

**The Earthgrains Company and Richard C. Jenkins.**  
Case 10-CA-33181

March 20, 2003

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

On September 11, 2002, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed a motion to strike the Charging Party's 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 record in light of the exceptions, motion, and briefs and has decided to affirm the judge's rulings,<sup>1</sup> findings,<sup>2</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.

*John D. Doyle Jr., Esq.*, for the General Counsel.

*John J. Coleman III and Mieke Hemstreet Esqs.*, for the Respondent.

<sup>1</sup> The Respondent's motion to strike is granted with respect to those portions of the Charging Party's brief in support of exceptions that refer to purported facts which, by the Charging Party's own description, "were not brought to the judge's attention." Thus, these matters are not in the record. These include: that Plant Manager Gary Kennedy's initials were on an employee writeup form for employee Derek Burke; that employee witness Linda Cameron's husband and son are supervisors for the Respondent and that her son, whom the Respondent had previously asked to resign, entered the Respondent's management training program after Charging Party Richard Jenkins was discharged; that Brenda Bartley is a supervisor; and that Jenkins requested that Kennedy let him take a lie detector test. However, the Respondent's motion to strike the Charging Party's exceptions document in its entirety is denied because that document substantially conforms with the requirements of Sec. 102.46 (b)(1) of the Board's Rules and Regulations.

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

<sup>2</sup> The General Counsel did not file exceptions in this case, and the Charging Party's exceptions principally address the judge's credibility determinations. In particular, no exceptions were filed to the judge's finding that the evidence failed to establish that the Respondent harbored animus toward the Charging Party because of his union or other protected concerted activities.

**DECISION**

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Birmingham, Alabama, on June 13 and 14, 2002. All parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. The charge was filed on July 25, 2001,<sup>1</sup> and amended on March 13, 2002, by Richard C. Jenkins (Jenkins). A complaint issued March 22, 2002, alleging that The Earthgrains Company (Respondent) discharged Jenkins on or about July 20, 2001, in violation of Section 8(a)(1) and (3) of the Act. Respondent filed an answer denying the pertinent allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the operation of a wholesale bakery at its facility in Fort Payne, Alabama, where it annually sells and ships goods valued in excess of \$50,000 directly to customers located outside the State of Alabama. 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 and that the Bakery, Confectionary, Tobacco Workers & Grain Millers, AFL-CIO-CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Issues Involved in this Case*

This case involves the discharge of Jenkins on or about July 20, 2001. General Counsel argues that Jenkins was terminated because he joined and assisted the Union and engaged in concerted activities. Respondent asserts that it terminated Jenkins because of its determination that he was away from the plant while on the clock on July 8, 2001.

B. *Background*

At the time of Jenkins' discharge in July 2001, he worked as 1 of 10 office employees at Respondent's Fort Payne, Alabama bakery facility. Jenkins began his employment at Respondent's facility in May 1977. Prior to his suspension on July 13, 2001, Jenkins had never received any discipline during his tenure with Respondent. Jenkins estimated that there were approximately 800 to 900 total employees at the Fort Payne facility. While no union represented the office clerical employees, the Union has represented the bakery production employees for more than 20 years. Local 611 of the Union represents only the bakery production and maintenance bargaining unit employees at Respondent's Fort Payne facility. Plant Manager Gary Kennedy has worked at the Fort Payne facility for 30 years and has been plant manager for approximately 19 years.

<sup>1</sup> All dates are 2001 unless otherwise indicated.

In August 2000, the Union initiated a strike at the Fort Payne facility. The strike lasted 4 weeks and involved approximately 680 to 700 Fort Payne production employees. While the strike began at Fort Payne, 26 of Respondent's other facilities eventually joined the strike because of their individual contract expirations or as sympathy strikers.

Jenkins testified that during the time of the strike, he observed Plant Manager Kennedy standing at the window of the office with some other individuals from the corporate office or from another of Respondent's plants. Jenkins heard Kennedy say that he would show them what a mistake they had made by going on strike and they would pay for it in the long run. Kennedy testified that he had no recollection of making this statement. Kennedy recalled that because the strikers had been out for a month, the employees had some concerns about how they would be received when they returned to the plant. Kennedy testified without contradiction, that when the first strikers returned to the plant at 6 a.m. on a Sunday morning, he met them at the timeclock. He shook their hands and thanked them for returning to work.

Respondent's Paris, Texas, and Fort Payne, Alabama bakeries are considered sister operations because of the similarity of their layouts and operations. At the time of the Fort Payne strike in August 2000, the Paris, Texas production employees were unionized but not the officer employees. On May 1, 2001, a sister local of the Union filed a petition with Region 16 of the Board in Case 16-RC-10312, seeking to represent the Paris, Texas office employees. Following a June 8, 2001 election, the Union was certified on June 18, 2001, as the bargaining representative for the Paris, Texas office employees.

### *C. Jenkins' Union and Protected Activity*

Plant Manager Gary Kennedy testified that when he found out that the Paris office employees had signed union cards; he called a meeting of his office and lab personnel to let them know what was going on in Paris. He recalled that a Paris office employee nearing retirement had checked on retirement benefits and found them to be less than what was available for the production employees. Kennedy recalled that he told the office employees that they were in a "pretty lucrative" position. They could sit back and watch to see what happened in Paris. If the Paris employees' situation substantially improved by becoming unionized, he could understand why they would make the same judgment in Fort Payne. He added that he thought that they were in a great position however, because they didn't have to make a decision. He opined that if Respondent were going to make improvements in one facility, then common sense would dictate that the Company would probably be willing to give the same under the same circumstances in another facility. Kennedy told the employees that Respondent had originally intended to upgrade benefits on or about January 2003. He also explained that because of ongoing union organizing efforts, the Company's hands were tied in doing a nationwide blanket improvement.

Jenkins recalled that Kennedy held a meeting with office and quality control employees after the office personnel at the Paris facility "had voted to accept the Union contract." Jenkins testified that Kennedy announced that the Paris plant had voted to

accept the union contract in the office and that they were in a position to do the same thing to improve their retirement benefits. Jenkins recalled that Kennedy asked the employees to wait a timeframe of 6 months, however, until after all outstanding union contracts were settled. He mentioned the California and Kentucky union contracts. Kennedy explained that Respondent could not make any changes in nonunion employee benefits for 6 months after all outstanding contracts had been settled. Jenkins testified that Kennedy opined that he fully expected the company to make improvements to retirement benefits for all management personnel, and that if they would wait the 6 month timeframe, he expected that both their retirement benefits and his would be improved.

Larry Aultman is the business agent for Local 611 of the Union and has held this position for 12 years. He previously worked as a production employee in the facility and remains on a union leave of absence from his job at Respondent's Fort Payne facility. Jenkins testified that approximately a week to 10 days after Kennedy's meeting, he spoke with Aultman about what was needed to initiate the Union's organizing efforts for the office employees. Aultman told Jenkins that the Union would need to know what the general consensus of opinion was for the office employees. Aultman testified that he told Jenkins to talk with employees in the office and quality control to gauge the level of support among the employees. He also asked Jenkins to find out what was important for the employees and what needed improving. Aultman cautioned Jenkins "not to walk up to them and ask them about the Union." He suggested that Jenkins work the conversation around to the Union or to their opinion as to what improvements or additional benefits were needed.

Aultman recalled that he initially spoke with Jenkins in late May or early June. Approximately a week later, Aultman ran into Jenkins in the plant. Aultman testified that he has known Jenkins for probably 12 to 14 years and often encountered Jenkins on his frequent visits to the plant.<sup>2</sup> Aultman had previously spoken with Jenkins about employees' payroll or insurance problems when Jenkins had filled in for the payroll and insurance clerk. Aultman also had occasion to see Jenkins in the plant area when Jenkins went to the parts department. During the later conversation with Aultman, Jenkins reported that while he thought that a majority of the office employees would be in favor of a union, they wanted to "take a wait and see approach." Jenkins reported that employees wanted to wait and see how the Paris employees fared before they really became actively involved in a campaign. Aultman told Jenkins that if the interest progressed and the Union began an organizing campaign, the Union would need a list of everyone's name, address, and telephone number. Aultman told Jenkins that he would get back with him if "it got that far." Aultman testified that he told Jenkins to try and come up with the information and have it ready in the event that Aultman needed it. Aultman estimated that this last conversation with Jenkins occurred ap-

<sup>2</sup> Aultman estimated that he usually averaged one to two visits a day to the plant and it was not unusual for him to be in the office as often as two to three times a week.

proximately a week or two before his discharge and Jenkins never provided him with the information.

Jenkins contends that within a week to 10 days after he first spoke with Aultman, he talked with approximately 10 of the eligible employees. Jenkins testified that he told the employees that he was leaning toward union representation to improve their retirement benefits and he wanted to find out if they would be for or against the Union if an election were held. Jenkins identified five of the employees with whom he spoke about the Union. He included Linda Cameron as one of those employees. Jenkins also testified that during this same time period, he told Office Manager David Burgess that he had discussed the Union with employees in the office and with Aultman. Burgess made no comment. Jenkins described Burgess as a personal friend and described the conversation as one between friends. While General Counsel alleges that Burgess is a supervisor, Respondent denies his supervisory or agency status.

#### *D. Jenkins' Alleged Absence from the Plant on July 8, 2001*

##### 1. Respondent's timekeeping system

Nonexempt office employees clock in and out of the plant using a card swipe KRONOS system, which records when they arrive at the plant and when they leave. Employees are required to clock out any time they leave the plant except for authorized company business. If an employee fails to clock out as required, the employee may correct the error by completing a punch order change form. Jenkins' KRONOS record shows that he clocked in at 6:32 a.m. on Saturday, July 7, and out at 11:14 a.m. He clocked back into the plant again at 12:55 p.m. and out of the plant again at the end of the day at 5:54 p.m. On Sunday, July 8, the KRONOS' accounting timerecord shows that Jenkins clocked in at 10:45 a.m. and out again at 2:38 p.m. the same day.

##### 2. Cecile Gray's sighting of Jenkins

Cecile Gray has worked at Respondent's facility for 24 years. Beginning her career as a call-in production employee, she progressed through a series of different production jobs in the Fort Payne facility. She eventually became a lead person and later worked as a shift supervisor for 8 years before joining the office staff. Since working in the office, she has been an inventory controller for packaging materials and raw baking materials and an assistant in human resources. Gray testified that when she left the production area and began the job as inventory controller, she received no assistance from fellow office employees in learning the job. One employee refused to even acknowledge her questions if she asked for assistance. She said that after 2 or 3 days of this situation, Jenkins felt compassionate enough to come over and help her learn the job. Gray described Jenkins as being a really good friend to her since that time in 1992. Gray was ultimately promoted to human resources manager and has been in that position since March 1998.

On Sunday, July 8, Gray was traveling home from church with her husband. Gray's vehicle had just turned from 14th Street north in Fort Payne and was heading north onto Gault Avenue. Gray testified that as she was at this location, she saw Jenkins in his truck and heading southbound in the direction of

his home on 14th Street south. At the time that Gray saw Jenkins, only the turn lane was between her vehicle and Jenkins' truck. She looked at her car clock, and noticed that it was 12:45 p.m.<sup>3</sup> Gray testified that at the time that she saw Jenkins she had no reason to know that Jenkins was working that day or on the clock.

##### 3. Gray's July 9 discussion with Jenkins

Gray recalled that Jenkins stopped by her office the next day around 6 p.m., while on his way to the parts room in the plant. Jenkins told her that he was considering applying for the payroll clerk position that was to become available the following Friday. Jenkins told Gray that he had spoken with Controller Larry Christ about the position and Christ had told him that he was going to fill the position from outside the office. Jenkins discussed his ambivalence about applying for the position. Gray recalled that Jenkins acknowledged that he knew that the job was stressful and required overtime. He commented, however, that he was already accustomed to working overtime. He explained that he had just worked overtime the previous week-end while he was filling in for vacationing employee Debbie O'Connor. Gray told Jenkins that if he were interested in the position, she would speak with Christ. Jenkins told her that he would think about it further and let her know the following day if he wanted to pursue the job. Gray denied that at any time in the conversation Jenkins made any comments about union representation or about any contact with Union Representative Aultman.

##### 4. Gray's followup to her discussion with Jenkins

After speaking with Jenkins, Gray then recalled that she had seen him the previous day. She checked the KRONUS' record and found that Jenkins had been on the clock at the time that she had seen him away from the plant. Immediately after checking the KRONUS' record and at approximately 6:45 p.m., Gray contacted Plant Manager Kennedy at his home.<sup>4</sup> She told Kennedy about having seen Jenkins the previous day and what she had discovered when checking Jenkins' KRONUS record. Kennedy suggested that they give Jenkins time to correct the mistake.

Prior to the time that Jenkins received his check on Thursday, he neither submitted a punch order change form nor made any attempt to correct the time record for the previous Sunday. On Friday afternoon, Jenkins was called into a meeting with Gray, Assistant Plant Manager Jim Crowe, and Office Manager David Burgess. Gray testified that she told Jenkins that she had seen him away from the plant on Sunday, July 8 at 12:45 p.m. Jenkins responded that he didn't know who she had seen but it had not been him. Later in the conversation, Gray recalled that Jenkins told her that he honestly didn't remember if he had left the plant, but asserted that if he had done so, he would have punched out. During the meeting, Jenkins asserted that he had either made a phone call to his wife or to former fellow em-

<sup>3</sup> She later determined that because her car clock had a discrepancy of 4 minutes from the plant clock, the time would have been 12:41 p.m. plant time.

<sup>4</sup> Respondent introduced the telephone log to corroborate the call made to Kennedy's home at 6:45 p.m. on July 9.

ployee Pam Mitchell while he was at the plant. He suggested that the Company check the phone records to verify his presence at the plant during the time period in question. Gray testified that she checked the phone records and found two calls made at 1:59 and 2:03 p.m. and neither call was made to his wife or Mitchell. She later determined that the two calls were made to St. Louis. Gray told Jenkins that he was suspended, pending further investigation. Before leaving the office, Jenkins also suggested that Gray speak with employee Brenda Bartley who had been in the office on July 8.

When Respondent introduced the telephone log for July 8, Gray testified that the only call that was made to Jenkins' home was shown to be at 2:36 p.m. There was also another call that was logged into the plant and to the extension where Jenkins was working on July 8. The call came into the plant at 12:10 p.m. and lasted for 10 minutes and 34 seconds. Gray testified that it takes approximately 26 minutes for the round trip from the plant to Jenkins' home. Gray also talked with office employee Brenda Bartley on July 13. Bartley confirmed that she had gone into work on the July 8 specifically for the purpose of calling St. Louis. Bartley told Gray that she had seen Jenkins prior to her making the first telephone call at 1:59 p.m.; approximately 10 to 15 minutes after arriving at the office.<sup>5</sup>

Gray testified that after talking with Bartley, she concluded that Bartley had not been at the plant at the time that she (Gray) had seen Jenkins at 12:45 p.m. and that Jenkins would have had time to leave the plant and return prior to Bartley's presence in the office. Gray explained that after her investigation, including the telephone records review, she determined that Jenkins was away from the plant while on the clock at 12:45 p.m. Because the offense is a termination offense, Gray recommended Jenkins' termination to Kennedy. Kennedy testified that because he believed Gray, he concluded that Jenkins should be terminated.

5. Jenkins' account of July 8, and the investigation that followed

*a. July 8, 2001*

While Sunday, July 8, was not a regularly scheduled workday for Jenkins, he had worked overtime to catch up on his work before the next workweek. He had been covering for employee Debbie O'Connor while she was away on vacation and he had gotten behind in his own work. When Jenkins arrived, there were no other employees in the office. Jenkins recalled that he was using the computer system in the AREBA program, which is an online parts ordering and reconciliation program. Jenkins was using the computer to match purchase orders to invoices. Jenkins explained that because the purchasing card was in Billy Wagner's name, he had to use Billy Wagner's computer identification code to log into the computer program. Jenkins maintained that after arriving at the facility, he never left the plant until he clocked out later that afternoon. He testified that during the entire time that he was present, he

continuously made entries on the computer as he reconciled the invoices. He saw no other employees in the office other than Brenda Bartley, who he estimated to have arrived sometime between 1 and 1:30 p.m.

*b. July 11, 2001*

Jenkins testified that while he worked on both July 9 and 10, he had no specific recall of having seen Cecile Gray. On Wednesday, July 11, however, Jenkins saw Gray as he was returning to the parts room to complete an inventory. Jenkins recalled that he sat down in Gray's office and began to share with her his frustration about Larry Christ's failure to follow seniority in filling front office positions. Jenkins told Gray about a conversation that he had with Christ about the payroll job that was scheduled to become available. Jenkins recalled that he had shared with Gray that he and his wife had just reconciled after a separation and he was seeking a job with less stress and overtime. Gray responded that she was glad to hear that he and his wife were back together and she hoped that everything worked out. She also told him that if he wanted to pursue the payroll job, he should submit the resume and she would consider it, regardless of what Christ said or thought. Jenkins also testified that during the conversation, he mentioned to Gray that he had spoken with Union Representative Larry Aultman and some of the office employees about the benefits of union representation. He said that he told Gray that he was definitely in favor of representation if it would improve their retirement benefits. Jenkins provided no explanation as to what Gray said in response to this information.

*c. July 13, 2001*

Jenkins confirmed that he was called to a meeting with Gray, Burgess, and Crowe on Friday, July 13, and was informed by Gray that she had seen him on Sunday. Jenkins' account tracks that of Gray's and he recalled asking Gray to check the telephone records. After he left the plant, he stopped and called back to talk with Gray. He had remembered the recipient of Brenda Bartley's telephone call and relayed what Bartley had told him about the substance of her calls to St. Louis.

*d. July 14, 2001*

Jenkins recalled that he called Gary Kennedy at his home the following day. He denied having been away from the plant on Sunday and he told Kennedy that Brenda Bartley could corroborate his being at the plant. Jenkins volunteered to Kennedy two possible reasons for Gray having accused him of being away from the plant. Jenkins suggested that it may have been because of the incident involving Larry Christ and his not getting the payroll job or it may have been because he had some involvement with the Union. Jenkins recalled that Kennedy had vehemently denied any knowledge of Jenkins' involvement with the Union. Kennedy told him that he would talk with Brenda Bartley, review the evidence, make a decision, and then let him know something on Monday. Jenkins testified that Kennedy did not call him back on Monday and he ultimately received his notice of termination on July 20, 2001.

<sup>5</sup> Gray's notes from her interview with Bartley reflected Bartley's estimate that the first call had been made 10 to 15 minutes after arriving at the plant. In Gray's testimony, she recalled that Bartley had estimated the call 5 to 10 minutes after her arrival at the plant.

### III. ANALYSIS AND CONCLUSIONS

General Counsel asserts that Jenkins engaged in two general categories of protected conduct: (1) the traditional “union” activities of speaking to a union representative about the prospect of obtaining his coworkers’ views about potential union representation, and stating his own inclination toward union representation; and (2) protected concerted discussions with other employees concerning management’s departure from a policy of filling front office job vacancies by seniority bid.

The analytical framework for determining when a discharge violates Section 8(a)(3) and (1) of the Act has been set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under the *Wright Line* test, the burden rests with the General Counsel to make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the Respondent’s decision to terminate Jenkins. To establish a prima facie case, General Counsel must show the existence of protected activity, Respondent’s knowledge of that activity, evidence of union animus, and the link or nexus between the protected activity and the adverse employment action.<sup>6</sup> If the General Counsel is able to make such a showing, the burden shifts to Respondent to demonstrate that it would have taken the same action even in the absence of the protected activity. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, it must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of any protected activity.<sup>7</sup>

#### A. Jenkins’ Protected Activity

##### 1. Traditional union activities

General Counsel argues that Jenkins first spoke with Union Representative Larry Aultman about the prospect of obtaining union representation and then spoke with 10 other employees. Jenkins identified some of the employees with whom he spoke and included Linda Cameron as one of those employees. Jenkins testified that when he spoke with these employees, he told them that he was “leaning toward Union representation for the purpose of improving their retirement benefits.” He stated that he tried to find out from the employees if they would be for or against the Union if there were an election. General Counsel presented no employees to corroborate these conversations. Pursuant to Respondent’s subpoena, Linda Cameron testified concerning her contacts with Jenkins during this period of time. Cameron testified, without contradiction, that she and her husband were friends of Jenkins. They had even helped him move during his domestic difficulties in 2000. Cameron recalled that there had been discussions about the Paris, Texas organizing among the Fort Payne office employees. Cameron denied however, that Jenkins ever said anything to her about a Union or inquired as to her union views.

Counsel for the General Counsel argues that Cameron was the only witness to refute any aspect of Jenkins’ testimony about his protected activities, and submits that her testimony is

reconcilable with Jenkins’ purpose of remaining low key during the conversations and gathering the most candid responses from employees. Despite General Counsel’s argument, however, there is no direct evidence that Jenkins spoke with these other employees or at least effectively communicated his union support to them. His support was apparently unnoticed by Cameron who was a friend as well as a coworker. The only corroborative evidence of his having spoken with these employees was hearsay evidence from union Representative Aultman. Neither Aultman nor any other witness could directly corroborate these conversations.

##### 2. Concerted protected discussion of the job bidding policy

General Counsel further asserts that Jenkins engaged in protected concerted activity when he spoke with other employees about employee benefits and about their dissatisfaction that office positions were not being filled by seniority as in the past. General Counsel argues that while Jenkins may not have raised the issue of job bidding expressly in connection with the prospect of unionizing, there was talk of the Union and potential benefits to unionizing within the office area. General Counsel submits that because seniority-based job bidding is a common benefit in union contracts, employees’ discussions about the job bidding system had a nexus to the potential group action contemplated by employees’ discussion of unionizing.

I do not find that the evidence supports such a nexus. When Jenkins testified that he spoke with the 10 employees, he made no reference to his having talked with them about the job bidding system in the office. He only mentioned his having spoken about improving retirement benefits. The only person with whom he mentioned any discussion about job bidding was Cecille Gray. Jenkins testified that he had told Gray that he was “kind of upset” about the way some open positions had been filled in the front office and that Controller Larry Christ was no longer going by seniority as it had always been done in the past. Jenkins recalled that he had told Gray that he spoken with some other people in the office about the fact that seniority no longer played a part in filling positions. Jenkins admitted that he had not mentioned the names of any specific individuals with whom he had spoken or given any details as to the exact substance of those conversations. While Jenkins may have been dissatisfied with Christ’s failure to follow seniority in filling positions, the evidence is insufficient to substantiate that Jenkins was engaged in discussions with other employees about this problem. At best, Jenkins’ raising this issue with Gray was arguably protected concerted activity. For reasons set forth below in the discussion concerning animus, I do not find Jenkins’ protestation of Christ’s failure to follow seniority to be a motivating factor in Jenkins’ termination.

#### B. Respondent’s Knowledge

General Counsel asserts that Respondent’s knowledge of Jenkins’ protected activities is established by (1) Jenkins’ statements to David Burgess concerning his union activities; (2) Jenkins’ statements to Cecile Gray concerning his union and concerted protected activities; and (3) Jenkins’ statements to Plant Manager Kennedy regarding his union and concerted protected activities.

<sup>6</sup> *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

<sup>7</sup> *T & J Trucking Co.*, 316 NLRB 771 (1995).

### 1. Statements to David Burgess

Jenkins testified that approximately 3 weeks before his termination, he spoke with his personal friend and Office Manager David Burgess. Jenkins testified that he told Burgess that he had talked with people in the office and he felt that if there were an election, the employees would support the Union. Jenkins also recalled that he told Burgess that he had spoken with Aultman about the consequences and benefits of union representation in the office. Jenkins recalled that Burgess made no comment and simply nodded. Within a few days, he had a second conversation with Burgess and he reiterated his earlier comments. Jenkins described the conversation as “just a conversation between fiends.”

### 2. Burgess’ supervisory status

The term “supervisor” means any individual “having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them or to adjust their grievances, or effectively to recommend such action, if in connection with, the foregoing the exercise of such authority is not merely routine or clerical nature, but requires the use of independent judgment.” *Queen Mary*, 317 NLRB 1303 (1995). General Counsel asserts that Burgess is a supervisor within the meaning of Section 2(11) of the Act and Burgess’ knowledge of Jenkins’ protected activities is attributable to Respondent as a matter of law. *Dayton Typographical Service*, 273 NLRB 1205, 1211 (1984), *enfd.* in pertinent part 778 F.2d 1188 (6th Cir. 1985), citing *Pelligrini Bros. Wines*, 239 NLRB 1220 (1979); *Red Line Transfer & Storage Co.*, 204 NLRB 116 (1973).

While the complaint alleged that Burgess is a supervisor within the meaning of Section 2(11), Respondent denied Burgess’ supervisory status. In his brief, counsel for the General Counsel acknowledges that the burden of establishing the supervisory status of Burgess rests with the General Counsel. Counsel also notes that an individual’s appraisal or evaluation of employees’ performance does not of itself establish supervisory status. General Counsel asserts however, that if the evaluations have a direct effect on the employees’ working conditions, such as where they directly affect wages, tenure, or employment status, then the evaluators are per force Section 2(11) supervisors.<sup>8</sup>

In asserting that Burgess is a statutory supervisor, General Counsel relies upon the testimony of Jenkins and former employee Pam Mitchell. Jenkins and Mitchell testified that based upon their experience running payroll for the Respondent, an employee’s appraisal score corresponds directly to the level of annual merit raise awarded to the employee. General Counsel submitted an appraisal form for Jenkins that was prepared and signed by Burgess in April 2000. I agree with General Counsel’s argument that the appraisals’ ability to affect discipline and tenure is implicit in the process and in the language of the form itself. The form language indicates that an unsatisfactory rating may serve as grounds for disciplinary action, up to, and including dismissal. I also note that Respondent submitted into

evidence a punch record change form for Jenkins that was dated December 15, 2000. David Burgess signed this form as Jenkins’ supervisor. Certainly the completion of these forms is a strong indication that Burgess met the criteria for supervisor in April and December 2000. The evidence however, does not support that Burgess continued to possess the same indicia of supervisory status in July 2001.

While Burgess signed the punch record change form as Jenkins’ supervisor in December 15, 2000, Larry Christ signed this same form as Jenkins’ supervisor on July 3, 2001. Jenkins’ testimony indicates that it was Larry Christ who had the responsibility to fill the positions in the front office. Jenkins neither asserts that Burgess had any role in selecting the payroll clerk nor in Respondent’s decision to terminate him. General Counsel also asserts that Burgess possessed other indicia of supervisory status including his participation in the July 13, 2001 meeting with Jenkins, his title of “Office Manager,” and the fact that he does not clock in and out. I note that while Burgess was present during Gray’s suspension meeting with Jenkins on July 13, there is no evidence that he participated in any way. At best, he appeared to be a witness who ultimately escorted Jenkins to collect his personal belongings. The fact that Burgess may have the title of “Office Manager” and is compensated by salary rather than based upon an hourly rate does provide sufficient evidence of authority or responsibility to establish supervisory status.

General Counsel argues that while it bears the burden of proving Burgess’ supervisory status, the fact that the Respondent did not offer any evidence on the point is significant. Citing *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d 720 (6th Cir. 1988), General Counsel submits that where witnesses who reasonably may be considered favorably disposed toward a party are not called to testify about matters disputed by the litigation and about which they have special knowledge, an inference is required that, had the witness testified, their testimony would have been adverse to the party on the point in question. Certainly, in *International Automated Machines*, the Board reiterated the rule that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. I note however, that in that case the Board drew such an adverse inference when the missing witness was a member of management. In a recent case, the Board noted that the failure to call a witness permits but does not require the drawing of an adverse inference. That determination depends upon the particular circumstances in each situation. *Desert Pines Golf Club*, 334 NLRB 265 (2001). Thus, while Respondent did not call David Burgess to deny knowledge of Jenkins’ union activity or to deny his supervisory status, such action is consistent with Respondent’s position that he was not a supervisor. Accordingly, I draw no adverse inference from Respondent’s failure to present Burgess.

Based upon the total record evidence, I do not find the evidence sufficient to establish that David Burgess was a statutory supervisor in July 2001. Having failed to find that Burgess was a supervisor, his knowledge of Jenkins’ union activity may not be imputed to Respondent.

<sup>8</sup> *Bayou Manor Health Center*, 311 NLRB 955 (1993).

### 3. Jenkins' statements to Gray

Jenkins testified that he told Gray during their meeting the week of July 9, 2001, that he had been in touch with Union Representative Aultman and that he had talked with employees about obtaining union representation. Gray denied that Jenkins made any mention of the Union or his having spoken with Aultman. She recalled that while Jenkins expressed his dissatisfaction about how Christ was filling the job opening in the office, he made no mention of retirement benefits.

Certainly, it is this conversation that is most critical to establish knowledge of Jenkins' union or protected activity. Jenkins presented no evidence that either Gray or Kennedy had personal knowledge of his having talked about the Union with office employees. Jenkins' testimony concerning his conversation with Gray must be credited in order to establish Respondent's knowledge through Gray. Respondent argues that Jenkins' contention that he had a conversation with Gray about the payroll position and his union leanings on Wednesday, July 11, 2001, is not credible. While Jenkins testified that this conversation occurred with certainty on Wednesday, July 11, Gray recalled that her conversation with Jenkins occurred on Monday, July 9. Gray recalled specifically that after learning from Jenkins on Monday that he had worked overtime on Sunday, she reviewed his time record. When she discovered that Jenkins was shown to have been on the clock at the time that she saw him away from the plant, she called Plant Manager Kennedy at home. Respondent submitted the telephone log to verify her call to Kennedy on Monday evening as she testified. Respondent also submitted Jenkins' time record to show that while he had worked as late as 6:51 p.m. on Monday, July 9, he had clocked out at 5:25 p.m. on Wednesday, July 11. These particular documents appear to bolster Gray's testimony that the meeting occurred on Monday rather than Wednesday, however I don't find them definitive for discrediting Jenkins' version of the substance of the conversation.

In considering the testimony of both Gray and Jenkins however, I find Gray to be more credible. Jenkins admits that during his conversation with Gray, he talked with her about his relationship with his wife and shared that he and his wife had gotten back together. Admittedly, Gray told him that she was pleased to hear it and that she hoped that everything worked out. Jenkins explained to Gray that one of the reasons that he was interested in getting the payroll clerk position was the stress and overtime demands of his current job. Jenkins admits that Gray told him that if he were interested in the payroll clerk's position, all that he had to do was submit a resume. She assured him that she would consider it no matter what Christ said or thought. Jenkins contends that it was in this same conversation that he told Gray that he had spoken with Aultman and other employees and that he was "definitely in favor" of the Union. While Jenkins contends that he openly shared these views with Gray, Aultman testified that he had cautioned Jenkins about raising the subject of the Union in an indirect manner. Aultman testified:

When I talked to him about trying to gauge the interest in the Union, I cautioned him about just walking up to somebody saying what do you think about the union. I encouraged him

to just work that conversation around to where the union just came up, or not even necessarily the union maybe, but just the need for improvement in benefits and things like that—to maybe start the conversation out with something that did not even have anything to do with the job or the benefits or anything, but then just work the subject of organizing around, to where people are not so open about it and they are not fearful that they are really talking about a Union and somebody will overhear them, and maybe get discharged.

Respondent argues that Aultman's advice would have been completely at odds with Jenkins' alleged bold proclamation of his union support and activity to Gray. I find merit in Respondent's argument. It is implausible that he would have boldly proclaimed his union support to the manager who had assured him that she would consider him for the payroll job despite possible resistance from Christ. The fact that he had been told by the Union to use caution in even bringing up the subject of the Union with other employees belies his assertion that he boldly proclaimed his union support during this particular conversation with Gray. I also find it incredible that Jenkins so boldly proclaimed this union support and yet he provides no explanation as to how Gray reacted or responded to this information. I do not credit Jenkins' testimony concerning this conversation and find no basis to conclude that Gray had knowledge of Jenkins' protected or union activity.

### 4. Knowledge based on Jenkins' conversation with Kennedy

Jenkins testified that during a July 14, 2001 telephone conversation he relayed to Plant Manager Kennedy his belief that the Respondent was taking these actions against him because of his union organizing activities and because of his complaints about Christ's process of filling office positions. Kennedy testified that he did not recall any reference to the Union or Jenkins' opinion about the Union during this conversation. General Counsel asserts that Respondent's position statement submitted during the Region's investigation concedes knowledge based upon Jenkins' conversation with Kennedy. General Counsel submits that under Federal Rules of Evidence 801(d)(2)(A) and Board precedent, an admission by a party-opponent may be admitted as nonhearsay.<sup>9</sup> Respondent's vice president and deputy general counsel, Thomas H. Langenberg, submitted the position statement to the Region. I note that the portion of the letter in issue is not consistent with either the testimony of Kennedy or Jenkins. Neither Jenkins nor Kennedy testified that Kennedy was involved in any investigatory interview with Jenkins. The only discussion referenced by either witness was the telephone conversation initiated by Jenkins on July 14, the day after Gray suspended him. The letter however, states that Kennedy conducted an investigatory interview with Jenkins after his suspension. Langenberg lists three reasons that Jenkins gave to Kennedy for why he felt that he had been suspended. Langenberg asserts that Jenkins had given his failure to be selected by Christ for the position of packaging buyer and his discussion with Gray about the payroll position as the

<sup>9</sup> Citing *Optica Lee Borinquen*, 307 NLRB 705 (1992); *Massillon Community Hospital*, 282 NLRB 675 (1987); *American Postal Workers Union*, 266 NLRB 319 (1983).

first two reasons. With respect to the third reason given by Jenkins, Langenberg states:

Finally, Mr. Jenkins raised a question of the office employees giving consideration to joining the union. The Fort Payne plant has a sister facility in Paris, Texas where the office employees recently voted to join the BCTGM union. Mr. Jenkins relayed to Mr. Kennedy that he had told some of his co-workers he would support joining a union if the union could improve his benefits. He did not allege that Cecile Gray was aware of his comments, or that any other member of management was aware of such comments. After the election at the Paris facility, Mr. Kennedy addressed the issue with the office employees and advised them that they were “in the cat bird seat.” He told them that they could watch to see what benefits the union obtained for the office employees in Paris and then make up their minds. Mr. Jenkins told Mr. Kennedy that his comments to his co-workers were a repetition of what Mr. Kennedy had said to them. Mr. Jenkins was unable to explain why anyone would object to him repeating, or paraphrasing, the plant manager’s statements. Further neither Cecile Gray nor Gary Kennedy nor any other manager was aware of the comments until the interview. Mr. Jenkins was already under suspension, with the expectation of termination, if a plausible, acceptable excuse for his behavior was not tendered, when the company [was] first learned of this activity. Further, this activity was alleged by Mr. Jenkins to be no more than a restatement of the plant manager’s remarks.

While Respondent’s deputy general counsel may have been mistaken about the circumstances of the discussion between Jenkins and Kennedy, his letter certainly corroborates that Jenkins informed Kennedy of his union discussions with employees. Accordingly, I find that the evidence supports that as of July 14, Jenkins had informed Kennedy that he had engaged in discussions with employees about the Union. See *McKenzie Engineering Co.*, 326 NLRB 473, 485 fn. 6 (1998); *Walker Stainless Inc.*, 334 NLRB 1260, 1275 fn. 23 (2001). I note however, that this knowledge is not established prior to Gray’s initiating the investigation and it was after Jenkins’ suspension.

### C. Animus

Under the *Wright Line* analysis, the General Counsel must prove that animus was a “substantial and motivating factor” in Respondent’s decision to take adverse action. *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996). In other words, the General Counsel must prove by a preponderance of the evidence that animus was present during the decisionmaking process. *Sears Roebuck & Co.*, 337 NLRB 443 (2002). Animus need not be proven by direct evidence; it can be inferred from the record as a whole.<sup>10</sup>

General Counsel argues that the motivational link between Jenkins’ protected activities and his discharge is inferred from five factors: (1) Plant Manager Kennedy’s statement during the strike, (2) Kennedy’s statement in his meeting with employees concerning the organizational activities at the Paris plant, (3) the highly suspicious timing of Respondent’s actions against

Jenkins, (4) Respondent’s failure to meaningfully investigate the events of July 8, 2001, and (5) official notice of Respondent’s prior unlawful conduct as found in a previous unfair labor practice proceeding.

#### 1. Plant Manager Kennedy’s alleged statements during the strike

General Counsel alleges no independent 8(a)(1) violations in this case. Counsel for the General Counsel argues however, that because Kennedy’s August 2000 statement was heard by employees and would reasonably tend to coerce them in the exercise of Section 7 rights, it would have constituted an independent Section 8(a)(1) had it been plead. General Counsel further acknowledges however, that because there is no complaint allegation or timely charge regarding that statement, no redress of the violation is sought. Citing *Hankins Lumber Co.*, 316 NLRB 837, 845 (1995), General Counsel asserts however, that evidence of coercive conduct properly establishes motive even though it is not alleged as an independent violation. In *Hankins*, the Government argued that an alleged threat of plant closure should be credited even though the remark was neither alleged as a violation in the complaint nor amended into the complaint at trial. The administrative law judge however, did not credit the statement, finding it to be ambiguous and not clearly interpretative of an unlawful meaning. General Counsel also relies upon *Best Products Co.*, 235 NLRB 1024, 1025 (1978), in its argument that Kennedy’s statement provides animus for Jenkins’ discharge. I note that in *Best Products* there had been a prior representation proceeding in which the employer was alleged to have coercively interrogated an employee whose discharge was the subject of the subsequent unfair labor practice hearing. The hearing officer, whose decision was affirmed by the Board, found such interrogation to interfere with employee rights. In the subsequent unfair labor practice proceeding, the Board found that the employer’s union animus toward this employee was established by the findings of the hearing officer and the Board in the preceding representation proceeding.

I find the circumstances of this case distinguishable from both *Hankins Lumber Co.* and *Best Products Co.* While Jenkins recited this one statement, he failed to identify to whom this comment was addressed, whether this was a part of a conversation, and what comments preceded or followed this statement. There is no evidence that this statement was directed to employees or even overheard by any other employees. I note that the Board has previously determined that it is irrelevant whether a comment is intended to be overheard when evaluating the coerciveness of an alleged statement. *Crown Stationers*, 272 NLRB 164 (1984). The coerciveness of Kennedy’s alleged statement however, cannot be ascertained without an adequate foundation of the circumstances in which it occurred. Unlike the circumstances in *Best Products Co.*, Kennedy’s statement was not directed to Jenkins. The evidence in fact, demonstrates that it occurred prior to Jenkins or any other office employee engaging in any union activity. Accordingly, I do not find the alleged statement by Kennedy sufficient to establish that Jenkins’ union or protected activities were a motivating factor in his July 2001 discharge.

<sup>10</sup> *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

## 2. Plant Manager Kennedy's statements to the congregated employees

In issuing complaint, General Counsel did not allege Kennedy's statements to the office and quality control employees as violative of the Act, although they were alleged to have occurred within 6 months of the date of the charge. General Counsel argues however, that Kennedy's statements were no less than a directive for employees to refrain from union activity for at least 6 months and a promise of benefits if they would refrain from unionizing for the prescribed time period. General Counsel argues that these statements establish a motivational link between Jenkins' union activities and his discharge since Jenkins disobeyed Kennedy's directive to hold off on union organizing. The Board and the courts have long recognized that while statements may not be alleged as violations, they may nevertheless be relied upon as evidence of animus.<sup>11</sup> While the remarks might arguably establish evidence of animus toward an employee who did not postpone pursuit of organizing activities, the evidence fails to establish Respondent's knowledge of Jenkins' union activity prior to his suspension.

## 3. Timing and the extent of Respondent's investigation

General Counsel further submits that the timing of Jenkins' discharge and the extent to which Respondent investigated the incident are further evidence of Respondent's unlawful motive. Considering only Jenkins' testimony, the timing of his discharge may certainly raise a question of unlawful motivation. It is undisputed that he had no prior discipline during his 24 years of employment. Based upon Jenkins' testimony, Respondent terminated him within weeks of his having talked with other employees about the Union and his dissatisfaction with Christ's selection process for office positions. Jenkins' testimony that he spoke with employees about the Union however, was not only uncorroborated but actually rebutted by his friend and fellow employee Linda Cameron. As discussed above, the credited evidence fails to show that Respondent had any knowledge of Jenkins' alleged union activity prior to Gray's investigation and Jenkins' subsequent suspension on July 13. Thus, without evidence of protected activity and Respondent's knowledge of such activity, the timing of the suspension and subsequent discharge fail to establish evidence of animus.

General Counsel argues that Respondent's investigation of the events indicated that the Respondent was more concerned with justifying planned action against Jenkins than determining whether misconduct occurred. General Counsel describes Respondent's investigation as "Verdict First—investigation afterwards." General Counsel submits that Respondent could have checked with the security guard or Gray's husband to determine the accuracy of Gray's account. I note however, that Jenkins' never asserted that the security guard could verify his presence "in the office." There was no evidence that the security guard's responsibility included visually observing and documenting each individual employee leaving and entering the premises. At best, the security guard could only have verified that he had

seen Jenkins' leaving or returning to the plant during the relevant time period. Inasmuch as Kennedy relied upon Human Resource Manager Gray's recollection of her observation, it would not have been reasonable for him to distrust her information and question Gray's husband. General Counsel also submits that Respondent could have interviewed other employees who clocked in and out during the time period in issue to determine if they had seen Jenkins. The record reflects however, that Gray spoke with Brenda Bartley, who was the only employee that Jenkins claims to have been present during this time period. General Counsel also argues that Respondent's consulting electronic evidence would have yielded additional sources of information. General Counsel argues that Respondent never checked its electronic log file or data uploads to determine the times at which Jenkins made entries on the day in question. Gray denied that Jenkins told her during the July 13 meeting that he was making computer data entries in the inventory database. Gray testified however, that after the July 13, 2001 meeting with Jenkins and prior to the decision to terminate Jenkins, Larry Christ checked the computer records. Gray explained however, that the relevant records were overwritten every 4 days and were no longer available for verification. While General Counsel would expand the investigation to every conceivable factual resource, the overall evidence does not indicate that Respondent engaged in a perfunctory or inadequate investigation.

## 4. Official notice of earlier unlawful conduct

General Counsel asserts that the Board's findings of Respondent's other unlawful conduct may be relied upon in determining animus. General Counsel submits that the Board has recognized that its earlier decisions regarding an employer are properly the subject of official notice in order to establish background information and the likelihood of ill motive.<sup>12</sup> As noted by the General Counsel, the Board has also found that prior unfair labor practices engaged in by the same respondent can not only be properly noted as background, but may also bolster a finding of union animus in a later proceeding. *Control Services, Inc.*, 315 NLRB 431 (1994). Accordingly, it is argued that I may appropriately rely on findings of other unlawful conduct found by the Board in *Earthgrains Co.*, 336 NLRB 1119 (2001), *Earthgrains Co.*, 334 NLRB 1131 (2001), and the administrative law judge's decision in *Earthgrains Co.*, JD-51-00. It is argued that collectively, these cases disclose a general disrespect on Respondent's part for employees' rights under the Act.

Respondent argues that judicial notice cannot fill the animus gap in General Counsel's prima facie case. Respondent argues that the earlier Earthgrains cases, as cited by General Counsel, are not proper subjects for judicial notice. Respondent submits that judicial notice is limited to cases involving the same decisionmaker, the same facility, the same factual basis, and/or the same employees. Respondent distinguishes *Barnes & Noble*, supra, as a case where the "chief activist" in the prior case that was judicially noticed was also the "chief activist" in the sub-

<sup>11</sup> *Electronic Data Systems Data*, 305 NLRB 219 (1991); *Passaic Daily News v. NLRB*, 736 F.2d 1543 fn. 15 (D.C. Cir. 1984).

<sup>12</sup> *Barnes & Noble Bookstores*, 237 NLRB 1246 fn. 1 (1978), enf. 598 F.2d 665 (1st Cir. 1979).

sequent case. Respondent argues that the other cases relied upon by the General Counsel are further distinguishable as the judicial notice involved: the same administrator and same facility, the same employees and the same facts, statements made to employees that had been found unlawful in a prior case involving the same statements, or was taken for the limited purpose of establishing a chronology of background events.<sup>13</sup> Respondent argues that not one of the cases cited by the General Counsel takes judicial notice of events that happened at another facility, involved a different decisionmaker, concerned different union locals, or implicated different employees, and/or different factual circumstances.

In *Earthgrains Co.*, supra, the Board affirmed the administrative law judge in finding that the Respondent violated Section 8(a)(5) of the Act during the terms of collective-bargaining agreements for two bargaining units by withdrawing recognition from the Union, ceasing to apply contract terms, bypassing the Union, and refusing to process grievances with respect to certain historically represented unit employees. The unfair labor practices involved Respondent's employees in Columbus, Laurel, Hattiesburg, and Meridian, Mississippi. *Earthgrains Co.*, 336 NLRB 1119, involved Respondent's facility in Orangeburg, South Carolina. The Board affirmed the administrative law judge in finding violations of 8(a)(1) that arose in the midst of an organizing campaign at the South Carolina facility. Included in the conduct found violative was the plant manager's statement to employees during the campaign. The plant manager told maintenance employees that they would get the planned wage increases if the union was defeated in the election, but the increase was "something that would have to be negotiated" if the union won. The administrative law judge decision pending before the Board in *Earthgrains Co.*, JD-51-00 (lead Case 11-CA-18006-1, May 1, 2001) involves allegations of independent 8(a)(1) conduct as well as the discriminatory discharge of one employee and the discriminatory transfer of another employee at Respondent's facilities in Johnson City, Tennessee; Norton and Bristol, Virginia; and Jenkins, Kentucky.

Respondent argues that the cases for which General Counsel requests judicial notice are not similar in time, nature, or participants to the case in issue. I find merit in Respondent's argument. Jenkins' discharge resulted from Cecile Gray's investigation and her later recommendation for termination to Plant Manager Gary Kennedy. There is no evidence that Gray, Kennedy, or Jenkins was involved in any of the prior cases cited by General Counsel. None of the cases involve the Fort Payne facility. While I take judicial notice of these cases as background, I do not find these cases sufficiently similar in nature or in participants to provide evidence of animus or unlawful motive in Jenkins' discharge.

##### 5. The question of disparity

Respondent asserts that employees Stanley Crowe, Gary Hughes, and Dwayne Meeks were all terminated for the same offense as Jenkins. General Counsel argues that Respondent

disparately terminated Jenkins as compared to its treatment of employee Stanley Crowe. The record reflects that Crowe was terminated for being away from the plant while on the clock in March 1999. While Crowe initially denied the accusation, he later admitted that he had left the plant because he had to check on a problem with his son. General Counsel submitted into evidence a memorandum by Supervisor Larry Gaines. The memorandum documents that Gaines had warned Crowe for leaving the plant without clocking out 6 months before his discharge. Plant Manager Kennedy testified that when he terminated Crowe, he had been unaware of Crowe's earlier warning for this infraction.

##### D. Summary and Analysis

After considering General Counsel's and Respondent's arguments and the total record evidence, I find that this case ultimately turns on the credibility of Cecile Gray. Plant Manager Gary Kennedy testified that he terminated Richard Jenkins because he believed that Jenkins was away from the plant while on the clock. He concluded that Jenkins had been away from the plant on July 8, because Cecile Gray told him that she had seen Jenkins. Kennedy was asked why he believed Gray even though Jenkins denied being away from the plant. Kennedy explained that he had placed Gray in her position as human resources manager primarily because of her integrity. She not only told Kennedy that she had seen Jenkins, but she fully described his behavior. She described Jenkins as driving with both hands on the wheel; looking straight ahead, and appearing possessed like a man on a mission. Kennedy recalled that a day or two after Gray first told him about seeing Jenkins, she confided to him the personal problem that she had with disciplining Jenkins. For the first time she shared with Kennedy how Jenkins had befriended her when she first went into the office and the fact that she might not have become eligible for her current job had it not been for Jenkins. Kennedy also explained that Respondent had taken into account everything that Jenkins had said but had found nothing that exonerated him. Kennedy testified that Respondent could find nothing that even remotely indicated that Jenkins was not where Gray placed him on July 8. Kennedy explained that he had to believe someone and that "someone" was Cecile Gray.

In his brief, counsel for the General Counsel described Gray as emotive while testifying and describes her as portraying a continuing internal conflict. General Counsel suggests that any lingering internal struggle evinced by Gray was indicative of one who realizes that she has done a friend wrongly and feels guilt. General Counsel further submits that the image of Jenkins assisting her at a time when others in the office coolly distanced themselves from her would not trouble her if her conscience were clean regarding her actions toward him. Gray's demeanor clearly demonstrated her anguish for her role in Jenkins' discharge. Contrary to General Counsel's argument however, I found her testimony to be forthright and completely credible. Candidly, one might wonder why Gray, as a friend, did not approach Jenkins on a personal basis and ask him about the problem with his time records. She apparently concluded however, that her job responsibility required her to do just as she did with no room for variance. While this may have been a

<sup>13</sup> *Barnes & Noble*, 237 NLRB at 1249; *Kings Terrace Nursing Home*, supra; *Best Products Co.*, 236 NLRB 1024 (1978); *Stark Electric, Inc.*, 327 NLRB 518 fn. 1 (1999).

very harsh stance to take with a friend, the evidence does not support that it was done because of an unlawful motive. Interestingly, it is the testimony of both Cameron and Gray that so markedly contradicts Jenkins and these are the witnesses who describe themselves as his friends.

Based on the overall evidence, I do not find that the record supports that Jenkins' union activity or protected activity was a motivating factor in Respondent's decision to terminate him. Jenkins' union activity was not corroborated. Any question that Respondent harbored animus about his complaints concerning Christ's selection criteria is diffused by Jenkins' own testimony. Admittedly, Gray assured him that she would consider him in spite of Christ. There is no credible evidence of Respondent's knowledge of any union activity until after Jenkins' suspension. In view of the total record evidence, I am unable to conclude that Jenkins' was treated in a disparate manner. Respondent has terminated other employees for the same offense. For the reasons set forth above, I find no probative evidence from which I can infer that Jenkins' discharge was the product of animus toward his union or protected activity.<sup>14</sup>

Even if General Counsel had met its burden of establishing a prima facie case, Respondent has demonstrated that it would have terminated Jenkins even in the absence of any protected or union activity.<sup>15</sup> The record evidence supports the conclusion that Respondent discharged Jenkins because it was determined that he was away from the plant while on the clock. Respondent has demonstrated that this determination was based upon the clear and unwavering account of Cecile Gray. Gray may have been mistaken in her conclusion that she saw Jenkins on July 8, at 12:41 p.m. Respondent however, relied upon Gray's observation and conclusion. The Board has determined that while an employer may act on a mistaken belief, such conduct does not constitute an unfair labor practice. See *Yuker Construction Co.*,

335 NLRB 1072 (2001). In *Yuker*, the Board also noted that an employer might discharge an employee for any reason, whether or not it is just, as long as it is not for protected activity.<sup>16</sup>

While Gray's treatment of a friend may appear to be harsh and even unjust based upon the undisputed history of their relationship, the overall evidence is insufficient to find that Jenkins was discharged for either his union or protected activity. Accordingly, I shall recommend that the complaint be dismissed in its entirety.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the alleged unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>17</sup>

#### ORDER

The complaint is dismissed.

<sup>16</sup> *Manimark Corp. v. NLRB*, 7 F.3d 547, 552 (6th Cir. 1993); *NLRB v. Ogle Protection Service*, 375 F.2d 497, 505 (6th Cir. 1967), cert. denied 389 U.S. 843 (1967).

<sup>17</sup> If no exceptions are filed as provided by Sec. 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.

<sup>14</sup> See *Meritor Automotive, Inc.*, 328 NLRB 813 (1999), where the Board found there was marginal knowledge of union activity but no direct evidence of animus. The Board concluded that there was an insufficient basis to infer animus and therefore a failure to meet General Counsel's burden of proof.

<sup>15</sup> *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).