UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ELECTROLUX HOME PRODUCTS, INC.	)	
	)	
and	)	Case 15-CA-206187
	)	
J'VADA MASON, an IndividualRespon	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. STATEMENT OF THE CASE

A. OVERVIEW

Charging Party, J'Vada Mason, is a former team lead at Respondent, Electrolux Home Products, Inc.'s Memphis, Tennessee plant. The International Brotherhood of Electrical Workers, Local 474 (the Union), organized the plant in September 2016, and Mason became a member of the Union's negotiating committee shortly thereafter. She was discharged for insubordination on May 5, 2017,[1] after she repeatedly refused to follow her supervisor's instructions on April 28.

The plant's human resources department promptly investigated Mason's misconduct, gathering witness statements and conducting investigatory interviews. Thereafter they consulted with the Union pursuant to the parties' pre-contract interim discipline procedure, and the Union raised no objection to the proposed decision to discharge Mason. The Union also declined to file an unfair labor practice charge on Mason's behalf. In fact, Union Business Agent Paul Shaffer testified at the underlying hearing in this matter that he "didn't get [the] impression" that Mason's involvement on the Union's negotiating committee had anything to do with her discharge (Tr. 30). Even Mason testified that she believes she was discharged because she "knew too much . . . about romantic relationships with [her manager] and associates" and because she "blew the whistle on [her supervisor] about his lack of performance" (Tr. 225).

Mason filed a charge on September 14 alleging that she was discharged because of her union activity. She filed an amended charge on November 2 alleging that she was discharged because of her union activity and protected concerted activity. The General Counsel issued a complaint on December 20.

[1]All dates referenced herein are in 2017, unless otherwise indicated.

The case was tried May 7 to 9, 2018, in Memphis, before Administrative Law Judge Arthur J. Amchan. The sole issue presented to the judge was whether Electrolux violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging Mason.

On July 2, the judge issued a decision concluding that Mason was discharged because of her union activity. The judge concluded that Mason was *not* discharged because of her alleged protected concerted activity; consequently, that conclusion is not the subject of Respondent's exceptions.

Mason's termination was not the product of discrimination or retaliation but the foreseeable and reasonable consequence of a team lead directly disobeying clear orders from her supervisor. This case raises serious policy concerns. If an employer cannot discharge an employee on the union's negotiating committee for blatantly defying a supervisor's instructions, then it cannot safely and efficiently manage its workplace. Membership on the union's negotiating committee does not insulate employees from the consequences of their misconduct. The judge disregarded this fundamental concept and found that Mason's discharge was unlawfully motivated. His decision cannot stand.

B. SUMMARY OF FACTS

1. Memphis Operations

Electrolux's Memphis plant produces high end gas and electric ranges. It opened in 2013 and employs approximately 700 hourly workers. (Tr. 17-18.) The plant's operations are divided into the following departments: assembly, materials, quality, maintenance, tool and die, and press. Mason worked as a team lead in the materials department, which supplies parts to the various production lines in the assembly department. (Tr. 122-123.)

a. Assembly department

The assembly department has multiple lines that produce different types of ovens. Line 1 produces double wall ovens. Line 2 produces single wall ovens. (Tr. 123-124.) Line 4 produces a specific type of oven called a Bado. Line 4 is also referred to as the "Bado line." (Tr. 115, 260.) The other production lines are not relevant in this case.

During the relevant time period, Hamza Huqq was the assembly department supervisor for Line 1 (Tr. 385), and John Collins was the assembly department supervisor for Line 2 (Tr. 469-470).[2] Jason Parsons was the assembly operations manager at the time (Tr. 131, 151).

b. Materials department

The materials department supplies the assembly department with parts, including bulk parts and fabricated parts. Bulk parts are parts supplied by outside vendors. They include items such as clocks, panels, and microwaves. (Tr. 130.) Fabricated parts are parts that are manufactured at the plant. Examples of fabricated parts include brackets, cooling ducts, and deflators. (Tr. 70-71, 387.) Most bulk parts are stored in "supermarkets," which are large warehouse areas with shelves and racks. Although microwaves are bulk parts, they are typically stored inside trailers near the receiving dock, or in staging areas just outside the dock. (Tr. 130.) Fabricated parts are generally stored in the "FAF" (Tr. 387).

Materials department employees deliver parts to the assembly lines using forklifts, tuggers, pallet jacks, and cherry pickers. A forklift is a motorized vehicle with forks on the front used to pick up bulk items on pallets (Tr. 56-57, 125). A tugger is a motorized vehicle that does not have forks. It is used to pull carts that are loaded with parts (Tr. 57, 60-61, 111-113, 125-126). A pallet jack is a non-motorized piece of equipment with forks that is used to manually move pallets from

[2]The record does not identify the assembly department supervisor for Line 4; however, that fact is not relevant in this case.

one point to another (Tr. 61-62, 126). A cherry picker is a motorized vehicle with a basket and forks that is used to retrieve items stored in high locations (Tr. 63, 127).

The hourly employees in the materials department are classified as pickers, tug drivers, forklift operators (also referred to as bulklift operators), or team leads. Pickers are primarily responsible for locating and retrieving items from the warehouses. Tug drivers are primarily responsible for operating tuggers to deliver parts to the assembly lines. Forklift operators transport palletized bulk parts to staging areas near the lines. For safety reasons, forklift operators cannot deliver parts directly to the assembly lines. The only exception is that forklifts can be used to deliver palletized microwaves directly to the lines because the microwaves are stacked on the pallets so high. (Tr. 111-112, 124-128, 204, 312.)

According to the job description, a materials department team lead's "primary responsibility is to effectively plan and coordinate work for assigned production area ensuring parts, materials and manpower are available to make a quality product in a safe manner." The "essential duties and responsibilities" section of the job description identifies tasks such as "[m]aintain compliance with all Company policies and procedures"; "[m]aintain productivity in assigned area"; and "[c]ollaborate with Supervisor, support functions and employees to solve work-related problems." Like most job descriptions, the materials department team lead job description also contemplates that the lead will "[c]omplete other duties as assigned." (GC Exh. 4.)

Materials department team leads are generally assigned to support a single assembly line (Tr. 132). Forklift operator and Chief Union Steward Stanley Reese testified that team leads are there "to instruct" but also "fill in" where needed (Tr. 83). According to Reese, "If there's a problem, [team leads] pretty much got to figure it out" (Tr. 58). Approximately 10 materials

department employees report to each team lead. The team leads, in turn, report to a supervisor. (Tr. 124, 132.)

Mason was hired in April 2013 as a team member in the materials department. She was promoted to team lead for Line 2 in June 2013 and worked in that capacity until she was discharged on May 5. (Tr. 122-123.) James Allen was the materials department team lead for Line 1 (Tr. 134). Chris Fair was Mason's supervisor, and he was responsible for all the materials department team leads who supported the assembly lines. He supervised approximately 50 to 60 materials department employees and 6 team leads. Supervisor Fair reported to then-Materials Department Manager Larry McClendon. (Tr. 115, 124, 131, 302.)

c. HR department

The Memphis plant's human resources (HR) department is led by an HR director, who is generally responsible for overseeing all of the HR department's services, including talent management, succession planning, recruiting, and labor management. A team of HR professionals reports to the HR director. Leola Roberts was the HR director from February 2017 through her termination in October 2017. (Tr. 369-370.)

Diana Jarrett is the plant's current HR director. Jarrett was an HR business partner from March 2016 until she was promoted to HR director in December 2017. (Tr. 431-432.) HR business partners are generally responsible for partnering with the supervisors in operations to assist, guide, coach, and manage labor and ensure compliance with policies and procedures (Tr. 372).

2. Union Representation

The Union first filed a petition to represent Electrolux's Memphis employees in the spring of 2015 (Tr. 64-65, 134). The Board conducted an election on May 15, 2015, which the Union lost (Tr. 19, 64-65). The Union filed a second petition in the summer of 2016 (Tr. 65-66). The Board

conducted a second election on September 27, 2016, which the Union won (Tr. 20, 65-66). The Board certified the Union on October 5, 2016 (GC Exh. 20).

On October 20, 2016, the parties agreed on an interim procedure for handling disciplinary actions while they bargained for a first contract. The interim discipline procedure provided as follows with respect to terminations, suspensions without pay, and disciplinary demotions: "The Company will send relevant paperwork to the Union by e-mail and wait 3 business days to allow bargaining if requested. The action will be taken after 3 days but bargaining can continue if necessary." The procedure further provided that "[t]erminations involving workplace violence, weapons, drugs and other serious violations can result in immediate suspension while the 3 day period . . . runs." (R. Exh. 6.) As Jarrett explained, suspensions for "serious violations" are reserved for situations where someone is a harmful threat (Tr. 495).

The parties began negotiating for a collective-bargaining agreement on January 24, 2017 (Tr. 22). They usually met at a hotel two to three days per week every three to four weeks (Tr. 23, 25, 158-159). The Company's chief negotiator was Fisher Phillips attorney Jonathan Pearson. The Union's chief negotiator was Randy Middleton. (Tr. 21-22, 157.)

In addition to Pearson, the Company's negotiating committee included Vice President of HR David Smith, Associate General Counsel Tim O'Rourke, Senior HR Director Ted Shields, Labor Relations Manager Erika Robey, Operations Manager Parsons, and Controller Jason Rush (Tr. 22, 157). Neither HR Manager Jarrett nor HR Director Roberts was on the Company's negotiating committee or had involvement in the negotiations (Tr. 31, 371).

In addition to Middleton, the Union's negotiating committee included Business Manager Paul Shaffer, Assistant Business Manager Kenneth Ingram, District Representative David Stevens, and Electrolux employees Mason, Reese, Jocko Williams, Marvin Grant, Victor Jones, and Jaquita

Ledlow (Tr. 21, 157). Other than Mason, all the employees on the Union's bargaining committee are still employed by Electrolux (Tr. 30).

The parties ultimately agreed to a contract, which was ratified on September 16 (Tr. 28). The contract includes a rule prohibiting insubordination, as did the handbook in effect at the time Mason was discharged (Tr. 39, 84-85; GC Exh. 12, p. 51).

3. Mason's Union Activity[3]

The judge found that Mason's union activity "most notably" included her participation on the Union's negotiating committee (Decision, p. 9, line 31). Mason was appointed to the negotiating committee approximately one month after the September 2016 election (Tr. 286). There is no evidence the individuals who made the decision to discharge Mason—then-HR Manager Jarrett and then-HR Director Roberts—knew anything about Mason's specific involvement on the committee. At most, Jarrett and Roberts knew that Mason was on the committee, but even that knowledge was imputed by the judge because counsel for the General Counsel failed to solicit evidence that they had actual knowledge of that fact.

The judge also found that Mason distributed authorization cards, handed out union flyers, and wore a pro-union t-shirt during both organizing campaigns (Decision, p. 2, lines 36-37). Additionally, he found—based exclusively on Mason's testimony—that she engaged in union

[3]The Complaint alleged that Mason was discharged because of her union and protected concerted activity. The record reflects that Mason's alleged protected concerted activity consisted of her complaining about 1) materials department team lead pay (Tr. 146-147, 256-257, 435-438; GC Exh. 10); 2) Supervisor Fair allegedly discriminating against women (Tr. 32-33, 226-227); 3) a sign-up sheet requiring production employees to sign before leaving the line to use the restroom (Tr. 162-167); 4) Manager McClendon allegedly favoring an employee with whom he was romantically involved (Tr. 159-161); and 5) Manager McClendon allegedly sexually harassing a co-worker (Tr. 148-150). The judge correctly found the record was "insufficient to establish that Respondent bore animus towards Mason as a result of that conduct or that it was related in any way to her termination" (Decision, p. 11, lines 20-22). Consequently, facts related to Mason's alleged protected concerted activity are not discussed in this brief except insofar as they overlap with facts related to the alleged union activity.

activity during a captive audience meeting approximately one week before the second election in September 2016. Specifically, the judge found that Mason openly challenged statements made by the plant manager at the time, Sebastian Gulka, about strikes at Kellogg's Memphis plant. (Decision, p. 2, lines 37-41.)[4] The judge further found that Gulka and another member of management Mason recalled only by the first name "Matt" told Mason during the meeting to "shut up because she didn't know what she was talking about" (Decision, p. 3, lines 1-2).

Roberts did not begin working for Electrolux until well after the second election (Tr. 369-370), and Jarrett was hired only a few months before the second election (Tr. 431-432). There is no evidence Jarrett was aware of Mason's alleged union activity during the second campaign, including her alleged conduct during the September 2016 meeting. With respect to Mason's alleged conduct during the meeting, the judge even went so far as to expressly conclude, "It is unclear as to who in management, besides plant manager Gulka, was aware of [Mason's] conduct at the captive audience meeting" (Decision, p. 10, lines 1-2).

4. Events Leading to Mason's Discharge

The events giving rise to Mason's discharge occurred on April 28. Three witnesses—Mason, Supervisor Fair, and Supervisor Huqq—had direct knowledge of the events.[5] Fair and

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[4]The judge noted there was no evidence that Gulka was the plant manager in May 2018 when the trial occurred; however, he also noted that both parties agreed to this fact, which contradicts his suggestion that Respondent should have called Gulka as a witness or explained why it could not call him (Decision, p. 3 fn. 2). To the extent the judge drew an adverse inference from Gulka's failure to testify, this was plain error. (Exception 8.) The "missing witness" rule allows a judge to draw an adverse inference against a party that fails to call a witness who is under that party's control and is reasonably expected to be favorably disposed towards it. *Natural Life, Inc. d/b/a Heart and Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 1 (2018) (citations omitted). A former employee, including a former plant manager, is not considered to be under a party's control. Id. (citations omitted).

[5]As discussed in more detail below, the judge highlighted his misunderstanding of the case when he noted that "[i]t is unclear what Huqq . . . has to do with this case" (Decision, p. 4 fn. 7) and when he concluded that Huqq's testimony had "absolutely no probative value regarding any issues in this case" (Decision, p. 4 fn. 8). Huqq was a new supervisor with no prior knowledge of

Huqq wrote statements on April 28 immediately after the incident (GC Exh. 11, pp. 1-2), and Mason wrote a statement on May 3, after initially declining to write one (GC Exh. 6).[6] All three witnesses' testimony at the hearing differed in some minor respects from what was included in their statements, which were written closer in time to the events. Mason's testimony, however, is the only testimony that was different in a number of material respects, as noted below.[7]

a. Mason's version

Mason testified that when she arrived to work at 6:00 a.m. on Friday, April 28, McClendon and Fair were waiting at her desk and informed her that both of the regular forklift drivers, Kenneth Ward and Diana Bennett, were absent (Tr. 178). Ward and Bennett normally serviced Lines 1 and 2 (Tr. 129). Mason testified that McClendon said he was going to find somebody to do that work and then walked off. Mason denied having any discussions with Fair that morning at her desk. (Tr. 178-179.)[8]

Mason or her alleged union activity, including her involvement on the Union's negotiating committee (Tr. 394-395). He directly observed Mason's insubordinate behavior (Tr. 396-417). Moreover, he credibly explained that it "shocked [him] that a team lead would say that she was not going to assist" (Tr. 398). To completely disregard Huqq's testimony and question why Respondent even called him to testify raises serious concerns about the judge's diligence in evaluating the record evidence. (Exceptions 15, 22.)

[6]Jarrett asked Mason to write a statement during the initial investigatory interview on April 28, but on the advice of her steward, Stanley Reese, she declined to do so (Tr. 205-206). Mason explained that "the little form that they give you is half a page and that wouldn't have been enough room for me to get everything that was said into that little small piece of paper" (Tr. 206). Mason wrote her May 3 statement after Union Business Agent Shaffer advised her to do so. Shaffer specifically told Mason to put everything she could think of in the statement so the Company would have all the information when they reviewed it (Tr. 37). Mason

[7]Importantly, although Mason's testimony and her statement were inconsistent in many respects, she consistently admitted the key fact that she repeatedly refused her supervisor's instructions.

[8]In her May 3 statement, Mason implied that Fair told her first thing he was going to find a replacement for the day (GC Exh. 6). She did not mention anything in her statement about McClendon finding someone to do the work.

Mason testified that at some point early that morning, John Collins, assembly department supervisor for Line 2, approached her and wanted to know who his drivers were going to be because the regular drivers were absent. According to Mason, her response to Collins was that he would have to call and ask Fair because she did not know.[9] (Tr. 195.)

Mason testified that shortly after learning the two forklift drivers were going to be absent, Tiffany Broadnax, assembly department team lead for Line 2, called her on the radio and said she had the wrong parts for the next order that was about to come down the line. Consequently, Mason testified, she retrieved a tugger and drove to the supermarket to pick those parts. (Tr. 179.)

Mason testified that as she was picking the parts Broadnax had requested, Fair approached and instructed her to take microwaves to the line. Mason explained to Fair that Broadnax—who, unlike Fair, was not a supervisor—told her the picker, Sykerra Walker, had picked the wrong parts, so she was trying to "hurry up" and get those parts to eliminate downtime. (Tr. 179, 182.) Mason testified that Fair responded by saying he would find someone to deliver the microwaves (Tr. 182-183).[10]

Mason next testified that Candyce Cox, who was serving as the acting assembly department team lead for Line 2 that day, called Fair on the radio, but Fair did not answer. Mason stated that she looked up and saw through the racks that Fair was sitting at his desk. Mason testified that Cox then called him again, and she observed Fair get up from his desk with his radio in hand and walk over to where Cox was. Mason saw Fair say something to Cox and then walk away. (Tr. 185-186.)

At that point, Mason claimed, Cox called her and said she needed two parts. Mason testified that she asked Cox who told her to call her, and Cox replied that Fair did. Mason admittedly told

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[9]Mason did not even mention John Collins in her May 3 statement, which is therefore inconsistent with her testimony and undermines it (GC Exh. 11).

[10]Notably, Mason's testimony that Fair allegedly said he would find someone to deliver the microwaves is nowhere to be found in her May 3 statement (GC Exh. 6).

Cox that she was "walking just like [Fair]" and that she (Cox) needed to call Gerron "G" Powell, who was the forklift driver for Line 4.[11] Mason testified that she observed Cox call Powell, but Powell did not respond (Tr. 186-187).

Mason testified that after delivering the additional parts to Broadnax she returned to her desk to enter orders into the scanner, read emails, and check on the members of her team. At that point, Mason claimed, Fair approached and informed her that a picker, John Weaver, was going to be assisting Powell. (Tr. 189.)

Mason testified that while she was still at her desk Fair and Huqq, the assembly department supervisor for Line 1, approached her (Tr. 190). Huqq was relatively new, and Mason had never met him before (Tr. 264). According to Mason, Fair said, "I need you to take microwaves to the line." Mason replied: "[Y]ou have two bulk drivers now. I don't, I mean, because I don't have the resources to take microwaves to the line. I don't have a lift." (Tr. 190.)[12]

Mason testified that she did not have a forklift because the pickers, Weaver and Walker, were driving the absent forklift drivers' forklifts. According to Mason, Walker normally operates a cherry picker, but she was driving a forklift that day because the battery in her cherry picker was being charged.[13] (Tr. 191-192.)

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[11]This testimony is wholly inconsistent with her May 3 statement, in which Mason claimed she told Cox that *she* would find a driver and get her the parts she was requesting (GC Exh. 6).

[12]Again, Mason omitted at the hearing another excuse she gave in her May 3 statement for her actions. In her statement, Mason indicated that her first response to Fair's second instruction that she deliver microwaves was that Powell needs to take them because she (Mason) was still covering the line (GC Exh. 6).

[13]During her testimony Mason appeared to make a big deal about Walker using one of the forklifts because her cherry picker had a dead battery; however, she did not mention anything about this in her May 3 statement (GC Exh. 6).

Mason recalled telling Fair that he could get help from team members in the packaging area, and Fair responding that those team members did not work for him. Mason stated that she told Fair "we were one team, one Electrolux, that's the motto." (Tr. 192).[14]

Huqq was obviously frustrated by Mason, as illustrated by Mason's testimony that he began "smacking his fist against his hand" and saying to Mason, "[Y]oung lady, my line needs to run." Mason stated that she responded by asking him, "What does that have to do with me? I don't service your line. I service line 2." (Tr. 192.) Mason testified that Huqq responded by saying, "[W]hat you fail to understand is if line 1 don't run, won't none of us have a job." Mason claimed that Huqq then began talking about needing "glass, and all that" so Mason said, "[S]ir, you (sic) having this conversation with the wrong person. I'm material team lead that supports line 2, not line 1. I'm not your personal contact for materials. I haven't serviced your line in over two years." (Tr. 192-193.)

Mason testified that Huqq was "still slapping his hand, talking about his line needs to run, and all that." At that point, Mason could see Huqq was angry, so before she allowed herself to get angry, she just walked off. (Tr. 193.) Mason testified that she was unclear what Huqq wanted her to do, but she knew what Fair wanted: "Chris [Fair] wanted me to take microwaves to the line" (Tr. 193).

After the exchange with Fair and Huqq, Mason chose to continue performing non-critical tasks like organizing the staging area instead of helping ensure that microwaves, which were needed to keep the lines running, were delivered. Around 10:00 a.m., Mason stated, production on

[14]Yet again, Mason left a key fact out during her testimony. In her statement, Mason also said that she told Fair that the employees in packaging did not have a supervisor, and he could give them instructions because she was "extremely busy" (GC Exh. 6). Again, Mason was deflecting her responsibilities back to her supervisor by essentially asking him to handle it himself.

Line 2 stopped. Mason did not know whether it was because the line did not have microwaves. (Tr. 196.)

b. Fair's version[15]

Supervisor Fair testified that when he came into work on April 28 and learned that two forklift drivers were absent, he "really just needed some help." It was clear from the outset of Fair's testimony that he simply wanted Mason to perform her team lead duties and ensure microwaves were delivered to Line 2. He rightfully expected her to use her authority as a team lead to get the required parts to the line. He did not care how she got them there. The team was short-handed and he needed Mason to be a team lead. Rather than do what team leads are expected to do, Mason refused to follow Fair's plain instructions. She chose instead to deflect Fair's instructions back to him to handle himself and essentially blame him for not preparing better for the absences. (Tr. 304.)

Fair explained that Supervisor Collins told him that morning that he (Collins) needed microwaves on Line 2.[16] Contrary to Mason's testimony, Fair testified that Collins told him that he (Collins) instructed Mason to deliver the microwaves, and Mason told him to call Fair. (Tr. 306.)

Fair recalled asking Mason a short time later about the status of the microwaves Collins reportedly asked her to deliver to Line 2. Fair testified that Mason told him that she was not going to get on a lift to support her line and for him to get forklift driver Powell to do it, because one of the other forklift drivers who was absent does it all the time by herself. Fair testified that Mason

[15]Supervisor Fair has not worked for Electrolux since October 2017. He left to work for what he described as a "[m]uch better company" (Tr. 300), indicating that he did not think highly of Electrolux when he testified. As the judge observed, Fair testified pursuant to a subpoena issued by Respondent (Decision, p. 3 fn. 2).

[16]Fair testified that the lines call for microwaves to be delivered within an hour of them being run (Tr. 354).

simply drove away on her tugger as he called her name three times, pleading for her to deliver the microwaves as instructed (Tr. 308.)

According to Fair, the next encounter was in front of Line 2 when he asked Mason again to get the microwaves that Collins had asked for 30 minutes earlier. Fair explained that Mason stated, in front of Huqq, that she had other things to do, like load the scanner gun for orders, which was not critical at the time. Fair recalled telling Mason that she was picking for Monday's work, and he needed her to support the line. Generally consistent with Mason's testimony, Fair testified that Mason refused to follow his instructions and instead told him to get "one of the guys on the dock to do it." Mason was referring to employees in the packaging/receiving area. Again generally consistent with Mason's testimony, Fair said that he replied to her, "They don't work for me. You do." Fair recalled Mason saying that "we are one Electrolux" and that she was "extremely busy." (Tr. 310-311, 328.)

Fair next recalled that Huqq interjected and told Mason that Lines 1 and 2 needed to run, at which point Mason said to Huqq that she supports Line 2 not Line 1. Fair denied that Huqq was aggressive with Mason. (Tr. 329.) Fair could not recall exactly how the conversation ended between him, Huqq, and Mason, but he recalled Mason driving or walking away without helping. (Tr. 311, 329.)

Fair testified that he asked Powell and Weaver to assist as well (Tr. 350). He recalled Powell complaining because he was being asked to help with all three lines. However, Fair denied that Powell ever said he was not going to do the work. (Tr. 351-352.)

Fair recalled Mason saying that she did not have a forklift; however, he explained that was not the point.[17] Fair explained: "She didn't have to do it. She could have asked somebody else to

[17]Mason's claim that she did not have a forklift available appeared to be a major theme of the General Counsel's case. As explained more fully in the argument section below, however, this

do it on her team. It's just the fact that it's not my responsibility to do her job of asking someone else." (Tr. 332.) Fair added: "[S]he's the team lead. She has access to everything I have access to. If she wanted somebody to get it, she could have just told somebody to get [the microwaves]. I mean, she's [g]ot a whole team of people." (Tr. 327.)

In short, according to Fair, instead of helping him as he had instructed, Mason essentially told him to do it. She deflected clear instructions back on Fair and gave excuse after excuse as to why she was refusing to do her job. Fair concluded, "I should be able to give her instructions and that should have been it." (Tr. 327.)

c. Huqq's version

Huqq testified that he first met Mason on the day of the incidents (Tr. 394). Huqq recalled that on that day his line, Line 1, was slated to run microwaves, and his team lead informed him that the microwaves had not been delivered. Consequently, Huqq said, he called Fair on his cell phone, and Fair asked him to meet him in the materials department.[18] (Tr. 395-396.)

Huqq testified that he walked over to the materials department and saw Mason standing next to Fair. Huqq overheard Fair inform Mason that she needed to take microwaves to Lines 1 and 2. According to Huqq, Mason responded to Fair with words to the effect that she was too busy

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was a red-herring. Whether or not Mason had access to a forklift, Fair's clear desire was for Mason to perform her team lead duties and ensure microwaves were delivered to the line. That could have been accomplished by Mason directing someone who had immediate access to a forklift to complete the task as indicated in her job description. Notably, the judge did not appear to put any stock into Mason's excuse about not having a forklift, nor did he appear to put much stock into any of Mason's other excuses. In other words, there is no real dispute in the judge's mind that Mason refused to do what she was instructed to do.

[18]Huqq testified that if he had to call Fair, it was because the microwaves had not been delivered to his line. He explained that the team leads only escalate issues like that to the supervisors when the parts have not been delivered. (Tr. 391-392, 420.)

doing something else and could not do it and that he (Fair) should get someone on the dock to do it.[19] (Tr. 396-397, 399, 417.)

Huqq testified, generally consistent with Mason and Fair, that he intervened at that point and explained to Mason that Line 1 was priority and that they needed microwaves. He further testified that he told Mason if Line 1 did not run, the plant would not run.[20] Huqq recalled Mason saying she was doing something else and then driving away on a tugger. (Tr. 397.) Huqq denied being aggressive or slamming his fist in his hand (Tr. 407).

Huqq testified that he and Fair looked at each other after Mason drove away, and Fair asked him if he just witnessed that. Huqq stated, "It kind of shocked me that a team lead would say that she was not going to assist us." (Tr. 398.)[21]

5. Investigation of Incident

Fair called Jarrett as she was driving into work the morning of Friday, April 28, and informed her he was having issues with Mason. Fair informed Jarrett that he needed assistance getting products to the line, and Mason refused to help him and follow instructions. Fair was obviously upset by Mason's behavior, as indicated by the fact that he called Jarrett seeking her help in dealing with the situation. Jarrett told Fair to collect statements from witnesses to the incident and she would address it when she arrived.[22] (Tr. 446.)

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[19]In his statement, Huqq also recalled Mason saying that was not part of her job duties (GC Exh. 11, p. 2).

[20]In his statement, Huqq recalled telling Mason that without Lines 1 and 2 operating, the entire plant would not have jobs (GC Exh. 11, p. 2).

[21]As alluded to above, Huqq's testimony in this regard clearly validated his appearance as a witness and did not lack "probative value," as the judge concluded (Decision, p. 4 fn. 8). Huqq was a new supervisor who undisputedly had no knowledge of Mason's union activity when the events of April 28 occurred. He saw Mason's behavior and found it to be shocking, particularly in light of her status as a team lead. To dismiss this evidence as irrelevant to the issue of whether Mason's behavior warranted her discharge is clear reversible error.

[22]It was consistent with past practice for Jarrett to instruct supervisors to initially collect statements from witnesses following incidents such as this (Tr. 449).

Fair wrote his own statement (GC Exh. 11, p. 1) and collected statements from Huqq (GC Exh. 11, p. 2), Cox (GC Exh. 11, p. 3), and Collins (GC Exh. 11, p. 4). When Jarrett arrived to work, she reviewed the statements Fair collected and called a meeting with Mason, Fair, McClendon, Collins, Huqq, and Erica Robey, then-Labor Relations Manager (Tr. 477). Mason recalled that at 11:55 a.m., Fair walked past her without stopping and informed her to report to conference room 3 at 12:00 p.m. for a meeting. Fair did not tell her what the meeting was about, and Mason was not aware that a meeting had been scheduled, so she contacted Chief Steward Reese to attend with her.[23] (Tr. 199.)

Jarrett, Robey, McClendon, Fair, Huqq, Collins, Mason, and Jarrett were present at the meeting.[24] (Tr. 199-200) According to Mason, Jarrett began the meeting by asking Mason and Fair what happened. Mason asked Jarrett what she was talking about, and then Fair explained he instructed Mason to get microwaves to the line and Mason said she was not going to do it. (Tr. 200-201.)

According to Jarrett, Fair led off the meeting by stating that he was having problems getting Mason to cooperate with him to get microwaves to the line. (Tr. 446-450.) Jarrett recalled Mason giving numerous excuses during the meeting for why she did not help, such as that she was too busy and that Fair or someone else could have done it.

Mason testified that at the end of the meeting Jarrett slid her a form across the table and asked her to write a statement, but Mason declined.[25] Mason told Jarrett she would take the form

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[23]Although Mason persisted at the hearing that she did not know what the meeting was about when Fair told her to report to the conference room (Tr. 269-271), she obviously suspected it had to do with her behavior earlier, which explains why she requested her steward's presence.

[24]Mason testified that neither Collins nor Huqq was in this meeting (Tr. 200). Huqq recalled arriving late to the meeting (Tr. 402).

[25]Chief Steward Reese testified that he advised Mason not to complete a statement (Tr. 76, 87).

home and write the statement because, she contended, the form Electrolux gives to employees is little and there would not be enough room for her to write everything. (Tr. 205-206.)

Contrary to Chief Steward Reese's testimony that "it was pretty much like they didn't want to hear what [Mason] had to say" during the meeting (Tr. 74), Mason admitted that Jarrett gave her ample opportunity to talk (Tr. 275).

Jarrett explained that Mason was not suspended after the meeting because, under the parties' interim discipline procedure in effect at the time, employees were only suspended when their conduct included "workplace violence, weapons, drugs, and other serious violations." (Tr. 444-445; R. Exh. 6.) Counsel for the General Counsel did not rebut this evidence.

6. Mason's Discharge

a. Review of evidence and consultation with legal

Jarrett testified that towards the end of the day after the investigatory meeting, she sat down with then-HR Director Roberts and discussed the incident. Jarrett stated that Roberts asked for her feedback, as she always did. Jarrett recalled telling Roberts the following:

> I asked [Mason] to tell me what happened. I said, why couldn't you just, you know, get someone on your team to fulfill the . . . Line 1, like [Huqq] said, Line 1 is key. . . . She said, well, [Fair] could have done it. You know, he tells somebody else to tell me, you know, to get somebody to do it. I said, that's your responsibility as a team lead; we direct. You know, you're part of the leadership. So that's what we do, we lead.

(Tr. 450.)

Jarrett further recalled telling Roberts: "I feel like termination would be warranted because as a team lead given direction, she's disrupted the operation; has caused, you know, three or four people to be looking for microwaves, trying to get product to the line. So Leola asked—I gave her my feedback. We submitted it for approval." (Tr. 451.) Jarrett explained: "[W]e needed [Mason] to jump in and help due to absenteeism, and she was just being, like I said, uncooperative, defiant, and just not following the instructions of a supervisor" (Tr. 481). Jarrett added: "When a supervisor

asks a team lead to assist in [getting] product to the line and you say I don't have time, I can't do it, . . . get someone else to do it. That's deflecting your responsibilities as a team lead" (Tr. 482).[26]

After Jarrett and Roberts met, they consulted with Electrolux's legal team, which consisted of Fisher Phillips Attorney Pearson and Associate General Counsel O'Rourke (Tr. 372-374, 451-452). Without revealing the legal advice received, Jarrett testified that following the meeting, Mason's discharge was carried out after consultation with the Union (Tr. 452).[27]

b. Notice to the Union and an opportunity to bargain

Business Agent Shaffer testified that, consistent with the parties' established practice, he received an email from Pearson with a copy of the witness statements and form indicating that the Company was recommending that Mason be terminated (Tr. 25, 33). When Shaffer discovered that there was no statement from Mason, he contacted her and recommended that she provide one "so that they've got all the information available to make a decision" (Tr. 36). Shaffer testified that he advised Mason to put everything she could think of in the statement (Tr. 37).

Shaffer and Pearson discussed the incident two days after Pearson sent the email "to see if . . . anything could be worked out" (Tr. 25). Shaffer recalled Pearson informing him that "management was recommending termination" (Tr. 33). According to Shaffer, he expressed to

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[26]For inexplicable reasons and without evaluating her demeanor, the judge discredited Jarrett's testimony (Decision, pp. 5-6). As discussed below, this was reversible error. (Exceptions 30-31, 34.)

[27]The judge appeared to take issue with the absence of evidence "regarding the review of Jarrett's recommendation or any deliberations regarding her recommendations by Pearson, Smith, O'Rourke or anyone else" (Decision, p. 6, lines 20-21) in an attempt to discredit Respondent's investigation. The judge's efforts were futile, however, because no evidence was introduced regarding that review given that it was clearly protected by the attorney-client privilege. Indeed, counsel for the General Counsel did not even ask any questions of Jarrett or Roberts about their vetting the decision with the legal team, and she did not challenge Respondent's counsel preliminarily cautioning the witnesses not to testify about what was discussed during that review process. It is highly inappropriate for the judge to draw an adverse inference from Respondent's failure to solicit testimony about an attorney-client privileged consultation.

Pearson the Union's belief that, "if anything, it should be a suspension and not a termination (Tr. 33). When asked on cross-examination if he thought Mason's involvement on the Union's negotiating committee had anything to do with her discharge, Shaffer testified, "With the people that we were dealing with from the Company on the negotiating committee, I didn't get that impression" (Tr. 30).[28]

On Wednesday, May 3, at 9:20 p.m., Mason emailed her statement to Shaffer (Tr. 26-27; GC Exh. 2). Shaffer testified that he instructed Mason to give the statement to the Company (Tr. 26), which she did via email to Jarrett on Thursday, May 4, at 11:03 a.m. (GC Exh. 6).

c. Mason's discharge meeting

Roberts informed Mason of her termination on Friday, May 5, during a meeting with McClendon, Fair, Robey, and Reese. Roberts led the termination meeting because Jarrett was working at a different location that day (Tr. 374, 452). Robey took notes during the meeting (Tr. 375; R. Exh. 3).[29]

Robey's notes reflect that Roberts informed Mason she was being terminated for the policy violation of insubordination. The notes further reflect that Roberts explained to Mason that, by law in the state of Tennessee, she would be receiving a separation notice. The notes also reflect that while Roberts was gone from the room to get the separation notice, Mason spoke under breath and uttered the words "bitch boy" in reference to Fair and in clear contempt of his managerial authority. Finally, the notes reflect that Roberts returned to the room and then escorted Mason out. (R. Exh. 3.)

[28]The judge inexplicably ignored Shaffer's impression, as well as Mason's own impression that she was discharged for reasons unrelated to her union activity (Tr. 225).

[29]Robey's notes from the meeting were received into evidence over counsel for the General Counsel's objection to their relevance (Tr. 375).

II. QUESTIONS PRESENTED

1. Whether the judge correctly found that the decision-makers had knowledge of Mason's union activity. (Exceptions 3, 4, 54, 55, 56, 57, 58, 59, 60.)

2. Whether the judge correctly found that the decision-makers had animus towards Mason's union activity. (Exceptions 34, 46, 49, 51, 52, 53, 61, 62, 63, 64, 65.)

3. Whether the judge improperly substituted his own judgement for that of management. (Exceptions 9, 10, 11, 12, 13, 14, 18, 28, 29, 32, 33, 43, 44, 47.)

4. Whether the judge failed to properly recognize the legitimate reasons why Mason was not immediately suspended or provide a copy of the employee counseling form. (Exceptions 25, 45, 46.)

5. Whether the judge made credibility findings without adequate explanation. (Exceptions 30, 31, 34, 43, 58.)

III. SUMMARY OF ARGUMENT

The Board should reverse the judge's rulings, findings, and conclusions concerning the allegation that Mason was discharged because of her union activity. Mason admittedly refused direct orders from her supervisor on April 28. The Company conducted a thorough investigation and consulted with the Union—consistent with their agreed-upon pre-contract interim discipline procedure—before discharging her on May 5. The Union had no objection to the proposed decision and did not file an unfair labor practice charge.

According to the judge, the General Counsel satisfied his *Wright Line* burden of proving that the decision-makers had knowledge of Mason's union activity and bore animus towards that activity. The judge blindly assumed knowledge. The judge inferred animus based on pretext. The judge found pretext based on what he believed was evidence of disparate treatment. Given his finding of pretext, the judge concluded that Respondent failed by definition to meet its *Wright Line* burden of showing it would have taken the same action absent Mason's union activity.

The judge misapplied established Board law and ignored, misconstrued, and drew illogical inferences from the record evidence to conclude that Mason was discharged because of her union activity. The decision-makers were not on the Company's negotiating committee and had no involvement with the negotiations. They knew nothing about Mason's participation other than the mere fact that she was on the committee, and even that knowledge can only be imputed to them. Moreover, they knew nothing about Mason's alleged union activity during the organizing campaigns. Indeed, one of them had only been employed by Electrolux for about two months before the incident giving rise to Mason's discharge, and she did not even know who Mason was.

The judge's finding of animus is even more troubling than his finding that the decision-makers had knowledge of Mason's union activity. The judge inferred animus because he could not reconcile Mason's discharge with discipline imposed on other employees for insubordination. A

careful reading of the record evidence reveals no disparate treatment. In fact, in some examples offered by counsel for the General Counsel, the evidence proves that other employees were discharged for insubordination that was comparable to Mason's insubordination.

The judge committed a litany of additional errors that improperly influenced his findings and conclusions. Among other things, he substituted his own judgment for that of management when evaluating the seriousness of Mason's misconduct; he failed to recognize the legitimate reasons why the Company did not immediately discharge Mason and why it did not give her a copy of the employee counseling form; and he made credibility findings without adequate explanation.

The judge's decision that Mason was discharged because of her union activity cannot stand. Membership on a union's negotiating committee should not insulate an employee—especially a team lead—from the consequences of blatant insubordination and disruptive behavior.

IV. ARGUMENT

A. THE JUDGE ERRONEOUSLY FOUND THAT THE DECISION-MAKERS HAD KNOWLEDGE OF MASON'S ALLEGED UNION ACTIVITY. (EXCEPTIONS 3, 4, 54, 55, 56, 57, 58, 59, 60)

The judge assumed—and the evidence confirmed—that Jarrett and Roberts were the sole decision-makers with respect to Mason's discharge (Decision, p. 10, lines 4-5).[30] The judge further assumed that Jarrett and Roberts were aware of Mason's union activity at the time they decided to discharge her (Decision, p. 10, line 5). The only union activity the judge concluded Jarrett and Roberts were aware of was Mason's participation on the Union's negotiating committee and her

[30]While the evidence reflects that Jarrett and Roberts consulted with Electrolux's legal team prior to imposing the discipline on Mason (Tr. 372, 451), there is no evidence anyone besides Jarrett and Roberts made the final decision.

alleged confrontation with then-Plant Manager Gulka and an unidentified manager named "Matt" a week before the second election in September 2016. (Decision, p. 9, lines 36-37.)

Although Respondent does not except to the judge's finding that Jarrett and Roberts were aware Mason was on the Union's negotiating committee, Respondent does except to the judge's suggestion that Jarrett and Roberts were aware of *the extent* of her involvement on the committee, including any complaints or concerns she may have raised during negotiations. (Exception 54.) Obviously a decision-maker's knowledge about what an alleged discriminatee said or did during negotiations would be more probative of unlawful motivation than merely knowing she was on a union's negotiating committee. In this case, simply knowing Mason was on the committee proves nothing, as evidence by the uncontroverted fact that everyone else on the Union's negotiating committee is still employed by Electrolux, and Mason was on the committee for approximately six months before being discharged.

The judge discounts the fact that all other members of the Union's negotiating committee are still employed by relying on the proposition that "an employer's failure to take action against all or some other union supporters does not disprove discriminatory motive, otherwise established, for its adverse action against a particular union supporter" (Decision, p. 7 fn. 16). While Board law generally supports this proposition, see, e.g., *Master Security Services*, 270 NLRB 543, 552 (1984), the element missing in this case is that no discriminatory motive has been "otherwise established." Without any other evidence of a discriminatory motive, the fact that others on the Union's negotiating committee are still employed is highly relevant to the analysis because it strongly suggests that there were other reasons for the decision.

Respondent next excepts to the judge's finding that Jarrett and Roberts had knowledge of Mason's alleged confrontation with then-Plant Manager Gulka and a manager named "Matt"

during a meeting before the second election in September 2016. (Exception 56.) The judge concluded that "Respondent's management was aware of Mason's attempt to contradict plant manager Gulka at a mandatory employee meeting just prior to the second election" (Decision, p. 9, lines 35-37). The judge expressly acknowledged, however, that "[i]t is unclear as to who in management, besides plant manager Gulka, was aware of [Mason's] conduct at the captive audience meeting" (Decision, p. 10, lines 1-2).

There is no evidence in the record that Gulka was the plant manager at the time Mason was discharged, let alone that he was consulted about or otherwise involved in the decision to discharge her. There is also no evidence that either Roberts or Jarrett was informed of Mason's alleged conduct during the meeting. Indeed, the judge's specific finding that it is "unclear as to who in management" other than Gulka was aware of Mason's alleged conduct during the pre-election meeting completely belies the inference that Jarrett and/or Roberts had the requisite knowledge to satisfy *Wright Line*. It is the General Counsel's duty to prove his case; it is not Respondent's duty to rebut a potential issue.

Respondent also excepts to the judge's finding that Jarrett and/or Roberts had knowledge of Mason's alleged union activity through Pearson, O'Rourke, Smith, and Robey, who were on the Company's negotiating committee. (Exceptions 57, 59.) According to the judge, "[w]hile there is only a little evidence that Diana Jarrett or Leola Roberts knew of Mason's union activities, Jonathan Pearson, Tim O'Rourke and David Smith, who participated in the decision to terminate Mason[,] were aware of her presence at collective bargaining negotiations" (Decision, pp. 9-10). This huge inferential leap cannot be made in the face of uncontradicted evidence that neither Jarrett nor Roberts was involved in or consulted about the negotiations (Tr. 31, 371).

The judge's inference of knowledge through Robey is even more inexcusable. According to the judge, Jarrett and Roberts "likely were aware of Mason's union activities through Erika Robey" (Decision, p. 10, line 11). The judge concluded, "It defies credulity to believe that Robey, the plant labor relations manager, who was familiar with the events of April 28, played no role in the deliberations leading to Mason's termination" (Decision, p. 10, lines 21-23). Again, the uncontradicted evidence proves that Jarrett and Roberts were the sole decision-makers, and, at most, Robey took notes during the investigatory interview and termination meeting. The General Counsel bore the burden of proving that Robey "played a role" in terminating Mason, and he did not meet that burden.

Based on this limited evidence, it was improper for the judge to infer that Jarrett and/or Roberts had any knowledge of Mason's involvement with the Union's negotiating committee other than the insignificant fact that she was a member of the committee. It was also improper for the judge to infer that Jarrett and/or Roberts were aware that Mason supported the Union during the campaigns. The General Counsel bears the burden of proving knowledge as an essential element of the *Wright Line* standard, and he failed to meet this burden.

B. THE JUDGE ERRONEOUSLY FOUND THAT THE DECISION-MAKERS HAD ANIMUS TOWARDS MASON'S ALLEGED UNION ACTIVITY. (EXCEPTIONS 34, 46, 49, 51, 52, 53, 61, 62, 63, 64, 65)

The judge next erred by finding that Jarrett and Roberts had animus towards Mason's alleged union activity. According to the judge, Electrolux harbored animus towards "at least some of" Mason's union activity based on Mason's testimony about the confrontation with Gulka and "Matt" prior to the second election (Decision, p. 10, lines 27-29). Additionally, the judge inferred animus based on Electrolux's "inability to explain why [Mason] was terminated and other employees guilty of insubordination were not" (Decision, p. 10, lines 29-31). The record does not support the judge's findings.

1. No Animus Based on Pre-Election Meeting

As explained above, the judge acknowledged that it was "unclear as to who in management, besides plant manager Gulka, was aware of [Mason's] conduct at the captive audience meeting" (Decision, p. 10, lines 1-2). Counsel for the General Counsel did not present any evidence that Roberts or Jarrett attended the meeting or had knowledge of Mason's alleged conduct at the meeting. Certainly counsel for the General Counsel could have asked those questions of the witnesses. Not only did the judge improperly impute knowledge of this meeting to Jarrett and Roberts, he improperly inferred that Jarrett and Roberts acted with animus towards Mason because of her conduct at the meeting.

If Jarrett and Roberts did not know about Mason's conduct at the meeting, they certainly could not have animosity towards that conduct. See *Gen. Tire & Rubber Co., Chemical Plastics Div.*, 149 NLRB 474, 480 (1964) ("Absent knowledge of union activity, the Company could not have been motivated in the layoff by antiunion animus.").

Moreover, there is no evidence in the record proving or even implying that Jarrett and/or Roberts had animosity towards unions in general. Again, the General Counsel bears the burden of proof on this issue, not Respondent. It was incumbent on the General Counsel to introduce evidence that Jarrett and Roberts had knowledge of Mason's alleged union activity and acted with animus towards that activity. Mere speculation that these two elements have been met is insufficient.

2. No Animus Based on Alleged Disparate Treatment

The crux of the judge's conclusion that Mason was discharged because of her union activity appears to be based on the alleged disparate treatment Mason suffered. Specifically, the judge inferred animus based on Electrolux's "inability to explain why [Mason] was terminated and other employees guilty of insubordination were not" (Decision, p. 10, lines 29-31). His inference of

animus based on this finding also presumably supported his conclusion that Electrolux failed to establish it would have discharged Mason notwithstanding her union activity. The judge's findings and conclusions are based on a serious misapplication of the law and misreading of the record.

a. Respondent does not have to prove that it terminated a non-union activist.

The judge found that "[i]n no instance has Respondent established that it terminated an employee, who was not a union activist, for a first instance of insubordination" (Decision, p. 9, lines 6-8). This assertion turns the *Wright Line* test on its head and imposes an impossible burden on Respondent. (Exception 51.)

Electrolux does not have the burden to prove that it terminated a non-union "activist" for a first instance of insubordination in order to justify its decision to discharge a union "activist." The burden of proving unlawful motivation is on the General Counsel, including the burden of proving animus through disparate treatment. See *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1198 (2004) ("[T]he General Counsel did not show that [the alleged comparators] were not, like [the alleged discriminatee], open supporters of the Union.").

Of further concern, for Respondent to meet the judge's burden, it presumably would have had to poll employees who have been terminated for insubordination to determine whether any of them were union "activists," and then present testimony of their sentiments. Polling employees about their union sentiments, of course, is highly violative of employees' Section 7 rights. See *Allegheny Ludlum Corp.*, 333 NLRB 734, 738 (2001) ("The Board has rejected the position that Section 8(c) protects an employer's efforts to discern, through polling or coercive interrogation, the union sentiments of employees."). Thus, it is legally impossible to meet the burden imposed by the judge.

b. The alleged comparators prove there was no disparate treatment.

According to the judge, General Counsel Exhibits 13-19, which purportedly involve discipline issued to other employees dating back as far as 2014, establish that Mason was treated disparately.[31] None of these exhibits establishes disparate treatment. In fact, some of the exhibits prove Mason was treated consistently with how others who engaged in similar misconduct were treated.

c. GC Exhibit 13 (Carey Taylor)

General Counsel Exhibit 13 is a May 23, 2016 position statement in Case 15-CA-171931 prepared by a law firm that previously represented Electrolux. That case involved the alleged unlawful suspension and discharge of employee Carey Taylor in February 2016. Relying exclusively on the position statement as evidence, the judge found that Mason and Taylor were treated disparately. Despite the judge's improper reliance on this document, it actually supports the Respondent's position and undermines the judge's conclusion.

Most tellingly, *Taylor was discharged for insubordination*. The position statement reveals that Taylor refused to complete movement sheets that all materials department employees were required to complete. While the unfair labor practice charge alleged that Taylor was discharged because of his union activity, no such finding was ever made by the Board. In fact, a settlement agreement introduced by counsel for the General Counsel (GC Exh. 3) establishes that the parties only agreed to settle the allegation concerning Taylor's suspension. Thus, the uncontradicted

[31]The judge overruled Respondent's objections to the admissibility of these documents based on counsel for the General Counsel dumping them into the record without foundation or supporting testimony at the end of her case-in-chief. He should not have even considered the documents without evidence from counsel for the General Counsel concerning their specific relevance to the case.

record evidence reflects that Taylor refused to perform a task assigned to him, and he was discharged for that reason and not because of his union activity.

The judge apparently drew a distinction between Taylor and Mason because Taylor was "repeatedly insubordinate" prior to being discharged (Decision, p. 8, line 3). The judge misunderstood the evidence.

First, given that Taylor's 5-day suspension was revoked pursuant to a settlement agreement (GC Exh. 3), it is as if it never occurred. And if that 5-day suspension never occurred, the only prior discipline Taylor had before being discharged was a verbal warning in January 2015 for failing to wear the correct PPE and for taking his break in a work area, and a verbal warning in March 2014 for using his cell phone while on a tugger. Thus, contrary to the judge's conclusion, Taylor's discharge was for a single incident of insubordination.

Second, even if it were considered, Taylor's 5-day suspension for leaving a mandatory meeting without permission does not support the conclusion that Taylor was only discharged after being repeatedly insubordinate. Leaving a mandatory meeting without permission is not the same type of insubordination as a team lead refusing to perform an assigned task multiple times. Had the record reflected that Taylor was given a 5-day suspension for refusing to perform an assigned task, and then discharged the second time he refused to perform an assigned task, the judge's reasoning may have held water. But those are not the facts.

Third, even assuming Taylor engaged in multiple instances of insubordination prior to being discharged that does not distinguish him from Mason because Mason also engaged in multiple instances of insubordination, albeit on the same day. Thus, to the extent the judge distinguished Taylor's circumstances on the basis that Mason was only insubordinate one time, he misconstrued the record evidence.

In sum, the fact that Taylor was lawfully discharged for insubordination is actually highly probative of the lack of animus towards Mason's alleged union activity. See *Garage Management Corp.*, 334 NLRB 940, 949, 953 (2001) (finding "no evidence of disparate treatment" where other employees were also discharged "for the same misconduct"). The judge erred in concluding otherwise.

d. GC Exhibit 14 (Lonneshia Craft)

General Counsel Exhibit 14 is an employee counseling form indicating that Lonneshia Craft was given a 5-day suspension in May 2018 for "inappropriate behavior." The details section of the form vaguely reads, "Ms. Craft did not willing perform (sic) the tasks she was assigned by her Supervisor" (GC Exh. 14).[32] The judge found that, "although characterized as 'inappropriate behavior,' [Craft's] misconduct is clearly insubordination as well" (Decision, p. 8, lines 10-11). Even assuming Craft was insubordinate, that alone does not render her a proper comparator.

First, the mere fact that two employees are disciplined for "insubordination" does not make them comparable. See *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 112, slip op. at 5 (2016) (recognizing that even if employees are disciplined for misconduct that is labeled the same, they are not comparators when one of the "infraction[s] [is] markedly different"). The task Craft was apparently unwilling to perform was not even listed on the counseling form, and there is no evidence Craft refused multiple times to perform the task. The task Mason refused *multiple times* to perform was critical to production, which makes her insubordination "markedly different" from Craft's "inappropriate behavior."

[32]Jarrett explained that supervisors are responsible for completing the "details" section of the employee counseling forms, and they only identify, as the title of the section suggests, "areas of concern" (Tr. 451).

Second, despite carrying the burden of proof, counsel for the General Counsel offered no additional evidence concerning how Craft was insubordinate. At most the record reflects that Craft "did not willing perform (sic) the tasks she was assigned . . ." (GC Exh. 14). It is not clear what this means given the typographical error. If the supervisor who completed the form intended to say that Craft "did not *willingly* perform the tasks she was assigned," that suggests she ultimately complied with her supervisor's instructions. Assuming that to be the case, Craft's situation is clearly distinguishable because Mason never complied with her supervisor's repeated instructions.

Third, Craft was not a team lead, which is significant notwithstanding the judge's conclusion to the contrary. According to the judge, the fact that Mason was a team lead is irrelevant to the issue of disparate treatment because, he asserts, Respondent has not articulated this as a basis for treating Mason more harshly than other employees (Decision, p. 9 fn. 18). The judge completely misread the record evidence.

Jarrett plainly considered the fact that Mason was a team lead when making the decision to discharge her for her actions. She explained the significance of that fact multiple times during the hearing. For instance, Jarrett testified that she told Mason during the investigatory interview "that's your responsibility as a team lead; we direct. You know, you're part of leadership. So that's what we do, we lead." (Tr. 450.) Jarrett further testified: "When a supervisor asks a team lead to assist in [getting] product to the line and you say I don't have time, I can't do it, . . . get someone else to do it. That's deflecting your responsibilities as a team lead" (Tr. 482).

Fair and Huqq also testified about how Mason's status as a team lead was relevant to their impressions of her misconduct. Fair explained, "[S]he's the team lead. She has access to everything I have access to. If she wanted somebody to get [the microwaves], she could have just told

somebody to get them. I mean, she's [g]ot a whole team of people." (Tr. 327.) Huqq added, "It kind of shocked me that a team lead would say that she was not going to assist us" (Tr. 398).

Even Chief Union Steward Reese acknowledged that more is expected of team leads. He explained that team leads are there "to instruct" (Tr. 83), and "[i]f there's a problem, [team leads] pretty much got to figure it out" (Tr. 58).

Moreover, the job description for a materials department team lead specifically provides that the "essential duties and responsibilities" includes "[c]ollaborat[ing] with Supervisor, support functions and employees to solve work-related problems" (GC Exh. 4). There is no evidence any of the non-team lead job descriptions include this requirement.

Clearly, then, Mason's status as a team lead was a significant factor in the evaluation of her misconduct and the decision to discharge her. The judge committed reversible error by disregarding this key fact and failing to recognize that Mason's team lead status distinguishes her from the alleged comparators. Counsel for the General Counsel should have introduced evidence that a team lead was *not* discharged for like insubordination in order to prove a proper comparison. She did not, presumably because no such evidence exists.[33]

Fourth, counsel for the General Counsel failed to present any evidence concerning Craft's union sentiments. If Craft was an open union supporter, that undermines the General Counsel's theory of disparate treatment. See *MEMC*, above at 1198 ("[T]he General Counsel did not show that [the alleged comparators] were not, like [the alleged discriminatee], open supporters of the Union.").

[33]It is important to remember that the Memphis facility was only about 4 years old when Mason was discharged (Tr. 17-18). Thus, it is certainly reasonable to assume that no other team leads during that short time period engaged in misconduct comparable to Mason's misconduct.

Fifth, Craft was not employed in the materials department, nor was she supervised by Fair or managed by Larry McClendon. Id. ("[E]ven if I believed that the misconduct of the alleged comparators was meaningfully similar to [the discriminatee's], that evidence would be of little value under the circumstances present here because the supervisors and managers who made the decision to terminate [the discriminatee] had no involvement in the discipline issued to the three alleged comparators.").

e. GC Exhibit 15 (Shanika Handy)

General Counsel Exhibit 15 is an employee counseling form indicating that Shanika Handy was disciplined for insubordination and job abandonment in December 2015. According to the form, on December 14, 2015, Handy was assigned to the production line but later left the assignment without authorization and returned to her regular job. Handy claimed she had never worked in the production line position before. On December 19, 2015, Handy was instructed to assist in the "runtest" station, where she worked for approximately one hour before leaving the assignment without permission. In her handwritten comments on the form, Handy explained that she completed her work in the runtest area, which is why she returned to her regular assignment. The form does not identify what level of discipline Handy received. Handy is not a proper comparator for a variety of reasons.

First, Handy's discipline in 2015 is too far removed to draw any reasonable inference that Mason's discharge in 2017 was unlawfully motivated. See *MEMC*, above at 1198 ("The discipline decision involving [the comparator] was made almost 21 months before the decision to terminate [the discriminatee]. Given the significant passage of time, I believe that the evidence regarding [the comparator's] discipline is of extremely limited probative value regarding the question of

whether [the discriminatee's] termination was the result of antiunion animus."). This is especially important where there was no union or interim disciplinary procedure in place back then.

Second, leaving an assignment without permission is not the same as directly refusing to perform a specific task multiple times on the same day. See *Remington Lodging*, above at 5 (recognizing that even if employees are disciplined for misconduct that is labeled the same, they are not comparators when one of the "infraction[s] [is] markedly different").

Third, counsel for the General Counsel failed to present any evidence concerning Handy's union sentiments. If Handy was an open union supporter, that undermines the General Counsel's theory of disparate treatment. See *MEMC*, above at 1198 ("[T]he General Counsel did not show that [the alleged comparators] were not, like [the alleged discriminatee], open supporters of the Union.").

Fifth, Handy was not a team lead, which, as explained above, cannot be disregarded in the analysis.

Sixth, neither Jarrett, Roberts, nor Fair was employed by Electrolux when Handy was disciplined. See *MEMC*, above at 1198 ("[E]ven if I believed that the misconduct of the alleged comparators was meaningfully similar to [the discriminatee's], that evidence would be of little value under the circumstances present here because the supervisors and managers who made the decision to terminate [the discriminatee] had no involvement in the discipline issued to the three alleged comparators.").

f. GC Exhibit 16 (Lakelia Davis)

General Counsel Exhibit 16 includes three employee counseling forms related to Lakelia Davis. The first form indicates that Davis was discharged for insubordination and failing to follow instructions on December 12, 2016. The second form indicates that Davis was issued a 5-day

suspension on November 7, 2016, for failing to follow instructions. The third form indicates that Davis was issued a written warning on September 2, 2016, for violation of safety rules, violation of policy, and unauthorized use of cell phone. Even considering Davis to be a proper comparator, her discharge, like Taylor's discharge (GC Exh. 13), establishes there was no disparate treatment with respect to Mason.

Davis was discharged when she refused to respond to an auditor's questions, cursed, and drove away on her forklift. Jarrett confirmed that the Company followed the interim discipline procedure with respect to Davis, which included notice to and consultation with the Union (Tr. 34). The judge failed to explain why Davis' discharge does not undermine the General Counsel's theory.

Presumably, the judge reasoned that Mason was treated disparately because Davis' prior insubordinate conduct did not result in her termination. Davis' prior conduct, however, was not comparable to Mason's. In fact, Davis' suspension in November 2016 resulted from her failure to follow instructions with regard to properly documenting the movement of material. Notably, Mason was only issued a verbal warning for failing to follow instructions with regard to making inventory movement transactions in December 2016 (GC Exh. 8).

Davis' written warning in September 2016 was for texting and driving while operating equipment, which is entirely different from a team lead willfully refusing to comply with a supervisor's instructions. In any event, Davis' excuse for using her cell phone—something was wrong with her child—is hardly comparable to the multiple excuses Mason offered for her failing to follow her supervisor's orders, including that she did not have time and did not have a forklift.

Of course, Davis' discipline is also distinguishable because she was not a team lead, and Fair was not her supervisor. Additionally, counsel for the General Counsel failed to present any

evidence concerning Davis' union sentiments. As with the other alleged comparators, if Davis was an open union supporter, that would undermine the General Counsel's theory of disparate treatment. See *MEMC*, above at 1198 ("[T]he General Counsel did not show that [the alleged comparators] were not, like [the alleged discriminatee], open supporters of the Union.").

g. GC Exhibit 17 (Keith Dotson)

General Counsel Exhibit 17 includes two employee counseling forms involving Keith Dotson. The first form indicates that Dotson was issued a 5-day suspension for insubordination, violation of policy, and inappropriate behavior on November 9, 2016. Specifically, the form reflects that Dotson was asked by Supervisor Johnny Strickland, who was apparently filling in for Thural Farmer, to set up "door skins" for the line and he refused to do so, replying that he just did not want to do it because the other die setters were coming in at 6:00 a.m. The second form indicates that Dotson was issued a written warning on July 8, 2014, because he did not follow his supervisor's instruction to go to lunch at a different time than his counterpart. Dotson is not comparable.

First, Dotson's July 2014 written warning proves nothing. Not only was it nearly three years before Mason's discharge, but Jarrett, Roberts, and Fair were not employed at that time, and the employees were not represented by a union and there was no interim discipline procedure in place. Moreover, refusing to go to lunch at a different time than your counterpart is not akin to refusing multiple direct instructions from your supervisor to perform a discrete task in order to avoid production downtime.

Second, Dotson's November 2016 suspension was based on events easily distinguishable from the events giving rise to Mason's discharge. Nevermind that Dotson did not work in the materials department, was not a team lead, and was not supervised by Fair or managed by

McClendon, an employee not performing a task one hour prior to his shift ending because employees on the next shift could do it is not the same as an employee refusing a direct instruction multiple times during a single shift that could have resulted in production downtime.

This is not to say that Dotson's conduct was excusable. It was not. But management determined at the time that a 5-day suspension was a sufficient consequence for him based on the surrounding circumstances. Counsel for the General Counsel simply failed to show that Dotson's misconduct was meaningfully comparable to Mason's misconduct.

h. GC Exhibit 18 (Renita Leath)

General Counsel Exhibit 18 is an employee counseling form indicating that Renita Leath was issued a verbal counseling on January 12, 2017, for insubordination, inappropriate behavior, and unauthorized use of cell phone. According to the form, Leath refused to work for 15 minutes because she believed she was entitled to a second break based on the number of hours she was working that day. This is not even remotely comparable to Mason's conduct.

First and foremost, Leath was protesting what she believed to be an unlawful instruction. Arguably, then, Leath was engaging in protected concerted activity. Mason, on the other hand, was protesting nothing, nor was she refusing to perform a task she deemed unlawful or unsafe. Mason refused to follow instructions because she did not want to.[34]

Second, Leath's situation is distinguishable because she was not a team lead and she was not employed in the materials department or supervised by Fair or managed by McClendon.

[34] The judge overlooks the significance of Mason's personality conflict with Supervisor Fair, although he acknowledges "it appears that friction between Mason and Fair started almost from the beginning of [Fair's] employment" (Decision, p. 3, lines 11-12). It was clearly the personality conflict that compelled Mason to refuse to comply with Fair's instructions rather than a concern over safety or compliance with the law.

Additionally, counsel for the General Counsel failed to present any evidence concerning Leath's union sentiments. See *MEMC*, above at 1198.

i. GC Exhibit 19 (William James)

General Counsel Exhibit 19 includes employee counseling forms involving William James. The first form indicates that James was issued a 5-day suspension for failing to follow instructions, insubordination, and violation of policy on June 22, 2016. According to the form, James refused to relieve a press operator during the press operator's break. There is no other evidence surrounding this discipline. The second form indicates that James was issued a written warning on May 17, 2016, for poor job performance. According to the form, James failed to set up the die protection when setting up a tool on a press.[35]

With respect to James' conduct in June 2016 resulting in his suspension, the record does not establish that he refused his supervisor's instructions multiple times like Mason did. Additionally, James was not a team lead, and he worked in a different department and for a different supervisor. Additionally, counsel for the General Counsel failed to present any evidence concerning James' union sentiments. Thus, it is unreasonable to assume that James is a proper comparator for purposes of inferring unlawful motivation. See *MEMC*, above at 1198.

3. No Animus Based on Additional Factors

In addition to disparate treatment, the Board has traditionally considered the following factors when analyzing whether a decision-maker had animus towards an employee's union activity: (1) the timing of the employer's adverse action in relationship to the employee's union activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus, and (4) departure from past practice. *Kitsap Tenant*

[35]Obviously James' written warning for poor job performance is not comparable to Mason's discharge for insubordination.

Support Services, Inc., 366 NLRB No. 98, slip op. at 11 (2018) (citing *National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016)). The judge completely ignored these other factors and based his entire conclusion of animus on his mistaken belief of disparate treatment.

a. Timing

The only union activity in which Mason engaged that was close in time to her discharge was participating on the Union's negotiating committee. While the committee met with the Company's negotiating committee two to three days per week every three to four weeks, they met at an offsite hotel (Tr. 23, 25, 158-159). Moreover, as explained above, neither Jarrett nor Roberts was on the Company's negotiating committee or had any involvement in the negotiations (Tr. 31, 371).

The record reflects that then-Labor Relations Manager Robey was the only HR representative on the negotiating committee (Tr. 21, 157); however, contrary to the judge's blink assumptions, there is no evidence she was involved in the decision to discharge Mason. At most, the record reflects that Robey took notes during the discharge meeting (R. Exh. 3). The judge did not find to the contrary. Incredibly, however, he found that "[i]t defies credulity to believe that Robey, the plant labor relations manager, who was familiar with the events of April 28, played no role in the deliberations leading to Mason's termination" (Decision, p. 10, lines 21-23.) In other words, the judge assumed *in the absence of evidentiary support* that Robey must have had something to do with the decision-making process. This is an egregious error. See *Albertson's, Inc.*, 351 NLRB 254, 255-256 (2007) (finding "judge's assumption was unfounded and cannot serve as a substitute for proof" of an alleged violation where there was "no evidence in the record" to support the assumption).

The judge further erred by overlooking the fact that there is a significant gap in time (eight months) between Mason's alleged confrontation with Gulka and her discharge, and there is a significant gap in time (six months) between when Mason was appointed to the Union's negotiating committee and her discharge (Tr. 286).[36] See *EZ Park, Inc.*, 360 NLRB No. 84, slip op. at 4 (2014) ("[T]he timing of Dasa's discharge was well removed from the union campaign. He was discharged almost a month after the election . . . . Thus, I cannot make the inference that his discharge was motivated by discriminatory reasons."); *Mt. Vernon-Woodberry Mills, Inc.*, 64 NLRB 294, 298 (1945) (finding employee's membership in union was not reason for discharge where employer had knowledge of employee's union membership at the time it reemployed him).

The record simply does not support an inference that the timing of Mason's discharge had anything to do with her union activity. Cf. *State Plaza, Inc.*, 347 NLRB 755, 757 (2006) (finding timing indicative of animus where discharge decision was made "within a few days" of protected activity). The judge, however, completely ignored this factor in his analysis.

b. Presence of other unfair labor practices

The judge next ignored the fact that Electrolux has not been found to have committed any other unfair labor practices. In fact, there is no evidence Electrolux engaged in conduct that could even *arguably* constitute an unfair labor practice around that time period. Consequently, this factor does not weigh in favor of finding animus, and the judge erred by failing to consider it. Cf. *North Hills Office Services*, 346 NLRB 1099, 1101 (2006) ("Considering the numerous other violations found by the judge and adopted by the Board in this case, there is substantial evidence of the Respondent's animus to the employees' Section 7 activities . . . .").

[36]This is why Respondent excepted to the judge's suggestion that Mason was identified as a member of the Union's negotiating committee in January 2017 (Exceptions 4, 53). The record reflects that Mason was appointed to the Union's negotiating committee in October 2016 (Tr. 286).

At most, Chief Steward Reese and Assistant Union Business Manager Noel Sherman testified about several unfair labor practices the Company allegedly committed during the 2015 and 2016 campaign periods.[37] Reese testified that he observed management throw away union literature in the cafeteria. Reese stated that he thought it was "strange" the Company would do that, but he offered no additional details regarding what the literature was about, when it was thrown away, or who specifically threw it away. (Tr. 67.)

Sherman testified that someone reported to him in August 2016 that "people that were in management" were "discarding" something from the break rooms, but he did not know exactly who it was or even what they were reportedly discarding (Tr. 46-47).

Reese next explained that one day he was distributing literature and soliciting cards at the front entrance of the building when a security guard told him to leave. Reese refused to leave, so the security guard called then-HR Director Thomas, who is no longer employed by Electrolux. Reese claimed that Thomas walked out and told him to leave because he was not on the clock. According to Reese, Thomas then escorted Reese to his vehicle, and Reese left. Reese stated that Thomas called him a couple hours later and told him he had received complaints that Reese was blocking the entrance. Reese did not testify about when this incident allegedly occurred. (Tr. 68-70.)

Sherman testified that during the first or second week in July 2016, he and others were handbilling when they noticed that somebody was recording them. He provided no other details about the alleged incident other than that he reported it to the Board. (Tr. 46-47.)

No witnesses connected Jarrett, Roberts, or Supervisor Fair to any of the Company's alleged unlawful conduct during the campaign periods. The record reflects that Roberts and Fair

[37]Sherman was the lead Union organizer during the second campaign (Tr. 45).

were hired after the Union was voted in (Tr. 299, 370). Indeed lead organizer Sherman testified that he did not even know Jarrett, Roberts, or Fair (Tr. 51-52).

Accordingly, there is no evidence that Electrolux engaged in any other unfair labor practices around the time that Mason was discharged. The judge should have considered that fact in his analysis.

c. Statements and actions showing the employer's general and specific animus

The judge did not consider the lack of evidence in the record that Jarrett or Roberts made any statements or took any action indicating that they had general or specific animus towards the alleged union activity (or protected concerted activity) in this case. Again, the record does not reflect that Jarrett or Roberts were involved in the organizing campaign or the contract negotiations. Moreover, the record does not reflect that they made any statements or took any action that would suggest they had animus towards unions in general. Cf. *Empire State Weeklies, Inc.*, 354 NLRB 815, 815 fn. 4 (2009) (finding animus where, during employee's termination interview, owner "interrogated him about his union activities and stated that [he] had been working with the Union for months"); *Inn at Fox Hollow*, 352 NLRB 1072, 1075 (2008) (finding supervisor's statement to union supporter during discharge meeting that "people like you we do not need at this workplace" was evidence of animus).

Even the Company's response to the Union organizing activity in 2015 and 2016 does not establish animus towards union activity. Mason and Reese testified that the Company communicated with employees about unionization during both campaigns, but neither of them testified that the Company communicated in an unlawful way.

Mason and Reese testified that one way the Company communicated with employees was through monitors in the cafeteria. Mason generally described the messages on the monitors as "the

company campaigning against the Union" (Tr. 141). She did not testify about any specific messages. The only message that Reese could specifically recall on the monitors had to do with authorization cards (Tr. 66-67). Reese vaguely explained, "One of the messages said authorization cards are a legal and binding document and even if you sign them, the card can sell online and you can be legally bound—bound by those cards" (Tr. 67).

Mason and Reese also testified that the Company held group meetings with employees prior to the elections. Reese did not testify about any specific meetings. Instead, he generally recalled that the meetings were about how the Company "felt about the Union" (Tr. 66).

Mason only testified about the one meeting where former plant manager Gulka and someone named "Matt" allegedly said that it would cost $40 or $50 per week to belong to the Union, and that the employees at another company were out on strike and "that could possibly happen if you vote for the Union" (Tr. 142-145.)

Mason and Reese testified that in addition to displaying messages on the cafeteria monitors and holding group meetings, the Company distributed "Vote No" t-shirts to employees during the first campaign (Tr. 71-72, 80, 137-138). All of these communications by the Company were protected by Section 8(c) of the Act.

There is simply no evidence of general or specific union animus by anyone affiliated with the Company, let alone the decision-makers Jarrett and Roberts, who were not on the Company's negotiating committee or involved in either campaign. The judge should have considered this in his analysis.

d. Departure from past practice

The only "departure from past practice" the judge relied on was Mason allegedly being subjected to disparate treatment. The judge gave no credence to the fact that the Company followed

its negotiated interim discipline procedure and conducted a thorough investigation, consistent with its past practice of handling other incidents of reported misconduct.

Indeed, Union Business Agent Shaffer confirmed that, consistent with the parties' established practice, the Company's attorney, Pearson, emailed him the witness statements and counseling form recommending that Mason be discharged (Tr. 25, 33). Shaffer and Pearson subsequently discussed the incident, and the Company waited the minimum three days before implementing the decision. In fact, the Company did not terminate Mason until after receiving her statement, which she originally elected not to complete.

Because the Company strictly followed its past practice with respect to investigating suspected reports of misconduct, including consulting with the Union and giving Mason ample opportunity to write a statement before taking action, it is unreasonable to infer animus. See *Diamond Electric Mfg. Corp.*, 346 NLRB 857, 860 (2006) (fact that employer gave employee opportunity to explain his error belies inference that unlawful animus motivated decision to discharge him for it).

C. THE JUDGE SUBSTITUTED HIS OWN JUDGMENT FOR THAT OF MANAGEMENT. (EXCEPTIONS 9, 10, 11, 12, 13, 14, 18, 28, 29, 32, 33, 43, 44, 47)

It is well-established that "the Board may not substitute its own business judgment for that of the Respondent or act as a 'super-personnel' department." *Pro-Tech Fire Services*, 351 NLRB 52, 58 (2007). Moreover, "[e]ven shortsighted or bad business judgments are permissible so long as they are not discriminatory." Id. The judge ignored this precedent and clearly based his conclusion of unlawful motivation on his own perception of the degree of discipline Mason should have received.

The most glaring example of the judge substituting his own judgment for that of management is his fixation on the notion that production did not stop as a result of Mason refusing

to comply with Supervisor Fair's instructions. Specifically, the judge indicated several times that the fact that production did not stop as a result of Mason's misconduct indicates it was not that serious. According to the judge, "There is no credible evidence that Mason's insubordination disrupted Respondent's operations in any material way" (Decision, p. 5, lines 26-27.) He later added that, "the testimony of Mason and Chris Fair establish that the assembly lines stopped running on April 28 for reasons unrelated to Mason's failure to bring microwaves to line 2 . . ." (Decision, p. 6, lines 35-37).

That Mason's insubordination did not actually result in production downtime does not mean it is unworthy of discharge. It simply means she was lucky. Following the judge's logic, if Mason's insubordination had resulted in downtime, it would have been worthy of discharge. This is a clear illustration of the judge substituting his own judgment for that of management. The judge—and Business Agent Shafferr—obviously believe that something less than discharge was warranted under the circumstances. But this is not an arbitration, where a "just cause" provision is being evaluated. This is an unfair labor practice charge. Right, wrong, or indifferent, management's decision to discharge Mason cannot be disturbed unless it was made because of Mason's union activity.

D. THE JUDGE FAILED TO RECOGNIZE THE LEGITIMATE REASONS WHY THE COMPANY DID NOT IMMEDIATELY SUSPEND MASON AND DID NOT PROVIDE HER WITH A COPY OF THE EMPLOYEE COUNSELING FORM. (EXCEPTIONS 25, 45, 46)

The judge took issue with the fact that Mason was not immediately suspended following the incident (Decision, p. 6, lines 39-43) and the fact that Jarrett did not provide Mason with a copy of the employee counseling form (Decision, p. 4, lines 19-20). However, counsel for the General Counsel failed to rebut Respondent's legitimate reasons for its actions in those regards.

First, Jarrett credibly explained that Mason was not suspended after the meeting because, under the parties' interim discipline procedure in effect at the time, employees were only suspended when their conduct included "workplace violence, weapons, drugs, and other serious violations." (Tr. 444-445; R. Exh. 6.) The judge did not specifically discredit Jarrett on this point. Instead, he concluded that "the fact that Respondent waited a week after the insubordination to terminate Mason is an indication that Respondent did not consider her misconduct to be particularly serious" (Decision, p. 6, lines 39-41). This was inappropriate.

It is not up to the judge to decide how Respondent should have interpreted and applied its interim disciplinary procedure, yet that is precisely what the judge purports to do here. Electrolux construes the interim discipline procedure concerning suspensions in such a way that only misconduct akin to workplace violence, weapons, and drugs warrant suspension pending investigation. As Jarrett explained, Mason's conduct did not present a "harmful threat," which explains why she was not suspended. (Tr. 495). Importantly, there is no record evidence that the union disagreed with this interpretation.

There was no evidence to contradict Electrolux's interpretation of the "suspension pending investigation" language of the pre-contract interim discipline procedure, including evidence that employees have been suspended pending investigation of other incidents of insubordination. The judge cannot substitute his own opinion for that of management and say that Mason should have been suspended if management thought her misconduct was serious. "Serious" is a relative term, and Electrolux has the right to interpret the use of that term in the interim discipline procedure as it sees fit.

It was also inappropriate for the judge to draw an adverse inference from the fact that Mason was not given a copy of the employee counseling form. Jarrett explained that the reason

the form was not signed and includes no comments at the end is because that section is only used for discipline less than discharge. Employees who are being discharged are presented with the official Tennessee Separation Notice form instead. (Tr. 493.) No evidence was offered to rebut that testimony, yet the judge found it carried no weight. While the judge may not agree with Electrolux's practice, he is not management.

E. THE JUDGE MADE CREDIBILITY CONCLUSIONS WITHOUT ADEQUATE EXPLANATION. (EXCEPTIONS 30, 31, 34, 43, 58)

The judge concluded that then-HR Business Partner Jarrett was not credible in a number of respects. First, he concluded that Jarrett did not credibly testify about the discussion she had with Roberts concerning her investigation and recommendations (Decision, p. 5, lines 27-40, p. 6, lines 4-5). Second, he concluded that Jarrett did not credibly explain why Mason's conduct warranted termination while the insubordination of other employees did not (Decision, p. 6, lines 9-11). Third, he concluded that Jarrett did not credibly testify that Mason was discharged because she disrupted Respondent's operations (Decision, p. 6, lines 34-35).

The judge's credibility resolutions concerning Jarrett were not based on her demeanor. In fact, unlike how he evaluated other witnesses who testified, the judge did not offer a single reason for why he was not crediting Jarrett. Cf. Decision, p. 4 fn. 6 ("I do not fully credit Mason's testimony because it is self-serving. I do not fully credit Fair's [testimony] because it is very confusing and at times inconsistent.").

The Board does not hesitate to overturn an administrative law judge's credibility resolutions when they are not primarily based on demeanor. See, e.g., *Marshall Engineered Products Co., LLC*, 351 NLRB 767, 768 (2007) ("[W]e emphasize that the judge did not resolve the issue of credibility based primarily on demeanor."); *J.N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979) ("[W]e view the [ALJ's] credibility resolutions . . . as unsupported by the record and

based more on his analysis of the circumstances than on the demeanor of the witnesses."); *International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 38 (Cleveland Electro Metals Co.)*, 221 NLRB 1073, 1074 fn. 5 ("[W]here credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.").

Because the judge failed to properly anchor his credibility resolution of a decision-maker on her demeanor, his findings should be rejected.

V. CONCLUSION

The judge's rulings, findings, and conclusions with respect to the allegation that Mason was discharged because of her union activity are inconsistent with Board precedent and not supported by the record evidence. The judge's position essential boils down to two things: Mason was on the Union's negotiating committee, and employees who were not on the Union's negotiating committee have engaged in insubordination but not been discharged. This is far too slender a reed on which to base a finding of unlawful motivation.

The mere fact that Mason was on the Union's negotiating committee means nothing, especially considering that the decision-makers were not on the Company's negotiating committee and had no involvement in negotiations. The judge finds knowledge and animus out of thin air. Regarding the alleged comparators, the record evidence supports Respondent's position and belies any inference of discrimination.

The reward in this case is clear, J'Vada Mason refused to do her job after being instructed multiple times to do it. She acted as if she was untouchable, and the judge has now condoned her behavior. The Board should reverse the judge's decision in this regard because it is inconsistent with Board precedent and not based on the credible record evidence.

(Signature Page to Follow)

Respectfully submitted,

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July 30, 2018

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ELECTROLUX HOME PRODUCTS, INC.	)	
	)	
and	)	Case 15-CA-206187
	)	
J'VADA MASON, an Individual	)	
	)	

CERTIFICATE OF SERVICE

It is hereby certified that Respondent's Brief in Support of Exceptions to Administrative Law Judge's Decision in the above-captioned case has been served on the following by e-mail on the date set forth below:

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July 30, 2018