

**Carrier Transicold Division of Carrier Corporation,  
a wholly owned subsidiary of United Technolo-  
gies Corporation and Gary Gresham.** Cases 10-  
CA-29246 and 10-CA-29437

May 15, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 16, 1997, Administrative Law Judge Philip P. McLeod issued the attached bench decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Lesley A. Troope*, for the General Counsel.

*A. McArthur Irvin, Esq. (Irvin, Stanford, & Kessler)*, of Atlanta, Georgia, for the Respondent.

*Gary Gresham*, pro se, of Athens, Georgia.

BENCH DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Athens, Georgia, on December 4-6, 1996. The case originated from charges filed by Gary Gresham against Carrier Transicold Division of Carrier Corporation, a wholly owned subsidiary of United Technologies Corporation (Respondent). On August 23, 1996, an order consolidating cases, complaint, and notice of hearing was issued. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by issuing a suspension, issuing a warning, laying off, and subsequently discharging Gary Gresham for engaging in concerted activities with other employees.

In its answer to the consolidated complaint, Respondent admitted certain allegations, but denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

<sup>1</sup> In adopting the judge's finding that the Respondent's April 8, 1996, warning to, and suspension of, Charging Party Gary Gresham did not violate Sec. 8(a)(1) of the Act, we find it unnecessary to rely on the judge's finding that Gresham's conduct on April 3, 1996, was not concerted activity. Instead, we rely solely on the judge's findings that the Respondent lawfully disciplined Gresham based on his interruption of a meeting conducted by Manager Kathy Holen with other employees; Gresham's insistence on discussing immediately a subject unrelated to the meeting; and his failure and refusal to acquiesce in Holen's repeated directions to him that his concerns could be discussed later that day at a more appropriate time. On the basis of these findings, it follows that even assuming Gresham's conduct was concerted, it lost the protection of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following oral argument, on December 6, I delivered a bench decision pursuant to Section 102.35 of the Board's Rules and Regulations. In accordance with Section 102.45 thereof, I certify the accuracy of, and attach hereto as "Appendix A," the pertinent portion of the trial transcript, specifically page 494, line 4 through page 520, line 13. Minor errors may occur, but are insignificant.

For reasons expressed in my oral bench decision, I recommend that the complaint be dismissed in its entirety. Accordingly, I issue the following recommended<sup>1</sup>

ORDER

The complaint is dismissed in its entirety.

APPENDIX A

BENCH DECISION

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The complaint in this matter alleges, inter alia, that Respondent violated Section 8(a)(1) of the Act by issuing a five-day suspension and written warning to Gary Gresham by issuing a verbal warning to Gary Gresham and harassing Gresham by telling him that he would be placed under more stringent working conditions by laying off Gresham and by discharging Gresham because Gresham engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual pay and protection.

In its answer to the consolidated complaint herein Respondent admitted certain allegations including the filing of the charges, the status of the Employer as an employer within the meaning of the Act, and the status of certain individuals as supervisors within the meaning of Section 2(11) of the Act.

Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

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Following the close of the trial counsel for the General Counsel for Respondent and the Charging Party all argued this case orally before me and I have considered their arguments in reaching my decision herein.

On the entire record in this case and from my observation of the witnesses, I make the following findings of fact, conclusions of law, and enter the following recommended Order.

Respondent Carrier Transicold, Division of Carrier Corporation, a wholly owned subsidiary of United Technologies Corporation is engaged in business in Athens, Georgia, where it manufactures transport refrigeration units.

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The record herein reflects that Gary Gresham was offered employment by Respondent in October of 1987 at approximately the same time it began business here in Athens. Gresham accepted that offer and began to work for Respondent in a salaried nonexempt position as a clerical employee.

The record reflects that in the early years of his employment, Gresham was considered an exemplary employee by Respondent as well as by his fellow employees.

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In September of 1988, Gresham was nominated for an award as Employee of the Year, which he received at an awards banquet on or about October 6, 1988.

The record reflects that in approximately 1992, Gresham became what could be best described as a proactive employee. In April of 1992, Gresham filed a charge with the Equal Employment Opportunity Commission, an exhibit here as General Counsel's Exhibit 10.

In March of 1993, the Equal Employment Opportunity Commission issued a notice of right to sue letter to Gresham.

On or about April 16, 1993, Gresham filed a class action lawsuit against the Respondent in conjunction with other employees alleging that Respondent had engaged in various acts which discriminated against minority employees on the basis of their race.

The record also reflects that in early 1995, Gresham complained to the Human Resources Department regarding the selection procedures for the Human Resources coordinator position and how, at least in his opinion, minorities were excluded for consideration from that position.

On May 30, 1995, Gresham was issued discipline from Plan Manager Jim Ferguson. That discipline is an issue—is in the record as General Counsel's Exhibit 4.

Addressing that discipline, I think it is important

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that we as lawyers recognize that a great part of our responsibility is to be able to discern the difference between distinctions which have a difference and distinctions which do not have a difference.

In the first paragraph of the discipline issued on May 30, 1995, Ferguson chastises Gresham for continued actions to instigate disruptions with other employees. The memo goes onto say "time and time again you have taken it upon yourself to crusade on behalf of anyone else who you can convince is somehow being discriminated against by the company. You have been coached and counseled on numerous occasions by Gwen, Randall, Ron, and myself, that it is not your role to seek out other employees and then make choices for them as to what they need to do and then act as their third party representative to management."

The second paragraph of that memorandum reads "several times in the past, Gary, you have used someone else's situation as a spring board for your own determined efforts to apparently discredit, and disrupt management actions in running the business. Some of these cases and I will omit the reference to the individual cases 'involve you actively pursuing employees and pushing them to take legal action, even when they are perfectly satisfied with the company's position.'"

The third paragraph of that memorandum refers to an

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incident with an employee named James Orange, which I will discuss in further detail in a few moments.

The fourth paragraph of the memo describes Mr. Ferguson's belief and position that he has and will continue to treat employees in a fair, consistent and non-discriminating fashion.

The last two paragraphs of the memo, I believe, are important particularly the next to last paragraph, which reads as follows: "However, let me remind you—it is not your role as support assistant to solicit others to create causes to disrupt the business, nor is it your role to act as a third party representative of any other employee. You have used poor judgment in the past in this area, which has resulted in lost productivity and has certainly been a hindrance to our desire of improving diversity issues on site. These types of behavior will not continue to be tolerated.

The last paragraph says that continued conduct of this nature will result in Gresham's termination.

My conclusions regarding this discipline are as follows: that within it are contained discipline and threats of further discipline which tend to interfere with employees' Section 7 rights. Also within it are matters which do not.

Specifically, with regard to the third paragraph

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dealing with the James Orange situation. I am not making any finding that paragraph in any way tends to interfere with Section 7 employee rights. In fact, the evidence in the record would suggest that Mr. Gresham may well have overstepped his bounds in dealing with other employees by suggesting to them—by perhaps misrepresenting himself and by suggesting to them that they go to him in the morning rather than clock in.

I'm not making the finding that he did that because I don't think it's necessary to do so. My point is that within any discipline of this nature, there may well be justifiable discipline which does not tend to interfere with Section 7 rights, and discipline which does tend to interfere with Section 7 rights. That paragraph, I believe, tends to address something which in all likelihood does not tend to interfere with Section 7 rights, and I am not making a finding that it does.

However, with regard to the language which specifically reprimands Gary Gresham for seeking out other employees and encouraging them to take actions against the company because of perceived discrimination, that tends to interfere with employees' Section 7 rights, because the employees, under the Act, have the right to communicate with one another about perceived inequities, including discrimination, and only by maintaining that right of

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communication do employees have the opportunity to engage in concerted activity.

The Board has long concerned itself with trying to properly define just what protected concerted activity is and I have been cited the case by both counsel for General Counsel and the Respondent of *Meyers Industries*, which of course, is the seminal case on this issue.

Certainly, the Respondent is right in pointing out that in *Meyers Industries*, the Board grappled at some length with exactly what protected concerted activity means.

I think it is important though to recognize that the Board has always and in *Meyers* reiterates the position that for there to ever be concerted activity, employees must have the right to address one another one on one and concerted activity may well include nothing more than one speaker and one listener. The listener may choose not to pursue the activity, and that's cer-

tainly their right but if we eliminate the right of the speaker to confront those employees about possible inequities, then we have eliminated the possibility of concerted activity, and therefore, I find that paragraphs one and two of this memo and the next to last paragraph tend to interfere with employees' Section 7 rights within the meaning of the Act.

Mr. Ferguson's response to that memo, which is an

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exhibit as General Counsel's Exhibit 5, shows that Mr. Gresham fully intended to continue his proactive position. That was further demonstrated by the complaint which Mr. Gresham filed on his own behalf in July of 1995, alleging race discrimination on the part of Respondent, even though that was an individual filing a charge because he had not been grouped with others in an appropriate class, the point to be taken from that is that Mr. Gresham was continuing to exemplify his proactive thinking and his willingness to take action based on it.

Now, that brings us up to 1996. The record reflects that an incident occurred on or about April 3, 1996, which is the incident that resulted in the discipline being imposed on Mr. Gresham, which is the subject of one of the specific allegations in the complaint. I note that because the earlier discipline in 1995 is not referenced in the complaint and would be time barred by Section 10(b) of the Act, and we are not confronted with that, but we are confronted with the specific discipline issued on April 6, 1996, in General Counsel's Exhibit 6.

We had a tremendous amount of testimony in this proceeding with regard to that specific incident. I believe half the witnesses who testified testified with regard to that.

Other than Mr. Gresham himself, I found all of the

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witnesses who testified with regard to that to be wholly straightforward and credible.

The testimony of the employees, the testimony of all witnesses taken as a whole, convinces me that that situation was one in which two employees, for their own individual reasons and not for any concerted purpose, approached management to discuss the matter of the safety shoe truck vendor being on site.

The record shows that when Ms. Clarke and Mr. Gresham approached Ms. Holen, Mr. Gresham knocked on the door and said, excuse me, in order to address Ms. Holen. It is clear that he was interrupting a conversation. It's not clear that he had any reason to believe he was interrupting a meeting or that there was any significance to be drawn from that moment.

When Mr. Gresham interrupted the conversation, he asked Ms. Holen about the presence of the safety shoe truck vendor at the plant that day, and Ms. Holen responded in what was described by more than one witness as a firm tone, that she was in a meeting and that she would get back to Mr. Gresham on that subject later in the day.

The record also reflects from the testimony of all the witnesses, including Ms. Gloria Clarke and Ms. Sara Ann Smith and Ms. Dorothy Cochran, that Mr. Gresham pursued the discussion with Ms. Holen. Ms. Clarke did not. Ms. Clarke

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left the site of the conversation and reported to work.

I relied on that in part in making my finding that Clarke and Gresham were acting individually with individual interests in going to see Ms. Holen.

When Ms. Clarke heard that they were interrupting a meeting and she would speak to Mr. Gresham about it later, Ms. Clarke left and went to work. Mr. Gresham did not. He stayed and pursued the conversation.

I credit Ms. Smith and Ms. Cochran that when the conversation began and when it continued, Mr. Gresham posed a question to Ms. Holen, why the safety shoe truck was there that day and why no one had told him sooner that it was coming. He asked why he didn't know that it was coming.

Whether it was Ms. Holen or Mr. Gresham who first began to raise their voice really does not matter. I have no doubt that it was Ms. Holen who first spoke with some firmness in telling Mr. Gresham that she was in a meeting. Be that as it may, Mr. Gresham stayed and pursued the conversation and repeated several times, asking why it was that he had not been told the truck was coming.

I credit Ms. Smith that as the conversation went on, the tone of the conversation was such that it would begin to make a reasonable person feel uncomfortable, as she testified she did.

I credit Ms. Smith that at the end of the conversation, Mr. Gresham told Ms. Holen, "you can take that somewhere else," or words to that effect.

I credit Ms. Cochran more specifically that at the end of the

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conversation, Mr. Gresham stated to Ms. Holen, "you can keep that - you can just keep that because you don't scare me."

I also credit the testimony of the witnesses, Ms. Cochran and Ms. Smith, that in making that statement, Mr. Gresham was pointing his finger and shaking his hand at Ms. Holen and I find the testimony credible that Mr. Gresham was in effect glaring at Ms. Holen, as one witness described it, in a manner that if looks could kill, Ms. Holen would be killed.

Following this incident, Mr. Gresham was issued discipline on April 8, 1996, which is in evidence as General Counsel's Exhibit 6. Strike that. Actually, there's no need to strike it. I meant to refer to something else first and I will do that.

Before the discipline was issued, Ms. Holen, Ms. Smith and Ms. Cochran all went and spoke to Human Resources Supervisor, Cathy Dawson, regarding this incident. The record reflects that Ms. Dawson conducted an investigation of the incident before any discipline was issued.

Ms. Dawson testified credibly that she spoke to each individual. I credit Ms. Dawson that when she spoke to Mr.

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Gresham, she did not tell him then and there that she was going to write him up, she does not have the authority to do that on her own. I also credit Ms. Dawson that in the conversation with Mr. Gresham, when she spoke to him about the incident, Mr. Gresham in effect admitted pushing or pursuing the issue of the safety truck with Ms. Holen, even though Ms. Holen instructed him that she would get with him later and did not want to discuss the issue at that time.

Specifically, I credit Ms. Dawson in the conversation with Mr. Gresham, Mr. Gresham stated to her "I don't know where you come from, but from where I come from, when you need to know, you need to know," or words to that effect.

Following the investigation by Ms. Dawson, the disciplinary memo was issued to Mr. Gresham on April 8, 1996, which I have mentioned is in the record as General Counsel's Exhibit 6. The memo speaks for itself and I do not think it is necessary to quote the memo at length. It describes the incident basically as

it was testified to and described by the witnesses herein, particularly Ms. Smith and Ms. Cochran.

I find that the discipline imposed on April 8, 1996 does not in any way tend to interfere with employees' Section 7 rights within the meaning of the Act.

The memo addresses and disciplines Mr. Gresham for what was in fact disruptive behavior, not at the beginning

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of the conversation, but as the conversation continued and as Mr. Gresham insisted on discussing that matter then and there with Ms. Holen.

It appropriately reprimands Mr. Gresham for intimidating and insubordinate behavior, particularly for pointing his finger at Ms. Holen and stating I'm not afraid of you or words to that effect.

I find it significant that General Counsel's Exhibit 6 points out that there is ample reason for discharging Mr. Gresham at that time, but that Respondent chooses not to do so. In fact, the memo states "management will continue to listen and respond to legitimate concerns when voiced in an appropriate manner. I challenge you, Gary, to present yourself in such a manner in the future."

Gresham, shortly thereafter, filed a charge in Case 10-CA-29246, alleging that the discipline was imposed against him in violation of Section 8(a)(1) of the Act. That charge is dated by Mr. Gresham on April 10, 1996. It was filed, that is to say docketed, in Region 10 of the National Labor Relations Board on April 15, 1996. It was served by mail from Atlanta to Athens on Respondent by letter dated April 17, 1996. By letter dated April 22, 1996, Mr. Irvin filed a notice of appearance in that matter.

There is every reason to believe and it is a

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reasonable inference to be drawn, which I do, that by April 22, 1996, Respondent had been served with a copy of the charge in Case 10-CA-29246.

As I stated on the record at some point yesterday, I had a serious concern that shortly after Mr. Gresham filed that charge, certain actions were initiated toward Mr. Gresham. Based on the credible testimony, I no longer have that concern.

The record shows that within days after the time of that charge being filed, Mr. Settlemeyer met with Mr. Gresham to initiate a performance review. Mr. Randall Carr testified credibly that—and Mr. Settlemeyer did as well, that performance review was initiated as a result of a tickler system which exists in the Human Resources Department to notify a supervisor when an annual performance review is needed.

Mr. Carr and Mr. Gresham both testified that Mr. Gresham became a support assistant B, performing the duties that he was performing at the time of his layoff, on or about mid-April to late April of 1994, and the record also shows that while no performance reviews were done on a regular basis of Mr. Gresham or any other employees necessarily, that in early 1996, the Respondent began to re-emphasize, to re-instill, if that's a word, the importance of using and complying with the performance

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review procedures, which were supposed to have been followed for some time at the Respondent's facility.

There is no reason to believe, based on the record here, that Respondent in early 1996 re-instituted and re-emphasized the importance of annual performance reviews in any way, shape or form because of Gary Gresham.

Indeed, in early 1996, the matter which arose in April concerning the safety shoes, which is alleged as an 8(a)(1) in this complaint, the record here strongly suggests that the importance of the performance review system was being re-emphasized because Respondent may well have some reason to face cut back's during 1996, and if it was going to determine who should be cut back on any objective basis, it was important for Respondent to have that performance review system up to date and objective.

I am convinced now that it was simply coincidental. Gary Gresham filed his charge with the Board in Case 10-CA-29246 just a few days before it was time for a performance review to in fact be initiated by the Human Resources Department.

It was particularly sent to Mr. Settlemeyer, whereupon Mr. Settlemeyer met with Mr. Gresham and asked Mr. Gresham to sit down and prepare some document showing his duties and the approximate time that he spends on each of those duties. Mr. Gresham did that and that is in evidence as

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Respondent's Exhibit 1.

In the course of the discussions between Mr. Settlemeyer and Mr. Gresham, it came to Mr. Settlemeyer's attention that Mr. Gresham was indeed behind in his work, that is to say the primary portion of his work, which was warranty data entry, and that will be discussed in greater detail in a moment.

The record also shows that in preparation for the annual performance review, Mr. Settlemeyer obtained a printout of Mr. Gresham's timeliness and tardiness.

The record reflects that on or about April 24, Mr. Settlemeyer met with Mr. Gresham to initiate the performance review, and that during those conversations, Mr. Settlemeyer had an opportunity to observe Mr. Gresham actually performing his work and to determine the approximate amount of time that it would take to perform each of the units of his work, particularly the data entry aspect.

Mr. Gresham does not deny that he was behind in his work. Therefore, I have no reason to doubt or reject the substance of Mr. Settlemeyer's memo to himself, which is in evidence as Respondent's Exhibit 3, particularly the second and third full paragraphs, which describe the extent to which Mr. Gresham was behind.

Specifically, with regard to credibility of the witnesses, I want to point out that I definitely do not

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credit Mr. Gresham, that he was so far behind in his data entry work solely because of the five day suspension that was imposed on him in early April as a result of his actions on or about April 2. I find that suggestion ludicrous.

It's totally illogical to believe that Mr. Gresham was five weeks behind in any of the data entry when it took him a full five weeks, from April 24 to June 3, to catch up.

I have some concern about certain of Mr. Settlemeyer's actions during the performance review. Specifically, I have a concern about Mr. Settlemeyer's apparent over zealotness with regard to timeliness. The evidence in the record strongly suggests, in fact, I will say establishes, that for salaried employees, including non-exempt salaried employees, there was a rather

lax procedure followed at the facility, that has been described in the record as flex time.

The record establishes that flex time was administered in such a way that individual employees could arrange with their supervisor to come in late on one day and leave late or come in early on one day and leave early, whether it be a few minutes or an hour.

The record is also absolutely clear that before the performance review was initiated on or about April 19, when

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Mr. Settlemyer requested the tardiness schedule of Mr. Gresham, Mr. Settlemyer had never spoken to Mr. Gresham about being tardy, even though Mr. Settlemyer had the opportunity to observe Mr. Gresham coming in a few minutes late.

The record is quite clear that for the first time, that it was the first time in the performance review in late April 1996 that Mr. Settlemyer raised this issue with Mr. Gresham.

The record, however, does not support any conclusion that this occurred as a result of Mr. Gresham's protected concerted activities, which dated back as early as 1992.

It is difficult to say what if anything might have been established between Mr. Settlemyer and Mr. Gresham, if in fact in the performance review, it had not developed that Mr. Gresham was so far behind in his work.

There is every reason to believe that issue became a matter of concern in that performance review. That "issue" meaning tardiness became an issue of concern in that performance review because it was ascertained that Mr. Gresham was in fact so far behind in his work.

I said a moment ago that it was determined in this performance review Mr. Gresham was approximately five weeks behind and I misspoke. In fact, it was determined that Mr. Gresham was approximately 7.5 weeks behind in his work.

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It was during the five-week period following this that he caught up most of what it was that he was behind on.

With reference to the performance summary itself, which is in evidence as General Counsel's Exhibit 8, it essentially documents what I have already described as having taken place between Mr. Gresham and Mr. Settlemyer during the performance review.

However, I want to specifically address one of the comments in that performance summary, in the box in the lower right-hand portion of the first page, there is a box entitled "improvement opportunities."

The first two of those, obviously, refer specifically to Mr. Gresham's on the job performance and getting his work done. The third one reads "needs to learn to temper his confrontations with management."

It may be argued that refers to Mr. Gresham's protected concerted activities, and that is one possibility. However, it may also be argued that refers to the incident in April 1996 in which the Respondent issued discipline, which I have found to be legitimate and not having been engaged in for any unlawful reasons, for Mr. Gresham's insubordinate and confrontational discussion with Ms. Holen.

That specific sentence as it reads can at least be

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said to be ambiguous and not clearly referencing Mr. Gresham's protected concerted activities. Moreover, I find it more logical to

conclude that it refers to the more recent event of April 1996, specifically, Mr. Gresham's confrontation with Ms. Holen.

That then brings us to the time of the layoff. The record reflects that there were discussions among and between employees and management throughout 1996 about the possibility of there being a layoff, a layoff which might include salaried employees.

Mr. Ferguson and Mr. Carr spoke more than once about the fact that it appeared a layoff was going to be likely and that if one did occur, it would, in all likelihood, include salaried non-exempt employees.

The record supports a conclusion that sometime in mid to late May of 1996, a specific decision was made that there would be a layoff and that it would include salaried non-exempt employees. I say that because Respondent's Exhibit No. 7 is a memorandum dated May 23, 1996 from Mr. Randall Carr to several individuals, which states "Let's remember, the process by which salaried employees will be selected for any economic reduction in force will be their demonstrated competence, current performance/contribution, and the current needs of the business."

On or about June 3, 1996, Mr. Settlemyer met with Mr.

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Gresham and informed him there would be a layoff effective July 1 and that it would include Mr. Gresham's position.

Counsel for General Counsel alleges that Mr. Gresham was selected for this layoff because of his protected concerted activities, which, of course, she contends were not just the activities of 1992 to 1995 but also included the incident in early April 1996.

I, of course, have found that incident was not protected concerted activity.

I do find, however, that the incident in April 1996 played a significant part in Respondent's decision to lay off Gary Gresham and to retain instead the other support assistants.

Counsel for General Counsel does not dispute the economic need for a layoff in June of 1996. That's not an issue in the case. The record amply supports a conclusion that a layoff was warranted.

Counsel for General Counsel's position is not even necessarily that salaried non-exempt employees were targeted in order to get to Gresham. The record testimony of Mr. Ferguson and Mr. Carr establishes that Respondent had good business reasons for including salaried non-exempt employees in the layoff, obviously, to the extent that more and more rank and file employees are laid off, there comes a point where there is good reason to lay off as well what

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we ordinarily think of as support personnel in any business.

None of that necessarily answers counsel for General Counsel's allegation, however. It could well be that there was reason to eliminate a salaried non-exempt position but nevertheless, Respondent may very well have been able to retain Mr. Gresham. The mere elimination of his position does not answer counsel for General Counsel's allegation either.

That having been said, let me also point out that it is counsel for General Counsel's burden to show that Mr. Gresham's protected concerted activity was a motivating factor in the decision to terminate/lay off Mr. Gresham. Then and only then does the burden shift to Respondent under the Wright Line decision to show that Mr. Gresham would have been laid off, would have

been the person chosen to be laid off, even without having engaged in protected concerted activity.

Having considered the record as a whole, I find that it does not support a conclusion of Mr. Gresham's protected concerted activity was a motivating factor in the decision to lay him off. That is to say the protected concerted activity of 1992 through 1995.

I do find that what occurred in April of 1996 was a motivating factor. If that is found by the Board to be

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protected concerted activity, I would reach a different result in this case. However, obviously, I have found it is not protected concerted activity, what occurred in April 1996.

The layoff resulted in—in the layoff, three individuals were targeted for their positions to be eliminated, and the record suggests, the record, in fact, supports a conclusion that Mr. Gresham was treated different than at least one other of the other two whose positions were eliminated.

This case is troubling and I am not going to pretend otherwise.

In the layoff, while supposedly three positions were eliminated, one of those individuals was offered the opportunity to assume other duties and in fact, to not be terminated. Mr. Gresham was not given that opportunity, although there were clearly duties available which Mr. Gresham could have performed, and those include the duties which I mentioned to Respondent during its closing remarks yesterday, the duties of Ms. Rowland.

There is absolutely no reason to believe that Mr. Gresham could not have performed those duties and had he been assigned or offered those duties as a temporary employee, as Ms. Rowland was, he would have accomplished Respondent's purpose in reducing its head count, because as

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we were told, temporary employees don't count.

We don't know whether Mr. Gresham would have accepted that. The point is Respondent didn't offer it to him, as it did to another employee.

I am also aware of the fact that the third employee was not offered the opportunity to stay and that is part of what makes the case troubling, because while one of the individuals was clearly treated differently than Mr. Gresham, the third one was not.

It is not as if Mr. Gresham was treated disparately from all of the others who were laid off. He was treated the same as one and differently from another.

I have considered at length whether or not Mr. Gresham was treated differently, in not being offered other duties, because of his protected concerted activity, and I have come to the conclusion that the record does not support either an inference or legal conclusion that he was not offered those other duties because of his protected concerted activities that I have found to be protected. That is to say the activities of 1992 to 1995. Rather, I believe the record supports a conclusion that he was not offered other duties because of the incident in early April involving Ms. Holen and because of his performance review, which showed quite clearly that Mr. Gresham was considerably behind in his work, and for those reasons,

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Respondent had good reason to not offer Mr. Gresham other duties.

I am assuming that counsel for General Counsel will take exceptions to my ultimate decision in this case, and therefore, I want to make it very clear that if it is found by the Board that Mr. Gresham's activities vis-à-vis Ms. Holen in April of 1996 were indeed protected concerted activity, I am specifically finding that those activities did play a motivating role in the decision to not offer him other duties at the time of the layoff in June 1996.

I would like to add that in my analysis, in reaching the conclusion that the record does not support a conclusion of Mr. Gresham's protected concerted activities which I have found to be protected concerted activities, played in any role in Respondent's decision to elect him for layoff, I have taken into consideration the fact that Respondent had ample opportunity to get rid of Mr. Gresham if it had chosen to do so, and I'm referencing specifically the incident in April 1996, where I have found Mr. Gresham was insubordinate to Ms. Holen.

With reference to the decision to select Mr. Gresham to in fact be terminated, I believe it is important to note for the record Mr. Ferguson's credible testimony yesterday that Kim Hayes, Linda Morgan, Peggy Stamey and Linda Mealler do not come under Mr. Ferguson's area of authority

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and Mr. Gresham could not have been moved, at least by Mr. Ferguson, into any of those positions.

The record reflects that Mr. Gresham could have been considered and in fact was considered for at least the position that was held by Ms. Norma Stafford.

I found Mr. Carr's testimony credible that with regard to considering that possibility, it was concluded Mr. Ferguson could not realistically replace Ms. Stafford because Ms. Stafford was in a role in an area of the facility which was already under staffed in terms of the function she performed. That department had requested the authority to hire additional people and that had been denied. Mr. Carr testified credibly that if anything, Ms. Stafford was over worked and as a result, it would not be reasonable from a business perspective to replace Ms. Stafford with Mr. Gresham.

That is not to say, however, there were not duties available that Mr. Gresham could perform, and I've noted that, particularly the duties that were being performed by Vicki Rowland.

In conclusion, therefore, I find the record does not support counsel for General Counsel's allegations in the complaint that Respondent issued a five-day suspension and written warning to Gresham on or about April 8, 1996 in violation of the Act. The record does not support a

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conclusion that Respondent on or about April 24, 1996 issued a verbal warning to Gresham and/or harassed Gresham by telling him that he would be placed under more stringent working conditions due to Mr. Gresham's concerted protected activities.

The record does not support a conclusion that on or about June 4, 1996, Respondent laid off Gresham and on or about June 28, 1996, discharged Gresham, due to Gresham's concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection.

I will therefore recommend that the complaint be dismissed in its entirety.