

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

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VINTAGE PHARMACEUTICALS, INC.

10

and

CASES 10-CA-33427  
10-CA-33920

CHARLES TALKINGTON, AN INDIVIDUAL

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*John D. Doyle, Esq.*

for General Counsel.

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*John A. Wilmer, Esq. And*

*George M. Beeson, Jr., Esq.*

for Respondent.

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**Decision**

A hearing was held in these proceedings in Huntsville, Alabama on January 8 and 9, 2003. I have considered the full record as well as briefs filed by General Counsel and Respondent.

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**Jurisdiction:**

Respondent Vintage Pharmaceuticals, Inc. admitted the jurisdiction allegations. It is an Alabama corporation with an office and place of business in Huntsville, Alabama. At material times it has engaged in the business of manufacturing pharmaceuticals. During the past 12 months in the conduct of those business operations Respondent sold and shipped goods valued in excess of \$50,000 directly to customers outside Alabama. During all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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**The Alleged Unfair Labor Practices:**

An Order Vacating Settlement Agreement, Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on October 31, 2002. The complaint includes allegations that Respondent maintained a rule prohibiting employees from discussing their pay; that Respondent discharged three employees because those employees violated that rule; Respondent maintained a rule prohibiting solicitation; that Respondent

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changed the terms and conditions of employment of its three employees after reinstating them pursuant to a settlement agreement; that Respondent again discharged one of the three employees; that Respondent failed to grant wage increases to those three employees; that Respondent issued a written warning to one of the three employees; and that Respondent's actions constitute unfair labor practices.

Respondent admitted that it issued and maintained the following rules in its employee handbooks on September 1, 2001:

10 *All employee's pay is a matter, which shall be kept confidential and only discussed between the employee and their immediate supervisor who has responsibility for that area.*

15 *Employees are not permitted to solicit other employees for funds, contributions, sales, membership, or other purposes during the employee's working time or at any other time if such solicitations interfere with other employees who are on working time, lunch, or breaks. In addition, distribution of literature, documents or any other type of written material is not permitted on company property at any time.*

20 Employees Charles Ray Stanley and Darrell Wade Hancock asked employee Charles Talkington if he had received his raise. Those employees discussed Talkington's pay. Respondent then discharged Talkington, Stanley and Hancock on November 16, 2001 because those three employees violated its rule against talking about employees' pay. The parties stipulated that Respondent returned Talkington, Hancock and Stanley to work with full back pay in March 2002.

25 General Counsel and Respondent entered into an informal settlement agreement in case number 10–CA–33427 on June 4. That agreement was approved on June 20, 2002. The complaint included allegations which Respondent denied, that since June 20, 2002 Respondent has refused to rescind its no–talking about wages or its no–solicitation rules; it has changed terms and conditions of employment of employees Talkington, Stanley and Hancock; and that it unlawfully warned and subsequently unlawfully discharged employee Charles Talkington.

35 Talkington testified that on March 18, 2002 when he, Stanley and Hancock returned to work, Judy Upton<sup>1</sup> told the three of them that James Higdon would no longer be their supervisor and that Higdon wouldn't have anything to do with them. Instead their supervisor would be Tim Miller. Moreover, the three would no longer be allowed in the buildings. All their work was outside.

40 Darrell Hancock testified that Tim Miller told them they were not allowed to enter the buildings and they were not to socialize with other employees. After March 18 Hancock along with Stanley and Talkington were required to clock out and back in after lunch. At the time of their March reinstatement none of the other maintenance

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<sup>1</sup> Upton testified that she is Respondent's human resources manager.

employees were required to do that and Hancock, Stanley and Talkington had no such requirement before being fired in November.

5 Before November 16 Talkington had an access card for admittance to the liquid building and he visited that building every workday. Darrell Hancock testified that he too had an access card to enter the liquid building but he was not given an access card to that building after he returned to work in March 2002. Hancock testified the three employees routinely worked in buildings before their discharge.

10 The maintenance shop is located in the liquid building. Before November Talkington used the liquid building break area. He talked with production employees about personal matters in both the liquid and pill buildings. His job before November 16 included maintenance work, which was routinely in the liquid building, the pill building, the warehouse and outside. Before November 16 he was never told to confine his activities to one area of the facility or to avoid talking with other employees. Before 15 November 16 Talkington did not mow grass.

***The call-in rule:***

20 A couple of months after returning to work Talkington called Tim Miller to report that he was sick and would not be in to work. Miller was not in and Talkington left word with the receptionists. Later that day, Miller phoned Talkington and told him that he must talk with Miller when he called in sick and he was not allowed to leave word with anyone else. Hancock recalled Miller telling him, Talkington and Stanley they must talk with him 25 when absent from work.

Talkington was scheduled to start work at 7:00. He complained to Miller that he could not call within an hour of his shift starting if he was required to talk with Miller since Miller was not available during that hour. Miller told him he would have to talk with 30 Miller and could do so when Miller was available. Miller said that he was in a meeting every morning until 8:30 but that he could be called at 8:30.

Miller also told Talkington that he would have to bring a doctor's excuse when he returned to work the next day. Charles Talkington heard from other employees they 35 had not had to bring in doctor's excuses for being out sick. He had a doctor's excuse, which he gave to Tim Miller but he complained that he should not have to go see a doctor and bring in an excuse if the other maintenance employees were not required to do the same. Miller said all right.

40 ***The May 17 write-up:***

Charles Talkington received a write-up (GCExh. 2) dated May 17. Maintenance supervisor James Higdon testified that he gave the warning to Talkington. After issuing 45 instructions to cut along the railroad Talkington asked Higdon why they<sup>2</sup> were stuck with that job. Higdon responded they were not stuck with that job; it just had to be done.

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<sup>2</sup> Talkington was referring to himself, Stanley and Hancock.

Higdon felt that Talkington was argumentative and he issued the warning. That was Higdon's only occasion to award that type warning.

**Hancock's pay raises:**

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Hancock received only one raise before his discharge. Subsequently he received one more raise on January 6, 2003. Talkington received a pay increase before his November discharge but he did not receive an increase after his March 18 reinstatement.

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**Talkington's injury and his discharge:**

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In June Talkington hurt his back trying to start a weed-eater. Initially he didn't realize his back was hurt even though he had pain in his shoulder and neck. He filled out an accident report on the day after the injury. After first telling Upton that he didn't need a doctor, pain from his neck, shoulder and lower back increased and James Higdon took him to see a doctor. After returning from the doctor Higdon assigned Talkington to do bush-hog work in order to enable Talkington to avoid any lifting. Talkington did the bush-hog work the remainder of Thursday and all day Friday. When he woke on Saturday, the pain had increased. On Sunday the pain was even worse. Talkington returned to the doctor on Monday but was directed to another facility. The doctor took him off work for three days and told Talkington to return and see him on Wednesday.

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Talkington never returned to work after June 24. Respondent wrote the following letter dated July 15, 2002:

*Vintage Pharmaceuticals, Ins. is accepting July 15, 2002 as your effective date of resignation.*

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*According to our handbook you are required to call and speak to your immediate supervisor or a member of management within 1 hour of your shift if you are not reporting to work for the day. According to our records you did not call in and report off within the time frame on July 15, 2002 according to company policy.*

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*Therefore, in accordance with your Receipt of Handbook signed we accept your voluntary resignation effective July 15, 2002. (GCExh. 8)*

**Conclusions:**

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**The no talking about wages rule:**

As shown above, Respondent's handbook in effect before January 2003, included the following:

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*All employee's pay is a matter, which shall be kept confidential and only discussed between the employee and their immediate supervisor who has responsibility for that area.*

**Credibility:**

There is no dispute regarding the no talking about wages rule.

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**Findings:**

The Board has held that an employer may not lawfully prohibit employees from talking about their wages. I find that Respondent did maintain a rule against employees discussing their wages in violation of Section 8(a)(1) of the Act. **Triana Industries**, 245 NLRB 1258 (1979); **Jeannette Corp. v. NLRB**, 532 F.2d 916, 919 (3<sup>rd</sup> Cir.1976).

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**The no–solicitation rule:**

Before January 2003 Respondent’s employees’ handbook included the following rule:

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*Employees are not permitted to solicit other employees for funds, contributions, sales, membership, or other purposes during the employee’s working time or at any other time if such solicitations interfere with other employees who are on working time, lunch, or breaks. In addition, distribution of literature, documents or any other type of written material is not permitted on company property at any time.*

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**Credibility:**

There is no dispute as to the facts. Respondent admitted that it maintained the above–cited rule during November 2001.

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**Findings:**

It is well established that an employer violates Section 8(a)(1) when it prohibits its employee’s solicitation during nonwork time. An employer’s rule prohibiting solicitation on the employees’ own time has consistently been found to be unlawful. **Republic Aviation Corp. v. NLRB**, 324 U.S. 793 (1945); **Peyton Packing Co.**, 49 NLRB 828, 829 (1943); **Ingram Book Co.**, 315 NLRB 515 (1994). I find that Respondent engaged in a violation of Section 8(a)(1) by maintaining its rule which prohibited employees from soliciting “at any other time if such solicitations interfere with other employees who are on \* \* lunch, or breaks.”

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**The November 16, 2001 discharges:**

As shown above, Respondent discharged employees Charles Talkington, Charles Ray Stanley and Darrell Wade Hancock on November 16 because they violated its rules against discussing wages.

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In November 2001 employees Hancock and Stanley asked Talkington if he had received his raise. Talkington replied that he had but that the raise was not what he thought it should have been.

5 At that time Respondent had a rule against talking about wages. That rule was set out in its employees' handbook:

10 *All employee's pay is a matter, which shall be kept confidential and only discussed between the employee and their immediate supervisor who has responsibility for that area.*

Respondent stipulated that it discharged Talkington, Hancock and Stanley in November 2001 because they talked about wages.

15 ***Credibility:***

There are no credibility disputes regarding the November discharges. Respondent admitted that it discharged Stanley, Hancock and Talkington because they discussed Talkington's wage raise.

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***Findings:***

It is well established that an employer engages in conduct in violation of section 8(a)(1) when it prohibits its employees from discussing their wages. By promulgating and enforcing the above rule and by discharging Talkington, Stanley and Hancock on November 16, 2001, Respondent engaged in conduct in violation of Section 8(a)(1) of the Act. ***Automatic Screw Products, Inc.***, 306 NLRB 1072 (1992); ***Scientific–Atlanta, Inc.***, 278 NLRB 622 at 625 (1986); ***Triana Industries***, 245 NLRB 1258 (1979).

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***Respondent refused to comply with its settlement agreement:***

General Counsel and Respondent entered into an informal settlement agreement on June 4 in 10–CA–33427 (GCExh. 19). That agreement was approved on June 20, 2002. Among other things the settlement agreement provided that Respondent agreed to be bound by the terms of the Notice. The Notice included provisions that Respondent would not make, maintain or enforce and would rescind or revise any rule that prevents employees from discussing pay rates and any overly broad solicitation or distribution rule; that Respondent will not terminate employees for talking about pay and benefits; that Respondent would reinstate and make whole employees Talkington, Hancock and Stanley and remove references from its files of the termination of Talkington, Hancock and Stanley; and that Respondent would not in any like or related manner interfere with, restrain or coerce its employees.

45 The parties stipulated that Respondent returned Talkington, Hancock and Stanley to work with full back pay in March 2002.

An Order Vacating Settlement Agreement, Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on October 31, 2002. Respondent allegedly violated the terms of that agreement in the following particulars:

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***By continuing its rules against talking about wages and no solicitation or distribution:***<sup>3</sup>

As shown above from September 1, 2001 Respondent maintained the following rules in its employee handbooks:

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*All employee's pay is a matter which shall be kept confidential and only discussed between the employee and their immediate supervisor who has responsibility for that area.*

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*Employees are not permitted to solicit other employees for funds, contributions, sales, membership, or other purposes during the employee's working time or at any other time if such solicitations interfere with other employees who are on working time, lunch, or breaks. In addition, distribution of literature, documents or any other type of written material is not permitted on company property at any time.*

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Billy Smith was hired as a groundskeeper on July 29, 2002. Judy Upton gave the orientation lecture to Billy Smith. She told Smith and the others attending that lecture that the rule in the employee handbook against talking about their wages would not be enforced.

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Other evidence including the testimony of Charles Talkington and Darrell Hanover shows that Respondent never said anything to them, or distributed a new or revised no talking rule or no-solicitation rule, or issued a new handbook during 2002 showing a change in either its rule against talking about wages or its no-solicitation rule. Moreover, there was no evidence that Respondent advised any employees in 2002 that it had rescinded its no-solicitation rule.

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***Credibility:***

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I found the testimony of Billy Smith and Darrell Hancock was credible regarding Respondent's actions after the settlement regarding its no talking about wages and no solicitation rules. Their testimony was not seriously contested and was supported by the record as a whole.

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***Findings:***

The record evidence shows that Respondent maintained unlawful no talking about wages and no solicitation rules before the November 2001 discharges of

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<sup>3</sup> The complaint alleges that Respondent, by maintaining the no talking about wages and no solicitation rules after entering into the settlement agreement, (1) refused to comply with the terms of the settlement agreement; and (2) engaged in violation of Section 8(a)(1) of the Act.

Talkington, Stanley and Hancock. After entering into the June 2002 settlement agreement four things occurred:

- 5 (1) Respondent posted an official NLRB notice that stated, among other things:

*WE WILL NOT make, maintain, or enforce any rule that prevents you from discussing pay rates with each other.*

10 *WE WILL NOT make, maintain, or enforce any overly broad solicitation or distribution rules.*

*WE WILL rescind our rule prohibiting employees from discussing their wages with one another, and WE WILL revise our solicitation and distribution policies to insure that they comply with the National Labor Relations Act.*

- 15 (2) Respondent did not immediately change its existing employee handbooks nor did it notify its incumbent employees of changes in that handbook.

- 20 (3) Respondent did immediately advise all incoming employees during orientation lectures that its handbook rule regarding no talking about employees wages was no longer in effect and should be disregarded. According to the credited testimony of Billy Smith, when he was hired in July 2002 Respondent gave him a handbook that had the section prohibiting talking about employees' pay, crossed out.

- 25 (4) Respondent issued a new handbook in January 3003 which rescinded its rule prohibiting employees from discussing their wages with one another and which revised its no solicitation rule to comply with the National Labor Relations Act.

30 Counsel for General Counsel contended that Respondent violated the Act and the terms of its settlement agreement by refusing to immediately advise incumbent employees as well as all new employees, of its rescission its broad no solicitation rule. After the June settlement it did nothing regarding that rule until a new handbook issued in January 2003. As to the no talking about wages rule, the credited record shows that Respondent did nothing other than post the NLRB notice, to show incumbent employees that it had rescinded its rule, until it issued its new handbook in January 2003. Respondent did advise new employees during the time between its June 2002 settlement and the end of 2002, they should disregard the handbook rule prohibiting employees from discussing their pay. General Counsel argued that failure to act in full accord with the settlement for a period 6 months constitutes a violation of the settlement (***Twin Cities Concrete, Inc.***, 317 NLRB 1313 (1995)).

45 In find that Respondent failed to notify its incumbent employees that it had rescinded the no talking about wages rule within a reasonable time after its June 2002 settlement. I find that Respondent failed to notify any of its employees that it had rescinded its no solicitation rule within a reasonable time after its settlement. By failing to notify all its employees of those changes Respondent violated the terms of its settlement agreement and violated Section 8(a)(1) of the Act.

***By changing the terms and conditions of the employment of the reinstated employees.<sup>4</sup>***

5           Talkington recalled that Judy Upton spoke when him, Stanley and Hancock when  
they returned to work on March 18, 2002. Upton told the three of them that James  
Higdon would no longer be their supervisor and that Higdon wouldn't have anything to  
do with them. Instead their supervisor would be Tim Miller. Moreover, the three would  
no longer be allowed in the buildings. All their work was outside. Darrell Hancock did not  
10 recall everything that happened in the March 18 meeting with Upton. He did recall her  
saying that Tim Miller would be their supervisor.

Judy Upton testified that she met with Hancock, Talkington and Stanley when  
they were reinstated in March and she told them their supervisor would be Tim Miller.  
15 She denied that she said anything about James Higdon. She did not say that Higdon  
had been taken out of supervision. Indeed, according to Upton, Higdon maintained his  
supervisory duties and he occasionally directed the work of Hancock, Talkington and  
Stanley after March 18. Upton testified that Hancock, Talkington and Stanley were  
assigned to work solely outside because spring was coming on.<sup>5</sup> Those three were the  
20 only ones assigned to work exclusively outside at that time.<sup>6</sup>

Hancock recalled Tim Miller told them they were not allowed to enter the  
buildings and they were not to socialize with other employees. Hancock had engaged in  
friendly conversations with other employees before his November 2001 discharge.

25 Charles Talkington testified that before their November discharge, the three  
employees had been allowed to enter all Respondent's buildings and they had never  
been told not to socialize with other employees.

30 Tim Miller admitted that he told the three that he did not want them going into the  
buildings. He denied that he told them they could not talk with other employees but he  
admitted that he told them he did not want them standing around socializing with other  
employees while they were on the time clock. Miller testified that he tells that to all the  
employees he supervises.

35 After March 18 Hancock along with Stanley and Talkington were required to  
clock out and back in after lunch. At the time of their March reinstatement none of the

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<sup>4</sup> The complaint alleges that Respondent, by changing the terms and conditions of employment of the reinstated employees, (1) refused to comply with the terms of the settlement agreement; (2) discriminated against the reinstated employees because of their involvement in the unfair labor practice charge in 10-CA-33427; and (3) engaged in violation of Section 8(a)(1) of the Act.

<sup>5</sup> In that regard it must be noted that all three of the alleged discriminatees were hired in the spring of 2001 (i.e., May, 2001) but none of the three were employed exclusively to outside maintenance at that time.

<sup>6</sup> Eventually Bill Smith was assigned to work outside maintenance. Smith was hired on July 29, 2002. At that time he was assigned both inside and outside maintenance work. Upton testified that was because of lack of communications and that Smith was subsequently assigned to work only on outside maintenance. After being assigned to do outside maintenance Smith worked under the same conditions as other outside maintenance employees.

other maintenance employees were required to do that and Hancock, Stanley and Talkington had no such requirement before being fired in November.

5 Before November 16 Talkington had an access card for admittance to the liquid building and he visited that building every workday. Darrell Hancock testified that he too had an access card to enter the liquid building but he was not given an access card to that building after he returned to work in March 2002. Hancock testified the three employees routinely worked in buildings before their discharge.

10 Subsequently, the employees asked Tim Miller how they would get their equipment out of the building without being allowed inside. Miller said he would get back to them. Miller came back and told the three they would be allowed to go in and get their mowing equipment but they could not go farther in the building or socialize with other employees. Talkington testified that he was never given an access card to any of the  
15 buildings after his reinstatement. Eventually, when the gate into the facility became fully operational, Talkington was given a scan card solely for admission through the gate.

20 Miller testified that the three employees complained about being limited to use of the restroom in the guardhouse and Miller arranged for them to use one of the restroom in the tablet building when that restroom happened to be closer to where they were working at the time. He also permitted the three to use the tablet building vending machines and water fountains for breaks when that location was more convenient than the guardhouse. After a complaint from the three Miller arranged for tables and chairs in the vending machine area of the guardhouse. Miller testified that all employees under  
25 his supervision have access to the tablet building but not to the other buildings. Miller's employees are all required to clock out for lunch.

30 Billy Smith was hired as a groundskeeper on July 29, 2002. At first Smith was assigned both indoor and outdoor work but now he is strictly outdoor. No one has told him that he could not socialize with other employees.

35 The maintenance shop was located in the liquid building. Before November Talkington used the liquid building break area. He talked with production employees about personal matters in both the liquid and pill buildings. His job before November 16 included maintenance work, which was routinely in the liquid building, the pill building, the warehouse and outside. Before November 16 he was never told to confine his activities to one area of the facility or to avoid talking with other employees. Before November 16 Talkington did not mow grass.

40 Darrell Hancock testified that he has observed two other employees, Kevin Castle and Donnie Batts, doing outside grounds maintenance work including mowing and he has also observed both of them regularly going into various buildings at Respondent's facility.

James Higdon testified there are currently two groundskeepers<sup>7</sup> and he supervises them. He testified they are allowed to take breaks including lunch breaks anywhere including in the tablet building. Both those employees are required to clock out for lunch.

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A couple of months after returning to work Talkington called Tim Miller to report that he was sick and would not be in to work. Miller was not in and Talkington left word with the receptionists. Later that day, Miller phoned Talkington and told him that he must talk with Miller when he called in sick and he was not allowed to leave word with anyone else. Hancock recalled Miller telling him, Talkington and Stanley they must talk with him when absent from work.

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Miller told Talkington that he would have to bring a doctor's excuse when he returned to work the next day. Charles Talkington heard from other employees they had not had to bring in doctor's excuses for being out sick. He had a doctor's excuse, which he gave to Tim Miller and he asked Miller how come he had to bring a doctor's excuse when other maintenance employees did not. He complained that he should not have to go see a doctor and bring in an excuse if the other maintenance employees were not required to do the same. Miller said all right.

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***Credibility:***

There are instances where testimony is not in dispute. I credit the testimony of Charles Talkington and Darrell Hancock regarding their meeting with Judy Upton on March 18 and their first meeting with Tim Miller, to the extent Upton or Miller did not dispute their testimony. Moreover, as noted below, I have made credibility findings as to specific points where there is a dispute.

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***Findings:***

The credited testimony shows that Talkington, Hancock and Stanley were not assigned to their former jobs when they were reinstated in March 2002. For example the three employees were assigned to work exclusively outside even though before their discharge they worked both inside and outside. Moreover, the three were assigned to work under a different supervisor and Tim Miller instructed the three employees they were not to go into the buildings and they were not to socialize with other employees while on the clock. Before their November discharges the three were not restricted from going into buildings and they were not prohibited from socializing while on the clock. Employee Billy Smith was hired as a maintenance employee after the three were reinstated and Smith was not restricted in socializing with other employees. Hancock observed employees Kevin Castle and Donnie Batts doing outside grounds maintenance work including mowing and he observed both of them regularly going into various buildings at Respondent's facility.

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<sup>7</sup> When reinstated on March 18, 2002 Hancock, Stanley and Talkington were all assigned the jobs of groundskeepers.

The three were required to clock out and in for lunch break after their reinstatement. That was not the practice before their November discharges. Neither Talkington nor Hancock was given an access card to the liquid building after their reinstatement although each had an access card before their discharge. The three were not restricted to going no farther into the building than necessary to get their equipment before November 2001. That was the practice after their reinstatement. The three were not restricted to using only the guardhouse restrooms nor were they restricted to any other restrooms before November 2001. As shown above, the three were restricted to the guardhouse restrooms for a time after their reinstatements.

The three were not restricted to using only specified break areas before November 2001. They were restricted to using only the guardhouse break area after their reinstatement. James Higdon testified there are currently two groundskeepers and he supervises them. He testified they are allowed to take breaks including lunch breaks anywhere including in the tablet building.

Talkington was not required to bring a doctor’s excuse for absence due to illness before his November discharge and Tim Miller did not dispute Talkington’s assertion to him that other employees were not required to bring a doctor’s excuse for absence due to illness, after he was reinstated.<sup>8</sup>

As shown above, Respondent agreed in its settlement, that it would be bound by the terms of the Notice. As to reinstatement, the notice provides,

*WE HAVE reinstated Charles Talkington, Darrell Hancock, and Charles Ray Stanley to their former jobs without prejudice to their seniority or other rights and privileges enjoyed.*

The credited evidence shows that Respondent did not reinstate Talkington, Hancock and Stanley to their former jobs. I find that Respondent violated the terms of its settlement agreement and continued its violation of Section 8(a)(1) of the Act by failing to reinstate Talkington, Hancock and Stanley to their former jobs.

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<sup>8</sup> In making the above finding, I distinguish that from the situation that subsequently developed after Talkington complained about injuring himself on the job. After his injury he was asked to supply Respondent with doctor’s excuses regarding his absences and there was no evidence showing that was not Respondent’s routine practice following on the job injuries. Therefore, I specifically find that Respondent did not violate the terms of its settlement agreement and it did not commit unfair labor practices, when it required Talkington to supply excuses from his physicians after he complained about an on the job injury. Moreover, I specifically find that Respondent did not violate the terms of the settlement agreement and it did not engage in unfair labor practices by requiring Talkington to abide by its notice of absence rule to the extent that rule had been modified by Talkington’s supervisor. His supervisor had directed him to call one and a half hours after his shift started as opposed to one hour after his shift started.

**By discharging Charles Talkington:<sup>9</sup>**

There is no dispute but that General Counsel must prove that Respondent was motivated to discharge Talkington because of its animus against him for his protected activity which may include his action in unfair labor practice charges settled by Respondent in June 2002. If General Counsel successfully satisfies that requirement, Respondent may defend by showing that it would have discharged Talkington in the absence of those protected reasons (*Manno Electric*, 321 NLRB 1, fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899(1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)).

The situation that led to Talkington's second discharge started when he was allegedly injured at work in June 2002 while trying to start a weed-eater. He didn't realize his back was hurt even though he had pain in his shoulder and neck. He filled out an accident report on the day after the injury. After first telling Judy Upton that he didn't need a doctor, pain from his neck, shoulder and lower back increased and James Higdon took him to see a doctor.<sup>10</sup> After returning from the doctor Higdon told Talkington to do some bush-hog work.<sup>11</sup> Talkington did the bush-hog work the remainder of Thursday and all day Friday. When he woke on Saturday, the pain had increased. On Sunday the pain was even worse. Talkington returned to the doctor on Monday June 24. The doctor took him off work for three days and told Talkington to return and see him on Wednesday.

Talkington phoned Upton and reported what the doctor has told him. Upton phoned back and told Talkington he had been released to see his family doctor.<sup>12</sup> After some difficulty Talkington saw another doctor and eventually started treatment with Dr. Charles Bradford. Talkington testified that he routinely phoned Upton and reported each time he saw a doctor. His last call was to Ms. Upton on July 15.

Upton denied that she told Talkington he had been released for treatment by his family physician. However, she had a conversation with the physician that Talkington was referred to by Respondent. That physician told her that he mentioned to Talkington that he may need to have his back injury treated by his family physician because it was not included in the workman compensation claim.

On July 15 Talkington told Upton that his doctor had taken him off again for that week. Upton said that Talkington was fired. She said that he ran out of leave time on Wednesday of the week before and had not called in on Thursday or Friday. Talkington protested that he didn't know he was taking leave and that his doctor's excuses should have covered his time off. Upton replied that his doctor's excuse was saying that he was

<sup>9</sup> The complaint alleges that Respondent, by discharging Talkington, (1) refused to comply with the terms of the settlement agreement; (2) discriminated against Talkington because of his involvement in the unfair labor practice charge in 10–CA–33427; and (3) engaged in violation of Section 8(a)(1) of the Act.

<sup>10</sup> The evidence is in dispute as to when Talkington first mentioned his back injury.

<sup>11</sup> This assignment was made for light duty purposes. Talkington was not required to do any lifting while operating the bush hog.

<sup>12</sup> Upton denied this testimony.

supposed to return to work on July 8 but he had not returned to work and his leave time had expired. He said that she should have received the doctor's excuses faxed from the doctor's office and if they had not received those excuses he would check with the doctor. Upton said there was no use in his checking and that he was fired.

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Nevertheless, Talkington went to his doctor's office that same day, July 15, and had them fax his excuses to Respondent (GCEXh. 7). He made several more phone calls to Upton but Upton never told him anything about the reason for his discharge other than he ran out of leave. Talkington also raised a question as to whether he was accorded rights under the Family Medical Leave Act. Upton replied that she was familiar with that act.

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Talking testified that Upton never mentioned anything about the time of day Talkington phoned on July 15 being a problem. Talkington subsequently received a letter from Upton (GCEXh. 8) stating:

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*Vintage Pharmaceuticals, Ins. is accepting July 15, 2002 as your effective date of resignation.*

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*According to our handbook you are required to call and speak to your immediate supervisor or a member of management within 1 hour of your shift if you are not reporting to work for the day. According to our records you did not call in and report off within the time frame on July 15, 2002 according to company policy.*

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*Therefore, in accordance with your Receipt of Handbook signed we accept your voluntary resignation effective July 15, 2002. (GCEXh. 8)*

Judy Upton testified that she received notice that Talkington had a doctor's excuse for absence thought June 26. However, Talkington did not show up for work and he did not phone regarding his absence on June 27, 28 or 29. According to Upton Talkington could have been discharged for absence for failure to call in on June 27 and on several occasions thereafter. However, due to the circumstances of his being reinstated Respondent did not discharge him.

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She denied that Talkington phoned her on July 1. Upton testified that she was out of town on July 1, 2 and 3.

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Upton testified that Talkington next phoned her on July 8. Talkington told her that the doctor had written him off for another week. She replied that she had not heard from him. Talkington responded that he had his doctor's excuses in his lunch pail. Upton told him that she needed those excuses. Talkington said that he would have the doctor fax the excuses to her.

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Judy Upton identified a July 11 note in Charles Talkington's file (REXh. 14) to the effect that she had received a doctor's phone call stating Talkington was free to return

to work on July 8. She also received a faxed doctor's excuse (RExh.15) stating that Talkington was free to return to work on July 8.<sup>13</sup>

5 During the week of July 8 employee Paul Higdon reported to Upton that he had seen Charles Talkington working on his house. He said that he had seen Talkington carrying sheet rock. Upton initiated an investigation and an investigator was hired.

10 Jerry McDaniel is a private investigator. He was hired by Respondent to check out Charles Talkington. Paul Higdon accompanied him to Talkington's house on July 10, 2002. Two individuals were working on an addition to the house. Higdon pointed out Charles Talkington.<sup>14</sup> McDaniel saw Talkington carrying a ½ piece of sheetrock or wall paneling. McDaniel returned to Talkington's house the following day. On that occasion he saw Talkington cleaning an aboveground swimming pool. Talkington had what appeared to be a long brush and broom with a vacuum hose attached which he used in  
15 cleaning the bottom of the pool.

20 Upton next received a phone call from Talkington about 9:20 a.m. on July 15. She told him she had not received his doctor's excuses and also that he had not called in within the time frame and that he was being terminated (RExh.16). Upton told Talkington that the only excuse she had for him showed that he could return to work on July 8. Judy Upton denied that she ever received the doctor's excuses identified as General Counsel Exhibits 3, 4 and 5.<sup>15</sup> After Talkington was terminated Upton received a doctor's excuse showing that he could return to work on July 23 with restrictions (RExh.19).  
25

Judy Upton made the decision to terminate Charles Talkington. She testified that she relied on his failure to phone in violation of Company policy, Talkington's failure to supply Respondent with appropriate doctor's excuses and the information she received regarding Talkington working on his home.  
30

***Credibility:***

35 There were some concerns about the testimony of Judy Upton. Her testimony is in dispute as to several material points. Moreover, it is apparent that she gave different reasons for Talkington's terminations at different times. Nevertheless, there was evidence that Charles Talkington failed to give notice for several absences in June and July; supporting probative testimony was lacking as to many of the instances where Talkington alleged he had been supplied with doctor's excuses; and Talkington did not dispute testimony that he lifted material while working on his home after he had  
40 requested absences due to an alleged on the job injury and at least one doctor had

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<sup>13</sup> As shown herein, GCExh. 3 was purportedly signed by Dr. Charles R. Bradford, is dated 7–1–02 and states that Charles Talkington is under his care and is able to return to work on 7–8–02.

<sup>14</sup> McDaniel identified Talkington in court.

<sup>15</sup> GCExh. 3 is a July 1 excuse purportedly signed by Dr. Charles R. Bradford that states that Charles Talkington is able to return to work on 7–8–02. GCExh. 4 is a July 6 excuse purportedly signed by Dr. Charles R. Bradford that states that Charles Talkington is able to return to work on 7–15–02. GCExh. 5 is a July 12 excuse purportedly signed by Dr. Charles R. Bradford that states that Charles Talkington is able to return to work on 7–22–02.

instructed him to avoid lifting anything heavier than 15 pounds. Therefore, the record as a whole supported the three reasons Upton gave at the hearing for her discharge of Talkington.

5 Counsel for General Counsel argued among other things that Upton’s inconsistency in stating why Talkington was discharged illustrated that she was not truthful and that Talkington was actually discharged for protected activity. I have considered those arguments and agree that Upton’s inconsistency in stating why  
 10 Talkington was discharged does tend to show that she was not completely truthful. However, as shown herein, the record shows that Talkington failed to comply with Respondent’s rules regarding both call-ins on days of absence and supplying excuses from physicians. Therefore, I am convinced on the basis of that other evidence that Talkington’s actions were grounds for discipline including discharge. As to what effect that should have on the credibility of Ms. Upton, I am convinced that she did give  
 15 different reasons at different times for Talkington’s discharge. Nevertheless, I am not convinced that she was testified untruthfully.

In reaching that conclusion, I have in large measure, looked to the other issue raised by General Counsel. That was that Upton was hiding the true motivation behind  
 20 Talkington’s discharge and the actual motivation was based on his protected activity. In that regard General Counsel argued that it was Talkington’s threat to go back to the Labor Board about his discharge that actually prompted Respondent to go through with the discharge. I am convinced that was not what happened. Instead the evidence showed that Respondent had made the decision to discharge Talkington before he  
 25 allegedly threatened to go back to the Labor Board. Even Talkington testified that Upton told him he was terminated before he threatened to go to the Labor Board. Moreover, there was an occurrence that overshadowed other events in the discharge incident. That occurrence was Respondent’s discovery during the week before July 15 that Talkington was working on his home while absence allegedly because of on-the-job  
 30 shoulder, neck and back injuries.

The record established without contest that Respondent learned Talkington was working on his house during the week of July 8 and that it hired an investigator and received a report showing that Talkington was indeed working on his house and that he  
 35 had engaged in lifting in apparent violation of doctor’s orders.

Therefore, I credit Upton’s testimony despite the problems noted above.

**Findings:**

40 I must first question whether General Counsel proved that Respondent was motivated to discharge Talkington because of animus against his protected activity. The record shows that Talkington engaged in protected activity by discussing his wage increase with two other employees in November 2001. There is no question but that  
 45 Respondent learned of that activity. Nor is it disputed that Respondent took adverse action by discharging Talkington because he engaged in protected activity. As shown above there is evidence that Respondent refused to abide by the terms of its settlement

agreement by assigning Talkington, Hancock and Stanley to a different job when they were reinstated on March 18, 2002.

5 Additionally, Counsel for General Counsel argued that Respondent's failure to  
 discharge or caution Talkington before July 15, regarding his alleged absences without  
 proper notification and without providing all appropriate doctor's excuses, supported its  
 case against the discharge. However, there was no showing that anything occurred in  
 the nature of unlawful motivation, on or shortly before July 15, which caused  
 10 Respondent to change from a policy of leniency to one of violation of law. The only  
 factor shown to have happened proximate to Talkington's discharge was the discovery  
 that Talkington was working on his home while out with an alleged injury. However,  
 such activity is not protected under the Act and there was no showing that Respondent  
 engaged in unlawful activity by learning of Talkington's work at home or in using that  
 information to justify Talkington's discharge. Therefore, I reject that argument by  
 15 Counsel for General Counsel.

Nevertheless, if view of the full record I am convinced that General Counsel  
 made a prima facie showing that Respondent was motivated to act out of animus  
 against the protected activities of those three employees.

20 Under the applicable law I shall consider whether Respondent proved that it  
 would have discharged Talkington in the absence of his protected activities. Judy Upton  
 testified that Respondent relied on three factors in deciding to discharge Talkington.  
 First, he was in violation of its rule requiring notice of absence within one hour of the  
 start his shift. Two, Talkington failed to supply Respondent with several doctor's  
 25 excuses even though he was claiming injury under workmen's compensation. Three,  
 evidence illustrated that Talkington was engaged in fraud by performing heavy labor on  
 his residence at the very time he was claiming he was unable to work for Respondent  
 due to a workmen's compensation injury.

30 The employee handbook introduced by Counsel for General Counsel  
 (GCExh. 9)<sup>16</sup> states as follows:

35 *Anytime personal circumstances are such that you the employee will be  
 late or miss work for an acceptable reason, you must contact your **SUPERVISOR  
 OR A DISIGNATED MEMBER OF MANAGEMENT** within one hour after the  
 beginning of your shift. **MESSAGES LEFT WITH OTHERS WILL BE  
 CONSIDERED A "NO CALL"**. Failure to call within this one hour will result in  
 loss of pay for the day or termination.*

40 *Should absence due to illness occur, a physician's statement may be  
 required. For prolonged illness, illness where emergency room treatment has  
 been rendered, minor surgery is involved, injury requiring crutches, braces or  
 supports or an illness requiring a hospital stay, a written physician's statement of*

<sup>16</sup>

There was a dispute as to which was the applicable handbook in effect on July 15. One of the disputed handbooks showed that failure to call in would result in termination while the other disputed handbook showed that a failure to call in might result in termination or loss of pay.

*complete release (NO special circumstances, light duty, etc.) must be provided before you may return to work.*

5 The evidence regarding Talkington's July discharge showed that he was subject to both the above rules. He, like all employees, was subject to the one-hour call-in rule. In his case he had been told by Tim Miller that he could call Miller an hour and a half after his shift started in view of the fact that Miller was routinely in a meeting and unavailable to answer calls until 8:30 a.m. However, that extension of time to call played no part in Talkington's discharge. There was never a question of him calling-in during 10 the period leading up to his discharge within the hour and a half permitted by Miller. Instead the evidence showed that Talkington failed to notify Respondent by calling within one and a half hours of his shift start time on several occasions including on July 15 when he called Upton at 9:10. That was well over 1 and half hours after his shift started.

15 Additionally, the record is undisputed that Upton advised Talkington to provide doctor's excuses for his absences after his June 20 injury. Despite several request from Judy Upton several excuses were not supplied until after Talkington's July 15 discharge, and the excuses supplied to Upton showed that the physician certified that Talkington 20 was able to return to work on July 8. The credited evidence showed that Talkington did not provide a doctor's excuse for missing work on July 8 or thereafter until long after he was told of his discharge.

25 I find that Respondent was correct in its contention that Talkington was required to satisfy both the call-in rule and to provide doctor's excuses for the time he was absent after his injury and that he frequently failed to satisfy both those rules in June and July.

30 In consideration of the fact that Talkington was required to give notice before 8:30 a.m., the evidence does show that Talkington failed to show up for work on June 26, 27 and 28, 2002 without calling in. Talkington testified that he did phone Judy Upton on July 1 to report that he would be out that week at the directions of a physician. However, Upton testified and provided supporting documentation, that she was out or town and not in her office on July 1, 2 or 3, 2002 and that she did not receive a call from 35 Talkington. She testified that Talkington missed July 1 through July 5 without proper notice. In view of her testimony and the supporting documentation and the fact that I have credited the testimony of Judy Upton, I find that she was out of town from July 1 through July 3 and that she did not receive a July 1 notification phone call from Talkington.

40 Talkington called Upton on July 8 and Upton received a doctor's excuse showing that Talkington was able to return to work on July 8. Talkington did not phone in as required on July 9, 10, 11 or 12.

45 Charles Talkington next phoned Upton on July 15. At that time Upton told him that he had been discharged.

Respondent proved that it has routinely discharged employees and a supervisor for failing to call in absent under its rule. With the exception of Charles Talkington, there was no showing that Respondent has ever permitted anyone to miss several days without calling in as required by its rules.

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Next, there was a question of Talkington supplying doctor's excuses. I credited the testimony of Judy Upton that she told Talkington that she needed those excuses. Talkington missed work from June 26 through 28, from July 8<sup>17</sup> through 12 and on July 15 without providing Respondent with a doctor's excuse. As shown above he was required to supply those excuses under Respondent's rules.

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Finally, there was no dispute that first one of Respondent's management employees, then an investigator hired by Respondent, saw Talkington engaged in labor at his home while he was out due to an alleged workmen's compensation injury.<sup>18</sup> As shown above, that evidence showed that Talkington worked at his home during the week of July 8 at the time when he was absent from work allegedly because of his work-related injury.

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As shown above, Counsel for General Counsel argued that Judy Upton gave conflicting reasons for Talkington's discharge. He pointed to Talkington's version of his July 15 phone conversation with Upton; Upton's note regarding that phone call (GCExh. 16); the termination letter and Respondent's failure to call William Pannell to corroborate Upton's version of the July 15 phone call. I have considered General Counsel's argument and I do note that while Upton did not give conflicting reasons for discharging Talkington, she did fail to give all the reasons for his discharge on any one correspondence with Talkington. Instead she gave three reasons for the discharge but those were first given together at the hearing. That tends to show that Upton was concerned about a claim that Talkington was being discharged because of protected activities. After all, Talkington had successfully made that same claim when he, Hancock and Stanley were discharged in November.

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Nevertheless, I am not persuaded that Upton's different accounts of why Talkington was discharged discredited Respondent's point that it would have discharged Talkington in the absence of his protected activities. The credited evidence does show that Talkington engaged in all the activities ultimately claimed as bases for his discharge. He did miss several days' work without giving notice before 8:30 on the day he missed work. He did fail to provide Respondent with several excuses by physicians even after Upton specifically asked for those excuses. He was shown to have engaged in physical labor including lifting at a time when he was claiming to Respondent that he was unable to work.

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I find the evidence is convincing that Respondent was lenient toward Talkington until it discovered that he was working at home while claiming to be unable to work for Respondent.

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<sup>17</sup> Both General Counsel and Respondent offered statements from Dr. Charles Bradford showing that Talkington was able to return to work on July 8, 2002.

<sup>18</sup> Talkington did not deny that he worked on his home while off work because of an alleged injury.

In view of the above and the full record, I am convinced that Judy Upton was justified in discharging Talkington on July 15 despite his earlier participation in protected activities. I find that Respondent proved that it would have discharged Charles Talkington in July 2002 in the absence of his protected activity and I find that Respondent did not engage in unfair labor practices by discharging Talkington on that occasion.<sup>19</sup> (*Yuker Construction Co.*, 335 NLRB No. 28 (2001))

***Failed to grant wage increases in May 2002:***

Charles Talkington started working for Respondent around May 2001. He received a pay raise in November.

Darrell Hancock received one raise in 2001. He received that wage increase before his discharge. Subsequently he received one more raise on January 6, 2003.

**Credibility:**

In view of my below findings, I am convinced that Judy Upton’s testimony more accurately reflects Respondent’s policy regarding pay increases and I fully credit her testimony in that regard.

**Findings:**

General Counsel argued that Human Resource Manager Steve Spray told Charles Talkington and Darrell Hancock when they were initially hired in May 2001; they would receive wage increases after 90 days, 6 months and 1 year from the date of hire. There was no testimony in conflict regarding what Spray said to Hancock, Stanley and Talkington. Steve Spray did not testify.

However, Judy Upton testified that Respondent’s policy was to give evaluate employees within 6 months of hire and thereafter, to evaluate that employee one year from the date of his or her first evaluation.

Testimony and documents in evidence show confusion as to Respondent’s actual policy. As pointed out by Counsel for General Counsel, five employees received pay increases within one month of hire. Thirty employees were hired after April 9, 2001, and all 30 received some wage increase within the first year of hire. Twenty–nine of the 30 received a wage increase within 6 months of hire. Counsel for General Counsel pointed out that 13 of those 30 received another wage increases within one calendar

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<sup>19</sup> As shown above, Respondent engaged in unfair labor practices by failing to reinstate Talkington, as well as Hancock and Stanley, to his former job as required in the settlement agreement. However, that action had no proximate relationship to Talkington’s discharge. I find that Respondent did not commit an unfair labor practice by discharging Talkington on July 15 even though it had failed to properly reinstate him.

month of their first wage increase. Twelve of the 30 received no wage increase other than their initial wage increase.

5 In view of the full record I am not convinced that Respondent discriminated against Talkington, Hancock or Stanley by denying a wage increase. There was no evidence that the three failed to receive a wage increase before their November 2001 discharge. In fact the testimony clearly established that Hancock and Talkington at least, did receive a wage increase before their discharge in November.

10 Moreover, there was no showing of animus against the three at any time before their November discharges. Therefore, there was no proof that Respondent acted unlawfully in failing to grant a wage increase to Talkington, Hancock or Stanley before the end of their first 6 months of employment. Moreover, the November increases for Hancock and Talkington support Judy Upton's version of Respondent's policy. As  
15 shown above she testified that employees receive their first evaluation within 6 months of hire. That evidence tends to refute the reported comments by Steve Spray.<sup>20</sup> During the time when Respondent had no reason to discriminate against them, Hancock, Stanley and Talkington did not receive a 90-day pay increase. Instead two and perhaps all three, received wage increases within 6 months of hire. That was in accord with the  
20 policy explained by Upton.

The record showed that although Darrell Hancock did not receive notice of his next pay increase until January 2003, his wage increase was retroactive until December 1, 2002.

25 According to Upton's version of Respondent's policy, Hancock should have received an evaluation within a year of his November 2001 pay increase. Even though he did not receive a raise until January 2003, Upton testified that he was evaluated in a timely manner and it was because she was burdened with work due in part to personal  
30 problems, that Hancock's raise did not come through until January. Nevertheless, the raise was made retroactive to December 1.

35 In view of that evidence I am not convinced that Respondent discriminated against any of the three alleged discriminatees by depriving them of a pay increase, which would have been granted in the absence of their protected activity. Therefore, I find that Respondent did not act unlawfully in failure to grant wage increases to Talkington, Hancock or Stanley.

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<sup>20</sup> In that regard I find it is not necessary to determine whether Steve Spray actually made those comments to Talkington, Hancock and Stanley. If he made the comments, my findings herein show his comments were inaccurate and in view of the evidence showing Respondent's actual practice, Spray's comments, if made, would not be binding on Respondent.

***Issued a written warning to Charles Talkington in May 2002:<sup>21</sup>***

5 Charles Talkington received a write-up (GCExh. 2) dated May 17. James Higdon testified that he gave the warning to Talkington. After issuing instructions to cut along the railroad Charles Talkington asked Higdon why they were stuck with that job. Higdon responded they were not stuck with that job; it just had to be done. Higdon felt that Talkington was argumentative. That was Higdon’s only occasion to award that type warning.

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The incident started while Charles Stanley was weed-eating. Stanley requested that Talkington ask James Higdon if it was all right for Talkington to get the bush-hog because the grass where they were at the railroad track was too high to handle with the weed-eaters. Talkington went to Higdon and Higdon said that he would get with Mr. Proach to see if it would be all right to take the tractor and bush-hog down there. However, Higdon did not return.

15

Talkington, Stanley and Hancock then went over to the pill plant to see their supervisor, Tim Miller. They asked Miller if he wanted them to go on with the work at the railroad track. Miller said that he knew nothing about that and for them to go back to their other work until he got with Proach or Higdon.

20

That afternoon Stanley told Talkington that Higdon was bringing the tractor. Talkington went over and asked Higdon how the three of them got stuck doing that work at the railroad when they had all they could do with their regular work. Higdon raised his voice and told Talkington that he didn’t get stuck doing that and that his men had all they could do too. Charles Talkington admitted that he then raised his voice with Higdon but he denied that he argued with Higdon.

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While Talkington was back at the guard shack that afternoon to clock out, Tim Miller came to him and said they were going to have a meeting in the pill plant. When they arrived Judy Upton and James Higdon were sitting in the pill plant conference room and Upton gave Talkington a write-up (GCExh. 2). Miller told Talkington that it was a write-up for using argumentative language with Mr. Higdon. Talkington said to Upton that she had told him that Higdon would no longer be their supervisor and that when he had been Talkington’s supervisor Higdon had told Talkington not to take orders from another supervisor. Upton replied, “If any supervisor told us to do a job, for us to go and do it.” Upton told Talkington to write comments on the write-up and sign it.

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<sup>21</sup> This matter occurred before the June 2002 settlement and is not alleged to involve a refusal to abide by the terms of that settlement. Instead it is alleged simply as an unfair labor practice on two grounds. First General Counsel alleged that Talkington was engaged in protected concerted activity by questioning the work assignment to all three employees. Second, General Counsel alleged that Talkington was warned because of his involvement with the earlier unfair labor practice charges.

Judy Upton was present when Talkington was given the warning (GCExh. 2). She testified that Talkington denied that he had argued with Higdon.

**Credibility:**

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I credit the testimony of Charles Talkington to the extent his testimony was confirmed by the testimony of James Higdon. Talkington, as well as Higdon, testified that Talkington was warned after he raised his voice in questioning Higdon as to why were “we stuck with that job.” I also credit Talkington’s testimony that he did not argue with Higdon. Higdon did not dispute that testimony.

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**Findings:**

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Counsel for General Counsel argued among other things, that Talkington was acting on behalf of himself, Stanley and Hancock, when he questioned Higdon on May 17 about how they were stuck with that job. He also argued that Respondent discriminated against Talkington because of Talkington’s past activities including his involvement in the filing of unfair labor practice charges, his discussions with others regarding his wage increase in November 2001 and Respondent’s need to reinstate Talkington, Stanley and Hancock pursuant to its settlement with the NLRB. I agree with General Counsel. The full record, as shown above, did show that Respondent was motivated by animus against Talkington after his March 2002 reinstatement. As shown above Respondent failed to comply with terms of the settlement and it engaged in additional unfair labor practices. I find that Respondent was fully aware of all Talkington’s activities including his speaking on behalf of Hancock and Stanley as well as himself, when he spoke with James Higdon on May 17.

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Moreover, the evidence shows that Talkington was treated in an unusual manner. James Higdon admitted that he has never before or since, disciplined any other employee as he did Talkington on May 17. Finally, the evidence clearly illustrated that Talkington was not argumentative. Not even the testimony of James Higdon shows him to be argumentative. Nevertheless, that was why he was warned on May 17 according to the warning notice (GCExh. 2).

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Finally Counsel for General Counsel argued that where an employee is engaged in protected activity,<sup>22</sup> an employer violates the Act by disciplining that employee unless the employee’s allegedly protected activity is shown to be “so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service.” *Anheuser Busch, Inc.*, 337 NLRB No. 2, slip opin. p. 16 (2002).

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<sup>22</sup> I find that Talkington was questioning a supervisor about his and his co-worker’s working conditions and that is protected concerted activity.

I find that I need not reach the issue argued by General Counsel involving the citation of *Anheuser Busch, Inc.* Instead, I find that Talkington was engaged in protected activity when he questioned the work assignment to Hancock, Stanley and himself. As shown herein and throughout this decision, the evidence illustrates that Respondent was motivated to discipline Talkington because of his protected activity including his concerted activity on May 17, and Respondent failed to prove that it would have warned him in the absence of his protected activity (*Wright Line*, 251 NLRB 1083 (1980), enf.d. 662 F. 2d 899(1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)). Moreover, should I reach the point argued by General Counsel, I find there was no evidence showing that Talkington engaged in egregious conduct sufficient to take him outside the Act's protection.

Therefore, I find that Respondent engaged in conduct in violation of Section 8(a)(1) by warning Talkington.

### Conclusions of Law

1. By unlawfully maintaining and refusing to immediately notify its employees after settlement of an unfair labor practice charge, that it rescinded its rule against soliciting on company time, or that it rescinded its rule against talking about wages; by discharging employees Charles Talkington, Hancock and Stanley in November 2001 because they talked about wages; by failing to reinstate Talkington, Hancock and Stanley to their former jobs after the settlement; by changing the terms and conditions of employment of Talkington, Hancock and Stanley after the settlement; and by issuing a warning to Talkington in May 2002; the Respondent, Vintage Pharmaceuticals, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) 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.

Although I find that Respondent discriminatorily discharged employees Charles Talkington, Darrell Hancock and Charles Stanley in November 2001 in violation of Section 8(a)(1) the record illustrated that Respondent reinstated all three of those employees with full backpay. Therefore, I shall not recommend that Respondent be ordered to reinstate the Talkington, Hancock and Stanley with backpay.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:<sup>23</sup>

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<sup>23</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER<sup>24</sup>

5 The Respondent, Vintage Pharmaceuticals, Inc., its officers, agents, and representatives, shall

1. Cease and desist from

10 (i) Maintaining rules prohibiting its employees from talking about wages or engaging in solicitation during work time or, after settlement of an unfair labor practice charge, failing to immediately notify all its employees that it rescinded its rules prohibiting talking about wages or engaging in soliciting during work time.

15 (ii) Warning, discharging, failing to reinstate to their former jobs after settlement, changing the terms and conditions of employment of employees involved in unfair labor practice charges and involved in discussing employees' wages, or otherwise discriminating against any employee for discussing employees' wages.

20 (iii) In any like or related manner 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.

25 (i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful November 2001 discharges and the unlawful March 2002 reinstatements, of Charles Talkington, Darrell Hancock and Charles Stanley, and within 3 days thereafter notify the Talkington, Hancock and Stanley in writing that this has been done and that the discharges will not be used against them in any way.

30 (ii) Within 14 days after service by the Region, post at its facility or office in Huntsville, Alabama copies of the attached notice marked "Appendix."<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, 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

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<sup>24</sup> 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.**"

<sup>25</sup> 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.**"

own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2001.

5 (iii) 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.

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

Dated, Washington, D.C

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**Pargen Robertson**  
**Administrative law Judge**

APPENDIX

NOTICE TO EMPLOYEES

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**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

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The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

15

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

20

**WE WILL NOT** discharge, warn, or fail to properly reinstate or otherwise discriminate against any of you for discussing employees' wages or because you become involved in unfair labor practice charges with the National Labor Relations Board.

25

**WE WILL NOT** change working conditions of our employees because of their protected concerted activities or because of their involvement in unfair labor practice charges.

**WE WILL** notify all our employees immediately upon settlement of an unfair labor practice charge that we have complied with all requirements of that settlement.

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**WE WILL** immediately rescind a warning issued to Charles Talkington in May 2002, because of his protected concerted activity and his involvement in an unfair labor practice charge.

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**WE WILL NOT** maintain a rule against employees discussing their wage rates and **WE WILL NOT** maintain a rule against employees soliciting while at work.

**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 discharges in November 2001 of Charles Talkington, Darrell Hancock and Charles Stanley and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

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**VINTAGE PHARMACEUTICALS, INC.**  
**(Employer)**

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**Dated:** \_\_\_\_\_ **By:** \_\_\_\_\_  
**(Representative)** **(Title)**

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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.nlr.gov](http://www.nlr.gov).

40

233 Peachtree Street NE, Harris Tower, Suite 1000, Atlanta, GA 30303-1531  
(404) 331-2896, Hours: 8 a.m. to 4:30 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, (404) 331-2877.

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The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

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**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

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**WE WILL NOT** discharge, warn, or fail to properly reinstate or otherwise discriminate against any of you for discussing employees' wages or because you become involved in unfair labor practice charges with the National Labor Relations Board.

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**WE WILL NOT** change working conditions of our employees because of their protected concerted activities or because of their involvement in unfair labor practice charges.

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**WE WILL** notify all our employees immediately upon settlement of an unfair labor practice charge that we have complied with all requirements of that settlement.

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**WE WILL** immediately rescind a warning issued to Charles Talkington in May 2002, because of his protected concerted activity and his involvement in an unfair labor practice charge.

**WE WILL NOT** maintain a rule against employees discussing their wage rates and **WE WILL NOT** maintain a rule against employees soliciting while at work.

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**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.

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**WE WILL**, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges in November 2001 of Charles Talkington, Darrell Hancock and Charles Stanley and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

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