

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CP ANCHORAGE HOTEL 2, LLC d/b/a ANCHORAGE HILTON | Case No. 19-CA-215741

And

UNITE HERE! LOCAL 878, AFL-CIO

**CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

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## STATEMENT OF THE CASE

This case asks the Board to consider whether an employer, which plainly sought to discharge a specific employee because of his union affiliation, may lawfully accomplish that otherwise unlawful goal by applying special scrutiny to the employee's protected conduct, extrapolating from that conduct a violation of an unwritten workplace policy that had never before been used for disciplinary purposes, and nominally relying on that policy to level the most punitive discipline possible. Under established law, the answer is no.

Respondent CP Anchorage Hotel 2, LLC d/b/a Hilton Anchorage (Respondent) engaged in this pattern of discriminatory and coercive conduct when it terminated Noberto "Bill" Rosario, a long-time employee, in retaliation for Rosario's protected conduct of documenting mold growing in guest rooms at Respondent's premises, as well as for his status as a prominent union supporter within the bargaining unit. Respondent justified its termination on the ground that, by disclosing the mold to his union but not to his supervisor, Rosario breached a known mold reporting policy. The problem with this theory is that Respondent never formalized this so-called policy, never previously used it to discipline an employee, and invoked it for the first and only time as a fig leaf to expose and terminate Rosario, whom Respondent's agents had long suspected of being the union's "mole" to learn about Respondent's health and safety issues.

After a hearing, the ALJ below concluded that while Rosario's conduct was clearly protected and Respondent's anti-union animus blatant, this putative reporting policy gave Respondent legitimate grounds to discharge Rosario. She therefore found that Respondent did not violate the Act by discharging Rosario. For the reasons explained below, the ALJ reached this conclusion by making several reversible errors of law and fact. The Board should therefore find merit in the Union's exceptions, reverse the ALJ, and hold Respondent liable for its unlawful termination of Rosario and the resulting coercion of the bargaining unit.

## FACTUAL BACKGROUND

Respondent is a Delaware corporation which owns and operates a hotel in Anchorage, Alaska and is an employer within the meaning of the Act. ALJ Decision p. 2:8-15. Charging Party UNITE HERE! Local 878, AFL-CIO (Union) is a labor organization under the Act, *id.* at p. 2:15-16, and serves as the exclusive bargaining representative for a unit of employees at the hotel. Since 2008, the parties have failed to negotiate a successor contract to an expired collective bargaining agreement. *Id.* at p. 3:11-12. The Union has conducted boycotts and information campaigns in support of its bargaining unit members' desire for a successor agreement. *Id.* at p. 3:12-13.

Beginning in 2014, unit members began reporting health concerns related to mold growth to both the Union and Respondent. *Id.* at p. 3:23-25; Tr. 394:10-14, 397:14-20. Among them was Rosario, a maintenance technician who had worked at the hotel since 2007. ALJ Decision p. 3:3-9, 24-25. Along with other tactics to pressure Respondent to address the problem, the Union created a website to document the mold growth called "hiltonanchorage moldreport.org." *Id.* at p. 3:27-29. Between 2014 and 2017, Rosario photographed approximately 30 examples of mold and other health hazards he came across in the course of his job duties and provided them to the Union to post on the website. *Id.* Rosario was also a prominent union supporter within the bargaining unit, as he wore a union button to work every day, attended rallies and bargaining sessions, signed Union petitions, distributed buttons to co-workers, and encouraged co-workers to attend negotiations. *Id.* at p. 3:13-17.

Since 2015, Respondent has been aware, or at least suspected, that Rosario was the source of the photographs which had been supplied to the Union. *Id.* at p. 3:39-40. Rosario's open union activism and suspected documentation of mold issues earned him a reputation as a "mole" and "troublemaker" among management figures. *Id.* at p. 3:40-44, 4:4; Tr. 71:12, 75:4-

11, 557:25. Respondent's General Manager until 2016, Bill Tokman, was particularly strident in this view and it led him to entertain a scheme to deny Rosario a vacation request and then terminate him for abandoning his post (a plan Tokman ultimately aborted). ALJ Decision p. 3:44-4:4. Soham Bhattacharya, Tokman's successor, was present for Tokman's tirades against Rosario and adopted the latter's outlook, subsequently "complaining" to a subordinate about Rosario's union activism. Tr. 637:20-638:1.

Although Respondent maintained specific, written policies for reporting and responding to discoveries of asbestos and lead, Tr. 1017:21-1021:19; GC 34, 37, 38, it never developed an analogue with respect to mold. ALJ Decision p. 4:16. Instead, members of the maintenance department had over the years developed an informal protocol that employees would report discovery of the mold to the Chief Engineer or else to their direct supervisor. *Id.* at p. 4:16-20. Yet there is no evidence that, prior to the instant case, Respondent has ever disciplined an employee for violating this informal protocol. *Id.* at p. 13:20-21; Tr. 643:11-21, 728:18-22, 1033:2-1034:16; 1048:18-25. Nor is there evidence that Respondent, upon discovering mold, has ever investigated whether the protocol had been breached, or that it has otherwise accused employees of failing to adhere to its requirements. ALJ Decision at p. 12:23-27; Tr. 1048:18-2.

Although the surrounding circumstances are disputed, what is clear is that on August 19, 2017, Rosario used his smartphone to take two photographs of mold he discovered in two of Respondent's hotel rooms. ALJ Decision at p. 5:29-30. Rosario testified that he discovered the mold in the course of reattaching peeling wallpaper that a room supervisor (whose identity he could not remember) directed him to fix. *Id.* at p. 5:25-34. He further testified that he cleaned the mold with a bleach product called ZEP, as he has been directed to do in the past, before regluing the wallpaper. *Id.* Respondent has disputed that narrative, and the ALJ credited Respondent's

contention that management does not instruct maintenance personnel to clean mold. *Id.* at p. 5:46-6:20. In addition, although Rosario testified that he subsequently informed his supervisor, Bill Best, about the mold, Best contradicted this narrative and the ALJ credited Best in this respect. *Id.* at p. 6:33-41.

On August 22, Rosario sent the photographs of the mold to Union organizer Dayra Valades via phone. *Id.* at p. 6:24-25. At some point between that date and September 26, 2017, the Union published these images on [hiltonanchorage moldreport.org](http://hiltonanchorage moldreport.org). *See* GC 4-5. On that second date, Bhattacharya received an email from a manager at Respondent's parent company which included links to the photographs on the Union's website. ALJ Decision p. 7:3-16. Upon reviewing the email, Bhattacharya asked Assistant Manager Steve Rader, Bill Best, and Director of Housekeeping Ivan Tellis whether any of them were aware of the mold in those rooms, which each denied. *Id.* at p. 6:18-21. The four then inspected the rooms and confirmed that the mold was unremediated. *Id.* at p. 7:22-27. During this inspection, Bhattacharya told Best that he believed Rosario was responsible for supplying the Union with the images. *Id.* at p. 7:22; Tr. 641:20-642:2.

At that point, Bhattacharya and Rader launched an exhaustive investigation to confirm their suspicion that Rosario was the source of the photographs. They were able to winnow the field of suspects down to Rosario by examining a "key interrogation" (an electronic log of card key entries) and comparing it against the metadata that could be extracted from the images (which they confirmed through a ruse to get Rosario to send them a new photograph by phone). ALJ Decision p. 7:29-8:7. On October 9, Bhattacharya and Rader directed Rosario sit for an interview, accompanied by Union Vice President Daniel Esparza. *Id.* at p. 8:11-14. Bhattacharya admitted at hearing that one of the purposes of the meeting was "to learn if [Rosario] admitted

taking the pictures.” Tr. 800:5-6. Rader likewise testified that at that point in the investigation, “the only thing we thought we knew at that time was the photos [] were taken by [Rosario]. As far as what came out after, we were open to however the investigation went.” Tr. 998:1-4.

Bhattacharya and Rader began the meeting by asking Rosario if he had taken the photographs, which Rosario denied. ALJ Decision p. 8:17-19. The managers continued to press Rosario on this point, stating that they had metadata to confirm that Rosario had taken the photos and accusing Rosario of failing to report the mold so the hotel could address it. *Id.* at p. 8:22-25. As the conversation progressed, Rosario acknowledged that he had seen the mold, indicated that he reported it to Best by telephone, and that a room supervisor named Zenaida had instructed him to re-glue the wallpaper in the rooms. *Id.* at p. 8:36-9:6.

Following interviews with some, but not all, of the other individuals identified in the key interrogatory, *id.* at p. 9:10-27, Bhattacharya and Rader concluded their investigation and decided to discharge Rosario. They drafted a discharge letter which cited as cause the fact that Rosario “repaired the wallpaper in Room 534 on August 19, 2107 and failed to report the visible presence of mold.” *Id.* at p. 9:35-41. Although Bhattacharya and Rader largely maintained this position at hearing, in a moment of candor, Rader admitted that one of the factors they considered was “the many inconsistencies as far as [Rosario’s] story and lying about the photos....” Tr. 969:9-970:2.

On October 10, 2017, the Union filed unfair labor practice charges against Respondent for violating Sections 8(a)(1) and (3) of the NLRA (the Act).<sup>1</sup> Region 19 investigated the charges and issued a complaint. The ALJ held a hearing on the charges between February 19-22 and March 1, 2019. The ALJ issued her decision on November 14, 2019. The Union’s exceptions, accompanied herewith, are timely filed.

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<sup>1</sup> The Union withdrew and amended the charges, which were resubmitted on January 8, 2018.

## QUESTIONS PRESENTED

1. Whether, under *Wright Line*, a respondent can carry its burden of persuasion to rebut a prima facie showing of unlawful discharge without establishing that it would have imposed the same level of discipline it actually levied, absent the alleged discriminatee's protected activity. **Exception 1.**
2. Whether, under *Wright Line*, a respondent can carry its burden of persuasion to rebut a prima facie showing of unlawful discharge where there is no evidence of discipline for similarly situated employees and where the employer's discovery of supposedly unprecedented employee misconduct resulted from engaging in an unprecedented investigation. **Exception 2.**
3. Whether Respondent discharged Rosario in part for his denying having taken the photographs of mold and, if so, whether that fact materially impacts the *Wright Line* or *Burnup & Sims* test. **Exception 3.**

## ARGUMENT

### **I. The ALJ erred under *Wright Line* by refusing to evaluate whether Respondent would have imposed the same level of discipline on Rosario absent his protected activity (ALJ Decision p. 12:34-39).**

Although the ALJ correctly found that the General Counsel had established a prima facie showing under *Wright Line*, 251 NLRB 1083 (1080), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), that Respondent unlawfully discharged Rosario for engaging in protected activity, she incorrectly concluded that Respondent satisfied its burden of rebutting this showing. In particular, the ALJ dispensed with the requirement that an employer prove it would have imposed the same level of discipline in the absence of the discriminatee's protected activity. Nowhere in her decision did the ALJ examine this issue. In fact, the ALJ expressly disclaimed and mischaracterized this component of the test, stating that she "decline[s] Charging Party's invitation to second guess the level of discipline imposed on Rosario, based on his tenure and value to the hotel." ALJ Decision p. 12:34-39. This was reversible error.

Severing the causal connection between the discipline actually imposed and the employee's protected conduct is a necessary element of an employer's *Wright Line* burden of

persuasion in order to rebut a prima facie case of discrimination or coercion. An employer cannot carry this burden “by merely showing that it had a legitimate reason for imposing discipline against an employee.” *Monroe Mfg., Inc.*, 323 NLRB 24, 27 (1997) (quoting *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989)). “Rather, the Respondent must show by a preponderance of the evidence that the ‘same action’ (i.e., discharge) would have occurred even in the absence of the protected conduct.” *Id.* (citing *Wright Line*, 251 NLRB at 1089); accord *Dunham’s Athleisure Corp.*, 318 NLRB 622, 623 (1995) (employer did not meet its rebuttal burden even though, as General Counsel acknowledged, employee “may have been subject to some form of discipline for his actions,” since the “the real issue is whether the Respondent has established that that form of discipline was discharge”).

As a result, there are many instances in which the Board has rejected an employer’s rebuttal defense where it demonstrated only that, absent the discriminatee’s protected activities, it would have issued *some kind* of discipline, but not that it would have issued the *same* discipline it actually levied. See, e.g., *Yellow Enter. Sys., Inc.*, 342 NLRB 804, 805-06 (2004) (despite fact that employee lied about scheduling constraints, Board held that “Respondent failed to establish that it actually would have discharged” her for this offense, given absence of evidence “that it had consistently discharged employees for similar offenses”); *N. Mem. Health Care*, 364 NLRB No. 61 (2016) (adopting ALJ’s finding that although “Respondent would likely have issued some discipline to [employee] absent his protected activities, the Respondent has failed to rebut the strong evidence indicating that [the employee] would not have been terminated if not for the Respondent’s...hostility towards [his] union activity”); *In re Golden Stevedoring Co.*, 335 NLRB 410, 431 (2001) (adopting ALJ’s finding that employer failed to show by preponderance of evidence “it would have taken the same action”—placing final warnings in

temporary lay-offs notices for slow work pace—against employees who had engaged in protected activities); *Manor Care of Easton, PA*, 356 NLRB 202, 204, 228-29 (2010) (employer violated 8(a)(1) and (3) because assuming, without deciding, that employee’s solicitation of letter from co-workers to legislator was punishable offense, evidence of comparator cases and “procedural irregularities” in investigation undermined employer’s “claim that it would have disciplined [employee] with the same severity had she not been a union activist”).

Contrary to the ALJ’s suggestion, engaging in this analysis does not mean usurping an employer’s business judgment regarding the appropriate level of discipline for an employee’s misconduct.<sup>2</sup> It is instead a tool to investigate what role (if any) the employee’s protected activity played in the employer’s decision-making process. Indeed, as the Board explained in *Yellow Enterprises*, the inquiry into an employer’s rebuttal evidence does not focus on the normative question of what level of discipline the employer *should* or *could* lawfully have imposed, but rather on the empirical counterfactual question of what level of discipline it *would* actually have imposed had the employee never engaged in the established protected conduct. *Yellow Enter. Sys.*, 342 NLRB at 805 (“...[A]n employer must establish not merely that it *could* have discharged the employee for legitimate reasons, but also that it actually *would have* done so, even in the absence of the employee’s protected activity.”) (citing *Structural Component Indus.*, 304 NLRB 729, 730 (1991) (emphasis in original); accord *Dish Network*, 363 NLRB No. 141 at \*1, n.1 (2016) (similar). Accordingly, the ALJ’s task here was not to determine whether Respondent’s decision to discharge Rosario was the most appropriate personnel decision, but

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<sup>2</sup> *Sam’s Club*, 349 NLRB 1007, 1009, n. 10 (2007), cited by the ALJ in support of this proposition, is inapposite. In that case, the Board concluded that the alleged discriminatee’s statement which precipitated the discipline in question “was not an act of protected activity....” *Id.* at 1008-09. Having found that the General Counsel failed to establish its prima facie showing, the Board never reached the issue of whether the employer would have levied the same discipline absent protected activity (as there was no protected activity to begin with). The Board’s statement that it would not “second guess” the employer’s disciplinary decision was merely a response to what it perceived as the dissent’s gratuitous suggestion that the employer should have let the employee “cool off for a few minutes,” rather than send her home. *Id.* at 1016.

whether it was the decision Respondent actually would have made, had Rosario not documented Respondent's mold problems and transmitted evidence thereof to the Union and had he not engaged in other pro-union activities. The ALJ simply avoided this task by framing the Union's position as a request to reevaluate the propriety of Rosario's discharge—a request the Union never made.<sup>3</sup>

Had the ALJ's performed the required analysis, she would have been compelled to find that, absent his protected disclosure of mold evidence to the Union and his other protected activities, Respondent would not have discharged Rosario for purportedly failing to disclose the same evidence to it. *See infra*, Sections II & III.

**II. The ALJ erred under *Wright Line* by ignoring evidence of inconsistent enforcement and the absence of comparator discipline (ALJ Decision p. 13:18-24).**

The undisputed evidence adduced at hearing was that prior to discharging Rosario, Respondent had never before disciplined, much less discharged, an employee for failing to report the existence of mold or any other health or safety hazard at the hotel. Tr. 643:11-21, 728:18-22, 1033:2-1034:16. Nor had it ever even *accused* an employee of such an offense before. Tr. 1048:18-25. It is an employer's, not the General Counsel's, burden to establish the existence of similarly situated employees who have received similar discipline for misconduct analogous to the alleged discriminatee's. *See Flagstaff Med. Ctr., Inc.*, 357 NLRB 659, 665 (2011) (“[T]he burden is not on the General Counsel to prove that a similarly situated employee received lesser discipline than [discriminatee]. Rather, the burden is on [the employer] to prove that it would have discharged [discriminatee] even absent his union activity.”). Without such evidence, the

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<sup>3</sup> The ALJ appears to be referring to the Union's statement in its post-hearing brief that Respondent “gave zero explanation for why a lower level of discipline would not have been appropriate for such a valued long-term employee.” Union Brief p. 13. But read in context, this was not an assertion that Respondent's discharge of Rosario was unlawful because it was overly harsh. Instead, it was one of several circumstantial pieces of evidence the Union pointed to in order to illustrate why Respondent's proffered reason for terminating Rosario was pretextual and thus failed to rebut the prima facie case of discrimination and coercion. *Id.*

Board generally finds that an employer fails to meet its rebuttal burden under *Wright Line*. See *id.*; *Champion Parts Rebuilders, Inc.*, 260 NLRB 731, 733 (1982) (“inasmuch as no probative evidence was presented that employees similarly situated to [discriminatee] have been discharged in the past, we conclude that Respondent has failed to meet its burden of establishing that [discriminatee] would have been discharged even in the absence of her protected activities”); *Aratex Serv.*, 300 NLRB 115, 116 (1990) (rejecting *Wright Line* defense in part because “Respondent offered no evidence of a similarly situated employee who received the same treatment as [discriminatee]”). That is because an employer’s “bald appeal” that the conduct in question was so serious an offense that “it would have taken the same action” regardless of the protected activity is self-serving and cannot, by itself, carry the burden of persuasion. *Manor Care*, 356 NLRB at 229; *accord Scrufari Constr. Co.*, 368 NLRB No. 40 at \*5 (2019) (“conclusory testimony does not sustain a party’s defense burden of proving that it would have taken the same action regardless of protected activity”).

Here, the ALJ acknowledged that “Rosario is the sole employee who has been disciplined pursuant to” the mold enforcement policy and that “that there is no evidence of any employee engaging in similar conduct to [Rosario’s]....” ALJ Decision p. 13:20-21.<sup>4</sup> Since Respondent bore the burden of introducing comparator evidence, its failure to do so should have ended the inquiry. However, the ALJ found this failure to hold “little force” because Rosario’s supposedly “unprecedented” misconduct put him in a class of one for which there inherently could be no

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<sup>4</sup> Respondent introduced evidence of three other instances in which it terminated employees under what it argued were similar circumstances. See R38-40; Tr. 824:5-825:17, 827:8-21, 831:21-23, 981:10-982:8. The only bases for the purported similarity between these cases and Rosario’s was the fact that they also occurred in 2017 and involved employees being discharged for a single instance of a “policy” violation. However, the “policies” in question were wildly different from the one cited in support of Rosario’s termination: one involved employee intoxication on the job, another involved a security officer who allowed non-guests access to hotel rooms, and a third involved a probationary employee who verbally berated co-workers. See *id.* The ALJ correctly deemed these examples inapposite to Rosario’s termination. Cf. ALJ Decision p. 13:20-21.

relevant comparator. *Id.* at p. 13:20-24 (citing *St. George Warehouse*, 349 NLRB 870, 879 (2007)).

The ALJ's reliance on the "unprecedented" nature of Rosario's offense is flawed because it ignores the correspondingly unprecedented nature of the investigation that brought to light Rosario's alleged misconduct. However, the one cannot be understood without the other. Respondent did not learn that Rosario had failed to report the existence of mold in the two hotel rooms by happenstance, but because it devoted substantial time and energy to identifying the "mole," Tr. 71:12, 75:9-11, who had provided the Union with the photographs posted to [hiltonanchorage moldreport.org](http://hiltonanchorage moldreport.org). From the start of the investigation, Bhattacharya suspected Rosario was the source of the photographs, a belief he communicated to Best. ALJ Decision p. 7:22; Tr. 641:20-642:2.<sup>5</sup> Bhattacharya also acknowledged that by interviewing Rosario, "[w]e hoped to learn if he admitted taking the pictures." Tr. 800:5-6. This is confirmed by the fact that Bhattacharya and Rader began their interview with Rosario by asking him whether he had in fact taken the photos that were given to the Union, *see* R13 at 3-4; Tr. 958:12-18, the answer to which was unnecessary to determine whether Rosario had found mold in the two rooms, glued wallpaper back over it, and neglected to report it to a supervisor.

In contrast, prior to the interview, Respondent's agents had no basis to conclude that a maintenance employee had failed to report discovering mold to a supervisor. Rader admitted at hearing that going into the investigation, "the only thing we thought we knew at that time was the photos [] were taken by [Rosario]. As far as what came out after, we were open to however the investigation went." Tr. 998:1-4. Nor was an employee's failure to report the presence of

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<sup>5</sup> Bhattacharya's anti-union animus is incontrovertible, as Best also testified that the former had "complained" to him about Rosario's support for the Union. Tr. 637:20-638:1. Bhattacharya was also present when his predecessor and mentor, Tokman, openly schemed to contrive a reason to discharge Rosario because of the latter's support for the Union. Tr. 75:4-11.

mold a subject that had ever previously interested Respondent. Indeed, as the ALJ observed elsewhere in her opinion, “there is no evidence that historically, upon discovering mold in hotel rooms, Respondent has undertaken an investigation into every employee who may have failed to report it.” ALJ Decision p. 12:25-27. Such an investigation would be surprising, given that Respondent had no written policy concerning mold reporting, Tr. 1027:1-6—as opposed to procedures for dealing with asbestos and lead, which did exist, Tr. 1017:21-1021:19; GC 34, 37, 38—and had at most developed an informal expectation. Thus, the investigation Respondent launched in September 2017 was not a search for the culprit to a known offense, but one for an offense to which the desired culprit could be pinned.

It is unsurprising that when an employer decides to put an employee under the microscope it can shape an offense to fit the wealth of facts it acquires. But that act of singling out an employee for additional scrutiny is prohibited and cannot support an employer’s decision to issue discipline. *See McLane/Western, Inc.*, 251 NLRB 1396, 1404 (1980) (“[T]he Act prohibits employers from watchfully waiting for a reason or pretext that can be seized upon as a means of eliminating union supporters because of that support.”); *accord Ace Cab*, 301 NLRB 119, 125 (1992) (rejecting employer’s *Wright Line* defense in part because manager directed subordinate “to keep a close eye on [union activist] until an offense was discovered sufficiently serious to warrant discharge”); *Flowers Baking Co.*, 240 NLRB 870, 872 (1979) (“[W]e conclude that [employee’s] unauthorized departure from the plant was seized upon by Respondent as an excuse to get rid of a union organizer and was therefore violative of Section 8(a)(3) and (1) of the Act.”); *Feldkamp Enter., Inc.*, 323 NLRB 1193, 1203 (1997) (rejecting employer’s rebuttal defense where “company president took the unusual step of keeping notes of his exchanges with [employee], and pounced on one excuse after the other to justify continuous

oversight of [his] attendance” and discovered basis for discharge after uniquely investigating employee’s timesheets); *San Benito Health Found. & Hosp.*, 318 NLRB 299, 306 (1995) (quoting *N.L.R.B. v. Lipman Bros., Inc.*, 355 F.2d 15, 21 (1st Cir. 1966)) (similar).

Because it cannot rely on its “unprecedented” scrutiny of Rosario to support the existence of an “unprecedented” offense, Respondent is not relieved of its rebuttal obligation to come forward with comparator evidence. Since it did not, Respondent cannot rely on its conclusory assertion that it would have discharged Rosario regardless of his protected activity. *Manor Care*, 356 NLRB at 229; *Scrufari Constr.*, 368 NLRB No. 40 at \*5. In turn, Respondent has not carried its burden of persuasion. The ALJ erred by finding that it did.<sup>6</sup>

**III. The ALJ erred by finding that Rosario was not discharged in part for denying he had taken the photographs of mold (ALJ Decision p. 13, n.16).**

The ALJ correctly determined that Rosario was privileged “to deny being responsible for the mold photographs.” ALJ Decision p. 13, n.16. However, she incorrectly found that “this temporary attempt to deflect blame was not itself the conduct for which he was discharged.” *Id.* Although Rosario was certainly discharged on additional grounds that Respondent made more explicit, the record flatly contradicts the ALJ’s conclusion that Rosario’s initial denials did not play into Respondent’s decision-making.

Specifically, when asked what led him and Bhattacharya to conclude that Rosario should be terminated, Rader testified that “it was all of the issues that we encountered throughout

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<sup>6</sup> *St. George Warehouse*, 349 NLRB 870 (2007), the case that the ALJ relied upon to sanction Respondent’s unprecedented discipline, has no bearing on this case and is not contrary to the above authorities. There, an employee was suspended with a written warning because he was found to have mishandled four cargo shipments within the span of a week. *Id.* at 879. The ALJ concluded that this discipline evinced disparate treatment because the employer generally provided informal warnings to employees prior to suspending them for this kind of infraction. *Id.* at 906-07, 911. The Board overturned this conclusion because the evidence showed that no other employee had committed that many infractions within such a short span, so the scope of the infraction was unprecedented and could reasonably be dealt with more harshly than the employer otherwise would. *Id.* at 879. Thus, *St. George Warehouse* stands for the unremarkable proposition that an employer may issue discipline proportionate to the given offense. But in that case, there was no dispute that the employer was applying an established, uniform policy to all employees and there was no evidence that it was scrutinizing the alleged discriminatee more closely than other employees—which is what happened here.

the...investigation,” including Rosario’s “many inconsistencies as far as the story and *lying about the photos....*” Tr. 969:9-970:2 (emphasis added). Plainly then, Respondent did take into consideration the fact that Rosario initially denied taking the photographs, when asked during his interview.

The ALJ’s error is material because, as explained above, the proper inquiry for evaluating a *Wright Line* rebuttal is whether the employer would have taken the same disciplinary action in the absence of the employee’s protected activity. *Monroe Mfg.*, 323 NLRB at 27. Since Respondent considered Rosario’s denial of engaging in protected activity—a denial he was privileged to make—in rendering its disciplinary decision, that consideration alters the empirical calculus of what Respondent would have done absent Rosario’s protected conduct. The ALJ was required to but did not incorporate that variable into her analysis.<sup>7</sup>

Similarly, the ALJ’s erroneous factual finding on this point led her astray in conducting the alternative *Burnup & Sims* test. *See N.L.R.B. v. Burnup & Sims*, 379 U.S. 21, 23, 85 S. Ct. 171 (1964). The ALJ found that the third prong of this test—“whether Rosario was discharged based on conduct occurring ‘during the course’ of his protected conduct—presents a close[] call.” ALJ Decision p. 14:11-12. Ultimately, though, the ALJ concluded that Rosario was not discharged for conduct that occurred in the course of engaging in protected activity because she identified the misconduct for which he was discharged as solely “his failure to report the mold condition he had concealed.” *Id.* at p. 14:15-16. However, the conduct for which Rosario was terminated included his denial of taking the photographs provided to the Union, Tr. 969:9-970:2, and such a denial was clearly intertwined with his documentation of the mold in the first place. Thus, the ALJ should have found that the General Counsel had satisfied the third prong of the

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<sup>7</sup> As explained in Section I, the ALJ did not engage in the basic counterfactual analysis required by *Wright Line*, even leaving this variable aside.

*Burnup & Sims* test. Likewise, the ALJ erred on the fourth prong—whether the employee is guilty of the misconduct—because she continued to limit the conduct in question to Rosario’s failure to report the presence of mold while excluding his denial to Rader and Bhattacharya of taking photos of the mold. ALJ Decision p. 14:25-33. Because, as even the ALJ elsewhere recognized, Rosario was “privileged” to deny engaging in such protected activity, *id.* at p. 13, n.16, that denial was not “misconduct” to which guilt can be imputed. As a result, the ALJ should have found that the General Counsel met all four prongs of *Burnup & Sims* and held Respondent liable for the alleged unfair labor practices on that alternative ground as well.

### CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board find merit to its exceptions and modify the ALJ’s Decision accordingly.

RESPECTFULLY SUBMITTED this 12th day of December, 2019.



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**DECLARATION OF SERVICE**

I, Jennifer Woodward, declare under penalty of perjury under the laws of the state of Washington that on this 12th day of December, 2019, I caused the foregoing document to be sent via email to:

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Signed in Seattle, Washington, this 12th day of December, 2019.

  
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Jennifer Woodward, Paralegal