

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

NEXSTAR BROADCASTING, INC.  
d/b/a KOIN-TV

Respondent- Employer

v.

Case 19-CA-232897

NATIONAL ASSOCIATION OF  
BROADCAST EMPLOYEES AND  
TECHNICIANS –  
COMMUNICATION WORKERS OF  
AMERICA, AFL-CIO LOCAL 51

Charging Party -Union

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

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### **ISSUES PRESENTED**

- 1. Were the ALJ'S Findings of Fact Regarding Credibility Self-Contradicting and Not Based on Record Evidence or otherwise Proper Grounds?**
- 2. Was the Written Warning Given to Hansen Warranted and Not Violative of Sections 8(a)(1) and (a)(3) of the National Labor Relations Act?**
- 3. Should the Confidentiality of the Identity of the Witness to Hansen/Moore Incident Be Protected and did KOIN Violate the Act by Not Providing the Identity of the Witness to the Hansen's Harassment Moore?**

**BRIEF IN SUPPORT OF EXCEPTIONS  
TO ADMINISTRATIVE LAW JUDGE’S DECISION**

NEXSTAR BROADCASTING, INC., d/b/a KOIN-TV (hereinafter "Nexstar", "KOIN", "Employer" or "Respondent") by its attorneys, Charles W. Pautsch, hereby provides its BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION filed herein pursuant to Section 102.46 of the NLRB Rules and Regulations, and asks this Board to reject the recommendations made by the Administrative Law Judge and enter instead a dismissal of the Complaint against it, and a finding that it has not violated Sections 8(a)(1), (3) or (5) of the National Labor Relations Act.

**I. STATEMENT OF THE CASE**

The Complaint was filed on April 25,2019, and a timely Answer was filed thereto. A hearing was held in Portland, OR on August 13, 2019 and ALJ Christine Dibble rendered her decision on June 3,2020. We submit that KOIN did not violate the National Labor Relations Act, as amended, in connection with the allegations in the Complaint. Respondent believes the facts and law establish that it did not interfere with the Section 7 rights of employee or discriminate against Ellen Hansen when it issued her a written warning for violating KOIN’s Non-Discrimination/Anti-Harassment and Business Conduct policies and that it did not violate the Act when it declined to provide the identity of the witness to the events leading to Hansen’s discipline to the Union. As a result, this Complaint should be dismissed in its entirety.

## II. STATEMENT OF THE FACTS

At the time of the incident complained of, Nexstar and NABET-CWA had a collective bargaining relationship governing two units of KOIN-TV employees employed at its' station in Portland, OR. These entities (and Nexstar's predecessors in interest) had been parties to successive bargaining agreements for many years. GC Ex. 1, para. 5. The facts underlying the charge in this case, which involve the issuance of a disciplinary warning to a unit employee named Ellen Hansen, are simple and straightforward, but compelling to the conclusion that the Act was not violated. The disciplinary warning given to Hansen grew out of a complaint made by another unit employee, Ben Moore, who reported to his supervisor Rick Brown that he was made to feel very uncomfortable by Hansen when she confronted him in the newsroom on the evening of Friday, May 18, 2019.

Since Moore's testimony on this conversation was short, credible and to the point we set it forth below in its' entirety as the best evidence of what occurred during the conversation.

As to that conversation, Moore testified:

She came up to me first. First it was a hi, hello, then it was a hey, let me talk to you about something. And she just had started bringing up the Union and how I should join, and -- but then at first -- that first -- excuse me. Then she started getting into me having secret meetings with my boss, Rick Brown. She was accusing me of that right off the bat. And I was uncomfortable during the time. I didn't really know what to say, so I was kind of just sitting there back, and just letting this happen. And then she started to openly badmouth Rick, saying some really profane words, and --

Q What were they?

A She called him a piece of shit and a rat, rat fuck. And this was right in the open. And I was feeling really uncomfortable at this point because, like I said earlier, this is a place where a lot of foot traffic happens, and anyone can hear this conversation. And I just did not want to be associated with this, and getting back to Rick, and being in his office, because it was very open, very blatant. I was very uncomfortable at this point.

And after she was accusing me of having secret meetings with Rick about badmouthing the Union, she started to give me the lecture about how good the Union is, and how it protects you from scheduling conflicts, and --

Q Did you -- what did you say? When did you first speak up?

A           It was probably the point where I was just -- wanted to ask her, like, can you tell me what the Union, like, really does for you. Like, what can it really do for you. I can't really recall what she was saying, but she was just more so mumbling. But then I asked her, is the Union just like for your protection, and that kind of aggravated her, as if I was, like, insulting her or something. What do you mean, the Union is for our protection? I was, like, I -- just sounds like that's what it's for. And then she started to really rant about scheduling and how it benefits us in every way, shape, or form. And then she started getting into how Dean (phonetic), and his -- the assistant technical director, Rick, who they used this scheme to -- with the new hires to not tell them about the Union before they get out there. And once they get out here and they learn about the dues and the other things as such, it would frustrate new hires, and then we would be turned against the Union, which was not true. I was informed about everything, about the Union and Nexstar and negotiations, and everything's kind of at a standstill. So I knew that coming out here. And she accused them of that. And at this point I'm just sitting here, just listening. And I believe she ended the conversation after her rant. It was more so a -- it was -- not everyone's your friend here, that's what she said at the end of the day.

Q.           How did you take that?

A. In silence, you know. I had just -- probably just nodded my head, and just carried on, thanks Ellen. I didn't want to be too much involved with this conversation. I just -- I knew she was just trying to convince me and just -- on something I didn't want to join in the first place, and carried on from there, carried on with my weekend. (TR: 84:2-25, 85:1-25, 86: 1-6)

Moore testified that he approached his supervisor Rick Brown a few days later, probably “on Monday or Tuesday” and said:

Just basically what I was telling you in great detail about what she said exactly, and how more so, she was badmouthing him, and it just made me really uncomfortable, because I didn't want -- I didn't want it to get back to him, if anyone heard anything, because it was very open, very blatant. And I just wanted to tell him my side of things before anything else got back to him because I was just covering for myself. (TR: 86: 12-21)

After receiving this complaint from Moore, Brown reported to Patrick Nevin, KOIN Vice President and General Manager that Moore had complained to him about Hansen’s vulgar and offensive behavior. Nevin resolved that the situation warranted an investigation to determine whether KOIN’s policies against harassment and business conduct had been violated. (TR. 102) Nevin asked Casey Wenger, KOIN’s Business Administrator who has human resources’ responsibilities to conduct an inquiry into whether these violations had

occurred. (TR. 102) Wenger met with Moore and Brown to review the incident. His notes of that investigatory meeting, held on June 11, and a second follow-up meeting he had with Moore on June 18 were admitted into evidence as GC Ex. 2.

Wenger testified that these notes were an accurate rendition of the investigatory interviews held with Moore. (TR. 123-24) This assertion was not challenged on cross-examination by either the Counsel for the General Counsel or Charging Party's counsel. Wenger summarized the investigation as it stood at this point, (R.Ex. 3), in doing so he noted that he had also talked to a witness to the discussion:

Summary of Ellen Hansen Issue/Investigation.

It was brought to our attention on 6/11/18 that Ellen Hansen had approached Ben Moore during working hours to convince him to like and support the union. Ben felt very uncomfortable. In a follow up with Ben on 6/18/18 his description of the incident remained the same. He also has had no additional issues with Ellen since the incident on 6/11/18. X witness the incident between Ellen and Ben and she made eye contact with Ben. She could see that Ben was uncomfortable and she gave him the look of sorry. We have completed our investigation with Ben Moore and X. Our next step will be to meet with Ellen Hansen to complete our investigation. After we meet with Ellen we will discuss and analyze the information from the investigation.

We will then decide if discipline is required and what it will include: Verbal Warning, Written Warning, Suspension or Termination. Currently we see this as a lack of respect to co-workers. This is also a violation of company policy including the business code of conduct and Anti-Harassment Policy.

As indicated in the Summary set forth above, the next step in the investigation of this harassment complaint was to interview Hansen. After arranging for union representation by Carrie Biggs- Adams, Local 51 President by telephone, this took place on June 28, 2018 at KOIN.

Casey Wenger, Pat Nevin and Ellen Hansen attended in person and Terri Bush VP of Nexstar Human Resources and Biggs-Adams participated by phone. Wenger and Nevin prepared a summary of this investigatory meeting which was marked as Jt. Exhibit 1. After

a brief introduction, wherein Nevin explained that the purpose of the meeting was to investigate the facts involving ‘possible company policy violations arising out of a conversation that took place in late May 2018-----specifically, possible violations of the business conduct policy for failure to show respect to co-workers at all times, and the anti-harassment policy which prohibits conduct that creates a hostile work environment, or is disruptive, or that has the purpose or effect of interfering with an individual's work performance’. *Id.* Then, Nevin asked Hansen a series of questions regarding her conduct during the incident involving Moore and related background events. Nevin asked her if she recalled a conversation, she had with Ben Moore on May 18, 2018 near the photog editing cubes regarding collective bargaining agreements. *Id.* Hansen did remember the conversation. She explained that she was informed by other employees that Moore had conversations with Rick Brown. She said she asked Moore if he had conversations with Brown. Moore acknowledged that he had but said, “he didn't want to talk about it.” *Id.* At that point Hansen said she was done with her questioning of Moore but that he then continued to ask her questions. She said the conversation lasted about 5 minutes. Nevin then asked her if she recalled any other discussions with Ben Moore or any other union member regarding these types of topics. *Id.* Hansen said she had these types of conversation with employees as she is pro-union and she does her union spiel. She mentioned that she shared information such as ‘the union gives employees many protections. She was also asked whether she had ever made derogatory comments about any of her co-workers to her peers. Hansen denied making such statements indicating ‘that she sometimes gets frustrated with actions she sees with stories, and that when this happens’, she says ‘nothing’ and ‘keeps working’. *Id.* Nevin noted that ‘there are allegations of a lack of respect of your

co-workers including management employees and asked her how she would respond to these, asking her specifically, have you ever used the words “rat” and “piece of shit” to describe Rick Brown? She responded by stating ‘not that she recalls’. *Id.* Nevin also asked her if she accused one of her co-workers of having secret meetings with Rick Brown. She said she did. She repeated her earlier response that she had heard Ben Moore had met with Rick Brown and because of this she asked Moore if he had a secret meeting with Brown. Moore said he had a meeting and didn't care to discuss it.

Following this meeting with Hansen, a decision was made to issue her a written warning.

A copy of that warning is marked as Jt. Ex. 2. The warning stated:

“based on the findings during our investigation KOIN management came to the conclusion that violations of company policies at issue did occur. Specific violations included violation of the Business Conduct Policy for failure to show respect to a co-worker at all times and the Anti-harassment policy which prohibits conduct that creates a hostile work environment, or is disruptive or that has the purpose of effect of interfering with an individual's work performance”. *Id.*

This warning also advised Hansen that:

“It is expected that you adhere to these company policies and take corrective steps immediately. In the event future violations of company policies occur, you will be subject to further disciplinary action, up to and including termination of employment with this letter, we have attached the Business Code of Conduct Policy, Anti -Harassment Policy and the Non-Retaliation Protection Policy for you to review”. *Id.*

Following the issuance of that warning, Biggs-Adams sent KOIN a request for information on July 12, 2018 asking for the “name of the witness” to the incident leading to Hansen’s disciplinary warning. (Jt. Ex. 3). KOIN responded promptly to the Union’s request on July 13, 2018 but declined to disclose the identity of the witness to this incident of harassment. This witness (‘employee’ X) had initially asked that X’s identity remain confidential at the time X gave an interview and repeated that request that it remain confidential when asked again when asked if X would allow disclosure after the union made

its' request for information. TR. 116:1-9. A copy of the response to the request for information is marked as Jt. Ex. 4.

## II. ARGUMENT

### **A. BRIEF IN SUPPORT OF EXCEPTIONS 1-8: The ALJ'S Findings of Fact Regarding Credibility are Self-Contradicting and Not Based on Record Evidence or Otherwise Proper Grounds**

Exceptions 1 through 8 relate to the credibility determinations arrived at by the ALJ. They all relate to one conversation between two individuals: 1) former KOIN employee Moore and the 2) employee Hansen, who received the written warning which is the subject of this Complaint. This disciplinary warning given to Hansen grew out of a complaint made by Moore, who reported to his supervisor Rick Brown that he was made to feel very uncomfortable by Hansen when she confronted him in the newsroom on the evening of Friday, May 18, 2019. Determining what was said in that conversation is central to determining whether a violation occurred. As the facts spelled out above make clear, the ALJ erred in performing this task. The Board has, of course, held that while credibility determinations by ALJs are entitled to deference, they can be overturned in appropriate circumstances. *International Longshoremen's Association, Local 28 (Ceres Gulf, Inc.)* 366 NLRB No.20 (2018) (Board overturned critical ALJ credibility determination as improperly based on bias and stereotypes)

In *Circus Circus Casinos, Inc. v. NLRB*, 954 F.3d. 279, (2020) the D. C. Circuit addressed, and then applied, the standards that a reviewing court will use in determining whether an NLRB ALJ has properly made a credibility determination:

Although our standard sets a high bar, ALJ witness credibility determinations are

not immune from judicial scrutiny and must be reasonable and reasonably explained. See *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337 (D.C. Cir. 2003) (“Decisions regarding witness credibility and demeanor are entitled to great deference, as long as relevant factors are considered and the resolutions are explained.” (citation and internal quotation marks omitted)). Our review is not a rubber stamp, and case law reflects at least three grounds that may render an ALJ’s credibility decisions unreasonable. This court will not condone arbitrary resolutions that reflect a “lack of evenhandedness.” *Sutter East Bay*, 687 F.3d at 437. Nor will we uphold credibility decisions resting “explicitly on a mistaken notion.” *Sasol N. Am. Inc. v. NLRB*, 275 F.3d 1106, 1112 (D.C. Cir. 2002). When drawing inferences for and against witness testimony, an ALJ “is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.” *King Elec., Inc. v. NLRB*, 440 F.3d 471, 475 (D.C. Cir. 2006) (cite omitted). 954 F.3d. 279, 289.

In *Circus Circus Casinos*, supra, the Court used these standards to vacate the allegation in that case that a manager threatened an employee at a safety meeting. In doing so, the Court found this was “the rare case” where it was appropriate to set aside the ALJ’s credibility determinations. The Court held the ALJ’s finding that the manager made the threatening statement to the employee was “patently insupportable.” The court essentially found that the employee’s allegation that a threat was made to be ‘out of whole cloth’ since the employee’s testimony regarding the meeting was materially contradicted [at trial] by other witnesses, union members and non-members alike, who remember only an ordinary discussion that concluded without any threats. Noting “[l]egitimate adjudication requires evenhanded assessment of testimony offered on behalf of the employer and the employee,” the Court overruled the witness’s testimony and vacated the related unfair-labor-practice finding., 954 F.3d. at 291.

First, it is clear that the ALJ issued contradictory conclusions as to whether Moore was to be believed on a critical aspect of the short conversation. The ALJ stated:

**“According to Moore, after Hansen greeted him with talk about the benefits of joining the Union, she accused him of having secret meetings with Brown. He testified that Hansen told him Dean and Brown used this “scheme” to not to tell new people about the Union until they got “out there” and once “here”**

**the new hires would learn about dues and “other things” which would frustrate the new hires and turn them against the Union. I will credit Moore on this point.**

Hansen acknowledged that she mentioned to him that management frequently changes and is not “always” supportive of its employee; but does not recall her exact words. Moore, on the other hand, was clear in his recollection. Moreover, his version has the ring of truth because it is not so far outside the realm of what Hansen admitted to usually telling new employees. (Emphasis added) (ALJD 5:1-11)

Yet, a few pages later in the Decision (ALJD 7:31-33) it is stated:

I do not credit Moore’s testimony that (1) Hansen “accused” him of having a secret meeting with Brown; (2) Hansen asked when he was going to sign documents to join the Union.....

As one can see, there is a direct contradiction by the ALJ on the critical point of whether or not Hansen accused Moore of having a secret meeting with supervisor Rick Brown. We submit that the first conclusion is correct-----that Hansen accused Moore of having a secret meeting with Rick Brown. This conclusion is supported by the ALJ’s own reasoning and the additional reason that it is preposterous to suggest that Moore invented the ‘accusation’ out of ‘whole cloth’. Moreover according to notes taken at the investigatory meeting held at KOIN, which were admitted into evidence at the hearing, Hansen admitted questioning Moore about his meeting with Brown. Once this credibility determination is reached it becomes critical as is discussed below to the conclusion that Hansen engaged unprotected workplace conduct warranting discipline.

The ALJ made another erroneous, and improperly justified, credibility determination regarding this short conversation. It is equally preposterous that Moore invented out of ‘whole cloth’ the vile and profane words next used by Hansen to attack their common supervisor Rick Brown. As described above in the Statement of Facts, Moore testified that:

**And then she started to openly badmouth Rick, saying some really profane words, and --**

Q What were they?

**A She called him a piece of shit and a rat, rat fuck. And this was right in the open. And I was feeling really uncomfortable at this point because, like I said earlier, this is a place where a lot of foot traffic happens, and anyone can hear**

**this conversation.** And I just did not want to be associated with this, and getting back to Rick, and being in his office, because it was very open, very blatant. I was very uncomfortable at this point. **And after she was accusing me of having secret meetings with Rick about badmouthing the Union,** she started to give me the lecture about how good the Union is, and how it protects you from scheduling conflicts, (Emphasis added)

The ALJ acknowledged this aspect of Moore's testimony by stating that "Moore also insists that Hansen continued the conversation by bad mouthing Brown and calling him a "piece of shit" and "rat fuck., but then baselessly discrediting Moore for the following alleged reasons: 1) Moore was hoping to transfer to the Portland facility , 2) Moore 'acknowledged that over his career he has had that contentious conversations with coworkers but, except for Hansen, he did not "report all of those conversations." and 3) Nevin admitted that for the past 1½ to 2 years of observing Hansen in contract negotiations, his impression of her was that of a notetaker and while in bargaining sessions Biggs-Adams would sometimes use profanity and derogatory terms to refer to management and that Nevin acknowledged that Hansen never used that type of language. (ALJD 8: 12-15). Each of these points fail, when fully and properly analyzed, to support crediting Hansen's testimony over that of Moore.

While it is true that Moore acknowledged that he hoped to transfer back to Portland from another station, it is, of course, also true that Hansen had every incentive to deny that she called Rick Brown a 'piece of shit' and a 'rat fuck' as she hoped to escape the discipline that had been imposed upon her. However of much greater significance to a proper evaluation of their respective credibility on this point is the fact that Hansen dodged and equivocated when pressed during the hearing to deny using these vulgar and disrespectful slurs directed towards Rick Brown, a supervisor that Hansen shared with Moore:

JUDGE DIBBLE: All right. And just for clarification,  
when General Counsel was asking if you recalled during your

conversation with Mr. Moore of referring to management as a piece of shit and a rat bastard, you said, you didn't recall. Does that mean that you may have said that but you just don't recall saying that?

**THE WITNESS: Yeah. You know, I really doubt that I would have said that. I don't remember saying that and try not to use stuff like that in these kind of conversations with employees. Initially, I try to be professional about it and so I can say that's the best of my recollection that I didn't say that and it doesn't sound like that's something I would say but I mean, I don't think I did, no. I don't recall.**

JUDGE DIBBLE: Okay. (TR: 44:15-25, 45: 1-3)(Emphasis added)

The ALJ's second reason for crediting Hansen over Moore as to the use of these vulgar slurs is that Moore 'acknowledged that over his career he has had that contentious conversations with coworkers but, except for Hansen, he did not "report all of those conversations.' (ALJD 8:9-11). Without any foundation as to the nature of these 'contentious conversations' this is a meaningless point. Surely, we do not have any evidence that in these previous 'contentious conversations' that Moore had in his career, that a fellow worker called a supervisor or manager a 'piece of shit' or a 'rat fuck'.

The ALJ's third reason for discrediting Moore's highly credible testimony that Hansen used these vulgar and derogatory slurs is just as unjustified as the others. The ALJ noted that Nevin testified that Hansen did not swear or use vulgar words in negotiations. We submit that this does not in any way establish that she would not use such words in a conversation occurring 'behind the scenes' or 'in the clenches. Common experience points to the opposite conclusion. Many employees are inclined to swear or use obscene language towards supervisors when they are not present, but not so inclined when they are. As noted above, with the ALJ apparently crediting Moore's testimony that Hansen was "accusing" him of having a 'secret meeting' with Brown, it is evident that Hansen was acting out of anger and a deep distrust of Brown, thus making it more likely that these vulgar and derogatory words were used.

For all of the reasons noted above we believe that Moore's testimony regarding the use of the vulgar and derogatory terms of 'rat fuck' and 'piece of shit' toward Brown should be credited over Hansen's incredibly weak and equivocating testimony that she did not remember if she said these words or not.

The final credibility point that the ALJ addressed in the Decision was to discredit the testimony of the 'anonymous witness' and then uses this to credit Hansen over Moore on the critical issue of the use of the vulgar and derogatory terms directed at Brown. The ALJ does this by stating:

“Last, there is no evidentiary value to the Respondent's anonymous witness. The Respondent's failure to produce the witness for cross-examination and my inability to assess her credibility discredits her as a witness. Equally important, the Respondent admits the witness didn't hear any specifics of the conversation. Consequently, I find Hansen more credible in her denials about using derogatory terms to describe Brown. (ALJD 8:17-21)

First it is evident that this discrediting of the anonymous witness is not really a 'credibility determination' at all, but actually a substantive and evidentiary ruling. Employee X was not a witness, as that would have identified the witness. So, the proper analysis is whether the statement attributed to the witness adds any weight to Moore's version of the conversation between him and Hansen. In that regard, it should be allowed to do so as Wenger credibly testified to his interview of the witness, and his testimony on this point laying the foundation for his investigatory notes of his interview of the witness who asked to remain anonymous because she had to work with Hansen. These investigatory notes were admitted into evidence and were not even objected in grounds of hearsay or otherwise. These notes indicated that the witness saw “the incident between Ellen and Ben and that “she made eye contact with Ben. She could see that Ben was uncomfortable and she gave him the look of sorry”. (R. Exh, #3) This evidence

should certainly have been weighed by the ALJ in assessing the respective credibility of Moore versus Hansen. Instead the ALJ ignored it, rejecting it as hearsay despite the fact that there was no hearsay objection made at the hearing. (ALJD 8:17-21 and 6:3-5)

**B. BRIEF IN SUPPORT OF EXCEPTIONS 9-19: The Written Warning Given to Hansen was Warranted and Not Violative of Sections 8(a)(1) and (a)(3) of the National Labor Relations Act.**

The General Counsel alleges that KOIN violated section 8(a)(1) and (a)(3) in connection with the disciplinary warning given to Hansen. GC Exhibit 1(c), para. 6 and 8. The ALJ examined and then applied three separate analytical frameworks to determine whether or not the Act was violated in this regard, which we had anticipated we would examine in turn: *Burnup*, infra, *Wright Line*, infra and *Atlantic Steel*, infra. However, on July 21, 2020 the Board issued a landmark decision in *General Motors*, 369 NLRB No.127, (2020) wherein it was decided to apply the *Wright Line* analysis instead of the *Atlantic Steel* approach in deciding cases such as this one where alleged Section 7 activity is involved in the misconduct that brought about the discipline. The ALJ, in this case, actually determined that *Wright Line* was inapplicable stating that: “A *Wright Line* analysis is not appropriate in this case because the Respondent’s motivation is not at issue. I found that the written warning was issued because of Hansen’s union activity”. (ALJD 11:46-47; 12:1-4). The Board rejected this reasoning in *General Motors*, by indicating that the *Wright Line* test is preferable to *Atlantic Steel* and would be the appropriate test to apply in a case like this one where there are arguably ‘dual motives’ to assess. *General Motors*, supra. While finding that the *Wright Line* test was inapplicable to this case the ALJ went ahead and determined that if it did, the Charging Party would prevail.

As to each test the ALJ applied, (*Burnup/Atlantic Steel*), or did not think applied (*Wright Line*), the ALJ reminded that she had not found that Hansen engaged in misconduct and even if she had, it was not serious enough to either lose the protection of the Act, or to justify lawful discipline, even if it was only a written warning. Now that *Atlantic Steel* 245 NLRB No.107(1979) has been overruled as a test, we shall analyze the case under the two tests that remain after *General Motors'* sound and historic ruling----*Burnup* and *Wright Line*. *General Motors*, supra at p.10 fn. 27(“Nothing in this decision should be read as conflicting with *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23–24 (1964). The test we announce today, like the setting-specific standards today’s decision overrules, pre- supposes that the employee actually engaged in the misconduct”).)

As to the first standard, we note that the Board and the Courts have long looked to the framework established in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), to determine whether a Section 8(a)(1) or 8(a) (3) violation occurred in this sort of context. “At all times, the burden of proving discrimination is that of the [NLRB] General Counsel.” *NLRB v. Plastic Applicators, Inc.*, 369 F.2d 495, 498 (5th Cir. 1966). The employer bears the initial burden to show that it had a good-faith belief that the employee was engaged in misconduct. *Burnup & Sims*, 379 U.S. at 23 n.3. The burden then shifts to the General Counsel, who must prove that the employee was engaged in a protected activity, the employer knew it was protected, the employer's actions were based on alleged misconduct occurring in the course of the protected activity, and the employee was not guilty of misconduct. *Id.* at 23.

On the facts credibly adduced at hearing, we submit that there can be no doubt that KOIN had an honest belief that misconduct had occurred. KOIN

clearly had a good-faith belief that Hansen had made Moore uncomfortable with her “ranting” and offensive and vulgar comments directed at another individual that Moore respected. After a careful review of the record, we submit that the only reasonable inference that can be drawn from the evidence is that KOIN plainly possessed an honest, good-faith belief that Hansen violated KOIN’s important company policies on business conduct and anti- harassment through her contemptuous vulgar and offensive comments directed towards Moore and his supervisor. Moore credibly testified that Hansen accused him of having “secret” meetings with a person she described as a “piece of shit” and either a “rat” or a “rat fuck”. (TR. 84-86) While Hansen maintained that she did not use those words, or when pressed by the ALJ that ‘she did not recall whether she did or not’ .....”I really doubt that I would have said that” (TR.44:15-25; 50:11-21)(see argument at pp. 11-16, supra)

As noted above, it was brought to the attention of KOIN Management that Hansen was involved in an inappropriate and harassing conversation with co-worker Ben Moore that took place on that date. KOIN management, pursuant to its’ Anti-Harassment Policy, carefully investigated the circumstances to determine what had occurred and whether Hansen had violated company policy during this incident. As part of the investigation, KOIN management met with Hansen on June 28, 2018 Pat Nevin, Casey Wenger were in attendance and Carrie Biggs Adams (NABET Representative) and Terri Bush VP Of Nexstar Human Resources were conferenced in via telephone. Based on the findings during its’ investigation KOIN management concluded that violations of company policies did occur, specifically violations of the Business Conduct Policy for failure to show respect to a co-worker at all times and the Anti-

harassment policy which prohibits conduct that creates a hostile work environment, or that has the purpose or effect of interfering with an individual's work performance. Because of the serious nature of these violations the KOIN decided to issue Hansen a written warning.( Jt. Ex. 3) Hansen cannot credibly argue that this event did not occur as stated above and as supported by the statements of Moore and employee X who witnessed the harassing and bullying conduct of Hansen. The fact that Hansen has engaged in union activity provides no excuse or protection from the inescapable conclusion that the conduct occurred as related by Moore, and that it, not union activity, was the “motivating factor” for KOIN’s decision to give her a written warning

The burden then shifts to the General Counsel to prove that Hansen was engaged in protected activity; that KOIN was aware of it; that the alleged misconduct occurred in the course of it; and that Hansen was not guilty of misconduct. *Burnup & Sims*, 379 U.S. at 23. In this case not only did KOIN have an honest good faith belief that Hansen engaged in misconduct; but we submit that credible evidence establishes that Hansen was guilty of misconduct. It has been held that 'flagrant conduct of an employee, even though occurring in the course of [protected] activity, may justify disciplinary action by the employer.'" *Allied Aviation Fueling of Dall. LP*, 490 F.3d at 379 (5th Cir. 2007) (quoting *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 514 (5th Cir. 1968)). Even if the incident began as protected activity, Hansen escalated the encounter, thus losing the protection of the Act. Harassment and intimidation are not protected union activities; offensive, hostile and profane language and threats are not protected even if under the guise of union activity. *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir 2001); see also *Mobil Exploration &*

*Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999) (citing *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 837 (1984)) ("The fact that an activity is concerted ... does not mean that an employee can engage in it with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of Section 7.") When employees resort to that kind of activity, they take a position outside the protection of the statute and accept the risk of discharge upon grounds aside from the exercise of the legal rights which the Act protects." *Paramont Min. Corp. v. NLRB*, 631 F.2d 346, 348 (4th Cir. 1980).

In *Contempor Fabrics, Inc. v. United Food & Commercial Workers Union*, 344 NLRB 851 (2005), a union employee, Lambert, had told a female employee that she "had better not vote no for this union." *Id.* at 852. She immediately reported the incident to management, stating that Lambert's comment made her feel "upset and afraid." *Id.* The Board found that the employer's subsequent discipline of Lambert was lawful because the comment, as "an implicit warning that unpleasant consequences would flow from a 'no' vote," lost the Act's protection. *Id.* Similarly, the Fourth Circuit in *Paramont*, 631 F.2d at 349, drew the line where the conduct "is intended to threaten or intimidate" rather than merely to persuade. There, the union employee had reached into another employee's car and touched the employee on the head, asking whether he was going to support the union. After the non-union employee refused to get involved, the union employee made vulgar remarks, although the extent of his threat was disputed. *Id.* At 347. Because the employee's actions were successfully designed to intimidate, the court found his activity unprotected, regardless of whether the employee was "engaged in concerted activity." *Id.* at

349-50. The court denied enforcement of the Section 8(a)(1) violation, holding that the company was justified in discharging the employee. *Id.* at 350.

Here, Hansen's conduct exceeded persuasion. She sought to intimidate and belittle Moore for having had discussions with his supervisor Rick Brown, who she described as a “rat” and a “piece of shit”. In this she succeeded as Moore credibly testified that he was made to feel “very uncomfortable” by her “rants” and bullying. (TR: 84:2-25, 85:1-25, 86: 1-6) Hansen’s offensive and vulgar statements to Moore, in addition to being clear- cut misconduct, do not fall under the protection of the Act and are subject to employer discipline, and KOIN did not violate section 8(a)(1) when it disciplined her for violating its’ Non-Discrimination/Anti-Harassment and Business Conduct Policy.

As to the second standard, to prove that a discharge or other discipline violates section 8(a)(3) of the Act, the Board has long employed the test from *Wright Line*, 251 NLRB 1083 (1980), *enf’d*. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). Prior to the landmark *General Motors* decision, the Board and the courts also applied the *Atlantic Steel* analysis in cases where the abusive conduct was arguably interwoven amidst Section 7 activity. This analysis however led to unacceptably varying results, and quite frankly too often protecting clearly abusive and offensive conduct. As the Board stated in *General Motors*:

The Board’s fundamental rationale in applying its setting-specific standards has been that employees need a certain amount of leeway in exercising Section 7 rights for those rights to be meaningful. As the Board wrote in *Consumer Power Co.*, 282 NLRB 130 (1986), “The Board has long held . . . that there are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.” *Id.* at 132. We believe, however, that this rationale is overstated and has largely swallowed

employers' concomitant right to maintain order, respect, and a workplace free from invidious discrimination. We read nothing in the Act as intending any protection for abusive conduct from nondiscriminatory discipline, and, accordingly, we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful. 369 NLRB No. 127 at p. 8

The Board went onto to note that Section 7 rights can thrive without the need to resort to uncivil, hostile, and profane language:

Much more often than not, employees comport themselves civilly when engaged in Section 7 activity, and no leeway is needed. That said, Section 7 rights can thrive in the same space afforded other challenging topics, and it is reasonable for employers to expect employees to engage all such topics with a modicum of civility. As eloquently written by former Member Johnson in his *Pier Sixty* dissent:

We live and work in a civilized society, or at least that is our claimed aspiration. The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances. Reflecting this underlying truth, moreover, legal and ethical obligations make employers responsible for maintaining safe work environments that are free of unlawful harassment. Given all this, employers are entitled to expect that employees will coexist treating each other with some minimum level of common decency. 362 NLRB at 510.

We do not read the Act to empower the Board to referee what abusive conduct is severe enough for an employer to lawfully discipline. Our duty is to protect employees from interference in the exercise of their Section 7 rights. Abusive speech and conduct (e.g., profane ad hominem attack or racial slur) is not protected by the Act and is differentiable from speech or conduct that is protected by Section 7 (e.g., articulating a concerted grievance or patrolling a picket line). 369 NLRB No. 127 at p 8

Applying this reasoning the Board determined that *Wright Line* is the proper standard to apply to cases where employees engage in abusive conduct in connection with Section 7 activity, stating:

For all the reasons discussed above, we believe that the Board must consider a different standard for deciding cases where employees engage in abusive conduct in connection with Section 7 activity, and the employer asserts it issued discipline because of the abusive conduct. In cases such as *Postal Service*, above, we believe it entirely plausible that the employer's decision to give the long-time union steward a warning letter was based entirely on her abusive conduct—calling the supervisor “an ass,” unleashing a stream of profanity, forcefully standing up, stepping toward the

supervisor, shaking her finger within striking distance, and continuously screaming, “I can say anything I want,” “I can swear if I want,” and “I can do anything I want”—rather than her union activity. See 364 NLRB No. 62, slip op. at 2–4. Likewise, it seems plausible in *Pier Sixty*, above, that the employer discharged an employee for the profane and vituperative attack on the manager in the Facebook post, which would make it difficult for the two to work together again, and not because the post also happened to conclude with a pro-union message. 362 NLRB at 506–508. 369 NLRB No, 127 at p.7

Under *Wright Line*, the General Counsel must initially show that the employee’s Section 7 activity was a motivating factor in the employer’s decision to discharge or discipline the employee. The elements required to support this initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. If the General Counsel makes such a showing, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the employee’s protected conduct. *Wright Line*, 251 NLRB at 1089; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. mem.127 F.3d 34 (5th Cir. 1997). Under certain circumstances, animus may be inferred from circumstantial evidence based on the record as a whole. See *Fluor Daniel, Inc.*, 304 NLRB 970, 971(1991), enfd. 976 F.2d 744 (11th Cir. 1992).

Under *Wright Line*, the critical inquiry is what motivated the Employer to issue the disciplinary warning? Here there can be little doubt. Hansen’s vulgar, derogatory, and harassing conduct on May 18, 2019 justifiably led to a written warning. As noted above, it was brought to the attention of KOIN Management that Hansen was involved in an inappropriate and harassing conversation with co-worker Ben Moore that took place on that date. KOIN management, pursuant to its’ Anti-Harassment Policy, carefully investigated the circumstances to determine what had occurred and whether Hansen had violated company policy during this incident. Based on the findings during its’ investigation KOIN management concluded that violations of company policies

did occur, specifically violations of the Business Conduct Policy for failure to show respect to a co-worker at all times and the Anti-harassment policy which prohibits conduct that creates a hostile work environment, or that has the purpose or effect of interfering with an individual's work performance. Because of the serious nature of these violations the KOIN decided to issue Hansen a written warning.( Jt. Ex. 1) This warning advised Hansen that “It is expected that you adhere to these company policies and take corrective steps immediately. In the event future violations of company policies occur, you will be subject to further disciplinary action, up to and including termination of employment With this letter, we have attached the Business Code of Conduct Policy, Anti -Harassment Policy and the Non-Retaliation Protection Policy for you to review”. Hansen cannot credibly argue that this event did not occur as stated above and as supported by the statements of Moore and employee X who witnessed the harassing and bullying conduct of Hansen. The fact that Hansen has engaged in union activity provides no excuse or protection from the inescapable conclusion that the conduct occurred as related by Moore, and that it, not union activity, was the “motivating factor” for KOIN’s decision to give her a written warning.

What factors have been employed by the Board and the courts to decide what was the motivating factor for the discipline imposed? It has been observed that circumstantial evidence may be sufficient for prima facie showing of animus-based motivation. *Valmont Industries v. NLRB*, 244 F.3d 454, 465 (5<sup>th</sup> Cir., 2001) Timing, among other factors, can provide evidence of a relationship between the adverse employment action and union activity. *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 565 (5<sup>th</sup> Cir. 2003). One court set out some other factors to use in assessing motive: “the failure to investigate the conduct alleged as the basis for

discipline, disparate treatment of the disciplined employee or discipline that deviates from the employer's past disciplinary practice, the implausibility of the employer's explanation of its action, inconsistencies between the employer's proffered reason for the discipline and other actions of that employer, and the seriousness of the alleged violation. Other factors considered when assessing motive include *Id.*(citing *Valmont*, 244 F.3d at 456). "Mere suspicions of unlawful motivation are insufficient to establish violations of the NLRA." *Asarco, Inc. v. NLRB* 86 F.3d at 1401, 1408 (internal quotations omitted).

Here, all of those factors point in KOIN's favor. There can be no doubt that KOIN conducted a careful and methodical investigation of the Hansen/Moore incident. There is absolutely no evidence of disparate treatment or proof that the written warning given to Hansen deviated from past disciplinary actions at KOIN. There is no implausibility as to KOIN's asserted reason for the discipline. There are no inconsistencies between KOIN's proffered reason for the discipline and other actions of KOIN. For reasons stated above the violation of KOIN policy were serious, at least warranting a written warning. Finally, there is absolutely no suspicious 'timing' involved here. It is undisputed that Hansen's involvement with the union is longstanding spanning many years and several 'very tough' negotiations, with absolutely no evidence that she had been disciplined before or after the ugly and profane actions that she engaged in on May 18, 2019. TR. 22-25. And while Biggs-Adams testified that KOIN and the union are involved in "very tough", she also testified that this is nothing new as the last negotiations took two years and were "complicated". TR. 62-63 Again we note that the fact that Hansen has engaged in union activity provides no excuse or protection from the

inescapable conclusion that the conduct occurred as related by Moore, and that it, not union activity, was the “motivating factor” for KOIN’s decision to give her a written warning. *NLRB v Arkema, Inc.*, 710 F.3d 308, 318 (5<sup>th</sup> Cir., 2013); *Electrolux Home Products* 368 NLRB No. 34 (2019). As the Board noted in *General Motors* there is “ nothing in the Act as intending any protection for abusive conduct from nondiscriminatory discipline, and, accordingly, we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful. 369 NLRB at No,127 at p.8.

**C. BRIEF IN SUPPORT OF EXCEPTIONS 20-25: Confidentiality of Identity of Witness to Hansen/Moore Incident Should Be Protected and as result KOIN Did Not Violate the Act by Not Providing the Identity of the Witness to the Hansen’s Harassment of Moore**

As to the element of the Charge relating to the KOIN’s denial of the Union’s demand to reveal the identity of eyewitness employee X, we begin with the acknowledgement that an employer’s duty to furnish information is a statutory obligation that exists independent of any agreement between the parties. *American Standard, Inc.*, 203 NLRB 1132, 83 LRRM 1245(1973). It is a derivative of the duty to bargain in good faith and violations of this duty, of course, arise under sections 8(a)(1) and (5) of the National Labor Relations Act. It has long been established that an employer is obligated to disclose information requested by its employees’ collective bargaining agent that is relevant and necessary to the union’s bargaining responsibilities and contract negotiations, *NLRB v. Truitt Mfg Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 400 U.S. 301, 303 (1960) These well-established principles have long provided clarity and definition to the collective bargaining process.

However, it also well-recognized that in certain circumstances, an employer may not

have to provide information that it has a legitimate interest in protecting. Using the “defense” of confidentiality, an employer may therefore limit information that a union would otherwise find useful or helpful. The Supreme Court stated in *Detroit Edison Corp. v NLRB*, 440 U.S. 301 (1979) that a union's interest in arguably relevant information does not necessarily predominate over other legitimate employer interests in non-production of the information. The Court noted that the needs of a union must be balanced against the legitimate and substantial confidentiality interests of the employer.

The Board and the courts have recognized that a claim of confidentiality as a defense to the production of otherwise relevant documents can be made when the following items are sought to be produced: (1) highly personal information, with promises or reasonable expectation of confidentiality (e.g., individual medical or psychological test results); (2) substantial proprietary information (e.g., trade secrets); (3) reasonable expectation that disclosure will lead to harassment or retaliation (e.g., identity of witnesses); or (4) traditionally privileged information (e.g., material prepared for pending lawsuit. For example, in *Allen Storage & Moving Co., Inc.*, 342 NLRB 501, 175 LRRM 1388 (2004), the Board upheld the company’s refusal to provide information containing customer specific data. When an employer claims that the information sought is confidential because of its confidential nature, the union’s needs are balanced against the "legitimate and substantial" confidentiality interests of the employer. *E.W. Buschman Co. v NLRB*, 820 F.2d 206 (6th Cir. 1987); *NLRB v United Technologies Corp.*, 789 F.2d 121 (2d Cir. 1986); *Washington Gas Light Co.*, 273 NLRB 116, 118 LRRM 1765 (1985).

While under Section 8(a)(5) there is a “general obligation” to supply a union with relevant information that it needs to “determine whether to take a grievance to arbitration absent settlement.”, confidentiality concerns come into play which properly preclude forced

disclosure or production of confidential information consisting of witness statements or even witness identity. Notwithstanding the employer's general duty to provide relevant information, the Board in *Anheuser-Busch* 237 NLRB 982,984-985(1978) created a broad, bright-line exception, holding that 'the 'general obligation' to honor requests for information...does not encompass the duty to furnish witness statements....' 237 NLRB at 984-985. In creating this rule, the Board concluded that witness statements 'are fundamentally different from [other types of information deemed discoverable through information requests], and disclosure of witness statements involves critical considerations which do not apply to requests for other types of information.' Id. at 984. Those "critical considerations" were potential for reluctance of witnesses to give statements if it was going to be turned over and the potential for witness intimidation. In a recent case, the Board in *Piedmont Gardens*, 362 NLRB No. 139 (2015) brushed aside these important and long-standing principles, and overturned nearly twenty-seven years of precedent following *Anheuser-Busch*, and held that the *Detroit Edison* balancing test should be applied to witness statements, just like all other claimed confidential documents.

This retreat from the bright-line rule of the *Anheuser Busch* doctrine has, of course, been heavily criticized (see footnote 4 in recent case of *American Medical Response*, 366 NLRB No.146 (2018) wherein Chairman Ring called for careful reconsideration of this issue in a future case before applying the *Detroit Edison* balancing test). But full return to the *Anheuser Busch* bright-line rule protecting against disclosure of witness statements is not necessary to resolve this case. Here the Union only sought the disclosure of the identity of the witness to the Moore-Hansen incident. As a result, the Board should not act further to force disclosure of the identity of employee X in the instant case, because the Board recently decided a case protecting the confidentiality of an informant, while at the

same time allowing the union access to the summary of the incident involved.

In that case, *Michigan Bell Telephone Co.*, 367 NLRB No. 74 (2019), the Board addressed a situation where the union had requested the identity of a workplace “informant,” a bargaining unit employee who had reported potential misconduct, and the employer refused to provide the information. The Union also sought a summary of the information that was provided and a list of managers that the summary was given. The Board held that while the summary should be provided to the union, the identity of the employee witness need not be. The issue arose out of a one-night “family night” refusal to work mandatory overtime. This refusal to work led to a settlement agreement, which included discipline for a number of unit members. The employer issued a new mandatory overtime policy which automatically extended the workday until management expressly released the techs. At a union meeting held shortly after the announcement of the new policy, bargaining unit members expressed their anger, and at least one technician suggested the group engage in another family night. An informant employee told management that another family night could possibly occur that evening. Management assembled additional supervision to confront any employees who attempted to leave work without permission and suspended five technicians involved. The union learned that an informant had given information to the employer. The union requested the identity of the informant, a summary of what the informant told the employer, and a list of who in management had received the information. The employer told the union it did not feel comfortable turning over any of the information requested and refused to do so. The union filed a grievance alleging that the employer violated a provision of the collective bargaining agreement which states that if any union employees engage in a prohibited work stoppage, “without the authority and sanction

of the [union], the Parties shall cooperate to enable [the employer] to carry on its operations without interruption or other injurious effect.” The General Counsel issued a complaint asserting all the requested information sought by the union was relevant and the employer should have provided it. The complaint also contained an allegation that the delay in turning over the information was a separate violation of the Act. After a trial, an Administrative Law Judge dismissed the complaint finding the information was not relevant to the processing of the grievance. The NLRB majority (Chairman Ring and Member Kaplan) reviewed the law, and noted, “[a]n employer, as part of its duty to bargain, must provide requested information to a union if that information is relevant to the union’s duties as the employees’ collective- bargaining representative, including the union’s grievance processing duties.” Applying this standard to the case, the NLRB noted that the grievance filed by the union concerned whether the contract’s prohibition against unauthorized work stoppages had been violated. In particular, the issue in the grievance was whether the employer had an obligation to cooperate with the union over stopping or minimizing such disputes. The Board concluded. the summary [of information provided by the informant] is relevant to the Union’s evaluation and prosecution of [its] grievance because it directly answers the question of what the Respondent knew about the potential for a family night. However, the Board held that the informant’s identity and the distribution list were not relevant to the grievance, as the Board held that whether the Respondent had an obligation under [the collective-bargaining agreement] to cooperate with the Union did not depend on the identity of the specific employee informant or the identities of the managers to whom the Respondent disseminated the informant’s tip.

The ALJ attempted to distinguish the *Michigan Bell* holding by asserting that there was

no credible evidence of witness intimidation, coercion or other threats to the witness' safety, without acknowledging the credible evidence that Moore reported, and proof established, that Hansen had engaged in harassing, accusatory and abusive conduct and the undisputed facts that witness X had asked to remain anonymous and the employee handbook assured her such anonymity if possible, and the additional undisputed fact that she works closely with Hansen. The ALJ also sought to distinguish *Michigan Bell* by claiming that the identity of the witness or witnesses involved was entitled to a greater degree of confidentiality in *Michigan Bell* than it would be in this case; despite the fact that in *Michigan Bell* there was no showing that the individual who was the informant to management about the planned job action requested confidentiality or had been threatened or intimidated.

The Board in *Michigan Bell*, while protecting the **identity** of the witness, also concluded that the union **should be provided a 'summary'** of what the informant provided to the Company as to the possibility of another job action. In the instant case, the Union only sought the identity of the witness, apparently not asking for a summary of the statement, or the statement itself, because they had already been furnished one. Moreover, the Company also provided a summary of what the witness said at the hearing,(R.Exh.#3) which was admitted without hearsay objection and should be credited as to its weight. (see supra at p.17-18). The final point that the ALJ raised as to support this violation is that the Company should have offered to accommodate the denial by offering an alternative. Given that a summary had been provided, there would be nothing left to offer as an accommodation without yielding the identity of the individual who wished not to be 'outed'.

Applying the decision in *Michigan Bell*, the Board should protect the confidentiality of the witness' identity from disclosure to the Union and find that KOIN did not violate the act by refusing to give up that individual's identity.

**D. STATEMENT IN SUPPORT OF EXCEPTIONS 26-27: The Conclusion is Erroneous, and the Remedy and Proposed Order are Not Justified**

For all of the reasons stated herein, we submit that the Conclusion reached by the ALJ that KOIN violated section 8(a)(1) and (a)(3) by issuing a written warning to Hansen for her conduct in violation of the Company's Business Code of Conduct and Anti -Harassment Policies and section 8(a)(1) and (5) for its' refusal to disclose the identity of the witness to the conversation between Hansen and Moore was in err and properly excepted to. Additionally, and as result, the proposed Order and Remedy are erroneous and properly excepted to.

**III. CONCLUSION**

The Exceptions to the Administrative Law Judge's should be granted and an Order dismissing the Complaint in its' entirety should be entered.

NEXSTAR BROADCASTING, INC. d/b/a KOIN-TV

*Charles W. Pautsch*

By: Charles W. Pautsch, Esq.

Dated: July 28, 2020

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AFFIDAVIT OF SERVICE

I hereby certify that I served the foregoing BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION on Anne Yen counsel for the Charging Party Union by e-mailing a copy of same in to [ayen@unioncounsel.net](mailto:ayen@unioncounsel.net), to Sarah Ingebritsen, Counsel for the General Counsel at [Sarah.Ingebritsen@nlrb.gov](mailto:Sarah.Ingebritsen@nlrb.gov). and Ronald Hooks, the Regional Director of Region 19, at [Ronald.hooks@nlrb.gov](mailto:Ronald.hooks@nlrb.gov). on July 29, 2020.

*Charles W. Pautsch*

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