

**Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation and Violet Darlene Ryan.** Case 7-CA-34877

July 25, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 29, 1994, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions, to which the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified and to adopt his recommended Order as modified and set forth below.<sup>2</sup>

Factually, this is an unusual case. The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging the Charging Party Violet Darlene Ryan (Ryan). Ryan was not in the unit that the Union sought to organize, and she was personally opposed to the Union. The conduct for which she was discharged was her performance of a work task that was unrelated to any union activity. Despite this, Ryan was discharged because the Respondent perceived that Ryan, in the performance of her regular job duties, unwittingly assisted the Union. The facts, summarized below, are more fully set forth in the judge's decision.

Background

The Respondent operates 13 retail department stores in the Detroit area. Since 1990 the UAW has been engaged in a campaign to organize employees at a number of these stores. Elections have been held at three of the stores. The store in this case is located in the Summit Place Mall. In 1990 the UAW lost an election at the Summit Place store. That election was set aside and a second election was scheduled for February 1992. Before the election, however, the UAW withdrew its petition.

Prior to the time of the events herein (early February 1993), the Union had been passing out union literature

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We will modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

at the Summit Place store. In addition, it was actively campaigning at other stores of the Respondent. Finally, the Union had called an "all-store" meeting to talk about organizational efforts at the Respondent's stores. There is evidence that some Summit Place employees attended this meeting.

The support for the UAW at the Respondent's various stores, including the Summit Place store, originated in the furniture department and in other "big ticket" departments. The UAW focused its organizing efforts in those departments.

Ryan had worked for the Respondent at Summit Place since 1978.<sup>3</sup> She eventually became a clerical employee in the personnel department. Among her duties were administering benefits, timekeeping, payroll vouchers, care and maintenance of the bulletin boards, updates of stock options, and assisting on the floor during major sales. The credited testimony also established that the processing of transfer requests was a component of her regular job duties.

In October 1990, just before the election at Summit Place, Ryan had a conversation with Susan Boram, the Respondent's corporate director of human resources. Boram asked Ryan how she was doing. According to Ryan's credited testimony, she replied that she was "tired of the tension . . . the whole routine of watching what you say, watching what other people say . . . ." Ryan went on to state, "I don't think I could stand it if the union came in here, I'm not ready to deal with that. And I'm not ready to deal with them."<sup>4</sup> According to Ryan, Boram said to her, "You need to know that we're not going to." Ryan asked, "What do you mean, we're not going to? They're in Westland [another of the Respondent's Detroit area stores]." Boram replied, "We are fully prepared to close that store Darlene. We're not ever going to negotiate with the union."

Ryan testified that in January and February 1993 there was talk at Summit Place concerning the fate of the furniture department. Ryan did not recall when the talk started but she did recall that there was a meeting regarding the issue in February 1993.

On Friday, February 5, 1993,<sup>5</sup> employee Elaine Clausen, who was an assistant in the design studio in the Summit Place furniture department, came to the personnel department and asked Ryan to help her get an interview for a supervisory position in the furniture department of another of the Respondent's stores in the Detroit area. The deadline for applying for the position was the close-of-business February 5. Pursuant to what

<sup>3</sup> All parties agreed that Ryan was a well-liked and well-reviewed employee. On her last annual evaluation, before her discharge, she was rated "Outstanding."

<sup>4</sup> As noted above, Ryan was not eligible to vote in the 1990 election, and she testified that she was personally opposed to the Union.

<sup>5</sup> All dates hereafter are 1993 unless otherwise indicated.

the judge characterized as “standard operating procedure,” Ryan asked Clausen to fill out a request for transfer. Ryan then telephoned the other store and advised them that she was faxing a transfer request. Ryan asked that someone arrange an interview for Clausen. Ryan testified that the assistance she gave Clausen was the same as she would have given to any employee.

After Clausen filled out the request, Ryan told Clausen to have Clausen’s manager, Tom Bitterlie, sign it. The transfer form included lines for the signatures of the “manager” and “group selling manager.” Bitterlie returned Clausen’s form to Ryan, signed it in front of her on the manager line, and stated that he hoped Clausen got the job. Bitterlie did not tell Ryan that she also needed the group selling manager’s signature. Ryan testified that she was unaware that the group selling manager’s signature was required, thought Bitterlie would have told her if it was necessary, and stated she did not know who held the position of group selling manager at Summit Place. Ryan then faxed Clausen’s transfer request.

After Ryan faxed the request, Personnel Representative Trudy Mason,<sup>6</sup> who worked in personnel with Ryan, and under Assistant Manager Christine McDermott, told Ryan that Ryan was going to be in trouble, because Ryan had bypassed McDermott. Ryan replied that she did not see how she would be in trouble as she was doing her job, and that she would have Clausen talk with McDermott about the matter. Ryan then advised Clausen to “get with” McDermott “the second she walked in” on Monday so that McDermott would be aware of the situation.<sup>7</sup>

On Tuesday, February 9, McDermott spoke with Ryan. According to Ryan’s credited testimony, McDermott wanted to know where Ryan, “got the right to fill out a transfer without consulting with her.” Ryan told McDermott that since McDermott was not there on February 5 Clausen could have lost her transfer opportunity. Ryan also told McDermott that she was “simply doing something that she thought she was supposed to do.” According to Ryan, McDermott said that by processing the transfer Ryan “had embarrassed the store president, the store manager, and herself.” Ryan asked McDermott how she had embarrassed them and McDermott replied, “When you faxed that through, you embarrassed all of us, because none of us knew that you were going to do it.” Ryan told McDermott that she did not know why that would have embarrassed anybody as it was protocol and that she did it all the time. McDermott agreed that it was part of Ryan’s job. McDermott explained that there had been meetings at Summit Place regarding the furniture department. McDermott asked Ryan if she had seen people going down the hall for the meetings.

<sup>6</sup>Mason was stipulated to be a supervisor.

<sup>7</sup>McDermott was on vacation.

Ryan said that she had seen people but that she did not know the purpose of such meetings. Ryan told McDermott that if she (McDermott) had mentioned this to her perhaps Ryan “would have been more concerned and would have been aware that there was a potential problem coming.” Ryan asked McDermott if she was wrong to fax the transfer request form and to ask for an interview for Clausen. McDermott told her no, but said that she should have told the store manager. McDermott agreed that Ryan “did what she was supposed to do.”

Ryan also credibly testified that during this February 9 conversation McDermott said to her, “Darlene, you know where our problems come from in this store. . . . You are aware where the union problems start.” McDermott told her, “[T]here was already trouble brewing and you [Ryan] know about that” to which Ryan said, “Yes, I’ve heard that.” McDermott then said, “But when you did this, you didn’t realize what you were doing.” McDermott went on, “Don’t you realize what you have done by helping Elaine obtain a position outside of the store? Don’t you see what you have done?” McDermott continued, telling Ryan that, “The union was already watching them. And the fact that they [the Respondent] were going to pull the furniture department out of Summit Place would cause tremendous trouble, and get the union brewing again. And that is what I [Ryan] had brought down on the store.”

On Thursday, February 18, Ryan testified that she was called into McDermott’s office and told that she had been observed on five separate occasions keying in 8 hours of work when she had worked less than that. Ryan stated that with the exception of Friday, February 12, she was not given any of the five dates in question. Ryan denied the allegations.<sup>8</sup> McDermott suspended her.<sup>9</sup>

The next evening, Friday, February 19, Ryan met with Store Manager Michael Wade at the store at Wade’s request. Wade told her that she had falsified her time records, which called for automatic discharge. Ryan denied falsifying her records. Wade offered her the opportunity to resign rather than be discharged. Ryan refused to resign, asserting that she had no reason to do so. Wade offered to help Ryan think of a reason for resigning. Ryan said she did not want to leave. She refused again to resign, and left the store. At this point, the Respondent still had not given Ryan the other four specific dates on which she was alleged to have falsified her time records.

<sup>8</sup>Ryan denied ever cheating the Respondent with respect to recording her hours of work.

<sup>9</sup>McDermott testified that she had been told by Jackie Wade, the Respondent’s group resource manager, to suspend Ryan regardless of what explanation Ryan offered.

On Monday morning, February 22, Michael Wade called Ryan and asked her if she was going to resign. Ryan again refused to resign, and asked Wade to give her the specific dates on which she was alleged to have falsified her time records. Wade finally gave her the dates.

After refusing to resign, Ryan was discharged February 23.

#### Analysis

The judge found Ryan to be a credible witness. He found the Respondent's asserted reasons for discharging Ryan to be totally pretextual. He found none of the Respondent's three witnesses<sup>10</sup> to be credible. In addition, the judge concluded that some of the documents submitted by the Respondent were manufactured to support its position. According to the judge, McDermott and Mason "sponsored fabricated evidence." We adopt his findings on those issues. The judge also determined that, by discharging Ryan, the Respondent violated Section 8(a)(3) and (1) of the Act. We agree with the judge's conclusion for the following reasons.

We agree with the judge that Ryan's alleged falsification of time records was a pretext to hide its real motive for discharging Ryan. We also agree with the judge that the real motive was to punish Ryan for an action which, as the Respondent perceived it, would foster unionization. The Respondent was concerned that the transfer of Clausen from the furniture department would cause employees to believe that the furniture department was slated for closure. As the Respondent perceived it, that fear among employees would "get the union brewing again."

The fact that Ryan herself was not in favor of unionization does not legitimize the Respondent's unlawful motive. The mere fact that an employee is not a union member and has not engaged in any union activity does not per se immunize an employer's adverse treatment of that employee from inquiry and answerability under the Act.<sup>11</sup> In establishing that an employer's opposition to union activity was a motivating factor in an employer's decision to discharge an employee, it is, therefore, immaterial that the employee was not *in fact* engaging in union activity as long as that was the employer's perception and the employer was motivated to act based on that perception.<sup>12</sup> Thus, it is a violation of the Act to discharge an employee

even on the basis of a *mistaken* belief that she has engaged in union or other protected activities.<sup>13</sup>

Here, of course, the Respondent did not discharge Ryan because of a belief that she was a union supporter who was knowingly engaged in union activity. The Respondent knew that she was not. Indeed, at the time of the events culminating in Ryan's discharge, there was no actual union activity taking place, and the Respondent was not laboring under any misperception that there was. Rather, the Respondent knew that there was a hiatus in the Union's long-running organizational campaign at the Respondent's stores. The Respondent wanted to make that hiatus permanent, or at least prolong it for as long as possible. In retaliating against Ryan for helping Clausen to apply for a promotion out of the furniture department at the Summit Place store, the Respondent was motivated by a fear that if Clausen, a senior employee, left the Summit Hill furniture department, other employees might construe that as a signal that the Respondent was going to shut down the Summit Hill furniture department. The Respondent was worried that the employees might seek the Union's help in keeping the department open, thus possibly reinvigorating the currently inactive union campaign.

Motivated by this fear,<sup>14</sup> the Respondent discharged Ryan because it believed that Ryan's performance of her work-related assistance to Clausen—albeit unknown to and unplanned as such by Ryan herself—could possibly have encouraged a rebirth of union activity in the furniture department. Thus, in the literal words of the statute, the Respondent discharged Ryan in order to "discourage" employees from joining the Union and from reinvigorating the moribund union campaign.

The principles set forth above, regarding an employer's mistaken belief of an employee's union activity or union support, are certainly relevant and instructive here, and have guided our consideration of the facts to this point. They do not, however, fully control the ultimate outcome of this case, in which, as seen, the Respondent *did not* suspect Ryan of being a union supporter or of being engaged in union activity.<sup>15</sup>

<sup>13</sup> *NLRB v. Link-Belt Co.*, 311 U.S. 584, 589–590 (1941); *Gulf-Wandes Corp.*, 233 NLRB 772, 778 (1977); *Pleasant View Rest Home*, 194 NLRB 426, 431 (1971).

<sup>14</sup> Indeed, the Respondent's subsequent resort to manufactured evidence to bolster its defense regarding Ryan's discharge demonstrates the extent to which Respondent would go to further its antiunion efforts.

<sup>15</sup> Chairman Gould finds that the rationale of the mistaken belief cases applies with equal force here, where the Respondent discharged employee Ryan because it believed that Ryan unwittingly assisted the Union while performing her regular job duties. True, there is no question of mistaken belief. The Respondent knew that Ryan was not a union supporter knowingly engaged in union activity. Nevertheless, the Respondent's motivation for the discharge, as

*Continued*

<sup>10</sup> Supervisor Christine McDermott, Store Manager Michael Wade, and Personnel Representative Trudy Mason.

<sup>11</sup> *Jack August Enterprises*, 232 NLRB 881, 900 (1977), *enfd.* 583 F.2d 575 (1st Cir. 1978).

<sup>12</sup> See *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 967 (4th Cir. 1985), *enfg.* 269 NLRB 999 (1984), as cited in *New River Industries v. NLRB*, 945 F.2d 1290, 1295 (4th Cir. 1991), denying enforcement on factual grounds of 299 NLRB 773 (1990).

Rather, in finding that the Respondent violated the Act by discharging Ryan, we apply the fundamental principles set forth above to this unique situation, where the Respondent suspected that an action taken by its employee might encourage the renewal of union activity. The Respondent discharged Ryan, in the literal words of Section 8(a)(3), in order to discourage the reinvigoration of the union campaign. It thus sent a message to all its employees, including Ryan,<sup>16</sup> that any attempt to bring the Union to its store and to revive the union campaign could lead to the ultimate penalty, discharge. Regardless of the fact that this particular employee may not have favored the Union herself, the message to her and to the other employees could not have been clearer. The message was that the employer would take action against the employees for any measure that would help the Union. We perceive no difference in principle from the Respondent's action here and an employer's discharging an employee and telling him that it is doing so to make it clear to him (and anyone the employee cares to tell) that the employer has power over its employees' jobs and that they act at their peril in doing anything to instigate or support a union campaign. It seems unquestionable that the latter action would violate Section 8(a)(3), regardless of the union sentiments of the discharged employee. We, therefore, affirm the conclusion that the Respondent discharged Ryan in violation of Section 8(a)(3) and (1) of the Act.<sup>17</sup>

in the cases of mistaken belief, was to prevent union activity among its employees. Further, the Respondent's discharge of Ryan clearly demonstrated to Ryan and other employees its willingness to adversely affect employment conditions in order to stop the recurrence of union activity. Finally, as with the mistaken belief cases, the Respondent's adverse action takes place in a setting where employees have engaged in union activity. Here, the activity had died out, but the Respondent terminated Ryan to prevent it from springing back to life.

<sup>16</sup>Even if Ryan had not, as the judge found, harbored unfavorable opinions of the Union before, she was certainly discouraged from any possible change of view by what she reasonably perceived as her discharge for an action which the assistant manager advised her was considered injurious because of its possible incitement of union activity.

<sup>17</sup>Chairman Gould and Member Higgins note that the Board's decision today does not condemn employment practices, developed in the absence of union activity or the perceived imminent resurrection of same, which are designed to instill a high morale among employees and thus deter employees from seeking unionization. Such practices are not designed to influence a specific choice presented to employees by a union seeking to represent them. There is nothing unlawful about improved employment conditions which may make it less likely that employees will opt for unionization. Different considerations come into play when, as here, the employees are presented with such a choice. Thus, the Board has long held that during a union campaign, an employer must make certain employment decisions as it would if the union were not on the scene. With respect to benefits, for example, if an employer's course of action is prompted by the union's presence, then the employer violates the Act whether he confers benefits or withholds them because of the union. *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29 fn. 1 (1967).

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth below.

### 1. Cease and desist from

(a) Suspending an employee because she took actions which Respondent perceived would cause Respondent's employees to seek union representation and/or look more favorably on union representation.

(b) Discharging an employee because she took actions which Respondent perceived would cause Respondent's employees to seek union representation and/or look more favorably on union representation.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Violet Darlene Ryan full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Violet Darlene Ryan whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Violet Darlene Ryan and within 3 days thereafter notify the employee in writing that this has been done and that the suspension and discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region post at its Summit Place Mall store in Waterford, Michigan, copies of the attached notice marked "Appendix E."<sup>18</sup>

See also *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), where the Supreme Court held that the conferral of benefits to employees while a representation election was pending, for the purpose of inducing employees to vote against the union, interferes with, restrains, or coerces employees in the exercise of their Sec. 7 rights.

Member Fox would not comment on this hypothetical set of circumstances.

<sup>18</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such facility at any time since August 12, 1993. Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

#### APPENDIX E

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend you or discharge you, because you take actions which we perceive would cause your fellow employees to seek union representation and/or look more favorably on union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer Violet Darlene Ryan full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Violet Darlene Ryan whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Violet Darlene Ryan and WE WILL, within 3 days thereafter, notify her in writing

that this has been done and that the suspension and discharge will not be used against her in any way.

DAYTON HUDSON DEPARTMENT STORE  
COMPANY, A DIVISION OF DAYTON  
HUDSON CORPORATION

*Linda Hammell, Esq.*, for the General Counsel.  
*John F. Birmingham Jr., Esq.* and *Paul Townsend, Esq.*  
(*Dykema Gossett*), of Detroit, Michigan, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On a charge filed by Violet Darlene Ryan on August 12, 1993,<sup>1</sup> a complaint was issued alleging that Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation, Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by suspending and subsequently discharging the Charging Party to retaliate against her, because it was perceived that her assisting while she worked in the personnel office of one of Respondent's stores, a sales employee in seeking a transfer to another of Respondent's stores would cause Respondent's employees to seek union representation and/or look more favorably on union representation. Respondent denies violating the Act. As a further defense, it asserts that the Charging Party was, at all material times, a "confidential" employee as that term has been defined by the relevant case law under the Act. Respondent did not pursue this further defense on brief.

A hearing was held in Detroit, Michigan, on January 24 and 25, 1994. On the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by the General Counsel and Respondent, I make the following

##### FINDINGS OF FACT

###### I. JURISDICTION

Respondent, a corporation, has been engaged in the operation of retail department stores and has operated several stores in Michigan, including one located in Waterford, Michigan (the Summit Place Mall store). The complaint alleges, the Respondent admits, and I find that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

###### II. THE ALLEGED UNFAIR LABOR PRACTICE

###### The Facts

Respondent operates 13 department stores in the Detroit, Michigan metropolitan area. In 1990 the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO (UAW) commenced a campaign to organize the employees at a number of these stores. Elections have been held at three of the stores.

<sup>1</sup> All dates are in 1993 unless otherwise stated.

Regarding one, Respondent's Westland Mall store, the UAW won the election and was certified in 1990. The Respondent appealed the bargaining order of the National Labor Relations Board (the Board) and the United States Court of Appeals for the Sixth Circuit remanded the case to the Board for further proceedings. It is presently pending before the Board. The UAW alleged Respondent committed unfair labor practices at the Westland Mall store. The administrative law judge who heard the case, Case 7-CA-34182, concluded that Respondent violated Section 8(a)(3) of the Act when it issued a written warning to one of the Westland Mall store employees and it violated Section 8(a)(1) of the Act when it interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act. The matter is pending on exceptions. (G.C. Exh. 2.)

With respect to Respondent's Fairlane Mall store, the UAW won the first election which was conducted in 1991. It was set aside by the Board and the Respondent won the second election. Subsequent to the UAW filing objections to the second election, the parties agreed to a third election. The UAW subsequently withdrew its election petition. Unfair labor practices were filed by the UAW regarding the Fairlane store. A consolidated complaint issued and the matter was heard. It is presently pending.

The UAW lost the 1990 election at Respondent's Summit Place Mall store. It was set aside and a second election was scheduled for February 1992. Before the election, however, the UAW withdrew its petition.

Nancy Shiffer, an associate general counsel of the UAW, testified that the initial union support came from the furniture department employees and some other "big ticket" areas also. Both employees who were leaders of the organizing attempt at the Summit Place Mall store came from the furniture department. Shiffer testified that the focus of UAW support at this store was the furniture department.<sup>2</sup>

Ryan was hired by Respondent at its Summit Place Mall store in 1978. Subsequently she became a clerical employee in the personnel department. There her job duties included the administration of benefits,<sup>3</sup> timekeeping,<sup>4</sup> payroll vouchers, the care and maintenance of bulletin boards, and news of stock options, and assisting on the floor during major sales. Ryan filled out the paperwork with respect to the aforementioned benefit programs, and she would discuss these matters with the stores' employees both in the person-

<sup>2</sup>This testimony was corroborated by Ryan who testified that two consultants hired by Respondent during the organizing drive, Ed Percoe and Peter King, worked out of the personnel office at the Summit Place Mall store and they told her and at least one other person in personnel that the main union support was in the furniture department at the Summit Place Mall store.

<sup>3</sup>The involved store had four benefit programs, namely, health care, a dental program, life insurance, and stock options.

<sup>4</sup>Respondent has two timeclocks in this store, which timeclocks are part of a computer system which, if working properly, automatically calculates the hours per day that an employee has worked. Occasionally, they do not function properly and sometimes employees make mistakes with respect to punching in or out. On these occasions a daily exception sheet calls attention to the fact that exception hours must be manually keyed into the computer. This is one of Ryan's functions. She was not, however, the designated timekeeper in the personnel department. Rather, she shared this function with two other individuals in her department, Trudy Mason and Sandy Benscoter.

nel office and on the sales floor. According to the head of the personnel department, Christine McDermott, this was expected. Ryan also was responsible for watching the reports with respect to the United Way and blood drives and she keyed the information into the system regarding these drives.

In October 1990, just prior to the aforementioned election at the Summit Place Mall store, Ryan had a conversation at the store with Susan Boram, who Ryan described as being the head of all of all human resources of Respondent. Boram's office is in Minneapolis, Minnesota. Boram asked Ryan while they were in the personnel department of the Summit Place Mall store how she was doing. Ryan replied that she was "tired of the tension . . . the whole routine of watching what you say, watching what other people say, listening, [and] going out." When Boram repeated her question, Ryan replied, "[s]ometimes not real well." Ryan also said to Boram "I don't think I could stand it if the Union came in here. I'm not ready to deal with that. And I'm not ready to deal with them." According to Ryan's testimony (A) Boram then said, "[y]ou need to know that we're not going to," (B) she, Ryan, then said "[w]hat do you mean, we're not going to? They're in Westland," and (C) Boram said, "[w]e are fully prepared to close that store Darlene. We're not ever going to negotiate with the Union."<sup>5</sup> Ryan testified that she was not an eligible voter since the personnel department was not included among those eligible to vote; and that she was totally against the Union.

In her March 2, 1992 performance review Ryan received an "Outstanding" rating from her supervisor at that time, Personnel Manager Durdre Pitts.<sup>6</sup> (G.C. Exh. 3.) Her review includes comments such as the following:

Darlene, you have taken the initiative [sic] with several projects that exceed your job requirements. You have done a tremendous job with each, for example EBB board maintenance, participating in the screening process, employee appreciation days set up etc. Thanks for your willingness to pitch in and help where ever and whenever possible.

. . . .  
Darlene you have continued to make this area a priority. I have often seen you organize your thoughts on a "To Do" list for the day. You were very successful in planning and organizing both spring and fall inventories. Other events that you played a key role in planning and organizing were Retirement Seminars, Benefits Bonanza, and Health "o," Rama Days.

. . . .  
Darlene, you have worked hard to impact the employee morale in our store. You have responded with urgency to employees issues and concerns. You have followed up with employees on a timely manner. I have

<sup>5</sup>This testimony was given on the first day of the trial here, January 24, 1994. During the second and last day of the trial, counsel for Respondent indicated that he had not anticipated any testimony about Boram since she was not named in the complaint and during the pretrial conference counsel for the General Counsel did not mention this testimony; that he had not been able to contact Boram, who is based in Minneapolis; and that, therefore, he was not able to produce her.

<sup>6</sup>According to the last page of the form, her next review date was to be 2-23-93.

observed you on several occasions working to get benefit issues resolved. You have continued to be a strong support for the store during major sale events and peak times. A challenge remains to increase your level of awareness when you verbally respond to employees.

. . . .  
 Darlene, your concern for your customers (employees) problems and the efforts you make in response to situations is outstanding. I challenge you to make me a partner more consistently when issues arise, so that I may help you in the problem solving process. This will allow us to respond more quickly and increase our level of creditability.

Subsequently, Ryan's new supervisor, McDermott, gave her, Ryan, a midyear review (G.C. Exh. 4), which included, among other comments, the following:

Job Knowledge: (7) Productivity Darlene, you seem to have a very good understanding of your job responsibilities. You have involved yourself in many projects and have gone "above and beyond" expectations! My only concern is that you stretch yourself with too many projects and situations throughout a given day. Example—you are so willing to help and assist that you volunteer to make phone calls and follow up on projects—to the point that even working a 24 hour shift wouldn't be adequate to complete the tasks!

Positive contribution to team: Darlene you have a "winning" smile and have the ability to bring humour [sic] to a situation that is in need of it! You show a genuine concern for your fellow employees. You also have made me feel very welcomed!

. . . .  
 Quality of work: Darlene, you have a tendency to fluctuate in this area and feel its due to stretching yourself too thin. You have been outstanding and at the same time errors have been made. I feel you take pride in your work—and it shows. I also believe that this fluctuation in quality is due to in part the changes that have gone on in personnel. We are working together on this and I appreciate it.

Summary: Darlene, you are a real team player. You have proven your dedication to the store and your job by involving yourself in projects—i.e. blood drive. I feel I can count on you and have confidence in your abilities. You are a very talented, personable woman. I look forward to growing with you this fall in personnel.<sup>7</sup>

<sup>7</sup> McDermott's evaluation also includes the following:

Darlene, we have discussed confidentiality and "not crossing that line." You are extremely personable and have the desire to be thorough in your interactions. Please work with me in this area as we have discussed.

Ryan testified that McDermott was referring to a conversation she, Ryan, had with employee Julie Corken; that Corken was on Workmen's Compensation; that McDermott told Ryan that she had told Corken something that would hurt the Company; that when Corken tried to get off Workmen's Compensation or had been taken off Workmen's Compensation and wanted to apply for short-term disability she, Ryan, told Corken that she should think long and hard about it since it would change things and it could affect Corken's

McDermott testified that a lot of the employees "[a] lot of people"—really like Ryan and that Ryan was quite an asset to the Company.

Ryan testified that there was talk concerning the fate of the furniture department at the Summit Place Mall store. She could not recall when it started but she did recall that there was a Region 1, which includes her store, management meeting regarding this in February 1993.

On Friday, February 5, Elaine Clausen, who was the assistant in the design studio in the furniture department and who started working for Respondent on the same day as Ryan in 1978, came to the personnel department and asked Ryan if she would help her, Clausen, get an interview for a supervisory position that was open in the furniture department at one of Respondent's other stores in the Detroit metropolitan area, the Northland store. The deadline for applying for the position was February 5. Pursuant to standard operating procedure, Ryan asked Clausen to fill out a request for transfer and she, Ryan, telephoned the Northland store and told them that she would be faxing the request for transfer. Ryan also requested Northland to arrange for an interview for Clausen since it was the last day she could apply for the position. Ryan testified that the assistance she gave to Clausen was no different than what she would normally do for any employee. After Clausen filled out the transfer request form Ryan told her to have her manager, Tom Bitterlie, sign it.<sup>8</sup> Bitterlie was the manager of all big ticket items. Bitterlie returned Clausen's request for transfer form to Ryan signing it in front of Ryan and saying that he hoped Clausen got the position, he was really rooting for her. Ryan testified that when Bitterlie signed the form he did not say that, in his opinion, it was necessary to have the group selling manager's signature also. Ryan faxed the form to Joe Bunting at Northland.

After Ryan faxed the above-described form to Northland, Trudy Mason, the personnel representative who worked in the personnel department at the Summit Place Mall store under McDermott, told Ryan on February 5 that she was going to be in serious trouble with McDermott, because Ryan had gone over McDermott's head. Ryan responded that she could not see how she would be in trouble since she was doing her job and she would have Clausen discuss the matter with McDermott. Ryan telephoned Clausen and told her to "get with Christine the second that she walks in the door Monday, so that . . . [McDermott] would be aware."

On Tuesday, February 9, McDermott spoke with Ryan in the former's office. Ryan testified that McDermott wanted to know where she, Ryan, "got the right to fill out a transfer without consulting with her"; that she explained to McDermott that since she, McDermott, was not there on February 5 Clausen would very well have lost this opportunity; that she told McDermott that she, Ryan, was simply doing something that she thought she was supposed to do; that McDermott then said that "by sending this transfer through . . . [you] had embarrassed the store president [or vice president] Ray Steffner . . . [the] store manager and

stand; and that when McDermott made this comment Corken was involved in a lawsuit against the Company.

<sup>8</sup> A blank copy of a "REQUEST FOR TRANSFER" form was introduced herein by Respondent. (R. Exh. 1.) There is a line for the "MANAGER'S SIGNATURE" and just under that line another line for "GROUP SELLING MANAGER'S SIGNATURE."

herself"; that when she asked McDermott how she embarrassed all of these people McDermott replied, "[w]hen you faxed that through, you embarrassed all of us, because none of us knew that you were going to do it"; that she told McDermott that she, Ryan, did not know why that would have embarrassed anybody, it was protocol and she did it all the time; that McDermott then said "[y]ou didn't even get with Michael [Wade, the store manager] on this"; that she replied that she did not discuss the matter with Michael Wade but she had Clausen's manager sign the form;<sup>9</sup> that McDermott was "very worked up, very upset"; that McDermott agreed with her that it was part of her, Ryan's job to do this; that McDermott then explained that there had been meetings taking place in the Summit Place Mall store and they were deciding whether to make the furniture department a part of the store, which was experiencing a major renovation, or eliminate the furniture department completely; that when McDermott asked her if she had seen all the people going down the hall for the meetings she, Ryan, said that she saw the people but she did not know what they were meeting for; that she told McDermott that if she had mentioned this to her perhaps she, Ryan, "would have been more concerned, and would have been aware that there was a potential problem coming"; that she asked McDermott if she, Ryan, was wrong to fax the REQUEST FOR TRANSFER form to Northland and ask for an interview for Clausen; that McDermott said "[n]o. You should have let Michael Wade know . . . [because] he was the area manager. And . . . [she] did not notify him as an area manager"; that McDermott said that she, Ryan, "did what . . . [she was] supposed to do" and McDermott agreed that Ryan did her job; and that she asked McDermott if she would assist in getting Clausen an interview and McDermott replied that she would. Ryan also gave the following testimony regarding her conversation with McDermott on February 9:

Q. Did Ms. McDermott indicate to you anything about why management was going to be embarrassed by your having assisted Elaine Clausen in trying to get a transfer?

A. Yes.

Q. What did Ms. McDermott say in that regard?

A. She said, "Darlene, you know where our problems come from in this store."

And I said, "Problems?"

And she said, "You are aware where the Union problems start."

Q. And what did you say?

A. I don't know that I said anything at this point.

Q. And what did she say?

A. She went on to explain to me that there was already trouble brewing, and you know about that.

And I agreed. And I said, "Yes, I've heard that."

And she said, "But when you did this, you didn't realize what you were doing."

<sup>9</sup>Ryan testified that she assumed that if this was not supposed to be done Bitterlie would have spoken with Michael Wade; and that Bitterlie did not say that it was necessary, in his opinion, to have the group selling manager's signature also. Ryan also testified that on February 5 she did not know that Michael Wade, the store manager, was also the group selling manager and she told McDermott this on February 9.

And I said that I didn't know that I had to be concerned about what I was doing. Because I was not aware that there was a problem, and that there was a discussion about the furniture department being jerked out.

Yes, that would have caused a major problem. But I was not aware of it.

. . . .

BY MS. HAMMELL:

Q. What if anything was the explanation for the relationship?

THE WITNESS: She was trying to—

BY MS. HAMMELL:

Q. Tell us what she said.

A. Christine said, "Don't you see what you have done by helping Elaine obtain a position outside of the store? Don't you see what you have done?"

And at the time I didn't, until she explained to me the Union—

Q. What did she explain to you?

A. She explained to me that the Union was already watching them.

And the fact that they were going to pull the furniture department out of Summit Place would cause tremendous trouble, and get the Union brewing again.

And that is what I had brought down on the store.

(Long Pause)

Q. And did Ms. McDermott give you any indication of whether she thought the employees of the store had called the Union concerning the furniture department?

A. Right now, I'm sorry, I don't remember.

Q. How many times during the course of this discussion with Ms. McDermott, did she say to you words to the effect of "Darlene, do you realize what you've done?"

A. Several times. Because she was trying—

Q. Just answer the question.

A. Several times.

Regarding her meeting with Ryan on February 9, McDermott<sup>10</sup> testified that Mason came to her and told her that Ryan faxed a transfer request for Clausen to Northland but the form did not have a manager's signature on it; that she never saw the original transfer form that was sent over but she was under the impression at the time that no manager had signed it; that Ryan stated that the area manager had signed it; that she told Ryan that "we need to make sure that the group selling manager sign. Or if the group selling manager is not there, any senior executive, to make sure it is complete when it's faxed over to the other personnel office"; that she thought that Michael Wade was the acting group selling manager; and that an incomplete document might jeopardize Clausen's chances of getting an interview, if the group selling manager didn't sign off on it, or if it didn't

<sup>10</sup>The answer to the complaint admits that McDermott is the personnel manager at the Summit Place Mall store. She testified that she has been the assistant store manager of human resources since June 1992. Before that she was employed at the Summit Place Mall store as the group selling manager for woman's shoes, the men's division and the "home floor."

have the appropriate management signatures. McDermott testified further on direct as follows:

Q. All right. Well, did you have any conversation in that meeting with her, that you were discussing the Elaine Clausen request for transfer, about the Union?

A. I did not. No.

Q. Well, what if anything did you know, about the Company's plans for this department?

A. I knew that we were going to do one of three things, leave it the way it was; totally eliminate it; or just streamline it; and just have carpeting and mattresses.

Q. Okay. And how did you gather that information?

A. It had been discussed with the individuals in the area and with us, as managers.

Q. Before this transfer request?

A. Yes. In my conversation with Elaine, she had stated to me that she was pretty sure that she was going to be transferred to Oakland. Because that is where the design studio was going.

And she felt that she would rather drive to Northland than drive to Oakland.

Q. All right. And do you know what the position at Northland was that she was applying for?

A. It was a supervisor's position.

Q. Okay.

A. I never actually saw the sheet that she had, with the job description on it.

Q. And did she get the position?

A. No, she didn't.

Q. All right. Did she continue to work at your store?

A. Yes, she did.

Q. Is she there now?

A. No. She went to Oakland. The design studio was transferred to Oakland.

Q. Okay. And that's where she's working now?

A. That's correct.

Q. Okay. And did you reprimand the . . . [Charging Party] for her performance on that occasion?

. . . .

THE WITNESS: I had a conversation with Darlene, about making sure that when she is faxing information over to other personnel offices, that it is complete.

BY MR. TOWNSEND

Q. Well, what I am driving at is this, did you take any discipline of any kind?

A. I just had a conversation with her about accuracy. And that was the end of it.

Q. All right. And did you do anything further with respect to Elaine Clausen's application?

A. Yes. I got the appropriate signatures on a transfer for her, called over, spoke with the personnel office, and they set up an interview for her.

Q. Okay. And did the Charging Party's performance in this instance, upset you?

A. Did Darlene's performance upset me?

Q. Yes.

A. I questioned why she would send it across, fax it, being incomplete. That is what I talked to her about.

Q. Were you angry with her?

A. I wasn't angry with her, no.

Q. All right. And when you suspended her, did that incident play any part in your thinking?

A. It had nothing to do with it.

On cross-examination, McDermott testified that she never received word from Northland store that Clausen's transfer request form which had been faxed by Ryan was incomplete; that, rather, she telephoned the personnel office at Northland and told Joe, who is the personnel representative, that the form "was incomplete, and that it had been inadvertently sent over but we do have the appropriate management signatures, and were faxing that over"; and that she faxed over the information "with the managers' signatures on it, the transfer request." McDermott further testified that she was aware that Michael Wade was acting group selling manager before the Clausen transfer incident.

The store manager of the Summit Place Mall store, Michael Wade, testified that in January/February 1993 there were rumors circulating throughout the store that the furniture department was going to be closed down; that "[w]e tried to stop that rumor . . . [b]ecause we weren't sure what we were going to do at the time"; that "we just very informally let the managers know, in case they heard these rumors"; that "we didn't want the people in the furniture department to be so focused on it shutting down"; that McDermott told him that "Clausen was requesting a transfer to Northland, and it had gone through without the proper signatures, but that she had gotten involved and got that corrected"; that he only had one conversation with McDermott about the Clausen transfer; that McDermott would always let him know who was transferring into or out of the store; that Bitterlie apologized to him for signing the transfer request form and not getting another signature; and that he told Bitterlie it was no big deal, just to make sure that he got somebody else to sign off the next time. Subsequently, Michael Wade testified that he did not eventually sign the transfer form for Clausen on the line for group selling manager's signature; and that he believed that McDermott signed this line of the form but he was not certain. Mason testified that the furniture department at the Summit Place Mall was closed in summer 1993.

On Thursday, February 18, Ryan had a conversation with McDermott in the latter's office. With respect to this conversation, Ryan testified that McDermott initiated it saying, "Darlene, I have to do something. . . . last Friday you left early"; that she told McDermott "okay"; that McDermott then said, "you came in at 9:00"; that she told McDermott "all right"; that McDermott then asked, "Did you key yourself in for eight hours"; that she told McDermott, "No, I did not. I keyed myself in for seven"; that McDermott asked, "Do you key your own hours in"; that she told McDermott "yes"; that McDermott asked, "Do you key eight hours in if you work seven"; that she told McDermott, "No, I do not"; that McDermott asked, "But do you key your own hours"; that she told McDermott "Yes" that McDermott then said "Okay, we have five specific dates that you have been observed coming in at 9:00 and leaving at 5:00, and then keying your hours for eight"; that McDermott did not give her the dates other than the prior Friday, February 12; that McDermott had a 3- by 5-inch card in her hand while she spoke but she did not give it to Ryan; that McDermott asked her if she realized the "seriousness of this"; that she

told McDermott that she, Ryan, was not even sure what “this was”; that McDermott then said, “You have been observed coming in at 9:00 and leaving at 5:00 and paying yourself for eight hours”; that she told McDermott “that’s not true”; that McDermott then said “Okay, someone has seen you do these things. So we are going to—I’m going to have to suspend you”; that she was suspended immediately; that before, she left McDermott’s office McDermott said, “I will call you tonight. And I will check into the timekeeping. Help me defend you. Help me show how you didn’t do this”; that she said to McDermott, “Do you look at me and see a thief”; that McDermott then said, “No, I look at you and see a lovely lady”; that McDermott announced to Ryan’s workers, “Darlene isn’t feeling well and she is going home now”; that McDermott did not telephone her that evening; and that other than February 12, McDermott did not, during this conversation, identify any particular dates on which she, Ryan, was alleged to have misreported her time. Subsequently, Ryan testified that McDermott said that it involved days when she, Ryan, went and had her nails done. On cross-examination, Ryan testified that she may have told McDermott regarding February 12 that she, Ryan, originally keyed in 8 hours and then realized her mistake and rekeyed it; that McDermott did not ask her about February 9 or January 12; that McDermott did not discuss an incident when she, Ryan, arrived late for a personnel meeting; that while they did discuss whether Ryan leaves early on Tuesdays to get her nails done they did not discuss a specific date other than Friday, February 12; that McDermott did say there were five dates that she, Ryan, had been observed; and that McDermott did not discuss who made the observations.

With respect to her February 18 meeting with Ryan McDermott she testified that she began the meeting by asking Ryan about her timekeeping for Friday, February 12; that she asked Ryan “if . . . she does her own exceptions hours” and Ryan said, “Yes”; that she asked Ryan why she would put in 8 hours for a shift that she didn’t work and Ryan told her that she realized she put in too many and she went back and changed the hours and the timekeeping would reflect 7 hours; that she asked Ryan about February 9, stating the date; that she asked Ryan why she would work a 7-hour day on February 9 and key in 8 exception hours for herself; that for February 9 she stated to Ryan, “You were observed coming in at 9:00. You took an hour lunch. You left at 5:00. And yet you keyed eight exception hours for yourself. Can you explain this”; that Ryan did not have an answer regarding February 9; that she discussed every date on the piece of paper, namely, February 12 and 9 and January 26, 12, and 11; that she could not remember whether she discussed the sales consultation meeting of January 12 with Ryan on February 18; that she asked Ryan “if she keyed her own hours” and Ryan stated, “Yes”; that she believes that she mentioned Ryan’s standing appointment on Tuesday at 5 for nails or hair; that Ryan said that she didn’t know why the timekeeping would show 8 hours when she worked a 7-hour shift; that Ryan said “that there is not enough to do in there, and that other people are padding their hours”;<sup>11</sup> and that she told Ryan she, McDermott, would have to suspend her. On cross-examination McDermott testified that it is possible

<sup>11</sup> Ryan testified that she did not remember saying that “people in there are padding their hours.”

that Ryan’s nail appointments were biweekly; that Ryan stated that the nail appointments were at 5, but she could not remember when Ryan said this; that there is a separate document which records when an employee punches the time-clock but she did not look at this document when she monitored Ryan’s hours; that in concluding that Ryan was guilty of miskeying her time she, McDermott, relied on her own observations, Mason’s observations, and the timekeeping sheets, namely, Respondent’s Exhibits 2, 4, and 8; that the first time this matter was brought up with Ryan was on February 18, the day she was suspended; that she asked Ryan if she was taking care of business before she walked into personnel and Ryan said, “No”; that I asked her “when you come into personnel, are you visiting with people? What are you doing before you come in”; that she was not sure of the exact words used; that she did not know if Ryan interpreted her question to be whether she, Ryan, visited recreationally with people before she walked into personnel; that before she spoke with Ryan, she, McDermott, was instructed by Jackie Wade<sup>12</sup> to ask Ryan if she had an explanation and then immediately suspend Ryan regardless of what explanation Ryan offered; and that she never offered Ryan any additional opportunities to explain things after the day she suspended Ryan. Subsequently McDermott testified that while earlier she testified more than once here that she had spoken with Ryan before February 18 regarding the fact Ryan keyed in her own exception hours,<sup>13</sup> she asked Ryan on February 18 if she keyed in her own exception hours for the following reason:

Because I was questioning the events as to what led up to the eight hours being keyed.

I was asking her for any explanation that she had as to why I could observe her working seven hours, and her keying eight.

On Friday, February 19, Ryan received a telephone call at home from Jackie Wade. Ryan testified as follows regarding the telephone call:

And she asked me how I was doing. And I said, “I’m doing all right. How are you, Jackie?”

And she said, “Oh, you knew who I was?”

And I said, “Yes, I know your voice.”

And she—

I said “Judging from the fact that you’re calling me at my home, this obviously [is] not a good sign.”

And she said, “What do you mean?”

And I said, “When a leader with your position calls me at my home on my phone, this is obviously not going well. That tells me where this is going.”

And she said, “I wonder if we could just go and meet in a restaurant someplace, and have a little chat?”

And I said I didn’t believe so.

<sup>12</sup> Jackie Wade, according to Ryan, is in charge with Karen Kelly of human resources for 21 of Respondent’s stores. Michael Wade testified that Jackie Wade was Respondent’s group resource manager.

<sup>13</sup> This testimony was given when McDermott was being questioned by counsel for the General Counsel about certain of her, McDermott’s, statements in memoranda allegedly covering her observing Ryan key in her own exception hours for certain of the 5 days in question.

And she asked me, "Why not?" She said, "You may pick the restaurant."

I said, "I didn't see any point in me picking a restaurant and trying to drive my car. Because I wasn't doing well."

And I said, "If you want to do something, why don't you just terminate me over the phone?"

I said, "You're the one that did [terminated] my son a couple of years ago. Just handle it."

And she said—

.....

She said, "Oh, no. No, nothing like that. I just would like to get together and chat with you."

And I said, "Would you like to come to my home?"

[And Wade said] "Oh, no, no. Nothing like that. No, no."

.....

Jackie kept saying, "No, no." She would not meet me at my home.

And I said, "I'm upset. Could I have my husband bring me, when he comes home from work, to meet you someplace?"

And she said, "Heavens, no—"

Jackie said, "Heavens no, Darlene. We wouldn't want him to know, would we?"

I said, "No, I was not going to drive someplace and meet her, under any circumstances, because I wasn't up to it."

And she stopped being terribly friendly at that point and said, "Fine. I'll just have your boss call you at your home, Darlene."

She said, "I wanted to get this out of the way before I went on my vacation."

And she hung up.

Jackie Wade did not testify here.

About 1 hour later on February 19, Michael Wade telephoned Ryan. They agreed to meet at the store at 7:30 that night so that Ryans' husband could drive her. With respect to this meeting, Ryan testified that she met along with Michael Wade; that after opening the meeting by asking her how she was doing Michael Wade looked at a sheet of paper he had and he said, "You keyed your own timekeeping, Dar and it shows here that you keyed eight and you were only here seven. So it is an automatic termination, Dar"; and that Michael Wade was referring to Friday, February 12, when he said this. Ryan gave the following testimony regarding what was then said:

A. I said, "It's not true and you know it's not true. I don't know why you're doing this to me. I don't understand."

He said, "It will have to be a termination, Dar."

And he said, "That as a friend, because we are friends, that he would let me—allow me to resign. It would be easier on everyone."

Q. Easier on who?

A. Easier on everyone, the people in the store and me, and it would be easier if I would resign.

And I said I didn't have a reason to resign. I didn't want to leave.

And he said, "But you have to."

And then he said—

I asked him—

I asked Michael why I would be resigning, when I planned to stay there forever.

And he said, "I will help you think up a reason why you can resign."

He said, "If you resign, we can have a party for you in the training room, and everyone can come and say good-bye to you."

And I said that I didn't want to have anyone say good-bye to me, because I didn't want to leave.

And he said, "It would be better. I hope you think of a reason."

I said, "Okay, so am I going to resign because I'm going to be a grandmother someday, or that I'm tired of the strife in my office?"

And he said, "I will help you think of a reason. Hang on a minute and I will go get the form."

Q. And what did he then do?

A. He left the office. He, I believe, went to Christine's office to get —

Q. Why do you think that?

A. Because I could hear her voice.

Q. And then what happened?

A. When he came back he had the forms. And I said, "Is Christine here?"

And he nodded his head [yes]. And I said, "Can I talk to her?" He said, "No."

.....

Michael sat down and asked me my employee number. And I gave it to him.

And then he said, "Okay, let's think of a reason that you're resigning."

And I got up and I patted him on the shoulder, and I said, "No, Michael. I'm not resigning. I can't do this."

And he said, "Dar, just think about it. If you just resign, it would be easier. What if another company calls or something?" He said, "We wouldn't want to have to."

And I said, "What?" And he stopped what he was about to say.

And I got up and I left. And I started to go towards my office. But I realized where I was going.

And I started to run, and went back out the other way.

And he said, "Dar, I'll call you Monday."

And I said, "Okay."

He said, "Think about it."

And I said, "All right." And I left.

Q. And as of that moment, your leaving on Friday evening, February 19th, had anyone in management identified to you, any days other than Friday, February 12th, in which they were alleging that you had misreported your time?

A. No, no, no.

Q. Okay.

A. There was one implication, one time when it was the days that I went and had my nails done. And Christine had done that.

Q. What did she say?

A. I said something about when I go to get my nails done?

And she said, "Exactly."

But there was no further from me or from her, in explanation.

Q. About the days on which—

A. Right.

Q. —this had occurred?

A. Right, right.

Regarding his February 19 meeting with Ryan, Michael Wade testified, as here pertinent, as follows:

I asked her how she was doing, and then let her know that, you know, this was serious obviously, because we have suspended her, and that we don't take these kinds of matters lightly.

Because number one, she is a long term employee with us. And we want to make sure that she has the opportunity to tell us what happened.

So you know, I asked her what happened and Darlene had said that she wasn't really sure. The whole day is kind of—was kind of fuzzy to her.

She said that she didn't really understand why she was being suspended.

And I said, "From what I understand Christine shared with you, on five occasions that you had put more time in than what you had worked."

And her response was, "There is no way. I would never cheat this Company. This is my job. This is my life. I love this Company."

She said, "If I put that time in, then I must have worked it."

And then I said, "Okay." I said, "on these, so can you give me more information? So what else? So you say you put the time in?"

And she was very upset. She really didn't have anything else to offer.

And so I said, "So what I understand then, is that there are these five occasions when more time was put in, that you put more hours in than you worked?"

And she again just kept repeating herself, "I couldn't have done that. I wouldn't cheat the Company. I am not a thief. I don't do those kinds of things."

.....

And she said that she had always tried to maintain the integrity of the Company, and that she wouldn't do that.

And she couldn't understand how that could have happened, and that she wouldn't have done it on purpose.

And I said, "Okay. I understand that. And I don't doubt what you're saying. I guess what I still have before me, though, are the facts that we have documented you coming in, leaving, and then putting more time than what you had keyed—or putting in more time than you had worked."

And again, she was just very upset. And you know, she just couldn't understand how that could have happened, and that she wouldn't have done that.

And I said—

I told her, I said, "well, Darlene, based on what I have, I don't have any other choice here. Unless you have something else to offer, I don't have any other choice here, but to terminate you. And I hate to do that

to somebody with your length of service, and you know, the time and the commitment that you have given to this Company over the past 14 or 15 years."

And I—

But, I said, "I don't have any other choice, based upon what I have."

And I said, "What I can do, because I would certainly hate to see you go out with a bad name, because having known from past experience when we have had to let employees go, that you know, rumors go through the store. Because we don't tell anybody why. People just end up leaving the Company. And that is as much as we tell people."

But I wanted her to be able to leave gracefully, if that is what was going to have to happen.

And so I offered—

I told her, you know, "I would be more than willing to have you resign if you would like, so that you know, we could come up with a reason together, as far as why you're leaving, so that at least there isn't all this speculation surrounding your termination."

And she thought for a minute. And she said, "Well, maybe that is what I have to do."

And she just sat there for a moment and gained a little bit of her composure.

And I don't remember if at that point I stepped out to go and get the HRS form as we call it, or if at this particular juncture—

At some point in this conversation she said, "There is [are] a few things you need to know."

And I said, "Well, what are those things?"

And I said—

She said that "One, you have to—other people in the area are padding their hours. You need to know that." [Ryan denied making this statement.]

And I said, "Well, what do you mean, padding their hours?"

"Other people are putting in more time."

And I said, "Okay, who might those people be, so that I can follow up on that?"

"Well, just other people in the office." And she wouldn't give me any more details.

And I said, "All right." I said, "I appreciate you sharing that with me."

I said, "I understand, you know, it's something that we need to follow up on, you know. But the facts still remain about your particular situation."

.....

And so then at that point, I went to go and get the HRS form.

And when I came back, she was standing at that point.

And she said, "I really can't sign anything. I don't feel right signing something that—when I don't know that I did anything wrong."

And I said, "I understand." I said, "Why don't you—you know, you don't have to sign anything right now."

I said, "Why don't you—

This was on Friday, I believe. And I told her that if she would like, she could think about it over the weekend and she could then call me on Monday and let me

know what decision she would make as far as whether we processed it as a termination, or we processed it as a resignation.

And so that was the end of that particular conversation.

Q. All right. And now during that conversation, did you and she discuss at all, any possible reasons for the discrepancy between the hours observed and the hours recorded?

A. Uh, I do know that there was a discussion. I don't remember if it was one of the following phone conversations with her, or whether it was the discussion that evening.

She had asked me about how it was that she was observed.

And I had told her that she had been observed—

And I wasn't exactly sure who by. I know that loss prevention might have been involved. And I know that Christine McDermott had observed. I knew that from some of the documentation that Christine McDermott had shared with me.

And I knew that people had seen her. I didn't tell her who.

But people had seen her when she came into package pickup and down to the office, and then when she had left for that day, and left the building, and out of the personnel office.

And so that is as much as she questioned in terms of the hows and whys and all of that.

I don't know if that answered your question.

Q. Well, did she give you explanations for other parts of the time, as to where she was or what she was doing?

A. No.

Q. And did she mention to you that she took work home?

A. No.

On cross-examination, Michael Wade gave the following testimony regarding his February 19 meeting with Ryan:

Q. All right. Now, when you met in your office in the evening with Darlene, did you at that time, have the recall of the exact dates in question?

A. (No response.)

Q. The exact dates in which Darlene Ryan was alleged to have falsified her time?

A. I had—I knew that there were five dates.

Q. All right. Well, my question—

A. That's as much as I knew.

Q. My question is, did you have then a recall of the exact—

A. Of the exact dates?

Q. Yes.

A. No.

Q. So I take it then, that you weren't able at that time, to ask Darlene Ryan specific questions about her activities on those dates?

A. Yeah, I asked her—

Q. You didn't know what dates they were.

A. No. But I asked her. I said, "There were five occasions on which you put in more time than what you actually worked."

Q. I mean—

A. "Tell me what happened."

Q. But you didn't tell her what dates those were, at that time?

A. No, I did not.

Q. All right, So you couldn't have asked her about her activities on those particular dates then, is that correct?

A. Sure I could. I could ask her in a general fashion.

Q. You couldn't have asked her about her activities on those specific dates, if you didn't know them, sir. That's my point.

Is that correct?

A. That's correct.

Q. Okay. Now you say that during that meeting Darlene Ryan told you that there were . . . things that you needed to know.

A. Uh-huh.

Q. One of them was that other people in the area were cutting hours.

What area was she referring to?

A. The personnel office.

Q. And you asked her for names, but she declined to give them, is that correct?

A. That's correct.

Q. Okay. And what steps, if any, did you take to determine whether or not Darlene Ryan was telling the truth about this further padding of hours, or this dishonesty?

A. I went back and I asked Christine McDermott if she had reviewed everyone's hours, which I knew that she had been doing.

And she had told me that she didn't find any other irregularities.

. . . .

Q. Now, in one of your conversations with Darlene Ryan, she asked you how it was that she was observed.

And you said that you weren't sure who had made the observations, is that correct?

A. No, I didn't say I wasn't sure.

I told her that she had been observed when she came in and when she left.

Q. When you imparted that to Darlene Ryan, did you then have knowledge yourself, of who had made those observations?

A. I knew that Christine McDermott had made some of those observations.

Q. That's all you knew?

A. Yes.

Q. All right. And did you at any time talk to Trudy Mason yourself, concerning the situation regarding Darlene Ryan, and the hours?

A. No.

On Monday February 22 Michael Wade telephoned Ryan in the morning to ask whether or not she was going to resign. She gave the following testimony about this conversation and two other telephone conversations she had with Michael Wade later that same day and the next day:

A. He called me at 10:00 in the morning. And he apologized for calling late. Because we had a bad snow storm. And he had just gotten to work.

He asked me if I had a chance to think about what we had discussed on Friday.

Q. What did he say?

A. And I said, "Yeah, I thought about it." I said, "I'm not going to resign."

And he said, "Was there anything he could do for me?"

And I said, "I would like to know the dates that I was accused of. And I would like my file."

And he said, "I will check on it. And I will call you back." And he did.

He checked on it, and called me right back—well, within whatever—an hour or whatever.

Q. And when he called you back, what did he say?

A. I asked if my husband could pick up my file for me, and he said, "No. That is of a confidential nature. You can come in and pick it up."

And he gave me the five dates that I was accused of cheating on my timekeeping.

And then he asked if—

He said, "I'm not going to do anything with the time. We're not going to key anything in on you. I want you to think about it the rest of the day. Because the system isn't going down until tonight anyway. Think about it. I will see to it that nobody keys anything in. And I will call you back."

And he did.

Q. When did he call you back?

A. In the afternoon.

Q. And what did he say at that time?

A. He asked me how I was doing, and if I had thought anymore about it.

I said, "I'd like my—

He asked if he could help me, if there was anything that he could do.

And I said, "I would like my pension years." And I stopped.

And then he said, "I'll get them for you."

And then he called me Tuesday morning and left word—

Q. And that would be Tuesday, February 23rd?

A. Yeah. That he had them. And he left word on my machine. "This is Michael. I've got what you need. Give me a call."

As here pertinent, Michael Wade gave the following testimony about his February 22 and 23 telephone calls to Ryan:

And I remember, I think that I arrived late that Monday, and asked if Darlene Ryan had called. I asked my secretary, or whoever happened to be in the office. I think it was my secretary.

And she said that no, Darlene had not called.

And so I waited an hour or so, just to see if she would call me.

I really wasn't expecting a phone call. But—

So I called her.

And again, I asked her how she was doing. She said that she hadn't slept all weekend. She was very upset. That she felt like she was being picked on.

I told her that I felt badly that she felt that way, that nobody was trying to pick on her, that I wanted to

know if she had come to a decision as to how she would like me to handle this.

And she said, "Well, I can't resign." She said, "In my heart I don't believe that I did it. And I can't do that."

And I said, "Okay."

She went on to ask me about—

And at that point, I didn't know quite how to handle it myself, over the phone, in terms of how to process the termination or resign.

And so at that point, she asked me a few more questions.

She wanted to know what dates were in question. And I said that I didn't have that right in front of me, but that I could get those for her.

. . . .

And she also asked me about her SRSP, which is her supplemental retirement and savings plan.

And she in fact had asked me about that the night before too, what would happen with that.

I had told her that I didn't know.

All right. She has asked me about that supplemental retirement savings plan piece before, that previous Friday, when I had first talked to her.

But I told her that I wasn't sure, but that I would get that information for her.

And so I told her that I would call her back.

So I called her back within an hour or two, and told her that—gave her the five dates that were in question.

She had not asked for those previous—

. . . .

And then that the SRSP info, I still needed to check on and let her know about that.

And then I went on to let her know that at this point, I needed to go ahead and process this.

And again, I believe, in this conversation, she just said, "I can't resign."

And I said, "That's fine. Then if I don't hear from you by the end of the day, it will be processed as a termination."

And she said, "That's fine. You do what you have to do."

And I said, you know, "I appreciate your understanding."

That was the end of that particular conversation.

That was the last phone call or conversation that I had with Darlene.

I did call her that following day and left a message on her home machine, that I had her file ready for her, and that I also had the SRSP information with it, waiting for her, when she was ready to come in and pick it up.

Subsequently Michael Wade testified that when Ryan asked for the five specific dates on February 22 he had to go to McDermott to get this information.

Ryan testified that twice a week she did not take her full lunch hour but rather she would work in the store; that she did not take work breaks other than a lunchbreak; that in 1992 and 1993 she would take store work home with her about three times a week and on average she would spend 30 minutes to 2 hours working at home on store work; that

80 percent of the time she did not seek compensation for the extra work, because “[i]t wasn’t a money issue for . . . [her]”; and that she loved her job and loved working with the employees at the store. On cross-examination Ryan testified that things she would take home to work on included changes that were taking place in benefits, the mail received that day, and current stock standings; that the store work she did at home consisted of reading, correspondence, and an occasional telephone call; that Respondent did not require that she take work home; that Mason and Bencotter would key in the time Ryan worked at home on the 20 percent for which she was compensated; that the managers she had before McDermott authorized or approved her being paid for working at home for the 7 years she was in personnel; that the personnel manager before McDermott, Durdre Pitts, told her, Ryan, to make sure that she put in for the hours she worked at home on store matters; that she did not recall discussing it with McDermott; and that she assumed McDermott was aware of it.<sup>14</sup>

Regarding what allegedly led up to Ryan’s termination, McDermott testified that she first became concerned about Ryan’s hours being reported in January 1993 when she was monitoring timekeeping to make sure there was no overtime in the office; that she personally observed Ryan’s actual hours of work on specific days and she had Mason observe Ryan on the days she, McDermott, was not at work; that normally employees in her department would record their hours by punching in and out on a timeclock; that she reviewed timekeeping sheets which cover the 5 days in question, Respondent’s Exhibits 2, 4, and 8;<sup>15</sup> that she personally observed Ryan on January 12 and she memorialized her observations, Respondent’s Exhibit 3;<sup>16</sup> that she could not remem-

<sup>14</sup> McDermott testified that employees in personnel do not take work home, at least no that she is aware of; that she could not think of any circumstance which would require an employee in personnel to take work home; and that since she has been in charge of personnel, no employee has asked for authorization to get paid for work done at home. McDermott also testified that it was part of Mason’s responsibility to work on the company paper; that she did not know if Mason worked at home on the paper; and that she was not aware that Mason put in for hours worked on the paper at home. Mason, who as stipulated by Respondent was a supervisor when she worked in personnel and who punched a timeclock, testified that she had a computer terminal at home at the time she worked at the Summit Place Mall store; that she worked on Hudson’s newsletter on her home computer; that she was paid by Respondent for the time she spent working at home on the newsletter; that “Christine McDermott would take care of—[her, Mason, getting paid for working on the newsletter at home]. . . . I would tell her keep track of all my hours that I would work, and she would give me a day off. Then she would put in exception time for that”; that McDermott was well aware that she, Mason, was working at home on the newsletter; and that McDermott would make sure that she, Mason, would get [paid for the time spent working at home if she did not get comp time]. . . .”

<sup>15</sup> It was explained that the “EX” after the hours on the exhibits means that these exception hours had to be manually keyed into the computer system either because the timeclock did not accept the number or the employee did not punch the timeclock.

<sup>16</sup> A copy of R. Exh. 3 is attached hereto as Appendix A. The appendix is a copy of typed notes. McDermott’s original handwritten notes were not retained and, therefore, they were not made available at the hearing. On voir dire McDermott testified that she typed the original of R. Exh. 3 either the evening of January 12 or on January

ber when Mason gave her Respondent’s Exhibit 5, which is a copy of Mason’s typed observations for January 11 and 26, covered more fully, infra; that she did not have Respondent’s Exhibit 5 when she talked with Ryan on February 18; that she had the dates when she spoke to Ryan but she did not have a handwritten version of this document; that she was not certain, she did not know if Respondent’s Exhibit 5 was actually typed up after her February 18 conversation with Ryan; that as of February 18 Mason had told her about her, Mason’s observations and Mason had “scrap paper that she had written it down on. . . . [b]ut the actual formal written documentation, I can’t recall if I had that”; that she personally observed Ryan on February 9 and she typed a document containing her observations, Respondent’s Exhibit 6;<sup>17</sup> that she was not sure if the copy of Respondent’s Exhibit 6 which she forwarded to Carroll had her name on it; that while she typed her name on Respondent’s Exhibit 6, she did not know when she did it; that she used a typewriter not a computer to type the upper part of Respondent’s Exhibit 6; that she has a typewriter and not a computer; that she typed Respondent’s Exhibit 6 either on February 10 or 11; that her handwritten notes regarding her observations on February 9 were made on that day and she did not retain them; that while Respondent’s Exhibit 6 states, in part, “She [Ryan] keyed 8 exception hours for herself,” she, McDermott, did not remember, did not know if she observed Ryan doing that;<sup>18</sup> that when she originally typed Respondent’s Exhibits 3 and 6 she did not type her names on the documents and “[s]o I went back and obviously used a *different typewriter* in the personnel office, and my name came out that way on it” (emphasis added); that she typed her name on Respondent’s Exhibits 3 and 6 at the same time; that she personally observed Ryan on February 12 and she typed a document containing her observations, Respondent’s Exhibit 7;<sup>19</sup> that she typed the top part of Respondent’s Exhibit 7 “close to the 12th,” “I don’t know if it was that evening, that day or the next day [b]ut it was off my hand written observation of the date”; that she did not save any of her notes; that she typed her signature at a later date at the same time she did the other documents; that while Respondent Exhibit 7 reads, “Darlene keyed 8 exception hours for herself,” McDermott did not remember if she saw Ryan key after February 12 testifying “I don’t know. I can’t remember”; that Ryan told her

13; that she faxed this memorandum to Jackie Wade but she could not remember when except that it occurred prior to Ryan’s suspension; that she either faxed or sent by Federal Express a copy to Timothy Carroll, one of Respondent’s attorneys, but she could not remember when she sent it other than it occurred after Ryan’s suspension and while McDermott’s name is typed on R. Exh. 3, her name is not typed on the copy she forwarded to Carroll which was subsequently attached to a position statement Carroll forwarded to the National Labor Relations Board (the Board) in September 1993. McDermott testified that when she originally typed R. Exh. 3, she did not type her name on it; and that subsequently she used a different typewriter to type her name on the memorandum. McDermott also testified that while her memorandum, R. Exh. 3, states “[s]he keyed: 8 hours exception hours for herself,” she, McDermott, did not remember if she observed it or not.

<sup>17</sup> A copy of R. Exh. 6 is attached hereto as Appendix B.

<sup>18</sup> McDermott conceded she would have to be close enough to the computer screen to see what was being inputted. She asserted “[i]t’s normally that I’m there when timekeeping is being input.”

<sup>19</sup> R. Exh. 6 is attached hereto as Appendix C.

on February 18 that she keyed her own exception hours; that, in view of the fact that it was pointed out to her, McDermott, that the February 18 conversation occurred after she allegedly drafted her memoranda, McDermott then testified that she thought she had a conversation with Ryan before February 18 where Ryan, told her she keyed her own hours;<sup>20</sup> that while the timekeeping she had seen for February 12 had 8, exception hours for Ryan, the timekeeping sheet she sponsored at the trial here, Respondent's Exhibit 8, plainly shows that 7.8 exception hours are keyed in, not eight; that she saw a timekeeping document similar to Respondent's Exhibit 8 which had 8 exception hours for Ryan for February 12 but she could not remember when she saw it; that as of February 18 she positively had Respondent's Exhibit 8 in her possession; and that on February 18 Ryan told her that she had mistakenly keyed in 8 exception hours for February 12 and she went back and corrected it. With respect to who was aware of the alleged problem with Ryan's hours as of January 1993. McDermott testified that in the beginning of January 1993, she did not know the date, she told Jackie Wade about her observations, namely, she, McDermott, saw Ryan "coming in and leaving, and then eight exceptions hours showing [sic] up on the timekeeping"; that Jackie Wade told her to monitor it and document it; that she asked Mason to observe Bencoter and Ryan; that she did not recall if Mason drafted any memorandum with respect to Bencoter; that in the beginning of January she asked Mason "to be sure that everyone is taking their lunch breaks, what time they come in and what time they leave" on the days that she, McDermott, was not in the office; that she asked Mason to "surveil [sic] the activities of employees sometime in January . . . [and] it was not directed specifically at . . . Ryan at that time"; that she had asked Mason, who as office manager, was observing everyone in the office; that she dis-

<sup>20</sup> McDermott testified a second time that she had a conversation before February 18 about Ryan keying her own hours. McDermott gave the following testimony on cross-examination about this assertion:

What conversations did you have with the Charging Party on a previous occasion [before February 18] about keying in hours?  
A. (No response.)

Q. What was the nature of those discussions?

A. I can't remember how it came up.

Q. Well, do you remember what was said in connection with the keying in process on those occasions?

A. No. I can't remember.

Q. How about the dates of those discussions?

A. No.

Subsequently when questioned as to why she would ask Ryan on February 18 if she keys her own hours if she, McDermott, already knew that for a fact, McDermott, as noted above, gave the following testimony:

A. Because I was questioning the events as to what led up to the eight hours being keyed.

I was asking her for any explanation that she had as to why I could observe her working seven hours, and her keying eight.

Also, McDermott testified that there was nothing in writing which prohibited an employee from keying in their own hours; that Mason and Bencoter told her on separate occasions before Ryan's suspension that they do not key their own hours; that Bencoter and Mason told her that keying in one's own hours "is just something that they just don't like to do in personnel"; and that she could not recall if either Mason or Bencoter mentioned that they keyed in Ryan's hours, but it is possible they said that.

cussed the situation involving Ryan's hours with Brenda McNamara, the head of security, sometime in January 1993 because Jackie Wade had asked her to inform loss prevention; that she could not recall what date she spoke to McNamara but she did recall telling McNamara specifically about Ryan; that prior to suspending Ryan she spoke to Michael Wade but she could not recall the date of the conversation; that Jackie Wade told her to inform Michael Wade about the situation and she, McDermott, told Michael Wade that she had spoken with Jackie Wade who asked her, McDermott, to observe and to document her observations; and that Michael Wade asked her specific questions as to what instructions Jackie Wade had given her and she told him. And finally McDermott gave the following testimony:

Q. Is there anyone in Respondent's management besides Jackie Wade, Michael Wade, and Brenda McNamara, with whom you discussed the Darlene situation before Darlene was suspended?

A. No, I don't believe so.

Mason testified that she began observing Ryan about January 11 when McDermott was not there; that McDermott told her "that it's been brought to their attention that Darlene had been inputting time that she didn't work; that McDermott said she had been "reviewing the timekeeping. . . . every morning. . . . [a]nd she said that the times that. . . . [Ryan] had exception hours, were more than the times that she had worked"; that she typed Respondent's Exhibit 5<sup>21</sup> from a handwritten statement after McDermott told her it should be typed; that a couple of weeks after she typed Respondent's Exhibit 5 at McDermott's behest she, Mason, typed her name on it; that she observed Ryan on January 11, made notes of her observations and gave them to McDermott; that she gave her handwritten notes regarding her January 11 observations of Ryan the next day; that McDermott gave the handwritten notes back to her because she, McDermott, felt they should be typed up; that she and not McDermott typed up these notes; that she then gave McDermott the handwritten and typed notes; that she typed both the January 11 and the January 26 entries on the same piece of paper at the same time which was sometime after January 26; that she gave McDermott her handwritten notes of her January 26 observations on January 27; that she believed that McDermott gave her back her handwritten notes for January 11 and 26 sometime in February 1993 to type them; that she returned the handwritten notes and gave McDermott the typed observations about 20 minutes later that same day; that she saw Ryan key in her own exception hours on January 11; that she observed Ryan key her exception hours for January 26 on the following Monday; that she added her observation about the exception hours for January 26 on or after on February 1;<sup>22</sup> that she typed the entry on Respondent's Exhibit 5 for January 11 on a typewriter in the office, which typewriter she does not normally use; that she typed her name using a dif-

<sup>21</sup> A copy of R. Exh. 5 is attached hereto as Appendix D.

<sup>22</sup> Subsequently, Mason testified that she added her handwritten observation about Ryan giving herself an exception for 8 hours right there in McDermott's office so that McDermott allegedly had continuous possession of the handwritten notes from the time they were drafted, except for the 20 minutes Mason had them to type R. Exh. 5.

ferent typewriter “[b]ecause . . . [she] probably just went to the first one that . . . [she] came to, to put her name on it”; that McDermott might have used the same typewriter for the body of her memoranda because the typewriter she, Mason, used is the typewriter in the office which everybody uses; that the typewriter McDermott used to type her name, which type is different than used for the observations, looks like the same type she, Mason, used to type her name; that this is a coincidence; that the typewriter used for the body of the memorandum is located in her office and the typewriter which was used for the names is in the outer office; that McDermott does not have a typewriter in her office so she uses Mason’s typewriter; that when she first started working in personnel in another of Respondent’s stores the first thing she was told was that it was a rule that you do not input your own time; and that she had seen Ryan input her own time other than on January 11 and 26 but she, Mason, never mentioned the aforementioned rule to Ryan “because she [Ryan] was a personnel representative before, just like I was. So she knew the rules.” On cross-examination Mason testified that about 1 or 2 weeks after she started working at the Summit Place Mall store in October 1992 she noticed Ryan inputting her own hours; that McDermott asked her just to monitor Ryan; that she did not observe Ryan’s activities during her lunch hours; that she did not know that Ryan did from the time she punched in the morning until she arrived in the personnel office; that if Ryan was meeting with employees outside the personnel office regarding personnel matters she would not have seen that; and that she did not know if Bencotter input hours for Ryan but if she, Bencotter, did she, Mason, did not see it.

Michael Wade when asked on direct when he first became aware that McDermott had some concerns about timekeeping by Ryan gave the following testimony:

And so in reviewing the overtime and all of that with Christine McDermott, at one of our normal touch bases that we have, she had said that she was monitoring her time.

She had some overtime. And she had noticed some irregularities. And she was going to monitor those irregularities.

She noticed that people were inputting more time than they —

She didn’t specify who at that time. But she just said that she was going to monitor it.

She had talked to Jackie Wade. And she just wanted to know how to handle it.

And basically, it was just to observe it and document whatever she found.

Michael Wade further testified that this occurred in January 1993; that either later that month or in the early part of February 1993 McDermott told him that she had some documentation that Ryan had input some time that she had not worked and she, McDermott, was conferring with Jackie Wade on how to proceed; that the next conversation he had with McDermott about this matter was on February 17 or 18 when she told him she would be talking to Ryan to find out why this was happening; that he first learned that McDermott suspended Ryan after McDermott spoke with Ryan on February 18; and that on February 18 when McDermott told him

about the suspension she told him what documentation she had on the specific incidents. On cross-examination Michael Wade testified that in January 1993 McDermott told him that she was suspicious about the inputting of hours but he did not ask her which employees were involved because he did not think it was that important at that point; that he asked McDermott if she had any proof and she replied that she had observed some things, it was a “hunch”; that McDermott told him that she told Jackie Wade who said that she, McDermott, should start to document her observations; that McDermott did not mention names and he did not ask at that point in time; that he had no knowledge that Ryan was going to be suspended until after she was suspended; that he knew McDermott had documentation going into the meeting with Ryan on February 18 but he did not recall seeing the actual documentation then; that he had seen “time sheets” in the form of McDermott’s notes which actually was just a list of dates; that he saw the dates written on a sheet of paper on McDermott’s desk and he just glanced at it “I didn’t really pay attention to it”; that McDermott said she had the documentation for the five dates but as of the date of Ryan’s suspension he had not seen Respondent’s Exhibits 3, 5, 6, and 7; and that he did not recall when he first saw these documents but it was some time “after the incident” and he believed it was after Ryan was terminated but he was not sure.

Regarding who decided to terminate Ryan, Michael Wade testified on cross-examination that it was his and Jackie Wade’s decision to terminate Ryan; that “*I know Jackie Wade had conferred with some people in Minneapolis but I did not know who [b]ut it was Jackie and myself, primarily*”<sup>23</sup> (emphasis added); that the decision “was a collaboration, looking at what documentation we had”; that this collaboration occurred between the time Ryan was suspended on February 18 and when he met with Ryan on the evening of February 19 and again after he met with Ryan on February 19; that his collaboration with Jackie Wade after he met with Ryan on February 19 occurred the following day— “[t]hat was a Saturday though. So I don’t know, it might have been that Monday. It was either on that Saturday or that Monday. I don’t recall”; that after he met with Ryan he told Jackie Wade by telephone that Ryan did not have anything else to offer and he told Jackie Wade how he proceeded, namely, he offered Ryan a resignation and told her that if she did accept that approach he would be terminating; that Jackie Wade agreed that was the way to proceed; that he had decided that if Ryan did not offer any more information to him on February 19 he was either going to discharge Ryan or offer her an opportunity to resign when he talked to Jackie Wade the first time after Ryan was suspended; that when he made the decision he had not seen the memoranda regarding observations of Ryan, he had not seen the timesheet in question, he had only glanced at the five dates in question written on a piece of paper and he had not yet spoken to Ryan; and that his information at that point was based on his conversation with McDermott and his conversation with Jackie Wade and glancing at a piece of paper with five dates written on it.

<sup>23</sup> On direct Michael Wade testified as follows when asked who made the decision to terminate Ryan: “Uh, myself and Jackie Wade.” He went on to testify “[a]nd she [Jackie Wade] may have consulted someone else. *But I don’t know that.*” (Emphasis added.)

With respect to who decided to terminate Ryan, McDermott gave the following testimony<sup>24</sup> on cross-examination:

Q. Well, who made the decision to discharge her [Ryan].

A. Jackie Wade.

Q. And when did she make that decision?

A. It was after the suspension.

I don't know if it was the day after, or the next day.

I don't know.

I am not sure of the date.

Q. Was it two days?

A. No, not necessarily. I don't know.

Q. How were you informed of the decision to discharge?

A. Michael told me.

Q. When did he tell you?

A. I don't know if—

The following week? I don't know.

McDermott testified that as personnel manager she terminated an employee in 1992 who had worked for Respondent between 3 and 5 years when he told his manager in receiving, who was doing the timekeeping, that he, the employee, had worked more hours (2 or 3) than he actually had and he asked two people who knew when he came in that day, which two people unbeknownst to the employee were investigators, not to tell his manager what time he actually came in. The employee did not punch in that day. Michael Wade testified that this other employee was suspended by the store's loss prevention manager and then subsequently terminated for his actions.

On rebuttal, Ryan testified that she had observed two other people in the personnel department, Mason and Bencoter, input their own exception hours; that on February 18 during the meeting when she was suspended McDermott asked her if she, Ryan, "was socializing before . . . [she] came in, in the morning"; that she told McDermott "No"; that there were occasions when one half hour or more lapsed from the time she entered the store and when she entered the personnel department; that on those occasions she did such things as put up posters dealing with the blood drive on January 12; that when she met with McDermott on February 9 regarding the Clausen transfer McDermott had the transfer that Ryan had faxed to Northland with the confirmation stapled to it; that with respect to Respondent's Exhibit 5, she recalled that she punched in at 8:30 a.m. on January 11 and she arrived at the personnel office at 9 a.m.; that between 8:30 and 9 a.m. on January 11 she picked up inventory sheets in security so that she could tabulate them to determine the pay of people who had worked on inventory on Sunday; that she had a hair appointment scheduled for January 11 for 5:30 p.m. but she did not leave the office until 5:35 p.m., because the beauty salon telephoned her and informed her that her hairdresser was running late; that on January 12 she punched in at 8:30 a.m. and she put up blood drive posters in a "bunch of house areas in the store" before entering the personnel department at 9 a.m.; that contrary to Respondent's Exhibit 3, she left the personnel office at 5:15 p.m. on January 12 and

after her nail appointment in the beauty salon in the store, which is located down the hall from the personnel department, she went back to the personnel office, compiled benefit enrollment forms (it was open enrollment season), took off the first two sheets, put them in an envelope, took them to the mailroom, and then took all her mail home with her; that she spent about 20 minutes in the personnel office on January 12 after her nail appointment; that the evening of January 12 at home she spent 30 minutes to 1 hour going through the appointments she had to keep, making notes as to who she had to reach the next day regarding help doing the inventory, because volunteers had not responded as much as expected, setting up an itinerary of things she had not been able to accomplish that Tuesday, and telephoning one or two people at Lakeland Band Boosters to make sure they were lined up for inventory; that on January 26 she arrived at the store about 8:50 a.m. and entered the personnel office at 9 a.m.; that she did not take 1 hour for lunch on January 26 as noted on Respondent's Exhibit 5, but rather she took only 30 minutes, because she had to get back to people regarding the inventory routine and she discussed, on the way back to the office, a problem with a saleslady on the main floor who had signed up for the wrong benefit, discovered she was pregnant and wanted to switch companies; that at home on the evening of January 26 she worked for 45 minutes to 1 hour on what was owed to various groups for helping with taking the store's inventory; that Bencoter keyed her, Ryan's, hours for January 11, 12, and 26; that this keying was done on the Monday following each of these days; that on February 9 she left personnel at 5:15 p.m. and took home all that she had not been able to work on that day (mail and the following day's itinerary), because she was upset about what her conversation with McDermott regarding the Clausen transfer; that she did work related to the store at home for 30 minutes on the evening of February 9; that on February 12 she, Bencoter, and Mason all left at 4:50 or 4:55 p.m.; that Monday, February 15, she keyed in the exception hours for February 12 giving Bencoter 8, herself 8 and Mason 8; that she realized that she had not worked 8 hours on February 12 so during the morning of February 15 she "zeroed . . . [the 8 hours] out, and went back in and keyed 6.9"; that she had no knowledge how the 7.8 exception hours were inserted for her February 12 time on Respondent's Exhibit 8, which is a daily timesheet;<sup>25</sup> that five people in her office and four in the central office have access to get into the time records on the computer; and that whoever is sitting at the terminal would input the exception hours for the office, which had been the practice for the 7 years she had been in personnel. On cross-examination Ryan testified that she did not remember when she arrived at work and when she left work on February 9. On redirect Ryan testified that in her meetings, with McDermott (February 18) and Michael Wade (February 19) she did not offer them explanations of her whereabouts and activities on January 11, 12, and 26 and February 9 and 12, because "I didn't know those dates. And I didn't know what I was being accused of. . . [and] I didn't realize that one was needed"; that after Michael Wade gave her the five dates on February 22 she, during the next

<sup>24</sup> Michael Wade was in the room when this testimony was given and he testified after McDermott testified.

<sup>25</sup> An exception report is also generated daily by the departments. This report shows timeclock punches or the lack thereof. Also on Mondays there are cumulative exception reports for the whole week.

3 weeks, attempted to piece together what she had done on those days; that she subsequently gave this information to the lawyers and other legal representatives; and that she did not make the same effort to go through and recollect her daily activities on other days in January and February. Subsequently, Ryan testified that on January 12, while she was in the beauty salon, she saw McDermott pass by and go home.

Ryan testified that she never in fact cheated her Company with respect to the recording of the hours she worked.

#### Contentions

On brief, the General Counsel contends that McDermott should be discredited wherever her testimony contradicts the Charging Party's since (A) Mason's testimony establishes that McDermott lied under oath regarding (1) her knowledge with respect to people in her personnel department doing company work at home and being paid for it, (2) asking Mason to observe anyone in the personnel department other than Ryan, and (3) Mason telling her that Ryan keyed her own exception hours; (B) McDermott's admitted ignorance about the many subjects and "any witness who claims such a profound lack of knowledge about the essential matter at issue is either too mendacious or too unreliable to deserve credence"; and (C) the documentary evidence which McDermott advanced was suspicious in origin and appearance;<sup>26</sup> that the lack of due process bespeaks pretext; that the timing, just 9 days after Ryan's discussion with McDermott about the Union and the furniture department, implicates the Company; that consideration should be given to the fact that neither Jackie Wade nor McNamara was called as a witness to corroborate McDermott's story that she developed a suspicion of Ryan in January; that Respondent failed to explain why, if Ryan's alleged problem started in early January, it waited 5 weeks to take action when it acted immediately on the only other termination for theft of time known to McDermott and Michael Wade; that McDermott began to simulate surveillance of the Charging Party's timekeeping practices only after hearing of Ryan's role in Clausen's transfer application; that there is only one reason why Respondent would "sweep out a dedicated and admired employee with such callous expedition"; that as Boram suggested, this

<sup>26</sup> More specifically, at Br. 20, counsel for the General Counsel contends as follows:

testimony about the preparation of these memoranda [R. Exhs. 3, 5, 6, and 7]—when the notes were written, what happened to the handwritten notes, when and by whom the notes were typed, at whose instruction, at which typewriters, when the authors' names were added, and when Michael and Jackie Wade saw the final typed copies—tends to cloud the picture rather than illuminate it.

And at Br. 21 she contends

McDermott virtually confessed that she had no basis for concluding prior to February 18 that the Charging Party herself had entered false numbers in the timekeeping system. (Tr. 178–180, 186–188.) This implies that the memoranda were not typed from contemporaneous notes drafted on or about January 11, 12, 26 and February 9 and 12, as McDermott contended, but were *manufactured* after February 18, to buttress the Company's case against the Charging Party. The convenient disappearance of the handwritten originals, and the strangely similar appearance of the typed versions, undermine the genuineness of the memoranda as well. [Emphasis added.]

Company is willing to go to great lengths to avoid unionization; that as set forth on page 23 of her brief, Respondent

was particularly paranoid in February about the impact that closure of the furniture department would have on employees' union sentiments. Michael Wade admitted that management concertedly—and misleadingly—tried to dispel such rumors. A transfer application by a senior furniture department worker such as Clausen would promote the rumors, however, and create job insecurity on which the UAW could capitalize. Had Summit Place's upper-level managers known in advance that Clausen wished to submit her transfer application, they would have been able either to scuttle the effort or to keep it confidential. When the Charging Party became involved, however, the matter was no longer secret or controllable. As a result, management was panic-stricken, as McDermott plainly exhibited to the Charging Party on February 9;

that since an employees' protection under the Act does not depend on the subjective reason that the employee engaged in the activity for which he was unlawfully disciplined, it does not matter that Ryan did not favor the Union or intend her action to advance its cause; that it does not matter that Ryan's action taken alone or evaluated in another context, may not give rise to Section 7 rights; that, as set forth on page 24 of her brief,

[T]he essential ingredient in the instant case is that the Company viewed her action as conducive to union organization. Its retaliation against her based on its perception of the import of her conduct constituted discrimination to discourage employees' union activity in the literal terms of the statute. The Company's punishment of the Charging Party for her inadvertent assistance to the UAW is just as contrary to the language and spirit of Section 8(a)(3) as would be punishment of an employee for happening to cross an intersection during a union parade, or for offering to babysit for a striker's child while the striker is on picket duty. The common denominator is that, in the mind of the employer, the employee's activity furthers a union objective;

and that Respondent violated Section 8(a)(3) of the Act when it terminated Ryan because she unwittingly made common cause with the UAW.

Respondent, on brief, argues that the General Counsel is seeking a limitless and unwarranted extension of Section 8(a)(3) of the Act since Ryan did not engage in protected or union activity and the situation at hand is not included in the only recognized exceptions, namely, when the alleged discriminatee has been discharged or otherwise discriminated against (1) because a relative or close associate has engaged in protected conduct, (2) to conceal other discriminatory discharges, or (3) as a consequence of the discriminatory discharge of other employees; that even if the General Counsel's complaint asserts a viable legal theory, substantial evidence that any union-related concern was a motivating factor in Hudson's decision to terminate the Charging Party was not presented; and that the General Counsel can establish a violation if it is demonstrated that the reason given was a pretext

for discrimination or in other words, as Respondent argues at page 35 of its brief,

the General Counsel's legal theory is accepted and if it was established that Hudson's framed Ryan for time falsification when it was actually motivated by Ryan's processing of Clausen's transfer request, there would be a violation of § 8(a)(3). However, the testimony of McDermott, Wade and Mason clearly establishes that Hudson's began to monitor Ryan's timekeeping practices in *early January*. Plaintiff testified that the Elaine Clausen incident occurred on *February 5, 1993* [Tr. 71]. Therefore, the argument that Hudson's contrived a scheme to get rid of Ryan after the Clausen incident is rebutted by the unequivocal testimony concerning the chronology of events. [Emphasis in original.]

#### Analysis

In my opinion, Respondent violated the Act as alleged.

Respondent's witnesses, in testifying herein, contradicted themselves and each other. I did not find any of the three to be a credible witness.

When pressed on cross-examination regarding the statement in one of her typed observations that Ryan keyed 8 exception hours for herself, McDermott asserted that while she could not remember Ryan doing it she, McDermott, was told by Ryan that she keyed her own exception hours. When it was pointed out to McDermott that Ryan made this statement on February 18, which was supposedly after McDermott's memoranda were drafted, McDermott sought refuge in the assertion that Ryan told her before February 18 that she, Ryan, keyed her own exception hours. As pointed out in footnote 20, *supra*, McDermott could not supply any information about these alleged conversations. Moreover, McDermott could not adequately explain why, if she knew before February 18 that Ryan keyed her own hours, it would have been necessary for her, McDermott, to ask Ryan on February 18 "if . . . she does her own exception hours." It is one thing to ask Ryan if she keyed her own exception hours on specific days. It is quite something else to ask Ryan "if . . . she does her own exception hours." It is highly unlikely that if McDermott and Ryan had had prior conversations about Ryan keying her own exceptions, McDermott would be asking on February 18 "do you key your own exception hours."<sup>27</sup>

McDermott also testified that she asked Ryan on February 18 whether she was taking care of business before she walked into personnel. Subsequently McDermott testified that on February 18 she asked Ryan if she was visiting with peo-

ple before coming into the personnel office; and that she asked Ryan "[w]hat are you doing before you come in." Then McDermott testified that she was not sure of the exact words used and she did not know if Ryan interpreted her question to be whether she, Ryan, visited recreationally with people before she walked into personnel.

While McDermott testified that on February 18 she did not have a handwritten version of Mason's observations,<sup>28</sup> Michael Wade testified that McDermott said she had the documentation for the five dates but as of the date of Ryan's suspension he had not seen Respondent's Exhibits 3, 5, 6, and 7. Mason testified that she gave her handwritten observations for January 11 to McDermott on January 12 and for January 26 or 27; and that her notes were in McDermott's office, except for 20 minutes when Mason typed the observations.

McDermott is contradicted by Mason on two other points. First, while McDermott claims that she did not know anything about anybody doing work at home and being paid by Respondent for doing work at home, Mason testified that not only was McDermott aware that she, Mason, did work at home for Respondent for pay, but McDermott personally saw to it that Mason received either comp time or pay. Second while McDermott testified that she did not tell Mason to observe only Ryan, Mason testified that McDermott asked her just to monitor Ryan.<sup>29</sup>

Michael Wade, in testifying about his conversations with Ryan after she was suspended, testified that he knew that McDermott had observed Ryan—"I knew that from some of the documentation that . . . McDermott had shared with me."<sup>30</sup> At another point, however, Michael Wade testified that the only documentation he saw before he told Ryan she was to be terminated was a list of dates which he just glanced at; and that when he made the decision to terminate Ryan he had not seen the memoranda regarding observations of Ryan.

At one point Michael Wade testified regarding his February 19 meeting with Ryan that "we want[ed] to make sure that she . . . [had] the opportunity to tell us what happened." Subsequently Michael Wade, on cross-examination, begrudgingly conceded that he did not even know all of the five dates in question when he spoke with Ryan on February 19 so he could not have asked her about her activities on those particular dates.

At one point Michael Wade testified that he did not know whether Jackie Wade consulted with someone else. At another point Michael Wade testified that he knew that Jackie

<sup>28</sup> Subsequently McDermott testified that she had "scrap paper that . . . [Mason] had written it down on. . . . [b]ut the actual formal written documentation, I can't recall if I had that."

<sup>29</sup> Mason testified that she typed the observations on R. Exh. 5 on a typewriter in the office, which she does not normally use. At another point Mason testified that she typed her observations on the typewriter in the office that everybody uses and McDermott might have used the same typewriter in the office to type the body of her, McDermott's, memoranda. Then Mason testified that the typewriter used for the body of the memoranda is located in her, Mason's, office and the typewriter which was used for the names is in the outer office.

<sup>30</sup> Interestingly Michael Wade then testified, as here pertinent, that "people had seen her [Ryan] when she came into package pickup." None of the typed observations speak to when Ryan came into package pickup where the involved timeclock is located.

<sup>27</sup> At another point when McDermott was testifying about her observations in one of her memoranda that Ryan keyed 8 exception hours for herself, she, McDermott, tried to convey the impression that she would have been close enough to the computer screen to see what was being input with her assertion "[i]t's normally that I'm there when time keeping is being input." If McDermott had seen Ryan input her own exception hours and if there was something wrong with this practice, would she not have said something long ago, even before it became an issue? If McDermott had watched Ryan at the computer input her own exception hours and had discussed this with Ryan before February 18, why would she, McDermott, have had to ask Ryan on February 18 if she input her own exception hours?

Wade conferred with some people in Minneapolis but he did not know who.

Michael Wade testified that he and Jackie Wade primarily decided to terminate Ryan. McDermott testified that Jackie Wade made the decision to discharge Ryan and Michael Wade told her, McDermott, of the discharge.

Michael Wade also testified that the decision to terminate Ryan “was a collaboration looking at what documentation we had [as noted above, Wade also testified that the only documentation he saw before he told Ryan she was to be terminated was a list of dates which he just glanced at] and this collaboration occurred between the time Ryan was suspended on February 18 and when he met with Ryan on the evening of February 19 and again, after he met with Ryan on February 19; that his collaboration with Jackie Wade after he met with Ryan on February 19 occurred the following day— “[t]hat was a Saturday though. So I don’t know. It might have been that Monday. It was either on that Saturday or that Monday. I don’t recall”; and that after he met with Ryan he told Jackie Wade by telephone that Ryan did not have anything else to offer.

Jackie Wade did not testify herein. Consequently, Ryan’s testimony about their telephone conversation on February 19 is not even challenged. On February 19 Jackie Wade told Ryan that she, Jackie Wade, “wanted to get this out of the way before . . . [she] went on . . . [her] vacation.” Ryan’s testimony is credited.

Jackie Wade terminated Ryan. Michael Wade did not even know about Ryan’s suspension until after it occurred. McDermott, even before she met Ryan on February 18, was told by Jackie Wade to suspend Ryan no matter what she said. I find Ryan to be a credible witness. Her testimony about what was said by McDermott to her on February 18 and what was said by Michael Wade to her subsequently is credited. Ryan was in effect terminated on February 18. She was not given the chance to defend herself. Jackie Wade was calling the shots. She wanted to wrap up this matter before she went on vacation. When Ryan’s state of mind would not allow this, Jackie Wade told Michael Wade to wrap it up. He did. His stumbling testimony as to when he collaborated with Jackie Wade after speaking to Ryan serves only to highlight the fact that there was no real collaboration on the decision. Perhaps if he testified that he telephoned Jackie Wade while she was on vacation, one would have to wonder if there was even a ring of truth to his assertions.

As noted above, Jackie Wade never testified here. She either orchestrated or spearheaded this termination. She was conspicuous by her absence. Perhaps she had a very good reason for not testifying here. In my opinion, as counsel for the General Counsel contends, some of the documents received here, namely, the observations, were manufactured to support Respondent’s position. In other words, I believe that, as alleged, McDermott and Mason-sponsored fabricated evidence.<sup>31</sup> In his testimony here, Michael Wade put as much

<sup>31</sup> Interestingly, Administrative Law Judge Ladwig recently issued a decision in the aforementioned case (Case 7–CA–31476) involving Respondent’s appeal of the Board’s bargaining order at the Westland mall store which had been remanded by the United States Court of Appeals for the Sixth Circuit. As here pertinent, Judge Ladwig made the following findings in his decision which was issued on March 25, 1994:

distance between himself and these documents as he could. If she had testified, Jackie Wade would not have been able to take the same approach as did Michael Wade.

As noted above, I find Ryan to be a credible witness. Her testimony regarding what was said by McDermott on February 9 is credited. Ryan’s actions on February 5 were viewed by Respondent as giving support to the Union. It does not matter either that Ryan did not realize the possible ramifications of her February 5 action or that she was not in favor of the Union. What matters is Respondent’s motivation for terminating Ryan. As alleged in the complaint, Respondent terminated Ryan because it was perceived that her February 5 actions would cause Respondent’s employees to seek union representation and/or look more favorably on union representation.

Under *Wright Line*, 251 NLRB 1083 (1980), enf. 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 (1983), counsel for the General Counsel has shown that Respondent was aware that Ryan engaged in an action which Respondent perceived to be in support of the Union; that Ryan was terminated just 10 days<sup>32</sup> after her supervisor,

MARION C. LADWIG, Administrative Law Judge. On remand from the United States Court of Appeals for the Sixth Circuit, a hearing was held on January 18–21, 1994.

In an election held on May 11, 1990, at the Company’s Westland, Michigan store, the vote was 274 for the Union (UAW), 8 for another union, and 179 against both. On December 26, 1990, the Board rejected the Company’s objections and certified the Union. On May 15, 1991, the Board granted a Motion for Summary Judgment and ordered the Company to bargain.

On June 7, 1991, the Company filed a motion to reopen the record, alleging that it had obtained a statement from the Union’s principal employee organizer to the effect that “numerous authorization cards” were forged and “intentionally used by the UAW to falsely portray union strength and support from a majority of the eligible voters.” On September 30, 1991, in the absence of “any allegation that the employees were actually shown the allegedly forged cards,” the Board denied the motion.

On March 1, 1993, the court remanded the case, instructing that “the record be reopened and a new hearing held on the issue of forged authorization cards.” At the hearing the employee organizer, John Madgwick, falsely testified that the cards submitted to support the March 12, 1990 petition were “30 percent plus a few extras.” He claimed that weeks later, when the cardsigning slowed, he forged 10 to 20 cards to start a bandwagon. In fact, the Union submitted 268 cards with the petition, a 61.8-percent majority of the alleged 433 employees in the bargaining unit.

In addition, Madgwick gave grossly conflicting versions of his purported forgeries in his May 10, 1991 written statement to the Company, in a June 6, 1991 affidavit, and in his January 18, 1994 testimony (in which he, changing his testimony, claimed that certain assertions he made in the affidavit were lies).

After weighing all the evidence, as discussed below, I agree with the Union that Madgwick’s claim that he forged authorization cards is a “total fabrication.”

I find that the whole basis of the Company’s motion to reopen the record—that the Union used forged authorization cards to portray a false picture of majority support—is grounded on fabricated evidence.

<sup>32</sup> In my opinion, Ryan was terminated when she was suspended on February 18. From that point on Respondent was just going through the motions.

McDermott, spoke to her about her February 5 action in effect telling her that she had given aid to the enemy; and that, as demonstrated by Boram's above-described statement, there was antiunion animus on the part of the Respondent. The alleged business justification advanced by Respondent is a pretext. I credit Ryan's testimony that she did not cheat on her hours. Additionally, there is no reliable evidence in this record that she ever cheated on her hours. It has not been demonstrated by Respondent that absent Ryan's February 5 action, which was perceived by Respondent as causing Respondent's employees to seek union representation and/or look more favorably on union representation, she would have been terminated. Respondent's action sent a chilling message to other employees, namely, we will take action against an outstanding employee even if that employee unwittingly does something which may advance the cause of the Union.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending Violet Darlene Ryan and subsequently discharging her, because she took actions which Respondent perceived would cause Respondent's employees to seek union representation and/or look more favorably on union representation.
3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent suspended Violet Darlene Ryan on February 8, 1993, and subsequently discharged her in violation of Section 8(a)(1) and (3) of the Act, it is recommended that Respondent offer Violet Darlene Ryan immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay she may have suffered as a result of the discrimination against her by payment to her of a sum of money equal to that which she would have earned as wages during the suspension and during the period from the date of her discharge to the date on which Respondent offers reinstatement less net earnings, if any, during the period in accordance with *F. W. Woolworth Co.*,

90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>33</sup>

[Recommended Order omitted from publication.]

<sup>33</sup> Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes set forth in the 1986 amendment to 26 U.S.C. § 6621.

#### APPENDIX A

On January 12, 1993, Darlene Ryan arrived in the personnel office at 9:00 a.m. I had been waiting for her to discuss a sales consultant situation. She took an hour for lunch. Darlene walked out of the office a few minutes to 5:00. I was in the fax room and heard her announce she was going to get her nails done even though she did not have an appointment. She was not aware I was in the room.

She keyed: 8 hours exception hours for herself.

/s/ Christine McDermott

#### APPENDIX B

On February 9, 1993, Darlene Ryan arrived to work at 9:00 a.m. She took an hour lunch break. She left the building with the personnel rep at 5:15 p.m. She keyed 8 exception hours for herself.

/s/ Christine McDermott

#### APPENDIX C

On Friday, February 12, 1993, Darlene arrived to work at 9:00 a.m. I was waiting for her so we could have a quick personnel meeting. She took an hour for lunch. She announced to me that she would be leaving at 5:00 p.m. to avoid overtime. I checked the office at 5:05 and everyone had left except Sharon. I asked where everyone was and she stated they had gone home.

Darlene keyed 8 exception hours for herself.

/s/ Christine McDermott

#### APPENDIX D

January 11, 1993

Darlene came to work at nine o'clock, she went to lunch at one o'clock and returned at 2 o'clock. She left the office at 5:15 to go to her hair appointment. On timekeeping she put an exception for eight hours.

/s/ Trudy Mason

January 26, 1993 Tuesday

Darlene came to work at nine o'clock she left for lunch at one o'clock and returned at two o'clock. She went home at 5:15. She gave herself a exception for eight hours.

/s/ Trudy Mason