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Krystal Enterprises Inc. *and* United Food and Commercial Workers Union, Local 324.[1] Cases 21–CA–34553 and 21–CA–34875

August 26, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 1, 2002, Administrative Law Judge John J. McCarrick issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) by: threatening to retaliate against employees for engaging in union activities; interrogating employees about their and other employees' union activities;[4] creating the impression that employees' union activities were under surveillance; denying employees access to union representatives during a union rally; and promulgating and maintaining an overly broad no-solicitation, no-distribution rule. We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) by disciplining and suspending employee Ricardo Romero for engaging in union activities and by reducing the work duties of employee Olga Lopez based on the Respondent's belief that she was engaging in union activities.

Contrary to the judge, however, we find that the Respondent did not violate Section 8(a)(3) and (1) by discharging Romero and by laying off Lopez. As discussed more fully below, we find that the Respondent satisfied its rebuttal burden under *Wright Line* of establishing that it would have discharged Romero based on his violations of the Respondent's sexual harassment policy even in the absence of his union activities.[5] We similarly find that the Respondent established that it would have included Lopez in its 20-percent work force reduction even in the absence of her perceived union activities.

I. DISCHARGE OF RICARDO ROMERO

Romero was employed by the Respondent from October 1999 to May 10, 2001.[6] He was a quality control inspector in the parts department from September 2000 until his discharge on May 10. In January, Romero began assisting the Union's organizing effort at the Respondent's facility by providing the Union with home phone numbers of the Respondent's employees, handing out authorization cards, handbilling outside the facility, and talking about the Union with coworkers.

Between March and May, the Respondent issued disciplinary actions against Romero on three occasions. On March 9, the Respondent gave Romero a written warning for accepting three defective doors. On March 22, the Respondent gave Romero a written warning for being out of his work area during working time. On May 7, the Respondent issued a 3-day suspension to Romero for again being out of his work area during working time. We agree with the judge that these disciplinary actions violated Section 8(a)(3) of the Act.

In early May, at the company Cinco de Mayo party, at least three supervisors and employee Nestor Sanchez witnessed Romero grab two or three other employees from behind and push his pelvis against them. At the end of the party, one of the Respondent's supervisors, Luis Alvarez, approached Sanchez and asked if he had seen Romero's actions. Sanchez responded that he had seen them, that he had seen Romero engage in that sort of behavior regularly, and that he did not think it was right. Alvarez then told Sanchez that he should file a complaint with human resources if he did not think Romero's conduct was right. Sanchez then went with Alvarez to Plant Manager Dominick Vitelli's office and told Vitelli that he had seen Romero and other employees in the parts department touch employees' genitals and buttocks on many occasions. Sanchez, however, was not sure he wanted to file a complaint and stated he wanted to think about it over the weekend.

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers Union from the AFL–CIO effective July 29, 2005.

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

[3] In light of the fact that many of the Respondent's employees are Spanish-speaking, we shall modify the recommended Order to provide that the Respondent post the attached notice to employees in both Spanish and English. *Washington Fruit & Produce Co.*, 343 NLRB No. 125, slip op. at 1, fn. 3 (2004).

We shall additionally modify the recommended Order to provide standard remedial language and to conform it to the violations found.

[4] We find it unnecessary to pass on the judge's conclusion that Plant Manager Vitelli's questioning of employees Rodriguez and Quintana in January 2001 was unlawful as such a finding would be cumulative and would not materially affect the remedy.

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st cir. 1981), cert. denied 455 U.S. 989 (1982), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[6] All dates are 2001 unless otherwise indicated.

On the following Monday, Sanchez told Vitelli that he was ready to file a complaint.[7] Sanchez then filed a complaint with Human Resources Assistant Flavio Montes. The complaint did not mention the misconduct at the Cinco de Mayo party. Instead, it cited sexual horseplay and touching that Sanchez had observed Romero and employees in the parts department, Miguel Valpuesta, Rafael Bonilla, Ivan Artiaga, and Christian de la Cruz, engage in on a regular basis. Sanchez testified that he also told Montes that Romero and Valpuesta had, on separate occasions, grabbed him from behind and touched his buttocks and that he did not feel comfortable around employees who engaged in such offensive touching.

In response to Sanchez' complaint, Montes and Vitelli conducted an investigation into sexual harassment in the parts department. During the investigation, Montes and Vitelli interviewed about 15 employees. A number of them implicated Romero as a primary participant in the sexual touching. Upon completion of the investigation, Montes concluded that Romero had repeatedly violated the company sexual harassment policy and recommended his discharge. Montes recommended Romero's discharge because this was his second offense. Romero previously received a written warning in February for violating the Respondent's sexual harassment policy by using profanity with another employee during the morning break.[8] Given the weight of evidence against him and the fact that Romero had been previously warned about violating the Respondent's sexual harassment policy, Montes did not interview Romero before recommending his discharge.

In addition to Romero's termination, Montes recommended the discharge of Valpuesta, whom Montes determined had been the other main instigator of the sexual touching in the parts department and had been previously disciplined for violating the Respondent's sexual harassment policy. Montes also recommended that Bonilla be suspended, and that Jaime Martinez, Jose Alberto Espinosa, and de la Cruz be given written warnings. Human Resources Manager Gabriella Strauss implemented the recommended disciplinary actions, including discharging Romero for violating the Company's sexual harassment policy. Other than Romero's discharge, none of the disciplinary actions taken as a result of the sexual harassment investigation were alleged as violations.

To establish a violation under *Wright Line*, the General Counsel must prove, by a preponderance of the evidence, that the employee's protected conduct was a substantial or motivating factor in the employer's decision to discharge or take other adverse action against the employee. The burden then shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected activity.

We have adopted the judge's findings that the March and May warnings and suspension issued to Romero violated Section 8(a)(3) and (1).[9] In these circumstances, we also agree with the judge that the General Counsel met his burden of proof in its case in chief that Romero's union activity was a motivating factor in his discharge. We disagree, however, with the judge's finding that the Respondent failed to show that it would have discharged Romero even in the absence of that activity.

The judge correctly recognized that the "Respondent had ample evidence that Romero's behavior in 2001 violated company sexual harassment policy," which defines sexually harassing conduct as "unwelcome sexual advances . . . or any other verbal or physical contact of a sexual nature that prevents an individual from effectively performing the duties of their position or creates an intimidating, hostile, or offensive working environment." The judge found, however, that the Respondent's sexual harassment policy was regularly dishonored by both employees and supervisors and found that the Respondent treated Romero disparately when compared with its permissive treatment of its supervisors and employees. Thus, the judge concluded that the Respondent's sexual harassment defense was a pretext and the true reason for Romero's discharge was his union activity. We do not agree with these findings.

As the judge recognized, Romero's conduct clearly violated the Respondent's sexual harassment policy. Moreover, these violations were serious and repeated. As discussed more fully above, at a company party, Romero grabbed two or three employees from behind and pushed his pelvis against them. Several employees similarly indicated that Romero had touched them in an offensive manner at work on other occasions. The Respondent concluded that Romero had repeatedly touched fellow employees in a sexual manner and discharged him for his misconduct.

The record demonstrates that the Respondent consistently investigated and took action when, as here, it re-

[7] Our colleague refers to Sanchez' complaint as "trumped up" by the Respondent. The record, however, does not support this assertion. There is no evidence to call into question whether Romero engaged in misconduct at the Cinco de Mayo party, and the judge found that similar conduct by Romero and others was common in the parts department. Sanchez filed the complaint only after thinking about it over the weekend. We are satisfied that the complaint was not "trumped-up" but was instead well-founded and filed by Sanchez voluntarily.

[8] This warning was not alleged as a violation of the Act. The Respondent's sexual harassment policy is set forth in full in the judge's decision. It prohibits verbal as well as physical harassment. In the absence of any record evidence concerning the specific profanity used by Romero in February, we will not disturb the judge's unexcepted to finding that the warning issued by the Respondent was for violating its sexual harassment policy.

[9] In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by disciplining Romero on March 9, we do not rely on his finding that the Respondent coercively interrogated employee Rene Anguiano about Romero on March 7 because the record shows that this interrogation occurred on May 7.

ceived a complaint of sexual harassment. Indeed, there is no evidence that the Respondent ever failed to investigate a sexual harassment complaint. Nor is there any evidence that the Respondent failed to take disciplinary action if the complaint proved well-founded. For example, in August 1999, the Respondent terminated four employees after a complaint and investigation into an incident in which those employees had pulled down the pants of a coworker. In February, only 3 months before Romero's discharge, the Respondent suspended a male employee in the parts department for 3 days after he made a sexually oriented remark to a female coworker and she complained to human resources. Again in February, one parts department employee was suspended and two others put on probation for being in possession of offensive materials.

The Respondent's handling of the complaint concerning Romero was consistent with this past practice. Upon receiving the complaint, the Respondent conducted a thorough investigation and interviewed 15 employees. As a result of this investigation, the Respondent disciplined five employees other than Romero. Three employees received written warnings, one employee was suspended, and the other employee, Valpuesta, implicated as a primary instigator with Romero was likewise terminated. None of these other employees were known union supporters and none of these disciplinary actions were alleged as unfair labor practices.

Our dissenting colleague, like the judge, asserts that the Respondent did not similarly discipline other employees who engaged in the same type of offense as Romero. Our colleague recounts in lengthy and graphic detail conduct of a sexually oriented nature at the Respondent's facility that went unpunished. We recognize that the Respondent's supervisors and managers did not respond to many incidents of sexually oriented conduct and indeed participated at times in such conduct. When no employees complained, the conduct was apparently tolerated by the Respondent, an indifference we neither condone nor share. The record clearly demonstrates, however, that when an employee complained about this tawdry behavior, the Respondent took action.[10]

Sanchez' complaint was one of many on which the Respondent acted. Sanchez felt uncomfortable and complained that the conduct was affecting his ability to do his job. It prompted the investigation and discipline at issue here, just as previous complaints prompted discipline against other offending employees. The incidents the judge and our dissenting colleague allude to are distinguishable because they did not involve or result in an employee complaint. Consequently, they cannot be relied upon as evidence of disparate treatment. [11]

Our colleague argues that the Respondent "orchestrated" Sanchez' complaint. In our view, nothing in the manner in which the complaint was made justifies a finding of antiunion motivation rendering Romero's discharge discriminatory. The Respondent did not direct Sanchez to file a complaint; it told him to file a complaint *if* he did not think the conduct was right. Consistent with its practice, the Respondent took no action on the matter until Sanchez thought about it over the weekend and then filed a complaint.[12] The complaint was not about Romero's activities at the Cinco de Mayo party, but about his offensive behavior and the similarly offensive conduct of others in the parts department and Sanchez' serious discomfort with it. Thereafter, the Respondent acted on Sanchez' complaint in accordance with its consistent practice of investigating and taking action on complaints of sexual harassment.

Under these circumstances, we find that the Respondent met its burden under *Wright Line* of showing that it would have discharged Romero, even absent his union activity, for his repeated violations of its sexual harassment policy. Accordingly, we shall dismiss this allegation of the complaint.

II. DISCHARGE OF OLGA LOPEZ

We also reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) by laying off employee Olga Lopez. Lopez was employed as a safety clerk in the Respondent's human resources department from April 1999 to August 1. Her duties included conducting safety training, distributing safety equipment, performing first aid, completing medical authorization forms, investigating work injuries, assisting employees in the completion of workers compensation forms, and or-

[10] Our colleague notes that several supervisors and managers witnessed prior misconduct and even participated in same. However, particularly in light of the latter fact (participation), there is nothing to show that they complained about the misconduct. By contrast, employee Sanchez did complain.

[11] Our dissenting colleague cites to a number of cases to support her contention that the Respondent treated Romero disparately. These cases, however, are distinguishable because in each the employer failed to show that it had ever taken similar disciplinary action in response to similar violations in the past. In the present case, the Respondent has shown that it took similar disciplinary actions against employees who it found had violated the sexual harassment policy on several occasions, including terminating one employee and disciplining four others in addition to Romero for engaging in sexual harassment in the parts department.

We likewise find *KOFY TV-20*, 332 NLRB 771 (2000), cited by our dissenting colleague, inapplicable to the present case. In *KOFY TV-20*, the Board found that the respondent failed to rebut evidence of disparate treatment by presenting examples of similar treatment. In the present case, the General Counsel failed to show disparate treatment. The examples of sexual horseplay about which no complaints were made are not analogous to the examples of sexual horseplay over which employees filed complaints of sexual harassment. Indeed, the record does not identify a single instance of an employee complaint that did not result in the Respondent disciplining the offending employee.

[12] In these circumstances, contrary to our dissenting colleague's belief, the fact that Sanchez did not complain after witnessing numerous prior incidents of sexual horseplay and misconduct does not establish that his complaint in this instance was induced by the Respondent.

dering first aid supplies. On July 9, Strauss altered Lopez' duties, including removing Lopez' responsibility for employee files and sending injured employees to the medical clinic. Strauss informed Lopez that her duties were changing because of a "negative change" the Respondent had toward Lopez. Strauss also stated that during Strauss' maternity leave, a lot of information had filtered out of the human resources office and employees were complaining of the Union visiting their homes. Lopez' remaining duties were to distribute safety equipment, perform first aid, and conduct safety training. The judge found that the Respondent violated Section 8(a)(3) by reducing Lopez' duties.

Also in July, the Respondent's vice president, Mike Hill, formulated a plan for layoffs due to a 50-percent decline in sales. He gave his managers, including Human Resource Manager Gabriella Strauss, the option of laying off 20 percent of their work force or cutting all employees' pay by 20 percent [13] The human resources department had a total of five employees: Strauss, Lopez, Assistant Manager Montes, payroll clerk Isabella,[14] and Hilary Gonzalez, a part-time, temporary clerk hired to assist in the department during Strauss' maternity leave. Strauss chose to lay off both Lopez and Gonzalez. Gonzalez resigned prior to the layoff. Strauss informed Lopez on August 1 that the Respondent was conducting a layoff and Strauss was going to have to let her go. Lopez responded that she understood and left. Plantwide, approximately 80 employees were laid off on August 1. The Respondent did not fill Lopez' position. Instead, her duties were absorbed by the remaining human resources staff.

We agree with the judge's finding, for the reasons he set out, that the Respondent violated Section 8(a)(3) by reducing Lopez' duties on July 9 based on her perceived union activities.[15] The judge also found that the Respondent violated Section 8(a)(3) and (1) by laying off Olga Lopez. We assume, arguendo, that the General Counsel satisfied his initial burden under *Wright Line* of establishing that Lopez' perceived union activity was a motivating factor in the decision to include her in the layoff. Contrary to the judge, however, we find that the Respondent met its *Wright Line* burden of demonstrating that it would have laid off Lopez in any event.

As noted above, the Respondent's decision to lay off Lopez was part of a plantwide layoff of about 80 employees. There is no claim that this layoff was unlawfully motivated. To the contrary, it is undisputed that the layoffs were a necessary response to declining sales and revenue. It is equally clear that the Respondent did not need Lopez in order to meet its human resources requirements. Strauss and Hill both testified that Lopez' position was created in 1999 when the Respondent's workforce reached at least 400 employees, and the August 1 layoff resulted in a significantly smaller work force, making Lopez' position unnecessary. Additionally, Lopez' duties were absorbed by remaining human resources staff and the position was not reinstated.

Although this economic justification is compelling, the judge rejected it. He concluded that the Respondent's economic defense was pretextual, because the human resources department was only required to reduce its personnel by 20 percent, and satisfied that requirement with the departure of Gonzalez. Our dissenting colleague similarly concludes that there was no economic justification for the layoff of Lopez following the departure of Gonzalez. We disagree.

As shown above, the human resources department was overstaffed even after Gonzalez resigned. Gonzalez was hired as a part-time, temporary employee to help cover the needs of the department during Strauss' maternity leave. Gonzalez stayed for a little while after Strauss returned part time, but was not a permanent employee. Gonzalez' position was thus extraneous before the planned layoff. In these circumstances, her resignation did not meet the Respondent's 20-percent force reduction goal for the human resources department.

We also disagree with our dissenting colleague's view that the Respondent selected Lopez for layoff because of her perceived union activities. The safety clerk position held by Lopez was created about 1999 to meet the needs of the Respondent's work force at that time. With the layoffs, the number of production employees dropped below the 1999 levels, making the safety clerk position once again unnecessary. Having established that there was no longer a need for Lopez' position, and that it was legitimately seeking to significantly reduce its payroll expenses, the Respondent met its rebuttal burden under *Wright Line* of showing that it would have included Lopez in the layoff regardless of her perceived union activity.[16] Accordingly, we shall dismiss this allegation of the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Krystal Enterprises Inc., Brea, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[13] It is clear that each department would be cut by 20 percent under the first option.

[14] The record does not reveal Isabella's last name.

[15] The judge found that Olga Lopez did not engage in any union activity. The Board has held, however, that an employer may violate Sec. 8(a)(3) if it discriminates against an employee in the belief that the employee has engaged in union activities, even if the employer is mistaken. *Handicabs, Inc*., 318 NLRB 890, 897 (1995); *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). The record indicates that the Respondent believed Lopez was engaging in union activity.

[16] In selecting Lopez for layoff, the Respondent did not rely on her reduced duties. As noted above, that reduction is found to be unlawful.

(a) Disciplining or otherwise discriminating against any employee for supporting United Food and Commercial Workers Union, Local 324, or any other union.

(b) Coercively interrogating any employee about their union support or union activities.

(c) Threatening any employee for supporting United Food and Commercial Workers Union, Local 324, or any other union.

(d) Creating the impression that employees' union activities are under surveillance.

(e) Denying employees access to union representatives.

(f) Maintaining an overly broad no-solicitation, no-distribution rule.

(g) 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) Make Ricardo Romero whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and suspension of Ricardo Romero, and within 3 days thereafter, notify him in writing that this had been done and that the warnings and suspension will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its facility in Brea, California, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. This notice shall be posted in English and Spanish. 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 and former employees employed by the Respondent at any time since January 2001.

(d) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 26 , 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

The Respondent targeted Ricardo Romero and Olga Lopez for phony discipline or other punishment, and ended up discriminatorily terminating both of them. Romero was discharged because he was a union activist (and not because he engaged in sexual horseplay, which was rampant—and tolerated–in the workplace here). Lopez was laid off because the Respondent suspected that she was the cousin of a union activist and that she was aiding the Union's organizational campaign (and not for economic reasons, which had evaporated). Despite finding other unlawful retaliation against Romero and Lopez, my colleagues curiously accept the Respondent's defense of its actions, which simply do not bear up under scrutiny.[1]

A. Romero's Discharge

1. Overview

Romero was an open and active union supporter. From the very start of his participation in the Union's organizing campaign in January 2001, he was targeted by the Respondent for unlawful retaliation, as our decision today finds.[2] Ultimately, he was discharged, assertedly for engaging in sexual horseplay in violation of the Respondent's written policy against sexual harassment. As the record makes clear, however, the Respondent tolerated virtually identical sexual horseplay and misconduct in the workplace by many other employees and supervisors

[17] 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] My colleagues and I agree that the judge correctly found that the Respondent violated Sec. 8(a)(1) of the Act by: threatening to retaliate against employees for engaging in union activity; interrogating employees about their and other employees' union activity; creating the impression that employees' union activity were under surveillance; denying employees access to union representatives during a union rally; and promulgating and maintaining an overly broad no-solicitation, no-distribution rule. We also agree that the judge correctly found that the Respondent violated Sec. 8(a)(3) and (1) of the Act by disciplining and suspending Romero for engaging in union activity and by reducing Lopez' work duties because the Respondent believed she was engaging in union activity.

[2] All dates are 2001 unless stated otherwise.

alike.[3] If ever there was a case of disparate treatment, this is it.

2. Sexually oriented horseplay and misconduct was generally tolerated

Sexually oriented horseplay and misconduct was rampant in this plant among employees and supervisors, and was well known to—and generally tolerated by—management. The judge describes this fully in his decision.[4] He paints a vivid picture (parental guidance suggested): incidents of simulated fellatio; pervasive sexual profanity (including by Plant Manager Vitelli); display of pornography by employees as well as periodically by a supervisor to employees on the supervisor's computer at work; e-mailing of sexually harassing material between supervisors at work; a supervisor's printing of that material at work, as well as sending it to two of the Respondent's vendors; a supervisor's printing at work and distributing to employees an e-mail titled "Top 10 Sexual Positions"; the same supervisor distributing pornographic material at work; and an employee displaying this same pornographic material to other employees at work.

Of particular relevance to Romero's discharge, the judge recounted how employees and supervisors (including on occasion Plant Manager Vitelli and Supervisor Alvarez) frequently playfully touched each other on the buttocks and genitals, sometimes in the presence of other supervisors, again including Vitelli and Alvarez, and Human Resources Assistant Montes. On one occasion, Montes and Security Guard Rivera observed employees mimicking sexual activity in the body shop department. Montes laughed and neither he nor Rivera made any effort to get the employees to stop. Another time, Vitelli himself touched employee Javier Garcia on the buttocks. Vitelli did the same thing to employee Lizarraga, who was bent over looking inside a limousine, and employee Zamarron, who was bent over buffing a car. On another occasion, during a conversation between Vitelli and Rivera in Rivera's office, Rivera turned around and Vitelli inserted his radio antenna between Rivera's buttocks in an upward thrusting motion. Similarly, Alvarez placed his radio antenna on the buttocks of Purchasing Clerk Carmen Von Puschendorf.

Each time Project Manager Brown visited the parts department, he grabbed employee Espinosa's genitals. On another occasion in the parts department, Brown sat on employee de la Cruz' lap and rotated his pelvis, simulating sexual activity. At least twice, employee Vela grabbed Supervisor Trotter from behind and moved his pelvis in and out. Trotter did not attempt to stop Vela either time. Supervisor Delgado regularly grabbed employees on the buttocks and genitals, and pretended to kiss them.

Leadman Machuca twice grabbed employees' buttocks. The employees objected, and complained to Trotter on both occasions. While Trotter admonished all of the wood shop employees to stop this type of misconduct, he took no formal action against Machuca himself, and he did not report either incident to higher management.

Between January 1 and May 7, employee Nestor Sanchez observed employees in the parts department, including Romero, engage in the type of sexual horseplay generally described above about *20-25 times each day*. He never reported any of this conduct to Vitelli or to any other supervisors or managers.

3. Romero is targeted for retaliation for his union activity

In January, Security Guard Rivera reported to Plant Manager Vitelli that Romero was getting employees' phone numbers so that the Union could contact them. Vitelli called employee Juan Rodriguez into Vitelli's office and, with Rivera present, asked Rodriguez whether Romero was in the Union and why Romero was asking for Rodriguez' phone number. Vitelli told Rodriguez that "we don't want the Union in." Rodriguez replied that Romero had also spoken to employee Quintana. After dismissing Rodriguez, Vitelli had Rivera bring Quintana to Vitelli's office. Vitelli asked Quintana why Romero was trying to get in touch with Quintana. After dismissing Quintana, Rivera told Vitelli to see what Vitelli could do to "get rid" of Romero, because Romero was enlisting support for the Union. Vitelli told Rivera that Vice President/Chief Financial Officer Hill and Human Resources Manager Strauss would "take care of it." Later that month, Rivera again told Vitelli to "get rid" of Romero. Vitelli replied, "I wish I could but I need evidence."

In February, Vitelli told Rivera to call him on the radio every time that Rivera saw Romero speaking to employees. On February 7, while on his lunchbreak in the parking lot, Romero and a fellow employee were engaged in horseplay, calling each other profane names and pretending to fight. Unknown to Romero, Human Resources Manager Strauss overheard the profanity. She was embarrassed, and assertedly thought that the profanity violated the Respondent's sexual harassment policy.[5] Shortly thereafter, Strauss and Inventory Control Manager Dieter Von Puschendorf held a conference with Romero and issued him a warning for using profanity. The Respondent's record of employee conference about this incident states in pertinent part that:

[3] The Respondent's written policy against sexual harassment is contained in its employee manual, and is set out by the judge in sec. II,A,4,d of his attached decision.

[4] Secs. II,A,4,d and II,B,2,d of his attached decision.

[5] Strauss' sensibilities are, however, called into question by her express reference to her Human Resources predecessor as a "[f—king] old lady."

> Employee [Romero] must respect other employees by respecting the workplace. Employee must refrain from the use of abusive and offensive language (cursing). This is considered an offensive behavior.[6]

Neither Strauss nor Von Puschendorf, however, disciplined the *other* employee involved in the incident.[7] In fact, after Romero apologized to Strauss for using bad language in her presence, Von Puschendorf told Romero not to worry about the warning because Strauss was "full of shit."

On March 9, and again on March 22, the Respondent gave Romero pretextual written warnings in retaliation for his union activity, as the Board finds today. On March 26, Romero gave Vitelli a letter stating that Romero was engaging in organizing activity on behalf of the Union. On April 10, Vitelli told Romero that several employees had said that Romero asked them to sign something for the Union. Vitelli told Romero "If I don't [f—k] with your family, don't [f—k]with mine," an unlawful threat we unanimously find.

In early May, Supervisor Alvarez asked parts department employee Gallegos whether Romero had spoken to Gallegos about the Union while Romero was returning defective parts. Later that day, Gallegos was called into Vitelli's office, with Alvarez present. Vitelli asked Gallegos where he had been going with Romero when Vitelli spotted them together in Gallegos' car. Vitelli also asked Gallegos whether Romero had spoken to Gallegos about the Union during "working hours," and whether Gallegos knew whether Romero spoke to other employees about the Union. We unanimously find both interrogations unlawful.

On May 7, employees Gutierrez and Anguiano told their supervisors that Romero had been speaking to them about the Union. Later that day, Anguiano was called into a meeting with Vitelli and Human Resources Assistant Montes. Vitelli asked Anguiano when and how often Romero had been talking to him. Anguiano replied that Romero had often spoken to him about the Union, as well as about work and other topics, that Romero visited Anguiano's department two or three times per week for about 10–15 minutes, during breaktime and worktime, but Anguiano could not say which topics Romero discussed during breaktime and which topics he discussed during worktime.

Later the same day, as the Board finds unanimously, the Respondent discriminatorily suspended Romero for pretextual reasons in retaliation for his union activity. After Romero was unlawfully suspended, Plant Manager Vitelli, Security Guard Rivera, and Romero's immediate supervisor, Garcia, all escorted Romero from the plant to the parking lot. On the way to the parking lot, Vitelli walked behind Romero and repeatedly kicked Romero's feet. When they reached Romero's car, Vitelli told Romero he had 1 minute to get off the premises. As Rivera and Vitelli walked back to the facility, Vitelli asked Rivera, "Did you see me? I kicked that [f—ker] and he didn't do anything about it."

As this recitation illustrates, and the Board finds unanimously, between January and May 7 (3 days before Romero's discharge, discussed below), the Respondent: (1) repeatedly unlawfully interrogated employees about Romero's union activity; (2) unlawfully threatened Romero if he continued to participate in union activity; and (3) unlawfully retaliated directly against Romero for his continued participation in union activity. By May 10, all that was left for the Respondent to do to Romero was to get rid of him.

4. Romero's discharge

The judge correctly found that on May 10 the Respondent's course of unlawful conduct towards Romero culminated with his discharge. The majority, however, finds that the Respondent lawfully discharged Romero for—of all things in this workplace—*sexual harassment*.

a. Facts leading up to Romero's May 10 discharge

On May 4, the Respondent held a Cinco de Mayo party for its employees from about noon to 3p.m. in the parking lot. During the party, Plant Manager Vitelli and Supervisors Alvarez and Marines saw Romero grab two or three employees from behind and push his pelvis against them. The employees themselves did not complain to the Respondent about this, and no one took any immediate action against Romero for it, or indeed even mentioned it to him.

About an hour later, however, after the party had ended, Alvarez went to where employee Nestor Sanchez was eating and asked him if he had seen Romero "doing that stuff to the persons in the crowd." Sanchez replied that he had, but that it was a "regular thing" for Romero and that Sanchez had seen him do it "a lot of times."

At this point, even though Sanchez was not involved in any way in the incident in question, and even though Alvarez and Vitelli had witnessed the incident themselves, Alvarez suggested that *Sanchez* file a sexual harassment complaint against Romero. Specifically, Alvarez asked Sanchez if he thought Romero's conduct was proper. Sanchez replied that he did not think it was right, and that it was not something that should be done in public. Alvarez said that if Sanchez did not think that Romero's conduct was right, "I think you should file a report." Alvarez then offered to accompany Sanchez to Vitelli's office. When they got there, Alvarez said to Sanchez, "Why don't you tell [Vitelli] what you saw?" (which, of course, was the same thing that Vitelli and

[6] Thus, contrary to my colleagues' characterization of this warning (and the judge's characterization of it in sec. II,A,3,a of his attached decision), the warning was clearly *not* for violating the Respondent's sexual harassment policy. It was for cursing, with no mention at all of sexual harassment.

[7] Indeed, the use of profanity by and between employees and supervisors was pervasive and almost entirely undisciplined. See the final two paragraphs of sec. II,A,4,d of the attached judge's decision.

Alvarez themselves had seen an hour and a half before, without saying anything to anyone else about it). Sanchez told Vitelli that he had seen Romero "grabbing people from behind and trying to pull them and stuff like that." Vitelli asked Sanchez whether he had seen Romero do that before, and Sanchez replied that he had, and that it was a "common thing" for Romero: "Every time I would see him or I would see him around where I used to eat, he would do that to someone." Sanchez also told Vitelli that he had seen at least four or five other employees in addition to Romero (Sanchez named Artiaga, de la Cruz, Valpuesta, and Bonilla) touch other employees' genitals and buttocks on many occasions, and that it was an everyday occurrence.[8] Vitelli said that if Sanchez wanted to file a report, he should go to the human resources department. Sanchez agreed to think about it over the weekend.

Three days later, on May 7, Vitelli, as described above, separately unlawfully interrogated Gutierrez and Anguiano about Romero's union activity, and discriminatorily suspended Romero because of his union activity. The same day, Sanchez told Vitelli that Sanchez was "ready to file a report about it." Vitelli accompanied Sanchez to the human resources department to file a report about Romero. Vitelli stayed with Sanchez in Montes' office in the Human Resources department. Sanchez told Montes and Vitelli that he had seen the people in the parts department "grabbing each other, holding each other, their privates, their behinds, and sometimes . . . almost trying to kiss each other." Sanchez again named Artiaga, de la Cruz, Valpuesta, Bonilla, and Romero, with Valpuesta and Romero being the "main instigators."[9] Sanchez' May 7 report to Vitelli and Montes was apparently only an oral report. There is no copy of or reference to any written report of this matter in the record.

In any event, Montes and Vitelli conducted an "investigation" of Sanchez' report. They interviewed 15 employees. They never interviewed Romero. The investigation confirmed that it was common practice in the parts department for employees to touch each other in a sexual manner and to use profane and obscene language.

b. Analysis and conclusion

The Respondent engaged in a 4-month course of unlawful activity aimed at Romero, culminating in his discriminatory suspension 3 days before his May 10 discharge. The majority nevertheless concludes that, at the very end, the Respondent proved that it would have lawfully discharged Romero for "sexual harassment" even if he had not engaged in any of the union activity that caused the Respondent to treat him unlawfully right up to 3 days before it discharged him. They accept the Respondent's position that Romero's conduct at the Cinco de Mayo party (which assertedly prompted Sanchez' report, which in turn assertedly led to the Respondent's investigation) violated the Respondent's sexual harassment policy. The record rules out the majority's conclusion.

As the judge found, the Respondent's sexual harassment policy was a sham, regularly dishonored by employees and supervisors alike, and the Respondent's assertion that it discharged Romero for violating its sexual harassment policy was a pretextual attempt to mask its discharge of Romero because of his union activity. Romero's misconduct at the party, while arguably in violation of the Respondent's *written* policy, was in fact no more than par for the course. Romero's discharge reflected disparate treatment, revealing the Respondent's overriding motive here.[10]

Meanwhile, the record makes clear that Sanchez' report of the Cinco de Mayo incident was itself trumped up by the Respondent as a pretext to get rid of Romero, only 3 days after unlawfully suspending him in retaliation for his union activity. Vitelli and Alvarez themselves observed Romero engaging in sexual horseplay at the party. Yet, they did nothing at that time to stop it or even mention it to him. Rather, they waited for about an hour after the party had ended and then began to cajole *Sanchez* into making a report.[11] My colleagues say that Sanchez made his May 7 report about Romero because Sanchez felt uncomfortable and complained that Romero's conduct was affecting Sanchez' ability to do his job. But by Sanchez' account, he witnessed approximately *1800* incidents of sexual horseplay and misconduct during the 4-month period prior to his May 7 report about Romero, and he was himself the target of two earlier incidents of

[8] Sanchez described the conduct to Vitelli as employees "grabbing their privates . . . grabbing each other . . . mostly in front of people . . . rubbing each other and lifting one leg up . . . just kind of like trying to have sex with them with their clothes on . . . running their thumb up their behind . . . just the regular stuff they do."

[9] Indeed, Sanchez also told Montes and Vitelli at this May 7 meeting that (1) about a year and a half earlier, in about November 1999, while Sanchez was walking in the plant, Valpuesta grabbed Sanchez from behind and tried to "pull his middle finger up my behind," and (2) about 7 months earlier, in about October 2000, while Sanchez was making copies, Romero grabbed him from behind and "ran his hand up my behind." Sanchez did not, however, report either of these incidents to the Respondent before this May 7 meeting with Vitelli and Montes.

[10] See *Joseph Chevrolet, Inc.*, 343 NLRB No. 2 (2004) (disparate treatment where other employees who committed similar offenses were not immediately discharged); *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 53–54 (2003) (section styled "6. Disparate treatment"); *SCA Tissue North America, LLC*, 338 NLRB 1130, 1137 (2003) (other employees disciplined in less severe way for considerably more egregious conduct), enfd. 371 F.3d 983 (7th Cir. 2004); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (employer had a practice of not disciplining drivers for driving infractions) (2002), affd. mem. 71 Fed. Appx. 441 (5th Cir. 2003).

[11] Perhaps Vitelli and Alvarez did not think they, in good faith, could report Romero's misconduct at the party because they themselves had engaged in similar sexual horseplay on other occasions.

sexual misconduct. Sanchez never complained to management about any of this until he was induced by to Alavarez and Vitelli to make his May 7 report about Romero.

Nevertheless, the majority finds that the Respondent established that it would have discharged Romero for violating the sexual harassment policy, even in the absence of his union activity. They find that whenever anyone filed a sexual harassment complaint, the Respondent investigated it and took action. But the Respondent's claim, that in investigating Romero it was simply acting consistently with its practice of investigating complaints from employees, is disingenuous. The record clearly establishes that several of its supervisors and managers witnessed first-hand, and even participated in, some of the abundant sexual horseplay and misconduct involved in this case. The Respondent cannot, therefore, seriously claim that the reason it did not take action in or even investigate those other incidents of sexual horseplay and misconduct was because no one complained about them. Because much of that misconduct was witnessed by and participated in by the Respondent's supervisors and managers, no complaint from an employee was needed to alert the Respondent to the misconduct.

The majority also accepts the Respondent's claim that in investigating Romero, it was simply investigating Sanchez' report. But the record establishes that the Respondent itself orchestrated that report from the very beginning, for the same unlawful reason that it had suspended and warned Romero earlier.

The Respondent's assertion, endorsed by my colleagues, that its discipline of some other employees for similar sexual misconduct legitimizes its discipline of Romero, is also unavailing. The record establishes that much, if not most, of the sexual horseplay and misconduct of the type that Romero was found to have engaged in went *undisciplined*, even though the Respondent was aware of it. The real question is not whether Romero was treated similarly to the other employees who *were* disciplined as a result of the investigation in question,[12] but rather whether Romero was treated differently from the many other employees (as well as managers and supervisors) who engaged in sexual horseplay and misconduct known to the Respondent, but who were *never* disciplined.[13] As the Board has observed, "It is not uncommon for an employer to discipline some of its employees in order 'to give credence to its pretextual reasons' for disciplining other employees whom it has unlawfully targeted." *Koronis Parts, Inc.*, 324 NLRB 675, 675 fn. 1 (1997). For all of the reasons discussed, it seems obvious that Romero was treated differently because of his union activity.

B. Lopez' Termination

I disagree with the majority that Lopez was lawfully laid off for economic reasons; instead, I would adopt the judge's finding that Lopez was unlawfully laid off because of her perceived union activity.

1. Background

Lopez was the safety clerk in the human resources department. The Board has found unanimously that the Respondent discriminatorily took away many of her job duties in early July, including particularly her access to employee personnel files, because it believed that she was engaging in union activity and providing employee addresses to the Union.

More specifically, when Human Resources Manager Strauss discriminatorily reduced Lopez' job duties on July 9, she told Lopez that the reduction in duties was because of a "negative change" the Respondent had toward Lopez. Lopez asked Strauss if the reason her duties were being reduced was because the Respondent believed that she was Jorge Romero's cousin.[14] Strauss did not deny to Lopez that that was the reason, but instead simply told Lopez that she could not prove that it *was*.

On July 16, Supervisor Raphael Rodriguez told employee Hernandez that the Respondent knew that Hernandez was a union supporter, and asked Hernandez if she knew whether Lopez was Jorge's cousin. Around this time also, Rodriguez told Lopez that Vitelli had earlier asked Rodriguez if he knew whether Lopez was Jorge's cousin. (Vitelli suspected that Lopez was providing the Union with employee addresses.) Rodriguez also told Lopez that the Union was becoming strong and that management was concerned. The next day, July 17, Vitelli asked security guard Rivera whether he thought that Lopez was involved with the Union. Vitelli then told Rivera that Jorge and Ricardo Romero were to blame for getting the Respondent into the union "mess."

About 2 weeks later, on August 1, the Respondent laid off Lopez.

[12] See, e.g., *KOFY TV-20*, 332 NLRB 771 (2000) (examples of arguably similar treatment not enough to rebut significant showing of disparate treatment).

[13] See *Becker Group, Inc.*, 329 NLRB 103, 104 (1999) (Jennings' warning for using vulgar language and gestures toward shop steward was pretextual where employer tolerated regular use of vulgar language and gestures in the workplace by employees and supervisors alike; "[T]he record is replete with evidence that the use of profanity and obscene gestures between employees, and even between supervisors and employees, is rampant at the facility."); *Carry Cos. of Illinois*, 311 NLRB 1058, 1067 (1993) (discharge of union supporter for urinating outside on employer's premises was disparate treatment where record established that it was common practice for employees and supervisors to urinate outside on employer's premises, without being disciplined for doing so) enfd. 30 F.3d 922 (7th Cir. 1994).

[14] Jorge was a former employee of the Respondent in the human resources department who had been discharged in January. He was also discriminatee Ricardo Romero's brother. The Respondent knew that Jorge was active in the Union's organizational campaign following his discharge, during the time of the events herein.

2. Lopez' layoff

a. Facts

During the first week in July, higher management told the department managers that there needed to be a plantwide reduction in costs. The managers, including Strauss, were required to choose between either reducing the workweek of everyone in their departments from 40 to 32 hours (a 20-percent reduction in wage and salary expense) or laying off 20 percent of the people in their department (a 20-percent reduction in force). Strauss decided to have a 20-percent layoff in the human resources department rather than cut the wages of everyone in the department 20 percent across the board. Accordingly, Strauss would have to lay off one of the five people in her department in order to meet the required 20-percent reduction in force.

Five people were assigned to the human resources department at the time of the July events in question: Manager Strauss, Assistant Manager Montes, safety clerk Lopez, payroll clerk Isabella, and human resources clerk Gonzalez (a temporary employee). Fortuitously, however, Gonzalez quit on July 24. The human resources department thus achieved its required 20-percent reduction in force without the need for a layoff. (As the judge found, the Respondent did not attempt to show that the resignation of Gonzalez, as a temporary employee, did not count toward the 20-percent force reduction quota.)

But on August 1, Strauss laid off Lopez anyway, with no advance notice, effective immediately.

b. Analysis and conclusion

The Respondent offered no explanation for why Strauss laid off Lopez even after the human resources department achieved its required 20-percent reduction in force when Gonzalez resigned a week earlier. Consequently, the judge correctly found that the Respondent had not met its rebuttal burden of proving that it would have laid off Lopez even in the absence of its perception that Lopez was engaged in union activity. I agree.

In finding to the contrary, the majority relies on the fact that the *plantwide layoff* of about 80 employees (of which the layoff in the human resources department was one small part) was not alleged to be discriminatorily motivated. But that is quite beside the point.[15] Lopez' layoff was only indirectly brought on by the general decision to have a plantwide layoff. Her layoff was the *direct* result of Department Manager Strauss' particular decision to lay off Lopez even though the department itself did not need to lay off anyone in order to achieve the required 20-percent reduction in force within the department.

Nor is Lopez' layoff explained by the fact, relied on by the majority, that the human resources department was apparently able to function without her, or the assertion, offered by my colleagues, that the human resources department was "overstaffed" even after Gonzalez' resignation. Again, these suggestions miss the point. Lopez was not laid off *because* the department could get along without her; she was laid human resources off in the course of the plantwide reduction in force, even though her department had already met its reduction in force quota a week before Lopez was laid off.

There is no basis, then, for concluding that the Respondent would have laid off Lopez, even in the absence of her perceived union activity.

Dated, Washington, D.C. August 26, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline or otherwise discriminate against any of you for supporting United Food and Commercial Workers Union, Local 324, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten any employee for supporting United Food and Commercial Workers Union, Local 324, or any other union.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT deny employees access to union representatives.

WE WILL NOT maintain an overly broad no-solicitation, no-distribution rule.

[15] See *Merrill Iron & Steel*, 335 NLRB 171, 173–174 (2001) (the fact that underlying layoff decision was motivated by business necessity does not preclude finding that selection of particular employees for layoff was discriminatorily motivated).

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, remove from our files any reference to the unlawful warnings and suspension of Ricardo Romero, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warnings and suspension will not be used against him in any way.

KRYSTAL ENTERPRISES INC.

Lisa McNeil, Esq. and *Sonia Sanchez, Esq.*, for the General Counsel.

Erick Becker, Esq. and *Robert Long, Esq. (American Consulting Group, Inc.),* of Costa Mesa, California, for the Respondent.

Jay Smith, Esq. (Gilbert & Sackman), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California, on February 25 to March 1, March 18 to 21, and March 25 to 28, 2002, upon the General Counsel's consolidated amended complaint issued January 30, 2002, which alleges that Krystal Enterprises, Inc. (Respondent) committed certain violations of Sections 8(a)(1)[1] and (3) of the National Labor Relations Act (the (Act). Respondent timely denied any wrongdoing.

Issues

1. Did Respondent threaten employees with unspecified reprisals in retaliation for engaging in union activities in violation of Section 8(a)(1) of the Act?

2. Did Respondent interrogate employees about their and other employees' union activities in violation of Section 8(a)(1) of the Act?

3. Did Respondent threaten employees with suspension in retaliation for engaging in union activities in violation of Section 8(a)(1) of the Act?

4. Did Respondent create the impression that its employees' union activities were under surveillance?

5. Did Respondent deny its employees access to union representatives by blocking and closing facility exits in violation of Section 8(a)(1) of the Act?

6. Did Respondent promulgate and maintain an overly broad no solicitation-no distribution rule in violation of Section 8(a)(1) of the Act?

7. Did Respondent warn, suspend and terminate Roberto Rivera in violation of Section 8(a)(3) of the Act?

8. Did Respondent reduce the work responsibilities of Olga Lopez and subsequently terminate her in violation of Section 8(a)(3) of the Act.

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

[1] At the hearing counsel for the General Counsel's motion to strike 8(a) and 9(a) allegations of the consolidated amended complaint was granted.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation, manufactures limousines, buses and funeral cars at its facility in Brea, California, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of California. The 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 United Food and Commercial Workers Union, Local 324, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent manufactures limousines, buses and funeral cars at its facilities in Brea, California. The main facility where most of the events in this case occurred is located on Imperial Highway and is referred to as the Imperial Building. A second building located on Kraemer St, a few blocks from the Imperial Building, is referred to as the Kraemer Building. Respondent's management team consisted of Ed Grech (Grech), president and CEO, John Beck (Beck), the executive vice president and William Michael "Mike" Hill (Hill), the vice president and chief financial officer (CFO). Hill reported to Grech and Beck. Hill supervised plant manager Dominick Vitelli (Vitelli), human resources manager, Gabriella Strauss (Strauss) and purchasing manager Rick Von Ahn (Von Ahn). During 2001, Flavio Montes (Montes) was the human resources assistant.[2] As plant manager of both the Imperial and Kraemer facilities, Vitelli's duties included oversight of the production facilities and coordination with production managers and leadmen in order to timely manufacture the vehicles. Vitelli's production assistant was Hector Tirado (Tirado).

At the Imperial building the vehicles were manufactured on production lines in several discrete departments, each with a supervisor. During late 2000, to August 2001, at the Imperial facility, Respondent operated production lines "A," "B," and "C." Each line employed about 100 employees. In total, prior to August 2001[3] Respondent employed over 500 production employees. Respondent manufactured limousines on production line "A," hearses on production line "B," and shuttle buses on production line "C." The vehicle fabrication process commences in the welding department, supervised by Florentino Morales (Morales). In the welding department the vehicle is cut in half, the center stretch piece is inserted, and the vehicle is reassembled. Doors are also installed in the welding department. The vehicle then proceeds to the mechanical department, supervised by Ken Thioulen (Thioulen). Next, the vehicle goes to the body and paint department, supervised by Benito Rodriguez. The vehicle then proceeds to the electrical department, supervised by Manuel Martinez. After that the vehicle moves to the trim department, supervised by Martine Ramirez. In the trim department employees continue the process of assembling

[2] Montes' duties included prescreening applicants, administering the medical/dental coverage, assisting employees with completing 401(K) forms, and assigning work tools.

[3] All dates are in 2001 unless otherwise stated.

the vehicle after it has been painted and wired.[4] Next, the vehicle travels to the upholstery department and final assembly, supervised by Luis Alvarez (Alvarez) and Geraldo Flores. Finally, the vehicle goes to the detail department, supervised by Geronimo Ochoa (Ochoa). In the detail department, the employees clean the vehicles before they are shipped out.

Respondent has other production employees not on the production line. Dieter Von Puschendorf (Von Puschendorf) and Raul Martinez (Martinez) supervised the parts department. Ken Trotter (Trotter) supervised the wood shop department.[5] Robbie Jasper (Jasper) supervised the final bus assembly department. Julie Blain (Blain) supervised the shipping department.[6] Cesar Delgado (Delgado), supervised the carpentry department. Gary Caccavalle (Caccavalle), Tyrone Threedouble (Threedouble) and Jason Luevanos (Luevanos) supervised the service department. Ralph Garcia (Garcia) supervised all the quality control inspectors.

This case is not legally complex. Rather the outcome depends on witness' credibility. This case takes place in an assembly plant where trucks and limousines are put together. Respondent's production employees are mainly Spanish speaking men without a great deal of education. From my observation of them while giving testimony, they appeared rough and unsophisticated. General Counsel's witnesses testified in a manner that was inherently probable and uniformly consistent about the day-to-day occurrences in their workplace. Thus, General Counsel's witnesses said it was commonplace for both supervisors and employees to sell food, beverages, candy, and jewelry throughout the workday; that both supervisors and employees participated in sports betting pools; that both supervisors and employees cursed and used vulgar language as part of the regular vernacular; that both supervisors and employees engaged in sexual horseplay in the form of touching employees' private parts and telling sexual jokes and; that both supervisors and employees passed around pornographic material. On the other hand Respondent called a succession of witnesses who would have me believe that the Little Sisters of the Poor ran Respondent's facility. These witnesses testified unbelievably that neither they nor any other employee ever used profanity[7] and they never bought or sold so much as a bar of candy while at work.[8] Many of these witnesses were impeached on cross-examination.[9] Other witnesses proffered by Respondent offered contradictory evidence when they admitted that they used or heard profanity and observed sexual horseplay.[10] Other Respondent witnesses were reluctant, non-responsive and hostile in their testimony.[11] I have not credited the testimony of Respondent's witnesses noted above and any contradictions in the facts found below are resolved in favor of General Counsel's witnesses.

2. The union organizing campaign

In November 2000, the Union began an organizing campaign among Respondent's production employees at the Imperial and Kraemer buildings. In support of the organizing campaign, in November 2000, the Union began handbilling Respondent's employees outside the Imperial building. In response to the Union's campaign, in November 2000, Respondent began conducting management meetings regarding the Union's organizing effort.

On January 17, Jorge Romero, Respondent's recently fired human resources assistant,[12] contacted Union organizer Jose Perez to assist in organizing Respondent's employees. Both Jorge Romero and his brother Ricardo Romero, an employee in Respondent's quality control department, furnished Perez with the home phone numbers of Respondent's employees.

Commencing in January, in addition to furnishing employees' phone numbers, Ricardo Romero handed out authorization cards, handbilled outside the Imperial facility and talked to Respondent's employees at work about the Union.

3. The 8(a)(1) allegations

a. The interrogations and threats

In January Respondent's security guard, Eddy Rivera, told plant manager Vitelli he had seen Ricardo Romero talking to fellow employee Juan Rodriguez in the break area and that Romero was getting employees' phone numbers so the Union could call them. Vitelli called Rodriguez into a meeting and in Eddy Rivera's presence asked Rodriguez, "Is Jorge Romero in the Union?" "What's going on?" "Why is he asking for your phone number?" Vitelli then stated, "He is in the union. We have to stick together. We don't want the Union in." During the meeting Rodriguez mentioned that Ricardo Romero had also spoken to employee Juan Luis Quintana. After dismissing Rodriguez, Vitelli told Rivera to bring Quintana to his office. Vitelli asked Quintana, "Why is Jorge Romero trying to get in touch with you?" Quintana said he did not know. After the meeting with Quintana, Eddy Rivera told Vitelli, "See what you can do to get rid of Ricardo Romero because he is getting numbers for Jorge for the Union." Vitelli replied, "Don't worry Strauss and Hill will take care of it." Later in January while walking into the plant with Vitelli, Eddy Rivera said, "Get rid of Ricardo." Vitelli replied, "I wish I could but I need evidence. If it was up to me, I would but upper management won't let me."[13]

[4] The trim department is where the headlights, grill, and taillights were put on the vehicle.

[5] During the first half of 2001, Trotter supervised 52 to 53 employees in the wood shop department, which is located between the parts and service departments. Respondent stipulated that Trotter is a supervisor within the meaning of Section 2(11) of the Act.

[6] Blain supervised the shipping department during the relevant period in 2000 to 2001. At the time of the hearing, Blain no longer works for Respondent.

[7] See testimony of Raphael Garcia, Florentino Morales, Jesus Gutierrez, Rene Angiano, Martin Lizarraga, Geronimo Ochoa, and Javier Garcia.

[8] See testimony of Gabriella Strauss, Raphael Garcia, Florentino Morales, Dieter Von Puschendorf, Jesus Gutierrez, Rene Angiano, Geronimo Ochoa Javier Garcia, Rafael Rodriguez, and Martin Lizarraga.

[9] See testimony of Strauss, Morales, Von Puschendorf, Gutierrez, Modesto Marines, Gilbert Delgado, Luis Alvarez, Raymundo Zuniga, Raul Martinez and Jeffrey Brown.

[10] See testimony of Von Puschendorf, Ken Trotter, William Hill, Alcides Bonilla, Nestor Sanchez, Marines, Delgado, and Vitelli.

[11] See testimony of Strauss and Rafael Rodriguez.

[12] Jorge Romero was employed by Respondent as human resources assistant from December 3, 1998 to January 2001. Strauss fired Jorge Romero because it was against company policy for human resources employees to have relatives working in the plant.

[13] Vitelli denied interrogating any employee about their union activities or the activities of others. Unlike Vitelli, Rivera was a disinterested witness with no axe to grind. His testimony was given in a manner free

In February while in the detail area of the Imperial plant Eddy Rivera told Vitelli he had seen Ricardo Rivera talking to employees. Vitelli said, "Why didn't you tell me? Every time you see Ricardo talking to employees call me on the radio."[14]

On February 7 at 10 a.m., Ricardo Romero was on his morning break at the lunch trucks in Respondent's parking lot. He was engaged in horseplay with a fellow employee, and both were using some rather rough language. Unknown to Romero, Strauss had come to the lunch truck and overheard the profanity. According to Strauss, she was embarrassed and thought Romero's profanity violated Respondent's sexual harassment policy. Strauss immediately gave Romero a written warning for violating Respondent's sexual harassment policy. Romero apologized for using the bad language in her presence. After the meeting while walking back to work Von Puschendorf told Ricardo Romero not to worry about it because Strauss was "full of shit."[15] No action was taken against the fellow employee.[16]

In early March, both Jesus Gutierrez (Gutierrez) and Rene Anguiano (Anguiano), mechanics in Respondent's service department, told their supervisors, Threedouble and Leuvanos, that Ricardo Romero had been talking to them about the Union. After complaining to Threedouble, Anguiano was called into a meeting with Montes and Vitelli on March 7. Vitelli asked Angiano how often Romero had been talking to him and when. Anguiano said that Romero had been talking to him often about the Union. According to Anguiano, Ricardo Romero visited the service department two to three times a week for 10 to 15 minutes during breaks and work time. Even though Romero sometimes talked about the Union, Anguiano could not say which topics Romero discussed during breaks versus during work time. In his interview by Vitelli and Montes, Gutierrez said that over the proceeding two-week period Ricardo Romero had come by the service department during breaks, lunch, and working time. Montes did not ask Gutierrez whether Romero was talking about the Union during these visits.

Because Ricardo Romero felt he was being discriminated against for engaging in union activity, he gave a letter to Vitelli on March 26 that indicated he was engaged in organizing activity on behalf of the Union.[17] Vitelli said he heard Romero was in the Union and didn't know why Romero was doing this after all Vitelli had done for he and his brother, Jorge.

On April 10, Ricardo Romero was in Vitelli's office. Vitelli, responding to rumors that he had signed some paper dealing with the Union, said, "Several employees said you asked them to sign. If I don't fuck with your family, don't fuck with mine. Don't take food off my table. I don't know why your brother is stabbing me in the back."[18]

After work on May 3 Ricardo Romero handed out Union literature outside the Imperial plant with other workers.

In May upholstery supervisor Luis Alvarez questioned Luis Gallegos (Gallegos), one of Respondent's parts department employees, outside the service department. Alvarez asked Gallegos, "What is Ricardo Romero doing in your department?" Gallegos replied Romero was returning defective parts. Alvarez said, "Did Ricardo Romero talk to you about the Union?"[19] Gallegos denied talking to Romero about the Union. About two hours later the same day Gallegos was called into Vitelli's office where Alvarez was present. Vitelli asked Gallegos what Ricardo Romero did in Gallegos' work area. Gallegos replied that Romero was doing his job. Vitelli said, "I saw you and Romero going in your car outside the company. Where were you going?" Gallegos said they were going to a restaurant. Vitelli then asked Gallegos, "Did Romero talk to you about the Union during working hours?" When Gallegos said no, Vitelli then asked if Gallegos talked to Union representatives. After Gallegos said he had talked to Union representatives during lunch-time at the park, Vitelli asked, "Do you know if Romero talked to other employees about the Union?"[20] Gallegos said he did not know.

On May 9 Brian Burt (Burt), one of Respondent's parts receivers was called into a meeting with human resources assistant Montes and Vitelli. Montes asked Burt several times, "Did anyone approach you about the Union?" Later that day Guadalupe Hernandez (Hernandez), employed by Respondent as an electrical assembler, was called to a meeting in the human resources office with Montez and Vitelli. When Montes told Hernandez that he was in the office because a coworker in the parts department had made a sexual harassment complaint, Hernandez said he had seen nothing. Montes then said, "Did anyone speak to you about the Union?"[21] Hernandez denied speaking to anyone about the Union.

On May 10, Burt acted as Ricardo Romero's witness at Romero's termination meeting. Later the day Romero was terminated, while in Vitelli's office, Vitelli asked Burt why Romero picked him to be his witness. Burt replied, "I guess he thinks I'm an honest guy." Vitelli said, "Either Romero thinks you're an honest guy or you're lying to me yesterday and today." Vitelli then asked Burt if he was part of the Union.[22]

On May 31, at the Kraemer facility, Gallegos asked supervisor Rafael Rodriguez (Rodriguez), also known as "Five" or "Fay", about the Union rally that had taken place that day at the Imperial building. Gallegos asked if there had been any speakers. Rodriguez replied, "No, and I told my employees if they talk at the rally, I will suspend them."[23]

On about July 16, Olga Lopez (Lopez), Respondent's safety clerk, had a conversation with Raphael Rodriguez in the safety office. Rodriguez said Vitelli had a meeting with supervisors in March and asked Rodriguez if he knew Jorge Romero and Lopez were cousins. Vitelli asked Rodriguez, "How did the Union visit employees and know their addresses?" At about the

of hyperbole or rancor. He was responsive to questions on both direct and cross-examination. I will credit his testimony.

[14] I credit Rivera's testimony.

[15] Von Puschendorf denied making this comment. I find Von Puschendorf was an incredible witness who was trying to minimize his participation in Respondent's workplace culture of pornography, vulgarity and sexual permissiveness. I will credit Romero's testimony.

[16] General Counsel has not alleged this warning as a violation of the Act.

[17] See GC Exh. 5.

[18] I credit Romero's version of the meeting.

[19] Alvarez denied interrogating Gallegos about the Union. In other testimony, Alvarez incredibly denied ever hearing an employee use profanity or tell a dirty joke at work. I credit Gallegos testimony.

[20] I credit Gallegos' testimony.

[21] Montez denied interrogating Burt or Hernandez. I found Montez' a facile witness with an obvious bias, as Strauss' lover. Burt on the other hand testified without rancor and was responsive in his answers on direct and cross-examination. I credit the testimony of Burt and Hernandez.

[22] Vitelli denied interrogating Burt. I credit Burt's testimony.

[23] Rodriguez was a particularly hostile and evasive witness who had to be admonished to respond to questions from counsel for the General Counsel on cross-examination. I credit the testimony of Gallegos.

same time in mid July, Raphael Rodriguez and Guadalupe Hernandez had a conversation in the electrical department. Rodriguez told Hernandez, "We know you are in the Union. If you know something, say it. Do you know Olga and Jorge are cousins?"[24] Hernandez denied being in the Union or knowing that Olga and Jorge Romero were cousins.

On July 17, security guard Eddy Rivera and Vitelli had a conversation in Vitelli's office. Vitelli asked Rivera if he thought Lopez was involved with the Union and Rivera stated that he did not think so.[25] At one point Vitelli blamed Ricardo and Jorge Romero for getting Respondent in the Union "mess." Vitelli told Rivera to stay away from the safety office.

b. The no-solicitation no-distribution rule

Respondent distributed an Employee Manual to its employees in both the Spanish and English languages. General Counsel and Respondent proffered competing versions of the Employee Manual.[26] The no-solicitation no-distribution rule in the English Language Employee Manual offered by General Counsel provided:

> Solicitations & Distributions
>
> Solicitation for any cause on company property is not permitted. You are not permitted to distribute non-company literature at any time. Persons not employed by Krystal are also prohibited from soliciting or distributing literature on company property.[27]

The translation of the solicitation and distribution rule in the Spanish Language Employee Manual reads:

> Solicitation of anything in the company is not permitted. You do not have permission to distribute literature which is not of the company. Persons who are not employed by Krystal are also prohibited from soliciting or distributing literature within the property of the company.[28]

Respondent submitted Employee Manuals[29] in both English and Spanish language versions.[30] The English language manual contained the following no solicitation no distribution rule:

> Solicitations & Distributions
>
> Solicitation for any cause during working time and in working areas is not permitted. You are not permitted to distribute non-company literature in work areas at any time during working time. Working time is defined as the time assigned for the performance of your job and does not apply to break periods and meal times. Working areas do not include the lunch room or the parking areas. Solicitation during authorized meal and break periods is permitted so long as it is not conducted in working areas. However, employees are not permitted to sell chances, merchandise or otherwise solicit money or contributions without management approval.
>
> Persons not employed by Krystal are prohibited from soliciting distributing literature on company property.

Hill and Rocio Wheat (Wheat) explained Respondent's version of the employee manuals. In early 1999 Hill told Wheat, Respondent's human resources manager at the time, to review the solicitation and distributions policy in the Employee Manual. According to Wheat, in March 1999 she reviewed both the solicitation and distributions and confidentiality language in the Employee Manual. Wheat drafted revisions for the solicitation and distributions policy in both Spanish and English. She had copies of the revisions made at Kinkos. Wheat told Jorge Romero, her assistant, to remove the old solicitation and distribution language and insert the new language into the Employee Manuals that were stored in the supply closet. Wheat said employees were notified of the change to the employee manual by memo. The memo dated March 19, 1999, states:

> This is a revised Krystal Employee Manual, please take sometime [sic] to review it, and return to me the Receipt & Acknowledgement page with your signature, and date. In addition, attached is also a revised copy of the Employee Invention, Non-Disclosure, & Non-Competition Agreement, please initial the first page, and sign and date the bottom of the second page.

Nothing in the memo indicates that the new solicitation and distribution language was distributed to employees.[31] Further, Wheat testified that in March 1999 there were only 50–100 copies of the extant Employee Manual in stock.[32] Vitelli testified Respondent employed almost 500 employees in 1999. Thus, contrary to the memo, Respondent could not have distributed new Employee Manuals to all of its employees in March 1999. I find that Respondent did not distribute the revised solicitation and distribution language or new Employee Manuals to its employees in March 1999. Moreover, according to Wheat, the old manuals, previously distributed to employees were not taken back. Accordingly, the Employee Manuals presented by counsel for the General Counsel were the versions in effect in 2001.

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[24] I credit the testimony of Lopez and Hernandez over that of Rodriguez.

[25] I credit Rivera's testimony.

[26] Jorge Romero obtained General Counsel's Employee Manuals in late 2000 when he was still employed in Respondent's human resources department. Romero, who was responsible for binding and distributing the Employee Manuals, testified that the only change to the Employee Manual in 1999 was a noncompetition policy. Mauricio Salinas, an employee hired by Respondent in March 2000, testified without contradiction that the Spanish language Employee Manual he received in March 2000 contained the solicitation and distribution language in General Counsel's exhibit 13. I credit the testimony of Romero and Salinas.

[27] GC Exh. 12, p. 38.

[28] GC Exh. 13, p. 37 and Tr. p. 899.

[29] R Exh. 19, p. 38, Exhs. 20 and 24, p. 37.

[30] Respondent did not provide a translation of its version of the Spanish language solicitation and distribution rule. However, Rocio Wheat, Respondent's human resources manager from July 1997 through October 2000 testified that Respondent's Exhs. 19, 20, and 24 contained the versions she revised of Respondent's solicitation and distribution rule in English and Spanish.

[31] Respondent presented an invoice dated March 17, 1999 from Kinkos for 2000 pages copied. However, Wheat testified that this invoice was for changes to the Non-Competition Agreement policy. Moreover the 2000 copies would have been insufficient to give each employee a copy of the two new policies or a new Employee Manual.

[32] Hill testified that in 1999 Respondent had about 200–300 extant Employee Manuals and had about 250 more copied so that every employee could get a new Employee Manual with the revised solicitation and distribution language. Other than the March 17 Kinkos invoice, Respondent proffered no evidence to support Hill's assertion that 250 new Manuals were copied. I credit Wheat's testimony that Respondent had only 50–100 Manuals in stock since she was responsible for storing, supplying, and revising the Manual and would have been more familiar with this information than Hill.

c. The allegation Respondent denied its employee's access to union representatives

On May 31 from 4 to 5:30 p.m., the Union held a rally at Respondent's Imperial facility. The rally took place on the sidewalk at the southwest corner of the Imperial facility. [33] On Kraemer Boulevard, Union representatives handed out handbills at the Kraemer exit and at an adjoining alley exit from the Imperial facility from about 4:50 to about 5:10 p.m. The Kraemer gate, about 400 feet north of the Union rally, allowed employees with cars to exit at a traffic signal. The alley, about 100 feet north of the Kraemer exit gate, was an exit from Krystal parking lot 2. From the alley employees could only turn right on Kraemer, away from the site of the Union rally. The exits were used by employees to exit the Imperial facility on foot and by car. The Kraemer exit had a gate that could be closed but was normally kept open so employees could leave work. On about May 17 a "new access" was cut into the wall between Krystal parking lots 1 and 2. On May 31, Vitelli told supervisors via radio to keep employees in their work areas and not to use the restrooms. Between 3 to 3:15 p.m. Vitelli ordered the roll up doors on the Kraemer Street side of the Imperial facility closed. They were open the next day and were not closed again through July 17. Owner Ed Grech said over the radio during the rally, "Hey, I see employees going toward the rally." Grech then ordered the Kraemer gate closed from about 5 until after 5:15 p.m. Vitelli told security guard Rivera not to allow employees to exit the Kraemer gate but to use the "new access" to prevent employees from attending the Union rally.[34] Four security guards, including Rivera, as well as supervisors Vitelli and Ken Thullem, stood in the area between the Kraemer gate and the new access gate. They all directed employees to leave via the new access gate. Rivera stated, "todos este lado," meaning "everyone this way." At least seven employees were prevented from exiting the Kraemer gate. At the alley exit, security guard Albert Casares, pursuant to Grech's order, was directing employees away from the rally.

4. The 8(a)(3) allegations

a. The March 9 warning to Romero

Respondent employed Ricardo Romero from October 1999 to May 10, 2001. Romero began working as a quality control inspector (receiving) in September 2000. Romero's duties as a quality control inspector called for him to inspect various parts received from Respondent's vendors for defects. While Romero worked in both the parts and receiving departments, his job took him throughout the Imperial building on a regular basis. He was never told that he could not leave the receiving area. Romero was supervised by both Von Puschendorf, the parts department supervisor, and Ralph Garcia, the quality control supervisor. However, supervisors from other departments gave Romero orders he carried out. Romero was never told not to follow the orders of other supervisors.

On March 9, Romero received three fiberglass hearse loading doors. While Romero was unloading the doors from the vendor's truck, welding supervisor Morales approached and asked whether Romero had received any loading doors because the welding department needed them. Romero showed Morales the door and immediately noticed that it was damaged on the corner. As a result of seeing this defect, Romero told Morales that he was going reject the door and send it back to the vendor. Morales instructed him to not return the door because the production floor needed it. Morales went on to say that the vehicle had already moved from the welding department to the next stage on the production floor without the loading door. Morales admitted that he instructed Romero to inform him the moment the doors came in because the welding department needed them, and that the vehicle that needed the door was already in the next department.[35]

After the door had been taken to the production floor, supervisor Alvarez called Romero's supervisor, Garcia, and told him to come look at a defective door. When Garcia arrived, he noticed that the door in question was damaged on the bottom corner. Morales then showed Garcia and Alvarez a second defective door, which had cracked fiberglass. Then Garcia and Alvarez were shown a third defective door that was still in the receiving area.

Garcia called Ricardo Romero and began yelling at Romero and asked him why he had accepted the defective door. Romero told Garcia that Morales had instructed him to accept the door. Garcia claimed that Morales had no authority to accept parts. However, Romero accepted defective doors in the past when told to do so by supervisors who needed the parts. For example, on March 27, Romero rejected a defective hearse shell. Alvarez admonished Romero for rejecting the shell because Alvarez needed the part. Alvarez told Romero, "Next time check with me before you reject a part."[36] Respondent's parts receiving clerk, Burt testified he knew that Ricardo Romero received defective parts when the production department needed the part and was able to repair it. Burt said the production department requested bent pillars, window moldings and damaged hearse doors. Contradicting Garcia's testimony, Alvarez admitted that Respondent had the ability to make repairs to fiberglass parts and repaired hearse fiberglass loading doors several times in 2001.

Later in the day on March 9, Respondent gave Romero a written warning for accepting the defective hearse doors. The warning stated in pertinent part:

> On Friday, March 9, 2001, failed to follow his job responsibilities, by approving 3 car doors that did not meet the established quality standards and allowed them to be taken to the production floor to be placed in the assembling [sic] line.

b. The March 22 warning to Romero

On March 22, around noon Ricardo Romero saw service department employee Gutierrez in the parts department. Gutierrez, who was on sick leave, had come to the plant to fill out disability forms. Gutierrez asked Romero for help in filling out the forms. Romero suggested Gutierrez speak with Strauss

[33] See GC Exh. 9.

[34] I credit Rivera's testimony.

[35] Morales was an incredible witness who denied seeing employees sell anything at work, hearing employees use bad language at work or seeing employees touch each other at work. Later on cross-examination Morales contradicted himself and admitted he heard employees use foul language at work and that he sold telephone credit cards at work. I will credit Romero's testimony.

[36] Alvarez testified that he admonished Romero for receiving the defective hearse shell. Alvarez said he reported this incident to Romero's supervisor, Ralph Garcia. However, despite both Garcia and Alvarez having been involved in the hearse door incident of March 9, neither provided Romero with a written warning. I credit Romero's testimony that Alvarez told Romero to check with him before rejecting a part.

and Gutierrez asked Romero to take him to Strauss' office. Romero agreed, clocked into work just before 1 p.m., and took Gutierrez to the human resources department to speak with Strauss. When they got to Strauss' office, Strauss was with someone so Romero spoke to Gutierrez for a few minutes and went to the purchasing department. According to human resources assistant Montes, the entire incident took no more than five minutes from the time Romero met Gutierrez in the parts department until Romero left for the purchasing department. While in front of Strauss' office, Montes had overheard Romero tell Gutierrez, ""Well, don't worry. If they don't help you here, we can help you. We are the Union. We can help you. We can help you get an attorney. We help you defend your case." Later, Montes told Strauss that Romero offered Gutierrez help from the Union.

On March 22 at about 3 p.m. Romero was called to the human resources office. Present were Vitelli, Strauss and Garcia. Strauss told Romero he was being warned for wasting company time on personal business. Strauss said he should not be talking to employees and not working. Strauss told Romero that he had spent over 30 minutes asking for Jesus' phone number. Romero was not asked to explain why he was out of his work area. Romero's warning stated in part:

> The employee must be at his designated working area at all times during his working hours unless the employee needs to take restroom' [sic] break or the employee is in his break or lunchtime.

c. The May 7 suspension of Romero

In the spring of 2001 supervisors Threedouble and Leuvanos complained to Vitelli that Romero was talking to service department employees about the Union during working time. Vitelli reported the complaint to Montes and they began an investigation.

Montes and Vitelli first met with Threedouble and Luevanos, in separate meetings. Threedouble stated that he did not know whether Ricardo Romero's visits to the service department were work-related or not. Luevanos stated that Ricardo Romero would speak with service department employees, including Gutierrez and Anguiano, about three times a week during break and stay after the break had ended. Luevanos told Vitelli and Montes that when he questioned employees Gutierrez and Anguiano, they told him that Ricardo Romero was talking to them about the Union.

Next Vitelli and Montes met with Gutierrez and Anguiano in separate meetings. Vitelli asked Gutierrez if Ricardo Romero was coming to his workstation during work hours to talk. Gutierrez stated that in the past two weeks Romero had come by the service department during breaks, lunch, and working time.

During the meeting with Anguiano, Vitelli asked him if he had any problems with Ricardo Romero. Anguiano said that Romero was bothering him by "pushing certain things" during working hours. Anguiano added that Romero visited to discuss work-related matters, such whether the service department could use parts that Respondent was excessing. Other times Romero visited Anguiano and talked to him about the Union. According to Anguiano, Romero visited the service department two to three times a week for 10 to 15 minutes at a time during both breaks and work time. Even though Romero sometimes talked about the Union, Anguiano could not say which topics Romero discussed during breaks as opposed to during work time.

As part of the ongoing investigation, supervisor Alvarez approached employee Luis Gallegos (Gallegos). Alvarez asked Gallegos what Ricardo Romero was doing in the service department since only supervisors were authorized to be in that department. Gallegos assured Alvarez that Romero was in the service department returning defective parts and performing his job duties. Alvarez asked Gallegos if Romero had talked to him about the Union.[37] Gallegos said, "no" and that Romero was only doing this job.

About 2 hours later, Gallegos was called to Vitelli's office where Alvarez was present. Vitelli asked what Ricardo Romero was doing in the service department. Gallegos again stated that Romero was performing his job duties. Vitelli then asked Gallegos whether Romero had talked to him about the Union during work hours. Gallegos replied, "no." Vitelli asked whether any Union representatives had talked to Gallegos. Gallegos responded that a Union representative had talked to him during lunch at the park. Finally, Vitelli asked Gallegos whether he knew if Romero had spoken to other employees about the Union and Gallegos said, "no." At the end of the meeting, Vitelli told Gallegos that if he heard anything about Romero talking to employees about the Union during working hours to inform Vitelli.

On May 7, Ricardo Romero was called to the human resources office. Present were Montes, Garcia and Vitelli. Flavio Montes told Romero he was being suspended for being out of his workplace. While it was Respondent's practice to give the disciplined employee an opportunity to present their side of the case, Romero was given no such opportunity concerning this suspension. The warning stated in part:

> The Employee must be at his designated working area at all times during his working hours unless the employee needs to take restroom breaks or the employee is in his break or lunchtime. . . . This is the second time that the Employee is found in violation of this company policy. Due to the severity of this issue here described employee will be suspended without pay for three days (until 5-10-01).

After Ricardo Romero was suspended on May7, Vitelli, Garcia, and security guard Rivera escorted Romero from the Imperial building to the parking lot. On the way to the parking lot, Vitelli, who walked behind Romero, repeatedly kicked Romero's shoes. Once they reached Romero's car, Vitelli told Romero he had one minute to get off the premises. As Rivera and Vitelli walked back to the facility, Vitelli stated, "Did you see me? I kicked that fucker and he didn't do anything about it."[38]

It was commonplace for employees to engage in personal business during working time at Respondent's facility. Respondent's employees regularly engaged in other activities unrelated to work. Employees sold bottled water, shrimp cocktails, computer software, music compact discs (CDs) and tapes, bed comforters, tamales, raffle tickets for vehicles and televisions, cigarettes, jewelry, chocolate bars, boxing gloves, and Avon products. They made bets on sporting events. Employee Salvador Lobato sold water during and after the lunch hour. An employee named Rene sold chocolate bars to employees

[37] I credit Gallegos testimony.

[38] I credit Rivera's testimony.

during working hours. Armanda Romero sold boxing gloves. Francisco Elizarraras sold cigarettes during working hours. Employee Wenceslao Alvarez sold computer software to employees. There were two "Avon Ladies," named Adilia and Magda. An employee named Bustos took bets on soccer games during work time.[39] The foregoing items were sold throughout the workday, including before, after, and during work hours.

General Counsel's witnesses testified that Martin Lizarraga (Lizarraga), employed by Respondent from 1993 to the present, sold tamales during the morning hours, both before and after employees began work. In the morning, Lizarraga took orders for tamales from employees and supervisors and he delivered the tamales throughout the day.[40] Olga Lopez saw supervisors, Modesto Marines, Eddias Macias, Rafael Rodriguez, and Jose Lopez purchasing items during working hours. Burt testified that he has seen supervisors Martinez and Von Puschendorf buy candy bars during working hours.

During his employment, Jorge Romero sold music CDs out of his office. For a period of time, Jorge Romero sold as many as 15 CDs a day. Jorge Romero sold a CD to Garcia during working hours. Garcia did not discipline Jorge Romero or instruct him to stop selling CDs. Carpentry department supervisor Delgado sold cars and would ask employee during working hours whether they wanted to buy cars.

Security guard Rivera testified that at no time was he directed to stop employees from selling items during work time.

d. The May 10 termination of Ricardo Romero

On May 4, Respondent held a Cinco de Mayo party for its employees in its parking lot from about noon to 3 p.m. Near the end of the party three supervisors, Marines, Vitelli and Alvarez saw Ricardo Romero grab two or three employees from behind and push his pelvis against them. At about 4 p.m., Alvarez asked Nestor Sanchez (Sanchez)[41] if he had seen Romero touch employees during the party. Sanchez said he had and that it was a common occurrence in the parts department. After speaking to Sanchez, Alvarez suggested that Sanchez file a complaint of sexual harassment against Romero. Later on May 4, Sanchez met Vitelli and told him that he had seen Romero and other employees in the parts department touch employees' genitals and buttocks on many occasions.[42]

On the morning of May 7, Sanchez filed a complaint against Romero with Montes, describing the sexual touching by Romero and other employees, including Miguel Valpuesta (Valpuesta), Rafael Bonilla (Bonilla) and Christian de la Cruz (de la Cruz).

Respondent's Employee Manual at page nine defines Respondent's harassment policy as follows:

> Harassment Policy
>
> Krystal intends to provide a work environment that is pleasant, healthful, comfortable and free from intimidation, hostility or other offenses which might interfere with work performance. Harassment of any sort-verbal, physical, visual-will not be tolerated.
>
> What Is Harassment?
>
> Harassment can take many forms. It may be, but is not limited to: words, signs, jokes, pranks, intimidation, physical contact, or violence. Harassment is not necessarily sexual in nature.
>
> Sexually harassing conduct may include unwelcome sexual advances, requests for sexual favors, or any other verbal or physical contact of a sexual nature that prevents an individual from effectively performing the duties of their position or creates an intimidating, hostile, or offensive working environment, or when such conduct is made a condition of employment or compensation, either implicitly or explicitly.
>
> Responsibility
>
> All Krystal employees, and particularly managers, have a responsibility for keeping our work environment free of harassment. Any employee who becomes aware of an incident of harassment, whether by witnessing the incident or being told of it, must report it to their immediate manager or any management representative with whom they feel comfortable. When management becomes aware that harassment might exist, it is obligated by law to take prompt and appropriate action, whether or not the victim wants the company to do so.
>
> Reporting
>
> In order to assist in preventing or eliminating any unwelcomed harassment, any incidents of harassment must be immediately reported to a manager or other management representative. Appropriate investigation and disciplinary action will be taken. All reports will be promptly investigated with due regard for the privacy of everyone involved. Any employee found to have harassed a fellow employee or subordinate will be subject to severe disciplinary action or possible discharge. Krystal will also take any additional action necessary to appropriately remedy the situation. . . .

Montes and Vitelli conducted the investigation of Sanchez' complaint. Montes and Vitelli interviewed about 15 employees Between May 7 and May 10. Of the 15 employees interviewed, six[43] implicated Romero as a participant in sexual touching together with other parts department employees. The other nine employees interviewed did not implicate Romero. The investigation disclosed that it was common practice in the parts department for employees to touch each other in a sexual manner and to use profane and obscene language.

[39] The record does not reveal the last names of employees Rene, Adilia, Magda, or Bustos.

[40] Lizarraga initially testified that he sold tamales from November 2001 to January 2002, in Respondent's parking lot at the Imperial facility before work. Then Lizarraga admitted that in August 2001, the health department came to Respondent's facility and told him he could no longer sell tamales. At that Lizarraga stopped selling tamales. Lizarraga admitted that he sold tamales to Strauss one time and he delivered them to her office at around 5 p.m. I credit the testimony of General Counsel's witnesses that Lizarraga regularly sold tamales during working hours.

[41] Employed by Respondent from September 1999 to the present in the parts department.

[42] Ricardo Romero denied that he approached any employees from behind and moved his pelvis in or out, or engaged in any similar conduct. I credit the testimony of Sanchez. Romero's conduct is consistent with what was common practice at Respondent's facility.

[43] One of the six, Gilbert Delgado, claimed Romero's name was Richard. Delgado claimed that Romero had black hair and a black mustache and had the name Richard written on his uniform. Romero's uniform did not have the name Richard embroidered over the pocket but rather the name Ricardo. Further, two other employees in the parts department and in the QC department were named Richard and both had black hair and mustaches. It is clear that Delgado's identification of Romero was incorrect.

On May 7, Respondent suspended Valpuesta pending completion of the investigation. Upon completion of the investigation, Montes recommended the termination of Valpuesta and Romero, the suspension of Rafael Bonilla and written warnings to Jaime Martinez and Jose Alberto Espinosa. Bonilla was suspended rather than terminated because he had no previous warnings. Montes informed Hill, Vitelli, and Strauss of his recommendations and received no objections. Strauss then made the decision to terminate both Romero and Valpuesta.

On May 10, Romero was terminated for repeatedly violating Respondent's sexual harassment policy. Once again Romero was not given an opportunity to present his side of the case. Montes said he did not interview Romero because the evidence against him was overwhelming and this was his second offense. Respondent terminated Valpuesta on May 11 for violation of Respondent's sexual harassment policy.

Montes' investigation ignored the common practice at Respondent's Imperial facility for both employees and supervisors to engage in sexual horseplay, to use profanity and vulgar language and to possess and display pornography. Several witnesses, including some presented by Respondent, testified that employees frequently touched each other on the buttocks, chest, and genitals. Employees testified that supervisors Von Puschendorf, Martinez, Alvarez, Vitelli, Marines, Geronimo Ochoa,[44] Robert Jasper, Jeff Brown (Brown),[45] Modesto Morales, Manny Robelledo, Ken Thullem, and Eddy Macias were present when employees touched each other on the buttocks, chest, and genitals.

Once, security guard Rivera and Montes were in the body shop department and saw employees mimicking sexual activity. Montes laughed and did not attempt to stop the employees from engaging in the activity. Valpuesta, in the presence of Von Puschendorf, observed employee Rafael grab employee Salgado's head and mimic the act of fellatio, while stating, "Suck it mother fucker, suck it." Von Puschendorf commented, "It must be nice." All the employees laughed. Von Puschendorf did not discipline the employees.[46]

Jorge Romero saw Vitelli walk toward employee Javier Garcia and touch him on the buttocks. Garcia said, "orale puto," which means "come on faggot." Vitelli repeated this same conduct with employee Lizarraga, who was bent over looking inside a limousine, and with employee Jose Zamarron, who was bent over buffing a car. On another occasion, Vitelli was in security guard Rivera's office. During the conversation, Rivera turned around and Vitelli ran his radio antenna between the Rivera's buttocks in an upward thrusting motion. In response, Rivera jokingly placed Vitelli in a headlock.[47] Ricardo Romero saw Alvarez place his radio antenna on the buttocks of Carmen Von Puschendorf, a purchasing clerk.

When supervisor Brown visited the parts department he grabbed employee Alberto Espinosa's genitals. On another occasion in the parts department Brown sat on employee Christian de la Cruz' lap and rotated his pelvis, simulating sexual activity.[48] Jorge Romero testified that on three separate occasions, while in his office with supervisor Trotter, employee Alberto Vela walked into the office and grabbed Trotter from behind and moved his pelvis in and out. Trotter did not attempt to stop Alberto Vela either time. Trotter admitted to two such incidents with employee Alberto Vela.

Jorge Romero stated that supervisor Modesto Marines entered his office and showed him a photo of a naked woman's breast and asked Jorge Romero whether he liked her. When Jorge Romero responded that he did, Modesto showed him the bottom half of the picture, revealing a male penis. Modesto laughed and told other employees.[49]

It is uncontroverted that Cesar Delgado (Delgado) hit an employee on the buttocks, while calling the employee an "idiot" and telling the employee to hurry up and complete a certain job task.[50] Employee Salinas saw Delgado on a regular basis grab employees on the buttocks and genitals, and pretended to kiss them. Delgado once told Salinas that he wanted to make love to him. Salinas told him that he was not a homosexual and the comment made him feel uncomfortable. Salinas did not report Delgado's conduct because he feared losing his job.

Trotter admitted that on two occasions his leadman Mauricio Machuca (Machuca), grabbed the buttocks of another employee.[51] The first time the employee objected and told Machuca that he did not like being touched.[52] About 2 weeks later, Machuca touched another employee in the same fashion and the employee pushed Machuca and told him not to touch him. Trotter claimed that he met with his entire wood shop department and admonished them against that type of conduct, because customers came through the facility and it was important to make a good impression. Trotter did not report either incident to human resources or to any other manager, despite his obligation to do so under Respondent's harassment policy. Trotter did not issue Machuca a written warning as a result of either incident.

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[44] Ochoa, who has been employed with Respondent for at least 5 years, is a line supervisor on the "A" production line. Ochoa is responsible for overseeing the whole production line, but he is most directly responsible for the detail department on the "A" line. During 2001, Ochoa supervised about 15 to 16 employees. Respondent stipulated that Ochoa is a supervisor within the meaning of Section 2(11) of the Act.

[45] Brown is the project manager.

[46] I credit the testimony of Rivera and Valpuesta.

[47] Vitelli denies touching employees in a sexual manner. I credit the testimony of Jorge Romero and Eddy Rivera over that of Vitelli. It is likely that Vitelli engaged in this conduct given its widespread practice in the Imperial facility, particularly in view of his previous counseling by Hill for engaging in similar conduct.

[48] Brown denied touching employees in a sexual manner. Brown also denied employees told dirty jokes at work then later contradicted his testimony and admitted employees told dirty jokes. I credit Ricardo Romero's testimony that Brown engaged in touching employees in a sexual manner.

[49] Marines denied ever seeing pornography at Respondent's facilities. He also initially denied using profanity. He later admitted that employees used "guy talk" including words like "fucking." I credit the testimony of Jorge Romero.

[50] In 2001, Delgado was the leadman on production line "C" and was responsible for about 20 employees. He reported to Trotter. If there was a problem on the production line Delgado would send the appropriate employee, based on the employee's skill and knowledge, to address the problem. Delgado had the authority to recommend merit raises for his subordinate employees. Even though Trotter would personally view employees' performance, he did rely on Delgado's assessment of employees work performance when considering merit raises. Delgado was responsible for conveying employees' complaints to Trotter and he made sure employees performed their work duties. He also reported misconduct to Trotter. Trotter relied on Delgado to ensure that Respondent's production needs were met. I find that Delgado is a supervisor within the meaning of Section 2(11) of the Act.

[51] Trotter did not recall the dates, but the first time occurred before Strauss was hired.

[52] Trotter did not recall the name of the employee.

Respondents' employees and supervisors often viewed and circulated pornographic pictures and e-mail. Burt testified that about once a month supervisor Raul Martinez called employees to his computer and showed them pornographic movie clips on his computer.[53] When Rivera patrolled Respondent's premises, employees showed him pornography. Rivera saw pornographic pictures on the toolboxes owned by Respondent[54] and on smaller tool boxes owned by employees. Rivera saw pornography in the welding, detail, body shop, and parts departments.

On May 6, four days before Respondent terminated Ricardo Romero, supervisor Von Puschendorf e-mailed supervisor Von Ahn a document entitled "Pick-Up Lines."[55] Von Puschendorf printed the e-mail on the company printer and employees viewed it. Vitelli conceded that Von Ahn violated Respondent's sexual-harassment policy by sending Von Puschendorf the "Pick-Up Lines" e-mail. Von Ahn was not disciplined. Von Ahn also sent "Pick-Up Lines" e-mail to some of Respondents' vendors including their paint vendor BASF Corporation and their fiberglass vendor, a company called Blackhawk.

Von Puschendorf received and printed on the company printer an e-mail entitled, "Top 10 Sexual Positions."[56] Von Puschendorf distributed copies of the e-mail to employees. Vitelli also conceded that Von Puschendorf violated Respondent sexual harassment policy by printing "Top 10 Sexual Positions" on the company computer. Von Puschendorf also distributed the pornographic material received as Charging Party exhibit 2.[57] Valpuesta maintained copies of the pictures on a clipboard, which he kept in the parts department. Valpuesta showed these pornographic pictures to employees. Burt testified that he saw pornography on Respondent's computer's shared hard drive between July and October 2000.

In May, after Ricardo Romero's termination, Larry Webster, employed by one of Respondent's vendors, e-mailed a document with the subject heading of "Men," the first line of which reads "This is for men tired of receiving male-bashing jokes."[58] Von Puschendorf then forwarded the e-mail to several supervisors, including Martinez. Vitelli further conceded that Martinez violated Respondent's sexual harassment policy by e-mailing this item. Martinez forwarded the e-mail to employee Burt. Martinez was not disciplined. Burt identified the e-mail entitled "Men" as one supervisor Martinez sent to him through company e-mail.

Respondent's employees regularly used profanity and curse words, in both English and Spanish. Some of the most common Spanish words and phrases were: "puto, joto, or maricon," each means "faggot"; "culero," meaning "asshole"; "pendijo," which means "stupid"; "chinga," meaning "fucker"; "chinga tu madre," which means "fuck your mother"; "pinche," which means "fucking"; "panocha," meaning "pussy"; and "verga," which means "cock"; and "cingota," meaning "go fuck yourself." The English equivalent of the foregoing words were also commonly used. Employees regularly said, "mother fucker," "son-of-a-bitch," "cock sucker," and "fuck you." Supervisors were often present when employees used offensive language and they never told employees to stop. Supervisors Manuel Martinez, Trotter, Alvarez, Marines, Jeff Brown, Benito Rodriguez, and Geronimo Ochoa, have each been present when employees used offensive language.[59]

Vitelli testified that he has heard employees say "chinga" and "pinche." Supervisors themselves used the very same offensive language. Supervisors like Manuel Robelledo, Modesto Marines, and Hector Tirado used offensive language on a daily basis.[60] Vitelli frequently asked employees "panacha o verga," meaning "pussy or cock."[61] Respondent's witness Sanchez said that employees in the parts department used profanity and offensive language, like "idiot," "fuck your mother," "fuck off," and "fuck you." Employees used this language in the presence of supervisor Martinez. Respondent's witness Zuniga also testified that employees used words like, "pinche," "chinga," and "pinche joto," "maricon," and "cingota," meaning "go fuck yourself." Supervisor Alvarez admitted that employees used profanity in Spanish, such as "pinche" and "bobasola," meaning "bullshit." Supervisor Marines admitted to sometimes using bad language. Jorge Romero heard Strauss refer to her predecessor, Rocio Wheat, as that "fucking old lady."[62]

e. The July 9 reduction in Olga Lopez' duties

Respondent employed Olga Lopez as safety clerk from April 1999 to August 1. Lopez' office was located in a trailer outside of the Imperial facility. As a safety clerk, Lopez duties included: distributing safety equipment to employees; conducting safety training of new employees and re-training of old employees; inspecting safety equipment to ensure they were in good working order; securing transportation to the medical clinic for injured employees; completing the medical authorization forms; performing first aid on employees' minor injuries; ordering first aid supplies; investigating work injuries by talking to the injured worker, supervisors, and witnesses; assisting employees complete workers compensation forms; maintaining files on injured employees; completing the Occupational Safety and Health Administration (OSHA) logs, which are called the OSHA 200 Logs; and completing the V.O.C. Logs, which indicate how much glue and paint Respondent used per day. Lopez duties gave her access to employee personnel files.

On July 9, at around 10:45 a.m., Lopez met with Strauss in the human resources office. Strauss informed Lopez that because of a "negative change" Respondent had toward Lopez, starting July 9, Lopez was no longer going to be responsible for completing the OSHA 200 Logs, sending employees to the clinic and worker's compensation forms. Strauss said all the safety file were to be maintained in Strauss' office.[63] Strauss also stated that during her absence on maternity leave, a lot of information had filtered out of the human resources office and

[53] Martinez was a thoroughly discredited witness who fully impeached himself on the issue of his observation and possession of pornography at work. I credit Burt's testimony.

[54] The company-owned toolboxes were about 4-feet tall.

[55] See GC Exh. 8.

[56] See CG Exh. 1.

[57] Von Puschendorf denied seeing or distributing Charging Party Exhibit 2. I do not credit this denial in view of Von Puschendorf's admitted appetite for pornography in the workplace.

[58] See GC Exh. 11.

[59] Many of these supervisors incredibly denied ever hearing swear words at work. I have discredited their testimony as a result of their prevarication.

[60] Rivera testified that Robelledo, Marines, and Tirado each had employees working under them and wore white shirts.

[61] Hill verbally counseled Vitelli once about this use of offensive language.

[62] Strauss denied making this statement. For the reasons noted above, I credit Romero's testimony.

[63] While Strauss denied reducing Lopez' duties, Lopez' testimony is corroborated by Strauss' e-mail of July 9, received as GC Exh. I credit Lopez' testimony.

employees were complaining of the Union visiting them at their homes. Strauss told Lopez to train employee Hilary Gonzalez, herein called Gonzales, on how to perform Lopez' duties at the Kraemer building. Lopez asked if the reduction in duties was a result of her performing poorly, and Strauss responded that Lopez was one of her best workers. Lopez asked Strauss if the reduction was because Respondent thought she and Jorge Romero were cousins. Strauss told Lopez that Lopez could not prove that.

Lopez was left with the job duties of distributing safety equipment, performing first aid, safety training and re-training employees at the Imperial building.

In July, supervisor Rodriguez approached the work area of employee Guadalupe Hernandez. Rodriguez told Hernandez that they already knew she was involved with the Union and if she knew anything she had better tell him. Hernandez stated that she knew nothing. Rodriguez then asked Hernandez if she knew if Jorge Romero and Lopez were cousins. Hernandez stated that she did not know.[64] After Lopez' duties were reduced, supervisor Rodriguez entered the safety office and talked with Lopez. Rodriguez informed Lopez that during a March supervisors' meeting, Vitelli asked him if he knew that Jorge Romero and Lopez were cousins. Rodriguez told Vitelli that he did not think so, and Vitelli replied how was it then that the Union visited employees and knew employees' addresses. Rodriguez also told Lopez that the Union was getting strong and the managers were concerned. On July 17, Rivera and Vitelli talked in Vitelli's office. Vitelli told Rivera that he was hanging around the safety office a lot and there was a rumor that he and employee Lopez had a sexual relationship. Vitelli asked Rivera if he thought Lopez was involved with the Union and Rivera stated that he did not think so. At one point Vitelli blamed Ricardo and Jorge Romero for getting Respondent in the Union "mess." Vitelli told Rivera to stay away from the safety office.

f. The August 1 termination of Lopez

According to Hill, in January Respondent's business began to decline about 25 or 30 percent in sales. By the second half of 2001, Respondent's business had dropped 50 percent in sales. In July, Hill met with each of the managers that report to him, including Strauss, and gave them a choice. Hill told the managers that they had two options: they could put their department on a 4-day workweek, working 32 hours a week, thus taking a 20 percent pay cut; or they could lay off 20 percent of the people in their department. If the managers chose the second option, and the department had five or less employees, the manager had to lay off one employee. Prior to the layoff, during July, Strauss' department consisted of five people: Montes, Lopez, Hilary Gonzales (Gonzales), Isabella,[65] and Strauss.

According to Strauss, after her discussion with Hill, she evaluated her staff and decided to lay off not one but two employees: Gonzales, who was hired as a temporary employee during Strauss' maternity leave and Lopez. Strauss had planned to retain Gonzales for several months after she returned from her maternity leave in June. On July 9 Strauss assigned Gonzales Lopez' safety duties at the Kraemer building. Lopez was chosen for termination because her duties had been performed in the past by outside safety consultant, Mike Bushey. Before Strauss could lay her off, Gonzales quit on July 24.

On August 1, 2001, Strauss had a meeting with Lopez in the safety office and told Lopez that Respondent was conducting a layoff. Strauss told Lopez that the layoff was going to effect the human resources department and that Respondent was going to have to let Lopez go. Lopez said she understood and left.

The August 1 downsizing resulted in approximately 80 production employees being laid off. In mid August, Hill instituted a four day work week when supervisors did not lay off sufficient numbers of employees in their departments. Then, as a result of September 11, 2001, the Employer laid off another 100 employees on September 27, 2001. Including 40 to 50 employees who voluntarily quit during 2001, a total of 220 to 230 production employees were terminated in 2001.

After Lopez was fired, Strauss and Montes performed some of the safety duties. They passed out safety equipment, conducted safety training, performed first aid, ordered safety equipment, filed and sent employees to the clinic. The safety clerk position has not been reinstated.

B. The Analysis

1. The 8(a)(1) allegations

The consolidated amended complaint alleged numerous instances of interrogations and threats and will be dealt with as they appear in the complaint.

a. In January Vitelli interrogates employees about their union activities and sympathies

This allegation was not plead in General Counsel's consolidated amended complaint but was fully litigated at the hearing.[66] In January Respondent's security guard, Eddy Rivera, told Vitelli he had seen Ricardo Romero talking to fellow employee Juan Rodriguez in the break area and that Romero was getting employees' phone numbers so the Union could call them. Vitelli called Rodriguez into a meeting and in Eddy Rivera's presence asked Rodriguez, "Is Jorge Romero in the Union?" "What's going on?" "Why is he asking for your phone number?" Vitelli then stated, "He is in the union. We have to stick together. We don't want the Union in." During the meeting Rodriguez mentioned that Ricardo Romero had also spoken to employee Juan Luis Quintana. After dismissing Rodriguez, Vitelli told Rivera to bring Quintana to his office. Vitelli asked Quintana, "Why is Jorge Romero trying to get in touch with you?"

In general, it is unlawful for an employer to inquire as to the union sentiments of its employees. *President Riverboat Casinos of Missouri*, 329 NLRB 77 (1999). Whether an interrogation is unlawful is determined by the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). The standard is whether under all the circumstances the alleged interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board applies an objective standard when determining whether a statement is coercive. *MDI Commercial Services*, 325 NLRB 53, 63–64 (1994). An employer may not create the impression

[64] Hernandez testified that she later reported Rodriguez' comments to Strauss.

[65] The record does not reveal Isabella's last name. Isabella was the payroll clerk.

[66] An unpleaded but fully litigated matter mainly support an unfair labor practice finding despite a lack of an allegation in the complaint. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995); enfd. in part 128 F.3d 271 (5th Cir. 1997); *Meisner Electric, Inc.*, 316 NLRB 597 (1995).

that employees' protected activities are under surveillance. *Hudson Neckwear, Inc.*, 302 NLRB 93, 95 (1993).

In the instant case Vitelli interrogated both Rodriguez and Quintana in order to determine if they, Jorge or Ricardo Romero were engaged in union activity. Vitelli's statement that Jorge Romero was in the Union created the impression that Romero's union activities were under surveillance and violated Section 8(a)(1) of the Act. The interrogation was conducted by a high management official, the plant manager, in his office. There was no legitimate reason for Vitelli to make these inquiries. The interrogations of Rodriguez and Quintana were coercive and violated Section 8(a)(1) of the Act.

b. On April 5 Vitelli interrogated employees about their union sympathies and activities and threatened employees and their families with unspecified reprisals for engaging in union activities

There was no evidence adduced that Vitelli interrogated employees in April about their union activities. However on April 10, Vitelli told Ricardo Romero, "Several employees said you asked them to sign. If I don't fuck with your family, don't fuck with mine. Don't take food off my table. I don't know why your brother is stabbing me in the back."

Vitelli's statement to Romero had to do with the March 26 letter Romero gave Vitelli, putting Respondent on notice Romero was engaged in union activity. Vitelli's statement was a veiled threat to Romero that he should not engage in union activity or Romero and his family could suffer the consequences of Romero's union activity. The Board has found similar statements coercive. *Stoody Co.*, 320 NLRB 18 (1995). In *Leather Center, Inc.*, 308 NLRB 16, 27 (1992), a violation of Section 8(a)(1) was found where an employer's vice president discovered that an employee had attended a union meeting and stated to the employee that he was fucking with the family and playing hardball. Also in *Taylor Co.*, 292 NLRB 658, 663 (1989), during a union campaign, where the employer's plant manager told employees I won't hurt you, if you all won't hurt me, the Board found an 8(a)(1) violation. I find Vitelli's statement violated Section 8(a)(1) of the Act.

c. On May 7, 9, and 10 Vitelli interrogated employees about their and other employees' union activities and sympathies

In early May Gallegos was called into Vitelli's office where Alvarez was present. Vitelli asked Gallegos what Ricardo Romero did in Gallegos' work area. Gallegos replied that Romero was doing his job. Vitelli said, "I saw you and Romero going in your car outside the company. Where were you going?" Gallegos said they were going to a restaurant. Vitelli then asked Gallegos, "Did Romero talk to you about the Union during working hours?" When Gallegos said no, Vitelli then asked if Gallegos talked to Union representatives. After Gallegos said he had talked to Union representatives during lunch time at the park, Vitelli asked, "Do you know if Romero talked to other employees about the Union?" Gallegos said he did not know. On May 10, Burt acted as Romero's witness at Romero's termination meeting. Later that day in Vitelli's office, Vitelli asked Burt why Romero picked him to be his witness. Burt replied, "I guess he thinks I'm an honest guy." Vitelli said, "Either Romero thinks you're an honest guy or you're lying to me yesterday and today." Vitelli then asked Burt if he was part of the Union.

Both the interrogation of Gallegos and Burt were made by the plant manager, in his office without any legitimate purpose. These interrogations violated Section 8(a)(1) of the Act. *Gardner Engineering*, 313 NLRB 755 (1994); *Hoffman Fuel Co.*, 309 NLRB 327 (1992); *Cumberland Farms*, 307 NLRB 1479 (1992).

d. On May 7 Alvarez interrogated employees about their and other employees' union activities and sympathies

In May upholstery supervisor Alvarez questioned Gallegos, Respondent's parts department employee outside the service department. Alvarez asked Gallegos, "What is Ricardo Romero doing in your department?" Gallegos replied Romero was returning defective parts. Alvarez said, "Did Ricardo Romero talk to you about the Union?" Gallegos denied talking to Romero about the Union.

This interrogation was the preamble to Vitelli's subsequent interrogation of Gallegos by Vitelli, discussed above. Supervisor Alvarez had no legitimate reason to ask if Romero was talking to Gallegos about the Union but rather was simply trying to find out who was supporting the Union. Alvarez' interrogation violated Section 8(a)(1) of the Act. *President Riverboat Casinos of Missouri*, supra.

e. On May 7 and 9 Flavio Montes interrogated employees about their and other employees' union activities and sympathies

On May 9 Burt, Respondent's parts receiver was called into a meeting with human resources assistant Flavio Montes and Vitelli. Montes asked Burt several times, "Did anyone approach you about the Union?" Later that day Guadalupe Hernandez, employed by Respondent as an electrical assembler, was called to a meeting in the human resources office with Montez and Vitelli. After Montes told Hernandez that he was in the office because a co-worker in the parts department had made a sexual harassment complaint, Hernandez said he had seen nothing. Montes then said, "Did anyone speak to you about the Union?" Hernandez denied speaking to anyone about the Union.

The interrogations of Burt and Hernandez by Montes, the highest human resources official at the time, in the human resources office was coercive and had no legitimate purpose, particularly since the purpose of the interview was supposedly to investigate sexual harassment not union activity. I find these interrogations violated Section 8(a)(1) of the Act.

f. On May 31 Raphael Rodriguez threatened employees with suspension for engaging in union activities

On May 31, at the Kraemer facility, Gallegos asked supervisor Rafael Rodriguez, also known as "Five" or "Fay," about the Union rally that had taken place at the Imperial building. Gallegos asked if there had been any speakers. Rodriguez replied, "No, and I told my employees if they talk at the rally, I will suspend them."

An employer's threat of suspension for engaging in union activities violates the Act. *Bestway Trucking, Inc.*, 310 NLRB 651, 671 (1993); *Q-1 Motor Express*, 308 NLRB 1267, 1277 (1992). Rodriguez threat to Gallegos violated Section 8(a)(1) of the Act.

g. On July 16 Raphael Rodriguez interrogated employees about their union activities and sympathies and creates an impression of surveillance

The allegation that Raphael Rodriguez created an impression that employees' union activities were under surveillance was

not plead in General Counsel's consolidated amended complaint but was fully litigated at the hearing.[67] On about July 16, Olga Lopez, Respondent's safety clerk, had a conversation with Rodriguez in the safety office. Rodriguez said Vitelli had a meeting with supervisors in March and asked Rodriguez if he knew Jorge Romero and Lopez were cousins. Vitelli asked Rodriguez, "How did the Union visit employees and know their addresses?" At about the same time in mid July, Rodriguez and Hernandez had a conversation in the electrical department. Rodriguez told Hernandez, "We know you are in the Union. If you know something, say it. Do you know Olga and Jorge are cousins?" Hernandez denied being in the Union or knowing that Olga and Jorge Romero were cousins.

Telling employees that the employer knows who is active in the union creates among employees an impression that their union activities are under surveillance and is unlawful. *Peter Vitale Co.*, 310 NLRB 865, 874 (1993). I find that Rodriguez' statement to Hernandez that Respondent knew she was in the Union reasonably would have created an impression in Hernandez' mind that her union activities were under surveillance and violated Section 8(a)(1) of the Act.

h. On May 31 Respondent denied employee's access to union representatives by blocking and closing facility exits

When an employer denies its employee's access to union representatives it violates Section 8(a)(1) of the Act. *Miller Group*, 310 NLRB 1235, 1238 (1993); *Libby-Owens Ford Co.*, 285 NLRB 673 (1987).

On May 31, Vitelli told supervisors via radio to keep employees in their work areas and not to use the restrooms. Between 3 to 3:15 p.m. Vitelli ordered the roll up doors on the Kraemer Street side of the Imperial facility closed. They were open the next day and were not closed again through July 17. Owner Ed Grech said over the radio during the rally, "Hey, I see employees going toward the rally." Grech then ordered the Kraemer gate closed from about 5 until after 5:15 p.m. Vitelli told security guard Rivera not to allow employees to exit the Kraemer gate but to use the "new access" to prevent employees from attending the Union rally. Four security guards, including Rivera, as well as supervisors Vitelli and Ken Thullem, stood in the area between the Kraemer gate and the new access gate. They all directed employees to leave via the new access gate. Rivera stated, "todos este lado," meaning "everyone this way." At least seven employees were prevented from exiting the Kraemer gate. At the alley exit, security guard Albert Casares, pursuant to Grech's order, was directing employees away from the rally.

During the Union rally on May 31, Respondent's owner and supervisors did all they could to deny employees access to the Union rally, taking place outside the Imperial facility. Grech directed gates closed that would have allowed employees to obtain information from Union representatives at those gates. Vitelli instructed security guards to route employees leaving work away from the rally to the north through the new access gate. This conduct violated Section 8(a)(1) of the Act by denying employee access to the Union. *Miller Group*, supra.

i. In January Respondent promulgated and maintained an overly broad no-solicitation, no-distribution rule

As found above, Respondent's no solicitation no distribution rule in the English Language Employee Manual provides:

Solicitations & Distributions

> Solicitation for any cause on company property is not permitted. You are not permitted to distribute non-company literature at any time. Persons not employed by Krystal are also prohibited from soliciting or distributing literature on company property.

The translation of the solicitation and distribution rule in the Spanish Language Employee Manual reads:

> Solicitation of anything in the company is not permitted. You do not have permission to distribute literature which is not of the company. Persons who are not employed by Krystal are also prohibited from soliciting or distributing literature within the property of the company.

The law relating to no-solicitation and no-distribution rules is well settled. An employer may not prohibit solicitation on the employees' own time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945). Distribution of literature may be prohibited in working areas during working time. *Stoddard-Quirk Mfg.*, 138 N.L.R.B. 615 (1962). A rule prohibiting solicitation or distribution during "working time" is presumptively valid, since it implies solicitation is permitted during non-working time; by contrast, a rule which prohibits solicitation during "working hours" is presumptively invalid, because the term "working hours" connotes periods of time, such as breaks and lunch, which are the employees' own time. *Our Way, Inc.*, 268 N.L.R.B. 394, 395 (1983). However a rule which is presumptively valid may violate the Act if it is applied in a discriminatory fashion. *Opryland Hotel*, 323 NLRB 723 (1997); *Reno Hilton Resorts*, 320 NLRB 197 (1995); *Emergency One, Inc.*, 306 NLRB 800 (1992).

Respondent's solicitations and distributions rule prohibits employee solicitation and distribution of literature in any place at any time. Under *Republic Aviation* and *Stoddard-Quirk* and their progeny, Respondent's rule is facially overbroad and violates Section 8(a)(1) of the Act.

2. The 8(a)(3) allegations

The consolidated amended complaint alleges several violations of Section 8(a)(3) of the Act. They will be dealt with as they appear in the complaint.

The General Counsel has the initial burden of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such a prima facie violation of Section 8(a)(3) are union activity, employer knowledge of the activity, and a connection between the employer's anti union animus and the discriminatory conduct. Once General Counsel has established its prima facie case, the burden shifts to Respondent to show that it would have taken the disciplinary action even in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980).

a. The March 9 warning to Romero

Ricardo Romero engaged in union activities on behalf of the Union herein. He assisted in organizing Respondent's employees with his brother Jorge beginning in January. Ricardo Romero provided the Union the phone numbers of Respondent's employees, handed out Union authorization cards to Respondent's employees and talked to Respondent's employees at work about the Union. As early as January Vitelli had been told by both security guard Rivera and employee Juan Rodri-

[67] Ibid.

guez that Ricardo Romero was getting employees' phone numbers for the Union. Vitelli was concerned about the Union campaign and began interrogating employees about the activities of the Romero brothers. By early March, Respondent had further knowledge of Ricardo Romero's union activities. In early March both Jesus Gutierrez and Rene Anguiano, mechanics in Respondent's service department told their supervisors Threedouble and Leuvanos that Ricardo Romero had been talking to them about the Union. After complaining to Threedouble, Anguiano was called into a meeting with Montes and Vitelli on March 7. Vitelli asked Anguiano how often Romero had been talking to him and when. Anguiano said that Romero had been talking to him often about the Union. In addition the element of anti-union animus has been established. In the January meeting with Rodriguez and Rivera Vitelli said, "Is Jorge Romero in the Union?" "What's going on?" "Why is he asking for your phone number?" Vitelli then stated, "He is in the union. We have to stick together. We don't want the Union in." After the meeting Vitelli expressed Respondent's animosity toward Ricardo Romero. Eddy Rivera told Vitelli, "See what you can do to get rid of Ricardo Romero because he is getting numbers for Jorge for the Union." Vitelli replied, "Don't worry Strauss and Hill will take care of it." Finally the warning to Romero came within days of the March 7 interrogations and expressions of anti union animus. Having established its prima facie case that Respondent's March 9 warning to Ricardo Romero for inspecting and accepting three defective fiberglass doors violated Section 8(a)(3) of the Act, the burden shifts to Respondent to show that the warning would have taken place even in the absence of Romero's union activity.

Respondent contends it warned Romero because he inspected and approved three defective fiberglass doors. Romero does not dispute that he accepted at least one door with a defect. However, there is no evidence that Romero inspected and accepted the other two doors. While there is an invoice acknowledging receipt of three doors signed by Romero and others, there was no evidence adduced at the hearing that Romero inspected or accepted the two additional doors that allegedly had defects. One door arrived in the welding department and one door remained in the receiving area. Indeed the credited evidence indicates that as the doors were arriving, welding supervisor Morales approached and asked whether Romero had received any loading doors because the welding department needed them. Romero showed Morales the door and immediately noticed that it was damaged on the corner. As a result of seeing this defect, Romero told Morales that he was going reject the door and send it back to the vendor. Morales instructed him to not return the door because the production floor needed it. Morales went on to say that the vehicle had already moved from the welding department to the next stage on the production floor without the loading door. It was Respondent's practice to accept defective parts that were urgently needed and could be repaired. Supervisors had told Romero many times to accept defective parts, including supervisor Alvarez on March 27. Respondent's March 9 warning to Romero was so inconsistent with its past practice that it must be considered pretextual. Respondent has failed to sustain its burden under *Wright Line*. I find that the March 9 warning of Romero violated Section 8(a)(3) of the Act.

b. March 22 warning to Romero

General Counsel has previously established Respondent's knowledge of Romero's union activity and Respondent's anti union animus. Additionally, the timing of Romero's March 22 warning for engaging in non work matters on company time occurred right after Montes overheard Romero offer Gutierrez Union assistance to remedy his injury. I find that General Counsel has established a prima facie case that Respondent violated Section 8(a)(3) of the Act in its March 22 warning to Romero. Under *Wright Line*, the burden shifts to Respondent to show it would have disciplined Romero even in the absence of his union activity.

Respondent argues that it validly disciplined Romero because he was away from his work area on noncompany business. Respondent produced disciplinary records of other employees who had been warned for not working to show that Romero's discipline was consistent with past enforcement of its rules. However, the examples cited by Respondent are not apposite to Romero's job. It appears that most of the employees disciplined were not working while at their job station or were away from their work area. While Respondent attempted to establish that Romero's job duties required his presence in the receiving area, the evidence has shown that Romero's job duties took him throughout Respondent's facility on a regular basis. Romero had just punched into work when he took disabled worker Gutierrez from the service area to the human resources office. From there Romero went to the purchasing department to conduct business. The entire trip took no more than five minutes according to Respondent's witness Flavio Montes. While Romero may have spoken to Gutierrez for a few minutes while waiting for Strauss, it was not uncommon for Respondent's employees to engage in non-work related activities during work time. The record is replete with examples of employees who engaged in non-work activity during work time without discipline. Further, in these circumstances it is disturbing that Respondent did not afford Romero an opportunity to explain his side of the story before deciding to discipline him. It appears that Respondent's true motive here was not valid discipline but rather discipline because Romero was engaged in Union activity at the time of the warning. I find that Respondent violated Section 8(a)(3) of the Act in its March 22 discipline of Romero.

c. The May 7 suspension of Romero

As noted above, General Counsel has established each element of a prima facie violation of Section 8(a)(3) of the Act in Ricardo Romero's previous warnings. Each element is also present in Romero's May 7 suspension for being in the service department on non-work business. Moreover, the timing of this warning took place within days of Vitelli and Alvarez' interrogation of Gallegos about Romero's union activity and within days of Romero handing out union literature in front of Respondent's Imperial facility.

Respondent's defense is identical to the one raised in its March 22 warning to Romero. As noted above, Romero's job duties took him to many parts of the Imperial facility. In the May 7 warning Respondent failed to determine if Romero's visits to the service department were for work or non-work purposes. The witnesses Respondent interviewed provided equivocal information in this regard. It was admitted that supervisor Threedouble did not know whether Romero's visits to the service department were work-related or not. Service de-

partment employee Anguiano testified that Romero visited to discuss work-related matters, such as whether the service department could use parts that Respondent was to discard. Other times Romero visited Anguiano and talked to him about the Union. According to Anguiano, Romero visited the service department two to three times a week for 10 to 15 minutes during breaks and work time. Even though Romero sometimes talked about the Union, Anguiano could not say which topics Romero discussed during breaks versus during work time. While Von Puschendorf claimed to have verbally counseled Romero in April for disrupting service department employees, there is no evidence that Von Puschendorf conducted an investigation into this incident to determine if Romero was talking to employees on work time. Given the paucity of evidence Respondent possessed to show Romero was out of his work area engaged in non-work activity, an inference can be drawn that Respondent's suspension of Romero was pretextual. Respondent has failed to show that it suspended Romero for valid reasons. I find that Respondent's May 7 suspension of Romero violated Section 8(a)(3) of the Act.

d. The May 10 termination of Romero

Having previously found that Respondent violated Section 8(a)(3) of the Act for twice warning and then suspending Ricardo Romero for engaging in union activity, I conclude that General Counsel has likewise established a prima facie case that Respondent terminated Romero in violation of Section 8(a)(3) of the Act. Respondent bears a heavy burden under Wright Line to establish that it would have fired Romero in the absence of his union activity.

Respondent's contends that it fired Romero for his repeated violation of its sexual harassment policy. At first blush, it would appear that Respondent had ample evidence that Romero's behavior in 2001 violated company sexual harassment policy. Thus even Romero admitted that he touched employees in a sexual manner and used profane and obscene language at work. During Respondent's investigation of Nestor Sanchez' sexual harassment complaint against Ricardo Romero other employees indicated that Romero had touched them in a sexually offensive manner at work. Moreover, Respondent had previously warned Romero in February for his use of profane language.

However, Respondent's investigation ignored that its sexual harassment policy was a sham. It was a policy regularly dishonored by both employees and supervisors alike. The record is replete with instances of sexually oriented conduct by supervisors as well as employees. Supervisors and employee routinely and frequently touched each other's buttocks, chest, and genitals; cursed at and called each other vulgar names; e-mailed sexual jokes, and circulated pornographic material through Respondent's e-mail system. Respondent's supervisors were often present when employees mimicked sexual acts. Supervisors never attempted to stop employees from engaging in this conduct. Supervisors never instructed the security guard, whose job responsibility was to report employees' activities to management, to report this conduct. In fact, employees did not report the sexually oriented conduct because it was so common.

Respondent's supervisors not only permitted the activity, they participated in it as well. Employees testified that several supervisors touched and grabbed employees' genitals and buttocks. Trotter testified that twice employee Alberto Vela grabbed him, yet Trotter never disciplined Vela. Supervisor Trotter testified that Machuca on two separate occasions touched an employee's buttocks. Trotter did not discipline Machuca.

The record reveals that Von Ahn and Von Puschendorf sent and received sexual e-mails over the Respondent's computer system. Von Puschendorf printed sexual e-mails and forwarded the e-mails to employees and vendors. Even though Vitelli conceded that printing the sexual jokes on Respondent's printer violated the sexual-harassment policy, neither Von Ahn nor Von Puschendorf was disciplined. Von Puschendorf e-mailed the "Pick-Up Lines" document four days before Romero was terminated for violating the sexual harassment policy.

It is apparent from Respondent's disparate treatment of Romero's behavior, when compared to Respondent's permissive treatment of its supervisors' and employees' behavior, that its sexual harassment defense is mere pretext. The real reason for Respondent's termination of Romero was his efforts to organize its employees.

Therefore, Respondent has failed to rebut General Counsel's prima facie case that it unlawfully discharged Ricardo Romero for his Union activities. I find that Respondent's discharge of Ricardo Romero violated Section 8(a)(3) of the Act.

e. The July 9 reduction of Lopez' job duties

Olga Lopez did not engage in any union or other protected-concerted activity. However, an employer may violate Section 8(a)(3) of the Act if it discriminates against an employee based upon what it perceives are the employee's union activities even if the employer is mistaken. *Handicabs, Inc.*, 318 NLRB 890, 897 (1995); *Henning and Cheadle, Inc.*, 212 NLRB 776 (1974); enfd 522 F.2d 1050 (7th Cir. 1975).

While it is clear that Lopez did not engage in union activity, Respondent expressed a morbid curiosity in her relationship with Union organizer Jorge Romero, who Vitelli knew was actively engaged in organizing efforts. Thus, in July, supervisor Rodriguez asked Hernandez if she knew if Jorge Romero and Lopez were cousins. Hernandez stated that she did not know. After Lopez' duties were reduced, supervisor Rodriguez informed Lopez that during a March supervisors' meeting, Vitelli asked him if he knew that Jorge Romero and Lopez were cousins. Rodriguez told Vitelli that he did not think so, and Vitelli replied how was it then that the Union visited employees and knew employees' addresses. On July 9, when Lopez' job duties were reduced and Lopez' access to employee files was removed, Strauss explained the connection between Lopez' reduced duties and the Union. Strauss commented that during her absence on maternity leave, a lot of information had filtered out of the human resources office and employees were complaining that the Union was visiting them at their homes. This statement was a thinly veiled insinuation that Lopez was the source of the information leaks to the Union. When Lopez asked Strauss if the reduction was because Respondent thought she and Jorge Romero were cousins, Strauss told Lopez that Lopez could not prove that. Finally, on July 17, Vitelli asked Rivera if he thought Lopez was involved with the Union and Rivera stated that he did not think so.

The ALJ in Handicabs, supra, concluded, ". . . the Act is violated if an employer acts against the employee in the belief that he has engaged in protected activities."[68] I find that Respondent was motivated by its anti union animus and terminated

[68] Handicabs, supra at 897.

Lopez in the belief she was engaged in union activity within two weeks of making inquiry into her union sympathy.

In defense, Respondent argues that the only duty removed from Lopez on July 9 was her safety function at the Kraemer facility. However Strauss' e-mail of July 9 clearly states that Lopez' duties were limited to first aid, safety training, ordering safety supplies and providing employees with safety equipment. Significantly the e-mail notes that Strauss was now in charge of employee files and sending employees to the clinic.[69] This was a significant reduction in Lopez' duties. Lopez' duties, including inspection of safety equipment, assistance of employees with transportation to the health clinic and completion of clinic forms, ordering first aid supplies, investigating work injuries, assisting employees fill out workers compensation forms, and maintaining the OSHA and VOC logs were removed. The e-mail confirms that Strauss removed Lopez' access to the employee files, consistent with Strauss concern that Lopez was leaking employee information to the Union. Respondent's defense that it did not significantly reduce Lopez' duties is simply not supported by the facts. I find that Respondent has failed to sustain its burden under *Wright Line* and I find that Respondent violated Section 8(a)(3) of the Act by reducing Lopez' job duties on July 9.

f. The August 1 termination of Lopez

Having found that Respondent violated Section 8(a)(3) of the Act in reducing Lopez' job duties due to Respondent's perception that Lopez was engaged in union activity, it follows that General Counsel has established a prima facie case that Respondent's termination of Lopez three weeks later violated Section 8(a)(3) of the Act. Respondent must show that its termination of Lopez on August 1 would have occurred even if it did not believe she was engaged in union activity.

Respondent contends that it terminated Lopez in an overall layoff of employees due to an economic slowdown. While Respondent produced no documentary evidence to support its contention that sales in 2001 were lower than in previous years, I will assume arguendo that this was the case. Moreover, there is no dispute that in 2001 there were about 200 employees laid off in various departments.

The plan for the layoffs was formulated by Respondent's vice president Michael Hill and given to his managers, including Strauss, at the department head's meeting during the first week of July. The plan required each department head to lay off 20% of their workforce (departments with five or less employees had to lay off at least one employee) or to cut all employees' pay 20 percent. Strauss chose to lay off employees rather than reduce pay.

When human resources clerk Hilary Gonzales quit on July 24, Strauss had met her quota to lay off 20 percent of the human resources department workforce, nevertheless Strauss laid Lopez off on August 1. Respondent proffered no evidence that temporary employees like Gonzales did not count toward the 20 percent reduction in force. Respondent offered no explanation for this violation of Hill's plan.

I find that Respondent's economic defense for Lopez' layoff is a pretext to disguise the true motivation for her discharge, her apparent union activities. Having already met her quota for the layoff of one employee in the human resources department, Strauss had no reason to discharge Lopez other than to eliminate an apparent Union supporter.[70] [FN70] I conclude that Respondent has failed to sustain its burden of proof under *Wright Line* and I find that Lopez was terminated in violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

By interrogating its employees about their and other employees' union activities, by threatening its employees with reprisals for engaging in union activities, by creating the impression that employees' union activities were under surveillance, by denying employees access to union representatives, by maintaining an overly broad no solicitation, no distribution rule, by warning, suspending and terminating Ricardo Romero and by reducing the duties of and terminating Olga Lopez, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

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.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[71]

ORDER

The Respondent, Krystal Enterprises, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting United Food and Commercial Workers Union, Local 324, AFL–CIO or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Threatening any employee for supporting United Food and Commercial Workers Union, Local 324, AFL–CIO or any other union.

(d) Creating the impression that employees' union activities are under surveillance.

(e) Denying employees access to union representatives.

(f) Maintaining an overly broad no-solicitation, no-distribution rule.

[69] See GC Exh. 15.

[70] Any argument that Lopez was laid off to comply with Hill's requirement that all departments reduce hours by 20 percent when they failed to layoff employees is spurious, since the human resources department had already reduced its manpower by 20 percent. An additional 20 percent reduction in force would have been punitive and only enforces the pretextual nature of Lopez' layoff.

[71] 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.

(g) 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 Ricardo Romero and Olga Lopez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Ricardo Romero and Olga Lopez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 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 discharges and warnings, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and warnings will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Brea, California copies of the attached notice marked "Appendix."[72] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon 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 January 2001.

(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.

[72] 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."

Dated, San Francisco, California August 1, 2002

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting United Food and Commercial Workers Union, Local 324, AFL–CIO or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten any employee for supporting United Food and Commercial Workers Union, Local 324, AFL–CIO or any other union.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT deny employees access to union representatives.

WE WILL NOT maintain an overly broad no solicitation, no distribution rule.

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 Ricardo Romero, and Olga Lopez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ricardo Romero and Olga Lopez whole for any loss of earnings and other benefits resulting from their 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 warnings and discharges of Ricardo Romero and Olga Lopez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and warnings will not be used against them in any way.

KRYSTAL ENTERPRISES, INC.