

**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
REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. FACTUAL SUMMARY RELATING TO MASON'S PROTECTED CONCERTED ACTIVITIES

A. It is undisputed that Mason engaged in protected concerted activities on numerous occasions in the months prior to her discharge.

In the General Counsel's cross-exception submission, Mason's various forms of protected concerted activities were detailed at pages 4 through 8. In its answering brief, Respondent admits that Mason's complaints about materials department team lead pay rates, the maintenance of bathroom logs for assembly employees, and Mason's complaints to Manager McClendon about his sexual harassment and favoritism to certain female employees all constituted protected concerted activity by Mason (Resp. Ans. Brief at 24, fn. 33).

B. Mason's complaints about Supervisor John Chris Fair reflected group concerns.

Mason testified about Fair's shortcomings as a materials 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).¹ 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.

It is undisputed that Mason complained on multiple occasions to Respondent's management about Fair's threat to lie about subordinate employees in order to avoid accountability for errors. Human Resources (HR) Manager Jarrett acknowledged that she

¹ "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). References to "ALJD" are to the pages and lines of the decision of Administrative Law Judge (ALJ) as follows: ALJD page(s):line(s).

and Labor Relations Manager Erika Robey discussed Mason's complaints (Tr. 453, 465).² Jarrett further admitted that she and Mason discussed the matter in person on a separate occasion (Tr. 453-454). Jarrett testified that in this conversation Mason expressed concern that lead employees faced potential discipline for following instructions from their supervisor. Jarrett assured Mason that no lead employee would be disciplined for following a supervisor's instruction, regardless of whether the direction was right or wrong (Tr. 453). At that point Mason reported to Jarrett that Fair had told her that he would lie about such matters in order to avoid being held accountable (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).³ Jarrett testified that she determined that this incident did not warrant a formal investigation (Tr. 474).

II. ARGUMENT

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

² Robey no longer worked for Respondent at the time of the hearing and was not called as a witness.

³ 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.

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).

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). Respondent no longer disputes that Mason was engaged in such activities when she repeatedly complained about pay levels for team leads in the materials department, when she intervened to end the use of bathroom logs for assembly employees on Line 2, and when she confronted McClendon about his sexual harassment of female co-workers and his practice of demonstrating favoritism to employees receptive to his advances. All of these matters reflected issues of group concern affecting Mason’s co-workers.

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).

Mason’s concerns about Fair’s threat to lie about his subordinate employees if necessary to deflect responsibility for his own errors or deficiencies extended beyond Mason’s own personal interests. Mason raised this issue with the Union and also with members of Respondent’s bargaining committee. Jarrett also admitted that Mason reported Fair’s threat during a conversation they had in late March 2017 (Tr. 453-454).

Jarrett testified that in this same conversation, Mason expressed concern that an assembly team lead might face discipline for following the instructions of a supervisor (Tr. 453; RX 1). Under these circumstances, Mason's complaint to Jarrett about Fair was not a "personal gripe," but is properly viewed as broader concern for co-workers who follow erroneous instructions from a supervisor. See *Circle K Corp.*, 305 NLRB 932, 933, enfd. mem. 989 F.2d 498 (6th Cir. 1993).

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).

In arguing that there is insufficient evidence that Respondent harbored animus toward Mason because of her protected concerted activities, Respondent reiterates its

invalid assertion that HR Director Roberts and Jarrett were the sole decision-makers as to Mason's termination.⁴ The Judge properly determined that Respondent's decision-makers included attorneys Jonathan Pearson and Tim O'Rourke and HR Vice President David Smith in addition to Roberts and Jarrett (ALJD at 9, lines 40-41). The Judge inferred that Robey also played a role in the deliberations leading to Mason's termination (ALJD at 10, lines 11-23).⁵

Respondent then builds on its flawed argument by asserting that knowledge of Respondent's other supervisors and agents concerning Mason's protected activities are not imputed to Jarrett and Roberts. This contention must be rejected. It is well established that the Board will impute a manager's or supervisor's knowledge of an employee's protected activities to the decision-maker "unless the employer affirmatively establishes a basis for negating such imputation." *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 2 fn. 9 (Aug. 27, 2018). Here, Respondent presented no evidence to support its claim that imputing such knowledge is not proper in this case.

The key players in Mason's discharge, specifically, Jarrett, McClendon and Fair, were employed by Respondent during the latter part of 2016 and through the date of Mason's discharge in May 2017. Jarrett testified that she has been a HR manager for Respondent at the Memphis facility since March 2016. This period includes the entire period in which Mason engaged in the protected concerted activities at issue. It also includes the entire time frame in which all the unfair labor practices reflected in the informal settlement agreement (GCX 3) were committed, with the sole exception of the

⁴ Counsel for the General Counsel fully addressed this argument in the Answering Brief to Respondent's Exceptions at pages 24-26.

⁵ This inference is supported by evidence that Robey participated in the April 28 investigatory meeting with Mason and that she took notes at this meeting which Respondent failed to produce; and that Robey worked closely with Roberts and Jarrett on a daily basis.

suspension of Carey Taylor, which took place in February 2016 (GCX 13).⁶ Respondent's unilateral imposition of bathroom logs during late February or March 2017 should also be considered a contemporaneous unfair labor practice by Respondent as such a change in working conditions clearly constitutes a mandatory subject of bargaining.

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 learned of the bathroom logs and she promptly and effectively put an end to the practice the same day (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).

McClendon, Fair and Supervisor Collins had good reason to be concerned that Mason was prepared to expose their errors and misconduct whenever a future 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.

Respondent presented shifting rationales as to how Mason poorly performed that morning. At the time of Jarrett's investigation, it was assumed that Mason refused to use

⁶ Respondent erroneously argues in its answering brief (at 27, fn. 35) that the unfair labor practices covered by the settlement agreement involved only union activity and not protected concerted activities. This is incorrect, as the suspension of Carey Taylor arose from his protected concerted activities (GCX 13).

an available forklift to bring microwaves to the line, as Fair had instructed her to do. Then the rationale shifted to Mason being insubordinate by failing to relay instructions to Gerren Powell or another bulk driver to deliver the microwaves. The third rationale was that Mason somehow should have commandeered another employee, or that employee's forklift, in order to get the microwaves delivered to the line. Respondent never explained how Mason reasonably could be expected to get Powell to deliver materials to Line 2 that morning when Fair had not been able get Powell to do so. The third rationale reflects strategies that Fair admitted were outside his authority (Tr. 326, 357-358). Fair's testimony reveals the no-win situation he put Mason in on April 28. If she had "borrowed" a forklift driver, or just a forklift, from another department she could have been accused of misconduct or impeding production just for that.

The superficial and inadequate investigation conducted by Jarrett is revealed by her testimony admitting that she did not have an accurate understanding of essential facts at the time she recommended to Roberts that Mason be discharged for insubordination (ALJD 5:30-40; Tr. 450, 491). Jarrett did not know that there were no extra lifts available that morning (Tr. 447, 486-487).⁷ Jarrett did not know that Powell and John Weaver had been assigned to fill-in for the absent bulk drivers that day (Tr. 481-485, 487). Jarrett erroneously believed that Assembly Lead Cox never got the parts she requested from Mason that morning (Tr. 487-491). Jarrett mistakenly understood that Mason had refused a work instruction from Supervisor Huqq that morning (Tr. 494-495). Jarrett never investigated further to determine whether Assembly Lead Broadnax's urgent request for correct parts that morning was appropriate.

⁷ Fair also repeatedly admitted that he mistakenly believed a forklift was idle that day and available for Mason to use (Tr. 349, 351, 364).

Even more astonishing is Jarrett's testimony that Mason's written statement emailed to Jarrett on May 4 would not have changed her discharge recommendation (Tr. 494). This assertion amounts to a confession that Respondent had no interest in doing anything other than firing Mason. A careful review of Mason's written statement should have provided, at minimum, a basis for further investigation. Respondent's unlawful motive can be inferred from its failure to conduct an adequate investigation into this incident. *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471 (1998).

Not only did Jarrett admit that she never read Mason's statement prior to when Mason was fired; Respondent presented no evidence that *anyone* read or considered Mason's written statement prior to the implementation of the discharge.

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. It is submitted that the same evidence of disparate treatment which strongly supports the Judge's inference of animus and pretext 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 done 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.⁸ 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.⁹ 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.”¹⁰ 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.¹¹ Similarly, Board 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.¹²

⁸ 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).

⁹ *Id.*, at 518.

¹⁰ *Id.*

¹¹ *Id.*

¹² 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

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.

III. 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 26th day of October, 2018.

/s/
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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).

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, a copy of Counsel for the General Counsel's Reply Brief in Support of Cross-Exceptions was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on October 26, 2018, a copy of Counsel for the General Counsel's Reply Brief in Support of Cross-Exceptions was served by e-mail on the following:

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