

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

HENNES & MAURITZ, LP D/B/A H&M

and

Cases 32-CA-250461
32-CA-256051

UNITED FOR RESPECT

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

On March 9, 2019, a hearing was held in Oakland, California, before Administrative Law Judge¹ Ariel Sotolongo on a consolidated complaint (Complaint) issued by the Regional Director for Region 32. As the Complaint alleges, Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by terminating Mr. Nickolas Gallant (Gallant) for his protected concerted activities and committing countless violations of Section 8(a)(1) of the Act to interfere with and discourage Gallant from exercising his Section 7 rights. Immediately after learning about Gallant's protected concerted activities, which undisputedly included talking to employees about their working conditions, Respondent: 1) interrogated Gallant about his protected concerted activities; 2) created an impression his protected concerted activities were under surveillance; 3) prohibited him from speaking with other employees about working conditions; 4) threatened him with unspecified reprisals if he continued to engage in protected concerted activities; 5) restrained him from engaging in protected concerted activities; and 6) told him not to speak with other employees or third parties about their working conditions.²

As will be shown below, on multiple occasions, Respondent interrogated Gallant about his discussions with employees and other third parties about employees' terms and conditions of employment. While Gallant disclosed that he had an unpaid internship with a workers' coalition that involved him conducting outreach for Fair Work Week ordinances and speaking to

¹ Hereinafter referred to as the ALJ. All references to the transcript are noted by "Tr." followed by the page number(s). Exhibits will be referred to in the following manner: General Counsel exhibits as "GC Ex." and Respondent exhibits as "R Ex.", followed by the exhibit number and then the Bates page number. All dates refer to the year 2019 unless otherwise noted.

² The Complaint also alleges that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing unlawfully an overbroad conflicts of interest policy (Complaint Paragraph 6). In light of *Argos USA LLC*, 369 NLRB No. 26 (2020), which issued after the close of the hearing in this matter, the General Counsel moves to withdraw Paragraph 6 of the Complaint.

employees and government agencies about health and safety laws and other working conditions, he rightfully refused to reveal the identities of the employees he spoke with or other details about his protected activities when it beyond what would be reasonably necessary for Respondent to evaluate whether he was engaged in misconduct. While it became quite obvious Gallant was not violating Respondent's conflict of interest policy or revealing confidential information but instead engaging in core Section 7 activities of initiating and inducing group action around common health and safety and leave issues, Respondent persisted in its invasive and unlawful questioning.

Any defense based on the reasonableness of Respondent's questioning must be dismissed as pretextual as Respondent had more than enough information about his internship and protected concerted activities to reasonably conclude that he was not disclosing confidential sales, financial, and personnel information through his internship activities. Further, Respondent's questioning was coupled with veiled threats and restrictions on talking to coworkers about their working conditions. While a *Wright Line* analysis is not necessary in this case because Respondent's admitted reason for firing Gallant was his protected concerted activities, even under such a legal standard, Respondent cannot meet its burden to show that it would have fired Gallant absent his protected activities. Gallant's protected concerted activities were well-documented in Respondent's own contemporaneous notes and emails. Based on its own words, there is no doubt Respondent equated Gallant's protected concerted activities with a conflict of interest. Thus, absent his protected concerted activities, Respondent would never have "enforced" its Conflict of Interest policy as it has no history of ever applying the policy to any one of its thousands of employees worldwide. To assert now that its enforcement of its

Conflict of Interest policy on Gallant is somehow lawful is to essentially admit that the purpose of its rule is to restrict Section 7 activities rather than a true legitimate business reason.

Thus, Respondent violated Section 8(a)(1) of the Act by committing numerous unfair labor practices to chill Gallant's discussions with employees and third parties about working conditions, which ultimately led to Respondent unlawfully terminating Gallant because he continued to engage in these protected concerted activities. The termination is unlawful under no less than three legal theories: 1) Respondent unlawfully terminated Gallant by enforcing its Conflicts of Interest policy to interfere with and discourage his protected concerted activities; 2) Respondent unlawfully terminated Gallant because he refused to answer questions that sought to uncover aspects of his protected concerted activities that he rightfully did not have to reveal; and 3) Respondent unlawfully terminated him because of its animus towards his protected concerted activities (i.e. *Wright Line*³ analysis).

Accordingly, an appropriate remedy must be ordered to address Respondent's violations of the Act and address the chilling effect that Gallant's termination undoubtedly caused once Respondent's employees learned about his termination and the basis for his termination. Their one open advocate, Gallant, who had advocated on their behalf and voiced their common concerns was summarily discharged even though he was a high performing employee who did not engage in any misconduct. That chilling message must be replaced by an assurance that employees can engage in protected concerted activities for their mutual aid and protection without fear of reprisal. That assurance can only come from a Board order.

³ *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

II. STATEMENT OF FACTS

A. Respondent Unlawfully Terminated Gallant

1. Background

Hennes & Mauritz, LP D/B/A H&M (Respondent) is a fast fashion retail clothing company that sells clothing and accessories. (Tr. 21, 169.) In about 2016, Mr. Nickolas Gallant (Gallant) began working for Respondent as a sales advisor (Tr. 21.) He last worked for Respondent on August 28, 2019, when Respondent fired him. (Tr. 24.) As a sales advisor, Gallant's job duties included maintaining the sales floor, completing fitting room tasks, returning unpurchased merchandise from the fitting room to the sales floor, running the cash register, and providing customer service. (Tr. 21.)

At the time of his termination, Gallant worked at Respondent's Emeryville, California store (the Emeryville store) - Store 145 - whose Store Manager was Thomas Baugh (Baugh). (Tr. 24, 26, 176.) About 40 employees worked at that store, and they were not represented by a labor union. (Tr. 26.) Prior to working at the Emeryville store, Gallant worked at various other Respondent stores, including two retail stores located in San Francisco, California: Store 101 located in the Westfield Mall (the Westfield Mall store) on Market Street, and Store 80 located on Powell Street (the Powell Street store). (Tr. 24 – 25., 125, 176.) Gallant last worked in the Westfield Mall store in 2019 and in the Powell Street store in 2017. (Tr. 25.) At the time of his termination, Gallant earned about \$17.50 per hour; worked full-time, between 37 – 40 hours per week; and received health, dental, vision, and employee discount benefits. (Tr. 25.)

2. Gallant's Initial Protected Concerted Activities

On about Memorial Day in May 2019, Gallant spoke to part time sales advisor Crystal Galacia (Galacia), who worked at Respondent's Westfield Mall store and was on her ten-minute break. (Tr. 28, 30.) Galacia told Gallant that earlier that day, the fire alarm went off in the Westfield Mall store, which resulted in Respondent evacuating the customers, locking the store's doors, and forcing employees to continue working while the alarm blared and lights flashed for several hours.⁴ (Tr. 28 – 29, 146.) During their conversation, Galacia said told Gallant that she did not feel safe working during the fire alarm, that management displayed a lot of favoritism at the store, and that she did not know who to speak to about these issues. (Tr. 29.) They also discussed how Respondent complained that Galacia, who at the time was six-months pregnant, used the bathroom too often and instructed Galacia to only use the bathroom during her ten-minute break. (Tr. 29.)

Gallant frequently spoke to employees at the Westfield Mall and various retail and fast food restaurants in San Francisco, California to inform them about San Francisco's Fair Work Week Ordinance.⁵ (Tr. 30.) Sometime at the end of May 2019, Gallant went to the Westfield Mall and visited Respondent's store in the mall to speak with employees who did not feel safe talking directly to management about the Memorial Day fire alarm incident. (Tr. 31.) He spoke

⁴ The store manager on duty at the Westfield Mall store during the fire alarm was Store Manager Kaci Goosling (Goosling), who knew that Gallant was involved in labor and housing advocacy work. (Tr. 94.)

⁵ The Fair Workweek Ordinance requires employers to meet certain standards regarding employees' work hours and schedules: employers must offer hours to their current employees before hiring new employees, employers must provide employees with two weeks' notice of their upcoming schedule, employers must give employees at least 11-hours to rest before the start of their next shift, employers must provide predictability pay for on-call and changes in shifts, and employees have the right to decline a shift that conflicts with their availability. (Tr. 31.) Fair Workweek ordinances promote workplace flexibility and protect against unfair scheduling practices. (<https://www.epi.org/publication/fair-workweek-laws-help-more-than-1-8-million-workers/>).

with Sales Advisor Adrianna Gutierrez (A. Gutierrez) while she was on her ten-minute break. (Tr. 32.) They spoke on the second floor of the mall, about ten feet away from Respondent's Westfield Mall store. (Tr. 32.) Only glass doors and walls separated the store from where they spoke (Tr. 32.) They discussed the Memorial Day fire alarm incident and how the employees and managers continued to work in the store while the fire alarm blared. (Tr. 32.) They also discussed how after the death of A. Gutierrez's cousin, Respondent only allowed her to take one day of bereavement leave and instructed her to "fake it off" and come into work over the weekend. (Tr. 32.) During their conversation, Department Manager Jay Dip (Dip) was about twenty feet away from them, at the store's cash registers. (Tr. 33 - 34.) Gallant also saw Department Manager Ching Lam (Lam) on the sales floor during his conversation with Gutierrez. (Tr. 34.) Gallant worked under both Dip and Lam in 2019, so the two managers knew him. (Tr. 34.)

About two-hours after speaking with A. Gutierrez, Gallant spoke with Sales Advisor Galacia during her ten-minute break, about two hundred feet away from Respondent's Westfield Mall store. (Tr. 35.) During their conversation, Galacia told Gallant that Department Manager Dip was watching him from the cash registers. (Tr. 35.) They then spoke more about the Memorial Day fire alarm incident, including the names of employees who worked during the incident, and the mall confirming that an electrical fire caused the fire alarms to go off. (Tr. 35 - 36.) They also discussed how management treated employees poorly, such as increasing employees' workload. (Tr. 35.) Finally, they continued their discussion about Galacia's pregnancy and Respondent instructing her to obtain a doctor's note due to her using the bathroom too often. (Tr. 35.)

3. Walters Admitted Knowledge of Gallant's Protected Concerted Activities and Interrogated Gallant at the Southland Mall Store

Shortly after these conversations with his co-workers, Gallant was summoned to a meeting where he was interrogated about his protected concerted activities, asked for the names of employees he spoke with, and told that he did not need to speak to other employees about workplace issues he raised. About the end of May or early June 2019, Gallant attended Respondent's management assessment training at its store in the Southland Mall (the Southland Mall store), located in Hayward, California. (Tr. 36, 126.) Respondent selected only a few employees, including Gallant, to attend this training, who were identified as candidates for future managerial roles. (Tr. 36, 126, 152.) Gallant was the only employee from the Emeryville store selected to attend this training. (Tr. 36.) After the training concluded that day, former Respondent District Human Resources Manager Nina Walters (Walters) approached Gallant and initiated a twenty-minute, one-on-one meeting, with him in the manager's office. (Tr. 37, 126, 149, 152 – 153, 205.) Walters initiating a meeting with Gallant that day was strange because that was the first time Gallant ever had a substantive conversation with Walters, who rarely visited Respondent's stores and whose office was located somewhere in San Francisco's Financial District. (Tr. 38, 41, 43 - 44.)

Walters began her one-on-one meeting with Gallant by telling him that she was aware he had been visiting several of Respondent's San Francisco, California stores. (Tr. 38, 95.)⁶ In response, Gallant said he visited Respondent's San Francisco stores to speak with employees who had reached out to him to express their concerns regarding the Memorial Day fire alarm

⁶ During the hearing, Walters admitted that after the Memorial Day fire alarm incident, there were at least two instances when a manager informed her that Gallant had visited the Westfield Mall store. (Tr. 147 - 149.)

incident. (Tr. 38 - 39, 127.) Through this conversation, Walters learned for the first time about employees' concerns regarding the Memorial Day fire alarm incident. (Tr. 146 – 147.) Walters then asked Gallant about what employees had told him concerning the incident. (Tr. 127.) In response, Gallant said employees complained that during the incident, Respondent evacuated all customers but instructed its employees to continue working in the store while the fire alarm blared for hours and Respondent did not know whether there was a real fire danger. (Tr. 38 - 39, 127.) Walters stated that it was outside his job description to speak to employees. (Tr. 38, 97.) Disagreeing that it was outside his job role to speak to employees, Gallant informed her about another safety violation at the Westfield Mall store. Gallant told her that during store hours, management at that store continued to lock the doors connecting the mall to the kid's department with no signage, resulting in customers being unable to enter or exit through that doorway. (Tr. 38 – 39, 49 – 51, 159.) Gallant said customers struggled to enter and exit through the locked doors and he surveyed them about how they felt being unable to access the locked doors because he had previously informed management several times about the locked doors and management disregarded his safety concerns. (Tr. 39, 41; 158 - 159.) Wanting to know more about his surveys, Walters asked him for copies of his surveys with customers and employees, said it was outside his sales advisor role to conduct these surveys, and asked why he conducted these surveys. (Tr. 39, 41.)

Feeling pressured by Walters's questions, Gallant said he conducted the surveys because he had an internship that involved him doing outreach for the City of San Francisco's Fair Work Week ordinance and examine whether employers complied with various workplace laws. (Tr. 39, 127, 154.) He asserted that if Respondent violated San Francisco's Fair Work ordinance, it would be appropriate for employees to speak to him about it. (Tr. 39.) Wanting to uncover more

about his internship, Walters began interrogating Gallant about his internship. (Tr. 39.) At the hearing, Walters admitted that she asked him what his internship was about and who he was interning for.⁷ (Tr. 155 - 156.) Gallant reiterated that his internship involved him being an advocate for Fair Work Week ordinances. (Tr. 39, 100, 127, 154.) Gallant said he suffered while working at the Emeryville store because Respondent constantly scheduled him to undesirable and erratic shifts and reduced his hours. (Tr. 39 – 40.) He said that prompted him to form a committee with many employees, who worked in the Bay Street shopping plaza where the Emeryville store was located, to form a committee to help pass the Fair Work Week ordinance currently in effect in the City of Emeryville, California. (Tr. 40, 100). He added that he was currently working with that committee on pushing the City of Los Angeles and the State of California to adopt their own Fair Work Week ordinances. (Tr. 100.)

Responding to Gallant’s statements about what his co-workers told him about their workplace concerns, Walters said that as a sales advisor, Gallant did not have the knowledge to speak to employees about Respondent’s work policies, such as its jury duty and bereavement leave policies. (Tr. 40, 206 – 207.)⁸ Under pressure and wanting to object to Walters’s directive that he not speak to employees about work policies and other terms and conditions of employment, Gallant told Walters that due to the Memorial Day fire alarm incident and

⁷ During the hearing, it was revealed that Gallant had an internship with United for Respect (UFR), but he did not inform Walters of that during her interrogations. (Tr. 13 – 14.) According to the UFR website, “United for Respect (UFR) is a multiracial national nonprofit organization fighting for big and bold policy change that improve the lives of people who work in retail. UFR is advancing a movement for an economy where corporations respect working people and support a democracy that allows Americans to live and work in dignity.” (<https://united4respect.org/about-us/>)

⁸ Prior to this, Gallant never informed Walters that he had concerns regarding the jury-duty and bereavement leave policies, the latter which he discussed with Sales Advisor A. Gutierrez on about the end of May. (Tr. 32, 207.)

management showing favoritism to certain employees, there were five employees who wanted to end their employment with Respondent. (Tr. 40 – 41; 88 – 89.) Gallant said those employees deserved a committee, which prompted Walters to begin speaking in a more serious tone and taking notes of their conversation. (Tr. 40 – 41; 88 – 89.) Walters then demanded Gallant reveal the identities of the five employees, asked who Gallant was in contact with, inquired about the questions Gallant asked employees, and said he did not need to speak to employees about specific terms and conditions of employment. (Tr. 41 - 42.) In response, Gallant said that he did not want to identify the five employees to protect them from Respondent retaliation and that management should be more transparent, so that employees can speak with them about workplace concerns. (Tr. 42 – 43.)

To show that he had the right to speak to employees about working conditions, he informed Walters about other workplace concerns that employees shared with him. He notified her about employees' concerns regarding the air conditioner that did not work for over four-months at Respondent's Powell Street store, informing her that he interviewed employees and customers about working and shopping, respectively, in the extreme heat inside the store. (Tr. 42.) He said he documented employees telling him that due to the heat in the store, they suffered from rashes, had to use their personal leave to avoid working in the heat, and in some instances, had to transfer to other stores. (Tr. 42.) Near the end of the meeting, Walters again asked Gallant to reveal the names of the five employees that wanted to quit and to tell her who he was in contact with. (Tr. 42.) Once again, he said he did not want to disclose that information to protect the employees from Respondent retaliation. (Tr. 42.) At the end of their meeting, Walters told Gallant that she would follow up with him about his internship, without explaining why. (Tr. 42.)

At hearing, Walters admitted that after speaking to Gallant, she had concerns about Gallant's internship and discussions with employees regarding workplace issues related to legal regulations. (Tr. 132.) Sometime after her interrogation of Gallant at the Southland Mall store, Walters informed Respondent's American Employee Relations Team, which at the time, consisted of Regional Manager Chris Mikulski (Mikulski), former Employee Relations Specialist Jose Henriques (Henriques), and Employee Relations Specialist for the West Coast Elena Siantz (Siantz), about her discussion with Gallant. (Tr. 131.) She informed them that Gallant had an internship, may be in law school, surveyed employees and customers at the store, and spoke to employees about their working conditions.⁹ (Tr. 131, 140 – 142.) They all agreed that Respondent would continue to probe into Gallant's internship and the information he shared with co-workers. (Tr. 143.)

4. June 13 – Gallant Called Mall Security on Respondent for Safety Violations

Even after suffering through Walter's interrogation at the Southland Mall store, Gallant continued to engage in protected concerted activities at Respondent's stores. On about June 13, Gallant visited Respondent's Westfield Mall store to speak to employees about San Francisco's Fair Work Week ordinance. (Tr. 45.) During his visit, he spoke with Sales Advisor Elsa Soronia (Soronia) in the kid's department. (Tr. 45.) They discussed the Memorial Day fire alarm incident and how Soronia previously told newly hired employees that Respondent reduced her hours but should have given more hours to existing employees, like her, before hiring new employees. (Tr. 45 – 46.) They also discussed how management continued to lock the doors to

⁹ She also informed the rest of the management District Team about her conversation with Gallant at the Southland Mall store: Luke Sandell, Howie Orange, and Jesus Palomares. (Tr. ,140, 142.)

the kid's department, and when Soronia had asked Department Manager Lam about the locked doors, he said Gallant was not there, so it was ok. (Tr. 46.) During their conversation, Department Supervisors James Reed (Reed)¹⁰ and Lam were about 100 feet and 30 feet away from them, respectively. (Tr. 46 – 47.)

After speaking with Soronia, Gallant checked to see if the doors to the kid's department were locked. (Tr. 47, 49 - 51.) After confirming that the doors were locked, Gallant asked Lam to unlock them, stating that the locked doors put everyone in jeopardy in the event of an emergency, and in response, Lam said he was too busy and walked away. (Tr. 48, 87.) Then, Gallant exited the store and went to mall security to inform them about the locked doors. (Tr. 48, 87.)

Gallant showed mall security his timeline regarding all the times Respondent locked the doors to the kid's department since 2017. (Tr. 48, 87.) Gallant then escorted mall security to the Westfield Mall store where they spoke with Manager Reed. (Tr. 48.) Mall security informed Reed that they received a complaint from Gallant about the doors to the kid's department being locked, which is an OSHA¹¹ violation, and they asked Reed to unlock the doors. (Tr. 48.) In response, Reed asked Gallant why he was doing this, and said Gallant was being a disturbance and made Respondent look bad. (Tr. 48.) In response, Gallant said that Reed was putting

¹⁰ Reed was clearly a 2(11) supervisor of Respondent within the meaning of Section 2(11) of the Act. At the hearing, Walters testified that he was a department supervisor during the relevant time. (Tr. 130.) Gallant previously worked under Reed, so Reed knew him. (Tr. 47.)

¹¹ The ALJ should take judicial notice that OSHA stands for Occupational Safety and Health Administration. It is a government agency whose purpose is to ensure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. <https://www.osha.gov/aboutosha>.

employees and customers in danger by locking the doors and that he was just raising awareness since it had been an ongoing problem. (Tr. 49.)

After his confrontation with Gallant, Reed sent an email to Walters about Gallant's visit to the Westfield Mall store that day. (GC Ex. 10.) In his email, Reed apologized for not sending an email to her the week prior when Gallant had visited the Westfield Mall, indicating that Walters previously told Reed to inform her every time Gallant visited the store. (GC Ex. 10.) Reed added that Gallant brought mall management (i.e. security) to the store to express safety concerns about the locked doors. (GC Ex. 10.) In his email, Reed added that he confronted Gallant by asking him, "why are you here disrupting my business again," indicating that Reed had previously seen Gallant visit his store. (GC Ex. 10.) At hearing, Walters stated that she also received a phone call from Reed that same day to discuss his confrontation with Gallant, but Walters made the dubious claim on the witness stand that she did not recall anything about that conversation. (Tr. 148.)

Soon after Gallant confronted Reed at the Westfield Mall store, he left a voicemail for Walters. (Tr. 51 – 52.) In his voicemail, Gallant told Walters that he asked Department Manager Lam to unlock the doors to the kid's department and Lam refused to do so. (Tr. 52.) He also told her that he contacted mall management about the locked doors, showing them a timeline of all the times those doors were locked, and that he escorted mall security to the store where they confronted Reed about the locked doors. (Tr. 52.) Fifteen-minutes after leaving his voicemail, Walters called Gallant. (Tr. 52.) They discussed the issues that Gallant listed in his voicemail. (Tr. 52, 129.) Gallant told her that he had spoken to employees and customers, who felt unsafe in the store due to the locked doors. (Tr. 52, 129.) Gallant told Walters that he contacted mall security about the locked doors. (Tr. 52, 129.) Walters said Respondent was

going to take care of the door situation, and Gallant asked to meet with her in person to discuss the issue, to which she declined. (Tr. 52, 129.)

The same day, after her telephone call with Gallant, Walters sent an email to Employee Relations Specialist Mikulski about the substance of that conversation, informing Mikulski that she was concerned about Gallant interviewing customers about how they felt regarding Respondent locking the kid's department doors during business hours. (GC Ex. 10.) To her email, she attached the June 13 email she received from Reed, as noted above. (GC Ex. 10.) She informed Mikulski that Gallant had an internship with a workers' coalition that involved him visiting several of Respondent's stores to audit various terms and conditions of employment: staff schedules, whether Respondent posted the mandated legal postings to employees, and whether Respondent applied its policies consistently at each store and with every employee. (GC Ex. 10.)

5. July 18 – Walters Interrogated and Threatened Gallant Over the Phone Regarding his Protected Concerted Activities

After her interrogation of Gallant at the Southland Mall store, Walters and Respondent's Employee Relations Team decided to probe more into Gallant's internship and discussions with employees. Employee Relations Specialists Mikulski and Henriques instructed Walters to meet with Gallant to discuss these matters. (Tr. 157.) As a result, Walters had a very extensive telephone meeting with Gallant on July 18. (Tr. 157.)

That day, Department Manager Haley Hunter (Hunter) escorted Gallant to the manager's meeting office to have a telephone meeting with Walters. (Tr. 52 – 53, 132; GC Ex. 2, 6, 11.) During the meeting, Hunter took notes and sat behind Gallant as Walters conducted the entire meeting over the phone. (Tr. 52 – 53, 132; GC Ex. 2, 6, 11.) At the start of the meeting, Walters again extensively interrogated Gallant about his protected concerted activities, including

his internship, claiming that he may be violating Respondent's Conflicts of Interest (COI) policy. (Tr. 54, 132, 157; GC Ex. 2, 6, 11.) She asked him about his role and responsibilities with the internship. (Tr. 157; GC Ex. 2, 6, 11.) Repeating what he previously told Walters at the Southland Mall store, Gallant said that his internship involved advocating for Fair Work Week ordinances; that he previously worked with other retail employees to pass a Fair Work Week ordinance in Emeryville, California; that he was currently working to have the City of Los Angeles and the State of California adopt their own Fair Work Week ordinance; and that he spoke to OSHA and State of California representatives regarding issues related to employees' health and safety and work schedules and Fair Work Week ordinances. (Tr. 54, 100 – 101, 158; GC Ex. 2, 6, 11.) Walters asked Gallant whether his internship paid him, and in response, he said he was not being paid and his internship was all voluntary. (Tr. 62, GC Ex. 2.) He said his goal was to make sure that every work environment was safe. (GC Ex. 2.)

Walters interrogated Gallant about his discussions with employees and customers about working conditions. (Tr. 56, 129, 133; GC Ex. 2.) In response, Gallant again informed Walters that he had spoken to Respondent's employees about the working conditions at the Westfield Mall store (#101), as well as to customers about how they felt being unable to access the locked doors to the kid's department, particularly in the event of a fire. (Tr. 56, 101; GC Ex. 2.) Gallant added that at the Powell Street store (#80), he asked customers and employees about how they felt shopping and working in the extreme heat due to the store's broken air conditioner. (Tr. 56, 101; GC Ex. 2.) Being pressed by Walters, Gallant also said that he previously made complaints with OSHA against Respondent and gave OSHA the phone number to former District Manager Jenny Kugizaki (Kugizaki) to discuss Respondent's OSHA violations. (Tr. 56 – 57, 91 – 92, 105; GC Ex. 2, 6.) After Gallant responded to Walters's questions about his discussions with

employees and customers, she declared to Gallant that it was outside of his job role to discuss certain work issues with employees: the Memorial Day fire alarm incident, the locked doors problem, the broken air conditioner, and OSHA complaints. (Tr. 57; GC Ex. 2.) Walters threatened Gallant that his conversations with employees could result in those employees receiving discipline. (Tr. 57; GC Ex. 2.) Walters added that it was not in his job role to make complaints to OSHA and that he needed to handle such issues through Respondent's chain of command. (Tr. 57, GC Ex. 2.) She said he needed to report such issues to his supervisor, who will escalate it to the department manager, who will escalate it to the store manager, who will then escalate it to the "higher ups." (Tr. 57.)

To further her mistaken claim that Gallant's protected concerted activities violated Respondent's COI policy, Walters directed Gallant to read Respondent's Support Book, which was placed next to him.¹² (Tr. 62 – 63; JT Ex. 2.) The Support Book contained one of Respondent's three COI policies, which will hereinafter be referred to as the Support Book's COI Policy. (Tr. 63; JT Ex. 2.) Walters reviewed the Support Book's COI policy with Gallant and made the unsupported claim that he violated the third bullet point under that policy. (Tr. 63 – 64, 133, 136, 138; JT Ex. 2; GC Ex. 2.) The relevant portion of that policy reads as follows:

Conflict of Interest

All employees must avoid professional activities and relationships that conflict with H&M's interests or negatively affect H&M's reputation. The activities and relationships include, but not limited to:

& Accepting employment or participating in a professional activity that may require disclosing H&M confidential Information.

¹² Respondent issued the Support Book to all its employees, nationwide. (Tr. 138.)

Walters told Gallant that he violated the policy because he disclosed confidential Company information, such as sales reports; shrink reports;¹³ and Respondent's bereavement, jury duty, and maternity leave policies. (Tr. 55, 61 - 63.) Gallant denied Walters's unsupported claim, telling her that everything he did and discussed with employees was public and not confidential. (Tr. 64; GC Ex. 2, 6.) Moreover, Gallant never disclosed confidential information to anyone, never told Walters that he disclosed confidential information, and he informed Walters that he was simply raising awareness about Fair Work Week ordinances and OSHA regulations – all public policies. (Tr. 61 - 63; GC Ex. 2, 6.) To further interfere with Gallant's protected concerted activities, Walters told him that his actions and internship could damage Respondent's brand, could make Respondent look negative, put Respondent's reputation at risk, and conflicted with Respondent's best interest. (Tr. 59, 134; GC Ex. 2)

Despite Walters's directive to not speak with employees about working conditions, Gallant rightfully persisted that it was his legal right to do so. While being interrogated, Gallant also said he spoke to employees, who worked at other retail stores and fast food restaurants, to inform them about their rights under San Francisco's Fair Work Week ordinance and about how they could file complaints for violations of that policy with the city. (Tr. 58, 101 – 102, 105, 159; GC Ex. 2, 6.) Gallant continued to assert his rights, telling her that he and these other retail and fast food workers have a right to, and indeed did, discuss how employers violated San Francisco's Fair Work Week ordinance. (Tr. 58, 102, 105, 160; GC Ex. 2, 6.) When Walters asked for more details about what he and these employees discussed, he told her about some of the topics of discussion: 1) how employers violated San Francisco's Fair Work Week ordinance

¹³ Shrink reports show what percentage of the store's merchandise has been lost due to theft. (Tr. 55, 106.)

by hiring new employees instead of assigning additional hours to existing employees; 2) how employees could file OSHA complaints against their employers; 3) employee concerns regarding various stores in the Westfield Mall locking their doors during fire alarms and business hours; 4) whether their respective employers kept safety exits accessible; 5) and whether their employers posted government mandated work regulations in the breakroom and whether employees understood their rights under those regulations. (Tr. 58, 102, 103, 105, 160; GC Ex. 2, 6.) After learning more details about his discussions with other retail and fast food workers, Walters told Gallant that those discussions violated Respondent's COI policy because he disclosed internal confidential information. (Tr. 58; GC Ex. 2, 6.) Gallant again denied disclosing confidential internal information and stated that he was simply educating employees about public/governmental workplace laws, explaining that employers often failed to inform employees about how these laws protect them. (Tr. 59, GC Ex. 2, 6.) Gallant never told Walters that he disclosed confidential internal information, including the information she claimed was purportedly confidential: Respondent's shrink reports, sales reports, and store layout,¹⁴ (Tr. 105.) Moreover, he never disclosed the aforementioned purportedly confidential information or any other confidential information. (Tr. 105.)

Although Gallant already explained in detail to Walters that his internship involved advancing retail and fast food employees' terms and conditions of employment, she demanded that Gallant submit a written statement concerning his internship and other protected concerted activities. (Tr. 59 – 60; GC Ex. 2, 3, 6.) She demanded that the written statement: 1) disclose

¹⁴ During the hearing, Walters implied that employee schedules was confidential information. (Tr. 132.) But Respondent failed to provide evidence showing that such information was confidential. Moreover, Walters did not include employee schedules when she informed Gallant of the types of information that was confidential. (Tr. 105.)

what he was doing in the internship; 2) reveal the questions he asked customers and employees about working conditions; 3) divulge the identities of the Respondent employees he spoke with about working conditions; 4) reveal the information he was gathering regarding working conditions; 5) explain his roles and duties with his internship, 6) disclose the name of the organization his internship was with; 7) divulge the name of his supervisor at the internship; 8) reveal what he was telling OSHA; and 9) describe and produce copies of his surveys with customers and employees and explain why he conducted them. (Tr. 59 - 60, 160; GC Ex. 2, 3, 6.) Walters demanded Gallant submit this written statement even though she had no evidence that Gallant leaked confidential information to outside sources. (Tr. 166.) Gallant told Walters that he would try to submit the written statement by the following week even though he felt uncomfortable and attacked and believed Walter's request to be improper. (Tr. 60.) Gallant asked Walters whether a member of management could sit down with him to compare Respondent's policies with his American Federal rights (i.e. Federal and California State labor laws). (Tr. 60; GC Ex. 2.) Gallant also asked Walters for the name of the labor union that represented Respondent's employees in New York City, and Walters said she did not know. (Tr. 60, 160; GC Ex. 2, 6.)

Immediately after speaking with Gallant, Walters, via email and telephone, informed Regional HR Manager Muchler (Muchler), and Employee Relations Specialists Henriques, and Siantz about her discussion with Gallant and to potentially consider discipline. (Tr. 135, 161, 176, 188; GC Ex. 6.) She told them that she questioned Gallant about his role in the internship; and found out that he had spoken to Respondent's employees and customers, and employees from other retailers about working conditions, safety issues, and other terms and conditions of

employment.¹⁵ (Tr. 176; GC Ex. 2.) She added that she discovered Gallant worked with OSHA and State of California representatives on issues related to employees' health and safety, scheduling, and Fair Work week ordinances. (Tr. 176; GC Ex. 2.) Finally, she told them that she demanded Gallant disclose what he discussed with Respondent's employees and customers, employees from other retailers, OSHA, and State of California representatives. (Tr. 176; GC Ex. 2.)

6. July 19 – Gallant Told Respondent More About His Protected Concerted Activities in Writing

On about July 19, Gallant submitted a Company Documentation Form to Manager Ricardo Gutierrez (R. Gutierrez) at the Emeryville store. (Tr. 64 – 65, 67 – 68, 90; GC Ex. 3.) A Company Documentation Form is an internal form that employees submit to Respondent to report negative and positive experiences at work. (Tr. 65; GC Ex. 3.) Typically, employees submit the Company Documentation Form to a manager, who then elevates it to the Store Manager. (Tr. 65.) In Gallant's Company Documentation Form, he objected to Walters's July 18 interrogation, explained that he maintained a timeline regarding all OSHA / health and safety violations that occurred at the Westfield Mall store, stated that he informed OSHA and the Westfield Mall security about these violations, and asserted that he spoke to employees about their concerns regarding the Memorial Day fire alarm incident. (Tr. 68; GC Ex. 3.) In the same form, Gallant also denied Walters's claim that he disclosed confidential information. (GC Ex.

¹⁵ Respondent used the term "audits" to refer to Gallant's discussions with employees and customers about terms and conditions of employment. But the record shows that Gallant did not conduct any "audits." Rather, he surveyed employees and customers about terms and conditions of employment and spoke to them about those issues. (Tr. 176; GC Ex. 2.)

3.) After submitting the Company Documentation Form, Respondent never spoke to Gallant about the form. (Tr. 69.)

7. August 12 – Gallant Met With Employees at the Fuddruckers Restaurant

On about August 12, Gallant met with three of his co-workers at the Fuddruckers restaurant near the Emeryville store: Sales Advisors Shanic and Kaci (both individuals' last name unknown), and Visual Merchandiser Shewitt (last name unknown). The restaurant was about 100 feet away from the men's store and 300 feet away from the ladies' store. (Tr. 69 – 70.) During their meeting, Gallant spoke to the employees about the City of Emeryville's Fair Work Week ordinance, whether they experienced violations of that ordinance, and how they could complaints for those violations. (Tr. 71.) As the employees discussed these matters, Supervisor Ricardo Gutierrez walked into the restaurant and was only about ten feet away from them, seeing that employees from his store were meeting with Gallant, who was on Respondent's radar for speaking to employees about terms and conditions of employment. (Tr. 70.)

8. August 14 – Siantz Interrogated Gallant

On about August 14, Gallant was instructed to go to the manager's office to speak with Employee Relations Specialist for the West Coast Siantz over the telephone. (Tr. 72, 177; GC Ex. 4.) At that time, Siantz was well aware that Gallant was speaking to employees and customers about working conditions, as well as working with government agencies and employees from other retailers on issues pertaining to employees' health and safety and Fair Work Week ordinances. (Tr. 195; GC Ex. 6.) During their telephone conversation, Siantz said Respondent did not receive the written statement regarding his internship and discussions with employees that Walters previously requested from him on July 18, and she instructed him to submit the statement. (Tr. 72, 178; GC Ex. 4.) She said his written statement should describe

his role in the internship and his surveys/discussions with employees and customers about specific working conditions at Respondent's stores. (Tr. 178, 194 - 196; GC Ex. 4.) Asserting his right to speak to employees about working conditions, Gallant said that he was uncomfortable with her request, that it was wrong for Respondent to demand such a written statement, and that he was protected by the National Labor Relations Board (NLRB) because he was working to improve employees' working conditions. (Tr. 72; GC Ex. 4.) Gallant requested that Siantz send him a written document indicating the specific information Respondent wanted from him in writing and the legal authority behind Respondent's invasive request. (Tr. 72, 196; GC Ex. 4.) Siantz told Gallant that she would send him a written request, but she never did. (Tr. 73, 196.)

9. August 26 – Gallant Questioned Respondent's Policies

On August 26, Store Manager Baugh emailed Walters and the Employee Relations Team, informing them that he reviewed Gallant's personnel file and determined that Gallant had not yet signed the form acknowledging he had reviewed the Support Book. (GC Ex. 13.) Baugh said Gallant did not sign the form because the managers at the stores he used to work at, did not have him sign one. (GC Ex. 13.) Baugh stated that he supplied the Support Book to Gallant, who was reading the book now. (GC Ex. 13.)

That day, Baugh did instruct Gallant to read the Support Book. He called Gallant and newly hired Sales Advisor Michelle (last name unknown) to the manager's office. (Tr. 74.) During their meeting, Baugh said Gallant and Michelle had not signed the acknowledgment form indicating that they had read Respondent's Support Book. (Tr. 74.) Gallant said that he did not sign the acknowledgment form because when Respondent hired him a few years back, it failed to provide him with the proper new hire orientation. (Tr. 74.) After Michelle, who was hired just a

week prior, signed the acknowledgment form, Baugh told Gallant that he could have some time to read the Support Book. (Tr. 74 – 75.) Gallant asked if Baugh or any other member of management could sit down with him to review the Support Book, so he could ask them questions. (Tr. 75.) Baugh denied Gallant’s request, told him to write down his questions onto “sticky notes,” and said he would answer those questions the following day. (Tr. 75.) That day, Gallant was only able to read half of the Support Book because he only had one hour before the end of his shift and Baugh did not authorize overtime to him. (Tr. 75.) Gallant wrote down two questions and comments onto sticky notes that day. (Tr. 75.) He wrote down that former Westfield Mall Store Manager Kachi (last name unknown) had previously violated the Support Book by only giving him one day off and failing to pay him when he had to miss work due to having jury duty. (Tr. 75.) Gallant also wrote down a question asking why Respondent collaborated with an individual who donated money to anti-LGBTQ organizations.¹⁶ (Tr. 76.) Gallant wrote his comments and questions onto a sticky note and attached it to the Support Book that Baugh collected from him that day. (Tr. 76.) Baugh told Gallant that he could finish reading the Support Book the next day. (Tr. 76.)

10. August 21 – Respondent Made the Decision to Terminate Gallant to Silence his Discussions with Employees

On August 16, Siantz sent an email to Blanco, informing her that she, Mikulski, and the Employee Relations Team made the decision to terminate Gallant. (Tr. 113; R Ex. 3.) On August 21, Muchler sent an email to Walters and Store Manager Baugh explaining how Respondent would terminate Gallant. (Tr. 113; GC Ex. 12.)

¹⁶ LGBTQ is an acronym for lesbian, gay, bisexual, transgender and queer or questioning.

On August 27, Gallant had a termination meeting with Store Manager Baugh and Department Manager Carmina Diaz (Diaz) in the manager's office.¹⁷ (Tr. 76.) Baugh said this was Gallant's last day with Respondent, and he read Gallant's termination notice to him. (Tr. 77; JT Ex. 4; GC Ex. 5.) At hearing, Siantz admitted that Respondent terminated Gallant based in part, on Walter's July 18 email to Mikulski, Henriques, and her regarding Walters's interrogation of Gallant on July 18. (Tr. 190; GC Ex. 6, 11.) At the termination meeting, Baugh read Gallant's termination notice, informing him that Respondent terminated him because he allegedly violated the COI policy by failing to submit a written statement describing his internship and discussions with employees about working conditions that Walters and Siantz previously requested from him. (Tr. 77; JT Ex. 2, 4; R Ex. 4.) After being informed of his termination, Gallant asked Baugh for a copy of his personnel file, which Baugh refused to provide. (Tr. 77.) Gallant told Baugh and Diaz that he was going to whistle blow all the health and safety violations Respondent had committed, such as the Memorial Day fire alarm incident. (Tr. 77, 208 - 210; GC Ex. 5.) Baugh and Diaz followed Gallant as he exited the store, and Baugh told Gallant that he was a good worker and they were sorry to lose him. (Tr. 77.) Gallant told Baugh that he was going to disclose everything about Respondent's violation of the law concerning the Memorial Day fire alarm incident, the locking of the doors to the kid's department during business hours, the broken air conditioner at the Powell Street store, and the fire exits at the Westfield Mall store that were constantly blocked with shipments and supplies. (Tr. 78, 208 - 210; GC Ex. 5.)

¹⁷ On August 16, Siantz sent an email to Blanco informing the latter that she, the Employee Relations Team, and Mikulski decided to terminate Gallant. (Tr. 113; R Ex. 3.) On August 21, Muchler informed Walters and Store Manager Baugh that the Employee Relations Team decided to terminate Gallant, and he instructed Baugh to execute the termination. (Tr. 113; GC Ex. 12.)

Gallant never told Respondent that he had or was going to leak confidential Company information or confidential personnel information. (Tr. 79, 208.) Gallant never disclosed any of the information that Walters told him was purportedly confidential on July 18. (Tr. 79, 209.) Gallant never had possession of any confidential information that was proprietary to Respondent. (Tr. 209.)

At trial, Labor Relations Supervisor Blanco admitted that except for Gallant, Respondent had never disciplined, let alone terminated, an employee for violating the Support Book's COI Policy or any other COI policy – Gallant was the only one. (Tr. 117 – 118; GC Ex. 7.) Moreover, Respondent's response to the General Counsel's subpoena duces tecum did not include any disciplines issued to employees for violating the Support Book's COI Policy or any other COI policy. (Tr. 117 – 118; GC Ex. 7.)

11. Respondent Continued to Show Animus After Gallant's Termination

On about August 28, Siantz contacted Respondent's Media Relations Department, instructing them to monitor media outlets for stories concerning Gallant's termination. (Tr. 193, GC Ex. 8.) Siantz admitted that she did not typically contact the Media Relations Department about a sales advisor's termination. (Tr. 194.) Siantz contacted the Media Relations Department due to what Gallant said at his termination meeting – that he was going to leak to the public information he learned from employees pertaining to Respondent's health and safety violations. (Tr. 78 – 79, 194.)

On about August 28, Siantz also contacted Respondent's Security Department to look out for Gallant. (Tr. 192; GC Ex. 8.) She contacted security based on Department Manager Diaz's notes regarding what Gallant said at the termination meeting – that he was going to leak

information about the Memorial Day fire alarm incident at the Westfield Mall store (#101), which was a shared concern among employees. (Tr. 198 -199; GC Ex. 5.)

III. CREDIBILITY

While Respondent's defense relied entirely on isolating the reason for Gallant's termination on violating the Support Book's COI policy, the fact is that Respondent had equated Gallant's protected concerted activities with an alleged conflict of interest. While the contemporaneous notes and emails in the record clearly established this, Respondent witnesses' hearing testimony attempted to hide this. In this regard, Walters and Siantz testimony should not be credited.

In making credibility determinations, administrative law judges may rely on a number of factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole."¹⁸ The Board has long held that there are a number of inferences that may be drawn from the circumstances of the testimony. One such inference is the Board's recognition "that the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests."¹⁹

Here, the testimony of Walters and Siantz should not be credited where it conflicts with that of Gallant concerning Respondent questioning Gallant about his protected activities. Specifically, Walters's hearing testimony about her July 18 interrogation of Gallant contradicts

¹⁸ *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 7 (2014).

¹⁹ *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995), citing *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978) and *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961).

her July 18 email to the Employee Relations Team and with Department Manager Hunter's notes from that meeting. (GC Ex. 2, 6.)

For instance, Walters testified that in response to her questioning, she did not recall Gallant stating that his internship involved advocating for Fair Work Week ordinances; and that he spoke to OSHA and State of California representatives regarding issues related to employees' health and safety and work schedules and Fair Work Week ordinances. (Tr. 158 – 159.). But Gallant's hearing testimony is that he did respond with that information and Walters's July 18 email to the Employee Relations Team corroborates his testimony. (GC Ex. 6.) Also, Walters testified that she did not recall Gallant stating that his goal was to ensure all work environments are safe; and that he was investigating incidents at the Westfield Mall store where customers struggled to access locked doors and at the Powell Street store where employees were forced to work in extreme heat due to a broken air conditioner. (Tr. 158 – 159.) On the contrary, Gallant testified that he did say those things and Hunter's notes from that meeting, which Walters reviewed, corroborate his testimony. (Tr. 159; GC Ex. 2.) Walters also testified that she did not tell Gallant that his actions could damage Respondent's brand/reputation, and that it was outside his role to discuss the locked doors and broken air conditioner issues. (Tr. 159 – 160.) But Gallant testified that she did make those coercive statements and Hunter's notes corroborate his testimony. (GC Ex. 2.) Walters also testified she did not tell Gallant that she needed more information about his relationship with OSHA. (Tr. 160.) But Hunter's notes show otherwise. (GC Ex. 2.) Contrary to Walters's 'unreliable testimony, Gallant's testimony about what was asked and said during the July 18 interrogation is consistent with Walters's July 18 email and Hunter's notes from that meeting. (Tr. 56 – 59; GC Ex. 2, 6.)

Also, Walters testified that she did not recall any managers ever telling her that Gallant called mall security on the Westfield Mall store regarding the locked doors. (Tr. 147.) Her testimony should not be credited. Contrary to her testimony, Store Manager Reed sent a June 13 email to her, stating that Gallant brought mall management (i.e. security) to the Westfield Mall store to unlock the doors and attempted to have mall management impose a fine on Respondent for the locked doors. (GC Ex. 9.) An email from one of her own store managers discredits her hearing testimony.

Similarly, Siantz's hearing testimony about the extent of her knowledge of Gallant's protected concerted activities is not credible because it contradicts Walters's July 18 email and Hunter's notes from the July 18 meeting, which were attached to the email. (GC Ex. 6.) Siantz testified that when she requested Gallant to submit a written statement about his internship on about August 14, she was unaware that he was advocating for Fair Work Week ordinances, and speaking with employees about employee health and safety issues like the locked doors at the Westfield Mall store and the broken air conditioner at the Powell Street store. (Tr. 195 – 196.) But Walters's July 18 email, which she received, and Hunter's notes from the July 18 interrogation show otherwise. (GC Ex. 6.)

For the above reasons, the ALJ should not credit Walters's and Siantz's hearing testimony about what was asked and said during the July 18 interrogation and about them having no knowledge of Gallant's protected concerted activities. On the other hand, Gallant's testimony was consistent with Respondent's own contemporaneous notes and emails in the record. Hence, Gallant is clearly the more credible witness.

IV. ANALYSIS

A. Respondent Committed Numerous 8(a)(1) Violations That Led to Gallant's Termination

The test of whether an employer has violated Section 8(a)(1) does not depend on an employer's motive, courtesy, or gentleness, or on whether the interference, restraint, or coercion succeeded or failed,²⁰ but on whether an employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights.²¹

The evidence establishes that prior to terminating Gallant for his protected concerted activity, Respondent engaged in numerous actions that would have reasonably tended to interfere with and restrain employees' free exercise of protected concerted activity. Respondent's pattern of unlawful actions shows Respondent's animus towards Gallant's protected concerted activities and that its motive for discharging him was to end his discussions with employees and governmental agencies about terms and conditions of employment.

1. Respondent Interrogated Gallant and Restrained Him From Engaging in Protected Concerted Activities (Complaint Paragraphs 5(a) (ii), (iii), (v), (vi); 5(b) (ii), (iii), (vii), (ix), (xi), (xii), (xiii); and 5(c))

Respondent both interrogated Gallant about his protected activity and dissuaded him from engaging in it. It is well-settled that the circumstances surrounding the questioning of an employee about his protected activity--that is, the time, place, manner and rank of those involved--is crucial in determining whether it is coercive and thus in violation of the Act.

Rossmore House, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom, *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Bourne v. NLRB*, 332 F.2d 47 (2d. Cir. 1964). When evaluating

²⁰ *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

²¹ *Crown Stationers*, 272 NLRB 164 (1984).

alleged interrogations, the Board examines all the circumstances to determine if the questioning would have reasonably tended to restrain or coerce employees in the exercise of protected concerted activity. *Id.* Factors to considered include the questioner's identity, the nature of the relationship between the questioner and the employee, the place and method of questioning, the nature of the information sought and whether it would reveal previously undisclosed union sympathies or activities, whether the questioner offered any legitimate explanation for the question or assurance against reprisal, the truthfulness of the employee's reply, and whether there is a history of employer hostility to union activity. See *Id.* at 1178 and n. 20; *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 16–17, 20 (2018), enfd. --- Fed. Appx. ---, 2019 WL 3229142 (D.C. Cir. July 12, 2019); *Novato Healthcare Center*, 365 NLRB No. 137 (2017), enfd. 916 F.3d 1095, 1106 (D.C. Cir. 2019). The Board also considers whether the interrogated employee is an open and active union supporter. See, e.g., *Southern Bakers, LC*, 364 NLRB No. 64, slip op. at 7 (2016), enfd. in relevant part 871 F.3d 811 (8th Cir. 2017).

Here, all the factors weigh heavily in finding that Respondent unlawfully interrogated Gallant about his protected concerted activities. In response to Walters's inquisition, Gallant shared some information about his protected concerted activities with her. But Walters crossed the line, as her questioning of Gallant became increasingly invasive, threatening, and coercive to the point Gallant had to tell this district human relations manager, who had far more authority than him, that he thought her questions violated federal law. (Tr. 72; GC Ex. 4.) Walters interrogated Gallant about his protected concerted activities during her meetings with him at the Southland Mall store and over the phone on July 18.

The evidence shows that any reasonable employee would have felt restrained and coerced to engage in protected concerted activities if questioned in the manner that Gallant was by

Walters. She was a high-ranking human relations manager, not a low-level supervisor casually asking a question of an employee on the shop floor. She sought information about Gallant's internship and other protected concerted activities. She had much more authority than Gallant, who was only a Sales Advisor. During their meeting at the Southland Mall store, she did not offer him any legitimate explanation for her questions or assurance against reprisal. During their July 18 meeting, she instructed him to submit a written statement about his internship that the Support Book's COI Policy did not even require, and she did not give him any assurance against reprisal. Walters initiated both meetings with Gallant, one of which was one-on-one, and the other was over the phone, where only a department manager accompanied him to take notes. Such conduct cannot avoid but having a chilling effect on Gallant's protected concerted activities. Based on the totality of the circumstances and the *Rossmore House* factors, any reasonable employee would feel restrained and coerced to engage in protected concerted activities by Walters's questioning.

At the Southland Mall store, Walters approached Gallant and initiated a twenty-minute, one-on-one meeting with him in the manager's office right after she assessed Gallant for a future managerial position. (Tr. 37, 126, 149, 152 – 153, 205.) The coercive nature of Walters's actions that day was further magnified because Gallant rarely saw her in Respondent's stores and this was the first time he ever had a substantive conversation with her. (Tr. 38, 41, 43 - 44.) During the meeting, she asked Gallant why he spoke to employees, which employees spoke to him about their concerns regarding the Memorial Day fire alarm incident, what did those employees tell him, who was he in contact with regarding his discussions with employees about working conditions, and what questions did he ask employees about working conditions. (Tr. 38, 41 – 42, 97, 127.) ((Complaint Paragraphs. 5(a) (ii), (vi)). This was not a casual conversation

that occurred impromptu. Rather it was a formal conversation that Walters initiated after learning that Gallant, who worked at the Emeryville store, had visited several stores of Respondent. Under such pressure, Gallant reluctantly informed Walters that five employees wanted to quit due to the Memorial Day fire alarm incident, but did not reveal their identities. (Tr. 40 – 41; 88 – 89.) He said those employees also wanted to quit due to managerial favoritism and that they deserved a committee. (Tr. 40 – 41; 88 – 89.) Wanting to learn more about his discussions with employees about working conditions, Walters asked Gallant to disclose the identities of the five employees, asked him what he discussed with those employees, and asserted that he did not need to speak to employees about specific terms and conditions of employment. (Tr. 41 - 42.) (Complaint Paragraphs 5(a) (ii), (v)). To add, Walters demanded copies of the surveys he conducted with employees and customers, said it was outside his sales advisor role to conduct these surveys, and asked why he conducted these surveys. (Tr. 39, 41.) (Complaint Paragraphs 5(a)(iii)). Finally, wanting to know everything about his internship, Walters interrogated Gallant, asking him what his internship was about and who he was interning for. (Tr. 39, 155 – 156.) (Complaint Paragraphs 5(a) (vi)).

Walters further interrogated Gallant about his protected concerted activities during her telephone meeting with him on July 18. During that meeting, Walters again asked Gallant about his internship, including his role and responsibilities. (Tr. 157; GC Ex. 2, 6, 11.) (Complaint Paragraphs 5(b) (xiii)). She also asked Gallant about the “audits”/surveys he conducted with employees and customers, demanding that he produce copies of the surveys. (Tr. 59 - 60; GC Ex. 2.) (Complaint Paragraphs 5(b) (ii), (iii)). Moreover, Walters asked Gallant to disclose the questions he posed to customers, Respondent’s employees, and employees of other retailers and customers, along with the identities of the employees he spoke to. (Tr. 56, 58 - 60, 102 - 103,

105, 129, 133, 160; GC Ex. 2, 3, 6.) (Complaint Paragraphs 5(b) (ii), (iii), (xi), (xii)). Even though Gallant answered many of Walters's questions, disclosing a great deal of information about his internship and protected concerted activities, she demanded that Gallant submit a written statement to reveal the questions he asked customers and employees of Respondent and other retailers; the identities of the employees he spoke with; the information he was gathering; more details about his internship; and the reasons behind his surveys. (Tr. 59 - 60, 160; GC Ex. 2, 3, 6.) (Complaint Paragraphs 5(b) (ii), (iii), (ix), (xi), (xii), (xiii)).

Likewise, during the August 14 telephone conversation that Siantz initiated, she interrogated Gallant about his protected concerted activities, in violation of Section 8(a)(1) of the Act. (Complaint Paragraphs 5(c)). The evidence establishes that any reasonable employee would have felt restrained to engage in protected concerted activities due to Siantz's questioning. Siantz was Respondent's Employee Relations Specialist for the entire West Coast, having much more authority and power than Gallant. (Tr. 168). She was so high ranking that Walters reported to her the results of her investigation into Gallant's internship and protected concerted activities. (Tr. 135, 161, 176, 188; GC Ex. 6, 11.) She initiated the telephone conversation by having someone pull Gallant off the sales floor to speak to her over the phone in the manager's office. (Tr. 72.) During the one-on-one telephone conversation, Siantz instructed Gallant to submit the written statement about his internship and protected concerted activities, which Walters previously demanded from him. (Tr. 72; GC Ex. 4.) Siantz said the written statement needed to explain what he was doing for the internship and what he discussed/surveyed with customers and employees about working conditions. (Tr. 72; GC Ex. 4.) Siantz instructed Gallant to submit the written statement even though the Support Book's COI Policy did not even require it, and she did not give him any assurance against reprisal.

In sum, Walters's and Siantz's questions, asked in the manner and under the circumstances they were, conveyed a tone of suspicion if not hostility toward Gallant's protected activity. Thus, Respondent both interrogated Gallant about his protected activity and dissuaded him from engaging in it, in violation of Section 8(a)(1) of the Act.

2. Respondent Created an Impression of Surveillance (Complaint Paragraph 5(a)(i))

An employer creates an unlawful impression of surveillance if its employees would reasonably assume from the statement in question that their protected activities had been placed under surveillance. *Heartshare Human Serv. of N.Y.*, 339 NLRB 842, 844 (2003). The idea behind finding an impression of surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in protected activities without the fear that members of management are peering over their shoulders, taking note of who is involved in protected activities, and in what particular ways. *Flexsteel Indus.*, 311 NLRB 257, 257 (1993) (quotations omitted).

Here, Walters created an impression of surveillance during her meeting with Gallant at the Southland Mall store on about the end of May or early June. That day, immediately after Walters approached Gallant and initiated the one-on-one meeting with him, she began the meeting by telling Gallant that she was aware he had been visiting several of Respondent's San Francisco, California stores. (Tr. 38, 95.) Disturbingly, Walters made this claim even though this was the first time Gallant ever had a substantive conversation with this high-ranking human resource manager and he only informed her about his protected concerted activities at the San Francisco stores in response to her subsequent interrogation. (Tr. 38 – 39; 41, 43 – 44, 127.) Hence, Walters's statement violated Section 8(a)(1) of the Act because it would have made

Gallant, and any other employee, reasonably assume that his protected concerted activities had been placed under surveillance.

3. Respondent Prohibited Employees from Speaking With Other Employees About Their Working Conditions (Complaint Paragraphs 5(a)(iv); and 5(b)(iv), (v), (viii), (x))

It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Such discussions are the genesis and power behind all protected concerted activities. If employees cannot speak to each other about working conditions, they cannot concertedly act to improve those conditions. Hence, Respondent tried its best to prohibit Gallant from speaking with employees about working conditions and ultimately terminated him to end such discussions. The Board has consistently held that the communication between employees “for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities.” *Phoenix Transit Systems*, 337 NLRB 510 (2002) (citing *Container Corp. of America*, 244 NLRB 318, 322 (1979)). An employer violates the Act when it attempts to prevent employees from engaging in protected concerted activities by prohibiting employees from discussing matters concerning their terms and conditions of employment. It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightways, Co.*, 124 NLRB 146, 147 (1959). As the Board explained in *Double D Construction Group*, 339 NLRB 303, 303-304 (2003), “[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” In determining whether an employer’s remarks are

unlawful, they must also be analyzed in the context of the employer's other misconduct.

NLRB v. Gissel Packing Co., 395 U.S. at 617.

During Walters's one-on-one meeting with Gallant at the Southland Mall store and over the telephone on July 18, she prohibited Gallant from discussing his working conditions with other employees. Specifically, during their one-on-one meeting at the Southland Mall store, in response to her questioning, Gallant told her about several concerns he and other employees shared concerning their terms and conditions of employment. Not liking what Gallant said, Walters chastised him by stating that as a sales advisor, he did not have the knowledge to speak to employees about Respondent's work policies, such as its jury-duty and bereavement leave policies. (Tr. 40, 206 – 207.) (Complaint Paragraphs 5(a) (iv)).

Walters continued her quest to chill Gallant's protected concerted activities during their July 18 telephone meeting. During that telephone meeting in the manager's office, where Department Manager Hunter sat directly behind Gallant, taking notes, Walters told Gallant he was violating the third bullet point under the Support Book's COI Policy. She made the unsupported claim that Gallant disclosed confidential Company information by equating it with his protected activities that includes his internship, discussions/surveys with customers and employees about working conditions, complaints to OSHA, and discussions with employees of Respondent and other retailers about working conditions. (Tr. 54, 58, 63 – 64, 132 - 133, 136, 138, 157; GC Ex. 2, 6, 11.) But Walters had zero evidence that Gallant had disclosed confidential information, and Gallant never disclosed any confidential information to anyone. (Tr. 105, 166.) Moreover, in response to Walters's constant questioning, Gallant had already told her a great deal about his internship and protected concerted activities, which concerned governmental regulations and ordinances and discussions with employees about their terms and

conditions of employment - all actions that Gallant had the right to engage in and therefore cannot be a reasonable basis to conclude that he was disclosing confidential financial, sales, and personnel information. Nonetheless, Walters insisted that Gallant violated the Support Book's COI Policy, reviewed the policy with him, and demanded that he submit a written statement concerning his internship and other protected concerted activities. (Tr. 55, 59 - 64, 133, 136, 138, 160; GC Ex. 2, 3, 6; JT Ex. 2.) (Complaint Paragraphs 5(b) (iv), (vii), (viii), (x)).

To bolster her directive that Gallant stop speaking to employees about working conditions, Walters told Gallant that his actions could damage Respondent's brand and reputation and make it look negative. (Tr. 59, 134; GC Ex. 2) (Complaint Paragraphs 5(b) (v), (vi), (viii)). To further quash Gallant's protected concerted activities, Walters explained to him that he should not speak to employees about working conditions by stating it was outside of his job role to discuss certain working conditions with employees: the Memorial Day fire alarm incident, the locked doors problem, the broken air conditioner, and the complaints he made to OSHA. Walters added that it was not in his job role to make complaints to OSHA and that he needed to handle such issues through Respondent's chain of command. (Tr. 57, GC Ex. 2.) (Complaint Paragraphs 5(b) (v), (viii)). Walters's statement was coercive because she imparted to Gallant that he was only a mere sales advisor and not permitted to speak to employees about their terms and conditions of employment, which should only be handled by Respondent's managerial hierarchy. Walters reinforced her directive that he stop speaking to employees about working conditions by telling him that such discussions could result in those employees receiving discipline. (Tr. 57, GC Ex. 2.) (Complaint Paragraphs 5(b) (iv), (v)). In sum, Walters's actions interfered with the free exercise of employee rights under the Act because she prohibited

Gallant from speaking with employees about matters concerning their terms and conditions of employment, in violation of section of 8(a)(1) of the Act.

**4. Respondent Threatened Gallant with Unspecified Reprisals
(Complaint Paragraphs 5(b) (i), (vi))**

“An employer violates Section 8(a)(1) if its conduct ‘would tend to coerce a reasonable employee’” in the exercise of his or her Section 7 rights. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003) (quoting *Madison Industries*, 290 NLRB 1226, 1229 (1988); *Without Reservation*, 280 NLRB 1408, 1414 (1996)). If an employee would reasonably interpret a remark as a threat, then the remark violates Section 8(a)(1) regardless of the speaker’s actual intent or the actual effect on the listener. *Concepts & Designs*, 318 NLRB at 954 (1995). The Board considers the “totality of the relevant circumstances” when determining whether an employer’s statement violates Section 8(a)(1). *Saginaw Control & Engineering, Inc.*, 339 NLRB at 541 (quoting *Ebenezer Rail Car Services*, 333 NLRB 167, n.2 (2001)).

Here, the evidence established that Walters’s statements to Gallant on July 18 would tend to coerce a reasonable employee in the exercise of his or her Section 7 rights. Walters’s made her implied threats of possible discipline directly in response to Gallant’s answers to her questions, in which he informed her about his internship, surveys, outreach for Fair Work Week ordinances, and review of whether Respondent’s stores complied with OSHA and other health and safety laws. To illustrate, Walters told Gallant that he violated the Support Book’s COI Policy by participating in his internship, making complaints to OSHA, and speaking with employees who worked for Respondent and other retailers about their respective terms and conditions of employment. (Tr. 54 - 55, 61 – 64, 132 - 133, 136, 138, 157; GC Ex. 2, 6, 11; JT Ex. 2.) (Complaint Paragraphs 5(b) (i), (viii), (x)). She also told him that such discussions with employees could result in discipline for those employees. (Tr. 57.) Thus, Walters made a

statement about what she might do in the future to him and those employees he spoke to.²²

While Respondent would never admit that the Support Book's COI policy was intended to prevent employees from engaging in protected concerted activities, this was actually how it was being applied. Respondent nefariously conflated employees' protected concerted activities with an alleged conflict of interest.

Walters further threatened Gallant with unspecified reprisals by telling him that his protected concerted activities could damage Respondent's brand, make Respondent look negative, and put Respondent's reputation at risk. (Tr. 59, 134; GC Ex. 2) (Complaint Paragraphs 5(b)(vi)). She said this around the same time she made the unsupported claim that he violated the third bullet point under the Support Book's COI Policy. (Tr. 63 – 64, 133, 136, 138; JT Ex. 2; GC Ex. 2.) The very first sentence in that policy states, "All employees must avoid professional activities and relationships that conflict with H&M's interests or negatively affect H&M's reputation." Gallant had no other choice but to make the reasonable conclusion that his actions would lead to discipline or termination because he supposedly violated Respondent's work policy. Thus, coupled with the language in the Support Book's COI Policy, Walters threatened him with future discipline if Gallant persisted in his protected activities.

Further, since nothing Gallant was saying to others was maliciously or recklessly false or about matters outside of core Section 7 concerns, whether to employees or other third parties, her remarks were even more chilling. The Board has held that "employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication

²² Cf. *Orient Tally Company, Inc.*, 367 NLRB No. 36 (2018).

is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.” *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (2011) (quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000)). Here, Gallant had the support of the organization he was interning for to further his protected concerted activities at his own workplace. Nothing he was saying or sharing about the fire alarms, locked doors, lack of air conditioning, or unfair leave policies with any third party was disloyal, reckless or maliciously untrue as to lose the Act’s protection. The tough message Walters gave to Gallant was that in Respondent’s view, his protected concerted activities violated Respondent’s policies and conflicted with its business reputation, meaning that he would likely be disciplined or terminated if he did not disclose everything about his internship and protected activities under duress. Hence, Walters’s statements to Gallant were unspecified reprisals for engaging in Section 7 activities in violation of Section 8(a)(1) of the Act.

B. Respondent Terminated Gallant Due to His Protected Concerted Activities (Complaint Paragraph 6)

Based on any set of facts, whether from the General Counsel or Respondent, Respondent violated Section 8(a)(1) of the Act when it terminated Gallant. As discussed below, the General Counsel established that Respondent’s termination of Gallant violated the Act under three separate legal theories: 1) by applying Respondent’s COI policy to terminate Gallant for not disclosing everything about his protected concerted activity; 2) by using unlawful interrogations as the genesis of his termination; and 3) by terminating Gallant for his protected concerted activities under a *Wright Line*²³ analysis.

²³ *Wright Line*, supra.

1. Gallant Engaged in Protected Concerted Activities When He Spoke to Coworkers and Third Parties About Health and Safety Concerns and other Terms and Conditions of Employment

The standard for determining whether an employee has engaged in protected concerted activity is an objective one. See, e.g., *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). The question is whether the employee’s conduct “relate(s) to collective bargaining, working conditions and hours, or other matters of ‘mutual protection’ of employees.” *Id.*, quoting *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328, fn. 10 (7th Cir. 1976).

In *Meyers Industries*, 281 NLRB 882 (1986), the Board reiterated the definition of concerted activity as encompassing “those 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.” In *Meyers*, the Board also recognized that at its inception, concerted activity only involves a speaker and a listener, and added that the initial conversation is an “indispensable preliminary step to employee self-organization,” provided that the conversation had some relation to initiating, inducing or preparing for group action in the interests of employees. *Id.* (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951) and *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986)). Notably, the object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate. See *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (Board noted that a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about working conditions).

Here, Gallant clearly engaged in a great deal of protected concerted activities prior to his termination. He frequently spoke to employees at the Westfield Mall and Emeryville stores to

conduct store audits and outreach for Fair Work Week laws and OSHA regulations. Soon after Galacia informed Gallant about the Memorial Day fire alarm incident and shared her concerns about being forced to work during the fire alarm, Gallant investigated the incident and discussed the incident with employees, including Sales Advisors Galacia, A. Gutierrez, and Soronia. Gallant also investigated the safety hazard caused by Respondent continually locking the doors to the kid's department at the Westfield Mall store during business hours. He spoke to employees and asked them about how they felt about being unable to enter and exit through those locked doors. He spoke with employees about how they felt working in extreme heat due to the air conditioner at the Powell Street store being broken for several months. Furthermore, Gallant often spoke to employees about their concerns regarding Respondent's maternity, bereavement, and jury duty leave policies. In sum, Gallant engaged in a lot of protected concerted activities for the purpose of improving employees' terms and conditions of employment.

The Board has made clear that employee discussions with coworkers are indispensable initial steps along the way to possible group action and are protected regardless of whether the employees have raised their concerns with management or talked about working together to address those concerns. *Hispanics United of Buffalo*, 359 NLRB 368, 370 (2012) *enfd.* 734 F.3d 764 (8th Cir. 2013), citing *Relco Locomotives*, 358 NLRB 298, 309 (2012). Moreover, protection is not denied because employees have not authorized another employee to act as their spokesperson. *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984).

Here, Gallant's did raise employees' concerns to management, and these employees specifically sought him out as their spokesperson because they felt safer having their concerns being raised by him than to face any potential reprisals themselves. Therefore, the facts of this

case overwhelmingly show that Gallant was engaging in protected concerted activities even assuming his activities were motivated, in part, by his unpaid internship with a worker's coalition. To not make this finding would be like concluding that an employee's union activities is not protected simply because he is a member of a union.

Moreover, Gallant's discussions with his coworkers and customers were for the mutual aid or protection of himself and Respondent's employees who were working under similar working conditions. The concept of "mutual aid or protection" focuses on the *goal* of the concerted activity; whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, 361 NLRB at 154 (2014), citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees. *Id.* Although personal vindication may be among the soliciting employee's goals, that does not mean that the soliciting employee failed to embrace the larger purpose of drawing management's attention to an issue for the benefit of all his or her fellow employees. *St. Rose Dominican Hospitals*, 360 NLRB 1130, 1134 (2014). Here, Gallant was raising true group concerns over their health and safety. They were concerned about working through fire alarms, locked exit doors, and the lack of air conditioning. It matters not that he also had wanted to organize employees and the public to further the goals of Fair Work Week ordinances. It is well settled that raising OSHA complaints is Section 7 activity. See, e.g., *Michigan Metal Processing Corp.*, 262 NLRB 275, 276 (1982); *Owens Illinois, Inc.*, 290 NLRB 1193, 1204-1205 (1988), *enfd.* 872 F.2d 413 (3d Cir. 1989). Equally well-settled is that complaints to management about safety issues is protected. *Dreis & Krump Mfg.*, 221 NLRB 309, 314 (1975) (employees' complaints protesting

supervisory handling of safety and training issues fell within the scope of the “mutual aid or protection” clause). Under these circumstances, it is clear that Gallant was engaged in exactly the type of concerted activities for mutual aid or protection that are protected under Section 8(a)(1) of the Act.

Also, as previously explained, Gallant’s conduct did not lose the protections of the Act because while engaging in protected concerted activities he never made any statements to employees, customers or other third parties that was disloyal, reckless or maliciously untrue. The Board has held that ““employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.”” *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (2011) (quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000)). His discussions, comments, and questions about the fire alarms, locked doors, lack of air conditioning, or leave policies was about true. It was based on observations and conversations he had with his coworkers. Most tellingly, Respondent at no point told him what he was saying was untrue or disloyal. Rather, Respondent, through Walters, had admonished him that it was not within his job duties to talk about these matters and that he failed to follow the supervisory chain of command in raising these issues when he exercised his Section 7 rights to speak directly to employees or third parties such as OSHA about working conditions.

As the evidence clearly establishes that Gallant engaged in protected concerted activities, Respondent’s termination of Gallant violated Section 8(a)(1) of the Act under at least three legal theories as explained below.

2. Respondent Violated Section 8(a)(1) of the Act by Unlawfully Applying a Workplace Rule Against Gallant to His Protected Activities (Complaint Paragraphs 7, 8(a), 8(d))

The *Boeing* Board made clear that discipline under a lawful rule is still unlawful if applied to employees protected concerted activity. The Board explained that “even when a rule’s *maintenance* is deemed lawful, the Board will examine the circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act.”²⁴

a) Gallant Engaged In a Great Deal of Protected Concerted Activities

Here, even if the Support Book’s COI policy is lawful, Respondent applied the policy to terminate Gallant because he engaged in a great deal of protected concerted activities. Gallant spoke to employees about Fair Work Week ordinances, Respondent’s multiple employee leave policies, OSHA regulations, the safety hazard caused by the locked doors at the Westfield Mall store, and the health hazard caused by the broken air conditioner at the Powell Street store. Gallant also frequently complained directly to Respondent about various terms and conditions of employment. In response to Walters’s and Siantz’s interrogation, Gallant disclosed a great deal about his internship and other protected concerted activities under dress. When Respondent continued to relentlessly interrogate Gallant to uncover everything about his protected concerted activities, he rightfully refused to disclose more information about his protected activity, telling Walters and Siantz that their questions violated federal law and he did not want Respondent to

²⁴ *The Boeing*, 365 NLRB No. 154, slip op. at 4-5 (2017) (emphasis in original); *see also id.*, slip op. at 16.

retaliate against the employees he spoke with. Hence, Respondent would not have terminated Gallant but for his discussions with employees and government agencies about working conditions, his surveys with employees about those conditions,²⁵ and his refusal to disclose everything about his internship and protected activity - all of which was part of the res gestae of his protected conduct.

b) Gallant’s Actions Did Not Fall Outside the Acts Protection

Once the Board has determined that an employee was disciplined or discharged for conduct that is part of the res gestae of protected concerted activity, it examines whether the employee’s actions were so egregious as to be unprotected nonetheless.²⁶

Here, Gallant never disclosed confidential internal information when he engaged in protected concerted activities and his refusal to disclose additional details about his internship activities was not so egregious as to be unprotected. Gallant reasonably understood that Walters

²⁵ Respondent used the term “audit” to refer to Gallant’s surveys and discussions with employees about working conditions. But his actions did not constitute what is conventionally understood of an audit.

²⁶ See, e.g., *KHRG Employer, LLC, d/b/a Hotel Burnham & Atwood Café*, 366 NLRB No. 22, slip op. at 2 & n.5 (Feb. 28, 2018) (“When, as here, an employer defends a discharge based on employee misconduct that is a part of the res gestae of the employee’s protected concerted activity,” i.e., breaching hotel’s security by leading a group to a secured area to present a petition to management, “the employer’s motive is not at issue. Instead, such discharges are considered unlawful unless the misconduct at issue was so egregious as to lose the protection of the Act.”); *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002) (refusing to apply *Wright Line* where it was undisputed that the employer discharged the employee because of articles he wrote in a union newsletter, as “the only issue is whether [the employee’s] conduct lost the protection of the Act. . . .”), *enforced per curiam*, 63 F. App’x 524 (D.C. Cir. 2003); *Tampa Tribune*, 351 NLRB 1324, 1327 n.14 (2007) (finding employee’s discharge for making profane statements while criticizing employer’s communications concerning negotiations to be unlawful, explaining that “[c]ontrary to Respondent’s contentions, we do not apply *Wright Line* . . . in the absence of a dispute about the Respondent’s motive,” and noting that profanity is “part of the res gestae of the otherwise-protected conversation”) (internal citation omitted), *enforced in part*, 560 F.3d 181 (4th Cir. 2009). Moreover, contrary to the Employer’s argument, the Board has applied a res gestae analysis to 8(a)(3) allegations. See, e.g., *Beverly Health & Rehabilitation Center*, 346 NLRB 1319, 1321, 1322 (2006), *overruled on other grounds*, *E.I. Dupont De Nemours*, 364 NLRB No. 113 (Aug. 26, 2016). In other cases, it has applied a res gestae analysis to find an 8(a)(1) violation without reaching 8(a)(3). See, e.g., *Mast Advertising*, 304 NLRB 819, 820 n.7 (1991).

and Siantz were trying to learn everything about his protected activities when they continually interrogated him about his internship and protected concerted activities, and that he would suffer reprisal for that activity. Under these circumstances, Gallant was under no obligation to respond to questions to uncover more about his protected activities or the identity of employees he spoke with or who he interned for, an organization whose mission is to mutually aid and support employees. See *Paragon Systems, Inc.*, 40 362 NLRB 1561, 1567 (2015). Moreover, Gallant's refusal to disclose such information about his protected concerted activities was not related to his job performance or Respondent's business, but to a protected right under the Act which he was not obligated to disclose. See *St. Louis Car Co.*, 108 NLRB 1523, 1525–1526 (1954).

Respondent did not investigate Gallant for misconduct. Rather, its investigation solely focused on Gallant's internship and protected concerted activities, which Gallant did not want to fully expose to Respondent for fear reprisal.²⁷ In sum, Respondent had no right to terminate Gallant for refusing to disclose more information about his internship and discussions with employees and government agencies about working conditions, which were all parts of the res gestae of his protected concerted activities, meaning that Respondent violated Section 8(a)(1) of the Act by discriminatorily enforcing the Support Book's COI Policy selectively and disparately to fire him.

3. Respondent's Termination of Gallant Violated Section 8(a)(1) of the Act Because Its Genesis was an Unlawful Interrogation

The termination also violated the Act because Walters's and Siantz's questioning of Gallant about his protected Section 7 activities was unlawful. Specifically, Respondent's

²⁷ Compare with *Fresenius USA Mfg. Inc.*, 362 NLRB 1065 (2015) (finding an employee's dishonesty during an investigation of misconduct of alleged harassment and threats was unprotected by the Act due to the focus of the investigation on the allegation, and not on any union activity). Contrary to that case, here, Gallant simply refused to provide additional information about his protected activity during Respondent's investigation of his internship and protected concerted activities.

termination notice states the basis of the termination is because Gallant failed to submit a written statement further explaining his protected concerted activities.

An employee is under no obligation to respond to questions that seek to uncover his protected activities. *United Services Automobile Association*, 340 NLRB 784 (2003); *St. Louis Car Co.*, 108 NLRB 1523 (1954). An employer may not terminate an employee for lying in response to questions regarding protected concerted activity. *Tradewaste Incineration*, 336 NLRB 902, 902 (2001) (employee's untruthful denial that he posted a wage-related notice was protected where it "did not relate to the performance of his job performance or the [r]espondent's business."); *St. Louis Car Co.*, 108 NLRB 1523, 1525–1526 (1954) (employee's untruthful denial of her union organizing activity was protected where the denial "related not to the [r]espondent's business at all, but to personal rights guaranteed by [the Act] which she desired not to disclose."). Indeed, the Board has been clear that misconduct provoked by an employer's unfair labor practice is not grounds for discharge. See e.g. *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849-50 (2001). As the Board noted in *In re Preferred Transp. Inc.*, "[t]he common principle is that employers should not be permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that – in other circumstances – might justify discipline." 339 NLRB No. 2, slip op. 4 (2003).

Here, Gallant was under no obligation to respond to Respondent's questions that sought to uncover more details about his protected activities. Although there are some cases in which the Board has held that lying was not protected, such cases involve lying about misconduct in the workplace, something which is not present here because Gallant did not lie about his protected activities. Fearing reprisal, Gallant simply refused to disclose everything about his protected activities, and Respondent had no right to fire Gallant for his refusal. Hence, since Respondent's

stated reason for terminating Gallant is that it terminated him for refusing to disclose more information about his internship and protected concerted activity, such as what he discussed with employees about working conditions and what he was doing at his internship, Respondent's discharge of him violated Section 8(a)(1) of the Act. See. *Frazier Industrial Co.*, 328 NLRB 717 (1999).

The analysis regarding Gallant's termination should end here. As discussed above, Board law is clear: an employer cannot rely on a *Wright Line* defense where an employee was terminated for lying during an unlawful interrogation into his protected activities. *In re Preferred Transp. Inc.*, supra. Similarly, Gallant's omission about certain details of his protected concerted activities or internship cannot be a valid basis to fire him. This is true because it constitutes bad faith on the part of the employer, as an employer cannot create good cause to justify the discharge of an employee. *Business Products-Division of Kidde, Inc.*, supra at fn. 3. However, even ignoring this framework, Respondent cannot establish that it would have nonetheless terminated Gallant for legitimate business reasons under a *Wright Line* framework.

4. Respondent Violated Section 8(a) (1) of the Act by Terminating Gallant Under *Wright Line*

Finally, Respondent's termination of Gallant also violates the Act under a *Wright Line* analysis. The record evidence establishes Respondent terminated Gallant due to the animus it had for his protected concerted activities. Moreover, Respondent failed to meet its burden to prove that it would have terminated Gallant absent his protected concerted activities. In fact, as discussed above, Respondent admitted that it terminated him because he refused to disclose everything about his protected concerted activities even though he told them that their questions violated federal law and he wanted to protect his coworkers from retaliation.

The legal framework for establishing unlawful discrimination under Section 8(a)(1) is set forth in *Wright Line* and its progeny. Thus, it is the General Counsel's burden to demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Once the General Counsel has established that an employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.* To establish this affirmative defense "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activity." *L.B. & B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). "The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities." *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006).

An employer may not prove this affirmative defense where the proffered reasons for the discharge are merely pretextual. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Brink's, Inc.*, 360 NLRB 1206, 1217 (2014) (noting that there is no need to perform the second part of the *Wright Line* analysis if the reasons for discharge are pretextual); *Parkview Lounge, LLC*, 366 NLRB. No. 71 (slip. op. at pg. 4) (April 26, 2018) (Board confirmed it is unnecessary to proceed to the second step of the *Wright Line* analysis, which is only applicable in mixed-motive cases, where proffered reason for terminating employee was pretextual). But cf., *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019) (Board held that when the reasons for decision are found to be pretextual discriminatory motive may be inferred but such an inference is not compelled).

a) Gallant Engaged in Protected Concerted Activities

As explained above in Section B.1 of this brief, Gallant engaged in textbook protected concerted activities when he spoke with his coworkers, customers, OSHA and other third parties about Respondent's lack of air conditioning, blocked ingress and egress, and working through fire alarms, among other things. There is no factual dispute about his activities and the totality of the evidence clearly establishes that his conduct did not lose the protections of the Act.

b) Respondent Had Knowledge of Gallant's Protected Concerted Activities

Respondent knew a great deal about Gallant's protected concerted activities. First, Gallant told Walters details about his internship and protected activities during her interrogation of him at the Southland Mall store and over the telephone on July 18. Second, at the Southland Mall, Walters summoned Gallant to a one-on-one meeting and started the meeting by stating she has been noticing him visiting some of Respondent's San Francisco stores, even though she only had one passing encounter with him sometime in the past. (Tr. 38.) Walters made a statement

that indicates Respondent had been watching Gallant and his activities at various stores, which included discussions with employees about working conditions.

Third, Respondent's own documents establish its knowledge. Direct evidence of Respondent's knowledge of Gallant's protected concerted activity is established through Walters's June 13 and July 18 emails to the employee relations team (GC Ex. 10, 11.) and Reed's June 13 email to Walters (GC Ex. 9.) For instance, Walters knew early on that Gallant's internship involved him speaking to employees about working conditions because in her June 13 email, she informed Mikulski that Gallant "has an internship with a workers coalition." Moreover, she attached to that email, Reed's June 13 email to her that describes how Gallant objected to the safety hazard caused by the locked doors and brought mall security to the store to open the doors. To add, Walters's July 18 email comprehensively described what she knew about His internship and protected concerted activities. Third, Walters and Siantz both demanded that Gallant submit a written statement to disclose more information about his internship, surveys and communications with employees about working conditions, communications with employees of other retailers about working conditions, and relationship with OSHA. Fourth, Gallant spelled out some of his protected activities in his July 19 written submission to Respondent. (GC Ex. 3.)

While Respondents own emails conclusively establish Respondent's knowledge of Gallant's protected concerted activities, the following further corroborates such a finding. Gallant frequently engaged in protected activities right in front of Respondent. He frequently confronted Department Supervisors Reed²⁸ and Lam, and Walters about the locked doors at the

²⁸ Reed is clearly a 2(11) supervisor of Respondent within the meaning of Section 2(11) of the Act. At the hearing, Walters testified that she he was a department supervisor during the relevant time. (Tr. 130.)

Westfield Mall store, and on June 13, brought mall security to the store to force Reed to unlock the doors for employees and customers. Gallant also openly spoke to employees at the Westfield Mall and Emeryville stores about their terms and conditions of employment. Those discussions occurred in the stores or at locations very close to the stores. At the Westfield Mall store, on June 13, Gallant spoke to Soronia inside the store. On about the end of May or early June, he spoke to Galacia and A. Gutierrez in the mall's public areas, which were visible from inside the store. When Gallant spoke to Galacia and A. Gutierrez in the mall's public areas, he clearly saw Department Manager Dip working at the cash registers, and Galacia warned him that Dip was watching him from the cash registers. While Gallant held a meeting with several employees at the Fuddruckers restaurant, supervisor R. Gutierrez entered the restaurant and was less than ten feet away from the group. Finally, the day before his termination, Gallant submitted to Baugh, in writing, his questions and objections to certain provisions in Respondent's Support Book. Hence, the evidence clearly established that Respondent had an abundance of knowledge about Gallant's protected concerted activities.

c) Respondent Harbored Animus Towards Gallant's Protected Concerted Activities

There is both direct and indirect evidence that Respondents decision to terminate Gallant was based on discriminatory motive. Evidence that an employer's hostility to protected activity motivated its decision to take adverse action against the employee may include: (1) statements of animus directed to the employee or about the employee's protected activities;²⁹ (2) statements by the employer that are specific as to the consequences of protected activities and are consistent

²⁹ See e.g., *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities).

with the actions taken against the employee;³⁰ (3) close timing between discovery of the employee's protected activities and the discipline;³¹ (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions;³² or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless.³³

Here, several factors weigh heavily in favor of finding Respondent's motivation in terminating Gallant to be discriminatory: Respondent's hostility towards Gallant's protected concerted activities, evidenced by the numerous unfair labor practices it committed and are at issue in this matter; the timing of his termination, Respondent's atypical post termination actions, and Respondent's pretextual reasoning for his termination.

³⁰ See e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat).

³¹ See, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card).

³² See, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2 (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees).

³³ See, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (2014); *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997).

(i) Respondent Committed Many Other Unfair Labor Practices That are at Issue in This Matter

The record is clear that Respondent exhibited animus towards Gallant's actions, which is established by the numerous unfair labor practices it committed, as discussed above (i.e. interrogation, threats of unspecified reprisals, prohibiting Gallant from speaking to employees about working conditions, impression of surveillance). See *Metro-West Ambulance Service*, 360 NLRB 1029 (2014); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (employer's contemporaneous 8(a)(1) violations demonstrate its animus); *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 3 (2016). As previously explained above, Respondent 1) interrogated Gallant about his protected concerted activities; 2) created the impression that his protected concerted activities were under surveillance; 3) prohibited him from speaking with other employees about Fair Work Week ordinances and health and safety issues related to potential fires, locked doors, and lack of air conditioning; 4) threatened him with unspecified reprisals if he continued to speak to employees about such working conditions; 5) restrained him from engaging in these types of protected concerted activities; and 6) told him not to speak with employees or third parties about working conditions. In sum, the multitude of unlawful interrogations and coercive statements by Respondent strongly indicate that it terminated Gallant due to his protected concerted activities.

(ii) Timing

In addition to the overwhelming evidence of Respondent's animus towards Gallant's protected concerted activities, the timing of Gallant's termination in relation to his protected concerted activities supports a finding of discriminatory motive. See *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003) ("where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised"); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275 (D.C. Cir. 1999) (court noted that timing is a telling

consideration in determining whether employer action is motivated by animus). As recognized by the Board, the “timing alone may suggest antiunion animus as a motivating factor in an employer's action.” *Inova Health System v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015); *Advanced Masonry Associates, LLC*, 366 NLRB No. 57 (2018). As stated by the administrative law judge in *AdvoServ of New Jersey*, 363 NLRB No. 143 slip op. at 31 (2016), “Indeed, “timing alone may be sufficient to establish that union animus was a motivating factor in a discharge decision.” *Sawyer of NAPA*, 300 NLRB 131, 150 (1990); *NLRB v. Rain-Ware*, 732 F.2d 1349, 1354 (7th Cir. 1084); *NLRB v. Windsor Industries*, 730 F.2d 860, 864 (2d Cir. 1984); *Manor Care Health Services--Easton*, 356 NLRB 202, 204, 226 (2010) (Proximity in time between discriminatee's union activity and discharge supports finding of unlawful motivation for the termination); *LaGloria Oil & Gas*, 337 NLRB 1120, 1123, 1132 (2002). (“Discharge shortly after Employer learned of employee's union activities, strongly supports a finding that discharge motivated by union animus”).

The timing of Gallant’s termination shows Respondent was motivated by animus towards his protected concerted activities. Prior to learning about his activities, Respondent identified Gallant as an exceptional employee, who was a candidate for a future managerial position, selecting him to attend the management assessment training at the Southland Mall store. Gallant’s exceptional work performance was also exemplified when Store Manager Baugh told Gallant that he was a great worker and he was sorry to lose him, immediately after he informed Gallant of his termination.

After Respondent first learned about Gallant’s protected concerted activities and he continued to engage in those activities, Respondent proceeded to hunt down more information about his activities, culminating in Walters’s July 18 telephone meeting with Gallant, in which

she interrogated him and demanded that he reveal more details about his protected concerted activities in writing. The very next day, Gallant submitted a written document that provided additional information about his internship and protected concerted activities. In the same document, Gallant objected to Walters's actions, stating that he felt uncomfortable and attacked for helping co-workers improve their working conditions. He added that he felt Respondent was targeting him when it was violating laws and governmental policies at the Westfield Mall store. Despite receiving Gallant's written statement, Respondent still yearned to learn everything about his protected concerted activities. On August 14, Siantz called Gallant, stating that Respondent still had not received the written statement regarding his internship and discussions with employees about working conditions that Walters previously requested from him on July 18. She then demanded that he submit a written statement describing his role in the internship and his surveys/discussions with employees about specific working conditions. Once again, Gallant felt threatened and targeted by Siantz's instruction, so he told her that he was uncomfortable with her request, that it was wrong for Respondent to demand such a written statement, and that he was protected by the NLRB because he was working to improve employees' working conditions. To protect his right to speak to employees about working conditions, Gallant requested that Siantz send him a written document indicating the specific information Respondent wanted from him in writing and the legal authority behind Respondent's invasive request. (Tr. 72, 196; GC Ex. 4.) As a result, Respondent concluded that its coercive actions could not intimidate Gallant into stopping his discussions with employees about working conditions because he knew he had the legal right to engage in those protected discussions. Shortly after, Respondent invoked the ultimate penalty to silence Gallant by terminating him under the guise of the Support Book's COI policy. Respondent made the decision to terminate Gallant on about August 21, which was

a little over two-months after it first learned about his internship and protected concerted activities, about a month after Gallant disclosed more details about his discussions with employees and governmental agencies (like OSHA) about working conditions due to Walters's interrogation, and only two-days after he asked Siantz to set forth the legal authority for her invasive request. The timing of Gallant's discharge on the heels of Respondent's top human relations officials learning about his protected concerted activities and immediately after he challenged the legality of Respondent's interrogations further establishes Respondent's discriminatory intent.

(iii) Respondent's Post Termination Actions Departed From its Past Practice

Respondent's actions immediately following Gallant's termination further shows its true motive, which was to discourage and curtail his protected concerted activities. One day after Gallant's termination, Siantz contacted Respondent's Media Relations Team to inform them about his termination and advise them to look out for media coverage about anything that concerned Gallant or his termination. Siantz admitted that she did not typically take such action when terminating a Sales Advisor and that she took the action due to Gallant stating that he was going to disclose all of Respondent's health and safety violations, such as the locked doors, blocked fire exits, and broken air conditioner. Thus, Siantz took this extraordinary step because she knew that Gallant had investigated and spoke to employees and governmental agencies about Respondent's workplace violations and she feared that he was going to expose those legal violations to the public.

(iv) Respondent Offered False Defenses for Gallant’s Termination That are Clearly Pretextual

(a) Respondent Knew That Gallant Did Not Disclose Confidential Information

In *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (Aug. 2, 2019), the Board stated that when the respondent's stated reasons for its decision are found to be pretextual--that is, either false or not in fact relied upon--discriminatory motive *may* be inferred, but such an inference is not compelled. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (“If [a trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal--an unlawful motive--at least where . . . the surrounding facts tend to reinforce that inference.”); *Wright Line*, 251 NLRB at 1088 fn. 12 (“The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case.”) (citing *Shattuck Denn Mining*, *supra*).

Respondent falsely accused Gallant of disclosing confidential company information even though it had no evidence he had done so, and he simply was a sales advisor who provided customer service on the sales floor, with very limited access to confidential information. (Tr. 21.) He never worked in Respondent’s executive offices, never had access to confidential financial information, and never had access to confidential employee information. (Tr. 21.) Although Respondent presented all sales advisors with pictures of new clothing lines from the annual guest designer, Gallant had no access to the design schematics of the new clothing lines. (Tr. 23 – 24.) Moreover, Respondent notified its employees at the same time it notified the public of guest designers. (Tr. 84.) On a few occasions, Gallant asked his managers if he could see some items before they were put out onto the floor for sale. (Tr. 84 – 85.) Although the

managers allowed him to see a few items, they never told Gallant to keep what he saw confidential since those clothes were going to be placed on the floor for sale. (Tr. 85.) Likewise, even though Gallant's supervisor showed him where merchandise should be placed within the store, known as "floor moves" or "store layout", no one ever told him that information was confidential, and he never shared that information with anyone. (Tr. 85 – 86.)

As a sales advisor, Gallant had seen sales reports, which showed how well, or poorly specific lines of clothing were selling while displayed for sale in certain parts of the store. (Tr. 99.) However, Gallant was unable to directly access or print sales reports, which department managers had to provide to Gallant as they worked together to move items from one area of the store to another area. (Tr. 99.) Gallant never took any photographs of sales reports, never took copies home, and never shared them with anybody outside of the Company. (Tr. 100, 105.) Moreover, the sales reports did not contain any financial information (Tr. 99.)

Gallant never possessed or disclosed any information that Walters claimed was confidential – sales reports and shrink reports. Respondent claims that it did not know enough about Gallant's internship and discussions with employees and governmental agencies about working conditions to determine whether he was disclosing confidential information, but that is not true. First, Walter's July 18 email to the Employee Relations Team clearly memorializes that Respondent knew a great deal about Gallant's internship and protected concerted activities. (GC Ex. 6.) In that email, she informed the Employee Relations Team that Gallant's internship involved him conducting outreach for Fair Work Week laws, enforcing OSHA regulations, and advocating for employees' health and safety. Second, Respondent did not base Gallant's termination on the allegation that he *might* be disclosing confidential information. Rather, it based his termination on the false claim that he did leak confidential information, which he never

did. Walters and Gallant's termination paperwork specifically accused him of disclosing confidential information – not that he might be disclosing such information. (Tr. 55, 58, 61 – 63; GC Ex. 2, 6; R Ex. 4.) Respondent made this false accusation even though it had no evidence to support it. Third, Walters's June 13, 2019 email to Mikulski further establishes that Respondent already knew a lot about Gallant's internship and protected activities. In her June 13 email, Walters informed Mikulski that Gallant had an internship with a workers' coalition and that he was speaking to employees about their work schedules, their concerns about work safety, their questions regarding employee relation issues, whether Respondent displayed the legally required government postings in the breakroom, and whether Respondent consistently applied its policies to all its stores and employees.³⁴ (GC Ex. 10.) Walters's emails never mention that Gallant is working with confidential reports. Thus, Gallant already told Respondent a great deal about his internship and protected concerted activities, and it is disingenuous for Respondent to now purport that its actual concern was regarding him disclosing confidential information like sales reports and shrink reports. Such after the fact defenses should be summarily rejected in light of contemporaneous emails clearly laying out the subjects Gallant was discussing with employees. Respondent's claim that Gallant disclosed confidential information has no evidentiary support and therefore is pretextual, further showing its discriminatory intent.

(b) Respondent Applied Non-Existent Terms in the Support Book COI Policy to Gallant

Respondent terminated Gallant based on the Support Book's COI Policy because he refused to submit a written statement disclosing additional information about his internship,

³⁴ Respondent used the term "audit" to refer to Gallant's discussions with employees about these workplace issues.

discussions with employees about working conditions, and other protected concerted activities. But nothing in the Support Book COI Policy required Gallant to submit a comprehensive written statement about his off-duty activities. In sum, Respondent's manipulation of the Support Book's COI Policy further shows its discriminatory intent.

The strong evidence that Respondent's reasons for terminating Gallant were pretextual and unworthy of belief rebuts any attempts by Respondent to show that it would have fired him, absent his protected activities.³⁵ As the Board stated in *Rood Trucking Company, Inc.*, 342 NLRB 895, 897 (2004):

A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminate[e]s absent their union activities. This is because where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981)). See also *Sanderson Farms, Inc.*, 340 NLRB 402 (2003).

Even if no pretext exists (it does), Respondent failed to meet its burden because there were no comparators or other evidence to establish that they would have taken the same action against him.

³⁵ *KNTV, Inc.*, 319 NLRB 447, 452 (1995) (finding that false and pretextual nature of employer's justification for terminating employee sufficient to rebut any defense that it would have taken the same action absent the employee's protected activity), citing *Transp. Mgmt. Corp.*, 462 U.S. 393 (1983); *Cell Agricultural Mfg. Co.*, 311 NLRB 1228 fn. 3 (1993); and *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (1966).

(v) Respondent Failed to Prove That it Would Have Discharged Gallant Even in the Absence of his Protected Concerted Activities

The burden now shifts to the Respondent to prove, as an affirmative defense, that it would have discharged Gallant even in the absence of his protected concerted activities.

Respondent cannot meet its burden given the undisputable facts for the basis of the termination as shown in the emails regarding Gallant's protected concerted activities.

Here, Respondent failed to point to any past practice of disciplining, much less terminating, employees for engaging in conduct similar to Gallant. Except for Gallant, Respondent has never disciplined or terminated an employee for violating its COI policies or for failing to provide a written statement detailing their off-duty activities and associations. Moreover, Respondent enforced the Support Book's COI Policy selectively and disparately against Gallant because of his protected concerted activities. Respondent failed to present any evidence that it requested other employees to submit a written statement regarding their outside, off-duty activity, or that it disciplined any employees for violating the policy. Respondent introduced as Respondent's Exhibit 1, an email from an employee informing Respondent about a job opportunity outside the Company. But there is no evidence that Respondent requested this employee to submit such a statement. Plus, the subject line in the email states, "Chapter 1.f Code of Ethics POV Manual," indicating that the email does not pertain to the Support Book COI Policy. The email also flops as a comparator because it fails to show that the employee worked in the Emeryville store and because the employee was a Visual Merchandiser, not a Sales Advisor like Gallant. Possibly, Visual Merchandisers may typically have had more access than Sales Advisors to confidential information like store layouts and sales reports. Why did Respondent not tolerate Gallant's internship while it tolerated other outside activities? The

answer is because he engaged in protected concerted activities and Respondent linked those activities to his internship with a workers' coalition.

Respondent failed to present any evidence that it would have fired Gallant even if he disclosed everything about his internship and protected activities. Gallant's termination notice rebuts any attempt by Respondent to claim that it would have. (JT Ex. 4). In his termination notice, Respondent stated that it terminated him specifically because he failed to provide the information about his internship and protected activities, as requested by Walters and Siantz. Moreover, Respondent failed to establish any other reason for his termination. Because Respondent was unable to make the necessary showing that it would have fired Gallant absent his protected activities, it cannot overcome the showing that Gallant's protected activities were a motivating factor in his termination.

In sum, Gallant engaged in a tremendous amount of protected concerted activities, and Respondent knew a lot about his protected activities. Furthermore, Respondent had animus towards those activities, and that animus motivated Respondent to unlawfully terminate Gallant in violation of Section 8(a)(1) of the Act.

V. CONCLUSION AND REMEDY

As the General Counsel has established that Respondent has violated Section 8(a)(1) of the Act as alleged, the General Counsel seeks all other relief appropriate to remedy Respondent's unfair labor practices. The General Counsel seeks a remedy requiring Respondent to make Gallant whole and offer him reinstatement. The remedy should also require Respondent to post notices to employees at its Westfield Mall store, Powell Street store, and Emeryville store, and

on its internal electronic Shop Information Portal (known as “SIP”),³⁶ assuring employees of their Section 7 rights and promising to cease and desist from its unlawful conduct.³⁷

DATED AT Oakland, California, this 4th day of May, 2020.

/s/ Jason Wong

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NATIONAL LABOR RELATIONS BOARD
REGION 20
901 MARKET STREET, SUITE 400
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³⁶ SIP is Respondent’s internal online document library where it posts work manuals, rules, and policies for employees to access. (Tr. 29, 170, 175.)

³⁷ See Appendix A for the Notice to Employees proposed by the General Counsel.

VI. APPENDIX A – PROPOSED NOTICE

PROPOSED NOTICE

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

YOU HAVE THE RIGHT to talk about your working conditions, including the leave policy, safety concerns, and your schedules, and **WE WILL NOT** stop you from talking about these matters or other terms and conditions of employment.

YOU HAVE THE RIGHT to freely bring workplace concerns and complaints to us on behalf of yourself and other employees regarding your terms and conditions of employment and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT make it appear that we are watching you engage in the above-described activities with your co-workers.

WE WILL NOT threaten you with unspecified reprisals if you engage in activity with other employees, or members of the public, regarding your wages, hours, and working conditions.

WE WILL NOT ask you to identify who you have talked with about your workplace concerns or ask you what you talked about.

WE WILL NOT demand that you provide us with copies of any surveys you have given to employees or customers regarding wages, hours, and working conditions.

WE WILL NOT prohibit you from talking to your co-workers (at any location) about your working conditions by telling you that it is not your role or that you are not the best person to talk with employees about the Employer's policies.

WE WILL NOT ask you to tell us why employees need an organizing committee.

WE WILL NOT ask you about your outside activities, including internships, when there is no basis for concluding that you have shared confidential information or have a conflict of interest.

WE WILL NOT ask you to provide a written statement about your organizing and/or protected activities regarding your working conditions.

WE WILL NOT discriminatorily apply workplace rules by enforcing those rules selectively and disparately against you to discourage you from exercising your right to bring issues and complaints to us on behalf of yourself and other employees.

WE WILL NOT fire you because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees.

WE WILL offer Nickolas Gallant immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Nickolas Gallant for the wages and other benefits he lost because we fired him.

WE WILL remove from our files all references to the discharge of Nickolas Gallant and **WE WILL** notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

HENNES & MAURITZ, LP D/B/A H&M

and

UNITED FOR RESPECT

**Cases: 32-CA-250461
32-CA-256051**

Date: May 4, 2020

**AFFIDAVIT OF SERVICE OF THE COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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United for Respect
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May 4, 2020

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida Lam