

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Oakland, California

UNITED FOR RESPECT,

Charging Party,

vs.

HENNES & MAURITZ, LP, DBA H&M,

Charged Party.

Case Nos. 32-CA-250461, 32-CA-256051

RESPONDENT HENNES & MAURITZ, LP'S

POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Pursuant to the Administrative Law Judge's ("ALJ") direction and section 102.42 of the National Labor Relations Board's ("NLRB" or "the Board") Rules and Regulations, Respondent Hennes & Mauritz, LP dba H&M ("H&M," "the Company," the "Employer", or "Respondent") submits this post-hearing brief regarding the Complaint filed by the General Counsel for the NLRB in the above-captioned case. Specifically, the General Counsel alleges that H&M violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "the Act") by purportedly enforcing an unlawful conflicts of interest policy, terminating the employment of Nickolas Gallant for violating the conflicts of interest policy, engaging in unlawful surveillance and interrogation, and otherwise restraining employees from exercising their Section 7 rights. (G.C. Exh. 1(l).)¹

The instant hearing took place at the Oakland Regional Office of the Board located at 1301 Clay Street, Suite 300N, in Oakland, California before Administrative Law Judge Ariel Sotolongo on March 9, 2020. At the conclusion of the hearing, the ALJ directed the parties to submit post-hearing briefs by Monday, April 13, 2020. The parties subsequently moved to extend the deadline for submitting briefs to Monday, May 4, 2020, which Associate Chief Administrative Law Judge Gerald Ethchingham granted.

As discussed below, the General Counsel's allegations are not at all consistent with the facts, which demonstrate that the Employer enforced a lawful conflicts of interest policy and that it lawfully terminated the employment of Gallant. Moreover, the Employer in no way engaged in any unlawful interrogation or surveillance, nor did it seek to prevent or discourage Gallant or any

¹ Transcript pages will be referenced as "Tr.," followed by the page number(s). Joint Exhibits will be referenced as "Jt. Exh.," General Counsel's Exhibits as "G.C. Exh." and H&M's Exhibits as "R. Exh.," in each case followed by the exhibit number(s) and, if applicable, the exhibit page number(s).

other H&M employee from exercising their Section 7 rights. The Employer's actions did not in any way violate Section 8(a)(1) of the Act. For these reasons, the Complaint should be dismissed in its entirety.

II. SUMMARY OF FACTUAL BACKGROUND

A. Background Information Regarding The Employer.

H&M is a fast-fashion global retailer. (Tr. 169:13-15.) The Company maintains retail shops all over the world, including several in the San Francisco Bay Area. (Tr. 24:20-25:3; 169:13-15.)

The Employer recognizes its employees' right to organize and engage in protected concerted activities. To that end, H&M maintains Global Labor Relations Principles, which the Company posts on its Shop Information Portal ("SIP").² (Tr. 174:14-175:19; R. Exh. 2.) Some H&M employees in New York and New Jersey are represented by unions, and the Employer entered into collective bargaining agreements with those unions. (Tr. 174:3-10.)

B. The Employer's Conflicts Of Interest Policy.

H&M maintains a conflicts of interest policy that is published in three separate sources. (Jt. Exh. 1; Jt. Exh. 2; Jt. Exh. 3.) The primary purposes of the conflicts of interest policy is to ensure that employees do not engage in activities that are directly competitive with the Employer's interest while in the employ of H&M. (*Id.*)

The Employer publishes the conflicts of interest policy in its People, Operations, and Values ("POV") Policy Book. (Tr. 169:22-170:6; Jt. Exh. 1.) The policy within the POV Policy Book provides as follows:

² SIP is a computerized online library that H&M maintains at its stores that is accessible to the employees to review Company policies. (Tr. 27:16-19, 99:1-10, 170:10-12.)

CONFLICTS OF INTEREST

Conflicts of interest may arise if your personal interests compete or conflict with the interests of the Company you are employed by. You should avoid any actual or imaginable situations that could damage your integrity and/or risk putting H&M's interests and/or reputation at stake.

You must always inform the Company if you have anything other than a strictly business relationship with someone that you do business with through your work at H&M. You must not carry on business on behalf of the Company with relatives and/or other persons that you have a close personal relationship with.

You must always inform the company if you or your immediate family (wife/husband/partner/children living at home) have any financial interests that you are aware may compete with H&M's interests or with the interests of those with whom you do business through your work at H&M.

You must never mix your personal affairs with the business you do on behalf of H&M and you must not use H&M's name or trademark in your private affairs.

While you are employed by H&M you must not take up employment or task outside the Company that could conflict with the Company's interests. If you want to take up employment and still keep working for H&M, either as an employee or as a consultant, you must have the Company's written permission before accepting such position. If you have any questions about whether employment would be competing, please direct your inquiry to Human Resources. (Jt. Exh. 1 at 000003-000004.)

Employees can access the POV Policy Book through SIP. (Tr. 170:7-12.)

The Employer also has a conflict of interest policy published in its Support Book.

(Tr. 170:13-19; Jt. Exh. 2.) The Support Book's conflict of interest policy states:

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, receiving or soliciting gifts, favors or services that may or appear to influence the employee's decisions or professional conduct.

& Accepting, agreeing to accept or soliciting money or other tangible or intangible benefits in exchange for the employee's favorable decisions or actions pertaining to job performance.

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

& Accepting work or conducting outside business with a competitor. State and local regulations apply.

Employees must inform their manager of actual or potential conflicts as soon as they are aware of them. (Jt. Exh. 2.)

Like the POV Policy Book, the Support Book is available on SIP. (Tr. 170:20-23.)

In addition, the Company publishes its conflicts of interest policies in its Code of Ethics.

(Tr. 170:24-171:7; Jt. Exh. 3.) The Code of Ethics states in relevant part:

CONFLICTS OF INTEREST

Conflicts of interest may arise if your personal interests compete or conflict with the interests of the Company. You should avoid any actual or imaginable situations that could damage your integrity and/or risk putting H&M's Interests and/or reputation at stake.

You must always inform the Company if you have anything other than a strictly business relation with someone that you do business with through your work at H&M. You must not carry on business on behalf of the Company with relatives and/or other persons that you have a close personal relationship with.

You must always inform the Company if you or your immediate family (wife/husband/partner/children living at home) have any financial interests that you are aware may compete with H&M's interests or with the interests of those with whom you do business through your work at H&M.

You must never mix your personal affairs with the business you do on behalf of H&M and you must not use H&M's name or trademark in your private affairs.

While you are employed by H&M you must not take up employment or task outside the Company that could conflict with the Company's Interests. If you want to take up employment and still keep working for H&M, either as an employee or as a consultant, you must have the Company's written permission before accepting such position. (Jt. Exh. 3 at 000002.)

As demonstrated by the fact that H&M publishes its conflict of interest policies in multiple sources, the Company makes sure its employees are aware of the Company's concerns regarding the issue. The Employer believes that the vast majority of its employees are aware of the policies. Indeed, as illustrated by a May 16, 2019 communication between employee Jannon Roque and the Company's Employee Relations team, when H&M employees consider second jobs outside of the Company that could support brands other than the Company's, they seek written approval from H&M to ensure that there is no conflict of interest. (Tr. 172:16-22; R. Exh. 1.)

C. Background Information Regarding Nickolas Gallant.

H&M hired Nickolas Gallant as a Sales Advisor in or around August of 2016. (Tr. 21:10-13.) As a Sales Advisor, Gallant was generally responsible for attending to customers, assisting customers in the fitting room, returning items from the fitting room, maintaining the sales floor, and cashiering. (Tr. 21:14-17.) Gallant worked at several H&M stores in the Bay Area, including stores in San Jose, Walnut Creek, San Francisco, and Emeryville. (Tr. 24:17-25:16.) Gallant's last permanent location for H&M was at the Emeryville store, where he started working in or around January 2019. (Tr. 25:17-20.)

As Gallant acknowledges, he was privy to confidential and proprietary information during his employment with H&M. Among other things, Gallant had access to sales goals, floor layouts, marketing plans and trends, and upcoming collaborations. (Tr. 81:21-83:12, 85:18-86:3, 171:17-172:6.)

D. Gallant's Disclosure Of His Internship To H&M.

In or around May of 2019, H&M invited Gallant to participate in an assessment center at its Hayward, California store at the Southland Mall. (Tr. 36:13-22, 125:23-126:7.) An assessment center is a process through which the Company evaluates an employee to determine the employee's readiness to enter into a potential supervisory or managerial position in the future. (*Id.*)

Following the assessment center, Gallant approached Nina Walters, who was then an H&M District Human Resources Manager and said that he wanted to speak with her. (Tr. 125:19-126:22.) Walters pulled Gallant into the manager's office at the site so that they could speak with some privacy. (Tr. 152:23-154:8.) Gallant advised Walters about concerns he had regarding H&M's retail store in San Francisco's Westfield Mall, otherwise referred to as "Store 101."³ (Tr. 125:19-126:22.) Gallant shared with Walters complaints he received from employees at Store 101 about a recent fire alarm issue. (Tr. 126:25-127:8.) Walters engaged with Gallant and asked for further information regarding the employees' stated concerns. (Tr. 127:9-19.) During the discussion, Gallant told Walters that he was in law school, participating in an internship with a workers coalition, and surveying stores within the market to obtain information. (*Id.*) Walters asked Gallant about which entity provided him the internship opportunity and the nature of the internship. (Tr. 155:24-156:5.) Gallant elected not to share the information regarding the entity for which he interned. (*Id.*) However, he represented that one of the responsibilities in the internship was to make sure that workplace laws were enforced.⁴ (Tr. 154:15-18.)

³ Neither Walters nor H&M had any copies of notes that Walters took regarding her discussion with Gallant following the assessment center. Following the discussion, someone broke into the car Walters was driving and stole her backpack, which contained her notes. (Tr. 151:6-16.)

⁴ At no time during the discussion did Walters attempt to prohibit Gallant from speaking with H&M employees about their working conditions or the Employer's policies, nor did she ask him to identify the employees with whom he had spoken. (Tr. 127:22-25, 128:4-11, 128:24-129:8.)

Gallant's comments regarding his internship and his surveys of stores gave Walters concern because the nature of his comments were vague and unusual. (Tr. 131:24-132:11.) She was unclear what information was being shared between Gallant and H&M's retail competitors' employees elsewhere. (*Id.*) As explained above, H&M employees, including Gallant, are privy to information that is undisputedly considered proprietary and/or confidential, including sales goals, floor layouts, marketing plans and trends, and upcoming collaborations. (Tr. 81:21-83:12, 85:18-86:3, 171:17-172:6.) For these reasons, Walters reached out to Chris Mikulski and Jose Henriquez of the Employee Relations team, and Luke Sandall, Howie Orange, and Jesus Palomares of the District team. (Tr. 131:5-13, 140:11-25.) She advised them of what Gallant told her regarding his internship, his communications with others, and his surveys. (Tr. 131:14-23, 142:2-143:9.) They all agreed that they needed to gather more information regarding the nature of Gallant's internship and survey activities. (*Id.*)

E. Gallant's And Walters's June 13, 2019 Communications.

On or about June 13, 2019, Gallant spoke with employees at Store 101 and observed that certain glass doors at the store were locked. Gallant brought the issue to the attention of James Reed, a department supervisor for H&M, and then a mall security representative, who subsequently directed the store to unlock the door. Following the incident, Gallant called Walters to alert her as to what transpired. (Tr. 129:17-130:4.) Gallant asked Walters to visit the store and address concerns raised regarding the door. (G.C. Exh. 10.) Walters advised Gallant that she would follow up with the manager on duty to discuss the issues regarding the door. (Tr. 131:5-7.)

She did not ask Gallant to provide her with any surveys he compiled. (Tr. 18:1-3.)

Reed also sent Walters an email documenting his interaction with Gallant on that day. (G.C. Exh. 9.) In response, Walters admonished Reed to be patient and professional when interacting with employees regarding such issues. (*Id.*)

Later that day, Walters sent an email to Mikulski advising him of the developments. (G.C. Exh. 10.) In the email, she reminded Mikulski of Gallant's internship with a workers coalition (the identity of which he would not disclose) in which he audited H&M and other retailers. (*Id.*) She also noted his activities, which included "reviewing staff schedules, legal postings, consistency of policies from store to store/employee to employee, store safety, [and] fielding employee relation issues." (*Id.*) Walters opined that Gallant provided "an AWESOME second set of eyes" and she "appreciated the intent." (*Id.*) (emphasis in original.) However, she noted that some store managers believed that Gallant was "interrupting business and causing issues instead of resolving them." (*Id.*) She referred to an email she received from Reed regarding the earlier encounter that day as well as her own discussion with Gallant. (*Id.*) She advised Mikulski that she had already addressed the issues of the locked doors at Store 101 with store management, as Gallant requested. (*Id.*) However, she remained concerned regarding Gallant "interviewing" customers at the store especially because he did not work at Store 101 at that time. (*Id.*) For that reason, she asked for Mikulski's input regarding how she could "leverage Nick for his good service but ensure he is using the proper channels." (*Id.*)

Mikulski replied that evening that he was unaware of the concern and that he would call her the following morning because he had "serious concerns with the conflict of interests this creates." (*Id.*)

F. Walters Requests Further Information Regarding Gallant's Internship.

As of mid-July 2019, Gallant had yet to provide H&M with any additional information regarding his internship, and thus, the Company remained concerned that he might be sharing

confidential information with others outside of H&M. (Tr. 132:2-11, 132:20-133:2.) Mikulski and Henriques asked Walters to follow up with Gallant to ensure his internship and surveying activities did not violate the Employer's conflicts of interest policy. (Tr. 157:13-16.) Consequently, Walters set up a telephone conference with Gallant on July 18, 2019. (Tr. 132:12-133:2.) She asked Hailey Hunter, a Department Manager, to be physically present with Gallant at the Emeryville store during the interview and to take notes of the discussion. (Tr. 132:17-19, 156:14-20, 157:6-12.)

During the discussion, Walters advised Gallant of H&M's conflicts of interest policy, read him the policy as set forth in the Support Book, and shared her concern that Gallant's recent actions – the internship and the communications and surveys of employees with customers and other retailers – violated the policy. (Tr. 133:5-134:1, 136:23-138:3; G.C. Exh. 6.) Gallant replied that he partners with the Occupational Safety and Health Administration (“OSHA”), other retailers, and state representatives on issues, including employee health and safety, predictive scheduling, and the fair workweek.⁵ (G.C. Exh. 6.) Walters responded that H&M needed more information regarding his internship and the scope of his responsibilities associated therewith to ensure that his activities were consistent with the conflicts of interest policy and that he needed to provide the information in writing. (Tr. 133:5-134:1, 158:23-159:2; G.C. Exh. 6.) Walters made it clear that the Company did not require that Gallant disclose every aspect of his role with the internship, but only those that touched on H&M. (G.C. Exh. 6.) Gallant agreed to provide the requested information the following week.⁶ (Tr. 60:6-8; 133:5-134:1; G.C. Exh. 6.)

⁵ During the discussion, Gallant made requests of Walters, including a request for someone to compare H&M policies to California legal requirements (Jt. Exh. 6 at 000005.) He also asked for the name of the union that represented certain H&M employees on the East Coast. (Tr. 160:22-25; Jt. Exh. 6 at 000005.)

⁶ At no point in the discussion did Walters tell Gallant that he could not speak with other

Following the meeting, Walters sent an email to Mikulski, Henriques, and Elena Siantz (the new Employee Relations Specialist for the West Coast) summarizing her discussion with Gallant and attaching the notes Hunter took during the meeting. (G.C. Exh. 6; G.C. Exh. 11.) She advised that she requested of Gallant written documentation that would “better indicate what information he is actually gathering/sharing in this internship as some of it would fall with confidential information.” (*Id.*) Walters stated that she “would really like [Employee Relations] to take over the next communication with him.” (*Id.*) The next day, Siantz responded, “We will touch base after Monday to go over what [Gallant] provides you so we can offer our full support.” (G.C. Exh. 11.)

Walters and Siantz later spoke over the telephone so that Walters could update Siantz on all of her communications with Gallant regarding his mysterious internship. (Tr. 176:9-177:8.)

G. Gallant Fails To Provide Any Further Information Regarding His Internship.

Despite Gallant’s earlier assurance that he would provide more information regarding the nature of his internship shortly after his July 18, 2019 discussion with Walters, he elected not to do so. On August 14, 2019, Siantz called Gallant while he was working at the Emeryville store to follow up on Walters’s earlier request. (Tr. 177:11-178:1; G.C. Exh. 4.) She asked Gallant once again to provide a role description. (Tr. 178:2-9; G.C. Exh. 4.) Gallant stated that he would not provide any such information unless he was “served” with a letter by his store manager, Tom Baugh, explaining the “legalities” of the request.⁷ (Tr. 178:10-24; G.C. Exh. 4.)

employees regarding H&M workplace issues, share H&M policies with his co-workers, or criticize the Company. (Tr. 134:2-8, 134:24-135:1.) She did not ask him about questions he was asking others as part of his survey efforts, nor did she advise him that he could not speak to others outside of H&M regarding issues pertaining to the working conditions at H&M. (Tr. 134:18-23, 135:2-5.) She never accused Gallant of taking any action that was damaging to the Employer’s brand. (Tr. 134:9-16.)

⁷ Siantz acknowledged Gallant’s request, but did not agree to provide him with any such written

H. H&M Terminates Gallant's Employment.

After Siantz spoke with Gallant, she circled back with Mikulski to discuss next steps. (Tr. 179:14-21.) Mikulski and Siantz agreed that Gallant's employment should be terminated because Gallant refused to provide the information requested so that the nature of Gallant's "workers coalition" internship and auditing remained a complete enigma. (Tr. 179:22-180:3.)

On August 16, Siantz advised Pamela Blanco, H&M's Labor Manager, regarding the Employer's decision to proceed with termination. (R. Exh. 3.) In the email, Siantz explained the basis for termination (citing the conflicts of interest policy set forth in the Support Book) and the process through which the Company would alert Gallant of his termination. (*Id.*) On August 21, Andrew Mutchler, the Company's West Coast Regional HR Manager, sent an email to Baugh and Walters providing further direction on the process for terminating Gallant's employment.⁸ (G.C. Exh. 12.)

The following day, Baugh met with Gallant in his office in the presence of Carmina Diaz, a Department Manager at the Employer's Emeryville store. (Tr. 76:11-23.) Baugh advised Gallant that the Company was terminating his employment because, by failing to provide the requested information regarding the nature of his internship, he violated the conflicts of interest policies. (Tr. 77:6-16; Jt. Exh. 4; R. Exh. 4.)

letter. (Tr. 199:9-13.)

⁸ In Mutchler's email he stated that the Company needed to "make sure [Gallant's] file is 100% organized with his new hire paperwork, signed support book acknowledgement form, and documentations leading up to his termination. (*Id.*) On August 26, Baugh advised Mutchler that Gallant did not have a signed support book acknowledgement form. (G.C. Exh. 13.) Consequently, on that particular day, Baugh provided Gallant with the support book and allowed him to read it during work time. (*Id.*)

Upon being advised of his discharge, Gallant requested a copy of his personnel file, threatened to “leak everything that’s been happening,” and stated that “things are going to blow up.” (Tr. 77:17-79:1, 208:9-209:3; G.C. Exh. 8; R. Exh. 5.)

In light of Gallant’s statements, Siantz advised store security of what took place and asked for guidance regarding what could be done in the event that Gallant tried to engage in trespassing at the store. (G.C. Exh. 8; Tr. 192:14-17.) Beyond that, Siantz reached out to the Employer’s media relations team to see if any there had been any media attention relating to the dispute between Gallant and H&M, which she thought was possible in light of Gallant’s statements following his termination. (G.C. Exh. 8; Tr. 193:7-194:12, 198:2-7.)

III. THE UNFAIR PRACTICE CHARGE ALLEGATIONS

A. The Legal Standard Under Section 8(a)(1) Of The Act.

Section 7 of the National Labor Relations Act guarantees employees have the right to “engage in . . . concerted activities for the purpose of . . . mutual aid or protection” and “the right to refrain from any or all such activities.” 29 U.S.C. § 157. Section 8(a)(1) of the Act forbids employers to “interfere with, restrain or coerce” employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1).

The Board’s well-settled test for determining a Section 8(a)(1) violation is an objective one:

[I]nterference, 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).

See also Miami Systems Corp., 320 NLRB 71, n. 4 (1995), *enf'd in relevant part sub nom.*, 111 F.3d 1284 (6th Cir. 1997) (“The test to determine interference, restraint, or coercion under Section 8(a)(1) is an objective one . . .”); *Keith Miller*, 334 NLRB 824 (2001).

The General Counsel bears the ultimate burden of proving interference, restraint or coercion in violation of the Act. *NLRB v. Fluor Daniel*, 161 F.3d 953, 965 (6th Cir. 1998); 29 U.S.C. § 160(c) (violations of the Act can be adjudicated only “upon the preponderance of the testimony” taken by NLRB); *see also* Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”).

B. The General Counsel Failed To Meet Its Burden To Establish That Nina Walters’s Actions During Her Discussion With Nickolas Gallant At The Southland Mall Violated The Act.

In the Complaint, the General Counsel alleges that during the Nina Walters-Nickolas Gallant interaction at the Southland Mall following his assessment center, Walters:

- “created an impression among [H&M] employees that their activities were under surveillance by Respondent by telling employees they had been seen visiting Respondent's retail stores” (G.C. Exh. 1(l), ¶ 5(a)(i));
- “interrogated employees about their protected, concerted activities by asking them to reveal the names of employees they had talked to about their terms and conditions of employment” (G.C. Exh. 1(l), ¶ 5(a)(ii));
- “interrogated employees about their protected, concerted activities by asking employees to see copies of any surveys given to others regarding their terms and conditions of employment” (G.C. Exh. 1(l), ¶ 5(a)(iii));
- “prohibited employees from talking with each other about their working conditions by stating that it is outside of employees’ job titles to know about Respondent's policies and that employees are not the best people to talk about Respondent's policies” (G.C. Exh. 1(l), ¶ 5(a)(iv));
- “interrogated employees about their protected, concerted activities by asking employees why they needed an organizing committee” (G.C. Exh. 1(l), ¶ 5(a)(v)); and

- “interrogated employees about their protected, concerted activities by asking employees about their off-duty activities.” (G.C. Exh. 1(l), ¶ 5(a)(vi).)

As explained further below, the General Counsel failed to meet its burden to prove these “kitchen sink” allegations. The credible record evidence does not support the General Counsel’s claims.

1. The General Counsel Failed To Meet Its Burden To Establish That Walters Created The Impression Of Surveillance.

“Whether an employer has created an impression of surveillance [depends on] whether the employee would reasonably assume from the statement their [protected concerted] activities had been placed under surveillance.” *Flexsteel Industries*, 311 NLRB 257, 257 (1993). The standard is an objective one, and focuses on employer conduct evidencing unlawful surveillance of concerted activities. “The test for whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee could reasonably conclude from the statement in question that his protected activities are being *monitored*” by the employer. *North Hills Office Services Inc.*, 346 NLRB 1099, 1104 n. 24 (2006) (emphasis added). The General Counsel bears the burden of establishing the employer unlawfully created the impression of surveillance of employees’ concerted activities. *Grouse Mountain Lodge*, 333 NLRB 1322, 1323 (2001).

Walters credibly testified that Gallant pulled her aside and initiated the discussion to share his concerns regarding the developments at Store 101. (Tr. 126:13-22.) It was Gallant, not Walters, who instigated the discussion. Walters in no way said or did anything to give Gallant the impression that the Company was monitoring him. In fact, she learned of Gallant’s visits to Store 101 from Gallant himself. (Tr. 148:14-149:5.)

Gallant testified that after the assessment center, Walters directed him to speak with her in a manager’s office, at which point she stated something to the effect of, “[H]ey, I’ve been noticing that you’ve been visiting some San Francisco stores.” (Tr. 37:13-38:12.) According to Gallant,

he responded by telling her that he visited Store 101 to investigate issues relating to an activated fire alarm at the store. (Tr. 38:13-17.) Gallant also testified that before Walters even asked him a question, he volunteered that he took issue with the Company locking doors to the Kids Department at Store 101. (Tr. 38:19-39:7.)

Walters's testimony regarding the Southland Mall interaction is more credible than Gallant's. There is no evidence demonstrating that Walters received any complaints from managers regarding Gallant's behavior at the Store 101 prior to the Southland Mall interaction or that anyone requested that Walters speak with Gallant to get more information regarding what he was doing at Store 101.

In fact, James Reed's June 13, 2019 email – which was sent several days after the Southland Mall discussion between Walters and Gallant – strongly suggests that Gallant brought up the Store 101 issues to Walters and not *vice versa*. (G.C. Exh. 10.) Reed's email shows that there was no coordination between Store 101 and Walters prior to the Southland Mall discussion. In the email, Reed advised Gallant of his interaction with Walters that day. Reed stated that he asked Gallant, "What do you need? Why are you disrupting my business again?" (*Id.*) According to Reed, Gallant "invoked [Walters's] name and [stated] how [Walters] [was] either on his side or working with him on this." (*Id.*) Reed wrote to Walters, "If [Gallant] has some new inspector position[,] that's fine. But he seems overly eager to have our store fined for something we're trying to get fixed." (*Id.*) The email belies the notion that prior to the Gallant discussion with Walters at the Southland Mall, Company management advised Walters of Gallant's activities at Store 101 or expressed any concerns regarding those activities. As such, the ALJ should credit Walters's testimony regarding the Southland Mall discussion over Gallant's.

For these reasons, there is no merit to the allegation that Walters pulled Gallant aside after the assessment center to confront him based on information she obtained from H&M supervisors Gallant claims were monitoring him at Store 101. Therefore, the ALJ should dismiss this aspect of the charge.

2. The General Counsel Failed To Meet Its Burden To Establish That Walters Unlawfully Interrogated Gallant.

The General Counsel alleges that Walters asked Gallant to: (1) reveal the names of the employees with whom he had spoken about their terms and conditions of employment; (2) provide a copy of any surveys he gave to other employees regarding their terms and conditions of employment; (3) explain why employees “needed an organizing committee”; and (4) talk about his “off-duty activities.” (G.C. Exh 1(l), ¶ 5(a)(ii), (iii), (v), (vi).) None of these allegations have any merit.

The test for evaluating whether alleged interrogation violates Section 8(a)(1) is “whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Sunnyvale Med. Clinic*, 277 NLRB 1217 (1985), *citing Rossmore House*, 269 NLRB 1176 (1984). In making this determination, the Board reviews “the background, the nature of the information sought, the questioner's identity, and the place and method of interrogation.” *Dayton Typographic Serv. v. NLRB*, 778 F.2d 1188, 1194 (6th Cir. 1985), *quoting Rossmore House*, 269 NLRB at 1177. The fundamental issue to be addressed by application of the totality of circumstances test is whether the question “would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.” *Multi-Ad Servs.*, 331 NLRB 1226, 1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001). Statements “that [do] not suggest that the employees’ protected activities were futile, [do] not reasonably convey any explicit or implicit threats, and [do] not constitute harassment that would reasonably

tend to interfere with employees' Section 7 rights" simply do not violate the Act. *Trailmobile Trailer LLC*, 343 NLRB 95, 95 (2004).

a. There Is No Evidence That Walters Asked Gallant Why Employees Needed An "Organizing Committee."

As an initial matter, the General Counsel failed to put on any evidence in support of some of its interrogation allegations. Specifically, there is no record evidence supporting the notion that Walters "interrogated employees about their protected, concerted activities by asking employees why they needed an organizing committee." Walters denied that Gallant said anything at the Southland Mall about a "work committee," and she denied asking him to share any information about any purported work committee. (Tr. 128:16-20.)

Gallant himself specifically denied that the Southland Mall discussion addressed any purported organizing committee. He testified as follows:

Q. In your affidavit you used the term organizing committee. That's not a term you used in your -- when you testified earlier you stated there were five employees who were part of a committee. In your affidavit you refer to an organizing committee. Are these the same two things?

A. What do you mean, in the same context or?

Q. Well, in your affidavit you refer, you mentioned, that in your discussion with Nina Walters you stated that there was an organizing committee.

A. Oh, no. I said they deserve a committee.

Q. So when you spoke with Angela Hollowell-Fuentes when you gave your affidavit, your testimony was that you told Nina Walters that these employees deserve an organizing committee?

A. Committee.

Q. Okay. Your testimony today is that -- so just to be clear, you're saying that when you spoke with Ms. Walters you told her that the employees deserve a committee and that was the only reference to a committee?

A. Yes, at the Hayward store.

Q Okay.

A. The first conversation.

Q. You didn't say -- so you were talking about them deserving a committee, not that they already had a committee in place?

A. It was pretty much forming.

Q. But did you tell her a committee was forming?

A. No. I just said they deserve a committee.

Q. That was all you said to her about a committee?

A. Yep. (Tr. 88:16-89:18) (emphasis added.)

Notably, Gallant was referring to a contemplated committee at the Hayward store. In any event, Gallant did not testify that Walters ever asked him any questions about any potential committee of any sort.

This testimony does not square with Gallant's earlier testimony that he spoke with Walters regarding a possible committee at Store 101 in San Francisco. Indeed, Gallant testified as follows:

Q. Was there any discussion that day about favoritism?

A. Yes.

Q. And what was discussed?

A. I informed Nina Walters, you know, that there was five employees who were actually victims of the fire alarm that felt like they wanted to quit because of the favoritism that were happening and that they deserve a committee.⁹

Q. Now, what was Ms. Walters's response when you told her about the workers that wanted to quit?

A. After I said the word "committee" she straightened up. Her body language shapened (sic) up. Her tone of voice changed. She looked at me a little bit more serious and she started taking notes about the

⁹ The "fire alarm" incident took place at Store 101. (Tr. 28:2-29:14.)

committee. She -- she asked me who are the five people, what kind of questions are you asking, and again, do you know it's my job as HR -- you don't need to be doing this. (Tr. 40:22-41:12) (emphasis added.)

In other words, Gallant testified inconsistently about the committee.¹⁰ He initially stated that the planned committee was for Store 101 in San Francisco, and he later testified that the committee would have been for Emeryville. In light of his irreconcilable and incoherent testimony, the ALJ should not credit Gallant's testimony. Nevertheless, even assuming that the ALJ credits Gallant's representation that he spoke with Walters about a committee at the Southland Mall, there is no evidence that Walters probed into the basis for the committee.

Simply put, the General Counsel did not meet its burden to establish interrogation regarding any purported committees. Walters's testimony on the subject is far more credible than Gallant's inconsistent and nonsensical account of what was said regarding committees. As such, this allegation should be dismissed.

b. Walters Did Not Ask Gallant To Identify The Names Of The Employees With Whom He Had Spoken.

The credible record evidence demonstrates that Walters did not interrogate Gallant regarding the identities of the employees with whom he had spoken regarding their concerns about working at H&M. According to Gallant, Walters asked him, “[W]ho are the five people [who felt like they wanted to quit because of favoritism at H&M and were considering a committee?” (Tr. 40:24-41:12, 42:19-43:1.) Gallant claims that he told her that he would not disclose that information because he did not want them to suffer retaliation. (Tr. 42:19-43:1.) According to

¹⁰ Gallant's testimony is nonsensical in many respects. Notwithstanding his testimony that he was only talking to Walters about a potential committee, he also testified that he and “other retail workers at [the H&M] Bay Street [store in Emeryville] were able to form a committee, pass a Fair Workweek, and stay protected.” (Tr. 39:20-40:10.) However, as Gallant admitted, the Emeryville Fair Workweek ordinance was passed in 2017 before he began working at the Emeryville store and long before Walters and Gallant spoke at the Southland Mall. (Tr. 89:19-90:5.)

Gallant, Walters simply replied that she would follow up. (Tr. 43:2-3.) There is no evidence that Walters ever proceeded to follow up on the purported demand for the identities of the five persons Gallant allegedly referenced.

Walters expressly denies that she ever asked Gallant to disclose the names of the employees with whom he had spoken about any workplace issues or who had been the victims of favoritism. (Tr. 128:4-15.) Her denials are entirely credible. Walters is no longer employed by H&M and she had no reason to lie. There is no evidence of any animus that Walters held against Gallant.

In any event, even if she did (which she expressly denies), a mere question regarding the employees who purportedly conveyed concerns to Gallant does not give rise to the level of unlawful interrogation. Walters's discussion with Gallant did not occur within the context of any union organizing or corporate campaign. Rather, it came in the course of an earnest discussion between a concerned employee and a Human Resources representative who was willing to listen to his concerns. Merely asking Gallant to share more information about which employees purportedly had issues with the Company in no way had the purpose or effect of restraining, coercing, or interfering with Gallant's Section 7 rights. *See, e.g., Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 16 (2018) (concluding that supervisor's inquiries and comments did not amount to interrogation because it was "unlikely that White's remarks and questions would have reasonably tended to restrain or coerce an employee in exercising the right to engage in union activity"); *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1224 (2002) (concluding that supervisor did not engage in interrogation because the question at issue was brought up casually as part of an ordinary conversation, there was nothing in the record suggesting that the supervisor's tone was hostile, and no threat of reprisal, explicit or implicit, accompanied the question).

Indeed, Gallant's behavior following the Southland Mall discussion belies the notion that he felt that Walters was trying to chill his exercise of his rights under the Act. He subsequently visited employees at Store 101, publicly advocated for the unlocking of the Kids' Department door (and went to mall security to do so), advised James Reed that he had spoken with Walters about the issue, and personally called Walters on the telephone to fill her in on the developments. (Tr. 44:22-52:12, 129:14-130:7; G.C. Exh. 10.)

Indeed, Walters's post-Southland Mall correspondence with Mikulski demonstrates that she did not look negatively upon Gallant's efforts. She advised Mikulski that Gallant provided "an AWESOME second set of eyes," that she "appreciated [his] intent," and she felt Gallant was performing "good service." (G.C. Exh. 10.) Her own words demonstrate that she bore no animus towards Gallant's efforts.

Consequently, the General Counsel's contention that Walters interrogated Gallant by purportedly asking him to disclose the names of the employees with whom he had allegedly spoken is without merit.

c. Walters Did Not Ask To See Gallant's Surveys.

Gallant claims that after he volunteered that he was "conducting surveys to ask customers how they felt because management wasn't taking [him] seriously," Walters asked Gallant if he had "copies of them." (Tr. 38:21-39:7, 41:16-42:13.) According to Gallant, he replied that the surveys were verbal and not written. (Tr. 41:16-42:13.) Walters unequivocally denied asking Gallant to provide him with the surveys. (Tr. 128:1-3.)

For the reasons explained above, the ALJ should credit Walters's testimony over Gallant's testimony. As was the case with his testimony regarding a purported committee, Gallant's testimony regarding surveys was inconsistent. At first, he testified that he told Walters that he was

surveying customers. (Tr. 38:21-39:7.) He then testified that the surveys were of co-workers. (Tr. 41:13-42:13.)

In any event, even if the ALJ credits Gallant's testimony, Walters's alleged inquiry does not constitute unlawful interrogation. As explained above, the conversation took place in an innocuous setting in which Gallant disclosed of his own volition that he was conducting surveys of customers. According to Gallant, Walters merely asked him about the nature of his communications with customers after Gallant volunteered the information. Gallant's subsequent actions in no way indicate that he felt threatened, coerced, or restrained by any questioning he received from Walters during the Southland Mall interaction. Therefore, the General Counsel's allegation is without merit.

d. Walters Did Not Impermissibly Inquire Into Gallant's (Or Any Other Employee's) Off-Duty Conduct.

The General Counsel alleges that Walters engaged in unlawful interrogation by asking Gallant questions regarding his off-duty activities. There is no basis for the charge. As explained above, the credible evidence establishes that it was Gallant – and not Walters – who initiated the discussion at Southland Mall. Gallant admits that he voluntarily advised Walters of his internship and his surveys. (Tr. 38:21-39:7, 97:15-18.) Walters merely asked Gallant for further clarification regarding the nature and scope of his internship and the surveys because she was concerned that he was disclosing confidential information belonging to H&M and she wanted to ensure that whatever information he provided was neither confidential nor proprietary. (Tr. 127:9-18, 131:24-132:11.) Gallant's representation to Walters regarding the nature of those duties was vague, and thus, she merely sought clarification as to what Gallant was doing so that she could better understand whether he was sharing confidential information. (Tr. 131:24-132:11.) Her inquiry to Gallant in no way constituted interrogation.

3. Walters Did Not Impermissibly Restrict Gallant From Discussing Terms And Conditions Of Employment.

The General Counsel alleges that during the Southland Mall interaction, Walters “prohibited employees from talking with each other about their working conditions by stating that it is outside of employees’ job titles to know about Respondent’s policies and that employees are not the best people to talk about Respondent’s policies.” The record reflects that Walters made no such statement.

Walters denied making any such statement. (Tr. 129:2-4.) In fact, Gallant did not even testify that Walters made any such statement. Specifically, he testified as follows:

Q. Now, Mr. Gallant, did Ms. Walters say anything to you about speaking to employees about policies?

A. Yes.

Q. And what did she say?

A. That myself, as a sales adviser, are not aware or knowledgeable of them. (Tr. 40:16-21.)

In other words, even accepting Gallant’s testimony as true, Walters never directed or attempted to restrict Gallant from talking about H&M policies. At most, Walters conveyed her own opinion that Gallant did not fully know or understand the Employer’s personnel policies. This statement cannot reasonably be construed to deter or prohibit Gallant from communicating with employees regarding Company policies. There is no evidence that Walters or anybody else took any steps during Gallant’s employment to restrict him from having any such communications with employees. Thus, there is no merit to the General Counsel’s allegation.

C. The General Counsel Did Not Meet Its Burden To Establish That Nina Walters’s Actions During Her Discussion With Nickolas Gallant During Their July 18, 2019 Telephone Conference Violated The Act.

The General Counsel alleges that Walters committed a litany of unfair labor practices during her telephonic discussion with Gallant on July 18, 2019. (G.C. Exh. 1(l), ¶ 5(b).) Specifically, the General Counsel contends that Walters made two threatening statements; six statements that it contends constitute interrogation; two statements that constituted threats; and five statements that constituted restraints on Gallant’s exercise of his Section 7 rights. (*Id.*) These “kitchen sink” allegations have no merit, and the ALJ should dismiss the charge.

1. The General Counsel Did Not Meet Its Burden To Prove That Walters Unlawfully Threatened Gallant.

According to the General Counsel, on July 18, Walters: (1) “threatened employees with unspecified reprisals by incorrectly stating that employees[’] protected, concerted activities were in violation of Respondent’s Conflict of Interest Policy”; and (2) “threatened employees with unspecified acts of reprisal by telling employees that their protected concerted activities may tarnish Respondent’s brand.” (G.C. Exh. 1(l), ¶ 5(b)(i), (vi).) Neither contention is meritorious.

a. Walters’s Statement Regarding The Conflict of Interests Policy Did Not Constitute A Threat.

Walters spoke with Gallant over the telephone on July 18, 2019, with Hailey Hunter physically present with Gallant during the call. It is undisputed that the purpose of the call was for Walters to obtain further information from Gallant regarding the nature of his internship and survey activities so that the Employer could make sure that he was not violating the conflict of interest policies. (Tr. 132:20-133:2.) To that end, Walters read the conflict of interest policy to Gallant, advised him that she was unclear as to what information he was transmitting to others, her concern that the disclosure of that information could possibly violate the policy, and consequently she needed further information regarding the nature of his internship and his surveys. (Tr. 133:3-

20; G.C. Exh. 2.) Gallant agreed that he would provide Walters with the responsibilities of his internship the following week. (Tr. 60:6-8, 133:21-134:1; G.C. Exh. 2.)

Gallant's account of the discussion is mostly similar to Walters's recollection. (Tr. 54:5-14.; 54:25-55:6.) He recalled advising Walters of his advocacy to encourage cities to adopt "Fair Workweek" policies and reiterating the same concerns that he addressed with Walters in their Southland Mall discussion, which is consistent with Hunter's notes of the discussion. (Tr. 54:14-24, 56:6-57:1; G.C. Exh. 2.)

However, Gallant recalled Walters stating that his actions "could brand damage or make H&M look to be negative." (Tr. 59:13-15.) Walters denied ever making such a statement to Gallant. (Tr. 134:9-11.) She acknowledged reading to Gallant the Support Book's conflict of interest policy, which expressly states in relevant part, "All employees must avoid professional activities and relationships that conflict with H&M's interests or negatively affect H&M's reputation." (Tr. 134:12-17, 137:10-138:3; Jt. Exh. 2.) Walters merely conveyed that **if** Gallant was disclosing confidential information to customers, he could be negatively impacting H&M's reputation.

None of Walters's statement or comments to Gallant during the July 18 discussion could reasonably be construed to constitute threats. Walters simply advised Gallant that the Employer was concerned that Gallant's surveys of others as part of a mysterious internship with a "workers coalition" could have resulted in the disclosure of confidential information and thus breach the conflict of interest policy. As such, these allegations should be dismissed.

2. The General Counsel Did Not Meet Its Burden To Establish That Walters Interrogated Gallant During The July 18, 2019 Discussion.

According to the General Counsel, Walters interrogated Gallant during the July 18, 2019 telephone call by: (1) asking Gallant "about [his] discussions regarding working conditions with

other employees and customers”; (2) asking Gallant “whether [he was] talking with others about Respondent's leave policies and locked doors at its retail stores”; (3) requiring Gallant to “submit a written form reflecting information about [his] outside activities including [his] supervisor's names, duties and all other organizations [he was] involved with”; (4) asking Gallant whether he “shared non-confidential information with other retail stores”; (5) asking Gallant if he talked to “other retail employees about Respondent's terms and conditions of employment”; and (6) asking Gallant if he was “talking to other retail employees about Respondent's terms and conditions of employment.” (G.C. Exh. 1(c) at ¶ 5(b)(ii), (iii), (ix), (xi), (xii), (xiii).) There is no basis to these allegations.

The General Counsel unreasonably quarrels with Walters’s understandable inquiry regarding the nature of his cryptic “workers coalition” internship that he claimed required him to talk to H&M employees, H&M customers, and employees with other retailers. Walters in no way restrained, coerced, or interfered with Gallant’s rights under the Act.

Again, it is critical to note that it was Gallant, not Walters, who previously voluntarily advised Walters of his internship and his surveys. (Tr. 38:21-39:7, 97:15-18.) Walters did not ask Gallant about anything that he was doing covertly. It would make no sense for her to ask whether he was talking to employees about “locked door at [H&M] retail stores,” because, only five days earlier, Gallant publicly confronted a supervisor at Store 101 regarding the locked door there and Gallant reached out to Walters, on his own volition, to advise her regarding his concerns about the door. The notion that further discussion between Walters and Gallant about the locked door constituted an “interrogation” is baseless. *See, e.g., Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 16; *John W. Hancock, Jr., Inc.*, 337 NLRB at 1224.

Again, it is critical to note that it was Gallant, not Walters, who previously voluntarily advised Walters of his internship and his surveys. (Tr. 38:21-39:7, 97:15-18.) Despite claiming that the internship compelled him to speak with other employees, customers, and retail employees working for other companies, he did not share any significant details regarding the nature of the internship beyond it being part of a “workers coalition.” (Tr. 131:24-132:11; G.C. Exh. 10.) Notwithstanding her admiration for Gallant’s efforts, she had legitimate concerns that Gallant’s internship may have required him to disclose confidential information. (G.C. Exh. 10.) Just as Walters had a right to ask Gallant follow-up questions at Southland Mall regarding the internship and the nature of his duties, she had the same right to follow up on those unanswered questions on July 18, which is what she did.

For these reasons, the Charging Party’s allegations regarding interrogation should be dismissed.

3. The General Counsel Did Not Meet Its Burden To Prove That Walters Restrained Gallant’s Exercise Of His Section 7 Rights.

The General Counsel alleges that Walters: (1) prohibited Gallant from talking about “[employee] working conditions by telling [him] that certain working condition information should not be disclosed to customers or employees from Respondent’s other stores”; (2) prohibited Gallant from “talking about [employee] working conditions by telling [him] not to disclose negative information about [employee] terms and conditions of employment and that these concerns should be routed to an appropriate representative of management”; (3) required Gallant “to obtain written permission to participate in an internship”; (4) told Gallant “not to talk with other employees or third-parties about [H&M] working conditions if [he identified himself] as an employee of Respondent”; and (5) prohibited Gallant from “talking about [his] protected concerted activities by asking [him] if [he has] shared non-confidential information with other retail stores.”

(G.C. Exh. 1(l) ¶ 5(b).) The General Counsel did not meet its burden of proof to support these allegations.

As explained above, during the discussion on July 18, Walters merely conveyed her concern that Gallant's actions might not comply with the conflict of interest policy and thus, she requested that he provide further information regarding the nature of his internship and the surveying he was doing. (Tr. 54:14-24, 133:3-20; G.C. Exh. 2.)

Even if one accepts Gallant's testimony, Gallant merely testified that Walters told him that he might be in violation of the conflict of interest policy because he could be disclosing confidential information, such as "sales reports, shrink percentage, like internal move stuff with the visuals." (Tr. 55:3-56:2.) None of the categories of information Gallant identified constitute employee "terms and conditions of employment." As such, the notion that H&M directed Gallant not to discuss non-confidential information relating to employee Section 7 rights is false. Walters simply requested further information so that the Employer could fully ascertain whether his internship complied with the conflict of interest policy.

Furthermore, any representation by Walters that Gallant was performing tasks outside of "his role" was not in violation of the Act. Accepting Gallant's testimony, Walters merely directed Gallant to H&M's internal processes that he could utilize to resolve any grievances that he or any of his colleagues had against the Employer. (Tr. 57:2-10.) At no point did Walters indicate that Gallant or any other H&M employee would be disciplined for speaking with anyone regarding their terms and conditions of employees.

Beyond that, the General Counsel provided no evidence to support its assertion that the Employer required Gallant to "obtain written permission to participate in an internship." Gallant merely testified that Walters requested that he provide something in writing clarifying the scope

of his duties with the internship, along with his internship supervisor's name and any surveys he used. (Tr. 59:24-60:5.)

In summary, the evidence demonstrates that H&M's conduct on July 18, 2019 did not violate the Act. As such, the ALJ should dismiss these allegations.

D. The General Counsel Did Not Meet Its Burden To Prove That Elena Siantz's Actions On August 14, 2019 Violated The Act.

The General Counsel alleges that during her call with Gallant on August 14, 2019, Elena Siantz interrogated Gallant about his "protected, concerted activities by demanding a written statement setting forth information about [his] activities outside of [his] employment with Respondent." (G.C. Exh. 1(l), ¶ 5(c).)

It is undisputed that on August 14, 2019, Siantz spoke with Gallant over the telephone and requested the same information that Walters previously requested. (Tr. 72:2-73:7, 177:9-178:24.) As explained above, H&M had a lawful basis to request that Gallant provide further information regarding his internship because it was unclear to the Employer what the "workers coalition" internship entailed and whether the internship required disclosure of the Company's confidential information. The Employer needed the information from Gallant so that it could determine whether Gallant's actions violated the conflict of interest policy. For the reasons explained above, this charge should be denied.

E. The Conflict Of Interest Policy In The POV Policy Book Does Not Violate The Act.

In the Complaint, the General Counsel alleged that the conflict of interest policy in the POV Policy Book on its face violates the Act.¹¹ (G.C. Exh. 1(l) at ¶ 6.) On April 30, 2020, the

¹¹The General Counsel's Complaint never posed any facial challenge to the other two H&M conflict of interest policies. The General Counsel only alleged that the conflict of interest policy in the Support Book was "selectively and disparately applied against Nickolas Gallant" – as was the conflict of interest policy in the POV Policy Book because of his Section 7-protected activity.

General Counsel advised Respondent and the ALJ that it intended to withdraw the allegation contending that the policy violates the Act. As such, the allegation should be dismissed. In any event, if the ALJ remains inclined to address the merits of the allegations, the charge should still be dismissed for the reasons explained below.

The General Counsel contended that the following verbiage is overbroad:

. . . You should avoid any actual or imaginable situations that could damage your integrity and/or risk putting H&M's interests and/or reputation at stake.

. . . While you are employed by H&M you must not take up employment or task outside the Company that could conflict with the Company's interests. (G.C. Exh. 1(l) at ¶ 6.)

There was no basis to the General Counsel's challenge.

1. Legal Standard.

As set forth in the Board's 2017 *Boeing* decision, the Board "no longer find[s] unlawful the mere maintenance of facially neutral employment policies, work rules, and handbook provisions based on a single inquiry, which made legality turn on whether an employee would 'reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future." *The Boeing Co.*, 365 NLRB No. 154, slip op. at 2 (2017). Instead, the Board analyzes: (1) the nature and extent of the potential impact on rights protected by the Act; and (2) legitimate justifications associated with the rule. *Id.* at 3.

Under this standard, the first step is to determine whether "a facially neutral rule, reasonably interpreted, would not prohibit or interfere with the exercise of NLRA rights." *Id.* at 16. If so, then "the Board's inquiry into the maintenance of the rule comes to an end." *Id.* If the Board finds that a reasonable interpretation of a facially neutral rule would interfere with the

(G.C. Exh. 1(l), ¶¶ 8(a), 8(d), 9.)

exercise of NLRA rights, it then “will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the requirement(s).” *Id.* at 17. The Board will only find that a workplace rule violates the Act if it “determines that the justifications are outweighed by the adverse impact on rights protected by Section 7.” *Id.* at 16.

As the result of this balancing test, the Board delineated three categories of work rules:

- Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id. at 3-4.

In the *LA Specialty Produce Company* case, the Board clarified the analysis under the *Boeing* standard. 368 NLRB No. 93 (2019). In *LA Specialty*, the Board held that an employer’s strong confidentiality protections and limited media availability rules were lawful and designated the rules in Category 1. *Id.*, slip op. at 3-5. The Board found both rules lawful because when “reasonably interpreted” as a whole, the rules did not prohibit or interfere with exercising NLRA rights. *Id.* In coming to its conclusion, the Board clarified the new *Boeing* standard by holding

that it is the charging party's initial burden under *Boeing* to prove a facially neutral rule would potentially interfere with the exercise of Section 7 rights, as interpreted by a reasonable employee who is "aware of his legal rights" but "interprets work rules as they apply to the everydayness of his job"; if not, then the rule is lawful and the inquiry ends there. *Id.* at 2. Only if the initial burden is met would the *Boeing* balancing inquiry be applied. *Id.*

2. The Conflict Of Interest Policy In The POV Policy Book Does Not Interfere With Employee Section 7 Rights.

The ALJ should reject the General Counsel's challenge to the plain language of the conflict of interest policy in the POV Policy Book because no reasonable interpretation of the policy would lead one to conclude that it infringes on Section 7 rights and, even if it did, the justifications for the policy outweigh any minimal infringement.

First, the POV Policy Book's conflict of interest policy cannot be reasonably interpreted as restricting employees from engaging in protected conduct; and thus, it falls into Category 1 of the *Boeing* framework. Given the surrounding circumstance of the Company being a large retail employer and considering the policy as a whole, the policy cannot be interpreted to implicate any union or other protected Section 7 activity. In *LA Specialty*, the Board upheld the employer's media contact rule because, when read in whole, it pertained to instances where the media contacts employees and the employees purport to speak on the company's behalf, even though the rule itself is not so limited to those circumstances. *LA Specialty*, 382 NLRB No, 93, slip op. at 4-5. The media contact rule stated: "[e]mployees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization." *Id.* at 4. Notably, the Board did not read the first line of the rule in isolation, and instead, noted "authorized and designated" in the second sentence qualified the restriction in

the first sentence about providing information to the news media. Therefore, the Board appropriately concluded that read as a whole, a reasonable employee would realize that he or she is not allowed to speak on the company's behalf. Similarly, the conflict of interest policy here consists of five-paragraphs that provide a great deal of context and examples of what constitutes a conflict of interest in violation of the policy. The policy includes language clearly communicating the overall lawful purpose of the policy: "avoid any actual or imaginable situations that could damage your integrity and/or risk putting H&M's interests and/or reputation at stake." (Jt. Exh. 1 at 000003.)

In GC-1804, the General Counsel addressed conflict of interest policies in light of the new *Boeing* standard. See General Counsel Memorandum, GC-18-04, "Guidance on Handbook Rules Post Boeing" (June 6, 2018). The General Counsel stated that conflict of interest policies that ban conduct that is disloyal or damaging to the company, such as employment with another employer, or policies that ban conduct that competes with the company, interferes with one's judgement concerning the company's best interests, or exploits one's position with the company for personal gain, do not meaningfully implicate Section 7 rights. That is exactly what the policy does here. The policy makes clear to the employees that the Company is placing limits on their outside affairs to the extent they interfere with the employees' ability to perform their jobs or put the Company's interests or reputation at risk; and nothing else. Any reasonable employee would not interpret the policy as restricting Section 7 rights, making this policy a lawful Category 1 rule.

Moreover, even before the Board introduced the less stringent *Boeing* standard, the Board has interpreted rules banning disloyalty and blatant conflicts of interest to not have any meaningful impact on Section 7 rights since employers have a legitimate and substantial interest in preventing various conflicts of interest such as nepotism, self-dealing, or maintaining a financial interest in a

competitor. *See, e.g., Tradesmen Int'l*, 338 NLRB 460 (2002) (rule lawfully prohibited “conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company”); *Lafayette Park Hotel*, 326 NLRB 824 (1998) (rule lawfully prohibited “unlawful or improper conduct off the hotel’s premises or during non-working hours which affects the employee’s relationship with the job, fellow employees, supervisors, or the hotel’s reputation or good will in the community”). Accordingly, in light of the Board’s *Boeing* standard, there can be no doubt that H&M’s conflict of interest policy in the POV Policy Book is lawful.

Second, substantial business justifications underlie the policy. Even applying the Category 2 balancing test, it is clear the potential adverse impact on protected rights is outweighed by justifications associated with the policy. The policy prevents employees from engaging in activities that would interfere with their ability to perform their job duties for the Company, create a legal conflict of interest, or put the Company’s interests at risk. For instance, the policy explicitly discusses situations where employees have outside employment that competes with the Company, have other personal business affairs such as their own businesses that make it difficult for the employee to be objective in the performance of their duties, or where an employee attempts to use the Company’s name or trademark for private purposes. (Jt. Exh. 1 at 000003-000004 (e.g., “While you are employed by H&M you must not take up employment or task outside the Company that could conflict with the Company’s interests.”).) These types of conflicts present various concerns for the Company, including: reduction in the public trust; distraction from employees’ job responsibilities; undermining the Company’s reputation and integrity; causing employees to doubt the fairness of personnel actions, or, worse, cause incentive to act inconsistent with the Company’s interests. It is evident that such usurpation of company interests or pitting the

pecuniary interest of employees against their employer's can have a serious detrimental effect on an employer's business. For these reasons, H&M is justified in maintaining the conflict of interest policy in the POV Support Book.

Put simply, there is no reasonable interpretation of H&M's "Conflict of Interest" policy set forth in the POV Policy Book that would lead one to believe it interferes with Section 7 rights. To the extent the policy could be read to interfere with Section 7 rights, the justifications behind the policy outweigh any such interference. Therefore, the ALJ should reject the General Counsel's challenge to the language in the policy.

F. The General Counsel Did Not Meet Its Burden To Prove That H&M Unlawfully Terminated The Employment Of Nick Gallant.

The General Counsel alleges that H&M violated Section 8(a)(1) of the Act by terminating Gallant's employment in retaliation for his protected concerted activities. (G.C. Exh. 1(l), ¶ 7.) In addition, the General Counsel contends that the Company violated Section 8(a)(1) by enforcing its conflict of interest policy against Gallant. (G.C. Exh. 1(l), ¶ 8.)

The charge must be dismissed because the General Counsel has failed to meet its burden of proof. The Employer terminated Gallant for legitimate, non-retaliatory reasons – specifically, his violation of the conflict of interest policy. Gallant breached the policy by refusing to provide information in response to the Employer's reasonable request for details regarding the nature of his internship, which he advised the Company required him to speak with H&M employees, customers, and other retail employees. H&M inquiries were lawful and justifiable. Gallant's refusal to cooperate in response to such inquiries warranted his discharge. The notion that the Company retaliated against Gallant for engaging in Section 7-protected activity is false.

1. Legal Standard.

It is unlawful under Section 8(a)(1) of the Act “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act].” Because Section 8(a)(1) cases premised on retaliation allegations nearly always turn on the question of employer motivation, the Board and the courts employ a causation test to resolve such Section 8(a)(1) allegations. *See Wright Line*, 251 NLRB 1083 (1980), *enf. by* 662 F.2d 899 (1st Cir. 1981).

Under the *Wright Line* causation test, the General Counsel bears the initial burden of proving by a preponderance of the evidence that: (1) the employee as to whom the alleged violation was committed engaged in conduct protected by Section 7 of the Act; (2) the employer knew of the protected conduct; (3) the employer took an adverse employment action against the employees; and (4) the protected conduct was a motivating factor in the decision to take the adverse action. 251 NLRB at 1087.

As to the fourth element, absent direct evidence of discrimination, the General Counsel must establish a causal link between the protected activity and the adverse employment action by circumstantial evidence – *i.e.*, by showing that the employer’s decision was inconsistent with its other actions, its treatment of similarly-situated employees, or its past practices, or by establishing some temporal proximity between the employment action and the protected activity. *See, e.g., Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Peter Vitalie Co., Inc.*, 310 NLRB 865, 871 (1993) (explaining that “[t]he classic elements commonly required to make out a *prima facie* case of union discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge, timing, and employer animus”). Moreover, “[i]t is well established that in the absence of direct evidence [of anti-union animus], animus is not lightly to be inferred.” *CEC Chardon Electrical*, 302 NLRB 106, 107 (1991). In the absence of any proof of employer animus, it is irrelevant whether or not the employer would have taken the action in question in the absence

of protected activity — the allegation must fail. *See, e.g., Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 136 (1993) (deciding that “[b]ecause we find that the evidence does not support a finding of retaliatory motive, we need not decide whether the Respondent established that it would have laid the pilots off and discharged them even if they had not engaged in protected activities”); *Yusuf Mohamed Excavation, Inc.*, 283 NLRB 961, 962-64 (1987) (dismissing Section 8(a)(3) allegations based on the General Counsel’s failure to make out a *prima facie* case).

Only if the General Counsel meets its initial burden does the burden shift to the employer to rebut this showing by demonstrating a legitimate, nondiscriminatory motive for its actions. *See Upper Great Lakes Pilots*, 311 NLRB at 136; *Wright Line*, 251 NLRB at 1089. To satisfy its burden, the employer must show “that the same action would have taken place even in the absence of the protected conduct.” *See Wright Line*, 251 NLRB at 1089. It is not for the trier of fact to evaluate whether or not the business reasons asserted by the employer make sound business sense. The employer need only show that it was honestly motivated by legitimate, non-discriminatory business reasons. “[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change.” *Ryder Dist’n Resources, Inc.*, 311 NLRB 814, 816-17 (1993), citing *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), *enforcing in part* 137 NLRB 306 (1962); *see also Liberty Homes, Inc.*, 257 NLRB 1411, 1412, n. 9 (1981) (cautioning the dissent against substituting its own business judgment for the employer’s); *Super Tire Stores*, 236 NLRB 877, 877 n. 1 (1978) (“Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent’s position”) (citation omitted).

Throughout this test, the General Counsel retains the ultimate burden of proving the elements of an unfair labor practice by a preponderance of the evidence. *See Wright Line*, 251

NLRB at 1088 n.11. “[E]ven where the record raises ‘substantial suspicions’ regarding [the employer’s actions], the General Counsel is not relieved of ‘the burden of proving that Respondent acted with an illegal motive.’” *Yusuf Mohamed Excavation*, 283 NLRB 961, 964 (1987), citing *Affiliated Hosp. Prods.*, 245 NLRB 703, 703 n.1 (1979); see also *CEC Chardon Electrical*, 302 NLRB 106, 107 (1991) (explaining that “mere suspicion is insufficient to support a violation of the Act”).

2. The General Counsel Did Not Meet Its Burden Of Proving A Causal Link Between Gallant’s Discharge And His Protected Activity.

a. H&M Had Legitimate, Non-Discriminatory Reasons For Terminating Gallant’s Employment.

H&M does not dispute the notion that Gallant engaged in protected concerted activity during the course of his employment. However, the Employer had only legitimate, non-discriminatory reasons for discharging Gallant. There is no evidence that any aspect of either decision was based on animus toward Gallant based on his protected activity.

The Company terminated Gallant’s employment based solely on the fact that he refused to provide information regarding a mysterious “workers coalition” internship that he claimed compelled him to conduct interviews with customers, H&M employees, and other retail employees regarding the Employer’s operations. (Tr. 179:24-180:3; G.C. Exh. 12; R. Exh. 3; R. Exh. 4; Jt. Exh. 4.) Gallant’s stated intentions regarding his internship raised significant concerns regarding a potential conflict of interest, and the Company had every right to obtain more information about the internship. However, he refused to provide any such information despite being given multiple opportunities to do so. (*Id.*) Indeed, Walters requested this information from Gallant at the Southland Mall and again on July 18, 2019 during their telephone conference. (Tr. 133:5-134:1, 155:24-156:5, 158:23-159:2; G.C. Exh. 6.) Gallant assured Walters on July 18 that he would provide the information but he did not follow through. (Tr. 60:6-8; 133:5-134:1; G.C. Exh. 6.)

Siantz requested the information again on August 14, but Gallant refused to provide it. (Tr. 177:11-178:24; G.C. Exh. 4.) In light of these circumstances, H&M was left without any salient information regarding the nature of Gallant’s “workers coalition” internship and no understanding as to what information he was disclosing to third parties. The Employer reasonably concluded that Gallant was never going to provide that information to the Company, and thus, it would never learn whether Gallant’s internship created a conflict of interest. Gallant’s refusal to provide the information was unreasonable, and H&M had the right to end the employment relationship based on his refusal to comply. (Tr. 179:24-180:3; G.C. Exh. 12; R. Exh. 3; R. Exh. 4; Jt. Exh. 4.)

The General Counsel failed to meet its burden to establish that the Employer’s decision was pretextual or motivated to deter Gallant or any other employees from engaging in protected concerted activity. At no point in time did H&M advise Gallant that he could not speak with others regarding his or anyone’s working conditions.

3. The General Counsel’s Proffered Evidence Of Animus Towards Gallant’s Section 7-Protected Activity Is Insufficient To Meet The Burden Of Proof For Establishing Animus.

The General Counsel did not meet its burden of proof to establish that Gallant’s protected conduct of speaking with others regarding the workplace conditions at H&M was a motivating factor in the Employer’s decision to terminate his employment. As explained further below, the General Counsel’s proffered evidence in no way is sufficient to establish a nexus.

H&M in no way interfered with Gallant’s ability to communicate with others regarding his and his colleagues’ terms and conditions of employment at the Company. At no point did the Employer admonish Gallant not to speak with anyone regarding H&M workplace issues. The Company never disciplined Gallant for bringing his workplace concerns to anyone. As explained above, H&M merely asked him to disclose the identity of the entity for which he was performing

his internship; provide more information regarding his role in the internship; provide more information regarding why the internship compelled him to speak with customers and other retailers; and whether the internship required him to disclose confidential information. (Tr. 127:9-18, 131:24-132:11.) Beyond that, there is no evidence that the Company ever disciplined any of the employees with whom Gallant purportedly spoke about their workplace concerns, which belies the notion that the Employer sought to prevent employees from speaking with one another about their terms and conditions of employment. (Tr. 97:7-10.) Moreover, there is no evidence that the Employer made any efforts to restrict any employees from speaking with Gallant. (Tr. 97:11-14.)

H&M had a right to receive at least some assurance from Gallant in a verifiable form that his internship did not require the disclosure of confidential information. Gallant refused to cooperate with the Employer's reasonable request. He never shared at any point until the hearing that his internship was with the Charging Party, United For Respect, which employed him shortly after H&M terminated his employment. (Tr. 93:8-12, 93:22-24, 105:23-106:7.) He never disclosed to Walters or Siantz that he was working with an organization that claims that its mission is to assist employees. (Tr. 93:25-94:21.) Consequently, the Employer reasonably and lawfully concluded that Gallant had not complied with the terms of the conflict of interest policy, and thus, termination was warranted.

4. The General Counsel Did Not Meet Its Burden To Establish That H&M Selectively And Disparately Enforced Its Policies Against Gallant.

The General Counsel also attempts to support its case by claiming that H&M "selectively and disparately" enforced its conflict of interest rules against Gallant. The evidence does not support the General Counsel's contention.

The burden of proving disparate treatment generally requires evidence of comparators who are "similarly situated" to the discriminatee. In *Thorgren Tool & Molding, Inc.*, 312 NLRB 628,

628 n.4 (1993), the Board stated, “[a]n essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee was treated.” This necessarily requires a showing that the comparators engaged in the same offenses as the discriminatee in the same circumstances. *See Central Valley Meat Co.*, 318 NLRB 245, 249 (2006) (in determining whether the employer unlawfully terminated a pro-union employee for engaging in sanitation violations, the NLRB focused on similarly situated employees who also violated the employer’s sanitation rules); *Engineered Comfort Sys., Inc.*, 346 NLRB 661, 662 (2006) (comparing employees who committed the “same infraction” as the discriminatee).

In fact, in order to establish disparate treatment, the General Counsel must prove that employees with whom the General Counsel seeks “to compare [the alleged discriminatee’s] treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without any such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992). Indeed, “an inference of . . . animus based upon disparate treatment can be made if the only difference between two differently treated employees is the illegitimate criteria at issue” *Asarco, Inc. v. NLRB*, 86 F.3d. 1401, 1408 (5th Cir. 1996), citing *Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir. 1980), *cert. denied*, 449 U.S. 879 (1980).

The General Counsel failed to meet its burden that the Employer “selectively and disparately” enforced its conflict of interest policies against Gallant but not against other H&M employees who engaged in the same behavior at the Emeryville store or any of the other Bay Area stores. While it is true that there have not been any other recent disciplinary actions against an

employee at H&M's Emeryville store based on any violations of the conflict of interest policies (Tr. 112:12-118:12; G.C. Exh. 7 at 000007, ¶ 9), there is no evidence that any other employees at that store engaged in any activities that breached those policies. Gallant's behavior – advertising a mysterious internship that he claimed compelled him to survey employees, customers, and other retailers, but refusing to share any other information regarding the nature of his internship despite legitimate concerns about whether the internship required the dissemination of confidential information – was and is unprecedented at H&M. As such, the General Counsel's contention that the Employer selectively and disparately enforced its policies is unavailing.

For all these reasons, the General Counsel's charge of retaliation must be dismissed.

IV. CONCLUSION

For each of the above reasons, H&M did not violate Section 8(a)(1) of the Act as alleged, and the Complaint should be dismissed in its entirety.

Dated: May 4, 2020

Respectfully submitted,

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By



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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler Mendelson, P.C., 333 Bush Street, 34th Floor, San Francisco, California 94104 (I am currently working remotely owing to the COVID-19 shelter-in-place order). On May 4, 2020, I served the within document(s):

RESPONDENT HENNES & MAURITZ, LP'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

- by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number 415.399.8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.
- by forwarding a true copy of the document(s) listed above to either a firm employee working remotely or an outside attorney service for printing and mailing following the firm's current business practice during the COVID-19 shelter-in-place. The document was placed by the firm employee or the attorney service in a sealed envelope(s) with postage thereon fully prepaid for deposit in the United States mail in California, addressed as set forth below.
- by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.
- by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.
- I caused the document(s) listed above to be sent to the person(s) at the e-mail address(es) as set forth below on the date referenced above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is chgoodman@littler.com.

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I am readily familiar with the firm's current practice during the COVID-19 shelter-in-place of collecting and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be forwarded to either a firm employee working remotely or an outside attorney service who would deposit it with the U.S. Postal Service or, if an overnight delivery service shipment, deposit it in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on May 4, 2020, at San Francisco, California.



Charisse Goodman