

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

ELECTROLUX HOME PRODUCTS, INC.

and

Case **15-CA-206187**

J'VADA MASON, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE
AND ARGUMENT IN SUPPORT OF CROSS-EXCEPTIONS**

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COMES NOW Counsel for the General Counsel and, pursuant to Section 102.46 of the Board's Rules and Regulations, cross-excepts to the Decision of Administrative Law Judge Arthur J. Amchan, dated July 2, 2018, in the following particulars:

I. THE GENERAL COUNSEL'S CROSS-EXCEPTIONS

First Cross-Exception: To the Judge's finding that Respondent did not violate the Act in terminating Mason due to alleged protected concerted activities apart from her Union activity (e.g., complaining about a pay disparity; protesting the posting of a bathroom sign-out log; protesting favoritism on the part of Larry McClendon, who was Chris Fair's supervisor; or complaining about Fair) (ALJD 11:15-19).¹

Second Cross-Exception: To the Judge's finding that the record is insufficient to establish that Respondent bore animus toward Mason as a result of her protected concerted conduct or that it was related in any way to her termination (ALJD 11:20-22).

Third Cross-Exception: To the Judge's failure to definitively find that Mason engaged in protected concerted activities prior to her discharge (ALJD 11:19-20).

II. FACTS IN SUPPORT OF CROSS-EXCEPTIONS

A. Overview

Respondent is a home appliance manufacturer with a facility it has operated in Memphis, Tennessee since 2013. Respondent's Memphis facility employs approximately 700 hourly production and maintenance employees involved in the manufacture and assembly of residential ovens. These employees are currently represented by the International Brotherhood of Electrical Workers (IBEW) Local 474 (hereinafter the Union) following two successive organizing campaigns which spanned a period from early 2014 through about October 2016. A first election was conducted about May 2015, which the Union lost by a significant margin. Thereafter, a second campaign began

¹ References to "ALJD" are to the pages and lines of the Decision of the Administrative Law Judge (ALJ) as follows: ALJD page(s):line(s). "GCX" and "RX" references are to the numbered exhibits of the General Counsel, or Respondent, respectively. Transcript references are denoted by "Tr." followed by the page number(s).

almost immediately and culminated in an election conducted on September 27, 2016, which the Union won.

The Charging Party and discriminatee in this case is J'Vada Mason. Mason worked for Respondent as a Materials Team Lead from 2013 until her discharge on May 5, 2017. Mason was a capable and conscientious employee who loved her job and took it seriously. Mason was also an outspoken employee who was not reluctant to address workplace issues of concern to her and her co-workers. Mason's complaints included protesting the pay differential between team leads receive in the materials department as compared to team leads in other departments, and protesting a bathroom log that assembly supervisors and team leads started maintaining around March 2017, which required assembly employees to sign in and out whenever they needed to use the restroom. Mason also confronted Materials Department Manager Larry McClendon about his sexual harassment of female employees and she protested the favored treatment McClendon extended to female employees he was romantically involved with. Mason complained to the Union and several members of Respondent's management about her immediate supervisor, John Chris Fair, after Fair told her that he would lie about his subordinate employees, including Mason, if necessary to avoid being held responsible for workplace errors or deficiencies.

Mason was an open and vocal Union supporter during the organizing campaigns and she was a member of the Union's contract negotiation committee up to the date of her discharge. Mason's willingness to engage in protected concerted activities and to strongly support the newly certified Union made her a target for retaliation by her supervisors and management.

Mason was terminated for alleged insubordination on April 28, 2017. The credible evidence pertaining to that day, however, demonstrates that Mason performed her job conscientiously and to the best of her ability. She immediately addressed issues that could have resulted in down-time on her line. She also did her best to get specific tasks accomplished despite the absence of both bulk drivers who normally support her assigned assembly line (Line 2) on that day.

It is undisputed that on April 28, Mason was instructed by Fair to bring pallets of microwave ovens to Line 2. It is also undisputed that this work required the use of a forklift, equipment that was not available to Mason. Mason's response to Fair that she could not carry out his instruction was not defiance or willful insubordination, but was simply a statement reflecting reality – she did not have the necessary equipment to accomplish the directive she was given. Fair then took this opportunity to falsely claim that Mason conducted herself in an insubordinate manner on that day. Following a superficial and skewed investigation, Mason was terminated for this pretextual reason.

Mason filed an unfair labor practice charge on September 14, 2017 challenging her termination by Respondent on May 5, 2017. Following an investigation, the Region determined that Mason's charge, as amended, had merit.

A Complaint and Notice of Hearing issued on December 20, 2017 (GCX 1[e]), which alleged that Mason was unlawfully discharged in retaliation for her union and other protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act. Respondent's Answer was filed on January 3, 2018 (GCX 1[g]). On May 7, 8 and 9, 2018, a hearing was held before Administrative Law Judge (ALJ) Arthur J. Amchan in

Memphis, Tennessee. Judge Amchan's Decision and Order (ALJD) issued on July 2, 2018 (JD-42-18).

B. Mason's Protected Concerted Activities

1. Complaints about Pay Disparities for Team Leads in the Materials Department

In August 2016, Mason sent an email to several of Respondent's managers, including Human Resources (HR) Manager Diana Jarrett, raising the issue of pay disparities among team leads in the materials department compared to other departments, and requesting that this be rectified (GCX 10; Tr. 146-147). Mason testified that she first raised this issue in 2015 with then HR Director Terry Thomas, and at that time he promised to look into the situation in exchange for Mason agreeing to encourage her co-workers to vote against unionization in an upcoming election (Tr. 136-137).

2. Protesting Favoritism by Manager Larry McClendon

Mason testified that she and Manager McClendon had a cordial relationship and she enjoyed working for him and learning from him (Tr. 148). During most of 2016, Mason's immediate supervisor was Kenneth Oliver, who also reported to McClendon. About mid-2016, Mason became aware of a female co-worker who claimed that she had been sexually groped by McClendon and the incident had been reported to HR. Mason wanted to alert McClendon that a complaint had been made about him to HR, so she asked him to come with her to a private meeting room, where she informed McClendon that he had been accused of sexual harassment and that it needed to stop (Tr. 148-150). McClendon stated to Mason that Operations Manager Jason Parson was in a romantic relationship with the same employee he allegedly groped, and that McClendon intended to get Parson before Parson could get him (Tr. 151).

McClendon later told Mason that he learned that Supervisor Oliver had encouraged the employee to report McClendon's conduct to HR (Tr. 151). After this, it became apparent to Mason that McClendon was intent upon terminating Oliver (Tr. 151-153, 234). Mason was aware that McClendon was closely scrutinizing Oliver's performance and documenting errors he made. McClendon was ultimately successful in getting Oliver terminated (Tr. 154).

Following Oliver's discharge, McClendon hired someone he knew from church and who was related to McClendon's wife's family to replace Oliver (Tr. 154-155). This new supervisor was John Chris Fair.²

Mason testified that, about March 2017, it became apparent that a female material department employee, Kissy Killion, was not being required to perform her work as other employees were. Mason stated that she and other employees observed McClendon and Killion engaged in private conversations with each other, contributing to Killion's poor productivity. Employees complained to Mason about the favoritism (Tr. 159-160). Mason spoke to Killion, who confirmed that she was romantically involved with McClendon (Tr. 161). This prompted Mason to confront McClendon about the favoritism and to insist that it stop (Tr. 159-161).

3. The Bathroom Log Incident

Mason testified that about March 2017, when she returned to work after several days of contract negotiations, she had several notes left on her desk by assembly employees on Line 2 requesting her assistance (Tr. 162-163). When Mason spoke to these employees she learned that assembly team leads had started maintaining bathroom

² Jarrett admitted that prior to hearing, Respondent was not aware of the personal relationship between McClendon and Fair (Tr. 475).

logs, requiring employees to sign in and out when they visited the restroom. Employees were told that if they went to the restroom too often, or they were gone for more than five minutes, they would be required to produce medical documentation to the team lead. Mason walked up and down Line 2 and found one such log being openly displayed by Assembly Lead Tiffany Broadnax. Mason told Broadnax that this log was improper and a violation of employee privacy. Broadnax protested that the log had been approved by Sylvia Jennings, a non-unit training agent, and also John Collins, the Line 2 assembly supervisor, who was not at work on that day (Tr. 162-166).

Later that same day, Mason observed Operations Manager Jason Parson at Line 2 and she approached where Parson was standing and alerted him to the bathroom log hanging in Broadnax's work area. Parson instructed Broadnax "to take that mess down," in the presence of McClendon and Fair (Tr. 166-167). Mason testified that as she walked back to her work area with McClendon and Fair, some of the assembly employees started clapping, applauding Mason's intervention ending the maintenance of the logs (Tr. 167).

As they walked toward Mason's desk, Fair commented that Parson was angry and he asked Mason who she thought would "take the hit" for the bathroom log. Mason replied that since Collins was out that day, he would deny knowing about it, so it would likely be the team lead. Fair then stated, "I don't blame them, because if my job is on the line, I lie on you too" (Tr. 169-170). Mason, stunned by Fair's comment, asked him to repeat himself. At that point Fair put his hands on her desk and looked Mason in the eyes and stated, "If my job is on the line, I'm going to lie on you" (Tr. 170). Mason looked over at McClendon, who was standing next to Fair, and McClendon just dropped his head and did not say anything. Mason testified that she replied to Fair, "Well, since I know

that – since you are bold enough to tell me that you are going to lie on me, just know that I am going to tell the truth on you from now on” (Tr. 169).

When the parties had their next contract bargaining sessions around early April 2017, Mason reported Fair’s threat to the Union’s lead negotiator, Randy Middleton. At the lunch break that day, Middleton requested a sidebar conversation with Respondent’s bargaining team. Mason reported to Respondent’s negotiating team what Fair had said to her on the day the bathroom logs were discovered. Erika Robey, Respondent’s Labor Relations Manager, asked Mason to provide HR with a statement about this incident (Tr. 24, 169-171).

4. Mason’s Complaints about Supervisor John Chris Fair

Mason testified about Fair’s shortcomings as a material department supervisor. Specifically, he never bothered to introduce himself to the employees who work for him and he was resistant to learning how to perform the various duties of his job, which required the team leads to handle some of his tasks, such as ordering parts, for him (Tr. 155-156). Mason also testified that Fair would assign tasks to male employees, such as Kyle Smith, and the men would simply refuse to follow Fair’s instruction. In response, Fair would assign another employee (usually a female) to perform the task instead.

Mason testified that, as Robey had requested, she met with Robey and Jarrett in a HR conference room and she recounted the threat Fair made to her following the discovery of the bathroom logs while Jarrett took notes (Tr. 171). Before the meeting ended Mason was told to let HR know if Fair gave her any duties that he does not normally give her, because they did not want him retaliating against Mason (Tr. 172). Mason never heard anything further about her complaint.

Jarrett denied that there was ever a meeting she attended in the HR offices with Robey and Mason in which Mason provided an account about Fair's threats to lie about work issues (Tr. 466). Jarrett did, however, acknowledge that she and Robey discussed Mason's complaints (Tr. 453, 465)³ and that she and Mason discussed the matter in person on a separate occasion (Tr. 453-454).

In response to Mason's report Jarrett claims that she called McClendon, questioned him about the incident and told him that she needed a statement from Fair (Tr. 454; RX 1).⁴ Jarrett testified that she determined that this incident did not warrant a formal investigation (Tr. 474).

C. The Events of April 28, 2017

Mason testified that when she reported to work on Friday, April 28, 2017, McClendon and Fair were standing at her desk just after 6:00 a.m. They told her that both bulk drivers that service Lines 1 and 2 (Dana Bennett and Kenneth Ward) were out that day. McClendon stated that he was going to see if he could find someone to fill in. Fair walked off as well, presumably to do the same thing (Tr. 179-180). Mason turned on her computer, checked her email and turned her radio on. Mason testified that she had a brief exchange with Line 2 assembly supervisor John Collins, who asked her who the bulk drivers were for that day. Mason replied that she did not know and suggested he call Fair to find out (Tr. 195).⁵

³ Robey no longer worked for Respondent at the time of the hearing and was not called as a witness.

⁴ Jarrett gave conflicting testimony about whether she spoke to Fair about this incident or if she only reviewed a statement he had written (Tr. 473-474). Fair denied being aware of any inquiry into the statement he made to Mason following the discovery of the bathroom logs (Tr. 362-363). Curiously, Fair testified that he first learned about Mason's accusation *from Jarrett around the time of Mason's discharge* (Tr. 362). Jarrett never disputed this testimony by Fair.

⁵ Mason denied that Collins ever asked her to get any parts that morning (Tr. 195-196). Collins did not testify at the hearing.

Mason immediately got a radio call from assembly lead Tiffany Broadnax, who told her that she did not have the correct parts for the next order that was scheduled to run. It appeared that the wrong clocks and panels had been delivered to Broadnax's zone a day or so earlier and she had just discovered the error (Tr. 179, 181).

Mason recognized that this type of error could result in the line going down, so she got the part numbers from Broadnax and found a tug near her work area which she drove to the north supermarket to pick the correct parts for Broadnax. At about 6:45 a.m, while she was picking those parts, Fair approached Mason and told her that he needed her to take microwaves to the line. Mason explained to Fair that she was getting correct parts for Broadnax and trying to get them to her as soon as possible to avoid down-time. Fair responded that he would go and find someone to take the microwaves to the line and walked off (Tr. 179-183). Mason testified that microwaves were not scheduled to run on Line 2 for another four hours (Tr. 182).

As Mason was about to deliver the requested parts to Broadnax, she encountered Fair again, who told her that Gerren Powell (also known as "G"), a bulk driver who normally works on Line 4 (also known as the BADO Line) would be one of the replacement drivers for that day (Tr. 183-184). When Mason delivered the parts to Broadnax, she informed Mason of additional parts that she needed as soon as possible (Tr. 184). Mason got those part numbers from Broadnax and was on her way back to the north supermarket on the tug when she heard assembly team leads from both Lines 1 and 2 calling Powell in quick succession requesting bulk parts for their lines. Powell took the call for Line 1 and when he got the call from a Line 2 assembly team lead just after that, he told the Line 2 lead that he was assisting Line 1. The Line 2 assembly team lead then

told Powell over the radio that the bulk drivers he was replacing (Bennett and Ward) support both lines (Tr. 184).

While Mason was picking the additional parts needed by Broadnax, she observed Powell drive his lift down a warehouse aisle close to her location. She overheard Powell making the following angry outburst to himself as he drove past, “They got me fucked up. I’m not going to do both lines. They are not going to work the shit out of me. I’ll clock out of this motherfucker and take my ass to the house” (Tr. 184).

Mason then heard Powell get on the radio and call Fair and tell him that he needed to see Fair at the end of Line 4. Mason then observed Powell and Fair speaking to each other at that location. She could see that Powell appeared upset and animated as he spoke, shaking his head and gesturing with his arms (Tr. 184-186). The only piece of the conversation that Mason could hear was Powell stating to Fair, “I ain’t doing it” (Tr. 185). Fair admitted that Powell complained to him about being assigned to assist with Lines 1 and 2 on that day, but denied that Powell refused to perform any work (Tr. 351-352).

A short time after this, Mason hears Candyce Cox, an assembly employee who was acting team lead that day, call Fair on the radio. From where Mason was picking parts she could see Fair sitting at his desk. Mason observed Fair walk over to Cox, speak to her and walk away (Tr. 185-186). Cox then called Mason on the radio. Mason asked Cox who told her to call and she replied that Fair told her to. Cox needed bulk parts that required a forklift. Mason, who no longer had the tugger, took the part numbers from Cox and told her that she (Mason) was walking. She told Cox to call Powell, as he was the bulk driver for Line 2 for that day. Mason heard Cox try to reach Powell over the

radio and she never heard Powell answer (Tr. 186-187). Mason testified that she never saw Powell or heard him on the radio frequency for Line 2 during the rest of that morning (Tr. 188-189).

Mason then encountered Rakea Connelly, a receiving department employee driving a forklift, and she was able to persuade Connelly to help her out by getting the bulk parts Cox needed and dropping them off at the end of Line 2 (Tr. 187-188). Mason subsequently confirmed with Mike Shaffer, a tug driver on her team, that the bulk parts Cox needed had been delivered by Connelly and Shaffer had moved the materials to Cox's work area using a pallet jack (Tr. 188, 198).

Mason recalls that at this point in the morning, Fair informed her that John Weaver⁶ would be assisting Powell as the second bulk driver supporting Lines 1 and 2 (Tr. 189-190).

Mason returned to her desk where she checked the production schedule for changes and was preparing to reload work orders into the pickers' radio frequency (RF) guns (Tr. 189). As she was at her desk, Fair and the Line 1 assembly supervisor, Hamza Huqq, approached her. Fair tells her, "I need you to take microwaves to the line." Mason responds that there are two bulk drivers now and she did not have the resources to take microwaves to the line since she did not have a lift (Tr. 190-192). Mason suggested that Fair check with forklift drivers in the corrugate area, as they might have a lift available if there is no trailer parked at the dock door. Fair replied that those guys do not work for him. Mason then asks Fair if all Respondent's employees aren't part of the same team. At that point Huqq speaks up in a forceful tone of voice and tells Mason that his line needs to run. Mason clarifies that she is not the materials lead for Line 1; that she

⁶ Weaver normally works on Mason's team as a picker (Tr. 191).

is assigned to support Line 2 (Tr. 192-193). Huqq stated that he needed his glass and Mason reiterates that she is not Line 1's contact for materials. Mason, confused by Huqq's statements, observed that he was getting angry. She admits that she walked away from Fair and Huqq before she got angry herself (Tr. 193-194).

Mason testified that she never heard Fair or any assembly team lead contact a bulk driver to request that microwaves be brought to Line 2 that morning (Tr. 196). Mason and Fair consistently testified that Fair never instructed her to contact a bulk driver; instead he told her on two occasions that *she was to bring the microwaves to the line* (Tr. 196-198, 333, 360).

Mason testified that Line 2 ceased production that morning at about 10:00 or 10:15 a.m. for reasons unrelated to microwaves (Tr. 197). The down-time was caused by the lack of boxes and the oven models needing microwaves were never run on that day (GCX 6 at 2). Fair acknowledged that both Lines 1 and 2 were down by 10:30 a.m. that morning due to a lack of boxes (Tr. 334, 363).

Fair's testimony about the events of April 28, was unclear and at times contradictory based on his poor recollection.⁷ Fair testified that he first instructed Mason to bring microwaves to Line 2 at about 6:15 a.m. that morning (Tr. 304-305).⁸ He then asked her a second time when she was picking parts for Broadnax at about 6:50 a.m. Fair testified that on both occasions Mason responded by stating that she was not getting on a lift (Tr. 304, 307, 355-356). Fair then testified that his third instruction to Mason to get microwaves for Line 2 occurred no later than 7:30 a.m. that morning when he and Huqq

⁷ Fair's testimony reflects numerous responses of "I don't remember" (Tr. 308, 310, 312, 313, 315, 316, 318, 319, 326, 328, 329, 331, 337, 340, 341, 348, 350, 356, 358, 359, 363, 366).

⁸ Mason testified that the first time Fair instructed her to get microwaves that morning was at about 6:45 a.m. when she was on a tugger in the warehouse picking the correct parts that Broadnax needed (Tr. 182).

approached Mason at her work area (Tr. 366).⁹ However, Fair recalled that microwaves were delivered to the line by 7:30 a.m. that morning (Tr. 354). Fair could not explain why, in the presence of Huqq, he continued to direct Mason get microwaves to the line when those items had been or were being delivered by a bulk driver as this conversation was taking place (Tr. 354-355). Fair also admitted that at the time of the exchange involving Mason, Huqq and himself, he knew that Weaver was delivering glass to Line 1 (Tr. 329). Fair testified that he informed Huqq that Weaver was getting what Line 1 needed (Tr. 366).¹⁰ Fair could not explain why Huqq was complaining to Mason that Line 1 needed glass during the conversation (Tr. 329).

Fair testified that Line 2 assembly supervisor John Collins instructed Mason to bring microwaves to the line early that morning but he could not provide a clear explanation as to how and when Collins gave this directive to Mason (Tr. 305-306, 359).¹¹

Fair admitted that he was aware that acting assembly lead Candyce Cox requested Mason assist her in getting bulk parts and that those parts were delivered to Cox that morning (Tr. 331-332). Fair also admitted that Cox first radioed Powell requesting these parts and he never responded (Tr. 330).

Fair disputed that Broadnax had an urgent need for clocks and harnesses that morning and that her belief that she did not have the correct parts on hand for the models scheduled to run next was incorrect (Tr. 320, 352-353). Apart from Fair's testimony,

⁹ Fair's written statement dated April 28, indicates that this exchange took place at 7:45 a.m. (GCX 11). Huqq testified that Fair summoned him over to Mason's work area (apparently to witness his conversation with Mason) and that Fair instructed Mason to bring microwaves to Line 1 (Tr. 396-397).

¹⁰ Huqq denied that Fair ever told him that the parts he needed were being delivered to Line 1 by employees other than Mason (Tr. 398, 415-416).

¹¹ Collins was never called as a witness, nor is there record evidence that he was not available or no longer employed by Respondent at the time of the hearing.

Respondent failed to adduce any probative evidence to substantiate or corroborate Fair's contention.

As to the availability of an extra forklift on the day in question, Fair admitted that he was not aware that Sykerra Walker drove one of the bulk drivers' forklifts that day as Walker's usual piece of equipment, a cherry picker, was not operational. Thus, Fair mistakenly believed that there was an extra lift available for Mason to use on the morning of April 28, 2017 (Tr. 351, 364).

D. Respondent's Investigation and Decision to Discharge Mason

Jarrett testified that as she was driving to work on Friday, April 28, she received a call from Fair, who reported to her that he needed Mason's assistance that morning and she was refusing to help him out. Jarrett instructed Fair to obtain statements in preparation for a discussion of the matter after she arrived to work (Tr. 446). Fair prepared his own written statement and obtained brief written statements from Huqq, Collins and Cox (GCX 11). Fair did not ask Mason to prepare a statement at the time these other witnesses were asked.

Just before noon on April 28, Mason was told by Fair that she needed to be at a meeting at 12 in one of the conference rooms (Tr. 199). When Mason saw that her calendar did not show any scheduled meetings, she got Shop Steward Stanley Reese to accompany her to the meeting.

An investigatory interview of Mason was conducted by Jarrett. The testimony is confused and inconsistent in terms of who was present at this meeting. Mason testified that she was present with Reese and others present were Jarrett, Robey, McClendon and Fair. Mason and Reese testified that neither Collins nor Huqq were present in this

meeting (Tr. 200). Jarrett recalled Collins and Huqq were present in addition to the others (Tr. 446, 477).¹² Fair was never asked to name everyone present in this meeting and in his testimony he only identified Mason and Jarrett being present (Tr. 318).¹³

Mason and Reese testified that Jarrett took notes throughout the meeting (Tr. 76, 205-206). Jarrett denied that she took notes and claimed that Robey was the one taking notes (Tr. 477).¹⁴

Mason and Reese testified that during the investigative interview, Mason repeatedly asserted that she never refused any instruction from Fair, but only informed him that she was not able to bring microwaves to the line because she did not have a forklift necessary to do the work (Tr. 74-75, 205). Reese testified that it seemed like Jarrett and the other managers did not want to hear what Mason had to say (Tr. 74).

Jarrett testified that she did not recall Mason stating in the meeting that she did not have a forklift on that day (Tr. 486). Jarrett admitted that during the interview she assumed that since two bulk drivers were absent that day, Mason had ready access to a forklift (Tr. 447, 486-487).¹⁵ Jarrett further admitted that she did not recall being aware from the meeting discussion that Weaver and Powell had been asked to support Lines 1 and 2 as replacement bulk drivers on that day (Tr. 481-485, 487).

Jarrett also admitted in her hearing testimony that she had a mistaken impression that Cox did not get the parts that she requested from Mason that morning (Tr. 487-491).

¹² Huqq testified that he recalled being present in a meeting in which Mason was asked questions. He could not recall whether Diana Jarrett or Leola Roberts conducted the meeting. Huqq was also certain that Reese was not present (Tr. 422-425).

¹³ Fair also testified that he did not recall what questions were asked or anything Mason said at the meeting (Tr. 318-319).

¹⁴ The notes of the investigative interview were never produced by Respondent pursuant to subpoena (GCX 21). Jarrett presented inconsistent and confusing testimony as to whether she ever had a copy of Robey's notes and why these notes were not part of the record of the investigation (Tr. 477-479).

¹⁵ Fair also repeatedly admitted that he mistakenly believed a forklift was idle that day and available for Mason to use (Tr. 349, 351, 364).

Jarrett further claimed that Collins told her during the investigative interview that the parts requested by Broadnax were not needed immediately, contrary to what Broadnax had told Mason (Tr. 489). There is no evidence that Broadnax was questioned in this investigation, nor did Respondent offer evidence that Mason was told by Fair or Collins that the need for microwave ovens was more urgent than Broadnax's request. Jarrett testified that she had determined that on April 28, 2017, Mason refused to comply with Huqq's request that she bring microwaves to his line (Line 1) even though both Fair and Huqq denied that such a request was made (Tr. 366, 397, 494-495).¹⁶

Finally, Mason admits that during the investigative interview she declined to provide a written statement. Mason's refusal was based in part on the observation by Mason and Reese that Jarrett was taking copious notes (Tr. 205-206). Mason further explained in her testimony that Respondent's form for employee statements does not provide sufficient space for a lengthy, detailed statement.¹⁷ Mason testified that if she was to provide a statement, she would need time to take it home and prepare a full comprehensive account.

Upon the conclusion of the investigative interview, Mason returned to work and continued to work her normal schedule and duties for the rest of that day and through the following week. Jarrett testified that this was permitted because Mason's alleged misconduct was not violent and did not involve weapons or drugs (Tr. 444).

Jarrett testified that following this meeting she met with then HR Director Leola Roberts and recommended that Mason be terminated. The discharge recommendation was then vetted through Pearson, Smith and O'Rourke (Tr. 372-374, 452). About May 1,

¹⁶ Mason also denied that she ever received a work instruction from Huqq on April 28, 2017 (Tr. 193).

¹⁷ Respondent's Employee Statement form appears at pages 2-4 of GCX 11.

Pearson sent an email to Union Business Manager Paul Shaffer in which he notified Shaffer that Respondent was considering terminating Mason following an investigation (Tr. 33). Pearson's email included the witness statements that had been obtained during the investigation (GCX 11). Upon reviewing the statements, Shaffer noticed that there was no statement from Mason. He contacted Mason and recommended to her that she submit a statement detailing her account of the incident (Tr. 36, 213-214). Shaffer testified that after reviewing the materials he spoke to Pearson and protested the proposed discharge of Mason, arguing that no discipline harsher than a suspension was warranted (Tr. 35).

After speaking with Shaffer, Mason prepared a detailed statement which she emailed to Shaffer on the evening of May 3 and to Jarrett on the morning of May 4, 2017 (GCXs 2, 6).

On the morning of May 5, 2017, Mason went to the HR offices to inquire about what time her scheduled leave for the second half of that day would begin (Tr. 216). While she was in the HR offices, Roberts saw her and told her that she needed to discuss the results of the investigation. Mason summoned Reese to accompany her to the meeting. In a conference room Roberts met with Mason and Reese. Mason testified that Robey, McClendon, Fair, Collins and Huqq were also present (Tr. 216). According to Robey's notes, the meeting started at 10:55 a.m. and ended 11:03 a.m. (RX 3). Roberts told Mason that she was being discharged for insubordination. Mason was angry and walked out of the conference room. In the lobby area of the HR offices she received a separation notice from Roberts. Mason then told Roberts that she'd be hearing from Mason's attorney, as this was clear case of retaliation (Tr. 217).

Patricia Lytle, a tug operator on Mason's team, testified that on May 5, employees learned that Mason had been terminated when they returned from lunch (Tr. 119). Lytle observed Fair and James Allen (materials team lead for Line 1) celebrate by giving each other a "high-five" hand slap while Fair said to Allen, "she's gone" (Tr. 120).

Jarrett admitted that she never read Mason's statement prior to when Mason was fired (Tr. 494). Roberts, who implemented the discharge decision on the morning of May 5, never mentioned that she saw or considered Mason's statement. Robey's detailed notes of the meeting do not reveal any reference to Mason's written statement or any acknowledgment that it was considered (RX 3).

E. Evidence of Disparate Treatment and Pretext in Connection with Mason's Termination

Respondent's handbook contains a four-step progressive disciplinary policy in which step one is a documented verbal counseling, step two is to a written warning, step three is a final warning and suspension, and finally, the fourth step is termination (GCX 12 at 49). "Insubordination (i.e. refusing to follow legitimate instructions of a superior directly related to performance of one's job)" is specified as prohibited conduct (GCX 12 at 51). Respondent generally considers earlier discipline to be "active" for purposes of progression for a period of one year.

Mason's work history shows that she received a verbal counseling on January 12, 2017 for an allegedly erroneous inventory transaction that occurred more than one month earlier, December 5, 2016 (GCX 8). Respondent determined that for Mason's alleged insubordination on April 28, 2017, it was appropriate to skip the intermediate progressive steps and to impose termination (GCX 5).

Counsel for the General Counsel introduced documentary evidence and testimony showing that Respondent does not normally treat insubordinate conduct so harshly. Carey Taylor was discharged by Respondent about February 25, 2016, for insubordinate conduct in which Taylor, over the course of several days, repeatedly and deliberately refused to complete “movement sheet” documentation (GCX 13 at 4). Respondent’s position statement to the NLRB addressing Taylor’s disciplinary history acknowledges that Taylor engaged in a “pattern of insubordination” from the time he was hired in December 2013 (GCX 13 at 2). In March 2014, Taylor received verbal counseling discipline for playing music on his cell phone during work time. Taylor had been insubordinate by refusing to give his cell phone to his supervisor, and he had been previously counseled for the same misconduct (GCX 13 at 2 and attached Exhibit C). In January 2015, Taylor was issued another verbal warning for insubordination toward his supervisor on multiple occasions. Taylor was also issued a five-day suspension about February 11, 2016, for alleged insubordination in leaving a mandatory meeting without permission (GCX 13 at 3-4). This suspension was determined to be unlawful by the Region 15 and is reflected in the informal settlement agreement introduced into evidence at the hearing (GCX 3).¹⁸

Lonneshia Craft was issued a five-day suspension about May 1, 2018 for an incident occurring about March 26, 2018 when she failed to perform tasks assigned to her by her supervisor (GCX 14).

Shanika Handy was issued formal discipline on December 21, 2015 for insubordinate conduct and job abandonment on two separate occasions, December 14 and

¹⁸ Taylor’s discharge is not reflected in the informal settlement agreement as it was not determined to be unlawful by the Region.

19, 2015. On each date Handy was assigned to a work area by her supervisor, but later left that work area without her supervisor's permission. While the precise level of discipline is not evident from the document, its references to the need for improved performance and the possibility of future discipline demonstrate that it was less than termination (GCX 15).

Lakelia Davis was terminated about December 12, 2016 for gross insubordination when she was approached by an auditor on November 23, 2016 and she refused to answer the auditor's questions, cursed the auditor and drove away from the auditor on a forklift (Tr. 458; GCX 16 at 1-2). Davis' disciplinary history shows that she received a five-day disciplinary suspension in early November 2016 for failure to follow instructions concerning required inventory transactions on September 30, 2016 (GCX 16 at 3-4). Prior to that, on September 8, 2016, Davis received warning discipline when, on September 2, she disregarded her supervisor's repeated instructions to stop texting and using her cell phone while she was operating a motorized piece of equipment (truck) in the warehouse. She protested the supervisor's instructions in an angry tone of voice before driving off from the supervisor (GCX 16 at 5-6).

Keith Dotson was issued five-day suspension discipline in November 2016 for refusing his supervisor's work instruction on November 9, 2016, stating, "I just did not want to do it" (GCX 17 at 1-2). Dotson received prior warning discipline for insubordination in July 2014 for repeatedly defying his supervisor's instruction to take his lunch at a different time from his co-worker (GCX 17 at 3).

Renita Leath was issued verbal counseling discipline on January 12, 2017 for refusing to perform her job on January 4, because she believed that she was entitled to a

break at that time. Leath's insubordinate conduct caused 15 minutes of down time on the press equipment she was assigned to operate (GCX 18).

William James was issued five-day suspension discipline in July 2016 when, on June 22, he was instructed by his supervisor to relieve another press operator and he refused to do so (GCX 19 at 1-2).

Mason testified that she was not aware of any employees who have been terminated for insubordination. Mason and Patricia Lytle testified about other instances in which employees refused to comply with work instructions given by Fair, and no discipline to the employee resulted.¹⁹ Lytle testified that about March or April of 2017, the materials team for Line 2 was short-handed because one of the tug operators (Brian Oliver) had been fired for poor attendance. Fair asked Lytle to help cover the work that Oliver used to perform in addition to her normal duties. Lytle knew that Fair had also instructed Kyle Smith to assist, but Smith did not help out. Lytle informed Fair on more than one occasion on that day that Smith was not helping. Fair confirmed to Lytle that he had instructed Fair to assist her. Lytle testified that she never received any assistance from Smith on that day and it never appeared to her that there were any disciplinary consequences to Smith (Tr. 116-118).

Lytle also recalled an incident that took place about the same time, March or April 2017. On this occasion, she heard Fair on the radio giving a work instruction to materials team lead James Allen. She recalled that Allen responded, "I am not doing it. I have other stuff to do" (Tr. 118-119).

¹⁹ Respondent never introduced any disciplinary records for James Allen, Gerren Powell or Kyle Smith to demonstrate that discipline had in fact issued over the incidents Mason and Lytle testified about.

Mason testified about an incident involving Kyle Smith that took place around March or April 2017. Mason testified that Mike Shaffer, a new tug operator on her team,²⁰ was still being trained in his new position. Fair instructed Smith to assist Shaffer in dropping off parts because Shaffer was not yet familiar with all the drop-off points (Tr. 175-177). Smith responded to Fair in a loud voice that he wasn't doing shit, he was not going to help because he had his own work to do and he was tired because he has a second job, then he walked off away from where Fair and Mason were standing (Tr. 175-176, 218). Mason asked Fair if he was going to let Smith disrespect him like that. Fair replied that he wanted to fire him, but Smith had a baby on the way (Tr. 176-177).

Mason also testified that she believed that on April 28, 2017, bulk driver Gerren Powell had refused Fair's instruction to assist with Lines 1 and 2 (Tr. 184-189, 218).

III. ARGUMENT IN SUPPORT OF CROSS-EXCEPTIONS

In cases where an employer's motivation for a personnel action is in issue the Board utilizes the test outlined in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 800 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982). To establish a violation under *Wright Line*, the General Counsel bears the initial burden of showing that protected concerted activity was a motivating or substantial factor in the adverse employment action. The three elements commonly required to support such a showing are: (1) the employee engaged in protected concerted activity; (2) the employer had knowledge of that activity; and (3) the adverse action taken against the employee was motivated by the activity. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 (May 31, 2018); *Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100, 1105

²⁰ Mason testified that Shaffer had been transferred on to her team to replace Brian Oliver, who had been fired for poor attendance (Tr. 173-175).

(2000). If these elements are met, the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir 2015); *Centre Property Mgmt.*, 277 NLRB 1376 (1985). If, however, the evidence establishes that the reasons given for the employer's action are pretextual - that is, either false or not in fact relied upon - the employer fails by definition to show that it would have taken the same action for those reasons, and no further analysis is required. *SFO Good-Nite Inn*, 352 NLRB 268, 269 (2008); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

The Board has held that an employee's activity is concerted if the employee engages in activity with or on the authority of other employees and not solely on the employee's own behalf. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*). The Board has held that "protected concerted activity" includes conduct by an individual employee when the conduct seeks "to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*). Individual actions will also be "concerted" where such actions are a "logical outgrowth" of group concerns. See *C & D Charter Power Systems*, 318 NLRB 798 (1995), citing *Mike Yurosek & Son*, 306 NLRB 1037, 1038 (1992), enfd. 53 F.3d 261 (9th Cir. 1995).

When concerted activities involve employee complaints or inquiries about matters such as wages and bonuses, safety issues, or other terms and conditions of employment they are protected by Section 7 of the Act. *Super One Foods*, 294 NLRB 462 (1989) (wage complaints); *Trayco of S.C.*, 297 NLRB 630 (1990) (wage complaints); *Talsol*

Corp., 317 NLRB 290, 316-317 (1995) (safety complaints).

A. Mason’s Conduct Clearly Constituted Protected Concerted Activities

The Judge erroneously declined to make a definitive finding that Mason’s multiple protests pertaining to terms and conditions of employment, apart from her Union activities, constituted protected concerted activities (ALJD 11:19-20). The record evidence clearly establishes that Mason repeatedly complained about pay levels for team leads in the materials department, that she was instrumental in ending the use of bathroom logs for assembly employees on Line 2, and that she confronted McClendon about his sexual harassment of female co-workers and his practice of demonstrating favoritism to those employees receptive to his advances. All of these matters reflected issues of group concern affecting Mason’s co-workers. As to McClendon’s favoritism and the bathroom log incident, Mason was prompted to act by complaints from her co-workers.

Mason’s complaint about the pay disparity for team leads in the materials department was also an issue that impacted every lead employee in that department and not only Mason. Thus, the fact that Mason acted alone in sending the August 2016 email bringing this complaint to the attention of Jarrett and other managers does not preclude that conduct from being concerted in nature. The Board has held that an employee acting alone is engaged in concerted activities where “that employee was acting for, or on behalf of, other workers, or was acting alone to initiate group action, such as bringing group complaints to management’s attention.” *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131, slip op. 2 (July 24, 2018).

The same is true for Mason's complaint about Fair's threat to lie about his subordinate employees if necessary to deflect responsibility for his own errors or deficiencies. Mason complained about Fair's threat to the Union and also to members of Respondent's bargaining committee. Jarrett also admitted that Mason reported Fair's threat directly to her in late March 2017 (Tr. 453-454). As Jarrett's notes show, Mason expressed concern that an assembly team lead had been disciplined for following the instructions of a supervisor (RX 1). Under these circumstances, Mason's complaint to Jarrett about Fair was not a "personal gripe," but is properly viewed as a preliminary step to concerted action. See *Circle K Corp.*, 305 NLRB 932, 933, enfd. mem. 989 F.2d 498 (6th Cir. 1993).

The record evidence demonstrates that Mason's persistent activism and protected concerted activities, apart from her Union activity, served to make her a target for retaliation by Respondent.

B. The Judge Erred in Determining that there was Insufficient Evidence of Animus toward Mason's Protected Concerted Activities

With regard to animus and motivation, rarely does an employer provide a "smoking gun." For this reason, circumstantial evidence is sufficient to prove the unlawful motive element of retaliatory acts alleged to violate Section 8(a)(3). *Turnbull Cone Baking v. NLRB*, 778 F.2d 297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986). Unlawful motivation may be established by evidence which includes, among other things, (1) the timing of the employer's adverse action in relationship to the employee's protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus, (4) the disparate treatment of the discriminatee(s), (5) departure from past practice, and (6) evidence that an

employer's proffered explanation for the adverse action is a pretext. *National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016). Employer conduct which reflects hostility toward protected activities may be relied on as evidence of animus, even if that conduct is not itself unlawful. See *Braun Electric Company*, 324 NLRB 1 (1997); *Stoody Company*, 312 NLRB 1175, 1181-82 (1993).

About March 2017, Mason confronted McClendon about the favoritism being shown to employee Kissy Killion and she insisted that it stop (Tr. 159-161). This was around the same time that Mason intervened when bathroom logs were unlawfully imposed on the Line 2 assembly employees and she promptly and effectively put an end to the practice the same day that she learned about the logs (Tr. 162-167). Of course, it was this advocacy by Mason that prompted Fair to threaten Mason, in the presence of McClendon, that if his shortcomings as a supervisor were ever exposed, he would lie about the situation in order to save his job. Rather than being intimidated by Fair's threat, Mason assured Fair that now that she knew he was willing to lie on her, she would be sure to tell the truth about him (Tr. 169).

Mason was concerned enough about Fair's threat that she brought it to the attention of Union officials and also to Respondent's bargaining committee. Mason also reported Fair's threat to Jarrett and identified McClendon as a witness. Jarrett told Mason that she would look into the matter (473-474). Jarrett claims that she contacted McClendon, questioned him about the incident and told him that she needed a statement from Fair (Tr. 454, 474).²¹ Following this limited inquiry, Jarrett closed the matter without further investigation (Tr. 474).

²¹ Jarrett gave conflicting testimony about whether she spoke to Fair about this incident or if she only reviewed a statement he had written (Tr. 473-474). Fair denied being aware of any inquiry into the

McClendon, Fair and Collins had good reason to be concerned that Mason was prepared to expose their errors and misconduct when the opportunity presented itself. Shortly thereafter, on April 28, McClendon, Fair and Collins seized on this chaotic morning to falsely accuse Mason of refusing work orders given to her. They provided inaccurate and incomplete information to Jarrett, who conducted a superficial and skewed investigation of the matter.

Jarrett's testimony clearly establishes that she did not have an accurate understanding of essential facts at the time she recommended to HR Director Roberts that Mason be discharged for insubordination (ALJD 5:30-40; Tr. 450). Jarrett testified that she had determined that on April 28, Mason refused to comply with an instruction that she bring microwaves to Line 1 even though Fair denied that such an instruction was given to her (Tr. 366, 397, 494-495). The Judge properly considered Jarrett's discredited testimony as evidence of animus and pretext (ALJD 10:33-40). See *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 10 (Aug. 27, 2018).

The hearing record contains compelling evidence of disparate treatment which the Judge properly relied on to support an inference of animus. Respondent never effectively challenged the General Counsel's evidence demonstrating that Respondent does not routinely discharge employees for insubordinate conduct. Jarrett's limited testimony about one comparator, Lakelia Davis, only served to strengthen the General Counsel's case by showing that Davis engaged in conduct that was more egregious than anything Mason was accused of (Tr. 458-459; GCX 16). It is submitted that the same evidence of disparate treatment which strongly supports the Judge's inference of animus and pretext

statement he made to Mason following the discovery of the bathroom logs (Tr. 362-363). Curiously, Fair testified that he first learned about Mason's accusation *from Jarrett around the time of Mason's discharge* (Tr. 362). Jarrett never disputed this testimony by Fair.

also supports the inference that Respondent was motivated to retaliate against Mason for her protected concerted activities.

The circumstantial evidence indicates that McClendon had good reason to fear that Mason would report him for showing favoritism to female hourly employees he was romantically involved with. Fair had reason to fear that Mason would, as promised, no longer cover for him and she would expose his ineptitude. Similarly, Collins had reason to fear that Mason would report his errors to higher management, as she had with the bathroom logs. One solution to their common problem was to falsely accuse Mason of misconduct and to advocate for her discharge before she could bring future credible complaints against them.

An employer violates Section 8(a)(1) when its actions operate to chill or curtail future Section 7 activity of statutory employees.²² In *Parexel International*, the Board made clear that an employer's "preemptive strike to prevent [an employee] from engaging in activity protected by the Act" violates Section 8(a)(1) because of its chilling effect on employees' future exercise of their Section 7 rights.²³ Even if an employee has no history of Section 7 activity, if the employer acts to prevent that employee from engaging in protected activity in the future, "that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more."²⁴ In *Parexel*, the Board noted that it is the suppression or chilling of future protected activity that lies at the heart of unlawful employer retaliation against past protected activity.²⁵ Similarly, Board

²² See, e.g., *Parexel International, LLC*, 356 NLRB 516, 517-518 and cases cited at n.9 (2011) (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees).

²³ *Id.*, at 518.

²⁴ *Id.*

²⁵ *Id.*

precedent holding unlawful an employer's adverse action taken on the mistaken belief that an employee engaged in protected concerted activity is premised on the notion that the chilling of future protected activity violates the Act.²⁶

In the instant case, the General Counsel's evidence permits an inference that Respondent's apprehension of future protected concerted advocacy by Mason provided a basis for her discharge. In sum, it is submitted that the same circumstantial evidence which supports the Judge's conclusion that Mason was unlawfully discharged in retaliation for her Union activities, also strongly supports a determination that Respondent was unlawfully retaliating against Mason for her contemporaneous protected concerted activities.

C. The Judge Erred in Failing to Find that Respondent Unlawfully Discharged Mason in Retaliation for Her Protected Concerted Activities.

The evidence in this case demonstrates that Mason was a strong Union activist and that, apart from her Union activities, she also engaged in multiple instances of protected concerted activities which would be sufficient on their own to cause her to be targeted for retaliation. The Judge correctly concluded that the evidence established that Mason was unlawfully discharged for her Union activities and that Respondent's asserted reason was pretextual. In light of the evidence showing that Mason engaged in

²⁶ See, e.g., *United States Service Industries, Inc.*, 314 NLRB 30, 31 (1994) (“[A]ctions taken by an employer against an employee based on the employer’s belief the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity.” (internal quotation marks omitted)), *enfd.* 80 F.3d 558 (D.C. Cir. 1996) (unpublished table decision); *Metropolitan Orthopedic Associates, P.C.*, 237 NLRB 427, 427 n.3 (1978) (“The discharge of 4 employees in a unit of 13 employees because of Respondent's belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act”). See also *Parexel International, LLC*, 356 NLRB at 518, relying also upon *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964), and cases cited therein (holding unlawful a mass discharge undertaken without concern for whether all of the individual employees were engaged in protected activity).

significant protected concerted activities contemporaneous with her Union activities, the Judge did not have a sound basis to determine that Respondent was acting solely out of anti-Union animus and not out of hostility to Mason's other protected concerted activities.

IV. CONCLUSION

For the reasons discussed above, the General Counsel requests that the Board grant these cross-exceptions and find that Respondent's discharge of J'Vada Mason also violated Section 8(a)(1) of the Act as set forth herein.

Dated at Memphis, Tennessee, this 14th day of September, 2018.

/s/
Linda M. Mohns
Counsel for the General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, a copy of Counsel for the General Counsel's Cross-Exceptions and Argument in Support was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on September 14, 2018, a copy of Counsel for the General Counsel's Cross-Exceptions and Argument in Support was served by e-mail on the following:

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