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## **I. STATEMENT OF THE CASE**

### **A. BACKGROUND**

This matter is before the Board on Respondent Electrolux Home Products, Inc.'s (Electrolux or the Company or Respondent) exceptions, and counsel for the General Counsel's (CGC) cross-exceptions, to Administrative Law Judge Arthur J. Amchan's July 2, 2018 Decision. Respondent submits this answering brief to CGC's cross-exceptions pursuant to Section 102.46(d) of the Board's Rules and Regulations.<sup>1</sup>

Charging Party, J'Vada Mason, is a former team lead at Electrolux's Memphis, Tennessee plant. The International Brotherhood of Electrical Workers, Local 474 (the Union), organized the plant in September 2016, and Mason became a member of the Union's negotiating committee shortly thereafter. She was discharged for insubordination on May 5, 2017,<sup>2</sup> after she repeatedly refused to follow her supervisor's instructions on April 28.

The plant's human resources department promptly investigated Mason's misconduct, gathering witness statements and conducting investigatory interviews. Thereafter they consulted with the Union pursuant to the parties' pre-contract interim discipline procedure, and the Union raised no objection to the proposed decision to discharge Mason. The Union also declined to file an unfair labor practice charge on Mason's behalf.

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

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<sup>1</sup>Respondent filed its exceptions and supporting brief on July 30, 2018. CGC filed an answering brief to Respondent's exceptions on September 14, 2018. Respondent filed a reply to CGC's answering brief on September 28, 2018.

<sup>2</sup>All dates referenced herein are in 2017, unless otherwise indicated.

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

On July 2, the judge issued a decision concluding that Mason was discharged because of her union activity. The judge concluded that Mason was *not* discharged because of her alleged protected concerted activity. Respondent excepted to the judge's decision that Mason was discharged because of her union activity, while CGC cross-excepted to the judge's decision that Mason was not discharged because of her alleged protected concerted activity.

## **B. Summary of Facts<sup>3</sup>**

Mason was hired in April 2013 as a team member in the materials department. She was promoted to team lead in June 2013 and worked in that capacity until she was discharged on May 5. (Tr. 122-123.) The record reflects that Mason engaged in some protected concerted activity during her employment with Electrolux.

### **1. Alleged Protected Concerted Activity**

#### **a. Complaints about materials department team lead pay**

On August 13, 2016—ten months before she was discharged—Mason sent an email to then-HR Business Partner Diana Jarrett inquiring about why materials department team leads were not making at least \$3.54 per hour more than their team members as the other department team leads did (GC Exh. 10). Mason told Jarrett this issue had remained unresolved for a couple of years, perhaps because HR management was in constant turnover. She informed Jarrett that she

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<sup>3</sup>Facts discussed herein primarily relate to Mason's alleged protected concerted activity. Facts related to Mason's alleged union activity are discussed in more detail in Respondent's exceptions brief and reply to CGC's answering brief to Respondent's exceptions.

was hoping someone could resolve the issue. (Tr. 146-147.) Mason testified that Jarrett told her she would look into it (Tr. 147).

In October 2016, Mason and the other materials department team leads received a pay increase. Mason, however, claimed that they received the raise because they were assigned additional job duties. (Tr. 256-257.)

Jarrett refuted Mason's claim that the materials department team leads received a raise because they took on additional duties. Jarrett credibly testified that once she received Mason's August 13, 2016 email, she consulted with her superior at the time, David Smith, after confirming Mason's report that there was a gap in pay for materials department team leads (Tr. 435). This was the first time Jarrett heard about the issue, as she had only been with the Company since March 2016, and she had only been assigned the materials department employees for about a month before receiving Mason's email (Tr. 438).

After consulting with Smith, Jarrett authorized Mason and the other materials department team leads to receive "transfer pay" to account for the gap. The transfer pay was attributed to the fact that the materials team leads were performing scheduler duties that assembly team leads were also performing. Instead of changing the job description and reposting the job for materials team leads, Jarrett explained, the transfer pay option allowed the Company to more easily award the materials team leads additional pay. According to Jarrett, Mason's manager at the time, Larry McClendon, was the one who presented Jarrett with the business case for why Mason and the other materials department team leads should receive transfer pay, suggesting that McClendon had nothing against Jarrett's request. (Tr. 435-437.)

**b. Complaints about Supervisor Fair’s alleged performance and discrimination**

Chris Fair became Mason’s supervisor in October 2016 (Tr. 299). Mason had a poor perception of how Fair performed his job. In fact, according to Mason, “[h]e did not perform his job.” Mason explained: “He never wanted to learn his job. He would ask me what happened to the other supervisors that came along before him. And the things that I would tell him, those were the very things that he didn’t want to do because he didn’t want to be . . . held accountable when things didn’t go right.” (Tr. 155.) Specifically, Mason observed that Fair did not give instructions, order parts, support the team lead, or communicate with the team (Tr. 156).

Mason testified that from “time to time” during the negotiations she would discuss concerns she had about Fair. Specifically, Mason testified that she would talk about how he was not supportive and that she could not go to him for anything. (Tr. 226-227.)

Union Business Agent Paul Shaffer testified that approximately one month before Mason was discharged, she raised an issue to the Union’s bargaining committee members about how she believed she was being treated by her supervisors (Tr. 23, 32). Shaffer thought she was complaining about more than one supervisor, but Supervisor Fair is the only name he recalled being discussed (Tr. 32-33).

According to Shaffer, he and other members of the Union’s negotiating committee had a sidebar discussion with three members of Electrolux’s negotiating committee—Attorney Jon Pearson, Assistant General Counsel Tim O’Rourke, and then-Labor Relations Manager Erica Robey—in which they discussed how Mason felt she was being treated by her supervisors. Specifically, Shaffer recalled them discussing how Mason felt “her supervisors were harassing her and always picking on her.” (Tr. 23-24.) Shaffer testified that Robey asked them to tell Mason to come to her office and “go over the issues with her so they could have a formal complaint on file”

(Tr. 24-25). There is no evidence Mason ever followed up on this alleged report that she was being harassed and picked on by her supervisors to Robey or anyone else.

**c. Complaints about Fair's alleged statement that he would "lie on" Mason**

Mason testified that she complained to members of the Company's negotiating committee and to Jarrett that Fair told her he would "lie on her" if his job was on the line. According to Mason, Fair made the statement following an incident in February 2017 involving a log that assembly department team leads on Line 2 were allegedly requiring employees to sign before going to the bathroom.

**i. Bathroom log incident**

Mason testified that one day in February 2017, several assembly department employees from Line 2 asked her if it was legal for their team lead to have them sign a log when they went to the bathroom. They explained to Mason that their team lead, Tiffany Broadnax, was telling them that they had to sign the log before going to the bathroom and that it should not take them more than five minutes to go. Mason testified that she told the employees that Broadnax could not do that and that they did not have to sign a log. (Tr. 162-163.)

Mason testified that after the employees reported this to her, she proceeded up and down the entire Line 2 to determine if other team leads were using a log. She discovered that a couple other team leads were maintaining logs, but Broadnax was the only one who publically displayed it. Mason stated that she also checked with team leads at other lines in the plant, but Line 2 was the only line using them. (Tr. 164.)

Mason claimed she confronted Broadnax about the bathroom log and told her that it was unlawful and a violation of employee privacy. Mason eventually confronted Operations Manager Jason Parsons because John Collins, the assembly department supervisor for Line 2, was absent

that day. According to Mason, Parsons was surprised about the log and asked Broadnax who gave her permission to post it. Mason testified that Broadnax told Parsons that Collins knew about it and said it was ok. Mason stated that Parsons told Broadnax to take the log down. (Tr. 165-167.)

**ii. Fair's alleged comment**

Mason testified that around the time Parsons told Broadnax to take the log down, McClendon and Fair walked up to her to discuss a work-related matter. According to Mason, Fair told her that Parsons was “pissed” about the bathroom log incident and that “somebody was going to get in trouble for it” (Tr. 167). Mason stated that Fair asked her who she thought was going to “take the hit for it,” and Mason responded, “Well, [Collins] is not here today, and whenever he comes and they question him about it, I’m pretty sure that he’s going to act like he don’t know anything about it. So it will fall down on the team lead” (Tr. 168).

Mason claimed that Fair then said, “[W]hen my job is on the line, I (sic) lie on you too.” Mason said she asked Fair to repeat what he said, at which point, she claimed, he put his hands on her desk, looked her in the eyes, and said, “If my job (sic) on the line, I’m going (sic) lie on you.” (Tr. 168-169.)

Mason testified that at a sidebar discussion during one of the negotiation sessions, she told Union Chief Negotiator Middleton, Business Agent Shaffer, Attorney Pearson, Operations Manager Parsons, and Labor Relations Manager Robey “pretty much the whole scenario” about the bathroom log incident and how Fair allegedly told her “that if his job was on the line, that he would lie on [her].” According to Mason, everyone in the group looked at each other “and was like, ‘That’s a lack of integrity on his part.’” Mason recalled Robey telling her to come to her office when they got back to the plant to give a statement. (Tr. 169-171.)

### **iii. Investigation of Fair's alleged comment**

Mason testified she met with Jarrett and Robey a few days later to provide a statement about what Fair allegedly said. Mason recalled Jarrett taking notes while Mason spoke. Mason said she told Jarrett and Robey the same thing she told the group during the negotiation sidebar. Mason testified that Jarrett and Robey then told her they would investigate the matter further. (Tr. 171-172.)

Jarrett testified that Mason did not mention anything to her about Fair's alleged statement until three or four weeks after the February bathroom log incident (Tr. 453). Jarrett also denied having a meeting with Mason and Robey, and she denied that Robey informed her that Mason needed to meet with her because of something brought up during negotiations (Tr. 466). Jarrett claimed she heard about the bathroom log incident when it happened, but she did not connect it with Mason and Fair at the time. (Tr. 452, 455.) According to Jarrett, when the bathroom log incident was reported to her, she advised the supervisor, Collins, to coach the team lead, Broadnax, that it was not appropriate to maintain such a log. (Tr. 453.)

Jarrett explained that three or four weeks later, Mason stopped her in the hallway from the cafeteria and asked if Robey told her that she (Mason) wanted to talk about the bathroom log incident. Jarrett recalled telling Mason that she did hear about the incident and that it had been addressed, at which point Mason said she did not want anyone to get in trouble for it. Mason was apparently under the impression that the team lead, Broadnax, had gotten in trouble. Jarrett told Mason, "I just want you to understand no one got in trouble for it" and "[N]o one will be disciplined for a supervisor giving them direction." (Tr. 453.)

Jarrett testified that Mason then told her that she and Fair had a conversation about the bathroom log incident, and Fair told her words to the effect that "if you do it, I'm going to lie on

you.” (Tr. 453.) Jarrett told Mason she would look into her report about what Fair allegedly said (Tr. 454).

Jarrett testified that after the conversation with Mason she called Manager McClendon and explained what Mason reported. According to Jarrett, McClendon told Jarrett “that’s not exactly how the conversation went.” Jarrett then told McClendon she needed a statement from Fair on the subject. (Tr. 454.)

Fair submitted a statement to Jarrett, in which he acknowledged having a conversation with Mason about the bathroom log incident, but denied telling Mason that if his job was on the line, he would “lie on her.” According to Jarrett, Fair was under the impression Broadnax did this on her own without direction from management, which is why he told Mason: “[I]f you do something like that, don’t look for me to cover for you. If you do that you’re on your own; it’s you. So you know that’s inappropriate; don’t do that.” Jarrett believed, based on Fair’s report, that Mason had misunderstood Fair’s comments to mean that he would lie on her. (Tr. 454.)

Jarrett prepared a running summary of events beginning when she received the initial report about the bathroom log incident in February and continuing through when she met with Mason and McClendon, and received a statement from Fair, in March regarding Mason’s complaint about Fair’s alleged comment (Tr. 454-456; R. Exh. 1).<sup>4</sup> Jarrett’s testimony about Mason’s report was generally consistent with her notes (R. Exh. 1).

Fair, who has not worked for Electrolux since October 2017, did not recall speaking to Jarrett about the incident during the hearing, but he did confirm he never told Mason he would “lie on her.” Instead, generally consistent with Jarrett’s testimony and his statement, Fair testified that

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<sup>4</sup>Jarrett’s notes confirm that Mason’s report about Fair’s alleged comment occurred on March 27, as opposed to Mason’s testimony that it occurred a few days after the February incident.

he told Mason words to the effect that “if my team lead makes that decision, they going to eat that one. I mean, I’m not going to take up for you on that one, because that’s a bad decision.” (Tr. 337.)

**d. Complaints about Manager McClendon**

Mason testified that she reported to Manager McClendon that her team members believed he was allegedly showing favoritism towards a female employee, and that one female employee complained he sexually harassed her.<sup>5</sup> Mason further testified that she reported McClendon’s alleged sexual harassment to Jarrett on May 4, the day before she was terminated. Jarrett denied receiving any such report about McClendon, and there is no such report in the May 3 statement Mason provided in connection with her discharge or in her Board affidavit.

**i. Alleged favoritism**

Mason testified that in March 2017, some of her employees complained to her that they did not think it was fair they were having to do their own work plus the work of a picker named Kissy Killion. According to Mason, the employees were referring to the fact that some of Killion’s work orders were being removed from her scanner gun and reassigned to them. Mason testified that the employees saw McClendon and Killion spending a lot of time together, and they believed he was favoring her over them. (Tr. 159-160.)

Mason testified that she confronted McClendon one day about the report of alleged favoritism but he just said he would look into it. Mason believes that McClendon was showing favoritism towards Killion because they were in a romantic relationship. (Tr. 161.)

**ii. Alleged sexual harassment**

Mason testified that a female employee told her sometime in mid-2016 that McClendon “groped” her (Tr. 148-149). Mason liked McClendon and wanted to give him a “heads up” that

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<sup>5</sup>The record is unclear if this was the same female employee.

someone had complained about him, so she allegedly confronted him about the issue in a room in the front office area referred to as the “fish bowl,” due to it being made of glass (Tr. 148-150). Mason testified that McClendon denied the complaint (Tr. 149-150).

Mason speculated that people nearby can hear conversations in the fish bowl if the conversation is loud enough (Tr. 149), but upon cross-examination she admitted no one was standing around at that time she had this alleged conversation with McClendon, and she acknowledged that they were not speaking loudly enough such that anyone could hear them (Tr. 238).

Mason testified that she reported McClendon’s alleged sexual harassment to Jarrett on May 4, the day before she was terminated. Mason also recalled mentioning to Jarrett that day that McClendon and Fair were related and they were trying get her fired because she knew “a lot of things” they were doing.<sup>6</sup> (Tr. 240).

Jarrett claimed that Mason never reported allegations of sexual harassment against McClendon to her. In fact, Jarrett denied even meeting with Mason on May 4. Jarrett was certain that meeting never occurred because she was not at work that day. Jarrett explained she was handling business related to her aunt’s estate. (Tr. 433.) Jarrett’s testimony was confirmed by a Company record indicating that her access identification badge was not swiped on May 4 (R. Exh. 4). CGC failed to rebut this evidence or even question Jarrett about the May 4 meeting Mason claimed she had with Jarrett.

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<sup>6</sup>Fair credibly testified that he is not related to McClendon (Tr. 344).

## Events Leading to Mason's Discharge<sup>7</sup>

The events giving rise to Mason's discharge occurred on April 28. Three witnesses—Mason, Supervisor Fair, and Supervisor Huqq—had direct knowledge of the events.<sup>8</sup> Fair and Huqq wrote statements on April 28 immediately after the incident (GC Exh. 11, pp. 1-2), and Mason wrote a statement on May 3, after initially declining to write one (GC Exh. 6).<sup>9</sup> All three witnesses' testimony at the hearing differed in some minor respects from what was included in their statements, which were written closer in time to the events. Mason's testimony, however, is the only testimony that was different in a number of material respects, as noted below.<sup>10</sup>

### a. Mason's version

Mason testified that when she arrived to work at 6:00 a.m. on Friday, April 28, McClendon and Fair were waiting at her desk and informed her that both of the regular forklift drivers, Kenneth

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<sup>7</sup>The remainder of the facts discussed in the Statement of the Case section of this brief are duplicative of facts discussed in Respondent's exceptions brief. They are repeated herein for the Board's convenience.

<sup>8</sup>As discussed in more detail below, the judge highlighted his misunderstanding of the case when he noted that "[i]t is unclear what Huqq . . . has to do with this case" (Decision, p. 4 fn. 7) and when he concluded that Huqq's testimony had "absolutely no probative value regarding any issues in this case" (Decision, p. 4 fn. 8). Huqq was a new supervisor with no prior knowledge of Mason or her alleged union activity, including her involvement on the Union's negotiating committee or her alleged protected concerted activity (Tr. 394-395). He directly observed Mason's insubordinate behavior (Tr. 396-417). Moreover, he credibly explained that it "shocked [him] that a team lead would say that she was not going to assist" (Tr. 398). To completely disregard Huqq's testimony and question why Respondent even called him to testify raises serious concerns about the judge's diligence in evaluating the record evidence. (Exceptions 15, 22.)

<sup>9</sup>Jarrett asked Mason to write a statement during the initial investigatory interview on April 28, but on the advice of her steward, Stanley Reese, she declined to do so (Tr. 205-206). Mason explained that "the little form that they give you is half a page and that wouldn't have been enough room for me to get everything that was said into that little small piece of paper" (Tr. 206). Mason wrote her May 3 statement after Union Business Agent Shaffer advised her to do so. Shaffer specifically told Mason to put everything she could think of in the statement so the Company would have all the information when they reviewed it (Tr. 37).

<sup>10</sup>Importantly, although Mason's testimony and her statement were inconsistent in many respects, she consistently admitted the key fact that she repeatedly refused her supervisor's instructions.

Ward and Diana Bennett, were absent (Tr. 178). Ward and Bennett normally serviced Lines 1 and 2 (Tr. 129). Mason testified that McClendon said he was going to find somebody to do that work and then walked off. Mason denied having any discussions with Fair that morning at her desk. (Tr. 178-179.)<sup>11</sup>

Mason testified that at some point early that morning, John Collins, assembly department supervisor for Line 2, approached her and wanted to know who his drivers were going to be because the regular drivers were absent. According to Mason, her response to Collins was that he would have to call and ask Fair because she did not know.<sup>12</sup> (Tr. 195.)

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

Mason testified that as she was picking the parts Broadnax had requested, Fair approached and instructed her to take microwaves to the line. Mason explained to Fair that Broadnax—who, unlike Fair, was not a supervisor—told her the picker, Sykerra Walker, had picked the wrong parts, so she was trying to “hurry up” and get those parts to eliminate downtime. (Tr. 179, 182.) Mason testified that Fair responded by saying he would find someone to deliver the microwaves (Tr. 182-183).<sup>13</sup>

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<sup>11</sup>In her May 3 statement, Mason implied that Fair told her first thing he was going to find a replacement for the day (GC Exh. 6). She did not mention anything in her statement about McClendon finding someone to do the work.

<sup>12</sup>Mason did not even mention John Collins in her May 3 statement, which is therefore inconsistent with her testimony and undermines it (GC Exh. 11).

<sup>13</sup>Notably, Mason’s testimony that Fair allegedly said he would find someone to deliver the microwaves is nowhere to be found in her May 3 statement (GC Exh. 6).

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

At that point, Mason claimed, Cox called her and said she needed two parts. Mason testified that she asked Cox who told her to call her, and Cox replied that Fair did. Mason admittedly told Cox that she was “walking just like [Fair]” and that she (Cox) needed to call Gerron “G” Powell, who was the forklift driver for Line 4.<sup>14</sup> Mason testified that she observed Cox call Powell, but Powell did not respond (Tr. 186-187).

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

Mason testified that while she was still at her desk Fair and Huqq, the assembly department supervisor for Line 1, approached her (Tr. 190). Huqq was relatively new, and Mason had never met him before (Tr. 264). According to Mason, Fair said, “I need you to take microwaves to the line.” Mason replied: “[Y]ou have two bulk drivers now. I don’t, I mean, because I don’t have the resources to take microwaves to the line. I don’t have a lift.” (Tr. 190.)<sup>15</sup>

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<sup>14</sup>This testimony is wholly inconsistent with her May 3 statement, in which Mason claimed she told Cox that *she* would find a driver and get her the parts she was requesting (GC Exh. 6).

<sup>15</sup>Again, Mason omitted at the hearing another excuse she gave in her May 3 statement for her actions. In her statement, Mason indicated that her first response to Fair’s second instruction that she deliver microwaves was that Powell needs to take them because she (Mason) was still covering the line (GC Exh. 6).

Mason testified that she did not have a forklift because the pickers, Weaver and Walker, were driving the absent forklift drivers' forklifts. According to Mason, Walker normally operates a cherry picker, but she was driving a forklift that day because the battery in her cherry picker was being charged.<sup>16</sup> (Tr. 191-192.)

Mason recalled telling Fair that he could get help from team members in the packaging area, and Fair responding that those team members did not work for him. Mason stated that she told Fair "we were one team, one Electrolux, that's the motto." (Tr. 192).<sup>17</sup>

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

Mason testified that Huqq was "still slapping his hand, talking about his line needs to run, and all that." At that point, Mason could see Huqq was angry, so before she allowed herself to get angry, she just walked off. (Tr. 193.) Mason testified that she was unclear what Huqq wanted her

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<sup>16</sup>During her testimony Mason appeared to make a big deal about Walker using one of the forklifts because her cherry picker had a dead battery; however, she did not mention anything about this in her May 3 statement (GC Exh. 6).

<sup>17</sup>Yet again, Mason left a key fact out during her testimony. In her statement, Mason also said that she told Fair that the employees in packaging did not have a supervisor, and he could give them instructions because she was "extremely busy" (GC Exh. 6). Again, Mason was deflecting her responsibilities back to her supervisor by essentially asking him to handle it himself.

to do, but she knew what Fair wanted: “Chris [Fair] wanted me to take microwaves to the line” (Tr. 193).

After the exchange with Fair and Huqq, Mason chose to continue performing non-critical tasks like organizing the staging area instead of helping ensure that microwaves, which were needed to keep the lines running, were delivered. Around 10:00 a.m., Mason stated, production on Line 2 stopped. Mason did not know whether it was because the line did not have microwaves. (Tr. 196.)

**b. Fair’s version<sup>18</sup>**

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

Fair explained that Supervisor Collins told him that morning that he (Collins) needed microwaves on Line 2.<sup>19</sup> Contrary to Mason’s testimony, Fair testified that Collins told him that

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<sup>18</sup>Supervisor Fair has not worked for Electrolux since October 2017. He left to work for what he described as a “[m]uch better company” (Tr. 300), indicating that he did not think highly of Electrolux when he testified. As the judge observed, Fair testified pursuant to a subpoena issued by Respondent (Decision, p. 3 fn. 2).

<sup>19</sup>Fair testified that the lines call for microwaves to be delivered within an hour of them being run (Tr. 354).

he (Collins) instructed Mason to deliver the microwaves, and Mason told him to call Fair. (Tr. 306.)

Fair recalled asking Mason a short time later about the status of the microwaves Collins reportedly asked her to deliver to Line 2. Fair testified that Mason told him that she was not going to get on a lift to support her line and for him to get forklift driver Powell to do it, because one of the other forklift drivers who was absent does it all the time by herself. Fair testified that Mason simply drove away on her tugger as he called her name three times, pleading for her to deliver the microwaves as instructed (Tr. 308.)

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

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

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

Fair recalled Mason saying that she did not have a forklift; however, he explained that was not the point.<sup>20</sup> Fair explained: “She didn’t have to do it. She could have asked somebody else to do it on her team. It’s just the fact that it’s not my responsibility to do her job of asking someone else.” (Tr. 332.) Fair added: “[S]he’s the team lead. She has access to everything I have access to. If she wanted somebody to get it, she could have just told somebody to get [the microwaves]. I mean, she’s [g]ot a whole team of people.” (Tr. 327.)

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

### **c. Huqq’s version**

Huqq testified that he first met Mason on the day of the incidents (Tr. 394). Huqq recalled that on that day his line, Line 1, was slated to run microwaves, and his team lead informed him

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<sup>20</sup>Mason’s claim that she did not have a forklift available appeared to be a major theme of the General Counsel’s case. As explained more fully in the argument section below, however, this was a red-herring. Whether or not Mason had access to a forklift, Fair’s clear desire was for Mason to perform her team lead duties and ensure microwaves were delivered to the line. That could have been accomplished by Mason directing someone who had immediate access to a forklift to complete the task as indicated in her job description. Notably, the judge did not appear to put any stock into Mason’s excuse about not having a forklift, nor did he appear to put much stock into any of Mason’s other excuses. In other words, there is no real dispute in the judge’s mind that Mason refused to do what she was instructed to do.

that the microwaves had not been delivered. Consequently, Huqq said, he called Fair on his cell phone, and Fair asked him to meet him in the materials department.<sup>21</sup> (Tr. 395-396.)

Huqq testified that he walked over to the materials department and saw Mason standing next to Fair. Huqq overheard Fair inform Mason that she needed to take microwaves to Lines 1 and 2. According to Huqq, Mason responded to Fair with words to the effect that she was too busy doing something else and could not do it and that he (Fair) should get someone on the dock to do it.<sup>22</sup> (Tr. 396-397, 399, 417.)

Huqq testified, generally consistent with Mason and Fair, that he intervened at that point and explained to Mason that Line 1 was priority and that they needed microwaves. He further testified that he told Mason if Line 1 did not run, the plant would not run.<sup>23</sup> Huqq recalled Mason saying she was doing something else and then driving away on a tugger. (Tr. 397.) Huqq denied being aggressive or slamming his fist in his hand (Tr. 407).

Huqq testified that he and Fair looked at each other after Mason drove away, and Fair asked him if he just witnessed that. Huqq stated, “It kind of shocked me that a team lead would say that she was not going to assist us.” (Tr. 398.)<sup>24</sup>

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<sup>21</sup>Huqq testified that if he had to call Fair, it was because the microwaves had not been delivered to his line. He explained that the team leads only escalate issues like that to the supervisors when the parts have not been delivered. (Tr. 391-392, 420.)

<sup>22</sup>In his statement, Huqq also recalled Mason saying that was not part of her job duties (GC Exh. 11, p. 2).

<sup>23</sup>In his statement, Huqq recalled telling Mason that without Lines 1 and 2 operating, the entire plant would not have jobs (GC Exh. 11, p. 2).

<sup>24</sup>As alluded to above, Huqq’s testimony in this regard clearly validated his appearance as a witness and did not lack “probative value,” as the judge concluded (Decision, p. 4 fn. 8). Huqq was a new supervisor who undisputedly had no knowledge of Mason’s union activity when the events of April 28 occurred. He saw Mason’s behavior and found it to be shocking, particularly in light of her status as a team lead. To dismiss this evidence as irrelevant to the issue of whether Mason’s behavior warranted her discharge is clear reversible error.

## 2. Investigation of Incident

Fair called Jarrett as she was driving into work the morning of Friday, April 28, and informed her he was having issues with Mason. Fair informed Jarrett that he needed assistance getting products to the line, and Mason refused to help him and follow instructions. Fair was obviously upset by Mason's behavior, as indicated by the fact that he called Jarrett seeking her help in dealing with the situation. Jarrett told Fair to collect statements from witnesses to the incident and she would address it when she arrived.<sup>25</sup> (Tr. 446.)

Fair wrote his own statement (GC Exh. 11, p. 1) and collected statements from Huqq (GC Exh. 11, p. 2), Cox (GC Exh. 11, p. 3), and Collins (GC Exh. 11, p. 4). When Jarrett arrived to work, she reviewed the statements Fair collected and called a meeting with Mason, Fair, McClendon, Collins, Huqq, and Erica Robey, then-Labor Relations Manager (Tr. 477). Mason recalled that at 11:55 a.m., Fair walked past her without stopping and informed her to report to conference room 3 at 12:00 p.m. for a meeting. Fair did not tell her what the meeting was about, and Mason was not aware that a meeting had been scheduled, so she contacted Chief Steward Reese to attend with her.<sup>26</sup> (Tr. 199.)

Jarrett, Robey, McClendon, Fair, Huqq, Collins, Mason, and Jarrett were present at the meeting.<sup>27</sup> (Tr. 199-200) According to Mason, Jarrett began the meeting by asking Mason and Fair what happened. Mason asked Jarrett what she was talking about, and then Fair explained he

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<sup>25</sup>It was consistent with past practice for Jarrett to instruct supervisors to initially collect statements from witnesses following incidents such as this (Tr. 449).

<sup>26</sup>Although Mason persisted at the hearing that she did not know what the meeting was about when Fair told her to report to the conference room (Tr. 269-271), she obviously suspected it had to do with her behavior earlier, which explains why she requested her steward's presence.

<sup>27</sup>Mason testified that neither Collins nor Huqq was in this meeting (Tr. 200). Huqq recalled arriving late to the meeting (Tr. 402).

instructed Mason to get microwaves to the line and Mason said she was not going to do it. (Tr. 200-201.)

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

Mason testified that at the end of the meeting Jarrett slid her a form across the table and asked her to write a statement, but Mason declined.<sup>28</sup> Mason told Jarrett she would take the form home and write the statement because, she contended, the form Electrolux gives to employees is little and there would not be enough room for her to write everything. (Tr. 205-206.)

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

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

### **3. Mason's Discharge**

#### **a. Review of evidence and consultation with legal**

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

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<sup>28</sup>Chief Steward Reese testified that he advised Mason not to complete a statement (Tr. 76, 87).

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

(Tr. 450.)

Jarrett further recalled telling Roberts: "I feel like termination would be warranted because as a team lead given direction, she's disrupted the operation; has caused, you know, three or four people to be looking for microwaves, trying to get product to the line. So Leola asked—I gave her my feedback. We submitted it for approval." (Tr. 451.) Jarrett explained: "[W]e needed [Mason] to jump in and help due to absenteeism, and she was just being, like I said, uncooperative, defiant, and just not following the instructions of a supervisor" (Tr. 481). Jarrett added: "When a supervisor asks a team lead to assist in [getting] product to the line and you say I don't have time, I can't do it, . . . get someone else to do it. That's deflecting your responsibilities as a team lead" (Tr. 482).<sup>29</sup>

After Jarrett and Roberts met, they consulted with Electrolux's legal team, which consisted of Fisher Phillips Attorney Pearson and Associate General Counsel O'Rourke (Tr. 372-374, 451-452). Without revealing the legal advice received, Jarrett testified that following the meeting, Mason's discharge was carried out after consultation with the Union (Tr. 452).<sup>30</sup>

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<sup>29</sup>For inexplicable reasons and without evaluating her demeanor, the judge discredited Jarrett's testimony (Decision, pp. 5-6). As discussed below, this was reversible error. (Exceptions 30-31, 34.)

<sup>30</sup>The judge appeared to take issue with the absence of evidence "regarding the review of Jarrett's recommendation or any deliberations regarding her recommendations by Pearson, Smith, O'Rourke or anyone else" (Decision, p. 6, lines 20-21) in an attempt to discredit Respondent's investigation. The judge's efforts were futile, however, because no evidence was introduced regarding that review given that it was clearly protected by the attorney-client privilege. Indeed, counsel for the General Counsel did not even ask any questions of Jarrett or Roberts about their vetting the decision with the legal team, and she did not challenge Respondent's counsel preliminarily cautioning the witnesses not to testify about what was discussed during that review process. It is highly inappropriate for the judge to draw an adverse inference from Respondent's failure to solicit testimony about an attorney-client privileged consultation.

**b. Notice to the Union and an opportunity to bargain**

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

Shaffer and Pearson discussed the incident two days after Pearson sent the email "to see if . . . anything could be worked out" (Tr. 25). Shaffer recalled Pearson informing him that "management was recommending termination" (Tr. 33). According to Shaffer, he expressed to Pearson the Union's belief that, "if anything, it should be a suspension and not a termination (Tr. 33). When asked on cross-examination if he thought Mason's involvement on the Union's negotiating committee had anything to do with her discharge, Shaffer testified, "With the people that we were dealing with from the Company on the negotiating committee, I didn't get that impression" (Tr. 30).<sup>31</sup>

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

**c. Mason's discharge meeting**

Roberts informed Mason of her termination on Friday, May 5, during a meeting with McClendon, Fair, Robey, and Reese. Roberts led the termination meeting because Jarrett was

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<sup>31</sup>The judge inexplicably ignored Shaffer's impression, as well as Mason's own impression that she was discharged for reasons unrelated to her union activity (Tr. 225).

working at a different location that day (Tr. 374, 452). Robey took notes during the meeting (Tr. 375; R. Exh. 3).<sup>32</sup>

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

## **II. LEGAL ARGUMENT**

### **A. THE JUDGE CORRECTLY ASSUMED THAT MASON ENGAGED IN SOME PROTECTED CONCERTED ACTIVITY.**

CGC first argues that the judge erred by not definitively finding that Mason's multiple protests pertaining to terms and conditions of employment, apart from her union activity, constituted protected concerted activity (CGC Cross-Exceptions Br. 24-25). Specifically, CGC contends that the judge should have definitively found that the following activities were protected concerted activities: 1) Mason's complaints about materials department team lead pay; 2) Mason's complaint about the bathroom log issue; 3) Mason's report to Manager McClendon that employees were complaining he showed favoritism to someone with whom he was romantically involved; 4) Mason's report to Manager McClendon that a female employee accused him of sexual harassment; and 5) Mason's complaint about Supervisor Fair's alleged statement that he would "lie on her."

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<sup>32</sup>Robey's notes from the meeting were received into evidence over counsel for the General Counsel's objection to their relevance (Tr. 375).

Contrary to CGC's argument, the judge did not err by failing to definitively find that Mason engaged in protected concerted activity, because such a finding was irrelevant to his ultimate conclusion that Respondent bore no animus towards Mason as a result of that alleged conduct (Decision, p. 11). Even if the judge had evaluated each instance of alleged activity to determine whether it was indeed protected and concerted, however, he would not have concluded that Mason's complaint about Supervisor Fair's alleged statement that he would "lie on her" was protected concerted activity.<sup>33</sup>

Mason's description of Fair's alleged comment that he would "lie on her" makes clear that it was directed towards her and no one else. According to Mason, Fair first said, "[W]hen my job is on the line, I (sic) *lie on you* too." Mason claims he then said, "If my job (sic) on the line, I'm going (sic) *lie on you*." (Tr. 168-169.)

Even crediting Mason's testimony about what Fair allegedly said, there is no evidence that Fair's alleged statement was directed to anyone besides Mason, and there is no evidence he repeated it to anyone else. There is also no evidence Mason discussed with other co-workers concerns about Fair not being truthful or otherwise raised the issue of Fair's alleged comment because she thought it was a "group concern." See *Meyers II*, 281 NLRB 882, 887 (1986) (concerted activity includes circumstances where individual employees "seek 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").

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<sup>33</sup>Respondent concedes that Mason engaged in protected concerted activity when she complained about materials department team lead pay and the bathroom log incident, and when she allegedly reported to McClendon that employees were complaining he was showing favoritism and that a female employee accused him of sexual harassment. As the judge properly found, however, Mason's protected concerted activity had no connection to her discharge.

Consequently, CGC's argument that the judge should have definitively found that Mason engaged in protected concerted activity should be rejected.

**B. THE JUDGE CORRECTLY FOUND NO EVIDENCE OF ANIMUS TOWARDS MASON'S ALLEGED PROTECTED CONCERTED ACTIVITY.**

CGC next argues that the judge erred in determining there was insufficient evidence of animus towards Mason's protected concerted activities (CGC Cross-Exceptions Br. 25-29). Contrary to CGC's argument, there is no record evidence to support the conclusion that the decision-makers, Diana Jarrett and Leola Roberts, were motivated by animus towards Mason's alleged protected concerted activities.

As an initial matter, CGC failed to establish that Jarrett or Roberts even had knowledge of all of Mason's alleged protected concerted activity. See *Music Express East, Inc.*, 340 NLRB 1063 (2003) (relevant inquiry under *Wright Line* is whether decision-makers had knowledge of union or protected concerted activity). Specifically, while the record reflects that Jarrett was aware of Mason's inquiries about materials department team lead pay (Tr. 435; GC Exh. 10), the record does not establish that Jarrett or Roberts was aware that Mason complained about the team leads' use of a bathroom log or about Manager McClendon.

According to Jarrett, a manager or supervisor called her (Jarrett) about the bathroom log incident on a Saturday when it occurred (Tr. 467). Jarrett testified that she did not connect Mason with the incident when it was first reported to her (Tr. 452). And when Mason ultimately discussed the issue with Jarrett, Mason was not complaining about the log itself; rather, she was complaining about Fair's alleged statement that he would "lie on her." As explained above, that complaint was not protected concerted activity because it did not relate to a group concern.

Regarding Mason's alleged complaints about Manager McClendon, Mason testified she brought the issue up at a meeting with Jarrett on May 4 in a cubicle in the front office, just after

she emailed her statement about the insubordination incident (Tr. 240-241). Mason's testimony on that issue was not credible, however, in light of Jarrett's testimony and the uncontradicted Company record establishing that Jarrett was not at work that day.

Mason's testimony about her alleged meeting with Jarrett on May 4 is also not credible because she admitted on cross-examination that she likely told people after she was terminated that had she known she was going to be fired, she would have told HR "about all the bitches that [McClendon] had been fucking" (Tr. 244). Mason's admission strongly suggests she did not raise any issues about McClendon to Jarrett or anyone else in HR prior to her discharge.

Additionally, Mason did not mention anything about McClendon's alleged favoritism or sexual harassment in her Board affidavit (Tr. 238) or in her May 3 statement (GC Exh. 6), even though she purposely took an extended time to contemplate what to include in her May 3 statement, and Business Agent Shaffer specifically told her to make sure she included everything (Tr. 239).

Even assuming, arguendo, that all of Mason's complaints constitute protected concerted activity, and Jarrett and Roberts were aware of all of those complaints, CGC still failed to prove that either Jarrett or Roberts—or, for that matter, anyone else involved in the events giving rise to Mason's discharge—had the requisite animus towards that activity to satisfy *Wright Line*. As CGC points out, the Board has traditionally considered the following factors when analyzing whether a decision-maker had animus towards an employee's union or protected concerted activity: 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, 5) departure from past practice, and 6) evidence that an employer's proffered explanation for the adverse action is a pretext. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 (2018) (citing

*National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016)). Contrary to CGC’s arguments, none of these factors weighs in favor of finding animus towards Mason’s alleged protected concerted activity.

### **1. Timing**

Mason last complained about materials department team lead pay in August 2016, nine months before her discharge. Mason complained about Fair’s alleged comment that he would “lie on her” over one month before she was discharged.<sup>34</sup> The timing of these events in connection with Mason’s discharge is far too remote to establish animus. See *EZ Park, Inc.*, 360 NLRB No. 84, slip op. at 4 (2014) (“[T]he timing of Dasa’s discharge was well removed from the union campaign. He was discharged almost a month after the election . . . . Thus, I cannot make the inference that his discharge was motivated by discriminatory reasons.”); cf. *State Plaza, Inc.*, 347 NLRB 755, 757 (2006) (finding timing indicative of animus where discharge decision was made “within a few days” of protected activity).

### **2. Presence of Other Unfair Labor Practices**

As explained in Electrolux’s exceptions brief (R. Br. 41-43), there is no evidence that Electrolux committed any unfair labor practices during the time period surrounding Mason’s discharge. In fact, there is no evidence Electrolux engaged in conduct that could even *arguably* constitute an unfair labor practice around that time period.<sup>35</sup> Consequently, this factor does not weigh in favor of finding animus. Cf. *North Hills Office Services*, 346 NLRB 1099, 1101 (2006) (“Considering the numerous other violations found by the judge and adopted by the Board in this

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<sup>34</sup>Although Mason alleges she complained about McClendon to Jarrett the day before her discharge, the credited record evidence does not support that allegation.

<sup>35</sup>Notably, the settlement agreement CGC introduced is useless to CGC’s theory that protected concerted activity also motivated Mason’s discharge because the settlement agreement only involved allegations related to union activity.

case, there is substantial evidence of the Respondent's animus to the employees' Section 7 activities . . .").

### **3. Statements and Actions Showing the Employer's General and Specific Animus**

There is no evidence in the record that Jarrett or Roberts made any statements or took any action indicating that they had general or specific animus towards the alleged protected concerted activity in this case, including Mason's complaints about materials department team lead pay or her supervisor and manager. Indeed, it is uncontested that Jarrett responded to Mason's complaint about the pay and, ultimately, Mason and the other team leads were awarded the pay. As for her report about Supervisor Fair, Jarrett investigated by talking to Manager McClendon and Fair. Jarrett's response to these complaints belies the inference that she acted with animus towards Mason's protected concerted activity.<sup>36</sup>

In sum, there is simply no evidence of animus towards Mason's alleged protected concerted activity by anyone affiliated with Respondent, let alone the decision-makers Jarrett and Roberts.

### **4. Disparate Treatment of the Discriminatee**

CGC argues that the record contains compelling evidence of disparate treatment, which she contends the judge properly relied on to support an inference that union animus motivated the decision. As argued in Respondent's exceptions brief (R. Br. 29-39) and reply to CGC's answering brief (R. Reply Br. 3-5), however, the judge misinterpreted the record evidence. Contrary to the judge's conclusions and CGC's arguments about the alleged comparator evidence, the record reflects that Mason was treated consistently with how others who engaged in similar misconduct were treated.

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<sup>36</sup>As discussed above, there is no credible evidence that Mason ever complained to Jarrett about Manager McClendon.

Regardless, the judge did not conclude that the alleged comparator evidence supported the allegation that Mason was treated differently because of her alleged protected concerted activity. In fact, one of the alleged comparators—Renita Leath—engaged in protected concerted activity, yet she was only issued a verbal warning for insubordination.

According to the employee counseling form issued to Leath on January 12, 2017 (GC Exh. 18), Leath refused to work for 15 minutes because she believed she was entitled to a second break based on the number of hours she was working that day. Leath was apparently protesting what she believed to be an unlawful instruction. The fact that Leath engaged in protected concerted activity yet was not discharged undermines Mason’s claim that she was discharged for engaging in protected concerted activity.

#### **5. Departure from Past Practice**

There is no evidence that Electrolux departed from past practice with respect to its treatment of Mason. Business Agent Shaffer confirmed that, consistent with the parties’ established practice, the Company’s attorney, Pearson, emailed him the witness statements and counseling form recommending that Mason be discharged (Tr. 25, 33). Shaffer and Pearson subsequently discussed the incident, and the Company waited the minimum three days before implementing the decision. In fact, the Company did not terminate Mason until after receiving her statement, which she originally elected not to complete.

Thus, there is no evidence that Electrolux departed from past practice with respect to Mason’s discharge.

#### **6. Pretext**

There is no evidence that Electrolux’s proffered explanation for Mason’s discharge—insubordination—was pretextual. An employer’s stated reason is pretextual if it is either “false or

not actually relied upon.” *Kitsap*, above at 14. The Board may find pretext if the employer gives shifting or inconsistent reasons for its decision. See *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) (“Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.”).

Here, the record is clear that Electrolux did not provide shifting reasons for Mason’s discharge. The separation notice Roberts prepared, signed, and submitted to the State of Tennessee unemployment office provides that Mason was terminated for “Violation of Company Policy—Insubordination.” (GC Exh. 7.) Business Agent Shaffer also confirmed that he was advised Mason was being investigated for insubordination (Tr. 25). Electrolux has never represented that Mason was discharged for any other reason. Cf. *Empire State*, 354 NLRB at 815 fn. 4 (finding employer’s stated reason for discharge pretextual where employer “failed to cite insubordination as a basis for [employee’s] discharge at the time it discharged [him] [or] during its meeting with the Union regarding [the employee]”).

The Board may also find pretext when the employer fails to conduct an investigation. See *Aliante Gaming, LLC d/b/a Aliante Casino & Hotel*, 364 NLRB No. 78, slip op. at 13 (2016) (finding employer’s “failure to conduct an investigation into the alleged misconduct by a discriminate” is evidence of pretext) (citing *ManorCare Health Services—Easton*, 356 NLRB 202 (2010)). As explained above, Jarrett conducted a thorough investigation and, even according to Mason, gave her ample opportunity to present her side of the story (Tr. 275). See *KHRG Employer, LLC d/b/a Hotel Burnham & Atwood Café*, 366 NLRB No. 22, slip op. at 7 (2018) (“The evidence makes clear to me that the Respondent did conduct a thorough investigation which weighs against a finding of discriminatory animus.”).

Because there is no evidence that the stated reason for Mason's discharge—insubordination—was false or not actually relied on, there is no evidence of pretext from which to infer that Mason's alleged protected concerted activity was the real reason for her discharge.

In her cross-exceptions brief, CGC argues in conclusory fashion that Jarrett's investigation was superficial and skewed (CGC Cross-Exceptions Br. 27). Specifically, CGC contends that Jarrett did not have an accurate understanding of essential facts at the time she recommended to Roberts that Mason be discharged. According to CGC, the best example of this was Jarrett's recollection that Mason failed to fulfill the needs of Line 1, as opposed to Line 2. CGC mischaracterizes Jarrett's testimony.

When describing her conversation with Roberts about the facts she discovered during her investigation, Jarrett testified that she informed Roberts that she told Mason, "Why couldn't you just, you know, get someone on your team to fulfill the – you know, Line 1, like [Supervisor Huqq] said, Line 1 is key. If Line 1 and 2 don't run, that makes the money of the building." (Tr. 450). CGC suggests that Jarrett's testimony is not credible because Mason never had responsibilities for Line 1, and Supervisor Fair never claimed that Mason was instructed to do anything relating to Line 1. As it turns out, however, Supervisor Huqq did indeed report to Jarrett that he observed Fair ask Mason to assist with *Lines 1 and 2* (GC Exh. 11, p. 2).

Huqq's statement provided as follows:

Around 7:45 Supervisor (Chris Fair) were (sic) attempting to locate a lift driver to support Lines 1 and 2. Supervisor (Chris) spotted [Mason] and asked her to assist us w/ lift for Lines 1 and 2 and [Mason] stated that wasn't part of her job duties. I attempted to intervene by telling [Mason] that without Lines 1 and 2 operating, the entire plant would not have jobs. [Mason] rode away on tug as if nothing we stated mattered at all.

(GC Exh. 11, p. 2).

Consequently, Jarrett's recollection about what she told Roberts following her investigation was accurate—it had indeed been reported to her that Mason was refusing to comply with instructions to deliver parts to both Lines 1 and 2.

Also, as evidence of pretext CGC also contends that Jarrett offered conflicting testimony about whether she spoke to Fair regarding Mason's complaint about Fair's alleged statement that he would "lie on her" or if she only reviewed a statement he had written (CGC Cross-Exceptions Br. 26). This, too, is a mischaracterization of the record. Jarrett never testified that she personally spoke with Fair about Mason's report. Rather, she consistently explained that she personally spoke with Manager McClendon, and that she reviewed an email statement from Fair. (Tr. 454-457, 473-474). Consequently, Jarrett did not contradict herself, nor did she contradict Fair, who simply did not recall being interviewed or asked to provide his account about the incident (Tr. 363).

As a final matter, CGC argues that because the judge relied on pretext to find that her discharge was motivated by union animus, he should have likewise relied on pretext to find that her protected concerted activity motivated her discharge. CGC advances an illogical position and misunderstands Board law.

If the Board gave credence to CGC's argument, a judge would be prohibited from making a partial determination based on the record evidence. According to CGC, if there is *any* pretext, the respondent loses everything, even if the judge believes—as he did here—that certain protected concerted activity had nothing to do with a decision. The fallacy of this position is supported by the thousands of ALJ decisions upheld by the Board where the judge ruled in part for the charging party and in part for the respondent.

CGC also ignores the Board's long-standing view of pretext, which is that "unlawful motivation *may* be inferred from circumstantial evidence, including evidence that the employer's

stated reasons for its actions were pretextual.” *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008) (citations omitted) (emphasis added). Contrary to CGC’s argument, the law does not *require* a finding of unlawful motivation where pretext is present. It simply allows a judge to infer it if the circumstances justify such an inference.

Thus, even assuming the judge correctly found that the stated reason for Mason’s discharge was pretextual, he did not err by refusing to infer that her discharge was motivated by her alleged protected concerted activity.

### **III. CONCLUSION**

The judge correctly found that Mason’s discharge was not motivated by her alleged protected concerted activity. Even assuming, as the judge did, that Mason engaged in protected concerted activity, there is no evidence the decision-makers were aware of all of her alleged protected concerted activity, let alone harbored animus towards any of it. Mason was discharged for repeatedly refusing to comply with her supervisor’s lawful instructions. It had nothing to do with her union activity or her alleged protected concerted activity. To conclude otherwise is to conclude that anyone who engages in protected concerted activity or union activity is insulated from being disciplined for blatant misconduct. Neither Board law nor policy supports such a conclusion. Consequently, CGC’s cross-exceptions should be denied.

*(Signature Page to Follow)*

Respectfully submitted,

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October 12, 2018

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

**CERTIFICATE OF SERVICE**

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

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October 12, 2018