

Fixtures Manufacturing Corporation and International Brotherhood of Teamsters, Local Union No. 41, AFL-CIO. Cases 17-CA-19174 and 17-CA-19366

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN
AND HURTGEN

On January 16, 1998, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting 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 and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

1. We agree with the judge, for the reasons she states, that the Respondent violated the Act by interrogating employees about their union activities;¹ by threatening employees with discipline and/or discharge because of their union activities; by discriminatorily banning union solicitation and the distribution of union materials during working time;² by discriminatorily prohibiting the posting of union materials on the employee bulletin board;³ by requesting employees to report to the Respondent employees who harassed them when soliciting them on behalf of the Union;⁴ by discriminatorily issuing a written warning for insubordination to George Hulse;⁵ and by discriminatorily discharging Penny Sheridan.

2. We agree with the judge that acting plant manager, Thomas McCann's statements to employee Robert Sheall and to a group of supervisors, overheard by employee

Dennis Evans, constituted unlawful threats of discipline or discharge. Contrary to Member Hurtgen, we adopt *both* of the judge's findings of unlawful threats.

The test of whether a statement would reasonably tend to coerce employees in the exercise of their protected concerted activity is an objective one, requiring an assessment of all the circumstances in which the statement was made.⁶ The speaker's intent is not a relevant factor.⁷ Here, McCann's statement to Sheall was that if he passed out union literature on company time, McCann would "have to deal with it." The statement was made in the context of an unlawful interrogation of Sheall's union sympathies and in the course of announcing a rule that discriminatorily prohibited only union solicitation and distribution during working time. Under these circumstances, McCann's remark would reasonably be construed by Sheall to be a threat to discipline him for passing out union literature.

As the judge stated, McCann's overheard remark to four supervisors that, in order to deal with the Union, "they need to verbally kill the chicken and weed out the bad seed" was somewhat nonsensical. Nevertheless, unlike our dissenting colleague, we agree with the judge that that remark was also unlawful. Having been made in the context of other unfair labor practices, the statement "weed out the bad seed" would reasonably be viewed as a threat to discipline or discharge employees who supported the Union.⁸

Accordingly, unlike our dissenting colleague, we agree with the judge that all of McCann's statements in issue constituted threats to discipline or discharge employees for engaging in union activities in violation of Section 8(a)(1) of the Act.

3. However, we do not agree with the judge in certain other respects. We find that the Respondent lawfully disciplined employees Robert Sheall and Harold Hoff under the Respondent's policy against harassment.⁹

¹ In view of our finding that Acting Plant Manager Thomas McCann unlawfully interrogated employee Robert Sheall, we need not pass on the allegation that Supervisor Mike Parker also unlawfully interrogated Sheall. The finding of such an additional violation would be cumulative and would not affect the remedy.

² In so doing, we rely on the testimony cited by the judge that employees regularly engaged in solicitation during working time for a wide variety of products and services.

³ The fact that prounion and antiunion materials were banned does not warrant a contrary result. The important fact is that Sec. 7 material (pro and con) was banned, and other material was permitted. See *Vons Grocery*, 320 NLRB 53, 55 (1995).

⁴ The vice of Respondent's conduct is that "harassment" is an ambiguous term. Thus, for example, employees might reasonably think that they are being asked to report on such protected activities as repeated efforts by the Union to persuade them to sign cards. See, e.g., *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979).

⁵ The judge inadvertently omitted her finding concerning Hulse from the cease-and-desist portion of her recommended Order and from the notice. We correct her omission here.

⁶ *Electrical Workers IBEW Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995).

⁷ *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997).

⁸ It is irrelevant that the complaint did not specifically allege this statement to be unlawful. "It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). Here, the complaint alleges other violations of Sec. 8(a)(1) occurring during the Union's organizational campaign, including threatening employees with discharge, and the issue was fully litigated. Thus, both parts of the *Pergament* test are satisfied, and there is no procedural bar to finding and remedying this violation of the Act.

⁹ As indicated in his separate opinion, Member Hurtgen joins Chairman Truesdale in reversing the judge on this issue. Member Liebman dissents for the reasons set forth in fn. 14, *infra*.

The Respondent issued written warnings for sexual harassment to Robert Sheall and Harold Hoff. The judge found that, in both instances, the Respondent violated Section 8(a)(3) and (1) of the Act. The Respondent concedes that the General Counsel made a convincing showing under *Wright Line*¹⁰ that antiunion considerations were a motivating factor in the written warnings. However, the Respondent excepts to the judge's finding that the Respondent submitted insufficient evidence to rebut the General Counsel's case. The Respondent contends that both Sheall and Hoff violated the Respondent's policy against harassment, which policy prohibits foul language.¹¹ We agree.

We note initially that the General Counsel does not contend that the Respondent's policy itself is unlawful or that the Respondent promulgated it for unlawful reasons. We also note that benefits administrator, Patricia Lackey, testified that several women complained to her about Sheall's "talking obscenely," and that his "gruff approach to people" was "intimidating and scaring the women." In particular, they were offended by his calling employees "mother fucking chicken shits" and various members of management "chicken shit" and "mother fucking chicken shit." Lackey also testified that several women complained to her about Hoff's "foul language." They told her Hoff was "obscene," that they did not like to hear what he was saying, that they were "offended," and that "they felt threatened by him." They told Lackey that they heard Hoff saying "[Y]ou can see who's got the fucking balls—they wear the [Union] pins." Lackey was not discredited on this point. The words of Sheall and Hoff clearly violated the "foul language" provision of the Respondent's policy against harassment.¹² Moreover, Lackey merely reacted to the employee complaints by issuing the written warnings to Sheall and Hoff pursuant to the policy. We believe that the complaints received by the Respondent warranted action, and we find that it would have acted in these instances even in the absence

¹⁰ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

¹¹ The policy states: "foul language . . . may be considered offensive to another employee and should therefore not occur." The Respondent gave a copy of the policy to Sheall at the time the Respondent disciplined Sheall. The Respondent did not give a copy to Hoff but he was disciplined on the same day as Sheall.

¹² We recognize that the record shows that the Respondent generally tolerated profanity and swearing during working hours on the shop floor. However, there is no showing that employees complained to management about language similar to that used here, and no showing that any such complaints were ignored.

of Sheall and Hoff's union activities.¹³ Accordingly, we shall dismiss these two complaint allegations.¹⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Fixtures Manufacturing Corporation, Kan-

¹³ See *Simmons Industries*, 321 NLRB 228, 241 (1996); *Boyetown Packaging Corp.*, 303 NLRB 441, 449 (1991).

¹⁴ Member Liebman dissents from her colleagues' reversal of the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by issuing the written warnings to Sheall and Hoff. Member Liebman observes that her colleagues do not disturb the judge's finding that the General Counsel established that the Respondent's animus against the employees' union activities was a motivating factor in the decision to discipline them. Unlike her colleagues, Member Liebman agrees with the judge's further finding that the Respondent failed to show that it would have issued warnings to the two employees in the absence of their union activities.

As emphasized in the judge's decision, the Respondent's own policy and past practice with respect to sexual harassment complaints was to conduct a thorough investigation, which included giving the alleged harasser notice of the exact nature of the accusations against him and an opportunity to respond. In the cases of Sheall and Hoff, however, the Respondent failed to speak to them during the investigation phase and, even when it issued the warnings, it still failed to advise them of the exact nature of the complaints against them. In this connection, the majority concedes, as it must, that the Respondent never interviewed Sheall. Although the majority claims that the Respondent "did interview" Hoff, the judge specifically found that at this so-called "interview" the "Respondent did not tell him specifically what he had done which constituted sexual harassment." Furthermore, certain of the alleged conduct in issue cannot reasonably be considered to be "sexual harassment," such as Sheall's statement that management cannot be trusted and his alleged staring at an employee after giving her an authorization card to sign.

In sum, Member Liebman concludes that the Respondent was not interested in investigating the merits of the sexual harassment complaints, but, rather, seized on them as a convenient pretext to justify disciplining two union adherents.

Chairman Truesdale and Member Hurtgen disagree with their dissenting colleague's assertion that certain conduct at issue cannot reasonably be considered to be "sexual harassment." They note that issues concerning whether conduct constitutes "sexual harassment" are often difficult and subtle, and are dependent on surrounding circumstances. In addition, the issue here is not whether the conduct was in fact sexual harassment, but rather whether Respondent was sufficiently concerned that it might be, so that Respondent took the action that it did.

In addition, they note that Respondent's policy, as testified to and as unrebutted, was to take prompt remedial action whenever an employee complained about perceived sexual harassment by another employee. The fact that Respondent may not have interviewed alleged harasser Sheall is consistent with this policy. Nor can it be said that any failure to interview Sheall was discriminatory. In this regard, we note that Respondent *did* interview union advocate Hoff (the other alleged harasser). The Respondent informed Hoff, upon giving him a warning, that two women had charged him with sexual harassment, including the use of vulgar language. Hoff responded that "this is a lie. I did not harass no one." Thus, Hoff had the opportunity, and used it, to deny any wrongdoing.

sas City, Missouri, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interrogating its employees about their union activities and sympathies and the union activities and sympathies of other employees.

(b) Threatening its employees with discipline and/or discharge because of their union activities and sympathies.

(c) Announcing a rule that discriminatorily prohibits union solicitation and the distribution of union materials during working time.

(d) Announcing a rule that discriminatorily prohibits the posting of union materials and union literature on the employee bulletin board at the facility.

(e) Requesting employees to inform Respondent if they had been subjected to abusive treatment by their fellow employees who solicit them to sign union authorization cards, and invite and encourage employees to identify union employees.

(f) Issuing written warnings for insubordination to employees or otherwise discriminating against any employee for supporting the Union.

(g) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Teamsters, Local Union No. 41, AFL-CIO, or any other union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them 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 Penny Sheridan 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 Penny Sheridan 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 discharge of Penny Sheridan and the unlawful written warning of George Hulse, and notify Sheridan and Hulse in writing that this has been done and that the discharge and written warnings will not be used against them 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 back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region post at its facilities in Kansas City, Missouri, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt 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 the 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 any time since April 18, 1997.

(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.

MEMBER HURTGEM, dissenting in part.

I do not agree with my colleagues' adoption of the judge's finding that a certain statement, noted below, made by Acting Plant Manager Thomas McCann constituted an unlawful threat.¹ McCann was overheard by employee Dennis Evan telling a group of four supervisors that, in order to deal with the Union, "they needed to verbally kill the chicken and weed out the bad seed."

McCann's language is vague. McCann's statement that "they needed to verbally kill the chicken and weed out the bad seed," is not readily decipherable. Indeed, the General Counsel did not allege this statement of McCann's as a violation in the complaint.² The judge conceded that McCann's words were "somewhat nonsensical." I find that McCann's words could not reasonably be understood as a statement that the Respondent would

¹⁵ 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 Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ I join Chairman Truesdale in finding that the Respondent lawfully disciplined employees Robert Sheall and Harold Hoff. In all other respects, I agree with both of my colleagues.

² Contrary to the majority argument, I am not suggesting that there is a procedural bar to the finding of a violation. I am simply noting, as a matter relating to the merits, the fact that even the General Counsel did not interpret this ambiguous statement to be unlawful.

discipline employees for engaging in protected activity. If the statement was nonsensical to the judge (a reasonable person), it is difficult to understand how another reasonable person (e.g., an employee) would read into the statement the message that employees would be fired for union activities.

APPENDIX

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT question you about your union activities and sympathies and the union activities and sympathies of other employees.

WE WILL NOT threaten you with discipline and/or discharge because of your union activities or sympathies.

WE WILL NOT announce a rule that discriminatorily prohibits union solicitation and the distribution of union materials during working time.

WE WILL NOT announce a rule that discriminatorily prohibits the posting of union materials and union literature on the employee bulletin board at our facilities.

WE WILL NOT request that you inform us if you have been subjected to abusive treatment by other employees when they solicit you to sign union authorization cards, and invite and encourage you to identify union employees.

WE WILL NOT issue written warnings for insubordination to employees or otherwise discriminate against any employee for supporting the Union.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting International Brotherhood of Teamsters, Local Union No. 41, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Penny Sheridan 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 Penny Sheridan whole for any loss of earnings and other benefits resulting from her 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 Penny Sheridan and rescind and remove from our files any references to the unlawful written discipline issued to George Hulse and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the written discipline and the discharge will not be used against them in any way.

FIXTURES MANUFACTURING CORPORATION

Naomi L. Stuart, Esq., for the General Counsel.

Mark G. Flaherty, Esq., Tim Davis, Esq., and Debra Campbell, Esq. (Sonnenschein, Nath & Rosenthal) (G. David Porter, Esq. on the brief) and Gary Jones, Director of Human Resources, of Kansas City, Missouri, for the Respondent.

Victor J. Terranella, of Kansas City, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. The General Counsel alleges that Fixtures Manufacturing Corporation (Respondent) violated Section 8(a)(1) of the Act by soliciting employee grievances and promising to improve terms and conditions of employment if employees refrained from activity on behalf of International Brotherhood of Teamsters, Local Union No. 41, AFL-CIO (the Union); interrogating employees about union activities; threatening employees with discharge because of union activities; discriminatorily promulgating a no solicitation, no distribution rule regarding union literature; discriminatorily refusing to allow union literature on the employee bulletin board; and requesting that employees inform Respondent regarding union activities of other employees. The General Counsel further alleges violation of Section 8(a)(1) and (3) of the Act by disciplining and discharging employees because of their union or protected, concerted activities. This case was tried in Overland Park, Kansas, on October 29 and 30, and November 3, 1997.¹

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,² and after considering the briefs filed by counsel

¹ All dates are in 1997 unless otherwise indicated.

² Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credi-

for the General Counsel and for Respondent, I make the following

FINDINGS OF FACT

I. THE PLEADINGS

The charge in Case 17-CA-19174 was filed by the Union on May 6, and amended on June 20. The charge in Case 17-CA-19366 was filed by the Union on September 16. Consolidated complaint issued October 9 and was amended October 23. The charge in Case 17-CA-19174 was amended for a second time on the first day of hearing. Pursuant to this second amended charge, counsel for the General Counsel moved to amend the consolidated complaint by adding two additional allegations of violation of 8(a)(1) discipline of employees based upon their protected, concerted activity which predated any union activity. I stated that I would defer ruling on the motion until the close of the General Counsel's case. However, through inadvertence, I did not rule on the motion at that time. This issue will be discussed infra.

II. JURISDICTION

Respondent, a Missouri corporation, with various places of business in Kansas City, Missouri, is engaged in manufacturing and distributing office furniture. During the 12-month period ending December 31, 1996, Respondent sold and shipped goods valued in excess of \$50,000 directly to points outside the State of Missouri and purchased and received directly from points outside the State of Missouri, goods valued in excess of \$50,000. 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.

III. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that International Brotherhood of Teamsters, Local Union No. 41, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

IV. ALLEGED UNFAIR LABOR PRACTICES

Jami, Inc. purchased Respondent in January 1996. At the time of hearing, approximately 75 full-time employees worked in two production plants. Additional employees of Century were assigned to production activities as temporary employees. There is no dispute that the transition from Fixtures to Jami produced some employee discontent and apprehension.

Due to employee dissatisfaction and prior to the advent of any union activity, Thomas McCann, Jami's vice president of operations,³ began meeting in early March with small groups of employees to discuss problems they were experiencing due to Jami's purchase of Respondent or for other reasons. McCann held about 12 to 14 meetings prior to late April.

Employees Peggy and Harold Hoff met with the Union on April 1 to discuss the possibility of unionization. Thereafter the Union began an organizational campaign targeting Respon-

bility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

³ At about this same time, McCann assumed the duties of acting plant manager for Fixtures.

dent's production employees. Authorization cards and handbills were distributed by union representatives beginning April 10.

A. Alleged Interrogation, Threat of Discipline, and Discriminatory Prohibition of Solicitation and Distribution of Union materials

Robert Sheall signed an authorization card on April 16. Shortly thereafter, Sheall's supervisor, Mike Parker, called Sheall to a meeting with McCann. McCann told Sheall he understood that Sheall was passing out union literature on company time. Sheall stated he was distributing union literature on breaks, lunch time, and off time but denied passing out union literature on company time. McCann asked why Sheall was interested in the Union. Sheall responded that Jami had not produced results in the 15 months since its acquisition of Fixtures and he wanted to listen to someone with something to offer. McCann concluded the meeting by stating that if Sheall passed out union literature on company time, McCann would have to deal with it.⁴

McCann's question to Sheall regarding why he was interested in the Union is alleged as unlawful interrogation. Interrogation is not, by itself, a per se violation of Section 8(a)(1). Interrogation is coercive if, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 187 (1993). Under the totality of the circumstances, I find this interrogation violative. Prior to this conversation, Sheall had been observed by members of management posting union literature on the bulletin board. However, he had not yet become an open union advocate. Nevertheless, he was called to a meeting with his immediate supervisor, Parker, and McCann, Jami's vice president of operations, and accused of distributing literature on company time and warned that this was not allowed. He was then asked why he was interested in the Union. Under these circumstances, I find the questioning unlawful.

Moreover, McCann's limitations on solicitation and distribution during working time were applicable only to union solicitations and distributions. The evidence clearly indicates that

⁴ Respondent relies on the testimony of McCann claiming that if McCann is credited, there is no violation. McCann testified that he had received reports that Sheall was wandering away from his work station to solicit and distribute union literature. McCann testified that he told Sheall that he was not authorized to leave his work station during normal working hours for union business. McCann stated that he did not discipline Sheall. McCann did not specifically deny questioning Sheall about the Union nor did he deny telling Sheall he would have to deal with Sheall if he passed out union literature on company time. Because both Sheall and McCann agree that McCann told Sheall he was not authorized to pass out union literature on company time and because McCann did not specifically deny asking Sheall about his interest in the Union and telling Sheall he might have to deal with Sheall in the future, I do not believe there is a credibility conflict to be resolved. Accordingly, I find that McCann questioned Sheall about why he supported the Union as well as warned him that future actions would be dealt with. Moreover, to the extent there is a credibility conflict, I find that Sheall's rendition of the conversation was more inherently believable. In this respect, I note further that Parker, Sheall's supervisor, was also present during the conversation and did not testify. From Respondent's failure to present Parker, I draw an inference that his testimony would not have been favorable to Respondent.

many other solicitations and distributions were knowingly allowed by Respondent during working time.⁵ Accordingly, this rule discriminatorily prohibits only union solicitation and distribution during working time and is violative of the Act. See, e.g., *Industrial Wire Products*, 317 NLRB 190 (1995) (prohibition on talking about union during work time while allowing talk about other subjects constitutes disparate treatment and interferes with Section 7 rights). Finally, McCann's cautionary to Sheall that he would have to deal with passing out union literature on company time in the future constitutes a threat of discipline or discharge because of Sheall's union activities. See, e.g., *Williamhouse of California*, 317 NLRB 699, 714 (1995) (telling employee he would be fired for talking about the union on worktime while allowing discussions about baseball constitutes unlawful threat).

B. Alleged Solicitation of Grievances and Promise to Improve Conditions if Employees Refrain from Union Activities

McCann held meetings with employees to discuss their problems beginning in early March and continuing through late April, after Respondent attained knowledge of union activity. On April 18, Joan Hill, vice president of human resources for Jami, spoke to employees stating that Respondent did not want a union.⁶ She noted that McCann had met with employees to discuss transitional issues and commended employees for their honesty and directness in participating in those meetings. Hill concluded,

You have clearly let us know that there are problems here that we need to work on and we will be working on those problems and you will be hearing from us about those problems in the immediate future. In the interim, we're asking you to not sign these cards until we have a chance to work on some of the problems that you have brought to our attention.

Although Respondent began its series of meetings with employees prior to the advent of union activity, after attaining knowledge of union activity, McCann continued soliciting employee grievances at further meetings and announced remedies for some problems.⁷ Hill told employees they would hear from Respondent about the problems in the immediate future and asked that employees refrain from membership or support for

⁵ For instance, employees testified without contradiction that there was no rule that prohibited talking while working and that employees commonly conversed with each other with full knowledge of their supervisors during working time. Employees also testified without contradiction that solicitations for Avon products, Girl Scout cookies, and school candy were made on the shop floor during working time with supervisory knowledge and distribution of Avon products, cookies, and school candy was permitted on the shop floor during working time. For instance, Sheall testified he had bought Girl Scout cookies and tickets to a poker game from Parker during working time. Sheall had also seen the Avon book routinely kept on Parker's desk. Employee Palmer sold home interior goods and flowers during worktime on the shop floor. She solicited Parker on occasion to buy these products.

⁶ I credit Hill's testimony that she read from a prepared text. This is also consistent with the testimony of General Counsel's witnesses.

⁷ McCann's "post-knowledge" meetings are not alleged as unlawful solicitations. The complaint alleges only Hill's comments on April 18 as violative.

the Union until Respondent completed work on the problems. It is clear that Hill did not solicit grievances during the meeting. Moreover, she did not specifically promise that any particular matter would be improved. Generalized expressions requesting a second chance or asking for more time are permissible campaign propaganda. See *Noah's New York Bagels*, 324 NLRB 266 (1997) (in context of unlawful solicitation of grievances, request to give employer, "a second chance to show what we can do" not violative); *National Micronetics*, 277 NLRB 993 (1985).

C. Alleged Interrogation

On Saturday, April 26, an in-house organizing committee was formed at the first union meeting for Fixtures employees. George Hulse, Harold Hoff, and Robert Sheall were initial members of the in-house organizing committee. The Union faxed a letter to Respondent on that date identifying the members of the committee. On Monday, April 28, Parker asked Sheall how many people attended the union meeting. Sheall refused to say. This constitutes unlawful interrogation. Although by this time Sheall had been identified as an open union supporter, this question does not relate to his support for the Union. Rather, it was an attempt to determine how much interest the initial meeting had drawn. Accordingly, the question is unlawful.

D. Alleged Threat of Discipline or Discharge

On May 1, employee Dennis Evans overheard McCann tell Supervisors Hays, Parker, Kirby, and Altis that in order to deal with the Union, Respondent needed, "to verbally kill the chicken and weed out the bad seed." McCann could recall no such meeting and specifically denied making such a statement explaining that such an analogy would be totally foreign to him. I credit Evans.⁸ Although the statement is somewhat nonsensical, I believe that Evans truthfully testified to what he heard. I find that the statement tends to interfere with employee exercise of Section 7 rights in that it constitutes a threat of discipline or discharge of employees because of their union activities.

Later that day, eight employees joined union representatives in handbilling. Employee Penny Sheridan overheard Plant Manager Jeff Altis state that if the handbillers came on company property, "they're dead meat."⁹ Handbilling occurred on May 9, June 12 and 18, and July 7 and 14. Among employees who participated in handbilling were Harold and Peggy Hoff, Robert Sheall, Penny and Bill Sheridan,¹⁰ and George and Debra Hulse. No petition for representation had been filed as of the date of the hearing.

⁸ Both Evans and McCann were straight forward, believable witnesses. My credibility finding is based on the inherent probability that an employee, upon hearing such a statement, would remember it accurately as well as the probability that McCann, who had no reason to know an employee was in the area, would not recall precisely what he might have said in what he thought was a confidential meeting.

⁹ This statement is not alleged as a violation of the Act. However, it is relied upon to show animus toward the Union. I find that the statement does, indeed, indicate animus toward the Union.

¹⁰ Bill Sheridan worked as a temporary employee for Century assigned to Respondent. He was not currently employed at the time of the handbilling.

E. Alleged Discriminatory Refusal to Allow Union Literature on Employee Bulletin Board

An employee bulletin board located near the timeclock was available for posting, “anything from death notices to autos for sale, furniture, dog give-aways, appliances,” without requesting permission. It is undisputed that union literature (pro and con) was routinely removed from the employee bulletin board by management although employees generally removed notices which they posted as they became obsolete.

George Hulse, an in-house organizer and open union advocate, attempted to post union literature on a daily basis. Specifically, he posted numerous copies of a red pamphlet which outlined employee rights pursuant to Section 7. Each time a copy was removed, Hulse posted another copy. On April 29, Hulse posted a pamphlet during his 1:45 p.m. afternoon break. Assembly Manager Mike Parker removed the pamphlet while Hulse was standing nearby. Hulse asked Parker why he had removed the pamphlet. Parker stated that he had been told to remove it by Trish Lackey, human resource director. Another employee, Donovan Willis, overheard this conversation. Willis agreed with Hulse that Hulse did not yell or scream during the conversation.

Hulse and Parker met a few minutes later in Lackey’s office. Hulse noticed a stack of union pamphlets on Lackey’s desk and asked why Lackey was taking down the union pamphlets. Although Lackey stated that she wanted to read the material, in light of the stack of pamphlets, Hulse asked if he didn’t have a right to place anything on the employee bulletin board. Lackey agreed that he did. Hulse asked Lackey why she did not replace the literature when she was finished reading it and Lackey responded it was not her job. Hulse laughed at this. Hulse accused Lackey of discrimination. Lackey did not respond and Hulse left her office.

Hulse denied that he yelled or screamed during this conversation. Lackey described Hulse as yelling on the point of screaming, stating that Hulse was angry because management was taking information off the bulletin board and, “he was so angry, he just turned around and walked out.” According to Lackey, she discussed the matter with Hill and they agreed a written warning was appropriate because Hulse was loud and extremely upset and this had frightened Lackey. Hulse continued to post union literature for the remainder of the week.

In general, “there is no statutory right of employees or a union to use an employer’s bulletin board.” However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any nonwork related matters, it may not “validly discriminate against notices of union meetings which employees also posted.” Moreover, in cases such as these an employer’s motivation, no matter how well meant, is irrelevant.

Honeywell, Inc., 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983). Respondent’s removal of the union notices constitutes discriminatory prohibition of posting of union literature. It is no defense that both pro and antiunion materials were

removed under Respondent’s policing action of removing “controversial” materials. The removal of “controversial” materials occurred only upon the advent of union activity and applied only to materials for and against the Union. Moreover, I find that the removed literature was not inflammatory or reasonably likely to create problems which would privilege a disparate content-based policy. See, e.g., *Vons Grocery Co.*, 320 NLRB 53, 55 (1995), and cases cited therein.

F. Written Warning to Hulse for Insubordination

Just before the end of his shift on May 2, Hulse was called to a conference room overlooking the production floor. Ed Hays and Tom McCann gave him a written warning for insubordination to Parker and Lackey on April 29. He protested that he was not insubordinate when he spoke to Parker and Lackey on April 29 but signed the written warning in any event. Respondent’s rules provide for counseling prior to a written warning. However, counseling was not utilized by Respondent. Hulse was also told that he would be terminated immediately if the offense occurred again. Hulse had not received any discipline for at least the last 5 years. According to Lackey, Hulse used a loud, abusive voice when questioning her about removal of union pamphlets from the employee bulletin board and he was obviously mad and stormed out of her office. Lackey considered this an act of insubordination.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), the Board articulated the allocation and order of proof in cases involving 8(a)(1) or (3) violations which turn on employer motivation as follows: First, the General Counsel must make a prima facie showing sufficient to support an inference that protected activity was a motivating factor in the employer’s decision. Upon making such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected activity.

In *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996), the Board stated that it had traditionally described the General Counsel’s burden as that of establishing a prima facie case. Noting, however, that in *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340 fn. 8 (1995), the court suggested that the General Counsel’s burden might be more appropriately described as a burden of persuasion, the Board concluded that the change did not represent a substantive change in *Wright Line* and restated that test as follows: “the General Counsel [must first] persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.”

Hulse’s union sympathies were well known to Respondent and Respondent exhibited animus toward these sympathies. Moreover, although the alleged insubordination occurred on April 29, it was not until the day after the first employee hand-billing on May 1, that Hulse and two other handbillers were disciplined for events which occurred before the handbilling. Hulse had no prior disciplinary actions for a 5-year period.

Based upon these facts, I find General Counsel has established that Hulse's written warning was motivated by antiunion sentiment.

Turning to Respondent's evidence, I find that is has not established that the same action would have been taken absent the union activities of Hulse and others. Specifically, I do not credit Lackey's conclusory descriptions of Hulse: he used a loud, abusive voice when he asked why she was removing union literature from the bulletin board, he was obviously mad that she was removing union literature from the bulletin board, and stormed out of her office when she provided no response to his questioning about removal of union literature. Hulse denied using a loud or abusive voice. I credit his denial. Moreover, Parker, who was also present in Lackey's office on April 29, did not testify at all regarding the alleged insubordination. This absence warrants an inference that his testimony would not have been favorable to the Respondent. On the other hand, Donovan Willis, who overheard the initial confrontation between Parker and Hulse, testified that Hulse did not raise his voice. Respondent provided no explanation for the lack of immediate discipline nor for the failure to utilize the progressive disciplinary action of counseling prior to a written warning. Accordingly, I find that Hulse would not have been disciplined in the absence of his activities and support of the Union.¹¹

G. Warnings to Hoff and Sheall

In addition, open union advocate Sheall was called into the conference room at the end of his shift on May 2. Sheall was given a written warning for sexual harassment due to use of vulgar vocabulary along with a copy of a previously unpublished sexual harassment policy. Sheall asked to speak with his accusers and was told he had no right to speak to his accusers and the matter had been fully investigated (although this was the first time he had been contacted), the decision was final, and if further complaints were received, he would be terminated. He was not informed of the specific nature of the complaints against him.

The employees who were allegedly harassed did not testify in this proceeding. Respondent did not confront Sheall with the specifics of the complaints. Respondent's memoranda supporting this discipline indicate that a manager reported on April 29 that Sheall said she could not be trusted because she was management; that an employee reported to Lackey that Sheall gave her an authorization card on May 1 and later stared at her making her feel unnerved; and that another employee reported that she overheard Sheall on May 2 describe various members of management as a "chicken shit" and a "mother fucking chicken shit." Nevertheless, Respondent concedes that profanity was used in the presence of supervisors on the shop floor. Sheall was promoted from key person to lead person in July.

Sheall's union activities were well known to management and the animosity toward union activities, as mentioned above,

¹¹ Respondent's records reflect that in November 1996 an employee was counseled for failure to follow instructions and loud, abusive language. No further specifics were provided. Respondent has failed to explain why counseling was appropriate in one instance while a written warning was appropriate in another. This constitutes further evidence that Hulse's union activity was a motivating factor.

is replete in the record. The timing of the written warning, on the day following the first handbilling, gives rise to an inference that union activity was a factor in the decision. Accordingly, I find that General Counsel has established the Sheall's union activities were motivated by antiunion animus.

I further find that Respondent has not established that it would have taken the same action in the absence of Sheall's union activities. Sheall's statements that management could not be trusted and his staring at an employee after giving her a union authorization card to sign hardly rise to the level of sexual harassment but do, indeed, evidence strong support for the Union. Moreover, management had frequently allowed use of profanity on the shop floor. Use of the words, "chicken shit" and "mother fucking chicken shit" was not uncommon. Finally, Respondent's "Policy Against Harassment" states that complaints will be investigated thoroughly and promptly and only if harassment is established will the harasser be disciplined. Respondent has disciplined other employees for sexual harassment. For instance, an employee was counseled and then discharged for making sexual advances to a coworker and another employee was counseled for playing a practical joke involving assertions that he loved a fellow employee.¹² In both instances, the employee was confronted with the exact nature of the allegations against him and given an opportunity to respond. I note that Sheall was never contacted in the course of a thorough investigation and infer from this that a decision was made without a thorough investigation. Respondent has failed to show that Sheall would have received a written warning regardless of his union activity.¹³ Accordingly, I find the warning violative of the Act.

Also written up for sexual harassment on May 2 was open union advocate Harold Hoff. Both Parker and Hays were present to present this warning. Hays told Hoff he was brought to the office because two women claimed sexual harassment. Hoff exclaimed, "[T]his is a lie. I did not harass no one." Hoff asked for an explanation and was told that the women complained because they had overheard him use vulgar language. Hulse

¹² Respondent's records reflect that an employee was confronted in October 1995 regarding complaints of sexual harassment and counseled about creating a hostile working environment. The employee denied the complaints. The same employee received a written warning and a 3-day suspension in February and March 1996 for insubordination and a poor attitude, respectively. In November 1996, the employee was terminated for sexually harassing a coworker by pursuing her romantically and telling her she had a nice ass and it was good that she wore shorts because this provided easier access. The employee was once again confronted with specific evidence and denied the events. Another employee was counseled in August for creating a hostile working environment due to comments made to a Century employee. This employee was specifically aware of the offending behavior and admitted it.

¹³ Sheall was accused of making a racial or ethnic slur in 1994, prior to Jami's acquisition of Fixtures. The records reflect that Sheall was warned that Fixtures would not condone such comments and that further such comments could result in severe disciplinary action. Respondent relies on this episode arguing that Sheall should be discredited. I found Sheall to be a strong, credible witness and I do not discredit him based upon a 1994 warning from a former employer. Further, such a warning hardly constitutes proof of a tendency to utter racial slurs, much less to create a hostile working environment.

was warned to watch his language around other employees and warned that future complaints would result in termination. Lackey testified that several employees had reported to her that Hoff made statements such as, “you can see who’s got the fucking balls—they wear the [Union] pins.” Lackey discussed this with Hill and they determined a written warning was appropriate.

As with Hulse and Sheall, Hoff’s union sympathies were well known and Respondent’s animus toward union activities, replete in the record. As in the case of Sheall, the timing of Hoff’s warning supports an inference of unlawful motivation. Accordingly, I find the General Counsel has established that Hoff’s warning was motivated by antiunion sentiment. Moreover, I find that Respondent has not established that it would have taken the same action absent Hoff’s union activities. Respondent did not present actual witnesses to the alleged harassment. Although Hoff could not recall making the alleged statements, he did not deny that he could have made them. If, indeed the statements were made, it is clear from the underlying memoranda that the witnesses overheard the statements but were not directly involved in a conversation with Hoff. When Hoff received the written discipline, Respondent did not tell him specifically what he had done which constituted sexual harassment. The underlying memoranda reflect that what Hoff did was speak profanely in favor of unionization. As profanity was tolerated by management, I find that Hoff would not have been disciplined in the absence of his union activity.

H. Alleged Unlawful Written Discipline of Hoff and Tom Peterson

On March 7 prior to the advent of any union activity, employees Harold Hoff and Don Peterson received counseling notices for, “comments on the floor.” The written counseling form indicated there had probably been a misunderstanding and Hoff was moved to a different press to correct the problem. Hoff was not given a copy of the policy against harassment at that time.

On cross-examination, Hoff was asked if the counseling resulted from his saying, “[T]his fucking company is full of bullshit.” Hoff did not recall making such a statement and did not know if such a statement was the basis for the counseling notice. Pursuant to the second amended charge in Case 17–CA–19174, counsel for the General Counsel sought to amend the consolidated complaint to include an allegation that the March 7 counseling violated Section 8(a)(1). Respondent opposed, noting that the Region had been fully apprised of the underlying facts long before the hearing and had waited until the day of hearing to seek amendment. Moreover, Respondent argued that the allegations were totally unrelated to other allegations in the complaint.

Because I did not rule on General Counsel’s motion at the hearing, the determinative issue at this point is whether the new allegations are closely connected to the subject matter contained in the complaint and were fully litigated. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995). I find that neither criteria is satisfied. The consolidated complaint focuses solely on an organizing campaign that began in April. There is no showing that Hoff’s counseling was related to any union activity or that the

counseling was aimed at dissatisfaction on Hoff’s part which caused him to later support the Union. Moreover, although Respondent cross examined witnesses presented by the General Counsel regarding the March 7 discipline, it did not present witnesses to rebut their testimony.

In any event, were the proposed amendment closely connected and fully litigated, I would nevertheless find no violation. There is no credible evidence that Hoff and Peterson were counseled on March 7 due to protected, concerted activity.¹⁴ Hoff does not remember what he said which led to the counseling. Peterson and Hays did not testify. Accordingly, even were the amendment allowed, I would find that the General Counsel has failed to show that Hoff engaged in protected, concerted activity.

I. Alleged Request that Employees Inform Respondent of Union Harassment

On May 5, McCann spoke to groups of employees. These were the first meetings designed to respond to issues raised by employees at prior meetings. McCann acknowledged that Respondent was removing union literature from the employee bulletin board stating Fixtures did not need a union and the information was unnecessary. At another meeting, McCann stated that union literature was trash and would be placed in the trash can.¹⁵ McCann suggested that intimidation and pressure were standard union techniques and told employees if they were being harassed, whether by union in-house organizers or not, they should report it to their supervisor or the director of human resources or to McCann and, “he would handle it.” McCann refused to define “harassment” when asked for an explanation.

Because McCann’s request was broad enough to include lawful solicitation and distribution of union materials both during working and nonworking time, at the plant or away from the plant, it constituted an open invitation to employees to iden-

¹⁴ Neither Hays, the supervisor involved, nor Peterson testified regarding this incident. Peterson’s counseling form is in evidence but offers no further elucidation regarding the nature of the comments which led to the counseling. A memorandum prepared on June 9 by Hays indicates that he issued the counseling forms to Hoff and Peterson because Hoff made comments such as, “Ed [Hays] showed favoritism and the fucking company is full of bullshit,” “I work my ass off and get paid peanuts,” and similar remarks and Peterson would agree with him saying, “[Y]eah, it is bullshit.” This memorandum was not prepared until 3 months after the incident in question and 1 month after Hoff received a written warning for sexual harassment. Given that it was prepared long after the events in question, it is at odds with Hays’ contemporaneous counseling forms which indicated he had to separate the employees due to a misunderstanding between them, and Hoff could not recall making the statements, I do not credit the version of the events set forth in the memorandum. Moreover, even were I to find that Hoff made these statements and Peterson agreed with them, I would find no protected activity but, rather, mere griping.

¹⁵ One employee recalled that McCann told employees that in the future they would need supervisory permission to post anything on the employee bulletin board. This statement is alleged as an unlawful announcement of a rule regarding the bulletin board. I do not credit the employee’s recollection of McCann’s speech. All other witnesses, employee and management, were in total agreement that no such rule existed.

tify union employees to management in the loose context of any subjectively objectionable conduct. Such a request tends to interfere with employee rights under the Act. See, by analogy, *Clifton Plastics*, 262 NLRB 1329 (1982) (directing a second election under similar conditions); *Bil-Mar Foods*, 255 NLRB 1254 (1981) (directing a second election due to employer request that employees let it know if they were harassed, coerced, pressured, or threatened in any way by union agents or pushers).

J. Discharge of Penny Sheridan

On July 31, Penny Sheridan told Plant Manager Moreno as he was walking away from her that she did not believe he was being fair and she was giving 2 weeks' notice. Moreno kept walking without acknowledging Sheridan. Sheridan was upset at the time because Respondent would not rehire her husband, William Sheridan, who worked as a temporary employee until early 1997 when he walked out, thus voluntarily resigning. Sheridan never submitted a written resignation. Her lead person, Sheall, told her that if she had not put the resignation in writing it was ineffective. On August 5, the Union identified Penny Sheridan as a member of the in-house organizing committee. However, Sheridan had begun wearing a union button everyday to work in late May or early June and a union T-shirt at least once a week and had participated in hand billing as well. Sheridan's supervisor never spoke to Sheridan about her comment to Moreno and no replacement was trained to perform her work. There is no dispute that Sheridan's work was acceptable. In fact, at a later time, Moreno offered to help Sheridan and her husband find work elsewhere.

On August 15, after expiration of the 2-week period, Moreno and Jones ascertained from other members of management that Sheridan had not communicated to anyone an intent to change her mind about resigning. However, they did not ask Sheridan what her intentions were, despite the fact that she was at work 15 days following oral 2-week notice of resignation. Jones explained that it might have colored Respondent's decision if Sheridan had communicated a change of heart but it did not seem appropriate to ask her directly. Sheridan was called to a meeting with Lackey and Human Resource Manager Gary Jones. Jones read a memorandum from Moreno regarding his July 31 conversation with Sheridan in which she gave 2 weeks' notice. Sheridan explained to Jones that she was upset when she spoke to Moreno and had no intention of quitting. Jones said he was going to adhere to the two weeks' notice and Sheridan said she was not quitting. Jones stated that if she did not quit, she was fired.¹⁶

Sheridan returned and spoke with Jones on Monday, August 18. She asked why Respondent had waited 15 days before honoring the 2-week notice. Jones did not respond. Sheridan was given a written explanation of her separation from the Company which she had requested. However, when she read it, she found it stated that she had resigned. The following day, she spoke with General Manager Jim Johnson at Respondent's

headquarters. However, he decided to adhere to the decision of Jones.

Under similar circumstances, at least two other employees were required to submit written notices of resignation. One of these employees, Lola Palmer, told Parker, "[Y]ou have my 2-week notice." Parker told her to put it in writing. She left a written notice on his desk the following morning. Parker spoke to her later that day telling her she could change her mind and stay if she wanted. On a prior occasion, Palmer told Parker she was tired of problems at work and she was about ready to give her 2-weeks notice. Parker walked away and Palmer continued to work for another month. No one mentioned her failure to leave 2 weeks later.

Employee Angela Eiken submitted a verbal 2-week notice to her supervisor. He accepted it but later told her she needed to put it in writing and submit it to Ed Hays. She complied and quit as scheduled two weeks later. Sheall also told his supervisor he was quitting on two separate occasions and left work 10 to 15 minutes before his shift ended because he was angry. On both occasions, he reported to work the following day and nothing further was said. The other employee, Delores Harris, told Mike Parker in the spring of 1996 that she was giving 2 weeks' notice. Parker told her if she was serious she should put it in writing.

I find that Sheridan's verbal notice of resignation would not have been accepted by Respondent in the absence of her union activity. Sheridan was an open union advocate. Her verbal notice of resignation was given in a moment of frustration. Thereafter, Respondent was informed that she had become a member of the Union's in-house organizing committee. Her "resignation" was accepted 15 days after the fact over her protest that she did not want to resign and despite the fact that no replacement had been hired. Based upon these facts, I find that General Counsel has established that Sheridan's union activity was a motivating factor in Respondent's decision.

Respondent has not established that it would have taken the same action absent Sheridan's union activity. Respondent had treated other employees differently in the past by requiring that they submit written notices of resignation and by allowing them to change their minds and withdraw their resignations. Based upon this evidence, I find that Sheridan's resignation would not have been accepted in the absence of her union activity. In addition, I find Respondent's unwillingness to consider her for rehire was similarly motivated.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, Respondent must offer Penny Sheridan reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

¹⁶ The testimony of Lackey, Jones, and Sheridan is in substantial agreement regarding this conversation.