

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

IMPALA BOB'S, INC.

and

**Cases 28-CA-18858
28-CA-19044**

SUSAN MARY JOHNSON, an Individual

and

Case 28-CA-18958

JULIA MARZETT, an Individual

*John T. Giannopoulos, Esq., and Mara Louise Anzalone, Esq.,
Phoenix, AZ, for the General Counsel.
Richard J. Harris, Esq., Mesa, AZ, for the Charging Parties.
Dawn C. Valdivia, Esq., Phoenix, AZ, for the Respondent.*

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, on January 28, 29, and 30, 2004. Susan Mary Johnson, an individual (Johnson), filed an original and an amended unfair labor practice charge in case 28-CA-18858 on July 15 and September 4, 2003, respectively, and filed an unfair labor practice charge in case 28-CA-19044 on October 7, 2003. Julia Marzett¹, an individual (Marzett), filed an unfair labor practice charge in case 28-CA-18958 on September 2, 2003.² Based on those charges as amended, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a consolidated complaint on October 31, 2003.³ The complaint alleges that Impala Bob's Inc. (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs.⁴ Based on the record, my consideration of the briefs filed by counsel

¹ The formal papers are hereby corrected to reflect the correct spelling of the name Marzett.

² See G.C. Exh. 1.

³ All dates are in 2003 unless otherwise indicated.

⁴ Counsel for Johnson and Marzett (collectively the Charging Parties) did not file a brief.

for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,⁵ I now make the following findings of fact and conclusions of law.⁶

Findings of Fact

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I. Jurisdiction

The complaint alleges, the answer admits, and I find that the Respondent is an Arizona corporation with an office and place of business in Meza, Arizona (herein called the facility), where it has been engaged in the operation of a catalog retailer of classic Chevrolet restoration parts, accessories, and supplies. Further, I find that during the 12-month period ending July 15, 2003, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000; and that during the same period, the Respondent purchased and received at its facility located within the State of Arizona goods valued in excess of \$50,000 directly from points located outside the State of Arizona.

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Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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II. Alleged Unfair Labor Practices

A. The Dispute

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In substance, the complaint alleges that Johnson, Marzett, and other employees engaged in concerted activities with each other by, among other things, discussing their mutual concerns regarding sexual harassment, safety in the workplace, and other issues affecting their terms and conditions of employment. These concerted activities allegedly included Marzett's submission of a letter of complaint to the Respondent outlining employees' concerns regarding working conditions. Further, the complaint alleges that the Respondent conducted an investigatory interview with Marzett, even though it had denied her request for a co-worker to be present during the interview, at which time the Respondent extracted statements from Marzett that it used to claim that she had resigned. Ultimately, it is alleged that as a result of her protected concerted activities, the Respondent terminated Marzett on June 16, 2003.

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⁵ The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

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⁶ At the hearing, counsel for the General Counsel was permitted to amend the complaint, without objection from counsel for the Respondent, by adding a new paragraph 4(f), which I found to be closely related to similar allegations in the complaint. (See G.C. Exh. 2, Notice of Intent to Amend Complaint.) The lettered complaint paragraphs that followed 4(f) were then re-lettered alphabetically. However, the record of the General Counsel's exhibits inadvertently listed a different document as G.C. Exh. 2. In this regard, counsel for the General Counsel filed with the undersigned an unopposed Motion to Correct the Record. I hereby grant that motion and return G.C. Exh. 2 to its proper place in the record of the General Counsel's exhibits. Further, I hereby admit the Motion to Correct the Record into evidence as G.C. Exh. 36.

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5 Additionally, the complaint includes the claim that by maintaining an overly-broad and discriminatory rule in its Employee Handbook prohibiting employees from discussing terms and conditions of employment with each other, and with third parties, and by orally promulgating said rule, the Respondent is discouraging employees from engaging in concerted activities. It is also alleged that the Respondent threatened its employees with unspecified reprisals if they discussed terms and conditions of employment with each other.

10 The Respondent's answer denies the commission of any unfair labor practices and affirmatively alleges that Marzett voluntarily terminated her own employment.

10 **B. Facts and Analysis**

1. Background

15 The Respondent sells restoration car parts for Chevrolets through a catalogue business and showroom located in Mesa, Arizona. During 2003, the Respondent employed approximately 15 to 20 employees. The Respondent's President and CEO is Bob Antebi. Both Julia Marzett and Susan Johnson were hired in June 2001. While both women were initially hired in administrative positions, they were soon promoted to managerial, supervisory
20 positions.⁷ Johnson was promoted to General Manager and Marzett to Customer Service Manager. As supervisors, Johnson and Marzett both occupied private offices. However, in about January of 2003, Marzett asked Antebi for permission to move from her private office into the salesroom. The salesroom was a large open room in which a number of salesmen worked, including Rick Johnson and Bill Haskins. Marzett suggested the move to Antebi, believing that it
25 would be good for business as sales and customer service would be brought together "under one roof."

30 At this point, it must be noted that there was much testimony at the hearing involving alleged sexual harassment of female employees, including Johnson and Marzett, by the Respondent's male employees, principally Rick Johnson. The theory of the General Counsel's case is largely premised on the contention that Marzett and Johnson's protected concerted activity involved their efforts to protect the female employees from this alleged sexual harassment and to alert management to the problem. Counsel for the Respondent's post-hearing brief is practically silent on the matter of the alleged sexual harassment. However, the undersigned cannot ignore the claims made by the Charging Parties. While this is obviously a proceeding before the Board, and not a sexual harassment suit, the nature of the Charging Parties' complaints must be discussed in order to fully comprehend the actions that they took, which the General Counsel alleges to be protected concerted activity.

40 From the evidence presented by all parties, there is no doubt that the salesroom was well known for having a "raunchy," locker room environment. The salesmen used profanity and sexual innuendo on a regular basis, often accompanied by obscene gestures and sexual horseplay. When Marzett asked Antebi for permission to move into the salesroom, he was apparently concerned with whether she would be able to tolerate the environment, and he
45 asked her to rethink her request. However, Marzett indicated the atmosphere in the salesroom would not be a problem, and she made the move.

50 ⁷ The General Counsel and the Respondent acknowledge that Johnson and Marzett were both supervisors during much of their employment. However, they disagree as to when, and under what circumstances, the women reverted to non-supervisory employee status.

The credible testimony of Marzett and Susan Johnson established that Rick Johnson was known for strange and aggressive behavior at work.⁸ Of particular concern was his habit of carrying an approximately two-foot long, 2 by 2 stick, which he had nicknamed the "Persuader." Typically he kept the Persuader next to his desk. However, once or twice a week he would walk
5 around the office with the stick, slapping it against his hand or desk, while he made threats against other employees. Susan Johnson testified that on several occasions he had confronted her with work-related problems while slapping the stick against his hand and saying, "Are you going to fix this or do I have to use my Persuader?" Marzett testified that Rick Johnson had the habit of saying, "This is either getting done or you're getting the Persuader."

10 According to Susan Johnson, on March 12, 2003, she had a series of confrontations with Rick Johnson. At that time, Susan Johnson was still the Respondent's General Manager with a private office. Rick Johnson was a salesman and, as such, reported directly to Antebi. Susan Johnson wears a wig, and, based on what she said at the hearing, is somewhat self-conscious and sensitive about it. She testified that early in the workday on March 12, Rick Johnson
15 entered her office, approached her desk, and "brushed the hair out of [her] eyes." She told him to keep his hands off her, at which time he started laughing, but left the office. Unfortunately, Rick Johnson returned to Susan Johnson's office approximately 45 minutes later. He approached Johnson and "smacked [her] on the back of [her] head," attempting, in her opinion, "to get [her] wig to fly off." She told him to leave her hair alone, that it was "special," and not to touch her. He laughed, made a joke about not having much hair himself, and left. However,
20 about three or four hours later, he again returned. According to Susan Johnson, he came at her with his arms outstretched. She was sitting down and, in an effort to protect herself, put her arms and legs up. One of her toes caught Rick Johnson in the groin, at which point he stopped and said, "Oh, that felt good, do it again." Susan Johnson told him, "This is sexual harassment." Apparently totally unconcerned with her comment, Rick Johnson removed a piece of candy from her candy dish, stuck his "bottom" out, patted it, and said, "Are you going to spank me?" He then left Susan Johnson's office for the last time that day.

30 Susan Johnson remained at work for the balance of the day, and did not initially tell anyone what had happened. However, she gave Marzett a ride home that afternoon, and became hysterical explaining what Rick Johnson had done. The following morning, March 13, Marzett informed Jim Weldon, Operations Manager, that Susan Johnson needed to talk with him. Weldon met with Susan Johnson, who reported to him what had happened to her the day
35 before. He then informed Antebi, who called Susan Johnson that same morning. She explained to Antebi what had transpired with Rick Johnson the previous day. According to Susan Johnson, Antebi told her not to discuss this matter with anyone. Weldon testified that the next day he was asked by Antebi to witness a meeting with Rick Johnson. At this meeting Antebi informed Rick Johnson of the claims that Susan Johnson was making. Rick Johnson
40 admitted the incidents, apologized to Abtebi, and said that it had merely been a joke, which had gone too far. Antebi informed Rick Johnson that he considered this matter "harassment," and he was going to issue a written warning to Rick Johnson, and expected this matter would not reoccur. According to Susan Johnson, Antebi informed her of what he had done, specifically having "written up" Rick Johnson. Once again, Antebi cautioned her not to discuss this matter
45 with anyone.

Throughout the course of this hearing there were variances between the testimony of the Charging Parties and that given by the Respondent's three supervisors, Antebi, Weldon, and Bill

50 ⁸ Rick Johnson did not testify at the hearing, and the incidents that he is accused of were un rebutted by any witness.

Haskins, who was at the time of the hearing the Respondent's Sales Manager. While some of these differences are minor and insignificant, others are significant and material. It is, therefore, incumbent on the undersigned at this time to comment on the relative credibility of the respective witnesses. For the most part, I found the testimony of Marsett and Susan Johnson to be credible. While both Charging Parties were clearly emotionally involved in the case, I believe that their display of emotion was genuine, not a product of theatrics or histrionics. I found both women to be intelligent and articulate, with a good grasp of details. I was impressed with their ability to recall events. Their testimony was inherently plausible and consistent with other credible testimony and documentary evidence. Although they were clearly passionate in their cause, I believe their testimony had "the ring of authenticity" to it. However, the same cannot be said for the three management witnesses. Antebi and Haskins in particular reminded me of someone being "caught with his hand in the cookie jar." Their testimony did not fill me with confidence as to its credulity. Rather, they seemed to have something to hide. Especially on cross-examination, they appeared to give their testimony reluctantly. I found their testimony more self-serving than would normally be expected and, at times, inherently implausible. Where they relied on documents for support, those documents were often prepared long after the incident in question. Accordingly, where there are differences in the testimony, I tended to credit the Charging Parties over the Respondent's witnesses. However, as will be noted later in this decision, there is a least one significant issue where this is not so.

By e-mail dated March 13, Susan Johnson sent Antebi a message entitled "What I Want." (G.C. Exh. 17.) In this message she stated that she did not want to see Rick Johnson fired for his actions. Rather, she wanted certain fundamental changes made by the Employer. This included keeping her as General Manager, but with "authority over the whole company." She indicated to Antebi that if he was not willing to do so, then he should make her his "secretary." From the credible evidence, it appears to me that Antebi used this unhappiness on the part of Susan Johnson to restructure his supervisory hierarchy. While both Antebi and Haskins testified that Haskins had been considering for some time an offer by Antebi to become Sales Manager, the Susan Johnson e-mail brought the issue to a head. On Saturday, March 15, she had overheard Antebi telling Haskins that he was to receive the promotion. This was confirmed in a series of e-mails between Susan Johnson and Antebi dated March 19. (G.C. Exh. 15.) The following day, March 20, Susan Johnson met Antebi in his office to discuss the changes that Haskins' promotion would create. Antebi informed her that thereafter there would only be two managers (presumably Haskins and Weldon), and that she would be a non-manager, an administrative employee with no employees working under her direction. Antebi denied Susan Johnson's accusation that Haskins' promotion was in retaliation against her for complaining about the Rick Johnson incident. He told her that he had merely accepted her offer to become his administrative secretary, as he was not willing to allow her to "run the whole company." (G.C. Exh. 16.) Thereafter, Susan Johnson performed only administrative duties. Her salary remained the same, although she was now paid on an hourly basis.

On approximately the same date, Marsett was called to Antebi's office. (She believes it to have been on March 19.) He informed her that from that date forward, the only two managers would be Haskins and Weldon, and she would be reporting directly to Haskins. She performed no supervisory or managerial duties after that date, but only the duties of a customer service representative.

Based on the credible evidence, I conclude that as of March 19 for Marzett and March 20 for Susan Johnson, the two Charging Parties no longer exercised nor possessed any of the indicia of supervisory authority as defined in Section 2(11) of the Act. Rather, from those dates forward, both women were employees as defined in the Act.

Further, I conclude that Bill Haskins effectively became the Respondent's Sales Manager as of March 19, when employees first learned of the promotion. Counsel for the Respondent amended the answer to the complaint to admit Haskins' supervisory status as of on or about April 1, 2003. This was allegedly the date the promotion became effective. However, I am of the belief that Haskins effectively became the Sales Manager on the earlier date, March 19. That is certainly logical in view of the credible testimony of Marzett and Susan Johnson. It is not reasonable to assume that Antebi would announce Haskins' promotion on March 19, but not make it effective for two weeks, thereby leaving the Respondent without adequate supervision. Also, I find a June 16 memo from Haskins to Antebi to be a highly self serving document, which was prepared two and a half months after the events in question. Allegedly, this document shows that as of March 31, Haskins had only recently been promoted to Sales Manager. (G.C. Exh. 5.) However, even this document, suspect as it may be, points to Haskins' promotion at least several days earlier than testified to by Antebi. In any event, I conclude that Haskins possessed and exercised the indicia of supervisory authority as of March 19, and continued thereafter to be a supervisor as defined in the Act.

2. The Concerted Activity

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations...and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection..." Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). An employer violates Section 8(a)(1) of the Act when it discharges an employee for engaging in protected concerted activity. *Rinke Pontiac Co.*, 216 NLRB 239, 241, 242 (1975).

The undisputed facts clearly establish that both Susan Johnson and Marzett were engaged in protected concerted activities following the change in their employment status from supervisors to employees. According to Susan Johnson, she spoke to Marzett about employment problems openly and in the presence of Operations Manager Jim Weldon two or three times following her removal as a supervisor. Johnson testified that among the matters discussed were the women's fear of Rick Johnson, the vulgar and crude talk in the salesroom, Rick Johnson's continued use of the "Persuader," and Antebi's prohibition against discussing the incidents involving Rick Johnson. Weldon testified, but never denied that these conversations took place. Also, Marzett testified that following her removal as a supervisor, she had regular conversations with her friend and co-worker Elaine Stoneberg at least three times a week where employment problems were discussed. Among other topics discussed were Rick Johnson and his "Persuader," the incident between Rick Johnson and Susan Johnson, the Respondent's policy against discussing such matters, and the fact that Susan Johnson was no longer at work.

From the time they were no longer supervisors, Marzett and Susan Johnson were engaged in protected concerted activity. An employee is engaged in concerted activity if the activity is "engaged in with or on the authority of other employees and not solely on [the employee's] own behalf." *Triangle Electric Co.*, 335 NLRB 1037 (2001); *Meyers Industries*, 268 NLRB 493 (1984). The matters discussed between Marzett and Susan Johnson, and between Marzett and Elaine Stoneberg obviously involved their working conditions at the Respondent. After all, a safe work place free of sexual and physical harassment is certainly a most basic condition of employment. Also, these matters involved the working conditions of not only the employees having the conversations, but of all the Respondent's employees.

Susan Johnson testified that she felt it necessary to consult with a psychologist because of emotional problems brought on by the incidents with Rick Johnson. On March 27 she had a conversation with Antebi in his office where she informed him that she was being treated by a psychologist. According to Susan Johnson, Antebi became angry and informed her that it was
5 "highly inappropriate" for her to have told her psychologist about matters which had occurred at work. Later that night, Antebi called her at home and repeated that it was "highly inappropriate" for her to have told anyone about the Rick Johnson incident. However, Antebi was not through with this subject, and he sent Susan Johnson a long e-mail message dated March 27. (G.C. Exh. 18.) The e-mail raises a number of matters including the incident with Rick Johnson,
10 Susan Johnson's reaction to it, Antebi's action following his being informed of the incident, her status with the Employer, and her emotional problems. In any event, Antebi uses the e-mail to once again remind Susan Johnson that she should not be discussing this incident and involving others in a personnel matter. He repeats in writing what he had previously told her orally, namely, "getting others involved was highly inappropriate."

15 As a result of her continuing health problems, Susan Johnson stayed home from work for a few days, ultimately informing Antebi that she was not sure when she would be able to return to work. During this period she continued to talk with Marzett about their concerns at work, specifically the work safety issues involving Rick Johnson, and she showed Marzett the
20 March 27 e-mail that Antebi had sent her. Finally, around April 2, Susan Johnson received another e-mail from Antebi informing her that as he was unable to keep her job open, she was therefore terminated.⁹

In Marzett's view, the situation at work did not improve, as Antebi was not properly
25 addressing her safety complaints involving Rick Johnson and concerns about profanity and obscene gestures in the salesroom. With these concerns in mind, Marzett submitted a letter to Antebi dated June 12, 2003. (G.C. Exh. 4.) In this letter, she informed Antebi of what she termed "illegal activities." She included in her list "a climate of fear and hostility" created because of the incident between Rick Johnson and Susan Johnson and its aftermath, as well as
30 the Respondent's policy prohibiting discussion of these events. She mentioned the "foul language, obscene gestures and degrading conversations about sex and women" engaged in by Rick Johnson and Bill Haskins in the salesroom. Further, she expressed her concerns for the safety of the "younger women" who could potentially be harmed by Rick Johnson or their exposure to profane language. Marzett concluded her letter with a demand that Antebi fire
35 Haskins and Johnson. She told him that unless he did so within the next 15 days, she would "feel compelled to quit." Before signing the letter, she noted that if Antebi wanted to talk with her, to let her know, and, if so, she would "want a co-worker of [her] choice present for any meeting." Before delivering the letter, Marzett showed it to fellow employee Elaine Stoneberg and got her opinion of it. Further, she told fellow employee Ron Boatman about the letter, and
40 requested him to serve as her witness, if Antebi asked for a meeting.

There is no question that in submitting the letter of June 12 to Antebi, Marzett was engaged in protected concerted activity. As I noted earlier, the issues that were raised, specifically safety concerns, the use of profanity, and a policy against discussing these matters,
45 unquestionably involved conditions of employment. Further, from the content of the letter, it is clear that she raised these issues not only on her own behalf, but also on behalf of other employees, particularly the female employees. The Board has traditionally held that such efforts by an employee constitute protected concerted activity. *Continental Pet Technologies,*

50 ⁹ The General Counsel did not allege either in the complaint, at the hearing, or in the post-hearing brief that Susan Johnson's termination was in any way a violation of the Act.

291 NLRB 290, 291 (1988) (where the Board found that an employee who wrote a letter to management accusing a supervisor of favoritism and racism was engaged in protected concerted activity); also see *TNT Logistics of North America, Inc.*, 340 NLRB No. 141 (Nov. 28, 2003) (finding an employee who wrote a letter of complaint to management and shared its contents with other employees was engaged in protected concerted activity); *Churchill's Restaurant* 276 NLRB 775, 777, fn. 11 (1985).

As I have indicated, both Marzett and Susan Johnson had engaged in protected concerted activity in the period following their return to employee status. However, it still remains to be seen whether Marzett was discharged for engaging in that activity, as alleged in the complaint. That issue will be discussed later in this decision.

3. Alleged Overly-Broad and Discriminatory Rule

Complaint paragraph 4(c) alleges that since at least January 15, 2003, the Respondent has maintained in its Employee Handbook an overly-broad and discriminatory rule. The handbook currently in use and effective since September 1, 2001 at page 11 has a section entitled "Confidential Information." According to this section, "All information to which an employee has access must be treated as confidential and should not be disclosed or repeated to third parties not associated with the company. Disclosure of, or acting upon, any such confidential information may subject the offender to disciplinary action and possible dismissal." The handbook then defines "confidential." This includes, "Employee statistical information." Some examples given are: "Employee names, addresses, telephone numbers... Salary... Drug testing..." Also listed are: "Company financial, statistical, and legal information, Any documents or information in the files, [and] All verbal communication or comments made on the premises." (G.C. Exh. 7.)

It is essential for the full exercise of Section 7 rights that employees are able to communicate about their wages, hours, and other terms and conditions of employment. The Board has consistently held that rules prohibiting employees from discussing their wages with each other is unlawful in the absence of a business justification for the rule. *Waco, Inc.*, 273 NLRB 746, 748 (1984); *Corporate Express Delivery Systems*, 332 NLRB 1522, 1530 (2000). The mere maintenance of such a rule even without evidence of enforcement violates the Act. *Fredericksburg Glass & Mirror*, 323 NLRB 165, 174 (1997). Further, the Board has traditionally held that this right to freedom of communication is not limited to organizational rights, "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit System*, 337 NLRB 510 (2002) (citing *Container Corporation of America*, 244 NLRB 318, 322 (1979)).

The Respondent's confidentiality rule bars employees from discussing with "third parties" salaries, information from personnel files, and any "verbal communication or comments" made on the Respondent's property. Clearly, this would prevent employees from reporting workplace violations of the law to various governmental agencies including the Board, the EEOC, and the Department of Labor. The Respondent's rule threatens employees that disclosure of such information "may subject the offender to disciplinary action and possible dismissal."

Further, employees reading the rule would likely understand it to mean that they are prohibited from discussing these matters among themselves. This is certainly the impression that Antebi left them with, in view of the way he enforced the rule over the years. Although Antebi attempted on cross-examination to carefully parse his words, he was forced to admit that employees are "discouraged" from discussing their salaries, and that he may have personally warned employees against discussing their salaries. In fact, there is documentary evidence that

the Respondent conveyed that impression to its employees. Antebi testified that pursuant to an audit by the Department of Labor two or three years earlier, certain employees received checks for back pay. Included with those checks was a letter from Antebi in which he said, "I remind you of our company policy, agreed to and signed by you, which strictly prohibits you from discussing your salary and wage information with any third parties, either fellow employees, or persons outside the company. I fully expect you to keep this matter confidential." (Underscoring was added by the undersigned for emphasis.) (G.C. Exhs. 8-11.)¹⁰

Also, it is clear from both Susan Johnson's testimony and the written communication that she received from Antebi that he was instructing her not to discuss the incident with Rick Johnson and her claim of sexual harassment with anyone but him. This appeared to include not only fellow employees, but also her psychologist. (G.C. Exh.18.) These conversations and the written communication occurred after March 20, when she was no longer a supervisory employee.

Traditionally, the Board upholds a confidentiality rule only where it is unambiguous, and reasonably understood by employees to prohibit divulging proprietary information in which the employer has a legitimate privacy interest. *Lafayette Park Hotel*, 326 NLRB 824 (1998). However, that is not the situation at hand. In my view, the Respondent's published confidentiality rule would reasonably be understood by employees to prohibit them from discussing working conditions among themselves or with third parties, including governmental agencies and unions.¹¹ Thus, restricting their ability to engage in protected concerted activity.

In a similar case, the Board recently found that a confidentiality rule in an employer's handbook specifically defined confidential information to include wages and working conditions and warned employees that a violation of the policy could lead to termination. Such a rule, the Board held, "leaves employees with nothing to construe" and "plainly infringes upon Section 7 rights." *Double Eagle Hotel & Casino*, 341 NLRB No. 17 (Jan. 30, 2004); Also see "The Loft," 277 NLRB 1444, 1461 (1986). This is precisely the problem with the rule in the Respondent's handbook. Employees who read the rule would reasonably assume that if they discuss among themselves or with third parties wages, or safety issues, including sexual harassment, or other issues affecting their terms and conditions of employment that the result may well be discipline. As such, the rule has a chilling effect on the exercise of employee Section 7 rights, even if it is never enforced.

¹⁰ The Respondent apparently takes the position that the individuals receiving the letters were all supervisors. However, the burden is on the party alleging supervisory status to prove such. I am of the view that the Respondent has failed to do so for at least employees Charles Blazer and David Sisler. They did not testify, and the only evidence offered by the Respondent as to their status came from Jim Weldon's testimony. I find Weldon's testimony inadequate to establish supervisory status for Blazer and Sisler. Further, the Department of Labor, in directing that the Respondent make overtime payments to these individuals, obviously found them to be rank and file employees. While such evidence is not conclusive as to the lack of supervisory status under the Act, it is worthy of some consideration. In any event, I find that the Respondent has failed to establish that Blazer or Sisler exercised any of the indicia of supervisory authority.

¹¹ At a minimum, Antebi's conduct in reminding employees of the existence of the rule and its prohibition against discussing certain information, such as wages and sexual harassment, would create ambiguity in the minds of the Respondent's employees as to the breadth and scope of the rule.

5 Accordingly, I conclude that the Respondent's maintenance of the confidentiality rule in its Employee Handbook has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. It is, therefore, a violation of Section 8(a)(1) of the Act, as alleged in paragraphs 4(c) and 5 of the complaint.

10 Paragraph 4(d) and (e) of the complaint alleges that on about March 27, 2003, Antebi promulgated an overly-broad and discriminatory rule prohibiting employees from discussing terms and conditions of employment with each other. As noted in detail above, it was on that date that Susan Johnson first alerted Antebi to the fact that a psychologist was treating her for emotional problems brought on by what she perceived to be sexual harassment from Rick Johnson. She was at that time no longer a supervisor. From her credible testimony it is obvious that Antebi was extremely upset that she had told her psychologist and others, including Marsett, about the incidents with Rick Johnson. Antebi told her in his office, later that evening in a call to her home, and later still that day by e-mail (G.C. Exh. 18.) that disclosing that information was "highly inappropriate." Susan Johnson's conversations with her psychologist had only recently occurred, and in making reference to that communication Antebi was not referring to matters that had been disclosed while she was a supervisor. He apparently bunched together all her conversations about Rick Johnson with persons other than himself. Under those circumstances, Susan Johnson would have reasonably assumed that Antebi was making reference to the handbook rule on disclosure of confidential information and possible discipline for discussing the incidents.

25 There can be no doubt that occurrences of sexual harassment and the ability to voice complaints about them constituted working conditions of considerable significance to Susan Johnson, Marzett, and others. As such, employees have a Section 7 right to discuss these matters, and Antebi's repeated directives to Susan Johnson on March 27 not to discuss such matters interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. See *Phoenix Transit System*, *supra* at 1.

30 Accordingly, I conclude that on March 27, the Respondent, through Antebi, promulgated an overly-broad and discriminatory rule prohibiting employees from discussing terms and conditions of employment with each other in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 4(d), 4(e), and (5) of the complaint.

35 Amended complaint paragraph 4(f) alleges that on or about the last week in March or the first week in April 2003, the Respondent, through Jim Weldon, promulgated an overly-broad and discriminatory rule prohibiting its employees from discussing terms and conditions of employment with each other. (G.C. Exh. 2.) Counsel for the Respondent argues in her post-hearing brief that this allegation should be dismissed because it was not the subject of any charge, is time-barred by Section 10(b) of the Act, and is not reasonably related to the charges filed in this matter. However, I disagree. The Board has repeatedly held that allegations involving events occurring more than six months prior to the filing of a charge are still considered timely if those allegations are "closely related" to the allegations made in a timely charge. *Seton Co.*, 332 NLRB 979, 985 (2000); *Nickles Baker of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1116-18 (1988). That is precisely the situation with the additional allegation.

50 The additional allegation is very "closely related" to the timely filed charges and the original allegations in paragraph 4 of the complaint, which allegations also raise the issue of the Respondent's overly-broad handbook rule and the Respondent's promulgation of that rule. All these incidents arise within a two-week period of each other, and concern the same background

event, namely, the altercation between Rick Johnson and Susan Johnson, and the effort on the part of Johnson and Marzett to discuss these matters with fellow employees and others. The General Counsel's legal theory is obviously the same for all the allegations in question, and, frankly, the Respondent's defense is basically the same for each allegation. That defense being
5 simply put as, the Respondent's supervisors did not say what is alleged, and, if they did, it is not a violation of the law in any event. Using such factors as a guide, the Board has repeatedly held that the new allegation and those allegations already existing in a complaint, which are based on a timely filed charge, are "closely related." *Nickles Bakery*, 296 NLRB at 928; *Redd-I, Inc.*, 290 NLRB at 1118.

10 Further, I would note that allowing the General Counsel to amend its complaint in no way prejudiced the Respondent. In response to my inquiry to counsel for the Respondent as to whether the Respondent objected to the proposed amendment, she responded in the negative. Also, counsel for the Respondent never asked for additional time to prepare a defense to this
15 new allegation. She answered the allegation with a denial, and did, in fact, offer a defense.

20 Regarding the allegation itself, Marzett credibly testified that at the end of March or beginning of April 2003, while on a cigarette break, she had occasion to overhear a conversation between Operations Manager Jim Weldon and Chuck Balzer, Dave Sisler and Scott.¹² According to Marzett, Weldon told the three employees, "I do not want to hear you guys talking about any of the incidents surrounding Susan Johnson and Rick Johnson." She was allegedly asked by one of the men what she thought of this matter, and responded that as they had families, they had to do what was best for them.

25 Weldon testified that after Susan Johnson left the Employer, he had a conversation with the warehouse employees in which he told them that, "Susan Johnson was no longer with the Company. Let's move on. She's gone. It's done and over with. Let's not waste a lot of time sitting gossiping about it. Let's get back to work." However, I continue to believe that Marzett was generally a credible witness, and I accept her version of the conversation. Weldon's story
30 seems contrived and too artificial to have actually occurred. This is especially true in light of Antebi's well-known position that matters involving allegations of sexual harassment should not be discussed among employees. I believe it much more reasonable to assume that Weldon would have simply and directly told the employees not to discuss this incident, rather than to "beat around the bush," and use some rather cryptic language.

35 Having found that the conversation in question occurred substantially as testified to by Marzett, I find that the Respondent, through Weldon, promulgated an overly-broad and discriminatory rule prohibiting its employees from discussing terms and conditions of employment with each other. As noted above, prohibiting employees from discussing sexual
40 harassment interfered with, restrained, and coerced them in the exercise of their Section 7 rights. Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act, as alleged in amended paragraph 4(f) and paragraph 5 of the complaint.

45 Paragraph 4(g)(1) and (2) of the complaint alleges that since on or about April 7, 2003, the Respondent, through Bill Haskins, promulgated an overly-broad and discriminatory rule prohibiting its employees from discussing terms and conditions of employment with each other;

50 ¹² As noted earlier, I have concluded that there is insufficient evidence to establish that Balzer and Sisler were supervisors. Accordingly, I continue to find that they were employees as defined by the Act. Similarly, as there is no contention that Scott, whose last name was unknown to Marzett, was a supervisor, I find that he was also an employee under the Act.

and threatened its employees with unspecified reprisals if they discussed such matters. As was noted above, I concluded that Haskins effectively became Sales Manager on March 19, when employees learned of his promotion. Marzett credibly testified about a conversation that she had with Haskins, which conversation she believed occurred “at the very end of March.”

5 Haskins places the conversation as occurring about two weeks earlier. In any event, I conclude that whenever the conversation took place, it was after Haskins was effectively functioning as a supervisor.¹³ At that point Marzett was a rank and file employee. According to Marzett, she attempted to have the conversation with Haskins during a coffee break. She asked him about Susan Johnson’s status with the Employer, and whether Rick Johnson was going to be fired.
10 He told her that he did not know anything about these matters. Further, he told her, “It’s best if you don’t talk about this. The less you talk about this, the better it will be for you.” Haskins prepared a memorandum for Antebi about this conversation with Marzett. However, the document is somewhat suspect in view of the fact that it was dated June 16, at least two and a half months after the conversation occurred. Never the less, in the document Haskins admits
15 telling Marzett that the situation between Susan Johnson and Rick Johnson was “none of her business.” Further, he told her that she should keep out of the matter, and “not bring it up with other employees.” (G.C. Exh. 6.)

20 Based on Marzett’s testimony, as well as Haskins’ admissions in his memo to Antebi, I conclude that Haskins, who was a supervisor at the time, was promulgating an overly-broad and discriminatory rule against employees discussing terms and conditions of employment with each other, specifically claims of sexual harassment. During cross-examination, Haskins acknowledged that employees were permitted to discuss other non-employment related matters, such as sports and home life, while at work. By cautioning Marzett, a subordinate
25 employee, against discussing allegations of sexual harassment with fellow employees, Haskins was interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. Further, his statement to Marzett that the less she talked about the matter the better it would be for her, was a threat of unspecified reprisals. I am of the belief that the statement by Haskins was a not very subtle hint that something bad would likely happen to her if she
30 persisted in talking about sexual harassment with fellow employees. Such a statement would obviously have a chilling effect on employees’ willingness to engage in protected concerted activity.

35 Accordingly, I conclude that the Respondent, through Haskins, violated Section 8(a)(1) of the Act, as alleged in paragraphs 4(g)(1), (2), and 5 of the complaint.

4. Request for a Co-Worker to be Present

40 It is alleged in paragraph 4(h), (i), (j), and (k) of the complaint that the Respondent denied Marzett’s request to have a fellow employee present at an investigatory meeting with management where she had a reasonable expectation that the meeting would result in disciplinary action being taken against her. As noted in detail above, Marzett submitted a letter to Antebi dated June 12, in which she set forth certain problems she perceived at work, including obscene language used by Haskins and Rick Johnson, sexual harassment, and safety
45 concerns she had for herself and the other female employees. She indicated that if matters did not improve within 15 days that she “would feel compelled to quite.” Marzett ended the letter by stating that “if” Antebi wanted to talk with her about this matter that he should let her know, and she would “want a co-worker of [her] choice present for any meetings.” (G.C. Exh. 4.)

50 ¹³ Whether the conversation occurred in late March or early April, it is encompassed by the language in the complaint paragraph, which reads “on or about” April 7.

Upon receiving Marzett's letter, Antebi sent her an e-mail dated June 13, indicating that he would respond to her letter on the following Monday. (G.C. Exh. 20.) He then prepared to meet with Marzett by showing her letter to Haskins and Weldon and getting their opinions. Antebi asked Weldon to be a witness at the meeting that he intended to have with Marzett
5 Monday morning. On the morning of June 16, Marzett arrived at work and was met at the front door by Antebi. He told her that they were going to have a meeting and directed her down the hall to his office. There is no dispute that before entering his office, Marzett asked to have Ron Boatman, a fellow employee, serve as her witness. There is also no dispute that Antebi refused the request. According to Marzett, he told her that Boatman had nothing to do with the matter,
10 and that he could not be removed from his work duties. Instead, he told her that he had selected Weldon as the witness. In a memorandum allegedly prepared shortly after the meeting, Antebi indicated that he told Marzett that she could not have Boatman, because "he was not part of management." Antebi selected Weldon, who he characterized as both management and impartial. Antebi admitted that Marzett felt that Weldon "might not be completely impartial," but never the less she ultimately agreed to allow Weldon to serve as the
15 witness. (G.C. Exh. 21.)

Antebi recorded the meeting, although the very first part of the meeting and a significant part at the end of the meeting were never recorded. (G.C. Exhs. 26 & 27.) According to
20 Marzett, she asked if the meeting were being recorded and Antebi denied doing so. Antebi testified that the recorder was in plain view where everyone could see it. In any event, the parties do not disagree to any material extent as to what matters were raised at the meeting. She mentioned being fearful that her complaints would lead to discipline, but he assured her that was not the case. Marzett clearly wanted to discuss the altercation between Rick Johnson and Susan Johnson and the circumstances surrounding Susan Johnson's departure from the
25 Employer. Antebi refused to discuss this issue, contending that it was a personnel matter that he had already dealt with and, which did not concern Marzett or other employees. Further, she wanted to discuss what she perceived to be sexual harassment toward her and other female employees by Haskins and Rick Johnson, which included their use of profane and sexually oriented language. In his post-meeting statement, Antebi acknowledged that it was at this point
30 that he told Marzett that "more than one person had indicated to [him] that [she] was not merely an innocent observer, but was also a willing participant, and had on numerous occasions herself used vulgarity at least as bad, if not worse than anyone else in her work area." (G.C. Exh. 21.)

The meeting continued to its conclusion, which I will discuss later in this decision.
35 However, for purposes of deciding the issue of whether Marzett was entitled to have an employee witness present, it is not necessary to consider anything that occurred after this point. It is axiomatic that it is an unfair labor practice for an employer to deny "an employee's request that [a] union representative be present at an investigatory interview which the employee
40 reasonably believed might result in disciplinary action." *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 252-53 (1975) (citing *Weingarten, Inc.*, 202 NLRB 446 (1973)). This right to a representative has been extended in the non-union setting. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).

In my view, the meeting was obviously investigatory in nature, and Marzett had a reasonable expectation that discipline might result. Counsel for the Respondent takes the position that Marzett had requested the meeting, but this is simply not so. Her letter of June 12 merely alerted Antebi to the fact that "if" he wanted to discuss the contents of the letter with her, she wanted a "co-worker" of her choice to be present. Antebi denied her request for Boatman,
50 insisting instead that the meeting proceed with a supervisor, Weldon, present as a witness. The meeting was apparently being held to discuss those issues raised in her letter. It would certainly have been reasonable for Marzett to fear that raising matters such as sexual

harassment might result in her being disciplined, especially in view of Antebi’s well-known policy prohibiting employees from discussing such issues.

5 Further, it is inaccurate to suggest that Antebi attempted to put Marzett at ease by assuring her that she would not be punished for making such claims. At the same time he allegedly made this statement, he was also telling her that he had heard that her use of vulgarity was as bad, if not worse than those people that she was complaining about. (G.C. Exh. 21.) It would seem to me that even if Marzett had not been reasonably concerned before the meeting began, she had every reason to be concerned at that point with being disciplined for allegedly using obscene language herself.

10 At the time Antebi refused Marzett’s request for an employee to witness the meeting, he could have simply cancelled the meeting. However, instead he proceeded with the meeting and had another manager, Weldon, present as an allegedly “impartial” witness. Not only was this not a substitute for an employee witness, if anything, it exacerbated the infringement of Marzett’s rights. Antebi conducted an interview that clearly became investigatory in nature, even if it did not start out as such. He never gave Marzett the option of forgoing the interview, or of proceeding with the interview without the presence of an employee witness. Instead, he simply presented her with a *fait accompli*, that being his intention of going forward with the interview using a manager as a witness, rather than her requested co-worker.

15 Accordingly, the Respondent, through Antebi, by requiring Marzett to attend an investigatory interview, which she had reasonable cause to believe would lead to discipline, and by refusing her request to have an employee witness present was interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. Therefore, I conclude that the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraphs 4(h), (i), (j), (k), and 5 of the complaint.

30 5. Marzett’s Alleged Termination

35 It is alleged in paragraph 4(L)(1), (2) and (M) of the complaint that the Respondent discharged Marzett and extracted statements from her used to claim that she had resigned, because she had engaged in protected concerted activity. There is no dispute that Marzett’s employment with the Respondent came to an end with the conclusion of the meeting of June 16. However, it is the General Counsel’s position that Antebi fired Marzett, while the Respondent contends that she voluntarily quit. In any event, the parties do not seriously dispute the words that were spoken as the meeting ended.

40 Marzett had continued to argue that Haskins and Rick Johnson were engaged in sexual harassment, and Antebi, who refused to discuss the Susan Johnson incident, asked Marzett if she had any new evidence of harassment by either man. She mentioned a derogatory racial comment that Haskins had allegedly made about her and her husband. Antebi offered to investigate the alleged comment, but he made it clear to Marzett that as matters presently stood, he had no basis upon which to fire Haskins or Rick Johnson. As she had asked in her letter of June 12 that both men be fired, Antebi questioned Marzett about what her response would be if he continued to refuse to fire Haskins and Johnson. According to Antebi’s post-meeting statement, she responded that she “would be forced to leave.” He asked her if she was “resigning,” and she replied that she was “not resigning,” she was “just leaving.” (G.C. Exh. 21.) For the most part, Marzett agrees that those were the words she used.¹⁴ She testified that at

50 ¹⁴ In her testimony she uses the word “quitting,” rather than “resigning.” However, there is
Continued

that point she stood up, said that she was “leaving,” thanked the two men, and “picked up all of [her] stuff.”

5 Marsett exited from Antebi’s office and walked down the hall toward the front of the building. At the end of the hallway, a left turn would bring Marzett to the front door leading to the outside, while a right turn would bring her to her desk. (G.C. Exh. 32.) According to Marzett, she was very nervous and upset, and when she reached the lobby at the end of the hallway, she turned to the left and “leaned on” the bar at the front door. Antebi had followed Marzett the approximately 25 feet from his office and down the hallway to the front door. When 10 he saw that her hand was on the push bar at the front door, he stopped her and asked her what she wanted to do with her personal belongings. He asked whether she wanted to take her personal belongings with her, leave them, or have the Respondent box them up for her? She indicated that she would return for them later. However, before she exited the building, Antebi asked Marzett why she had left his personal file cabinet unlocked the previous Friday. Marsett 15 responded that she had not done so, told Antebi not to make such claims about her, and left the building.

Later that day, Marsett sent Antebi an e-mail, which stated that he had “refused to meet any terms or negotiate actions and options of my letter of 12 June 2003. As per my letter, I 20 consider myself formally discharged.” (G.C. Exh. 22.) The Respondent takes the position that Marsett voluntarily quit her job, as she had threatened to do in her letter of June 12, because Antebi had refused her demand that he fire Haskins and Johnson. Further, the Respondent contends that Marsett’s e-mail of June 16 was her attempt to characterize her departure as a “constructive discharge,” which words she allegedly misstated as formal discharge. On the 25 other hand, the General Counsel and the Charging Parties take the position that Marzett was discharged by Antebi because of her protected concerted activity, principally complaining to other employees about sexual harassment at work, taking those complaints to Antebi, and because she requested an employee witness at her meeting with Antebi. Further, it is alleged that statements were extracted from Marsett during the meeting to make it appear that she had 30 quit her employment.

As I noted earlier in this decision, I generally found Marsett to be a credible witness, with one notable exception. This is that exception. In this instance Marsett’s story simply makes no sense, while Antebi’s version is logical. I find that she voluntarily quit her employment. The 35 sequence of events, and Marsett’s expressed words and deeds establish that she voluntarily ended her employment.

The meaning of Marsett’s letter of June 12 is clear, unambiguous, and unmistakable. In that letter she informed Antebi that, “You should get rid of Bill and Rick immediately. If you 40 don’t, they will keep getting more and more bold and disgusting. I’m not going to stay at work here if you don’t start protecting your employees from these two. If things don’t change in the next 15 days, I will feel compelled to quit.” (Underscoring was added by the undersigned for emphasis.) Marsett’s letter left little doubt in Antebi’s mind that if he did not fire Haskins and Rick Johnson that she would quit. 45

The meeting of June 16 did not go well, with Marsett desiring to discuss the Susan Johnson and Rick Johnson incident and Antebi refusing to do so. Antebi informed Marsett that he was not going to fire Haskins or Johnson because he allegedly had no basis to do so, and, under those circumstances, he wanted to know what her response was to be. Marsett replied 50

no significance in this variance.

that she “would be forced to leave.” Apparently unsure of exactly what she meant, Antebi asked Marsett if she were resigning. This was certainly a logical conclusion for him to have reached in light of her threat to do so in her letter. However, Marsett’s reply was somewhat cryptic, that being that she was “not resigning,” she was “just leaving.” In any event, her subsequent actions clearly demonstrated that she was leaving the building.

Marsett stood up, thanked Antebi and Weldon, gather her “stuff,” and left Antebi’s office, walking down the hallway toward the front door. Antebi followed. I find it very significant that when she reached the lobby, Marsett turned left and placed her hand on the push bar at the front door. She did not turn right toward her desk. There is no credible evidence that Antebi in any way obstructed Marsett’s path to her desk. Based on what had transpired to that point, it was certainly logical for Antebi to have assumed that Marsett was leaving the building in furtherance of her threat to quit, unless Haskins and Johnson were fired. Believing that, in fact, she had quit, Antebi asked Marsett about her personal belongings. She replied that she would return for them later, and after a conversation about an allegedly unlocked file cabinet, she exited the building. I do not accept Marsett’s contention that she merely “leaned” on the push bar at the front door, as an apparently random, gratuitous act, and that she had intended to return to her desk. To the contrary, her actions seem to have been very deliberate.

It is my belief, based on all the credible evidence, that when Marsett left Antebi’s office, she had every intention of voluntarily ending her employment. That is what her statements and actions indicated, and it was certainly logical for Antebi to have reached that conclusion. Concomitantly, I conclude that Marsett was not discharged. Later that day, Marsett sent Antebi an e-mail in which she attempts to put her own “spin” on the events of that morning, alleging that she considers herself “formally discharged.” However, the document makes it clear that in Marsett’s view Antebi had failed to take the action she demanded in her letter of June 12, and that for that reason her employment had ended. (G.C. Exh. 22.)

Marsett cannot have it both ways. As Antebi had failed to meet the demands in her letter of June 12, she had affirmatively carried out her threat and quit. It simply does not matter how she chooses to characterize the employment action, it was an affirmative, voluntary decision on her part. Marsett quit, she was not fired.¹⁵

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board’s *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

¹⁵ Marsett applied for unemployment benefits with the State of Arizona. Although initially denied benefits, ultimately the Appeals Board of the Department of Economic Security of the State of Arizona found in her favor that she had been discharged, and awarded her benefits. (G.C. Exh. 31.) I have considered the decision by the Appeals Board. While it is entitled to some weight, it is certainly not dispositive of the issues before me. Further, I would note that the record before the undersigned contains no credible evidence that, as concluded by the Appeals Board, “The Claimant left the meeting to go to her desk. She was followed by the President of the Employer who appeared to block her as she was on her way to her desk.”

The Board, in *Tracker Marine, L.L.C.*, 337 NLRB 644 (2002), affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. One of those elements the General Counsel must demonstrate is that the alleged discriminatee suffered an adverse employment action. However, in the matter before me, Marsett simply did not suffer an adverse employment action.

As I have indicated, I conclude Marsett quit her employment. She was not fired. Thus, there was no adverse employment action taken by the Employer. Further, it should be noted that at no point in this proceeding has the General Counsel ever alleged that Marsett was "constructively discharged." Counsel for the Respondent suggests in her post-hearing brief that Marsett's actions were taken by her with the intention of subsequently making a claim of constructive discharge. In any event, I need not comment on this issue further as the matter of a constructive discharge was never raised by either the General Counsel or the Charging Parties, nor was it litigated before me.

In her post-hearing brief, counsel for the General Counsel raises an alternative theory. She contends that even if Marsett resigned, her resignation was elicited under circumstances violative of the Act. In support of her proposition, counsel cites the Board decision in *Penn-Dixie Steel Corp.*, 253 NLRB 91 (1980). In that case, an employee's request to have a union representative present at an investigatory interview was denied, and he was forced to attend the interview. During that interview, he admitted to certain illegal drug and alcohol use and signed a letter of resignation. The Board found the resignation to be "invalid" as it was obtained pursuant to an investigation, which, while it uncovered evidence of the employee's substance abuse, was conducted in the absence of the requested union representative. However, in my view, this case is not analogous to the matter at hand.

In the matter before me, Marsett was forced to attend an investigatory interview she reasonably feared would result in discipline, after being denied an employee witness. I have already found that the Respondent's conduct in requiring Marsett to attend this interview was a violation of the Act. *Epilepsy Foundation, supra*. While egregious, this conduct on the part of the Respondent did not cause Marsett to quit. She was not questioned about criminal activity, nor did she make incriminating admissions, as was the situation with the employee in the *Penn-Dixie Steel* case. There was no effort to coerce Marsett into quitting. To the contrary, when her demands to fire Haskins and Johnson were not met by Antebi, she decided to carry out her threat made earlier to quit. Marsett was not forced to do anything that she had not already decided to do, namely voluntarily end her employment when her demands were not met.

It may very well be that Antebi was greatly pleased with Marsett's decision to quit, and seized the opportunity when it was presented to him. While Marsett had previously performed good service for the Respondent,¹⁶ Antebi was obviously upset with her defense of Susan Johnson, and her claim that the Respondent was not addressing sexual harassment and other safety issues. As I have found, she was clearly engaged in protected concerted activity. Never the less, her employment ended when she quit. I conclude that was her decision, taken voluntarily, and uncoerced by the Respondent through the interview process.

Based on all the above, I conclude that the Respondent took no adverse employment action against Marsett, as she voluntarily quit her position of employment. She was not

¹⁶ In December 2002, Marsett was awarded a certificate of appreciation by the Respondent as "Employee of the Year." (G.C. Exhs. 23 & 24.)

terminated. Accordingly, the General Counsel has failed to meet his burden of proof. *Wright Line, supra; Tracker Marine, supra.* Therefore, I shall recommend that complaint paragraph 4(L)(1), (2), and (M), and, only to the extent related, paragraph 5 be dismissed.

5

6. Summary

As is reflected above, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraph 4(a) through (k), and paragraph 5 of the complaint.

10

Further, I recommend dismissal of complaint paragraph 4(L)(1), (2), and (M), and, only to the extent related, paragraph 5.

Conclusions of Law

15

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

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

20

(a) Maintaining in effect, distributing, or enforcing an overly-broad and discriminatory disciplinary rule in its Employee Handbook prohibiting employees from discussing among themselves, or disclosing to third parties, employee names, addresses, and telephone numbers, and terms and conditions of employment, including salaries and drug testing, and other documents or information in employee personnel files, and verbal communications or comments made on the premises and pertaining to terms and conditions of employment;

25

(b) Maintaining, promulgating, or enforcing an overly-broad and discriminatory rule prohibiting employees from discussing among themselves, or disclosing to third parties, their terms and conditions of employment, including alleged sexual harassment, safety issues, and salary information;

30

(c) Threatening employees with unspecified reprisals for discussing among themselves, or disclosing to third parties, their terms and conditions of employment, including alleged sexual harassment, safety issues, salary information, and other work place complaints;

35

(d) Denying an employee’s request to have a co-worker present at an investigatory interview, which interview the employee may reasonably believe will result in discipline.

40

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not committed the other violations of law that are alleged in paragraph 4(L)(1), (2), and (M), and, only to the extent related, paragraph 5 of the complaint.

45

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.

50

The Respondent must amend its Employee Handbook, and any similar publications, to make it clear to its employees that it is not prohibiting them from discussing among themselves, or disclosing to third parties, employee names, addresses, and telephone numbers, and terms and conditions of employment, including salary information and drug testing, and other documents or information in employee personnel files, and verbal communications or comments made on the premises and pertaining to terms and conditions of employment.

Further, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, Impala Bob’s, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Maintaining in effect, distributing, or enforcing an overly-broad and discriminatory rule in its Employee Handbook prohibiting employees from discussing among themselves, or disclosing to third parties, employee names, addresses, and telephone numbers, and terms and conditions of employment, including salary information and drug testing, and other documents or information in employee personnel files, and verbal communications or comments made on the premises and pertaining to terms and conditions of employment;

(b) Maintaining, promulgating, or enforcing an overly-broad and discriminatory rule prohibiting employees from discussing among themselves, or disclosing to third parties, their terms and conditions of employment, including alleged sexual harassment, safety issues, and salary information;

(c) Threatening employees with unspecified reprisals for discussing among themselves, or disclosing to third parties, their terms and conditions of employment, including alleged sexual harassment, safety issues, salary information, and other work place complaints;

(d) Denying an employee’s request to have a co-worker present at an investigatory interview, which interview the employee may reasonably believe will lead to discipline; and

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to 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, amend its Employee Handbook, and any

¹⁷ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

similar publications, to make it clear to its employees that it is not prohibiting them from discussing among themselves, or disclosing to third parties, employee names, addresses, and telephone numbers, and employee terms and conditions of employment, including salary information and drug testing, and other documents or information in employee personnel files, and verbal communications or comments made on the premises and pertaining to terms and conditions of employment;

(b) Within 14 days after service by the Region, post at its facility in Mesa, Arizona copies of the attached notice marked “Appendix.”¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 28 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 15, 2003; and

(c) 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 be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at San Francisco, California on April 09, 2004.

Gregory Z. Meyerson
Administrative Law Judge

¹⁸ If this Order is enforced by a Judgment of the 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.”

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 do anything that interferes with these rights. Specifically:

WE WILL NOT distribute, maintain in effect, or enforce a disciplinary rule in our Employee Handbook prohibiting you from discussing among yourselves, or disclosing to third parties, employee names, addresses, and telephone numbers, and terms and conditions of employment, including salary information and drug testing, and other documents or information in employee personnel files, and verbal communications or comments made on the premises and pertaining to terms and conditions of employment.

WE WILL NOT maintain, promulgate, or enforce an overly-broad and discriminatory rule prohibiting you from discussing among yourselves, or disclosing to third parties, your terms and conditions of employment, including alleged sexual harassment, safety issues, and salary information.

WE WILL NOT threaten you with unspecified reprisals for discussing among yourselves, or disclosing to third parties, your terms and conditions of employment, including alleged sexual harassment, safety issues, salary information, and other work place complaints.

WE WILL NOT deny you the right to have a co-worker present when you request one at an investigatory interview, which you may reasonably believe will result in discipline.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, within 14 days from the Board's Order, rescind the disciplinary rules mentioned above, remove the written rule from our Employee Handbook, and advise you in writing that the rules are no longer being maintained, promulgated, or enforced.

IMPALA BOB'S, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.