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

VESTA VFO LLC

and

ANDREW DEFINIS

and

NICHOLAS DEFINIS

Cases 04-CA-260273 and 04-CA-260277

GENERAL COUNSEL’S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

Dated: July 23, 2021

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I. SUMMARY

This case concerns the discharge of brothers Andrew and Nicholas DeFinis from Vesta VFO LLC (Respondent), allegedly for seeking a pay increase. Respondent is a family-owned financial services company in the business of wealth management for high net-worth clients. Respondent provides investment services, insurance and estate planning, and risk management. (T 66) The types of investments include private companies, mainly oil and gas businesses and two wood pellet production facilities. (T 481) The Coleman family owns and operates the business, along with related businesses. Joshua Coleman is the principal owner. His father William Coleman is CFO, and Joshua’s brothers Jeremy and Justin are managers. Josh Myers was a managing partner in charge of the investment group.1

Andrew and Nicholas were hired on January 2, 2019. They both work until their discharge at the same time on December 6, 2019.2 The circumstances leading to their discharge are as follows: Andrew had found an unlabeled document in an open accessible virtual project workspace that turned out to be a spreadsheet of Respondent’s payroll. Andrew showed Nicholas, and the two learned that they were the lowest paid employees. They felt betrayed, because Respondent had given them the impression that other employees were paid relatively the same and assured them that their pay would soon be adjusted. They then asked with some urgency to meet with their supervisor Josh Myers. They did on the next morning of December 4 to let him know their pay concerns and to request a pay evaluation and increase, as their one-year anniversary was approaching.

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1 Myers testified that he left Vesta’s employment in June 2020. Yet, in a November 2020 state investment advisor report that would have been prepared on Myers’ behalf, the employment history indicates that Myers was still employed by Vesta at that time. (GC Ex 22, T 529-530)
2 All dates are in 2019 unless otherwise specified. Hereafter, this brief will at times use only first names to distinguish Andrew and Nicholas DeFinis.
Importantly, the brothers never divulged or disseminated the payroll or pay information; they never shared the payroll document or its contents with anyone. They never disclosed what any employee was earning. In fact, they alerted Justin Coleman right before meeting with Myers that there were personal documents stored improperly on the shared workspace. Justin asked the brothers to delete the downloads and they did. They never retained a copy of the payroll.

Respondent discharged the brothers two days after their meeting with Myers about pay. At the discharge meeting, Myers said the reason for discharge was searching for information they shouldn’t have, and what they did with that information, an admission that the discharge was in part motivated by the brothers’ protected concerted activity of seeking a pay raise. Myers added that he felt the brothers breached Respondent’s trust. This is peculiar, because the brothers came across the payroll document as part of their regular work duties and honestly called it to Respondent’s attention. It seems they should have been commended for discovering that payroll was openly accessible to all employees and reporting that fact. A different employee, who suffered no consequences, was responsible for improperly uploading the payroll to the shared workspace. There was talk of warning the brothers, but Respondent took the draconian step of discharging them without ever asking them their side of the story.

Obviously, admitting that the brothers were discharged for what they did with the information shows an unlawful motive, because what they did was protected by Section 7 of the Act. This admission was restated in two unemployment hearings, when Respondent’s officials Josh Myers and counsel Sagar Dalal swore under oath that the reason the brothers were discharged was not for finding the document, but for what they were going to do with it – leverage it for a pay increase. The inquiry into the merits of this case could end here, as analyzed in the case law below.
Yet, Respondent has only made its motivation clearer since then by backtracking and offering shifting defenses over time.

At various times since the unemployment hearing, Respondent has suggested: (a) that the brothers violated a manual provision that prohibited disclosure of confidential information to anyone outside the company, which the brother never did; (b) that the brothers violated a separate manual provision from a company for which the brothers did not work and that was never mentioned prior to trial; (c) that the brothers purposefully dug through confidential documents to find support for pay demands, even though they found the document in the course of work, there would have been no reason for the brothers to find personal pay documents where they were searching, and the payroll document itself was not marked as Vesta payroll but was instead surrounded by documents clearly marked relevant for an active project; and (d) that the brothers breached trust egregiously, even though they had never been disciplined, had previously been commended, and were never afforded an investigation to ascertain their side of the story. As explained below, these defenses are built on sand and cannot distract from the admission in the discharge meeting and unemployment hearing. In sum, Respondent discharged the brothers for using information innocently acquired to try to increase their pay.

II. PROCEDURAL HISTORY

The charges in this matter were filed by Andrew and Nicholas on May 12, 2020, and later amended on July 29, 2020. Region Four of the National Labor Relations Board fully investigated the charges and determined that they were meritorious. A Consolidated Complaint issued on

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3 Case 4-CA-260273 pertains to Andrew DeFinis, while Case 4-CA-260277 pertains to Nicholas DeFinis.

III. FACTS

The brothers were employed by Respondent as analysts. They were hired together after seeing a job advertisement on Indeed.com. (T 62) Justin Coleman made the hiring decision. The brothers worked for Respondent, but also performed work for related companies owned by the Colemans – Momentum Advanced Planning, JJKC, and other entities. (T 63) They reported to an office at 1600 North Bethlehem Pike, Lower Gwynedd, PA. They were issued company laptops, on which they researched data for prospective and ongoing projects, reviewed financial information, created Excel spreadsheet models, and prepared PowerPoint charts.

The brothers worked long hours (70-80 per week some weeks), taking work home, and were regularly commended for their work. (GC Ex 26-28, T 67, 316) They never missed work. (T 67) Josh Myers acknowledged that the brothers worked hard and gave consistent effort. (T 485) Immediately into the brothers’ tenure, company patriarch William Coleman liked the fact that Andrew and Nicholas were brothers, like the Coleman brothers. He admired their tenacity. The brothers performed numerous analytical tasks quickly and skillfully, such as researching potential investments, helping to streamline operations, helping to raise capital, compiling dossiers on potential clients, finding necessary documents, and preparing spreadsheets and reports. (T 64)

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4 Irrelevantly, Respondent attempted to delve into the brothers’ work history, which played no part of discharge.
Justin Coleman supervised the brothers until about May 2019, when they transitioned to Josh Myers’ team. Myers supervised them from about May 2019 to the end of their employment. They were both paid $50,000 per year. (T 68) When the brothers left his supervision, Justin kidded that Josh Myers “stole” the brothers from him; that’s how much he valued their work. (T 143) Once with Myers, the brothers assumed even more responsibility, such as digging deeper into analysis and being asked more often for their input. (GC 26-28; T 77-83) They had a high level of independence and were encouraged to take initiative. (T 289-290)

The brothers utilized internal and external research sources. (T 658) Nicholas testified that there was not a lot of data about private companies online, so they often relied on data already compiled internally. (T 308) Respondent gave the brothers general work assignments – like telling them of a project and asking them to find information on the project. They might be asked to do something for Bill Coleman, or Josh Myers, or Jeremy Coleman, or another individual. (T 70) The brothers were expected to take initiative; Respondent did not have a heavy-handed leadership style. There might be six or seven projects at any given time and the brothers were required to stay informed about each one in the event they were asked for their research and opinions. (T 146) Employees routinely shared their data and models via Team Chat, or by casting the model on a bigger shareable screen, and then uploading work product to a shareable virtual workspace called SharePoint. (T 310)

Respondent used SharePoint for employees to upload their data, research findings, and place anything related to a specific project into an overarching folder, which then could store many subfolders. Within the SharePoint folders were work-related files of all sorts -- Excel spreadsheets, chats, emails, PDFs, photos, and the like. (T 65) There could be SharePoint folders for target client companies as well as for whole industries. (T 65)
The brothers worked on the investment team (also known as the deal team), a group of employees specifically tasked with looking at potential investments. (T 72) That team consisted of various people at different stages. One member of the team was Seth Morton, head of research. He was terminated in late October 2019 in part because the brothers alerted Respondent that Morton was taking their ideas and claiming them as his own.5 (T 73, 535)

One investment opportunity Respondent pursued was known as the Cunningham Energy Project, an oil and gas investment in Canada and West Virginia. At the start of the brothers’ employment, the Cunningham Project was the priority project; they were expected to research that project every day for the first few months. (T 312) This project later became snarled in litigation when Respondent discovered that it was not getting the expected return on investment. (T 312) The brothers were instrumental in uncovering some misuse or commingling of funds that led to the Respondent claiming breach of contract. Bill and Jeremy Coleman relied heavily on the brothers to perform analytical work on Cunningham. (T 500)

The Cunningham project, although beset by litigation, never ceased and was back actively online at the time the brothers were discharged. Myers acknowledged that Respondent was in talks to negotiate a settlement of litigation. (T 502) He admitted telling his investment team, including the brothers, that Cunningham might be coming back up.6 (T 502)

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5 The brothers had noted on one occasion that co-worker Seth Morton had taken credit for some of their work. They were praised for bringing it to Respondent’s attention and Seth Morton’s position was eliminated. (R Ex 6, T 535) Their action in alerting Respondent to it was obviously irrelevant to the brothers’ discharge, notwithstanding Respondent’s attempts to say it was relevant.

6 Myers later tried to change his testimony by saying that he told his team verbally not to look at Cunningham, but he could not recall when. (T 556)
The brothers jointly raised concerns about their pay at various intervals – they felt underpaid and that they had been promised a raise. They live in the same house and talked frequently about work issues. At the start of their employment, the brothers felt that their pay would be renegotiated after three months. (T 68) They discussed their pay with Respondent officials several times. In March, Justin Coleman initiated a conversation with the brothers about compensation in the office space they shared. Justin told them at that time that they exceeded Respondent’s expectations of their performance, and that their pay should reflect that. (T 153) Justin asked them to be patient and said that once the company slowed down, he would discuss compensation with the brothers. (T 153) He said that everyone was in the same boat with respect to compensation levels. (T 155) They had another conversation with Justin about pay in July 2019. (T 157) There were also other passing conversations about pay. (T 155)

Notably, the brothers discussed their compensation in team chats with Josh Myers and Justin Coleman in September 2019 and with Myers again in October 2019. (GC Ex 19 and 20) Myers acknowledged these discussions. (T 499, 506) The brothers discussed their compensation between each other frequently, notably in September and again in November 2019. (R Ex 5) The brothers believed they deserved a boost in compensation in the form of a base pay increase, bonuses, commission from deals, or increase in fringe benefits. By late October 2019, Seth Morton had been let go, and the brothers felt that the savings from Morton’s compensation should go to them (T 179) After a September 2019 meeting the brothers had with Myers and Justin Coleman to

7 Respondent is expected to say that it heard the brothers demands for pay increases in the past without any animus. This argument fails in defense of the charges, because what the brothers did on December 4 was materially different. On that day when they demanded a pay increase with Myers, they understood they were the lowest paid employees and that their annual pay review was forthcoming. This put the matter more squarely before Respondent than ever before.
discuss some work concerns including pay, Justin told Myers he was impressed with how the brothers articulated their arguments for better compensation. (T 166)

In October 2019, the brothers told Myers they felt “grossly underpaid.” (GC Ex 20; T 166) They had researched industry benchmarks over the internet. Myers assured the brothers there would be an end-of-year evaluation and discussion about pay. He estimated it would occur by the end of December 2019. Nicholas recalled Myers promising to revisit the issue of adjusting the brothers’ pay. (T 364) Later, the brothers learned that Respondent would not be open for business the week of Christmas and that several officials would be on vacation in December. So, when early December 2019 approached, the brothers felt an urgency to meet with Myers about a pay increase.

At one point in November 2019, the brothers uncovered via an online search that Rick Cott would receive a 3% fee for total equity raised. (R Ex 9, T 377) They asked Myers if they needed this data as an input for the Strata Project as part of the capital structure. (T 186, 378) Myers told them it was old information and did not need to be included.8

Around November 4, 2019, Myers asked the brothers to find a deed for the Cunningham project. They found it quickly through a search into Respondent’s already existing documents – in

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8 Respondent intimated at trial, although never in the UC hearing or ULP investigation, that the brothers finding this information was somehow nefarious and was an example of them digging into private information, and thus part of the basis for discharge. This is completely unsupported by the evidence. Andrew testified this document had nothing to do with the brothers’ online research into their compensation. (T 187) Nicholas testified similarly. (T 377) Respondent also tried to suggest that a document the brothers found and shared with each other about Respondent’s capital expenditures on the Vesta Biomass project was something underhanded and related to the reason for discharge. (R Ex 9, T 380) Andrew testified credibly that the document had nothing to do with their compensation efforts. (T 187) Nicholas testified similarly. (T 377) Respondent attempted to make a big issue of a chat from Nicholas to Andrew whereby Nicholas said, “I got all this stuff …” to suggest the brothers did something improper. Nicholas could not recall saying those words and the chat appeared without context (T 316, 382) There is no basis for finding this to be anything problematic. In the end, it’s part of Respondent’s shifting defenses strategy. It’s a distraction from the truth.
SharePoint. In other words, the document was in Respondent’s system, but it took the brothers’ research skills to locate it. The brothers were expected to stay up to date on Cunningham. (T 207)

There were specific SharePoint folders for Cunningham -- Cunningham Appalachia, Cunningham Canada, and Cunningham iDeals. (T 99-100) Each SharePoint folder and the documents contained therein was accessible to the brothers and to all employees. There were no restrictions, no passwords required, no areas that were off limits. Again, employees were required to put their work product on SharePoint so it could be searchable, available, and useful to other employees. SharePoint was considered open discovery or open collaboration. (T 99) It was common for employees to upload documents into SharePoint with their name on a folder to show it was their work product. (T 290) Seeing an employee’s name on a folder meant that the files contained therein were work product related to that SharePoint project (such as Cunningham or Strata). (T 100) Personnel data like pay, on the other hand, is for obvious reasons stored in a different location not accessible via SharePoint. When the brothers searched through SharePoint, they could download an entire project as a zip folder, which would then show the various named subfolders within. Those subfolders could then be “unzipped” to show the files within.

By December 2019, the Strata project, a different investment opportunity, was a higher priority project than Cunningham. Nevertheless, Cunningham was still active, and the brothers were required to be informed about all active projects. The Cunningham project was coming back online because of a memorandum of understanding Respondent and Cunningham had signed. (T 286) There was talk of whether to proceed with further investment into a Cunningham school property or the assets in Canada or West Virginia. (T 286, 298) Cunningham was still an active

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9 Respondent inflates the relevance of the iDeals being a litigation hold folder as if that restricted an employee’s access. It did not. Even if it was part of a litigation, this does not mean that the information contained within would not have been helpful to anyone assessing the Cunningham deal. (T 202)
venture as of December 2019; the Cunningham SharePoint was still something that could contain useful information. (T 639, 640)

On December 3, 2019, while Nicholas was researching documents on the Strata project, Andrew was reviewing documents on Cunningham. They were seated next to each other on separate laptops. Andrew testified that he was researching the contents of the Cunningham SharePoint to familiarize himself with Cunningham in case he was called to present information or was asked questions. Importantly, no one had ever told Nicholas or Andrew to stop looking at Cunningham. In fact, Bill Coleman and Josh Myers had told the brothers to do a “deep dive” into Cunningham in November 2019.¹⁰ (T 98, 195)

During his Cunningham research, Andrew came across a document marked as fully loaded payroll. (T 101) He assumed, naturally, that this was a Cunningham payroll document that could help describe costs and figure into the investment analysis. The payroll document was discovered within Justin Coleman’s zipped subfolder within the overarching Cunningham iDeals folder. There were 11 such subfolder titles with the names of employees. The Cunningham iDeals folder contained documents relating to the Cunningham project that the attorneys involved in the litigation had asked to be created to hold relevant Cunningham documents. Every employee had been tasked with uploading their Cunningham documents there on or before November 7, 2019.

¹⁰ Bill Coleman did not testify, although he was available to Respondent. An inference should be made that Bill Coleman would not have contradicted the brothers on the point of Cunningham coming back online and that being an active assignment. Where Respondent fails to question its own witness about a significant matter, an adverse inference is warranted. Advanced Installations, 257 NLRB 845, 849 (1981); Colorflo Decorator Products, 228 NLRB 408, 410 (1977). Myers testified that he did instruct his team about Cunningham possibly coming back. He later wavered in his testimony as described in more detail below.
The expectation would have been that within each zipped subfolder would have been files pertaining to Cunningham, such as chat documents about Cunningham negotiations.11 (T 228)

Andrew expected, as was customary, that useful models, research, or other data would be within each employee’s subfolder. (T 291) Nicholas testified that he relied on whatever information was on SharePoint to be related to work. (T 336) There was never an expectation that any employee’s personally identifiable information would be stored on SharePoint. Indeed, the record shows that nearly all the documents in there related to the Cunningham project, with few exceptions. (R Ex 19) The payroll document was also there; it had been placed there by no fault of the brothers, apparently by Gregg Mallinder, an employee on the investment team.12 The payroll document was titled “Fully Loaded Payroll.” On either side of that payroll document within the Justin Coleman subfolder were documents relating to Cunningham Energy. The one document above the payroll document was titled “Cunningham Energy January 2015 to December 2018.” (R Ex 19, T 643). The one below was titled “Cunningham Energy P & L January 2009 to December 2009.” (T 644) The “fully loaded payroll” had no name associated with it. Given the surrounding documents and the expectation of what would be stored there, Andrew DeFinis reasonably figured that the payroll was a Cunningham Energy document. (R Ex 19, T 644)

Anyone looking into the Cunningham iDeals would have been able to access the payroll document. The brothers were not IT specialists and had no responsibility for the inappropriate documents being shareable on SharePoint. (T 289) The brothers informed Justin Coleman that there were personal documents of his in that Cunningham folder. Justin asked the brothers to delete

11 Tom Povedano testified that there was no reason to look at chat files, “in our estimation.” (T 615) However, he acknowledged that those should have contained Cunningham-related documents. (T 647)
12 Mallinder was never disciplined for this error. Given Respondent’s purported interest in security, one would reasonably think that Mallinder committed an egregious error by uploading personal documents to a shared folder.
the downloads, and they did so. These were never saved to the brothers’ personal drive, nor were they ever copied or sent to anyone else.

In addition to the payroll on SharePoint under the Cunningham iDeals, there was erroneously uploaded a bill-of-sale for Justin Coleman’s house. Andrew discovered that this document was on there after he discovered the payroll document; however, Respondent did not learn this until after the discharge, as testified by Tom Povedano. (T 651) The brothers also did not put that document on SharePoint.

Andrew opened subfolders within the Cunningham Energy SharePoint but did not view all the files, as there were too many documents to review. For instance, Andrew could see a list of documents under Seth Morton’s subfolder, but he did not open or read all the documents. (T 281)

Andrew didn’t know whether the payroll being on SharePoint was a mistake or whether Respondent intended it to be there, since it had been there for more than a month. (T 102, 276, 278) Andrew and Nicholas let Justin know that Justin’s personal documents were on SharePoint. (GC Ex 18) After Andrew viewed the payroll, he sent a screenshot to Nicholas. But Nicholas himself could not open the document. Nicholas did not share the document, nor did he or Andrew save it to their personal drive. Andrew testified that he was looking for data. In looking for data, the brothers would not necessarily look for the date the data was entered into the SharePoint. Data even two years old could be useful.13 (T 272) To Respondent’s query about why he would pursue historical and not just recent information on a project, Andrew logically stated: “to stay up to date,  

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13 Respondent suggests rather illogically that looking at data that was not recently placed on SharePoint is somehow indicative of mischief.
you can also have the information that was previously available and make yourself acquainted with it to be ready to go.” (T 273)

The payroll revealed that the brothers were the lowest paid employees, which was contrary to what they had believed because they were told that everyone’s pay was low. (T 106) They felt there had been a lack of transparency about pay. (T 320) Nicholas then contacted Myers by Microsoft Teams Message to ask to meet about compensation. He did not share information about anyone’s pay. (GC Ex 17) They met at the office the next morning at around 9:30 am, just Myers and the brothers. Prior to that meeting, at around 9 am, the brothers notified Justin that there were personal documents of his on SharePoint in the Cunningham-Canada folder. (T 103) Justin replied at around 1 pm that day to ask where the brothers found the document and to ask them to delete the download. They did so. (T 105)

The reason for urgently wanting to meet with Myers, besides the brothers’ pay ranking, was that key officials would soon be on holiday vacations and it was nearing the promised year-end review.14 (T 95, 422) At the meeting with Myers, the brothers told him they found a payroll document and knew their compensation was the lowest. (T 511) They told Myers they were hurt by this; they felt deceived. Myers did not chastise them for discovering the payroll document. He sympathized with them. He said he had a similar experience of seeing Rick Cott’s salary (he even disclosed that number to the brothers) and feeling disappointed in his own compensation. (T 214-215, 513) He said he had been promised things by the Colemans. They generally discussed industry benchmarks for compensation and the brothers said they just wanted what was fair. (T 112, 423) Myers expressed no concern over the fact that the brothers found the document. He only asked

14 Andrew testified the brother had planned to meet with Myers by the end of the year, and that finding the payroll document was like “an alarm clock” reminding the brothers to meet. (T 111)
that they inform Justin, which they had already done. (T 104, 512) Myers tried to encourage the brothers to move forward. (T 514)

Myers claims he later learned where the brothers found the payroll document. Later that day and the next day, there were team chats between Justin, Josh Coleman, and Josh Myers about the brothers. (R Ex 10) Josh Coleman told Myers that the brothers went through the email upload for the Cunningham complaint. Myers acknowledged that the payroll document had a non-descript title, obviously implying that the brothers could not know it was Respondent’s payroll. (T 516) Myers testified that he spoke with Justin and with Sagar Dalal about what to do with the brothers. There was a message from Josh Coleman to Justin Coleman stating that Dalal had advised that someone tell the brothers to delete the “entire directory” from their computers. This evidence contradicted Dalal, who said he was not part of the discussion on termination.15 (T 518)

By 10:14 am on December 5, Justin Coleman told Myers to issue a warning to the brothers. At 2:55 pm, Josh Coleman asked Justin his thoughts on the brothers, and Justin replied with what he proposed they do (seemingly referring to his directive to issue a warning). However, on December 6, Myers communicated with Josh Coleman, Justin, and Tom Povedano to confirm that the brothers would be fired. (R Ex 10)

Respondent decided to discharge the brothers without ever speaking with them to hear their side of the story. (T 113, 536) Tom Povedano testified that Josh Coleman was “visibly upset” that there were personal documents on SharePoint. (T 607) It’s not clear, and Respondent never explained, why Josh Coleman or anyone was upset with the brothers for discovering that there

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15 Myers was direct in his initial statement that Dalal was part of the discussion. When asked again by counsel, he later waffled in his testimony about whether Dalal had been part of the discussion. On cross examination, Myers admitted that Dalal was consulted. (T 547)
were personal documents on SharePoint as opposed to being upset that someone had made the egregious error of uploading them to the shared folder. Importantly, Respondent conducted no investigation. When asked about this, Tom Povedano oddly answered that it would have been riskier to ask the brothers about their conduct than to fire them. (T 651) The brothers had been permitted to work the rest of the day on December 4 and a full day on December 5, when Bill Coleman bought them lunch and said nothing about the payroll incident. 16

The brothers had never been disciplined, counseled, or advised that they ever exceeded the scope of research. (T 114) There had been no indication that their employment would end prior to the discharge. Myers testified that “it seemed they (the brothers) were looking for something” when they came across the payroll, but there was never any evidence or testimony as to why the brothers would have thought there could be documents in the Cunningham SharePoint that could help with their pay efforts. 17 In fact, Myers tellingly testified that the problem was not that the brothers researched a Cunningham SharePoint, which was accessible to everyone. (T 537-538)

Using an analogy of an open office door, Myers acknowledged that the brothers were permitted inside. (T 539)

At the discharge meeting, at around 10:30 am on December 6, Respondent representatives Josh Myers and Sagar Dalal told the brothers they were discharged for lack of trust. (T 326) Myers’s notes for that meeting and his testimony at trial provide two reasons for discharge: searched for information they shouldn’t have, and what they did with that information. (R Ex 14, T 522) Myers said these were the sole reasons for discharge. (R Ex 14, T 522, 524, 572) Neither

16 This obviously cuts against the argument that the brothers were an immediate risk and had to be fired.
17 This is one of the biggest holes in Respondent’s case. There has never been an explanation from Respondent as to why it believed Andrew DeFinis thought he could find pay-related info in a Cunningham project SharePoint. If the SharePoint was working properly, there would only be Cunningham-related documents in that SharePoint, regardless of whether it was active, inactive, litigation hold, or whatever status. (T 537)
Respondent representative said the discharge was because they unzipped SharePoint files, or found personal data, or found a bill-of-sale. (T 291) Indeed, Tom Povedano testified that the first time he learned the brothers accessed a bill-of-sale was at trial.\(^{18}\) (T 652) None of these things were mentioned in the unemployment compensation hearings either.

At the discharge meeting, Myers said “[W]hat you have done has caused us to no longer trust you.” (T 326) When the brothers asked what they did, Myers said it was not that they downloaded a payroll document, but it was what they were going to do with it. (R Ex 14, T 327) Nicholas asked what Myers thought they were going to do with the document, and Myers said, “you know what you were going to do with it.” That line of back and forth continued for a few seconds. At trial, Myers acknowledged that Respondent had no evidence that the brothers disclosed confidential information to anyone. (T 534)

Andrew testified that Dalal interjected and said the brothers were discharged because they were going to leverage confidential information for profit in the form of compensation. (T 116) As Respondent’s general counsel, Dalal was obviously there as Respondent’s attorney and agent. Incredibly, Dalal testified that he was simply a witness at the meeting and at the unemployment hearing. Andrew was overwhelmed with Respondent’s stunning action. Dalal and Myers gave the brothers the option to resign or be fired for breach of trust and have that on their record. (T 327)

That begs the question: over what did the brothers breach trust? It couldn’t be trust about improperly loading private files on SharePoint, because the brothers indisputably did not do that. It couldn’t be trust over accidentally coming across a payroll document because the brothers acknowledged that.

\(^{18}\) This is stark evidence that Respondent attempted to pad its defense at trial, which suggests an unlawful motive.
Finally, the brothers applied for unemployment compensation, and Respondent fought the applications. The unemployment hearings transcripts are part of the trial record. In sworn testimony at Nicholas’ unemployment hearing, roughly two months after the discharges, Josh Myers stated: They were using the confidential information to leverage a personal compensation discussion; misuse of information. They had “discovered the info through no fault of their own” (key fact). “[W]hat they did with the information breached trust.” It was “the use of confidential information in that manner.” (See GC Ex 7, page 6) Dalal testified at that same UC hearing, “It was for breach of trust; (they) improperly used confidential data (key fact); use of confidential data for personal gain.” (GC Ex 7 at page 10)

At Andrew’s unemployment hearing, Myers testified that another employee uploaded documents in the wrong place. He said it was not accessing the information that was the issue (for the brothers): “It wasn’t the access. It was what was done with that information. It was used to leverage a discussion for personal benefit” (emphasis mine). (See GC Ex 8 pp 9-10)

Looking at events prior to the filing of the charges in this case, the evidence clearly shows that Respondent discharged the brothers because the payroll document they found showed they were the lowest paid employees, and they called Respondent on it to try to obtain a pay increase. This was different than the times in the past in which the brothers may have discussed pay with their supervisors. Respondent suggests that employees talked openly about pay and that this showed lack of animus towards pay discussions. However, Nicholas testified that employees tiptoed around pay discussions. (T 361) Nevertheless, even assuming employees could sometimes talk about pay without repercussions, this does not mean Respondent was not motivated to fire the brothers when they pressed for a pay increase based on what they had seen. This time, they had concrete information to support their argument that they deserved more.
IV. CREDIBILITY ISSUES

Sagar Dalal

Sagar Dalal was Respondent’s Assistant General Counsel and an agent of Respondent. (GC Ex 1(k)) His job was to extend legal advice to Vesta management. He attended both the discharge meeting and the unemployment hearings. The credible evidence also indicates that he had input into the discharge decision. He attempted incredibly to downplay his role. He testified that he was asked to sit in only as a witness in the discharge meeting. (T 447) Asked why he was sitting in on the discharge meeting, and he said, “to be a witness.” (T 456) Asked why he attended the UC hearing, he said he was a witness. Dalal said he was not aware he attended as an agent of the company. (T 457) Asked if he was sworn in at the UC hearing, he said “I believe so.” (T 458)

When he was asked if, as the brothers recalled, he stated they were attempting to leverage confidential information for personal gain, Dalal said he could not recall. He said only that he spoke in support of Myers, who was summarizing what was on paper. (T 450) Dalal denied that he was part of the decision to terminate. An idea of Dalal’s reliability as a witness came when he did not know who worked for Vesta Advisors. “I wouldn’t be able to answer that” (when asked whether the brothers worked for Vesta Advisors). (T 455) Asked if the brothers could be employed by two different companies, he answered “I am not an employment attorney.” (T 456)

When Dalal was asked about the discharge note bullet point – what they did with the information -- he hesitated. Yet, in a nugget of truth, he then said: “They used the information for their own personal use.” (T 463) “I was informed that they used this information to ask for an increase in salary.” (T 464) He admitted there was no discussion in the discharge meeting about what files the brothers went through or any mention of inappropriately accessing Cunningham
iDeals. (T 470) Given Dalal’s inability to acknowledge an admitted fact, to the extent that Dalal’s testimony conflicts with the DeFinis brothers, the brothers should be credited.

Josh Myers

Myers testified that he no longer works for Respondent. Respondent may attempt to portray him as a neutral. But an investment advisor’s report prepared on Myers’ behalf says that he worked for Respondent as of November 2020, when he says he left Respondent in June 2020. (GC Ex 22, T 529-530) To the extent Myers’ testimony conflicted with the brothers’ testimony, the brothers should be credited.

Tom Povedano

Povedano sat through the entire trial as Respondent’s designated representative. He was somewhat credible, but not credible in certain regards. Rather unbelievably, Povedano testified that he did not know what “CE” meant in the Cunningham Energy SharePoint. (T 642) On direct examination, Povedano portrayed himself as an expert on the Cunningham SharePoint, but on cross examination when asked if something with “CE” in the title would be related to Cunningham Energy, he said only, “it’s possible.” (T 643) He later wouldn’t even admit that a document called “Cunningham Energy P & L” was related to the Cunningham Energy project. (T 644)

Shifts in Respondent’s Evidence

Respondent had numerous opportunities prior to trial to state the reasons for the discharges and to defend the allegations in this case. Starting with the discharge meeting, moving to the two
unemployment hearings, and then in three position statements submitted to Region Four, Respondent set forth varying defenses and unreliable evidence.

In an initial position statement for the investigation, (See GC Ex 3), Respondent stated that the Company maintained the highly confidential data (referring to the payroll) on its server as part of a legal proceeding from 2018, prior to the start of the Charging Parties’ employment. This is inaccurate. First, the reference to a server suggests some off-limits location. In fact, the document was on an open shareable workspace. The reference to 2018 also doesn’t make sense, because the brothers’ pay information was on the discovered payroll document, and they began employment in 2019. So, it could not have been on a server since 2018. Also, the Cunningham litigation, which prompted the relevant folder, did not commence until April 2019, so again the 2018 reference makes no sense and seems to be an effort to tag the brothers with searching improperly through very old data.

Respondent also says that “complainants” had to dig through several layers of data to access the payroll file. Of course, digging through data was precisely the nature of the brothers’ job. In fact, it was them digging through layers that helped save the company from bad decisions and led to finding a Cunningham deed as asked of them.

Josh Myers said the brothers would not have obtained this payroll data in the normal course of their employment. Yet, this was precisely how they found the data. The SharePoint was not closed like some dead file. The brothers were not looking through a human resources folder. The folder was openly accessible; the payroll was sandwiched amongst Cunningham documents. Respondent also accuses the brothers of disseminating confidential information, but it offered no evidence to support this claim. Finally, Respondent states that it confronted complainants, but it
never investigated prior to discharging them. Respondent offered no theory on how or why the brothers would think to look at Cunningham for any Vesta compensation support.

Respondent then made a highly suspect claim regarding a Vesta employee handbook and confidentiality. There was one handbook manual offered in the investigation and a different one offered at trial. The rule referenced in the investigation (and absent from Respondent’s case at trial) was from a company called Vesta Holdings and states: “confidential information belonging to the Company's clients. It is extremely important that all such information remain confidential, and particularly not be disclosed to our competitors. Any employee who improperly copies, removes (whether physically or electronically), uses or discloses confidential information to anyone outside of the Company may be subject to disciplinary action up to and including termination.” (GC Ex 3, T 292)

At trial, Respondent raised for the first time at trial a handbook issued under a company called Vesta Advisors.19 Within that manual is a provision about employees taking particular care with nonpublic personal information. (R Ex 2) There was no evidence that the brothers even worked for that company. In fact, Josh Myers did not know who was employed by Vesta Advisors. (T 528) Respondent was trying to apply a handbook provision that had never been introduced in the discharge meeting, the UC meetings, or the ULP investigation. (T 293) The rule Respondent tried to apply at trial states in relevant part: “Associated Persons will maintain the confidentiality of information acquired in connection with their employment, with particular care being taken regarding Nonpublic Personal Information. Improper use of the Company's proprietary information, including Nonpublic Personal Information, is cause for disciplinary action, up to and

19 The brothers did not recall receiving this Vesta Advisors Manual.
including termination of employment for cause and referral to appropriate civil and criminal legal authorities.” It is not clear how the brothers violated this provision, let alone whether it even pertained to them. There is no evidence that the brothers improperly used proprietary information, unless what Respondent is saying is that it was improper for the brothers to learn by accident that they were the lowest paid employees and then try to obtain a raise without ever disclosing anyone’s pay information. Truthfully, neither manual provision is applicable here. There was no proof the brother had shared pay information with anyone; the policies pertain to outside communications.

In a second position statement (GC Ex 4), Respondent said the payroll information was stored in the Company’s “secure cloud file system,” failing to mention that there was no password, nothing secure about employees entering this SharePoint. Indeed, it was their duty. If there was any security breach, it was by the employee who took private information and uploaded it to a public workspace. Respondent fails to note that the brothers would have reasonably suspected that a file with Justin Coleman’s name on it would contain Justin Coleman’s work pertinent to the Cunningham project. Two things to note: one, the brothers were not responsible for the mistake of putting payroll on the shared workspace, and two, the brothers commendably alerted Respondent to the fact that personal information was on that shared space.

In a third position statement, Respondent says the brothers were not in any way involved in the Cunningham Project. This is demonstrably false as every witness talked about the brothers’ contribution to the Cunningham Project. Respondent says without support that the brothers had not merely stumbled upon the files, but rather had gone through zipped files related to the Cunningham Project, expending exorbitant amounts of time on a fishing expedition to unearth information within such zipped files. It’s all conjecture since Respondent never interviewed the
brothers. Ironically, in this position, Respondent admits that Sagar Dalal, Respondent’s General Counsel, was involved in the discharge decision, contradicting Dalal’s own trial testimony.

Other inconsistencies in Respondent’s evidence: Josh Myers stayed on at Vesta until June 2020, not March 2020 as reported on Respondent’s position statement spreadsheet. (GC Ex 2) Chief Operating Officer Tom Povedano testified that he left Respondent to go to Momentum in September 2020. Yet, Respondent submitted evidence during the investigation that Respondent closed in March 2020 and that Povedano left Respondent at that time. (GC Ex 2) In fact, Povedano testified that Respondent ceased having employees in September 2020. (T 627, 628) Ironically, Povedano subconsciously captured Respondent’s defenses when asked why the discrepancy between Respondent’s evidence and his own testimony about his tenure when he said, “It was a moving target” and “was not accurate.” (T 629, 630) Povedano testified that although it was part of Respondent’s position statement, he had no evidence that the brothers violated a handbook rule. (T 633)

Finally, we may expect Respondent to add additional defenses on brief, perhaps arguing that the brothers inappropriately used their work laptops for personal use. This anticipatory defense must likewise be rejected. Such a defense was never mentioned prior to trial, and there is solid evidence that employees routinely used their work laptops for personal items. (T 296)

V. ANALYSIS

Direct Evidence of an Unlawful Motive

Paring this case to its essence, Respondent discharged the brothers at least in part for what they did with the payroll document. This was admitted by Myers, by Dalal, by Myers’ discharge
notes, and by the sworn unemployment hearing testimony. Respondent especially cannot escape the unemployment testimony by Myers and Dalal that finding the payroll document had nothing to do with the discharge. Rather, it was what the brothers were going to do with the payroll that prompted their discharge. What the brothers did with the information that they were the lowest paid employees was attempt concertedly to obtain a pay raise. This is protected concerted activity.

When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activity, the employer’s motive is not at issue; instead, the Board finds a violation unless the employee’s actions were so egregious as to be unprotected. *Component Bar Prod., Inc.*, 364 NLRB No. 140 (2016) (Where the conduct for which an employer claims to have discharged an employee is protected, concerted activity, the discharge violates Section 8(a)(1) and no analysis pursuant to *Wright Line*, 251 NLRB 1083 (1980), is necessary); *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002) (refusing to apply *Wright Line* where it was undisputed that the employer discharged the employee because of articles he wrote in a union newsletter, as “the only issue is whether [the employee’s] conduct lost the protection of the Act”); *Neff-Perkins Co.*, 315 NLRB 1229 fn. 2 (1994).

Essentially, Respondent is arguing that the brothers’ conduct was not protected, or lost protection of the Act, because of how they obtained the payroll information. For otherwise protected activity to lose the protection of the Act, the conduct must be significantly egregious. *White Oak Manor*, 353 NLRB 795 (2009) Generally, employees may not engage in acts constituting disloyalty or making misleading, reckless, or maliciously untrue statements about or regarding their employer. *Endicott Interconnect Technologies, Inc.*, 345 NLRB 448 (2005). Inflammatory remarks are not protected. *American Steel Erectors*, 339 NLRB 1315 (2003). But employees do not forfeit the protection of the Act, for making false or inaccurate allegations about
their employer so long as the statements are not deliberately or maliciously false or made with reckless disregard for their veracity. Kvaerner Philadelphia Shipyard, Inc., 347 NLRB 390, 400–02 (2006); Simplex Wire & Cable Co., 313 NLRB 1311 (1994).

In cases in which employer internal information is at issue, the question turns in part on whether the information was obtained in the normal course of work. See e.g., Rocky Mountain Eye Center, 363 NLRB No. 34 (2015); Ridgely Mfg. Co., 207 NLRB 193, 196–97 (1973). The facts in Rocky Mountain Eye Center are like ours. In that case, the Board adopted the Administrative Law Judge’s decision that the Employer violated the Act by discharging an employee who had obtained her co-workers’ contact information through the employer’s computer system. Employees were able to log into the computer system and were trained to do so; they routinely utilized that system. Therefore, the information was obtained through the normal course of work. To the extent any information on the system might have been confidential, like medical patient records, “it was the Respondent that failed to put proper safeguards in place.” The Respondent’s comingling of employee and patient data precluded any defense that the employee’s accessing the system warranted discipline. Rocky Mountain Eye Center, supra at page 13. One important distinction between our case and Rocky Mountain is that the brothers did not intentionally seek employee pay information; they accidentally came across it. This makes their conduct even more innocuous, far from the egregiousness needed to lose protection of the Act.

In Gray Flooring, 212 NLRB 668 (1974), the Board, reversing the administrative law judge, found unlawful the discharge of an employee for copying names and telephone numbers of employees from the employer's records. In that case, the workplace contained a warehouse office that housed the supervisors' desks. Employees regularly went into the office to get coffee, look at maps, get work assignments and timecards, and visit with the supervisors. This open door is
analogous to the open accessibility of the SharePoint folder in our case. The employee in *Gray Flooring* looked at a list of names from a schedule roster hanging by the supervisor's desk. While there, another employee handed him some index cards with employee names and phone numbers that he had obtained from the supervisor's desk. The Board found that the names and numbers were not “in any meaningful sense, ‘private records.’” *Gray Flooring*, 212 NLRB at 669. Again, a distinction with our case is intent. In *Gray Flooring*, the conduct was protected even though the employee intentionally copied internal records. In our case, there is no such intent. There is no support for finding that the brothers intended to find pay information, or even suspected there would be pay information, on a Cunningham SharePoint folder. They certainly did not copy employees’ pay; they never shared the details of the payroll, only that they found it; they deleted the download when asked.

In *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624 (1986), an employee was terminated for violating her supervisor’s trust by disclosing merit raises information that she received during a meeting in her capacity as a group leader. The Board found the employee’s actions protected, because the employee divulged information obtained in the “normal course of work activity and association,” as opposed to an employee who has been given custody of certain information and breaches the employer's trust where the employer expects that custody of the information will remain only with the employee.

Instances where the Board has found otherwise protected conduct involving employer records to lose protection are easily distinguishable from our case. Employees who misappropriate wage or other financial information of the employer may lose the protection of the Act. *Roadway Express*, 271 NLRB 1238 (1984) (holding that when an employee surreptitiously resorts to an employer’s business records for information rather than obtaining the information in the normal
scope of employment, such conduct is not protected under the Act); *International Business Machines Corp.*, 265 NLRB 638 (1982) (an employee who accidentally received two pages of salary information, but then purposefully typed the details of employees’ pay and sent them to an outside organization to be put into a newsletter, and who did not tell his employer, lost the protection of the Act). An employee who took bills of lading from an employer’s files, not in the normal course of work, and provided them to the union was not engaged in protected activity. *Roadway Express*, 271 NLRB 1238, 1239-1240 (1984) An employee possessed of special custody of confidential wage and salary information contained in the employer's personnel records, and aware that her established duties required that she maintain the confidentiality of this information, may lose the Act’s protection for disclosing information in wage discussions with fellow employees in violation of the employer's policy prohibiting such discussions. *Asheville School*, 347 NLRB 877 (2006).

The cases that set limits on protected activity demonstrate that intent to disclose private records is a required element for finding that otherwise protected conduct was egregious enough to lose protection. In our case, there is not even disclosure, let alone intent. The brothers did not purposefully or deceptively seek information concerning the salaries of co-workers. Instead, the information came to Andrew’s attention while he was performing his regular work duties. Moreover, neither he nor Nicholas divulged any of the payroll information. The brothers merely said they knew they were the lowest paid.

Respondent argues that it legally fired the brothers for purposefully digging into business records for the payroll information they were seeking for their own salary negotiations or for violating a confidential company information policy. This defense must fail. Respondent offered no basis for why Andrew or Nicholas would think to look in a Cunningham Project folder for
documents to support a personal pay discussion. Respondent will likely try to claim that the brothers had been searching for information to assist their pay demands in the week or so leading up to December 3, but the evidence in no way supports such a conclusion. This is complete speculation. The documents Respondent offered about capital expenditures on one project and another showing the commission cost for a manager of a project do not remotely establish that the brothers were looking surreptitiously for confidential payroll documents. Also, nothing establishes that looking into a Cunningham Project SharePoint folder accessible to all employees was some nefarious act.

Rather, Andrew was doing his job when he came upon the payroll document. Both brothers testified consistently and in detail about how Andrew encountered the information accidentally in the scope of his employment. In arguing that the brothers knew or should have known that the information was confidential, Respondent cannot overcome the fact that the payroll document was unmarked, was not password or otherwise protected, and was sandwiched between Cunningham Energy documents clearly work related. Anyone looking at the payroll would reasonably believe it was a Cunningham payroll, appropriate for computing Cunningham costs.

Wright Line Test

Alternatively, this case may be viewed under a traditional burden shifting framework. Under that framework, to prove discharge for protected concerted activity, the General Counsel must show the activity was protected and concerted, that Respondent knew about the activity, and that Respondent harbored animus against that activity. Wright Line, 251 NLRB 1083, 1089 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); Consolidated Bus Transit, Inc., 350 NLRB 1064, 1065 (2007), enf’d. 577 F.3d 467 (2d Cir. 2009). There must be a causal
nexus between the activity and the adverse action. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019).

The element of animus may be established by direct or circumstantial evidence. See e.g., *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that “[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation”). Suspicious timing raises a strong inference of discriminatory motivation. *Lucky Cab Co.*, 360 NLRB 271 (2014); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). Shifting defenses can be a strong indicator of discriminatory motivation. *Healthy Minds, Inc.*, 371 NLRB No. 6 (2021). A perfunctory or no investigation prior to discharge may also be an indicator of discriminatory motivation. *St. Paul Park Refining Co.*, 366 NLRB No. 83 (2018) (failure to conduct complete and objective investigation).

If the General Counsel demonstrates an initial showing, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 26-27 (2018), and cases cited therein. It is not enough for the employer merely to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Instead, it “must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence.” *Weldun International*, 321 NLRB 733 (1996), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998).
Reviewing the elements here, there is clearly a prima facie case. Seeking a pay increase jointly, as the brothers did, is protected concerted activity. See e.g., *Whittaker Corp.*, 289 NLRB 933, 934 (1988); and *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. 4, fn. 10 (2014) (wage discussions are “inherently concerted” even if they are not engaged in with the “express object of inducing group action.”). *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191 (2016)

In addition, there is no dispute that Respondent knew of the activity, witnessed by the meeting the brothers had with Josh Myers on December 4, two days before being discharged.

As to animus, the timing is highly suspicious. Respondent discharged the brothers two days after they asked for a pay review and increase with the newly acquired knowledge that they were the lowest paid employees. This must have rankled Respondent despite prior talks of pay, because now the brothers knew that assurances of being “in the same boat” with all employees were inaccurate.

There are also shifting defenses, strong evidence of a respondent's discriminatory motive. *Howard Elec. Co.*, 285 NLRB 911, 913 (1987) Here, most blatantly, Respondent offered a supposed company rule at trial that was not part of its three position statements offered during the charge investigation. See, e.g., *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) (when an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive); See also, *MCPC, Inc.*, 367 NLRB No. 137 (2019) (An Employer’s shifting reason for discharge – having given no reason at the event, a new reason during the unfair labor practice investigation, another reason on brief after trial, and still another reason on appeal – were grounds for finding a violation).

If the evidence establishes that the reasons given for a personnel action are pretextual — either false or not in fact relied upon — the Respondent fails by definition” to meet its burden.
Golden State Foods Corp., 340 NLRB 382, 385 (2003); Pro-Spec Painting, 339 NLRB at 949
(noting that where an employer's reasons are false, it can be inferred that the real motive is unlawful
if the surrounding facts reinforce that inference); Fast Food Merchandisers, 291 NLRB 897, 898
(1988); Frank Black Mechanical Services, Inc., 271 NLRB 1302, 1302 fn. 2 (1984) (noting that
“a finding of pretext necessarily means that the reasons advanced by the employer either did not
exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive

With the elements of a prima facie case established, the burden would shift to Respondent.
Adams & Associates, Inc., 363 NLRB No. 193, slip op. at 6 (2016), enfd. 871 F.3d 358 (5th Cir.
2017); Libertyville Toyota, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir.
2015); Bally's Atlantic City, 355 NLRB 1319, 1321 (2010) (if General Counsel makes a strong
initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd.
646 F.3d 929 (D.C. Cir. 2011); Consolidated Bus Transit, Inc., 350 NLRB at 1066; Pro-Spec
Painting, 339 NLRB at 949.

Here, there is no dispute that all SharePoint folders were shareable and accessible, and the
one SharePoint folder at issue pertained to a Cunningham project. The conduct here was not like
entering a locked desk drawer. Respondent further suggests that because the subfolder had Justin
Coleman’s name, it meant there must have been confidential information there. This also must fail,
because the expectation would have been that this was Justin’s Cunningham work product.
Respondent has never shown, nor can it, that the brothers expected there to be personal data stored
in Justin’s or anyone else’ Cunningham SharePoint.

Respondent says the brothers dug through massive amounts of data, as if that was
something mischievous instead of their regular work duties. The brothers very job was to dig
through massive internal files and analyze their contents. They were good at their job. Indeed, the credible evidence demonstrates they were told to deep dive into Cunningham by Bill Coleman and Josh Myers. They certainly were never told not to dig into Cunningham. None of the subfolders or files were labelled as off limits. None were password protected. None were obviously marked as personal only. All employees had access to the documents maintained on SharePoint, which strongly suggests that the Employer’s policy about confidential company information was not meant to apply to internal disclosures.

The plain language of Respondent’s handbook policy submitted in the investigation appears to direct it only towards external disclosures. In fact, it is difficult to imagine how analysts could work together at all on assignments if the policy was meant to apply to internal disclosures. Respondent did not establish that Andrew should have known that the Employer forbid such a disclosure to his co-worker. Even if the policy was meant to cover internal disclosures, and despite the vague wording and lack of previous enforcement that Andrew still should have known that it was meant to cover internal disclosures, the Employer still fired both brothers, even though only one could have possibly violated its policy. On the other hand, the Employer did know, regardless of who had accessed and disclosed the information to whom, both brothers had, in a concerted manner, attempted to use the information for the protected purpose of negotiating higher wages; and that was enough information for the Employer to fire both employees.

In addition, Respondent failed to interview the brothers to ascertain their side of the story. The Board has held the “failure to investigate the alleged misconduct of its employees fully and fairly, or even to provide them with an opportunity to rebut the accusations made against them, suggests the presence of discriminatory motivation.” Denholme & Mohr, Inc., 292 NLRB 61, 67 (1988). See also Embassy Vacation Resorts, 340 NLRB 846, 849 (2003); Washington Nursing


**VI. CONCLUSION**

Basically, what we have here is two employees going about their routine work duties, one employee coming across a document that should not have been on Respondent’s internal accessible file storage, through no fault of his. It may be analogous to walking into an open public office and seeing a document open for viewing on a desk. That employee showed his co-worker who happens to be his brother. The two, possessing information about their pay status, then raised a newly urgent concern about their pay. Both employees were fired.

Respondent’s defenses, shifting and evolving, fall short in all respects:

1) Respondent cannot show that the employees were searching in a workspace they shouldn’t have been in. The Cunningham folder concerned a work project with necessary information. Even if the brothers were expected to disregard the Cunningham project, Respondent cannot show that they were purposefully combing through personal data to support their pay argument. Glaringly unexplained is this: What basis would the employees have had to look in a Cunningham project file for company payroll information?

2) Respondent cannot show that the employees violated any internal rule. First, there was no rule applicable to the situation. Respondent’s trial efforts to link the behavior to a rule of a different company – Vesta Advisors – that had not been applied either at discharge or
during the ULP investigation must fail. This absence must be held against Respondent. Moreover, even if a rule barring disclosure of private information applied here, there is no evidence that the employees shared private documents with anyone outside of themselves.

3) Respondent cannot escape the fact that Myers admitted to discharging the brothers for what they did with the payroll information – which was without question to seek a pay increase. Two Respondent agents testified under oath two months from the discharge that the reason for the discharge was not that the employees found private information, but that they were planning to use it to leverage a pay increase. No amount of crafting post-UC defenses either in the investigation of the ULPs or at trial can change that. Respondent cannot meet the burden of showing that otherwise protected activity lost the protection of the Act, as the instances of losing protection involve egregious conduct not at issue here. Rocky Mountain Eye Center, 363 NLRB No. 34 (2015).

4) Finally, to rebut a prima facie case under Wright Line, Respondent must show that it would have discharged the employees even absent protected concerted activity. As noted, it is not enough for Respondent to produce a legitimate basis for discharge or even to show that the legitimate reason factored into its decision. T. Steele Construction, Inc., 348 NLRB 1173, 1184 (2006). Instead, it must persuade by a preponderance of the evidence that it would have discharged the brothers absent them coming to Myers for a pay review and increase armed with knowledge about their pay status relative to other employees. Weldun International, 321 NLRB 733 (1996), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). Respondent cannot meet this burden. The meeting with Myers was the impetus for what came afterwards -- discharge with no investigation.
For all the above reasons, Counsel for the General Counsel urges that the Administrative Law Judge find that Respondent violated the Act by discharging the brothers Andrew and Nicholas DeFinis due to their protected concerted activity of discussing/seeking a pay increase. Counsel further seeks an appropriate remedy, including reinstatement and full backpay to make the brothers whole for the loss of their employment. See Appendix A for a draft proposed Notice to Employees.

Respectfully submitted,

Edward J. Bonett, Jr.

EDWARD J. BONETT, JR.
Counsel for the General Counsel
National Labor Relations Board, Region Four
NOTICE TO EMPLOYEES

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

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

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

YOU HAVE THE RIGHT to freely bring wage issues and complaints to us on behalf of yourself and other employees and WE WILL NOT do anything to interfere with your exercise of that right.

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

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

WE WILL offer Andrew and Nicholas DeFinis immediate and full reinstatement to their former jobs, or to substantially equivalent positions, with Respondent or with an affiliated company without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and benefits they may have suffered from the time of their discharges to the date of our offer of reinstatement, with interest.

WE WILL remove from our files all references to the discharge of Andrew and Nicholas DeFinis, and WE WILL notify them in writing that this has been done and that the discharge will not be used against them in any way.

Vesta VFO, LLC

______________________________
(Employer)

Dated: By:

______________________________
(Representative) (Title)
The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation, and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/TTY (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.