</sup> and NCI's need for steno-captioners to work in-house,<sup>12</sup> Hall's request was granted because NCI needed to retain its steno-captioners.<sup>13</sup> Hall's salary and her paid time off (PTO) were reduced to correspond with the compensation terms of other remote workers.<sup>14</sup>

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<sup>6</sup> TR. 355

<sup>7</sup> TR. 333

<sup>8</sup> TR. 344-345.

<sup>9</sup> TR. 500:14-22. The primary production in Dallas related to steno and off-line which both had very poor profit margins. *See* GC 42.

<sup>10</sup> R 28A

<sup>11</sup> *See, e.g.* TR. 471-473. R 39A-M; 46B. Hall was historically a poor, fourth quartile performer. She was twice put on probation due to her accuracy ratings.

<sup>12</sup> R 28 B. Recruitment of captioners has always been difficult but especially in the Dallas area. As a result, NCI accommodated employees and in some cases, like Hall's, kept the poor performing employee too long. TR. 500-501; *See, e.g.* R 13.

<sup>13</sup> NCI was always desperate for captioners, so Hall was kept on as an employee and her demands were accommodated. *See, e.g.* TR. 500

<sup>14</sup> R 11D-E; R 28B; TR. 435.

Prior to leaving for San Antonio, Hall had the exclusive arrangement for 10 years of working from home and coming to work only when needed.<sup>15</sup> While Hall was working remotely in San Antonio, Darlene Parker, Director of Steno-Captioning, and Beth Nubbe, VP for Finance, Administration and HR, resumed discussions they had started earlier in the year (as directed by Toschi) to restructure the steno-captioner positions to address the inconsistent arrangements among steno-captioners.<sup>16</sup> The objective was to take advantage of the new flexibility that resulted from the contract changes that permitted more remote captioning and to offer that remote work to other steno-captioners who had expressed their desire to have an arrangement similar to Hall's arrangement.<sup>17</sup> The result was the creation of the Hybrid steno-captioner position (Hybrid). The Hybrid position was a formalization of the position that Hall had prior to leaving for San Antonio. A Hybrid worked primarily from home and came into the office only as necessary (i.e., if client contract required it or if another steno-captioner was on leave.)<sup>18</sup> Because NCI still needed in-house captioners, NCI sought to encourage workers to choose full-time in-house by offering more PTO than the amount offered to the Hybrid or One-Day A Week, in-house captioners.<sup>19</sup>

Hall was scheduled to resume working at the Dallas facility on December 28, 2015. In preparation for Hall's return, Parker emailed Hall to advise her of the structure change and to confirm the assumption that Hall would choose the Hybrid position since it was essentially the arrangement she had before she left for San Antonio except for the slightly reduced PTO.<sup>20</sup> Hall did choose the Hybrid position. Hall made clear that she resented the change.<sup>21</sup>

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<sup>15</sup> R 11D; TR. 389-391, 471.

<sup>16</sup> TR. 388-390.

<sup>17</sup> TR. 390, 431-432 (Before creating the Hybrid position, NCI lost two captioners who wanted to work from home pursuant to an arrangement like Hall's); R 29A-B.

<sup>18</sup> R 45 (Hybrid job description)

<sup>19</sup> TR. 436

<sup>20</sup> R 29A-B; TR. 391, 436.

<sup>21</sup> TR. 435; R 29

In addition to consistently performing under par, Hall had always been divisive, self-centered and arrogant but those traits had made her more of an irritation than a problem.<sup>22</sup> That changed when she resumed working in Dallas in the Hybrid position. Her anger over having to share the right to work from home position with her fellow steno-captioners consumed her. Between December 2015 and April 2016, (before NCI had any knowledge of the Union organizing initiative) Hall continuously disrupted NCI operations with her refusal to comply with HR's legal and procedural directives and by accusing management of lying and acting to intentionally harm her. Her hostility was not reserved for management. By late May it was clear that she alienated and abused her coworkers as well and it was that finding that ultimately led to the decision to terminate her.<sup>23</sup> The chronology of incidents after Hall returned from San Antonio are as follows:

*i. Domestic Partner Incident: Insubordination and Dishonesty*

Hall's first significant disruption centered around her desire to have a domestic partner added to NCI's healthcare plan. Hall had attempted to add the domestic partner in October 2015 while she was still in San Antonio.<sup>24</sup> Rochelle Johnson, HR and Administration Generalist, learned of Hall's domestic partner enrollment in December 2015. Johnson informed Hall about the legal requirements associated with adding a domestic partner that had not been satisfied. While concerned that Hall had added the domestic partner outside of open enrollment in contravention of the benefit plan, Johnson's primary concern was whether the individual Hall enrolled was in fact a domestic partner under the plan's legal requirements. *Id.* Johnson informed Hall that it was necessary to provide certain documentation to establish that the domestic partner relationship existed six months before the enrollment. For months, Hall ignored or challenged Johnson's

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<sup>22</sup> See, e.g. TR. 386-387, 492.

<sup>23</sup> See, e.g. TR. 492; see discussion *infra*.

<sup>24</sup> TR. 441-445.

requests for the documentation. Exhausted by Hall's aggression and concerned about the legal implications of the improper enrollment, in early February 2016, Johnson told Hall that if she didn't provide the documentation, she would cancel the benefits retroactively.<sup>25</sup> Hall responded by contacting Nubbe who, after researching the issue herself, confirmed to Hall that she needed to supply the documentation that Johnson requested.<sup>26</sup>

Not satisfied with Nubbe's response, Hall then added Toschi and Gene Chao, the Chairman of the Board and CEO, to her emails with Johnson.<sup>27</sup> In emails exchanged from February 9-18, Hall accused Johnson of misleading her and "making up rules" with the malicious intent of preventing Hall from adding a domestic partner to the NCI healthcare plan and of "smearing her character."<sup>28</sup> To each combative email, Johnson calmly clarified the issues and offered Hall suggestions on how she could satisfy the documentation requirements needed to establish the domestic partner relationship such as a last will and testament. *Id.* Hall responded to the latter advice by providing her last will and testament that was dated the day *before* she provided it to Johnson. Ultimately, Johnson accepted the minimal documentation required to justify the domestic partner enrollment and on February 18 Johnson notified Hall that the domestic partner's benefit status would not be changed.<sup>29</sup> Within a month of the confirmation notification, and once again outside of the open enrollment period, Hall removed the domestic partner from NCI's benefit plan. Hall's removal of her domestic partner so soon after her was approved caused Nubbe and Johnson to question whether he was ever legally a qualifying domestic partner.<sup>30</sup>

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<sup>25</sup> While she was in San Antonio, Hall had told Johnson that her domestic partner, who lived in Dallas, was travelling, so he couldn't sign the domestic partner affidavit. Johnson was left to wonder about the legitimacy of the domestic partner relationship if they were not in fact cohabitating. Hall's hostility and refusal to provide the requested documentation to support the domestic partnership exacerbated Johnson's concerns. TR. 444.

<sup>26</sup> *See*, R 40 A-B.

<sup>27</sup> R 33 A-C.

<sup>28</sup> R 33A-D.

<sup>29</sup> R 33.

<sup>30</sup> TR. 448. The reasonable inferences suggest that Hall was dishonest in her dealings with HR and the benefit plan.

*ii. Service Animal Incident: Selfish, Insubordinate, and Dishonest*

On February 17, one day before the domestic partner issue was resolved, Hall initiated her second round of combat with HR. Hall emailed her supervisor, Octavia Brandenburg, that she was bringing a service animal to her afternoon in-house shift scheduled for the very next day—February 18.<sup>31</sup> On February 18, (the same day that Hall was notified that the domestic partner matter was closed) Hall slept through her 6:30 am remote morning shift and did not call in until after 12:00 pm — almost six hours after her remote morning shifts. Her No-Show/No-Call resulted in the issuance of a disciplinary memo dated February 19.<sup>32</sup> As NCI provides live captioning 24/7, missed shifts and being unreachable are serious matters.<sup>33</sup> Shift coverage is so important that NCI requires its captioners to have alternative contact information on file so that the scheduling department or a supervisor can reach the employee if the employee is not signed in for her shift at the scheduled time.<sup>34</sup> NCI issues disciplinary memos to any employee who misses a shift, including non-union adherent, engineer, Tomy Duke, who was terminated with Hall and Lukas due to sleeping through his shifts.<sup>35</sup> Not calling in and not being reachable add an element of severity<sup>36</sup> although only a single disciplinary memo is issued for the same incident as is evidenced by the February 19 disciplinary memo issued to Hall.<sup>37</sup>

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<sup>31</sup> TR. 448.

<sup>32</sup> R 34 and 34A-D.

<sup>33</sup> *See, e.g.* TR. 456.

<sup>34</sup> *See*, R 34 C (Scheduling Department’s communications regarding efforts to locate Hall through alternative contacts.)

<sup>35</sup> TR. 461-466; *see also* TR. 389; TR. 406. In June 2016, engineer, Tomy Duke was issued a disciplinary memo for sleeping through shifts and it was that discipline that qualified him for termination, along with Hall and Lukas through the restructure. R19.

<sup>36</sup> NCI’s Error Accountability Policy notes that “serious infractions warrant skipping one or more steps” in progression of discipline. GC 35. Being unreachable is one such serious infraction.

<sup>37</sup> General Counsel relies on GC exhibits 46 and 47 to show pretext but in fact they support NCI’s position that Hall and Lukas were terminated because they had active disciplinary actions and were in the fourth quartile at the time Toschi decided who would be a part of the reorganization and not because they were interested in the union. Both Voice Writers Daniel Mills and Wendy Ervin were granted remote positions in the NCI reorganization despite their active disciplinary memos for over sleeping because they were *not* in the fourth quartile. R 10; GC 30. The disciplinary memos issued to Mills, on July 7, 2016 (GC 46) and to Ervin on July 10, 2016 (GC 47) demonstrate the importance NCI places on being reachable and calling in. While issued a disciplinary memo for oversleeping, the

As for Hall's email stating she was bringing a service animal to work the very next day, Brandenburg sent the email to Parker who told Hall she needed to contact HR "ASAP." On February 18, around the same time she finally contacted her supervisor to report she had overslept, she sent an email to HR stating she was told to contact HR about the service dog.<sup>38</sup> Because Johnson was completely drained by her interactions with Hall regarding the domestic partner matter, and because the issue implicated the Americans with Disabilities Act (ADA), Nubbe took the lead on the service animal matter.

Nubbe responded to Hall's email later the same day. She requested that Hall provide documentation from a health care professional regarding the requested accommodation and that the service animal has the proper training to service the medical condition in the workplace.<sup>39</sup> Upon receipt of the healthcare professional's confirmation of medical need, Nubbe followed up with a summary of the ADA and what she and Johnson planned to do to assess whether bringing the dog into the workplace was a reasonable accommodation. Nubbe explained that they needed to determine whether any other employee's health might be negatively impacted by the dog's presence.<sup>40</sup> Nubbe also asked Hall to respond to questions that would help Nubbe and Johnson work out the logistics of having a dog in the workplace, including information regarding the status of the dog's vaccinations.<sup>41</sup>

Hall's response was again hostile and uncooperative. *Id.* But what bothered Nubbe the most was Hall's selfish indifference to her fellow workers. After claiming that no one she works

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tone in both is considerably less harsh than the one issued to Hall in February because, unlike Hall who was unreachable for almost six hours, Mills and Ervin both followed protocols and responded appropriately once they realized they had overslept. *Id.* Mills was a known leader in the union organizing effort. GC 23; TR.370-371.

<sup>38</sup> R 41C

<sup>39</sup> R 41B

<sup>40</sup> R 41A

<sup>41</sup> TR. 449-450. (Johnson testified about the issues and information she and Nubbe needed to properly assess Hall's request to bring in a service dog.

with had a pet allergy, Hall wrote: “Even if the company decided to hire a person who had a pet allergy, that is not a sufficient health related reason under the ADA to not allow my service animal to be with me.”<sup>42</sup> Nubbe responded on February 25 with a counseling memo/email wherein she stated that she found Hall’s response “disappointing and reminiscent of her handling of her request for healthcare benefits for her domestic partner.”<sup>43</sup> Nubbe reminded Hall that her legal rights do not entitle her to “dictate the terms and conditions of [her] employment or what information [she] will or will not provide and when.” *Id.* Nubbe told Hall that she expected her to act professionally and cooperatively. She reiterated twice that NCI had every intention and desire to allow the service dog and that the sole purpose for her information requests was to fulfill her obligation to implement an accommodation that meets the interest of all concerned, which included other employees. *Id.* Consistent with her latter representation, Nubbe and Johnson allowed Hall to work from home from the time of her initial request in February until April 5 (30 days after the dog’s rabies vaccination would become effective)<sup>44</sup> and in mid-March, at Johnson’s suggestion, Hall was granted an hour of paid leave to allow her to go to the SPCA to obtain the vaccination records that Hall said existed but that she did not have time to get.<sup>45</sup>

Hall’s accusations that management was “making up rules,” condescending lectures on her rights under the ADA, and excuses for not supplying information regarding the status of the dog’s vaccinations continued for weeks. Consistent with her conduct in the domestic partner benefit matter, when she couldn’t get her way with Nubbe and Johnson she included Toschi and Chao on the email exchanges.<sup>46</sup> She threatened to file a complaint with the Department of Justice<sup>47</sup> and

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<sup>42</sup> R 41A; TR. 481

<sup>43</sup> R 41.

<sup>44</sup> TR 452

<sup>45</sup> R 35C

<sup>46</sup> R 35A-B.

<sup>47</sup> R 41A

in late March she filed a charge against “the HR Department in general and Beth” Nubbe claiming that she was denied the right to bring in her service dog in violation of the ADA.<sup>48</sup> She followed that charge with a retaliation charge.<sup>49</sup> On March 21, Johnson emailed Hall to say “NCI will proceed under the assumption that you will return to your in-house responsibilities effective April 5, 2016 and if you are able to provide the paperwork we need before that, simply send it to me.”<sup>50</sup>

Management ultimately concluded that they had been played. They realized that Hall wanted to work from home and she assumed management would tell her to work from home rather than bring the dog to work.<sup>51</sup> That conclusion was confirmed by employees who told Johnson that they never saw Hall with the dog.<sup>52</sup>

*iii. Hall Accuses Toschi of Lying and Demands Additional Compensation for Covering Shifts for a Coworker on Medical Leave.*

While HR was preoccupied with Hall, Toschi was focused on the matter of closing the Dallas facility.<sup>53</sup> On March 15, Toschi sent Chao an email with the formal proposal stating the reasons for her decision to close the Dallas facility.<sup>54</sup> In the following days she worked with Nubbe, Chief Engineer, Bill Magill and Director of Voice Writing, Meredith Patterson, to plan and implement the closing of the Dallas Facility.<sup>55</sup>

On March 31, Hall initiated her third round of combat but this time it was directed at Toschi. Hall accused Toschi of being dishonest and of breaching the terms Toschi allegedly set under which Hall would return to Dallas from San Antonio. She passive-aggressively requested a

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<sup>48</sup> R 35; TR 496.

<sup>49</sup> NCI filed position statements and the EEOC did not pursue Hall’s fraudulent charges thereafter. Hall’s representations to a coworker in GC 14 about her EEOC case were false, defamatory and harmful to morale.

<sup>50</sup> R 35.

<sup>51</sup> TR. 452; R. 35B (Hall’s motives are revealed when she states: “I feel I have no choice but to concede the constant battle over this issue for now *and indefinitely work from home...*”

<sup>52</sup> TR. 452

<sup>53</sup> TR. 346

<sup>54</sup> R 1

<sup>55</sup> TR. 347.

restoration of her PTO and a \$2.00 raise (not for all the Hybrids or steno-captioners, just her).<sup>56</sup> Toschi had no idea to what Hall was referring so she contacted Johnson and Parker before she responded to Hall.<sup>57</sup> Parker and Johnson explained the steno-captioning restructuring and the creation of the Hybrid position that included the small reduction in Hall's PTO.<sup>58</sup> Toschi calmly responded to Hall that based on her understanding of the restructuring and Hall's choosing of the Hybrid position there were no grounds for altering Hall's compensation. Hall followed up with two more accusatory and combative emails to which, on April 5, Toschi replied: "I gave approval for the positions created in the restructuring, and those are the only positions now available in the Steno Department. If you are not satisfied with the hybrid in-house position, you are encouraged to apply for another available position."<sup>59</sup>

*iv. Toschi Learns of Union Organizing Effort and that Hall & Novembrino Discuss Leaving NCI and Taking One of its Clients.*

On May 4, Magill notified Toschi that a Voice Writer, Chris Novembrino, contacted Communications Workers of America, CWA, and that he was in the early stages of organizing NCI employees.<sup>60</sup> Magill had received the information from an employee, Aleyna Vaughn ("Aleyna"), who was one of the original Union organizers and who had direct contact with the Union's representative, Eric Seggi. *Id.*<sup>61</sup> Aleyna provided Magill with an email between herself and Seggi wherein Seggi tells Aleyna he wants to put a call together to include Aleyna, Chris Novembrino, Pamela Gilcrease (Scheduler) and Brenna Lampson (Voice Writing Supervisor in the California office). Hall is not mentioned.

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<sup>56</sup> R 11A

<sup>57</sup> TR. 392

<sup>58</sup> R 11B-E.

<sup>59</sup> R 11

<sup>60</sup> R 3, 3C.

<sup>61</sup> TR. 173-174

Toschi immediately notified Chao by email.<sup>62</sup> She expressed her fear that when the decision to close the Dallas office was announced, the Union organization effort would be cited as the reason.<sup>63</sup> She also expressed her desire to speak with counsel regarding NCI's options and obligations. *Id.* Chao encouraged Toschi to seek counsel and confirmed that they must continue to pursue the Dallas closure as a business decision and not alter NCI's closure plans or the way it operates or disciplines employees.<sup>64</sup> "We have been discussing this for some time and it certainly was not influenced by any disgruntled employees." "We should never dissuade anyone from organizing or lobbying others. However, if that activity adversely impacts productivity or the work environment, or if we receive complaints from other employees, it is a disciplinary matter." *Id.* Toschi adhered to Chao's counsel and was careful to respect the employees right to organize, or not, but also operate NCI without intimidation. She educated herself about NCI's legal obligations and rights<sup>65</sup> and counseled senior management<sup>66</sup> and later supervisors<sup>67</sup> on what their responsibilities were under the law and to NCI.

Around the same time Toschi learned of the unionizing effort, Toschi was also told that Hall and Novembrino were talking about leaving NCI and taking one of its clients, WWE, with them.<sup>68</sup> That information prompted Toschi to have NCI's IT Manager, Doug Chamberlin, run a search for WWE as well as Novembrino and Hall in NCI's Spark communication system ("chat logs").<sup>69</sup> Through those searches, Toschi learned that Hall identified with the Union and that she used the chat logs to vent her *personal* gripes with and *lies* about management with the use of

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<sup>62</sup> R 3A-B.

<sup>63</sup> R 3B

<sup>64</sup> GC 42

<sup>65</sup> TR 408

<sup>66</sup> GC 18

<sup>67</sup> R 21

<sup>68</sup> TR 73-74

<sup>69</sup> TR 34-35

extraordinarily vulgar language.<sup>70</sup> Toschi also discovered that on April 7, Hall had asked Aleyna to have her personal laptop connected to the internet, in violation of NCI's telecommunication policy.<sup>71</sup> Additionally, Toschi found that Novembrino, Gilcrease, Mills, Stacy Gardner (Hawkins) and others, who thereafter openly identified themselves as employees interested in the Union by signing the July 11, 2016 communication,<sup>72</sup> engaged in Union organizing activity through the chat logs.<sup>73</sup> Neither Lukas nor Hall were involved in those exchanges. *Id.* In fact, management learned later that by mid-April, Hall had a falling-out with Novembrino and Lampson, and that they told Hall that they did not consider her part of the Union organizing group.<sup>74</sup> Even though some of the employees' communications in the chat logs "had inappropriate words and themes"<sup>75</sup> no adverse action was ever taken against any of the employees who were pro-union and who engaged in concerted activity through the chat logs and all of them retained their jobs through the closing of the Dallas facility and the restructure. As Toschi testified, her primary purpose for reviewing the chat logs was to determine the number of employees expressing interest in the union, which she had a legal right to do.<sup>76</sup> Having discovered Hall's disturbing conduct in addition to what she

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<sup>70</sup> See, e.g. GC 14 (See entries 2016-04-01:33:14 through 2016-04-05 09:16:48); GC 15 (On 2016-05-24, Hall wrote: "yep. me and a voice writer and a scheduler began this as soon as i returned from san antonio. We have found out soooooo much stuff on our corrupt ceo and president and marketers . . . fcc violations, sec violations." Hall's statements are both false and ignorant. As a *private nonprofit*, NCI is not even subject to SEC regulations. Hall engaged in defamatory, harmful communications for her own spiteful and selfish purposes and not for the mutual aid and protection of her coworkers. Although NCI did not discipline Hall for her profane lies in NCI's chat logs (as opposed to personal social media outlets), it had the right to do so. See, *Chipotle Services LLC*, 364 NLRB no.72 (2016) (False statements shared on social media for malicious purposes are not protected activity.) The common law imposes on all persons a general duty not to defame others. *Atlantic Lloyd's Ins. Co. of Tex. v. Susman Godfrey, L.L.P.*, 982 S.W.2d 472, 475 (Tex. App.-Dallas 1998, pet. denied).

<sup>71</sup> R 42

<sup>72</sup> GC 23.

<sup>73</sup> See, e.g. GC 5.

<sup>74</sup> TR. 228-230

<sup>75</sup> See, GC 7. See, also, GC 4.

<sup>76</sup> TR 40-41. Coercion is an essential element of unlawful surveillance and cannot be inferred. General Counsel had the burden of proving that the employer engaged in actions that could reasonably be construed as coercive, intimidating, or threatening, based on the totality of the circumstances and not just on actions that were out of the ordinary. *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224, 239 (4<sup>th</sup> Cir. 2015).

already knew about Hall's state of mind, Toschi felt obligated to protect NCI by continuing to monitor the chat logs.

Toschi's primary focus during this period was on the Dallas facility closing, including preparations for the May 24 board meeting whereat the board issued the formal resolution to close the Dallas facility.<sup>77</sup> After the board meeting, Toschi advised the department heads of the decision to close the Dallas facility. She told her department heads not to tell anyone about the decision because she thought it was important for her to communicate the news in person to the employees in the Dallas facility.<sup>78</sup> Toschi, Chao, and the department heads began preparing for the announcement of the closing and the specifics of the restructure. *Id.*

*v. Hall Protests Her Obligation to Cover for Coworker on Medical Leave and Spreads Inaccurate Medical Information about Coworker*

Meanwhile, Hall continued to obsess about her Hybrid position. On May 16, she sent an email tilted "new indefinite situation" to Johnson and Nubbe stating: "Because I will be required to indefinitely work as an in-house Captioner, I would like my status and PTO accrual to reflect that until I am again able to resume working in a capacity that reflects that of a Hybrid Captioner."<sup>79</sup> Johnson assumed that Hall's reference to the "new indefinite situation" referred to her need to cover for a coworker on medical leave. Johnson reminded Hall that working in-house to cover for another captioner when they are out is part of a Hybrid Captioner's responsibility and told her to review the Hybrid In-House job description. *Id.*<sup>80</sup> Having had actual communication with the coworker on leave ("CW"), Johnson also told Hall that the situation was not indefinite, and that CW would be returning at the end of May or shortly thereafter. *Id.* In her usual fashion,

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<sup>77</sup> R 2.

<sup>78</sup> TR. 352-356

<sup>79</sup> R 36A

<sup>80</sup> R 45; TR. 489 (Hall was not the only Hybrid captioner covering for CW.)

Hall challenged Johnson and offered her *expertise* on the medical condition at issue. Johnson stood firm. She told Hall she would not change her compensation structure and thanked her in advance for her cooperation. *Id.*

In a chat log discussion with another employee on May 24, Hall not only expressed her usual hostility toward management and accused them of denying her rightful compensation by making her cover for CW, she disclosed CW's medical condition, stated CW "may never be back" and grossly exaggerated and made up facts about CW's condition of which she had no actual knowledge.<sup>81</sup> Toschi found the chat logs on May 31 and sent them to Nubbe by email. *Id.* As the head of HR, Nubbe was very concerned about Hall's disclosure of CW's medical information and potential violations of HIPPA and the ADA.<sup>82</sup>

Coincidentally, on the next day, June 1, NCI's Client Concierge, Christy Roney called Nubbe to report a disturbing discussion she had with Hall the previous day, May 31 in which Hall complained about HR's refusal to change her Hybrid status to in-house captioner since CW was out on medical leave. Roney told Nubbe that Hall showed no concern for CW's well-being and cared only about how HR was denying her PTO.<sup>83</sup> Nubbe asked Roney to write up what occurred on May 31 between her and Hall, which Roney did on June 14.<sup>84</sup> In pertinent part Roney wrote:

She also brought up the fact the HR won't change her status from hybrid to in-house employee since [CW] was out [on medical leave]. She wanted her PTO to be a higher rate than a remote captioner. I was completely floored. She was talking about her dad and how he was out for like a year and [CW] would be out for a very long time and HR won't give her more PTO hours. At that point, I said to her, "is [CW] okay?" She said no she is not okay and then went back to her monolog about hours and said that it is like cutting your arm off and saying you'll be back captioning in a couple of weeks. She left after that.

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<sup>81</sup> R 43.

<sup>82</sup> TR. 488.

<sup>83</sup> TR. 490-491

<sup>84</sup> R 43D

In the interim, CW returned to work on June 7, as planned. On June 8, CW emailed Director of Steno, Parker to express her concerns about Hall's having told numerous employees about her medical condition:

Apparently, Marie Hall has been telling everyone at work about my [medical condition] and complaining to Christy about having to come into the office to cover for me. I don't know how she found out about it because *I never talk to her*. Please keep my health matters or medical reason confidential going forward. I am a very private person and if someone wants to know they can come ask me or call me.<sup>85</sup> [Emphasis added].

Parker notified Nubbe who immediately investigated the matter to determine the extent of Hall's disclosures. *Id.* Nubbe learned that Hall's supervisors had initially disclosed the information to Hall for purposes of obtaining coverage for the coworker and to another individual because of her close relationship with CW. *Id.* The supervisor's discussions about CW were limited and purposeful; nonetheless, they apologized to Nubbe and promised to be more careful in the future. *Id.* Their disclosures and responses were not comparable to Hall's extensive, inaccurate, and self-concerned disclosures or to her dishonest denial of her disclosures. *Id.* The supervisors, therefore, were not disciplined.

*vi. Nubbe Reaches Her Breaking Point When Hall Sends Coworker a Nasty Denial That She Disclosed Coworker's Medical Information to Others.*

On Saturday, June 11, Nubbe sent an email to herself in which she crafted a draft email to Toschi stating she thinks that Hall should be disciplined for the manner and tone of the communication she has sent to management because it was undermining management's authority.<sup>86</sup> On Sunday, June 12, Nubbe sent Toschi an email relaying her concerns about Hall's conduct. That email incorporated the advice Nubbe received from legal counsel.<sup>87</sup>

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<sup>85</sup> R 48.

<sup>86</sup> TR. 492-493; See also NCI 11, 11A-B

<sup>87</sup> GC 17.

On Monday, June 13, CW called Nubbe and expressed that she was upset that Hall shared her personal medical information with so many people.<sup>88</sup> She also informed Nubbe that she had sent Hall an email on Saturday, June 11, asking her to not talk about her medical condition<sup>89</sup> but as of the time of their conversation she had not heard from Hall. Hall responded to CW later that day. She told CW that “it was a flat- out lie” and that she would “NEVER” do something like this to “ANYONE.” She then accused CW of sending her “nasty” emails based on rumors and suggested that CW was the aggressor who violated their *friendship*.<sup>90</sup>

Hall’s email to CW was the breaking point for Nubbe. She was not only mad, she was sad.<sup>91</sup> Hall’s bullying of management was wrong; her bullying of the vulnerable coworker was intolerable. *Id.* Nubbe felt that she was contributing to the problem by not having disciplined Hall earlier for her abusive, disruptive and dishonest conduct. *Id.*

*vii. Nubbe Disciplines Hall for Her Pattern of Hostile Communications with Management and the Coworker, the Spreading of False Medical Information About the Coworker, and for Violating the Telecommunications Policy*

Nubbe prepared and issued the June 15, 2016 disciplinary memo to Hall that expressly incorporated the February 25 counseling email regarding Hall’s unprofessional way of communicating in the domestic partner and service animal matters.<sup>92</sup> It also referenced the numerous incidents of Hall’s unacceptable behavior, including: her accusing management of dishonesty and acting in bad faith; her complaining in an aggressive and hostile manner about covering for an ill employee notwithstanding her Hybrid position; and her spreading of inaccurate and personal medical information about an NCI employee to numerous other employees. In

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<sup>88</sup> R 43B; TR. 490

<sup>89</sup> R 43C; *see also* GC 16

<sup>90</sup> GC 16.

<sup>91</sup> TR. 492-494; (“I just clearly [sic] [really] felt bad, and to let her get away with it, I felt I was contributing to the problem by not disciplining her for it earlier.”)

<sup>92</sup> GC 12.

addition to admonishing Hall's inappropriate communications, Nubbe reminded Hall of the Telecommunications and Computer Systems policy and quoted its pertinent part. She did this because of the information she had received that Hall and Novembrino planned to leave NCI and service WWE on their own and Hall's disturbing April chat log request to have her personal laptop connected to NCI's computer system that Toschi had found while investigating Hall's and Novembrino's alleged plan.<sup>93</sup> Finally, because her primary purpose for issuing the June 15 disciplinary memo was to protect NCI employees from Hall's bullying, Nubbe expressly warned Hall that she would be terminated if she retaliated against any employee based on her belief that the employee reported her conduct to management.<sup>94</sup>

Hall did not come in the office the next day on June 16.<sup>95</sup> On July 5, Hall again slept through her shift and was issued another disciplinary memo.<sup>96</sup> The latter disciplinary memo for again sleeping through her shift was her third formal disciplinary memo in less than five months, two of which identified multiple serious transgressions.

#### C. TOSCHI NOTIFIES EMPLOYEES THAT NCI IS NOT IN FAVOR OF A UNION AND PREPARES FOR AND ANNOUNCES THE DALLAS FACILITY CLOSING.

In addition to working on the Dallas facility closing and restructuring and Hall's various issues, Toschi and her management team were dealing with Lampson, the Voice Writing Supervisor in the California office who ultimately had to be terminated because she actively engaged in Union organizing activity as a supervisor. With all that was going on, Toschi thought it best to inform the employees about the Union organizing effort, and NCI's position regarding it, before announcing the Dallas facility closing. So, on June 28, Toschi issued a companywide

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<sup>93</sup> TR. 486, 494-495.

<sup>94</sup> TR. 495.

<sup>95</sup> R 43E

<sup>96</sup> R 37

communication in which she told NCI employees that NCI was not in favor of the Union, but that NCI would respect the rights of employees who may oppose her view.<sup>97</sup> Toschi was quite relieved by the number of responses she received from employees who shared her perspective and did not want Union involvement at NCI.<sup>98</sup>

With respect to the Dallas facility closure, after much discussion and consideration of NCI's needs and capabilities, Toschi and Chao decided that it was in NCI's interest to transition as many of the in-house employees as possible but also take the opportunity to re-evaluate NCI's resources, including personnel, to ensure compliance with NCI's values in terms of productivity, quality and reliability.<sup>99</sup> Hall had been in the fourth quartile for years and Toschi and Chao were personally aware of her bad conduct in the preceding six months because Hall had included them on her combative emails and directly accused Toschi of breaching her agreement and of being dishonest. Toschi, of course, was in weekly, if not daily, communication with Nubbe and was aware of what was going on with Hall.<sup>100</sup> As for Tomy Duke, Nubbe had informed Toschi of his June disciplinary action issued for oversleeping in a weekly meeting in which both Hall and Duke were discussed.<sup>101</sup> In addition to his active discipline, Duke was a fourth quartile performer and did not satisfy NCI's production needs because he would have been redundant in the restructure.<sup>102</sup> Accordingly, after assessing their employees' productivity, quartile ranking, discipline record and seniority, Toschi and Chao decided that neither Hall nor Tomy Duke were employees that NCI needed or wanted as part of the restructure. As the common criteria for both Tomy Duke and Hall were their fourth quartile ranking and discipline within the previous six months, those two criteria

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<sup>97</sup> GC 19

<sup>98</sup> R 4

<sup>99</sup> TR. 379-380; TR. 90.

<sup>100</sup> TR.386-386

<sup>101</sup> R 39F; TR. 475-476.

<sup>102</sup> TR. 423-424; See, e.g. GC 26 (Productivity was one of the key factors important in Toschi's analysis.)

ultimately became the factors for determining which employees would not be part of the restructure.<sup>103</sup>

It was important to Toschi that the methodology used be objective but also fair. She understood that fourth quartile/active disciplinary methodology could result in an unfair outcome. For example, an employee could be in the fourth quartile because his/her peer group are exceptional, experienced employees and at the same time have an active disciplinary matter that is either an aberration for the employee or not a serious violation of NCI policy and practice (being minimally late to work as opposed to missing a shift and being unreachable). To avoid such an unintended consequence resulting from a strict implementation of the objective methodology, Toschi was willing to consider mitigating circumstances.<sup>104</sup>

In addition to considering the methodology to use to determine which employees would be offered positions in the transition, it was decided that the announcement would be made by Toschi, in person, accompanied by Nubbe and Magill, on July 7. Information packets that included letters of intent specific to each department were prepared for distribution at department meetings that were scheduled to take place after Toschi made the closure announcement. The letters of intent identified the position options available to the employee based on the employee's current position and instructed the employee to rank their preferences. Employees who were not scheduled to work in-house on July 7 were provided with a call-in number.<sup>105</sup> Lukas was one of those employees. Finally, Toschi prepared detailed notes to help her deliver the announcement.<sup>106</sup>

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<sup>103</sup> TR. 90-91, 375-377, 385; *See, e.g.* R 46A

<sup>104</sup> TR. 375-377, 385

<sup>105</sup> TR. 357

<sup>106</sup> R 5.

On July 7, relying heavily on her pre-written notes,<sup>107</sup> Toschi announced that the Dallas facility was closing, and she explained the reasons why. She emphasized NCI's desire to transition as many employees as possible and that the employees would learn more specifics in their respective department meetings to follow. Toschi told the employees that she "felt it was important that you, who are the most affected by this decision, be the first to know." "I ask that you please keep this information confidential for the time being to allow us time to notify the rest of the staff, our affected clients, vendors, and landlord in a professional manner."<sup>108</sup>

Toschi was so concerned about a client hearing about the closure from an employee and deciding to pull its work that Toschi arranged prior to the announcement to have the Vice-President for Sales and Marketing begin making the client calls at the time that the facility meeting began.<sup>109</sup> She also told the broker that she would notify him as soon as the meeting concluded so that he could inform the landlord.<sup>110</sup> And, within hours of the announcement and department meetings, Toschi sent a companywide email that was almost identical to her announcement notes so that the entire staff would know about the closure.<sup>111</sup>

#### D. LUKAS IS DISCIPLINED FOR ALLOWING FORMER EMPLOYEE TO ATTEND THE COMPANY MEETING

Within minutes of the conclusion of the meeting, Toschi learned from Patterson that Lukas had allowed a former employee, Michael Baker, to listen in on the meeting through a speakerphone.<sup>112</sup> Patterson and Toschi were shocked and disgusted.<sup>113</sup> They could not fathom why Lukas would allow a former employee to attend a NCI meeting. *Id.* Toschi wanted Lukas fired

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<sup>107</sup> TR. 357.

<sup>108</sup> R 5

<sup>109</sup> TR. 70.

<sup>110</sup> TR. 71

<sup>111</sup> GC 25.

<sup>112</sup> TR 358-359; GC 21

<sup>113</sup> TR 316, 359,

immediately and made that recommendation to Nubbe and Johnson.<sup>114</sup> They, along with Patterson, discussed the matter the next day and over the weekend (July 9-10) and it was decided that he would be issued a sternly worded disciplinary memo.<sup>115</sup>

On Monday, July 11, Patterson called Lukas and reprimanded him, and he was issued the written disciplinary memo for his “egregious breach of duty of loyalty” through an email sent by Johnson.<sup>116</sup> In the July 11 telephone call with Lukas, Patterson found herself in the ironic situation of both disciplining and congratulating Lukas. Patterson had just learned that Lukas had *finally*, after nine months, passed his accuracy tests that he was expected to pass within three months of hire.<sup>117</sup> Although Patterson was the Director of Voice Writing, she had personal knowledge of Lukas’ performance struggles and frustration. She had worked with him directly and with his supervisors who had taken extraordinary measures to help him succeed even though he complained that NCI’s performance standards were unfair and made excuses for his poor performance.<sup>118</sup> Although Lukas passed his tests and was promoted to IOA, he was still firmly in the fourth quartile.<sup>119</sup>

#### E. ORGANIZERS RESPOND TO TOSCHI’S JUNE 28 POSITION REGARDING UNION

Also on July 11, the employees involved in the union organizing effort sent to everyone in the company an email response to Toschi’s June 28 communication about NCI’s position regarding

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<sup>114</sup> TR 360.

<sup>115</sup> R 49;

<sup>116</sup> R 38. “Certain duties... arise upon the formation of an employment relationship.” *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 21-22 (Tex. 1998) “One of those duties forbids an employee from using confidential or proprietary information acquired during the relationship in a manner adverse to the employer. *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 600 (Tex. App.-Amarillo 1995) Employees have a common law duty of loyalty to their employer while employed. *See Gaal v. BASF Wyandotte Corp.*, 533 S.W.2d 152, 154-55 (Tex. Civ. App.-Houston 1976) (affirming the enjoinder of a former employee from contacting customers solicited prior to leaving employment).

<sup>117</sup> TR. 303-304, 306-307, 317; R 26. On Sunday July 10, Lukas’ Voice Writing Supervisor, Amanda Capp notified Johnson and Patterson that Lukas had passed his test and requested a promotion to IOA status.

<sup>118</sup> TR. 308-311; R 25

<sup>119</sup> TR. 319

the union.<sup>120</sup> Notably missing from the list of signatures is Hall's. As discussed above, in mid-April, Hall had a falling out with the union organizing employees and was not considered by them to be a part of their effort.<sup>121</sup> Lukas was listed and Toschi's recollection is that this was the first she had seen Lukas' name associated with the Union.<sup>122</sup> The July 11 communication is perhaps the best evidence that NCI did not terminate Hall and Lukas for their Union leanings and that the objective fourth quartile/active disciplinary action methodology was utilized to determine which employees would be part of the restructure. The signatories include:

**Greg Flanders:** A long time NCI employee who still works out of the California facility.

**Lia Harrison:** At the time of the restructure was a 3<sup>rd</sup> quartile in-house captioner who was granted her first-choice request to work as a remote captioner.<sup>123</sup>

**Stacy Hawkins (Gardner):** At the time of the restructure was a third quartile in-house captioner who had been issued a disciplinary memo on July 11 because she attempted to record the department meeting after the July 7 closure announcement.<sup>124</sup> She was granted her first choice to work as a remote captioner.

**Daniel Mills:** At the time of the restructure was a third quartile in-house captioner with an active disciplinary matter issued on June 24 for oversleeping. He was granted his first choice to work as a remote captioner.<sup>125</sup>

**Chris Novembrino:** At the time of the restructure was a remote captioner and considered by NCI to be the leader of the Union organizing effort. He continues to work for NCI as a remote captioner.<sup>126</sup>

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<sup>120</sup> GC 23

<sup>121</sup> TR. 228-230

<sup>122</sup> TR.424

<sup>123</sup> GC 30

<sup>124</sup> GC 30; TR. 364.

<sup>125</sup> TR. 370-371

<sup>126</sup> TR. 371

**Chris Spicer:** Continues to serve as a remote voice writer associated with the California facility.<sup>127</sup>

**Sean Taras:** Continues to work for NCI and is associated with the California office.

**Stephen Totten:** At the time of the restructure was a remote captioner. He continues to work for NCI.

**Adam Wing:** Was associated with the California facility as a remote captioner but had to resign when he lost the lease on the studio he used to perform his captioning.

Lukas is the only employee listed on the July 11 communication from the employees interested in the Union that was terminated. He is also the only employee on the list who was associated with the Dallas facility who was a fourth quartile performer and who had an active disciplinary matter.<sup>128</sup>

#### F. LUKAS IS TERMINATED BECAUSE HE WAS IN THE FOURTH QUARTILE AND HAD BEEN DISCIPLINED WITHIN SIX MONTHS

Toschi denied Lukas' request to become a remote captioner because he was in the fourth quartile<sup>129</sup> and he had an active and serious disciplinary matter. Being asked to call-in for the meeting was the first work related duty Lukas was asked to perform from a remote location and he responded by allowing a former employee to listen to the meeting on the speakerphone.<sup>130</sup>

Whether Lukas acted out of spite or due to having exceptionally poor judgment, Toschi felt that Lukas was not suitable for remote work.<sup>131</sup>

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<sup>127</sup> See, also, TR. 371-372

<sup>128</sup> TR. 372

<sup>129</sup> Respondent incorporates herein its Exceptions that provide extensive evidence of Lukas' poor performance and bad attitude that justified his fourth quartile ranking.

<sup>130</sup> See, TR. 269 (Lukas testified: "I mean we were all hanging out and I put the speakerphone on. My wife, my kids, and Michael Baker and I put the speakerphone on and put—you know, let them know I was in, hit on mute and I just let the meeting play in the background while we were going about our business and let the meeting kind of go forth.")

<sup>131</sup> TR. 383

## G. TOSCHI IMPLEMENTS THE FOURTH QUARTILE AND ACTIVE DISCIPLINE METHODOLOGY

After receiving quartile rankings and information about the third and fourth quartile ranked in-house and hybrid employees from the Directors and Supervisors, Toschi determined that only Hall, Lukas and Duke were in the fourth quartile and had discipline matters within the previous six months<sup>132</sup> and that there were no other employees she did not want or need. On August 4, Toschi emailed Chao her recommendation that Hall, Lukas, and Duke be denied their request for continued employment in the restructure because they had “disciplinary actions against them *and* are in the fourth quartile.”<sup>133</sup> Toschi attached to the email a spreadsheet that identified each of the 33 employees considered (3 of which were supervisors), their current position, quartile ranking, requested position and outcome.<sup>134</sup> The spreadsheet shows that an employee’s Union activity had no bearing on whether they received their first choice—known union organizers were given their first choice (i.e. Mills and Hawkins (Gardner)).

The evidence is clear: Hall lost her job because she was an insubordinate, disruptive, unreliable, poor performer who cares only about herself. At no time did she engage in protected concerted activity for the mutual aid or protection of her co-workers pursuant to Section 7 of the Act. To the contrary, she resented the other steno-captioners who were granted the right to work remotely through the newly created Hybrid position and repeatedly showed a callous indifference to the health and wellbeing of her co-workers (allergies to service dog or CW’s medical condition). Even the other Union organizers were put off by Hall’s self-absorption.<sup>135</sup> NCI had every right and

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<sup>132</sup> GC 32,34,43; TR 396.

<sup>133</sup> GC 31

<sup>134</sup> GC 30.

<sup>135</sup> TR. 228-230

reason to terminate Hall. She was a bottom fourth quartile performer with three formal disciplines for serious misconduct within the six months preceding her termination.

Lukas' termination was not a violation of his rights under the Act because he was not engaged in concerted activity at the time he allowed Baker to listen in on the meeting. Baker was a *former* NCI employee who, according to Lukas, resigned because he "is a man of born wealth and didn't need to work." He and Lukas did not talk about the Union after Baker left NCI because "he couldn't care less [about the Union], he was — Michael Baker was on a philosophical journey of his own, which is why he left there in the first place." "He wasn't part of the Union anymore. He had removed himself from the company and from that entirely."<sup>136</sup>

Lukas's rights were also not violated by Toschi's request that the employees keep the closure announcement confidential after the July 7 announcement meeting. Toschi's confidentiality request was made *after* Lukas allowed Baker's participation and *before* Toschi knew about Lukas' breach of duty or significant lapse in judgment. More importantly, Toschi made the request of the employees for a legitimate business purpose: to allow NCI to properly notify its clients, landlord and staff in the Virginia and California facilities of the Dallas facility closure.<sup>137</sup> That narrow purpose was expressly conveyed to the employees. *Id.* The duration of the enforcement was limited to serve the purpose for which it was intended, and, in fact, the employees knew within hours of the meeting that Toschi had notified the remaining staff. *Id.* Toschi's

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<sup>136</sup> TR. 270.

<sup>137</sup> *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (Employer's rules violate the NLRA if: (1) Employees would reasonably construe the rules' language to prohibit activity under Section 7 of the NLRA, including protected concerted activity; (2) the rule was issued in response to union activity; or (3) the rule was applied to restrict the exercise of Section 7 rights.) Toschi used very specific language and focused on very specific behaviors. Her request was not vague or ambiguous and it was therefore not a violation of the NLRA. *Chipotle Services LLC*, 364 NLRB no. 72 (2016). Toschi's request was made for a legitimate business purpose and did not violate the Act. *Fresh & Easy Neighborhood Market, Inc.* 361 NLRB No.12 (Aug. 11, 2014) (Employer did not violate Section 8(a)(1) when it asked the employee complaining of sexual harassment not to solicit statements from co-workers while the employer investigated the complaint because the employer's request stemmed from its desire and obligation to conduct a fair and impartial investigation; thus, it had a legitimate business interest for its instruction.)

announcement and the actions she took to protect the confidentiality of the announcement demonstrate how important the issue was to Toschi and why she considered Lukas' conduct so egregious. His lack of judgment was a potential liability. There is nothing pretextual about Lukas' discipline or termination. It is the GC's positions and the ALJ's findings that are contrived.

### **III. NEITHER HALL NOR LUKAS IS ENTITLED TO ANY REMEDY LET ALONE CONSEQUENTIAL DAMAGES**

GC's Cross-Exception to the ALJ's decision not to address or award consequential damages should be rejected for numerous reasons. First, the National Labor Relations Act, 29 U.S.C. § 160(c) ("Section 10(c) does not provide for consequential damages. Section 10 empowers the Board to issue cease and desist orders and impose affirmative remedies of reinstatement, notice posting and/or back pay.

. . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: Provided, that where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. . .

The Supreme Court has repeatedly held that courts (and agencies) "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); see, e. g., *United States v. Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U. S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U. S. 424, 430 (1981). The absence of any language in a statute is as informative as the

language itself. Here, it must be assumed that if Congress intended Section 10 to include consequential damages it would have so stated just as it did in Title VII of the Civil Rights Act of 1991. *Id.*

The Supreme Court has also made clear that the Board's discretionary powers do not supersede the fundamental rules of statutory construction; the Board's remedial discretion is not unlimited. The Board's "authority to order affirmative action does not . . . confer a punitive jurisdiction enabling the Board to inflict . . . any penalty it may choose . . . even though the Board is of the opinion that the policies of the Act may be effectuated by such an order." *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938); *see also Carpenters Local 60 v. NLRB*, 365 U.S. 651 (1961). The remedies ordered must bear an appropriate relationship to the policies underlying the Act. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 348 (1953). The Board may not justify an order solely on the ground that it will deter future violations of the Act. *Bell & Howell Co. v. NLRB*, 598 F.2d 136, 147 n.36 (D.C. Cir.), *cert. denied*, 442 U.S. 942 (1979).

The consideration of consequential damages by the ALJ would have been particularly egregious given that GC presented no evidence that either Hall or Lukas incurred any consequential damages or that they mitigated their alleged damages by seeking interim sources of employment. *See, e.g. Midwestern Personnel Services*, 346 NLRB 624, 625 (2006). Consequential damages must be proved with certainty. The duty to mitigate is a requirement in all employment laws prohibiting discrimination or retaliation in the workplace. *See e.g.*, 42 USCA §2000e-5. Any award of consequential damages would have been inappropriately speculative. The GC's failure to put on evidence to prove consequential damages cannot be addressed in some separate future damages proceeding because there is no authority or procedure for such a proceeding and, more importantly, the delay and costs associated with such a separate proceeding

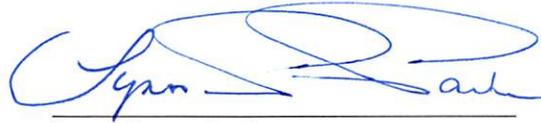
would be so burdensome as to be punitive and unjust. *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964) (Board orders cannot impose an undue or unfair burden on an employer.)

GC Exception 4 is without merit and must be rejected.

#### **IV. CONCLUSION**

The ALJD evidences an egregious failure by the ALJ to consider and evaluate NCI's evidence. The evidence demonstrates that NCI had just cause to terminate Lukas and Hall. The evidence proscribes a finding that NCI's reasons for terminating Hall and Lukas were pretextual. Cross-Exception 3 must be rejected. The evidence regarding NCI's discipline of Hall for spreading inaccurate medical information about a coworker was so abundant, clear and objective that the ALJ had to find that the discipline was appropriate, and that similar discipline would have been issued to a non-union adherent. GC Cross-Exceptions 1 & 2 must also be rejected. Finally, the Act does not provide for consequential damages and even if it did, GC's failure to present any evidence of such damages or that Lukas and Hall have mitigated their alleged damages, requires a rejection of GC's Cross-Exception 4.

Respectfully submitted,



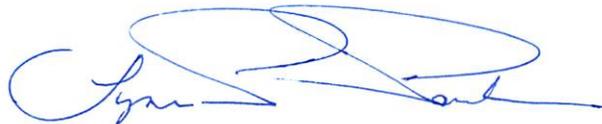
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11th day of December 2017, a copy of  
RESPONDENTS' ANSWERING BRIEF TO CROSS-EXCEPTIONS was served by email to:

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