No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

N.L.R.B.
APPELLATE COURT BRANCH
2018 SEP -6 PM 2: 04
LITIGATION SERVICES
WASH. D.C.

_____

LEE CRAFT – PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL --RESPONDENTS

PROOF OF SERVICE

I, Lee Craft, do swear or declare that on this date, September 5, 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001

Mason Miller, Sr. Counsel, Employment & Labor Law
Philips Electronics North America Corporation
200 Franklin Square Dr
Somerset, NJ 08873-4186

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 5, 2018

Lee Craft
(Signature)

N.L.R.B.
APPELLATE COURT BRANCH
2018 SEP -6 PM 2:04
LITIGATION SERVICES
WASH. D.C.

A COPY OF THE REPLY BRIEF WAS SUBMITTED TO THE FOLLLOWING PARTIES BY Lee

FEDERAL EXPRESS ON September 5 2018

WILLIAM T HEARNE
National Labor Relations Board, Region 26
80 Monroe Avenue, Suite 350
Memphis Tennessee 38103
901-425-7232

Linda Dreeben
National Labor Relation Board
Appellate and Supreme Court
Litigation Branch
1015 Half Street S E
Washington DC 20570

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Philips Electronics North America Corporation
200 Franklin Square Drive
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732-563-3123

Sherry McMurrian
Philips Electronics North
America Corporation
3399 E Raines
Memphis Tennessee 38118-6819
901-795-1071

No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

LEE CRAFT – PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL --RESPONDENTS

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without payment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court:

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Lee Craft

(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Lee Craft, am the petitioner in the above-entitled case. In support o my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pa the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each o the following sources during the past 12 months. Adjust any amount that was receive weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gros amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 19200-	$ 33600-	$ 1600-	$ 2800-
Self-employment	$ NA	$ NA	$	$
Income from real property (such as rental income)	$ NA	$ NA	$	$
Interest and dividends	$ NA	$ NA	$	$
Gifts	$ NA	$ NA	$	$
Alimony	$ NA	$ NA	$	$
Child Support	$ NA	$ NA	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ NA	$ NA	$	$
Disability (such as social security, insurance payments)	$ NA	$ NA	$	$
Unemployment payments	$ NA	$ NA	$	$
Public-assistance (such as welfare)	$ NA	$ NA	$	$
Other (specify):	$ NA	$ NA	$	$
Total monthly income:	$	$	$ 1600-	$ 2800-

2. List your employment history for the past two years, most recent first. (Gross monthly pa is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
St Jude	Memphis TN	5-2018- current	$ 1600-
Kellogg's	Rossville TN	7-2014- 1-2018	$ 2200-
			$

3. List your spouse's employment history for the past two years, most recent employer first (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ 100-
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
	$	$
Checking	$ 100-	$ 0
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☑ Home
Value 180,000-

☐ Other real estate
Value NA

☑ Motor Vehicle #1
Year, make & model 1992 NISSIAN
Value 500-

☑ Motor Vehicle #2
Year, make & model 1993 Chevolet
Value $1000-

☑ Other assets
Description 2014 Honda 5000-
Value

6. State every person, business, or organization owing you or your spouse money, and th amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spous
NA	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. For minor children, list initial instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
NA		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 1330 -	$
Are real estate taxes included? ☑ Yes ☐ No		
Is property insurance included? ☑ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$ 500 - mon
Home maintenance (repairs and upkeep)	$ 59 - monthly	$
Food	$	$ 200 - wee
Clothing	$ 20 mnthly	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$ 100 monthly	$ 200 mont

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 500 monthly	$
Recreation, entertainment, newspapers, magazines, etc.	$ NA	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$
Life	$ 60-	$ 60- /m
Health	$ 125	$ 125 /m
Motor Vehicle	$ 500-	$ 500- q
Other:	$	$ 9
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 1500	$
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$ 340 monthly	$ 800-mo
Department store(s)	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ NA	$
Other (specify):	$ NA	$
Total monthly expenses:	$ 2325	$ 2245

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 5, 2018

Lee Cu

(Signature)

No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

LEE CRAFT – PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL --RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LEE CRAFT

7467 NUNN COVE

MEMPHIS, TN 38125-4851

Mobile Phone: (901) 517-6392

QUESTIONS PRESENTED

1. When the concern is that presiding judge's credibility findings are in opposition to the facts presented in the case, is it right that a higher court can summarily refuse to review a petition and the facts of a case?
2. If a party is determined to be in violation of the law, and harm and/or damages are caused, should not the presiding authority have addressed relief sought by the injured party?

LIST OF PARTIES

Lee Craft – Petitioner

National Labor Relations Board – Respondent

Philips Electronics North America Corporation - Respondent

INDEX TO APPENDICES

APPENDIX A (BOARD ORDER DENYING MOTION FOR RECONSIDERATION)

APPENDIX B (ORIGINAL BOARD DECISION)

APPENDIX C (ORIGINAL TRIAL DECISION, Lee Craft v. Philips Electronics North America Corporation)

APPENDIX D (CIRCUIT COURT DENIAL OF REVIEW, Lee Craft v. NLRB)

APPENDIX E (NATIONAL LABOR RELATIONS ACT)

OPINIONS BELOW

The opinion of the National Labor Relations Board ("Board") denying the Motion for Reconsideration, which was not published, was issued on November 25, 2014, is attached as Appendix A. The opinion of the Board, which was published in *Decisions of the National Labor Relations Board* (361 NLRB No16), was issued on August 14, 2014, and is attached as Appendix B. The opinion of the administrative trial judge, which was not published, issued on June 13, 2013, and is attached as Appendix C. The opinion of the United States Court of Appeals for the Sixth Circuit, which was not published, issued on June 5, 2018, and is attached as Appendix D.

JURISDICTION

The date on which the United States Court of Appeals decided my case was June 5, 2015. A timely petition for review was denied by the United States Court of Appeals on the following date: June 5, 2018, and a copy of the order denying review appears at Appendix D. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act of 1935 (49 Stat. 449) 29 U.S.C. § 151–169. Section 8 (Appendix E)

STATEMENT OF THE CASE

Upon unlawful termination from my employer, Philips, I filed a case with the National Labor Relations Board, and was granted a hearing. I was unlawfully terminated for showing my disciplinary form (documented on my termination letter). In spite of this, and the facts presented

in the hearing, the administrative law judge concluded that the company did not violate the law and found the respondent's witnesses credible (Appendix B).

I appealed this decision with the NLRB, and while they agreed that Philips maintained an unlawful rule, however the Board did not hold Philips responsible for the maintenance and application of this rule in my case, and did not award damages. The Board also upheld the judge's decision and credibility findings stating that I would have been discharged even if I was not engaging in the protected activities (Appendix A). They maintained this in spite of brief filed delineating how the Judge's decision in the initial trial did was not based on the record evidence.

I then appealed the NLRB decision to uphold the administrative law judge's ruling, and filed with the U.S. Circuit Court of Appeals-Sixth District requesting a de novo review. This Court denied the petition review (Appendix C). I contend that the administrative law judge overlooked and or was influenced to overlook the facts of the case, and have petitioned the courts for a review of my case and have been continually denied.

REASONS FOR GRANTING THE PETITION

I pray that the Court grant certiorari, not just for my sake, but for the sake of any and all persons who are seeking justice in the face of what appears to be corruption at higher levels. I was unlawfully terminated from my employer—in spite of my efforts to follow the proper protocols for resolving issues on the job. When that happened, I pursued justice through the legal system—one man against a large corporation access to more resources than I could imagine, but I had the truth on my side, and the evidence supported that. The testimony of Philip's witnesses was often illogical and contradictory, yet the trial judge—for some reason unfathomable to me—determined that these witnesses were credible.

How could the judge find that the company maintained an unlawful rule—the documented reason for my termination—yet not hold the company responsible, or determine that witnesses who were caught in lies are credible? The only reason that appears to me is that corruption at some level was involved. I then appealed to the Board highlighting my concerns about the decision, but the Board upheld the judge's credibility findings without considering the facts as documented by the trial transcript. In fact, the transcript actually highlights evidence that was not considered or even misstated by the judge. No consideration was given to the evidence I provided, in spite of it being more consistent than the company's evidence. When the Board reviewed the case, it determined that Philips did maintain an unlawful rule and that the enforcement of that rule played a role in my termination, but it did not then address the damages caused or address compensation for said damages. When I filed a Motion for Reconsideration with the Board, it was also denied. Finally, my appeal to the Circuit Court of Appeals for a de novo review, and that Court denied to review the petition altogether.

All these decisions send the message that I do not matter when compared with the interests and resources of a big company. I now implore this Court to review my case, and how the decisions were made, the credibility of the trial judge, and the Board's refusal to examine the evidence to determine that the judge erred in the analysis of the law and credibility findings. This is the case of one man, and yet it is so much more than that. I understand the necessity of upholding the system and that there are reasons for upholding a judge's credibility resolutions; however when these resolutions have no basis in the totality of the evidence provided on a case, a higher authority should intervene and examine the issue. After exhausting all other paths, I am asking that the Supreme Court be that higher authority.

CONCLUSION

For the foregoing reasons, the petitioner requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

Lee

Date: September 5, 2018

Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PHILIPS ELECTRONICS
NORTH AMERICA CORPORATION

and Case 26-CA-085613

LEE CRAFT

ORDER DENYING MOTION[1]

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

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

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

Philip A. Miscimarra, Member

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.
[2] 361 NLRB No. 16.
[3] Cf. *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 1 fn. 1 (2014) (considering pro se Charging Party's exceptions even though they did not comply fully with the Board's Rules and Regulations).

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

August 14, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

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

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

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

I. FACTS

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

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

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

To document her conversations with Coleman and other employees, McMurrian prepared a file summary dated January 24. In relevant part, the file summary states that Coleman and Halbert reported to McMurrian that Craft was showing his disciplinary form to employees, and that Craft told other employees that he had been disciplined based on Coleman's accusations that he had harassed her. McMurrian wrote, "These employees are aware that disciplinary forms are confidential information and

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

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

Because no exceptions were filed to the judge's finding that the General Counsel met his initial burden under *Wright Line*, Member Schiffer observes that there is no need to address the judge's reliance on *American Gardens Management*, 338 NLRB 644, 645 (2002). See *Mesker Door*, 357 NLRB 591, 592 fn. 5 (2011).

[3] All dates refer to 2012.

should not be shared on the warehouse floor, at any time, much especially [sic] during working hours." She added, "Kim [Coleman] stated that [Craft] was purposely showing the write-up which he knows is confidential information. ."

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

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

II. DISCUSSION

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

The judge found the General Counsel's argument in support of the allegation unpersuasive. First, the judge determined that, even though the file summary referred to Craft's showing his disciplinary warning to some of his fellow employees, McMurrian included this information not because the Respondent prohibits discussion of discipline, but because *Coleman* was disturbed that Craft was broadcasting his warning to others and blaming her for it. Next, the judge found equally unpersuasive the references to confidentiality in the January 25 discharge notice. Here, the judge found that *Craft* raised the issue of confidentiality, and that the Respondent assured him that it would maintain the warning's confidentiality. The judge also observed that the Respondent did not tell Craft that he could not discuss his discipline with others. Thus, the judge essentially found that McMurrian added the reference to confidentiality in the January 25 discharge notice merely to reflect that Craft had been assured of the confidentiality of the January 20 warning, and that the reference was therefore not evidence of a rule prohibiting employees from discussing their discipline. In sum, the judge found that the wording in the file summary and discharge notice was insufficient to establish that the Respondent "told employees that they were prohibited from sharing and/or discussing their discipline with coworkers as alleged in [the] complaint ."

We reverse the judge's dismissal of this allegation. As the Board has previously stated, "[i]t is important that employees be permitted to communicate the circumstances of their discipline to their co-workers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense." *Verizon Wireless*, 349 NLRB 640, 658 (2007). An employer violates Section 8(a)(1) when it prohibits employees from speaking with coworkers about discipline and other terms and conditions of employment absent a legitimate and substantial business justification for the prohibition. See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 277 (2014); *SNE Enterprises*, 347 NLRB 472, 491–492 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007); *Caesar's Palace*, 336 NLRB 271, 272 (2001).

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

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

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

spondent was maintaining a rule prohibiting such conduct.

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

ORDER

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

1. Cease and desist from

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

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2012.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 26 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

MEMBER MISCIMARRA, dissenting in part.

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

Contrary to the arguments presented by the General Counsel and accepted by my colleagues, I do not believe we can reasonably infer the existence of such a rule from (a) language in the Respondent's January 24 file summary stating that employees "are aware" that discipline is confidential, and (b) language in Craft's discharge notice mentioning that Craft shared "confidential documentation" with others. In my view, this evidence fails to establish that the Respondent maintained a confidentiality rule.

My colleagues note that the file summary was prepared by Distribution Center Manager Sherry McMurrian to document her conversations with one of Craft's coemployees, Kim Coleman, among others. Although McMurrian's summary stated "employees are aware that disciplinary action forms are confidential," the credited evidence reveals (and the judge found) this observation was based exclusively on a statement by employee Coleman, who advised McMurrian that discipline forms are confidential and should not be shared with others. At the hearing, Coleman testified that no one ever told her that discipline was confidential—this was only her as-

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

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sumption. Moreover, when Coleman told McMurrian that she (Coleman) believed that Craft was revealing confidential information, the record reveals that McMurrian did not state or confirm that disciplinary information was confidential. Rather, after being informed of Craft's disclosure, McMurrian simply asked, "Why would he want to do that?" It is also relevant that, when Craft was given a final written warning for engaging in "highly disruptive" behavior and for harassing and intimidating others, including Coleman, Craft was *not* told the discipline was "confidential." However, he was lawfully transferred to another department and was directed to stay away from Coleman's work area (indeed, he was told not even to look toward the area where Coleman was working), and Craft undisputedly disobeyed the "stay away" instruction. Although Craft showed his final warning to co-employees, he advised several of them that he received the warning because of Coleman's complaints, and he stated that he was "untouchable" (while parked in his forklift about 10 feet away from Coleman). None of these facts suggest that Respondent maintained or enforced a rule against the disclosure of disciplinary information, but they clearly establish that Coleman—who was Craft's co-employee and the object of his repeated harassment—had ample justification to advise McMurrian that Craft was inappropriately disclosing "confidential" information.

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

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

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

In short, this case involves a lawful decision to terminate Craft's employment, based on a course of egregious harassment and intimidating conduct directed towards co-employees and management representatives. According to the testimony of the discharged employee himself, Respondent maintained no rule prohibiting the disclosure of discipline, and the employee had never been told he was prohibited from disclosing his discipline to others. At most, the record reveals that the Respondent prepared two documents—an internal file summary memo and Craft's discharge notice—that made general, imprecise references to "confidential" documentation. Neither of these documents was prepared for distribution to employees generally. Moreover, the judge made specific credibility findings establishing that the "confidential" references in these documents had nothing to do with any rule prohibiting the disclosure of discipline. Not only does the record reveal that Craft engaged in highly objectionable conduct, the evidence reveals that Respondent went to significant lengths to act appropriately in relation to Craft's co-employees and even Craft himself (who received repeated counseling and progressive discipline, including assurances that the *Respondent* would refrain from indiscriminately disclosing information regarding Craft's discipline). In these circumstances, we need more record evidence than exists in the instant case to establish that Respondent maintained or imposed some type of prohibition that constituted restraint, coercion or interference with protected rights.

Accordingly, as to this issue, I respectfully dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION

The Board's decision can be found at www.nlrb.gov/case/26–CA–085613 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

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

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Memphis, Tennessee, on March 11 and 12, 2013. Lee Craft, an individual, filed the charge in 26–CA–085613 on July 19, 2012, and filed an amended charge on September 28, 2012. On November 30, 2012, the Acting Regional Director for Region 26 of the National Labor Relations Board (Board) issued a complaint[1] and notice of hearing. Generally, the complaint alleges that since January 19, 2012, Philips Electronics, North America Corporation (Respondent) has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers. The complaint further alleges that Respondent terminated Lee Craft (Craft) on January 25, 2012, because he showed and discussed with his coworkers an employee counseling form that he received from Respondent on January 20, 2012.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel[2] (General Counsel) and the Respondent, I make the following

FINDINGS OF FACT

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

Alleged Unfair Labor Practices

A. Background

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

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

B. Relevant Facts

1. Craft's work history

Craft was hired at Respondent's facility as a material handler in February 2003. With the exception of the last 5 days of his employment, Craft was assigned to the Ballast Department. In April 2010, Craft was promoted to a lead position where he was supervised by Gene Blinstrup. Rolita Turner also began her work with Respondent as a warehouse worker and she was

[1] All dates are in 2012 unless otherwise indicated.

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

promoted to the lead position in 2005. Turner testified that although she and Craft never worked in the same department when they were leads, their working relationship as leads was not problematic.

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

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

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

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

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

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

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

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

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

3. Incidents occurring after Craft's demotion

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

Coleman recalled an incident that occurred after Craft returned to the job of material handler. Craft and Coleman argued as to whether Coleman had placed a skid in the wrong bin. She argued that she had not and Craft argued that she had done so. After she checked for herself, she found that the skid was in

the wrong bin. Coleman apologized to Craft and admitted that she had been wrong. She testified that he told her to get on her knees to make the apology. She refused.

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

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

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

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

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

4. Craft's participation in preshift meetings

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

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

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

5. Respondent's continuing investigation of Craft

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

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

hostile working environment Lee Craft has caused.

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

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

6. Respondent's initial decision to terminate Craft

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

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

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

7. Circumstances leading to Craft's discharge

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

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

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

C. Whether Respondent Violated the Act

1. The parties' positions

The General Counsel maintains that Respondent unlawfully terminated Craft because he engaged in protected concerted activity by discussing his January 20 final wanting with employees and making statements critical of Respondent's deci-

sion to issue him the final warning. Specifically, the General Counsel alleges in the complaint that since January 19, 2012, Respondent has maintained a rule that discipline is confidential and that prohibited employees from sharing and/or discussing their discipline with their coworkers. The complaint alleges that between January 20 and 24, 2012, Craft showed and discussed with his coworkers the final written warning that he received on January 20, 2012, and that Respondent terminated him for doing so. Respondent asserts that its decision to terminate Craft was based on his "final act of harassment/intimidation/bullying and his disruptive behavior occurring on January 24, 2012."

2. Applicable legal authority

As discussed further below, the parties not only disagree about the conduct that triggered Craft's termination, but they also disagree as to Respondent's motivation in deciding to terminate Craft. In cases where an employer's motivation is an integral factor in determining the lawfulness of discipline issued to employees, the Board utilizes the test that is outlined in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* analysis is based on the legal principle that an employer's motivation must be established as a precondition to a finding that the employer has violated the Act. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). In its decision in *Wright Line*, the Board stated that it would first require the General Counsel to make an initial "showing sufficient to support the inference that protected conduct was a 'motivation factor' in the employer's decision." *Wright Line*, above at 1089.

Under *Wright Line*, the General Counsel must establish not only that the employee engaged in protected conduct, but also that the employer was aware of such protected activity and that the employer bore animus toward the employee's protected activity. *Praxair Distribution, Inc.*, 357 NLRB 1048, 1048 fn. 2 (2011); *Camaco Lorain Mfg. Plant*, 356 NLRB, 1185 (2011). Specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. *North Hills Office Services*, 346 NLRB 1099, 1100 (2006). In effect, proving the established elements of the *Wright Line* analysis creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discipline are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

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

3. Whether Respondent maintained an unlawful confidentiality rule

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

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

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

Coleman testified that she told McMurrian that the discipline

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

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

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

4. Whether Craft was terminated because of his protected activity

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

D. The Application of the Wright Line Analysis

1. Whether Craft engaged in protected activity

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

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

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

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

to credit Craft's testimony, finding that he did not come back into the Ballast area on January 24, 2012, Respondent believed that he did so, and disciplined him for conduct related to protected activity. Accordingly, I find that Respondent had knowledge that Craft engaged in protected activity.

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

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

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

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

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

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

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

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

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

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

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

Because of Craft's reported behavior toward female employ-

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

[Recommended Order omitted from publication.]

JD(ATL)—16—13
Memphis, TN

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

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION

and **Case 26-CA-085613**

LEE CRAFT, an Individual

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

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Memphis, Tennessee, on March 11 and 12, 2013. Lee Craft, an individual, filed the charge in 26–CA–085613 on July 19, 2012, and filed an amended charge on September 28, 2012. On November 30, 2012, the Acting Regional Director for Region 26 of the National Labor Relations Board (Board) issued a complaint[1] and notice of hearing. Generally, the complaint alleges that since January 19, 2012, Philips Electronics, North America Corporation (Respondent) has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers. The complaint further alleges that Respondent terminated Lee Craft (Craft) on January 25, 2012, because he showed and discussed with his coworkers an employee counseling form that he received from Respondent on January 20, 2012.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel[2] (General Counsel) and the Respondent, I make the following:

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[1] All dates are in 2012 unless otherwise indicated.
[2] For purposes of brevity, the Acting General Counsel is herein referenced as the General Counsel.

FINDINGS OF FACT

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

ALLEGED UNFAIR LABOR PRACTICES

A. Background

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

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

B. Relevant Facts

1. Craft's work history

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

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

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

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

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

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

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

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

McMurrian recalled that on July 8, 2011, Coleman came to her office to discuss Craft. Coleman told McMurrian that Craft was harassing her on the floor. Coleman reported that Craft pulled her from her regular job to do other work, yelled at her, and threatened that he would "make sure" that she would lose her job. McMurrian spoke with Craft and explained

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

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

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

3. Incidents occurring after Craft's demotion

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

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

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

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

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

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

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

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

4. Craft's participation in preshift meetings

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

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

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

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

5. Respondent's continuing investigation of Craft

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

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

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

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

6. Respondent's initial decision to terminate Craft

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

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

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

7. Circumstances leading to Craft's discharge

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

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

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

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

C. Whether Respondent Violated the Act

1. The parties' positions

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

2. Applicable legal authority

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

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

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

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

3. Whether Respondent maintained an unlawful confidentiality rule

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

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

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

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

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

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

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

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

4. Whether Craft was terminated because of his protected activity

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

D. The Application of the Wright Line analysis

1. Whether Craft engaged in protected activity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

distribution center supervisors.

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

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

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

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

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

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

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

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

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

It has long been held that an employer violates the Act if it is shown that the discharged employee at the time engaged in protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. An employer's honest belief, however, provides a defense to a charge of discrimination absent a showing that the employee did not, in fact, actually engage in the alleged misconduct. *NLRB v. Burnip &*

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

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

CONCLUSIONS OF LAW

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

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

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

ORDER

The complaint is dismissed in its entirety.

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

Margaret G. Brakebusch
Administrative Law Judge

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

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1544

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 05, 2018
DEBORAH S. HUNT, C

LEE CRAFT,	)	
	)	
Petitioner,	)	
	)	
v.	)	ON PETITION FOR REVIEW
	)	FROM THE NATIONAL LABOR
NATIONAL LABOR RELATIONS BOARD,	)	RELATIONS BOARD
	)	
Respondent.	)	
	)	

ORDER

Before: BATCHELDER, GIBBONS, and WHITE, Circuit Judges.

Lee Craft, proceeding pro se, petitions for review of the National Labor Relations Board's (Board) decision adopting the administrative law judge's (ALJ) finding that Philips Electronics N.A. Corporation's (Philips) decision to discharge Craft did not violate section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

The Board issued a complaint on behalf of Craft, alleging that Philips had discharged Craft for engaging in protected activity. During the subsequent two-day administrative hearing, Philips presented evidence that it had intended to fire Craft regardless of his protected activity, and the General Counsel provided evidence to the contrary, including Craft's testimony. Upon considering all of the evidence, the ALJ found that, although Craft's protected activity was a

motivating factor in Philip's decision, Philips would have terminated Craft even if he had not engaged in such activity. Concluding that Philips had not violated section 8(a)(1) by discharging Craft, the ALJ dismissed the complaint. On review, the Board adopted the ALJ's conclusion, determining that there was no reason to reverse the ALJ's credibility findings. After the Board denied his request for reconsideration, Craft filed this petition and moved to proceed in forma pauperis.

We grant Craft's motion to proceed in forma pauperis under Rule 24(b)(2) of the Federal Rules of Appellate Procedure. When considering such a motion, we consider "whether the court costs can be paid without undue hardship." *Foster v. Cuyahoga Dep't of Health & Human Servs.*, 21 F. App'x 239, 240 (6th Cir. 2001). Upon review of Craft's financial affidavit, we are satisfied that paying the $505 filing fee would work an undue hardship upon him.

Our review of a decision issued by the Board is limited. We review the Board's legal conclusions de novo, but we "will uphold the Board's findings of fact if supported by substantial evidence on the record." *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008). A decision of the Board is supported by substantial evidence if "there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' even if there is also substantial evidence for an inconsistent conclusion." *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 844 (6th Cir. 2003) (quoting *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000)). In other words, we "defer to the Board's reasonable inferences and credibility determinations." *Id.* (quoting *Painting Co. v. NLRB*, 298 F.3d 492, 499 (6th Cir. 2002)).

Substantial evidence supports the Board's conclusion that Philips would have terminated Craft even if he had not engaged in protected activities. *See NLRB v. Int'l Bhd. of Elec. Workers*, 514 F.3d 646, 649 (6th Cir. 2008) (explaining employer's burden under *Wright Line*, 251 N.L.R.B. 1083 (1980)). According to Craft, the evidence did not sufficiently support that conclusion, as Philips's testimonial evidence was neither consistent nor credible. But we are compelled to defer to the Board's conclusions concerning credibility and the weight ascribed to the evidence. And on the whole, Philips presented evidence sufficient to support the Board's conclusion.

For these reasons, we **GRANT** the motion to proceed in forma pauperis, and we **DENY** the petition for review.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

The **National Labor Relations Act** of 1935 (49 Stat. 449) 29 U.S.C. § 151–169

Section 8

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7

[section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) [section 159(a) of this title];

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is- -

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsection (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title];

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) [this subsection] shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or

approved by a representative of such employees whom such employer is required to recognize under this Act [subchapter]: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) [of this section] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective- bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act [subchapter] any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act [section 159(c) of this title],

(B) where within the preceding twelve months a valid election under section 9(c) of this Act [section 159(c) of this title] has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [section 159(c)(1) of this title] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by

any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective- bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor
organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened

under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

(A) The notice of section 8(d)(1) [paragraph (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [paragraph (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [paragraph (4) of this subsection] shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [in paragraph (3) of this subsection].

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

[Pub. L. 93-360, July 26, 1974, 88 Stat. 395, amended the last sentence of Sec. 8(d) by striking the words "the sixty-day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase ", or who engages in any strike within the appropriate period specified in subsection (g) of this section." It also amended the end of paragraph Sec. 8(d) by adding a new sentence "Whenever the collective bargaining aiding in a settlement of the dispute."]

(e) [Enforceability of contract or agreement to boycott any other employer; exception] It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) [this subsection] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) [this subsection and subsection (b)(4)(B) of this section] the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided

further, That nothing in this Act [subchapter] shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) [Agreements covering employees in the building and construction industry] It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

(g) [Notification of intention to strike or picket at any health care institution] A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act [subsection (d) of this section]. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[Pub. L. 93-360, July 26, 1974, 88 Stat. 396, added subsec. (g).]