

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

VON MAUR, INC.,

and

Case 33-CA-15724

Jeremy C. Putnam

Deborah Fisher, Esq.,
for the General Counsel
Harry Secaras, Esq., of Chicago, Illinois
for the Respondent

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Peoria, Illinois on February 9, 2009. The charge was filed on November 4, 2008, by Jeremy C. Putnam (Putnam) against Von Maur, Inc. (Respondent).¹ The complaint alleges Respondent violated Section 8(a)(1) of the Act by discharging Putnam for engaging in the protected concerted activity of engaging in conversations with other employees about the need for a venue to report grievances against Respondent and the idea of a website for employees to discuss issues and problems concerning Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs by the General Counsel and the Respondent, I make the following²

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with an office and place of business in Normal, Illinois (Respondent's facility), has been engaged in the business of operating a retail department store. During the past calendar year, Respondent had a gross volume of business in excess of \$500,000, and purchased and received at its Normal, Illinois facility products, goods, and services valued in excess of \$50,000 directly from points located outside of the state of Illinois. Respondent admits and I find it is an employer engaged in commerce within the meaning of

¹ All dates are 2008 unless otherwise specified.

² In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth herein.

Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

5 At the time of the hearing, Respondent operated 23 department stores with locations in nine states. The events here took place at Respondent's facility known as the College Hill store in which there were about 100 employees. Putnam was employed by Respondent as an associate working in the women's shoe department until the time of his August 15, discharge.³

10 *A. The August 13 conversation between Putnam and Women's Shoe Department Manager Matt Machroli*

15 On August 13, Putnam was working in women's shoes along with women's shoes sales associates John Pugliani and Eric Stegman.⁴ Sales associate Mike Neri was working in men's shoes, which shares a common stock room with women's shoes. Putnam testified as follows: Around 6 p.m. on August 13, Putnam was standing at the register in the women's' shoes department. Putnam had just finished with a customer and was getting ready to do some merchandise requests (MR's). Pugliani was at the other register at the same counter, and they were about 5 feet apart. At that time, Putnam had a conversation with Machroli. There were no
20 customers present. Putnam testified, Machroli "came up, flopped some shoes down on the counter and said, put these up, kind of in a gruff tone." Putnam asked why Machroli always had him do these menial tasks and stated, "I think that's discrimination." Putnam testified he stated, "You're discriminating against me with a little bit of a lilt to my voice." He testified Machroli replied, "discrimination, huh?" Putnam denied using any profanity, and denied calling Machroli
25 an asshole. Putnam then testified as follows:

JUDGE FINE: Did Mr. Machroli say anything else?

THE WITNESS: No.

JUDGE FINE: Did you put the shoes away?

30 THE WITNESS: I did. Not at that point but I did.

JUDGE FINE: Did he see you doing it?

THE WITNESS: I have no idea.

JUDGE FINE: You got the impression that he wanted you to do it right at that time or -
- at the time was he giving you an order to do this now?

35 THE WITNESS: I guess probably, yeah, it would have been that he was giving it to me to do right then.

JUDGE FINE: But you didn't.

THE WITNESS: I didn't, no.

JUDGE FINE: Did you have something else to do?

40 THE WITNESS: Well, I was going to do some MR's.

JUDGE FINE: What's an MR's?

THE WITNESS: Merchandise Requests where you go and you make a phone call in the back and you call another store to try to get them to send you shoes for a customer.

JUDGE FINE: But he didn't know you were doing that.

45 THE WITNESS: I don't think so.

JUDGE FINE: And he just left? He just left?

THE WITNESS: Yes.

JUDGE FINE: And he didn't insist you put the shoes away, just that was it?

50 ³ Putnam began working for Respondent in August 2006.

⁴ Pugliani is sometimes referred to on the record and in this decision as JR.

THE WITNESS: That's correct.

JUDGE FINE: How long did the conversation last?

THE WITNESS: Forty seconds maybe, something like that.⁵

5 Putnam later testified:

Q Okay. Now, during any of these conversations with Machroli the evening of August 13th did he say anything to you about — to call him an asshole or any other profane name?

10 A No.

Q Okay. Did Machroli take any action against you the evening of August 13th for allegedly calling him a profane name?

A No.

15 Pugliani was called as a witness by the General Counsel. At the time of his testimony, Pugliani no longer worked for Respondent having quit without notice on August 23.⁶ Pugliani testified he heard the conversation between Putnam and Machroli at the register. He testified the conversation was late in the afternoon. Pugliani confirmed that he and Putnam were working on MR's at the same counter standing about 3 feet apart. Pugliani testified Machroli came up and asked Putnam to fix a shoe display. Putnam said, "Something like I'm in the middle of doing something and this is discrimination or something like just a little — kind of goofing around."⁷ Pugliani testified Putnam did not do what Machroli asked him to do. Pugliani testified Machroli walked away about 10 feet in front of them, and then Machroli returned in a few seconds and accused Putnam of calling him an asshole. Pugliani testified Machroli thought he had heard Putnam say something while he was walking away and Machroli's back was turned. Pugliani testified that he and Putnam were talking and that he did not hear Putnam call Machroli an asshole, or use profanity. Pugliani testified there were no customers on the sales floor or in the vicinity at the time of the conversation. Pugliani testified that Putnam heard Machroli accuse him of calling him an asshole, and Putnam responded, "No. I didn't say anything." Pugliani testified that no one from management ever asked him about the conversation between Machroli and Pugliani.

25 Pugliani initially testified, on cross-examination, that when Machroli walked back, he asked Putnam what did you say, and Machroli accused Putnam of calling him an asshole.

35

⁵ Putnam testified, on cross-examination, that he was joking when he accused Machroli of discrimination and that he did not feel Machroli was discriminating against him. Putnam testified he had socialized outside of work with Machroli in the past, and that from prior conversations he had had with Machroli, he thought Machroli knew he was joking.

40 ⁶ Pugliani testified he quit because he was upset about being brought to the office to meet with Floor Manager Tiffany Long and Machroli and being accused of something concerning his language in the back room. Pugliani testified that, during the meeting, he said it was "f-ing bullshit," and that "I f-ing quit." Pugliani testified he steamed out, went to the stockroom, grabbed his things and walked out. Pugliani testified that, after quitting, but before leaving the facility that day, Pugliani told Machroli in a separate conversation that "I hope you burn in hell with your kids,..." Pugliani testified that after he quit he returned to the store for a check or to pay a bill. He testified Regional Director Carrie Menke told him that he was not allowed back in the store as he had been accused of calling the store and using profanity towards management, which Pugliani denied.

50 ⁷ Pugliani testified he thought Putnam was joking "Because we were all friends." Pugliani testified that Putnam, Machroli, and himself became friends through their association at work.

Pugliani then changed his testimony stating, "He said, ass. He didn't say hole." Pugliani testified that Pugliani and Putnam were talking, and Putnam responded, "I didn't say nothing at all." Pugliani testified Putnam stated he was talking to Pugliani. Pugliani testified that he confirmed to Machroli that Putnam and Pugliani were talking.⁸ Pugliani testified that, during the conversation, Putnam received a direct order from his supervisor to perform an assignment with which Putnam did not comply. Pugliani testified Putnam was just smiling, and that he said, "I'll get to it later." Pugliani testified he did not see any frustration in Putnam and that it looked like he was joking. Pugliani testified that Putnam did not call Machroli an ass or any obscene names on the day of the incident. However, Pugliani testified that he did not tell Machroli that Putnam did not call him an ass or an asshole on August 13, but he stated that to Machroli in another conversation after Pugliani learned Putnam had been discharged.

Machroli testified that on August 13, around 7 p.m., he approached the cash registers and asked Putnam to put some shoes away and possibly to display another pair of shoes. He testified Putnam responded, "Well, why do you discriminate against me?" Machroli responded he just had Pugliani put some shoes away, and he did it, "Why can't you do the same?" Machroli testified then Putnam started walking towards the back room, and said, "What an asshole!" Machroli testified, "then I just walked away, back up to my position at the port, where I stand usually." Machroli testified that only Putnam, Pugliani and he were present. Machroli denied asking Putnam what Putnam had said to him. He testified he never asked Putnam whether he called him an ass or an asshole. When asked if anyone else was in hearing distance of the conversation, Machroli testified, "Possibly a couple customers in the sale room, ...". Machroli explained there was a sale room behind a wall and that "You can't see anybody in there." However, he testified there were customers in there as he saw two walk in. Machroli testified he did not have a loud exchange with Putnam, and he did not know if the customers heard what they said. The sale room is a room used to display sales merchandise.

Machroli testified that, at the time he heard Putnam make the remark, Machroli was at the front side of the cash register and Putnam was behind it. Machroli testified, "I was facing him and he was walking away from me." Machroli testified that Putnam was walking towards the stock room which was in the opposite direction of the wall behind which the customers were located. Machroli testified that Putnam was about 10 feet from him when he heard Putnam make the remark. Machroli testified that Putnam was around 6 feet from the hall where the customers were. Machroli testified that he and Putnam were about equal distance from the customers in that it was a triangle. Machroli testified that Putnam had his back towards Machroli, and that Putnam would have had his back to the customers too.

Machroli testified he was certain that Putnam called him an asshole on August 13. Machroli did not consider Putnam to be joking around. Machroli testified, "when anybody accuses me of discrimination, that is intimidating to me." Machroli testified he also felt intimidated by Putnam calling him an asshole, but "It was more the discrimination part of it." Machroli testified he did not feel Putnam was going to physically threaten him. Machroli testified he did not make the decision to terminate Putnam, and he was not asked his opinion on whether Putnam should be terminated. Machroli testified that on August 13, he never heard, observed, or became aware of a conversation by Putnam where Putnam discussed the need for

⁸ Pugliani gave an affidavit dated December 22. In it he stated, "Matt started to walk away, then asked Jeremy, 'What did you say?' Jeremy replied, 'I did not say anything to you.' Matt said he heard something. Matt then walked away." Pugliani testified he remembered Machroli asked if Putnam called Machroli an ass or an asshole at the time Pugliani gave the affidavit. However, Pugliani could not explain why he left that accusation out of his affidavit.

a venue or website to report grievances against Respondent.

5 Machroli testified he reported the incident with Putnam to Carmela Hurtado, the human resources manager, at the end of the night on August 13. The store hours were 10 a.m. to 9 p.m. Machroli testified that he told Hurtado that "I just wanted to let you know that Jeremy accused me of discrimination tonight, and also called me an asshole." Machroli testified the discrimination remark and the language on the floor where what made him report it to human resources. Machroli testified, that aside from this incident, he has never heard employees use profanity in an office or on the sales floor, and that he never said anything to an employee about their use of profanity.

B. The testimony concerning Putnam's conversations with co-workers about a website to air grievances

15 Putnam testified that he spoke to sales associates Stegman and Neri, on August 13 around 6:30 to 7:30 p.m., after Putnam's conversation with Machroli. Putnam testified his conversations with Stegman and Neri were fragmented in that they would leave the stockroom, check on customers, and then come back. Putnam testified he spoke with Stegman first. He testified that conversation started in the stockroom. No one else was present when the conversation began. Putnam testified as follows: Putnam approached Stegman and Putnam said that Stegman once asked him why people complained about this place so much. Putnam said do you get it now? Stegman said sure. Putnam said he had an idea on how to combat what was going on. Putnam said a lot of what Respondent does depends on people not talking to one another in that someone could get in trouble for something and it could be completely arbitrary. Putnam said the employees needed to talk to each other more in all of the stores. As the conversation continued, Putnam said he thought there should be a website for employees, like a message board, where they can share their stories. If they thought there was something Respondent did to them, or something was wrong, they could go on the website and let every one know what happened. Putnam said it would have to be completely anonymous or the employees would run into problems. Putnam said they could see if there was a pattern of treatment. Putnam told Stegman, if they could find some common stories and define a simple solution, then they could use the measure Respondent already had in place, which was to take their suggestions to store management to send to Jim Von Maur. Putnam stated no one used that system because they had to go through a floor manager. Putnam stated if they all do it at the same time, with something like delegates from each store, no one would bare the burden of being the one who was complaining. Putnam asked Stegman if he thought it could work, and Stegman said he did not know, and that he thought people would be worried Respondent would find out. Putnam asked if it was safe and anonymous would Stegman use it, and Stegman said he was not sure. Putnam cited an example in American history to Stegman by comparing how the British government treated the American colonists to how Respondent treats its employees. Putnam explained how each colony had started a group to report information to one another to be used to petition the British government. Putnam stated Respondent's employees could do something like that. However, Stegman was still non-committal.

45 Putnam testified he felt he was not making much headway with Stegman, so he brought Neri in on the conversation. Putnam testified the conversation with Neri mainly happened in the stock room, but there were times they went out to check on customers. Putnam testified he told Neri that Putnam had an idea for a website where employees could discuss what was going on at their respective stores, because Putnam did not think employees were aware of how pervasive the problems were. Putnam asked Neri if he would use a website like that, and Neri said he did not know, maybe, and Neri left the stock room at that time. Then Stegman and Putnam left the stock room and went to the floor.

Putnam testified that he and Stegman continued to talk on the sales floor near a flip flops display. Putnam testified he saw Machroli, who was about 20 feet away. Putnam testified he informed Stegman that maybe it did not have to be a website. Putnam testified his back was to Machroli while they were having the conversation. Putnam testified he continued to say it did not have to be a website, just a way for employees to discuss things they did not like about Respondent, because they should have a venue to report abuses or grievances. Putnam testified that, at that point, he looked around and Machroli was standing there clearly listening in on the conversation. Putnam testified Machroli was about an arm's length away. Putnam testified he felt confident Machroli heard the last thing he said to Stegman which was "we should have a venue to report abuse and grievances." Machroli did not react to the statement. Machroli could have heard something about a website, but Putnam did not know.

Putnam testified, that after Machroli approached them, Putnam gestured for Stegman to accompany Putnam to the stockroom, and they resumed the conversation in the stockroom. Putnam could not recall the specifics of what they said, but he testified Neri came into the stockroom and rejoined the conversation, and started telling Putnam about a time when he felt threatened by management for something nice he thought he had done concerning assisting a customer who had a broken leg, who management thought Neri had been dating. Putnam testified that, by Neri telling him this story, Putnam thought he had obtained Neri's support for the website idea. Putnam testified he was pretty sure Machroli did not hear his conversations with Neri. Putnam testified he resumed his conversation with Stegman back on the sales floor. Putnam testified at one point Stegman agreed with him and Stegman stated maybe the website could work like the smoking gun website. Stegman explained it was a consumer report website where people go to discuss a product's effectiveness. Putnam testified Stegman even suggested the website could be expanded to other retail chains. Putnam testified he was content with Stegman's answer so the discussion ended.

Putnam, on cross-examination, recounted the sequence of events on August 13, as follows: Machroli gave Putnam the instruction to return the shoes to the stockroom at around 6 p.m. It was around 6:30 p.m. that Putnam began his conversation with Stegman about a website or a grievance procedure, and that conversation lasted about an hour. Putnam thought Machroli overheard Putnam's statement that there ought to be a grievance procedure for associates at around 7 p.m.

Counsel for the General Counsel called Neri as a witness. Neri testified that around a few days to a week prior to Putnam's termination, he had a conversation with Putnam about a website. Neri testified the conversation took place in the back of the stockroom. Neri testified Putnam initiated the conversation. Neri testified "the conversation started maybe when I first got there, which would have been in the afternoon and like 1:00 p.m., 2:00." Neri testified that Putnam asked him if there were websites "about companies that like employees from other stores could talk about how things went down in their store," Neri testified the conversation was broken into segments as he and Putnam went out to the floor to wait on customers. Neri testified the conversation started around 1 p.m. and ended around 3 p.m. because it was broken up. He testified that the actual discussion was about 15 minutes in length. When later asked if the conversation took between 1:00 and 3:00 in the afternoon, Neri responded, "Yeah, I would say so. I'm not really sure on the timeframe there at that time but I'm pretty sure it was in the afternoon."

Neri testified Putnam said he wanted to know if there were places he could go on line to find out about the protocol at Respondent's other stores, and compare how things were with the store at which they worked. Neri testified he responded he thought there were places on

line because of friend who worked for another company used to brag on line about how well their day had gone, and how certain things were at that store pertaining to sales goals and the like. Neri testified the website Putnam was talking about could have been for positive or negative feedback. Neri testified Putnam was curious as to how the rules were applied at other stores compared to the one where he worked. Neri testified Putnam did not say it was to make complaints. Neri testified he responded that he was sure such websites existed, and that if Putnam wanted to invest the time in such a website he could do so. Neri did not recall anything further being discussed in these conversations. Neri testified when he spoke to Putnam about a website, no one else was present. Neri testified Putnam did not make any statements about creating a website. He testified, "From what I know he was just basically wanting to know if one was out there." Neri testified Putnam did not share with Neri why he was curious to find out whether there was a website.

C. Putnam's other August 13 conversations with Machroli

Putnam testified that, on August 13, he had another conversation with Machroli at around 8 p.m. Machroli called Putnam over on the sales floor with no one else present. Machroli asked Putnam if he valued his job. Putnam testified, "I said to him, if by value you mean the ability to take care of one's family, sure; but if you mean willingness to subrogate your own values and make enemies of coworkers at the whims of management then you have your answer and I punctuated it with a little flick of my wrist."⁹ Putnam testified that ended the conversation. Putnam testified that around 9 p.m., Machroli asked Putnam if he wanted to go home early. Putnam asked why, and Machroli said because you have been here the longest. Putnam testified he responded, "hey, thanks, buddy and I patted him on the arm and I went on my merry way home." Putnam testified he was not paid by the hour, but rather by a straight commission. Putnam testified he did not lose out on sales by leaving early, because they were already closed. However, he testified that protocol was for all the associates to stay around until 9:15 p.m. or a little later.

D. Respondent's investigation and decision to discharge of Putnam

Tiffany Long is the floor manager at the College Hill store. Long testified Machroli told her on August 14, that there was an incident between Machroli and Putnam on Wednesday evening August 13. Long testified Machroli told her that Putnam called Machroli an asshole on the sales floor for telling Putnam to put some shoes away, and that Putnam also told Machroli that he felt discriminated against. Machroli then asked how Putnam felt discriminated against, stating that he had asked Pugliani to bring some shoes out. Machroli stated he asked both of them to do the same thing, and that was when Putnam told Machroli that he was an asshole on

⁹ Putnam explained Machroli had gotten in trouble 2 or 3 weeks earlier, and since that time he was acting differently to the associates. Putnam testified a customer wrote complaint about associates standing around talking and no one greeted the customer. Putnam testified he heard that Machroli, along with the two assistant department managers, had gotten into trouble over the complaint. After his meeting with management, Machroli began acting coldly towards the associates, and there was a rumor that Machroli's job had been threatened. Putnam testified his comments were in response to Machroli's change in attitude towards the associates. Putnam testified that, prior to that time, he and Machroli had been friends, and had socialized together on a few occasions outside of work. Putnam testified that it was because of the change in attitude of the managers to the associates, which was discussed among the associates, that Putnam felt something needed to be done. Putnam testified this is why he came up with the idea of a grievance procedure.

the sales floor. Long testified she told Machroli that discrimination is a big word, and she wanted to touch base with Putnam before they proceeded with the name calling inquiry. Long testified the discrimination aspect was a priority because Respondent has an anti discrimination policy which they take seriously.¹⁰

5

Long testified that following her conversation with Machroli on August 14, she notified Regional Director Carrie Menke by email, and then interim store manager Laura Neugebauer by voice mail about the incident. Neugebauer was not at the store on August 14. Long testified the email to Menke was marked urgent for two reasons, for Putnam's conduct and because the word discrimination was used. Long testified she emailed Menke because that is the first step relating to "any kind of behavior that is more serious, or an investigation, for any type of discrimination, we would go through a Regional Director immediately, ...". In her email to Menke, Long stated she spoke to Machroli and his story was as follows:

10

Close to 9 pm, Matt was checking tables to see how the closing duties were coming and realized two things, one that we were missing a style of Uggs and two that we had a Josef Seibel double displayed. JR and Jeremy were the closers so he asked JR to grab the Uggs and then Jeremy to put away the extra pair. Jeremy asked Matt, "Why are you discriminating against me?" Matt replied, "How am I discriminating? JR is grabbing a pair for display and now I am delegating for you to put a pair away." Jeremy headed towards the back and on the floor said to JR, "Matt is an a**hole." JR just looked at Matt. Matt feels like he is not comfortable working with Jeremy. Matt told him he could leave right at nine so JR and him would do registers. Jeremy asked, "Why do I get special treatment?" Matt replied, "you were the first one in so you can leave first."¹¹

15

20

25

Long testified Putnam did not work on August 14. Long testified she had one conversation with Putnam about the incident before he was terminated. The meeting with Putnam took place on Friday morning, August 15. In attendance for the meeting were Long, Hurtado, and Putnam.¹² Long testified the initial part of the conversation with Putnam was about discrimination. Long testified Putnam said he did not feel discriminated against in a legal sense. Rather, when Putnam was asked the basis on which he felt discriminated against, Putnam responded, "Oh, I just feel like he picks on me. He used to be like my friend and now he is a manager." Long told Putnam that Respondent's policy required her to ask him if he felt discriminated against based on any of the protected classes. Long's notes reveal that she went through items such as age, national origin, race, gender, religion, and disability, to which Putnam answered there was no discrimination based on those reasons. Long testified she

30

35

¹⁰ Machroli testified he first discussed the incident with Long on August 14, when he came to work. Machroli testified he told Long, "I just wanted to make you aware that Jeremy accused me of discrimination; did call me an obscenity on the floor, and that was pretty much the conversation."

40

¹¹ Long testified Putnam's prior disciplinary record was summarized in the email to Menke because they are trained to pull the file, and provide the store manager and regional director a list of the employee's prior history.

45

¹² Both Long and Hurtado took notes. Hurtado's notes were the more detailed of the two sets, as Long testified she took notes "based on the discrimination factor. I stopped taking notes after that." Hurtado did not testify, however, Long testified that Hurtado's notes were fairly accurate but there were a few sentences that are not complete. Long testified there is no reference in either set of notes of customers being on the sales floor at the time of the alleged asshole comment. Long testified that no one from management interviewed Pugliani (JR) before Putnam was terminated.

50

concluded that Putnam had not been discriminated against. Long testified she asked Putnam three times during the conversation why he used the word discrimination and Putnam said, "Well, we used to be kind of buddies. I guess I don't feel discriminated, and I kind of feel silly that we are doing this, and I feel awful that Matt feels bad about it." Long testified that she said,
 5 "Well, we have to, you know, do this, because this is more serious now, because we are at a point where there has been words exchanged," and I said, "Specifically, on what basis." Long testified, Putnam said, "Again, I just feel like he was telling me to put shoes away, like he is picking on me." Long told Putnam it was Machroli's responsibility to delegate duties.

10 Long testified that, during the conversation, she asked Putnam if he called Machroli an asshole, and Putnam responded, "I don't recall what I said." Long testified that Putnam never denied calling Machroli an asshole. Hurtado's notes of the meeting state, in pertinent part:

15 T. No Matt's responsibility is to delegate and ask you to do things after you get done with a customer. Did you (call) Matt a name on the floor?

J. No I don't recall calling Matt a name

T. You didn't called matt an A..hole

J. No I don't recall saying that to anyone

20 Long testified Putnam did not say anything about conversations with other employees about a grievance procedure or a website for employees to discuss problems during their August 15 meeting.

25 Putnam testified that before they opened at 10 a.m. on August 15, Putnam was told to go back to the office. Long and Hurtado were there and they told Putnam they were going to write down everything that was said. Long did all of the talking for Respondent during the meeting. Long told Putnam that Machroli said that Putnam said he felt discriminated against, and she asked if that was true. Putnam testified that "I said I think I said something about that ...". Putnam testified that Long asked if Putnam was discriminated against based on race, sex
 30 or other such qualities to which Putnam responded no. Putnam testified, "then I said well, you know, maybe I feel a little singled out personally at times and then Tiffany -- she went back and said, so do you feel discriminated? And I said well, probably not as you're meaning it, so no but this isn't really a concern of mine. I don't know why Matt would have brought this up and she said, well, if you have specific grievances to report you need to come to us and I just kind of
 35 said, oh, okay, all right and at that point I thought we were done." Putnam testified that then Long asked if Putnam called Machroli a name. Putnam asked what name, and Long said a cursed word, then Long said the word "asshole." Putnam testified he asked at what point in the conversation to which Long said she did not know. Putnam testified, that "I kind of set back and thought about it. I don't think so. I don't know why I would have, you know." Long then asked
 40 Putnam if he had ever cursed on the floor. Putnam testified, "my response was, you know, Matt and I joked around all the time but -- and sometimes in a faux-serious tone but I wouldn't have called him, you know, that name."

45 Putnam testified he did not recall Machroli's asking him to put the shoes in the stockroom being discussed with Hurtado and Long. Putnam testified the conversation centered on the discussion about discrimination, and during that discussion Putnam supposedly called Machroli an asshole. Putnam testified he told Long he did not remember using that term. Putnam testified he did deny using that term, "but I also, at first, you know, said I didn't recall it because I was -- you know, I was trying to think, you know, is there any way I could have called
 50 him, you know, and so -- but no, I denied it then -- I just said I didn't recall." He testified that later in the discussion he denied using the term.

Long testified that following her meeting with Putnam, she met with Machroli on August 15. Long testified that at the beginning of the meeting, it was just Machroli and Long. Then Machroli used the word intimidated, and Long stopped the meeting to get Hurtado to attend and they started documenting the conversation. Long testified, that during the meeting, Machroli told her he was working on the closing duties, and he delegated to Pugliani or Putnam, that one was to bring some displays out, and one was to put some displays away. Machroli stated that Putnam made the comment, "Why are you discriminating against me." Machroli asked how he was discriminating against Putnam in that he had also given Pugliani an assignment. Long testified that Putnam "didn't respond, and turned around to do it, and said, Matt is an asshole." Long asked if Putnam meant for Machroli to hear the remark, and Machroli said he was definitely close enough so he did not know how he could not hear it. Machroli told her it was by the cash registers. Long asked if there were customers present at the time, and Machroli said there were a few in the sale room. Machroli then said, "I don't know if I can work with Jeremy. I am intimidated by him." Long testified that is how the conversation led to the second part when she had Hurtado sit in the conversation.¹³

Hurtado's notes of the August 15, meeting with Machroli read, in pertinent part:

T He doesn't remember calling you that name, or even saying that, he wants to work it out with you, has that been a part of how we talk to them out there.
M Maybe sometimes.
T Have you ever engaged on that conversation
M Not that I'm aware of that

The notes reveal that Machroli was asked if he felt he was in danger, and he replied, "I feel intimidated."¹⁴ The notes state that Machroli stated that Putnam went in the back, "he was really angry ready to jump on Mike." Machroli later stated, as reflected in the notes, "Every time I asked Jeremy to do anything he's not willing to do anything that I asked him to do." The notes reveal Long asked Machroli if he was willing to talk to Putnam with another member management present to try and work things out, and Machroli replied he was willing do to so.

Long testified that, after she met with Machroli, Long phoned Menke with Hurtado sitting in on the conversation. The call took place around 1:30 or 2 p.m. Long told Menke that Putnam did not feel discriminated against in the legal sense. Rather, he felt Machroli was picking on him

35

¹³ Machroli confirmed he had a conversation with Long and Hurtado on August 15. Machroli testified he was asked a series of questions, the first of which was whether he felt intimidated to which he answered yes. Machroli was then asked to describe the incident. Long told him that she had previously spoken to Putnam. Machroli testified there was no discussion about Putnam wanting a grievance procedure or a website for Respondent's associates. Machroli testified that Long did not tell Machroli that Putnam denied calling him an asshole.

40

¹⁴ Long testified the note taking began when Machroli stated he felt intimidated. Long testified she had been talking to Machroli about 15 minutes before someone started taking notes, and the whole conversation lasted about 30 minutes. Long testified she had two conversations with Machroli prior to Putnam's discharge. Long testified she thought it was during both conversations that Machroli told her there were customers on the floor. Long testified this meant there were customers in hearing range of the conversation. At another point in her testimony, Long stated, "Both Jeremy and Matt had stated to me both that there were a few customers in our shoe saleroom on the floor. They weren't sure how many." Long admitted there were no reference to customers being on the floor in the notes of interviews made during her investigation.

50

when he asked him to put shoes away. Long told Menke that Putnam did not deny calling Machroli an asshole, that he said he did not remember, and that he did not remember if customers were there. At that time, Neugebauer walked into the room. They told Menke that Neugebauer was there, that they going get her caught up, and call Menke back. Long then showed Neugebauer the paperwork that had been completed as part of the investigation, which included notes of the conversations pertaining to the investigation. Neugebauer felt they had taken all of the steps typically taken. They then spoke to Menke, who said they would be separating Putnam's employment, and she asked if the others were in agreement and they all said yes. Long testified the reason Menke gave for the termination was for the offensive behavior on the floor towards a co-worker; citing items 2 and 3 listed in Respondent's Code of Conduct. Long testified that Menke made the decision to terminate Putnam, and that it can only be done by the Regional Director. Long testified that she did not make a recommendation, rather she concurred with Menke's decision. Long denied knowing, prior to Putnam's discharge, that he had conversations with employees about the need for a venue or website for employees to report grievances. Long testified that, during her conversations with Menke and Neugebauer, there was no discussion of Putnam engaging employees in conversations relating to a grievance procedure, or about a website for associate grievances.

Menke testified a regional director, regional manager, and a senior manager have the authority to terminate a sales associate. A store manager does not have the authority to discharge. Menke testified she has the final say on terminations for the stores for which she is responsible. Menke testified she was never informed in the conversations leading up to Putnam's discharge that Putnam or his co-workers engaged in conversations regarding a need for a grievance procedure for associates, or that Putnam had discussions with employees about a website to discuss grievances or work problems.

Menke testified Putnam was discharged because on August 13th, he was involved in a conversation with his department manager, in which he called the department manager an asshole. Menke testified that is not tolerated under Respondent's Code of Conduct. Menke testified that she and Neugebauer made the decision to discharge Putnam. Menke testified she did not consider any prior disciplines concerning Putnam in making that decision. Menke testified she knew Pugliani was present for the conversation leading to Putnam's discharge. Menke knew that neither Long, Neugebauer, or Hurtado talked to Pugliani. Menke testified she did not consider this to be important because, "At that time, based on the investigation that Tiffany had conducted, Jeremy was not denying that he had said it." Menke testified that Long, "had covered the investigation notes with me, piece by piece, until I knew exactly what Jeremy said," Menke testified she did not recall hearing a statement from the notes that Putnam denied ever saying Machroli was an asshole. Menke testified, "He never came out and said, 'I did not call Matt an asshole.'" Menke testified she did not see the termination slip that Long authored concerning Putnam prior to his termination.

Long identified Respondent's "Code of Conduct," which reads in pertinent part:

All employees are expected to conduct themselves in a responsible, professional manner. Violation of the established guidelines for employee conduct will result in disciplinary action, including discharge, as deemed appropriate by Management. However, all employees of Von Maur are at will employees and therefore may be discharged without cause. There may be conduct in addition to those listed below that could result in termination.

The Code of Conduct goes one to list 20 numbered items which can be the cause of disciplinary action, including the following:

2. Use of loud or offensive conversation on the selling floor or in the presence of customers.
3. Unprofessional conduct with customers or coworkers.

5

* * *

17. Discussion of your wage/salary with anyone other than the Human Resources or Payroll Office during work hours.¹⁵

10 Long signed and authored Putnam's termination paper dated, August 15. It reads that Putnam was terminated for misconduct and states that, "On August 13, 2008, Jeremy used offensive language toward the Department Manager in the presence of a Department Manager, an associate and customers on the selling floor. This is a violation of the Von Maur code of conduct; therefore we are terminating his employment." Neugebauer signed the form as a witness. It is marked that Putnam refused to sign the form. Long testified Machroli is the department manager referred to in the form, and Pugliani was the associate who was referenced. Long testified she was not sure how many customers were present on the selling floor. Long testified Putnam violated rules 2 and 3, cited above, of Respondent's Code of Conduct as the reason for his termination.

20

E. The discharge meeting

Putnam testified that he met with Neugebauer and Long in the office after lunch on August 15. When Putnam sat down, Long brought out Putnam's termination form. Long said after further research they decided to terminate Putnam. Putnam asked why. He testified Long said they believe Putnam called Machroli a name, which Putnam denied. Putnam said this is wrong and asked what this was really about. Neugebauer said the decision has been made, that they felt strongly about this and there was no other reason. Putnam testified Long said Putnam did not deny calling Machroli a name, and Putnam responded that he absolutely denied it. Long said well you have said things like that before. Putnam said he was being mischaracterized, and he asked that Hurtado be brought into the room. However, Neugebauer said the executives were in agreement. Putnam asked for his employee file, and Long presented him with his three prior write-ups.¹⁶ Putnam testified he gave up arguing. Putnam was given a copy of his termination form at the meeting. Putnam testified he did not call Machroli an asshole on August 13, or at any other time.

35

Long testified she served as a witness when Neugebauer communicated the termination to Putnam. Long testified that when Neugebauer told Putnam he was terminated, he said, "You

40 ¹⁵ Counsel for the General Counsel cited item 17 at the hearing as background evidence of animus by Respondent towards Putnam's conversation with co-workers about establishing a grievance or complaint forum on the internet. However, Counsel for the General Counsel specifically stated at the hearing that the maintenance of item 17 in Respondent's Code of Conduct was not being alleged as an independent violation of the Act. The lawfulness of item 45 17 was not addressed in the parties' briefs, and in view of Counsel for the General Counsel's explicit disclaimer, I do not find it appropriate to make a legal finding as to the lawfulness of the maintenance of this rule.

50 ¹⁶ It was stated on Putnam's August 15 termination form that he had three warnings. Prior to his discharge, Putnam had received documented warnings dated, August 29, 2007, November 16, 2007, and May 24, 2008. The first involved poor customer service and tardiness, the second was for substandard work, and the third was listed for substandard work although the body of the write up dealt with absenteeism and tardiness.

don't want to do this. Trust me, you don't want to do this." Putnam asked to see his prior warnings. Neugebauer showed him the warnings, and stated this has nothing to do with the warnings, it has everything to do with his conduct on the floor. Long testified the prior disciplines did not have anything to do with Putnam's termination. Long testified that Putnam's actions on August 13, on the sales floor when customers were present was a terminable offense, and that someone could have been a 10 year employee with a clean record and been terminated for it. Long testified Respondent does issue verbal and written warnings to employees. She testified Respondent sometimes has a progressive disciplinary system, depending on the nature of the conduct. Long testified there is no rule about how many warnings an employee will receive prior to termination.

F. The General Counsel's evidence of disparate treatment

Pugliani worked for Respondent from May 2007 to August 23, 2008, when Pugliani quit without notice. Pugliani testified that Jeremy Gray was the manager of the women's shoe department prior to Machroli. Pugliani received a written warning for absenteeism and tardiness on August 24, 2007. Gray signed off on the warning for management, with someone named Ashley signing off as a witness.¹⁷ Pugliani refused to sign it. Pugliani testified he met with Gray and Ashley when he was given the warning. Pugliani testified that, during the meeting, he said this is mostly bullshit referring to the absentees and tardiness. He said he had told them he had a back problem, which was the reason he could not make it in all of the time. He testified that during the meeting, he stated, "This is pretty much crap, bullshit. I could say a few other things.- - fucking -- " Pugliani testified he received an undocumented verbal warning from Gray for making obscene remarks. On cross-examination, Pugliani stated he told Gray that this was bullshit and he was fucking sick of this bullshit, crap, or words to that effect.

Pugliani received a warning dated August 30, 2007, for attitude which was signed by Gray, and witnessed by Sarah Borland, the then floor manager. Pugliani met with Gray and Borland concerning the warning. However, prior to the meeting, he had a conversation with Gray in which Gray asked Pugliani to come to the office to discuss Pugliani's performance. Pugliani testified he responded "cut the shit" that his performance was fine. Pugliani testified he was very aggravated about the way Gray talked to him. Pugliani testified the conversation was on the floor, and Pugliani had customers on the floor.¹⁸ Pugliani testified Gray did not say anything in response, and then they went back and had the meeting with Borland. Pugliani testified that, during the meeting, things heated up and he called Borland a "fucking bitch". He testified he also gave Gray "a few words and I stormed out, said I quit." Pugliani testified he called Gray, "a fucking cock sucker". Pugliani testified Gray started crying during the meeting. Pugliani testified he tried quitting until the then store manager Maggie (Webb) came in. Pugliani testified Webb calmed him down, and told him he could not use that type of language. Pugliani testified his employment was not terminated, and in fact they talked him into staying on. Pugliani testified that Pugliani was very loud in his conversation with Gray and Borland and that Long's office was next door. Pugliani testified Long told him that she heard Pugliani screaming. He testified that Webb also heard him which was why Webb came into the office. Pugliani testified when he tried to quit, Webb talked him into staying by stating please go back to the floor, that he was a good guy and a great salesperson. Pugliani testified Webb issued him an

¹⁷ Pugliani could not recall Ashley's last name.

¹⁸ On cross-examination, Pugliani testified that Gray wanted him to come back for a meeting, and Pugliani's response was this is a crock of shit, I have customers on the floor. Pugliani testified there were about 10 customers waiting for Pugliani. Pugliani did not know if the customers heard his conversation with Gray.

undocumented verbal warning about his language.¹⁹

5 Pugliani received a written warning, May 15, 2008, for substandard work. Pugliani met with Machroli and Long when he received the warning. Pugliani testified the warning was over tardiness, and that he was “pissed off” in that they knew he had a back problem. Pugliani testified that during the meeting he said, “why am I being in this shit again? Why is this shit happening? This is bullshit and I was aggravated...”. Pugliani testified that, during the meeting, he thought they told him not to swear. However, he was not discharged. On cross-examination, Pugliani testified, “I said this is bullshit, why the hell am I here — damn it, things like that.” He testified he had back injuries which were the reason he was tardy and absent.²⁰

15 Pugliani described an incident taking place around June 2008, where a customer referred to some teenagers as fucking bitches. Pugliani’s response was teens can be bitchy and they both laughed about it. Pugliani testified an assistant manager asked him how he could talk to a customer with that type of language. Pugliani responded the customers talk to him that way, that he was selling her something, and that he went to the level of the customer in the use of his language. Pugliani testified that Machroli then approached him and told him he could not talk to customers using that language. Pugliani testified Machroli was close enough to overhear the conversation. Pugliani testified there were other occasions where Machroli verbally warned him over the use of profanity. He testified Long and Gray have also warned him. He testified 20 he was also warned by Sarah, the store manager, and Mike Pasewald, the manager of men’s shoes. Pugliani testified he never received any written warnings. Rather, he was just verbally told to watch his language.

25 Pugliani testified he heard Machroli sometimes use inappropriate language at work. He testified that Machroli has used words such as “damn, shit or a girl will be walking by, a nice ass, you know, just kind of something like that and other anatomies of the woman.” Pugliani was more descriptive in his testimony of other pronouncements that he heard Machroli make about some women who were customers and who were on the sales floor. Pugliani testified 30 some of the customers turned around, and some probably heard them talking. None came up and said anything. Pugliani testified he also heard Store Manager Neugebauer say, “it’s busy day and — shit’s like crazy she said.” He testified customers were on the floor at the time, although he did not think the customers heard. As set forth in detail above, Pugliani testified he quit under duress following an incident on August 23, 2008, after which he was barred from the store for allegedly calling the store and cursing at management. He admittedly, after quitting, 35 told Machroli, that, “I hope you burn in hell with your kids...”

40 Contrary to Pugliani, Long testified that Pugliani never cursed in her presence. Long testified “the worst word that I ever heard him say was “sucks,” and I said to him, “J.R., that is not appropriate,” and he said, “Well, that is not a cuss word,” and I said, “No, but it is not very positive or professional either.” Long testified this took place in the stockroom when Pugliani dropped some shoes. Machroli testified that, aside from the incident with Putnam, he has never heard employees use profanity in an office or on the sales floor, and he has never said anything to an employee about their use of profanity.

45

¹⁹ Pugliani also received a written warning dated December 18, 2007, relating to tardiness and absenteeism under the heading of substandard work.

50 ²⁰ Pugliani received a written warning dated June 6, 2008, for substandard work, which cited his history of warnings and threatened termination without immediate and consistent improvement.

The General Counsel also introduced into evidence a series of warnings issued to seven other employees in an effort to establish disparate treatment concerning Putnam. G.C. Exh. 12 contained five written warnings pertaining to employee A.²¹ Employee A received warnings dated or issued on April 30, May 29, July 24, August 20, and November 14, 2008, relating to substandard work citing tardiness and sales. Employee A was not discharged as a result of the warnings. G.C. Exh. 13 relates to employee B who received warnings dated December 22, 2007, January 11, March 10, April 30, June 26, and July 23, 2008, citing tardiness. Employee B was discharged on July 31, 2008, for tardiness with the termination form citing employee B's prior warnings. G.C. Exh. 14 relates to employee C, who received warnings dated May 4, October 20, and December 21 in 2007; and dated June 2, September 19, October 18, and November 14 in 2008. The warnings related to tardiness, absenteeism, or substandard sales performance. Employee C was not terminated as a result of the warnings. G.C. Exh. 15 relates to employee D, who received seven written warnings between June and November 2008, relating to sales, tardiness and absenteeism. Employee D was not discharged as a result of the warnings. G.C. Exh. 16 relates to employee E, who received four warnings between September 2007 and December 2008, relating to attendance and/or customer service, one of which related to arguing over a customer with a co-worker and another for failing to follow up on a customer's requests. Employee E was not discharged as a result of the warnings. G.C. Exh. 17 relates to employee F, who received six warnings between January and August 2006 relating to sales performance. Employee F was not discharged as a result of the warnings. G.C. Exh. 18 relates to Employee G, who received five warnings between January and June 2008. The warnings related to tardiness and one to tardiness and procedures. Employee G was not discharged over the warnings.

G. Credibility

I did not find Putnam to be the most credible of witnesses. He testified that, around 3 weeks prior to the August 13 incident leading to his discharge, there was a customer complaint concerning sales associates which caused Machroli and other members of management to adopt a change in the way they treated the sales associates. Putnam testified this change in attitude by management was a concern to and discussed amongst the associates and it led to Putnam's idea to discuss establishing a grievance procedure on the internet with fellow associates Neri and Stegman.

It is undisputed in the testimony of Putnam, Pugliani and Machroli that during the evening of August 13, Machroli approached Putnam at the cash register in the presence of Pugliani and asked Putnam to put some shoes away. Putnam testified he asked Machroli why he was always asking him to perform menial tasks and he accused Machroli of discriminating against him. Both Putnam and Pugliani testified Putnam was just joking around in his response to Machroli, stating that they had all been friends. Machroli, on the other hand, credibly testified that he thought that Putnam was serious. I do not credit Putnam or Pugliani that Putnam was joking or that Pugliani thought he was joking. Putnam admitted that he had been upset by his treatment by Machroli based on Machroli's recent change in attitude towards the associates. Moreover, Putnam testified he had received a direct order as to an assignment from his supervisor, in which his supervisor expected Putnam to immediately respond. However, Putnam did not act on the assignment, and he gave the supervisor no explanation for his failure to do so, other than accusing his supervisor of discriminating against him. Putnam testified he was working on MR's at the time of Machroli's instruction, but Machroli did not know Putnam

²¹ I see no reason to publish the names of the employees in this decision in the circumstances presented here.

was doing this. Given Putnam's view of Machroli's perceived change in attitude towards him, his failure to follow a direct order, I do not credit Putnam or Pugliani's testimony that Putnam was not serious or was acting in a manner suggesting that he was not serious when he accused Machroli of discriminating against him.

5

Putnam, during his testimony, denied calling Machroli an asshole, or that Machroli accused him of calling him an asshole during their August 13, exchange. I do not credit this testimony. In this regard, Pugliani, who testified in support of Putnam, testified that after Putnam accused Machroli of discrimination, that Machroli walked away, but within a few seconds Machroli returned and accused Putnam of calling Machroli an asshole. Machroli testified that he asked Putnam to put some shoes away, and Putnam accused him of discriminating against him. Machroli responded that he had just given Pugliani an assignment, that he complied, and he asked why Putnam could not do the same. Machroli testified that Putnam then started walking towards the back room and stated, "What an asshole!" Machroli denied asking what Putnam had said to him, or asking Putnam whether he called him an asshole. Machroli testified he was certain Putnam called him an asshole on August 13, and that he did not consider Putnam to be joking around. Machroli testified in a credible fashion concerning this exchange, and I have credited his testimony concerning the event.

10

15

20

Pugliani's testimony establishes that the term asshole was used during the conversation between Putnam and Machroli on August 13. In this regard, either Putnam called Machroli an asshole, or Machroli accused him of it, or both events took place. Either way Pugliani's testimony undercuts Putnam's claim that the term was not used, as well his claim to Long that he could not recall or did not know what she was talking about, when she inquired about it during her investigation on August 15. In crediting Machroli as to the event of August 13, I also did not find Pugliani to be the most honest of witnesses. Pugliani admitted testifying in his pre-hearing affidavit that, "Matt started to walk away, then asked Jeremy, 'What did you say?' Jeremy replied, 'I did not say anything to you.' Matt said he heard something. Matt then walked away." Pugliani testified he remembered Machroli actually asked if Putnam called Machroli an ass or an asshole at the time Pugliani gave the affidavit. However, Pugliani could not explain why he left that out of his testimony in the affidavit. Pugliani was aware that this was an important omission from his affidavit as Pugliani went on to state in the affidavit, "I was right next to Jeremy, and I never heard him call Matt an asshole." Thus, Pugliani was aware, at the time he gave the affidavit, that he left out a key element from Machroli's inquiry to Putnam, because the dispute over the term led to Putnam's discharge. I have concluded Pugliani's omission in his affidavit was intentional, and not mere oversight. In this regard, Pugliani had an axe to grind against Respondent in that he quit in an inflammatory fashion, and was barred from returning to the store.

25

30

35

40

Machroli's credited testimony as to the August 13, conversation, as corroborated by Pugliani's admission that Machroli accused Putnam of calling him an asshole at that time, establishes that Machroli's assertion that Putnam called him an asshole on the work floor was not the result of any protected activity of Putnam's. Rather, Pugliani's admission serves to confirm Machroli's testimony that Putnam did indeed call Machroli an asshole during their exchange on August 13. In this regard, Putnam claimed his exchange with Machroli took place around 6 p.m., and that it was only after the exchange that Putnam began to discuss the possibility of a grievance procedure using the internet with co-workers Stegman and Neri. Putnam testified those conversations took place around 6:30 to 7:30 p.m., and that he thought Machroli heard his conversation with Stegman about it around 7 p.m. However, General Counsel witness Neri testified that his conversation with Putnam concerning a website was in the afternoon, stating he thought it was between the hours of 1 and 3 p.m.

45

50

As set forth above, I did not find Putnam to be the most reliable of witnesses. Moreover, key aspects of Putnam's testimony were not corroborated and in fact were undercut by the testimony of the General Counsel's other witnesses. Considering the demeanor of the witnesses, and in the face of the Machroli's credible denial, I have concluded Machroli did not overhear Putnam discussing the need for a venue to report abuse and grievances with his co-workers as Putnam claimed.

H. Analysis

In *Benjamin Franklin Plumbing*, 352 NLRB 525 (2008), in finding the discharge of two employees violated Section 8(a)(1) of the Act, the Board approved the use of a *Wright Line* analysis for Section 8(a)(1) allegations that turn on motive. See also, *General Motors Corp.*, 347 NLRB No. 67, fn. 3 (2006) ("*Wright Line* applies to all 8(a)(3) and 8(a)(1) allegations that turn... on employer motivation"). In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983), the Board established a framework for deciding cases turning on employer motivation. To prove that an employer action is discriminatorily motivated and violative of the Act, the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *Wal-Mart Stores*, 340 NLRB 220, 221 (2003). If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089.

Putnam began working for Respondent in August 2006. At times during his employment, Putnam and co-worker Pugliani socialized outside of work with their supervisor Machroli. Putnam testified that around late July or early August, there was a customer complaint concerning service by the sales associates. Putnam understood there was a management meeting concerning the complaint, and he testified that following the meeting there was change in attitude by management, including Machroli, as to the way they treated sales associates. Putnam testified the change was discussed by and a matter of concern amongst the associates, including Putnam.

Machroli credibly testified that on August 13, around 7 p.m., he approached the cash registers and asked Putnam to put some shoes away and possibly to display another pair of shoes. He testified Putnam responded, "Well, why do you discriminate against me?" Machroli responded he just had Pugliani put some shoes away, and he did it, "Why can't you do the same?" Machroli testified Putnam started walking towards the back room, and said, "What an asshole!" Machroli testified, "then I just walked away, back up to my position at the port, where I stand usually." Machroli testified that only Putnam, Pugliani and he were present for the conversation. When asked if anyone else was in hearing distance of the conversation, Machroli testified, "Possibly a couple customers in the sale room, ...". Machroli explained there was a sale room behind a wall and that "You can't see anybody in there." However, he testified there were customers in there as he saw two walk in.²²

²² Both Pugliani and Putnam denied there were customers in the area. However, I credit Machroli that he saw a couple of customers walk into the sale room. Pugliani and Putnam may not have seen them walk in. Machroli admitted that his exchange with Putnam was not loud and that he did not know whether the customers heard the remark. I do not find that it was

Continued

Putnam admitted that he accused Machroli of discrimination and that he did not follow his supervisor's directive of putting the shoes away at the time of the incident. Putnam denied calling Machroli an asshole, and he denied that Machroli accused him of such at the time.

5 Putnam's testimony was undercut by General Counsel witness Pugliani, who admitted that Machroli accused Putnam of calling Machroli an asshole at the time of the incident. Pugliani claimed that Putnam denied it, but that Pugliani did not himself state that Putnam did not do it in Putnam's defense. I have found for the reasons stated in the credibility section as well as the witnesses' demeanor that Putnam and Pugliani's testimony relating to the August 13, incident
10 was unworthy of belief. First, Pugliani's admission that the word asshole was used in the exchange as being directed by Putnam towards Machroli serves to corroborate Machroli's testimony that he thought Putnam called him an asshole at the time of the event. Second, Putnam's denial that Machroli made the accusation that Putnam called him an asshole, is undercut by Pugliani's version of the incident, which serves to corroborate Machroli. In any
15 event, Machroli testified in a credible fashion that Putnam used the disputed term against him during the conversation. Given, Putnam's admitted antipathy towards Machroli, his accusing him of discrimination, and his admitted refusal to follow the supervisor's directive, I have credited Machroli's testimony that Putnam made the remark and that Putnam was serious when he did so, over Putnam and Pugliani's claim that Putnam was joking during the exchange.

20 Putnam testified that later on the night of August 13, he had another conversation with Machroli at around 8 p.m. Machroli asked Putnam if he valued his job. Putnam testified, "I said to him, if by value you mean the ability to take care of one's family, sure; but if you mean willingness to subrogate your own values and make enemies of coworkers at the whims of
25 management then you have your answer and I punctuated it with a little flick of my wrist." Putnam attributed his remarks to Machroli as resulting from Putnam's perceived change in Machroli's attitude towards the sales associates following a customer complaint. Thus, Putnam's anger towards Machroli was exhibited by his actions and statements throughout the evening, serving to further substantiate Machroli's claim that Putnam called him an asshole
30 when he was given an assignment. Given the fact that Putnam's remarks were in response to a directive by his supervisor, I find that they were not only serious in nature but were insubordinate.

35 Machroli credibly testified, "when anybody accuses me of discrimination, that is intimidating to me." Machroli testified he also felt intimidated by Putnam calling him an asshole, but "It was more the discrimination part of it." Machroli testified he reported the incident with Putnam to Hurtado, the human resources manager, at the end of the night on August 13. Machroli testified he told Hurtado that "I just wanted to let you know that Jeremy accused me of
40 discrimination tonight, and also called me an asshole." Machroli testified the discrimination remark and the language on the floor where what made him report it to human resources. Machroli credibly testified that on August 13, he never heard, observed, or became aware of a conversation by Putnam where Putnam discussed the need for a venue or website to report grievances against Respondent.²³

45 Putnam's intent for the customers to have heard what was said.

²³ Putnam testified the incident with Machroli took place around 6 p.m. on August 13, and that between 6:30 and 7:30 p.m. he engaged in conversations with sales associates Stegman and Neri in which Putnam was advocating the creation of a website where employees at all of
50 Respondent's stores could post anonymous grievances and other concerns relating to Respondent. Putnam testified that around 7 p.m. Machroli overheard Putnam state to Stegman that "we should have a venue to report abuse and grievances." Stegman did not testify. Neri's

Continued

Long credibly testified that Machroli spoke to her on August 14, and told her that Putnam called Machroli an asshole on the sales floor for telling Putnam to put some shoes away, and that Putnam also told Machroli that he felt discriminated against. Machroli then asked how Putnam felt discriminated against, stating that he had asked Pugliani to bring some shoes out. Machroli stated he asked both of them to do the same thing, and that was when Putnam told Machroli that he was an asshole on the sales floor. Long testified she told Machroli that discrimination is a big word, and that they wanted to touch base with Putnam first before they proceeded with the name calling inquiry. Long testified the discrimination aspect was a priority because Respondent has an anti discrimination policy which they take seriously.²⁴

On August 14, Long left a message for then interim store manager Neugebauer about the incident, and she emailed Regional Director Menke. Long testified the email to Menke was marked urgent for two reasons, for Putnam's conduct and because he accused Machroli of discrimination. The email to Menke is instructive because it informed Menke that Putnam accused Machroli of discriminating against him when Machroli gave him an assignment, and that in the process Putnam called Machroli an asshole. It also stated that Machroli did not feel comfortable working with Putnam. The email did not mention anything about Putnam discussing a grievance procedure with his co-workers.

Long met with Putnam, in the presence of Hurtado, on August 15. Long testified, and her notes confirm, that she first discussed Putnam's accusation that Machroli had discriminated against him. Long credibly testified that Putnam told her that he did not feel discriminated against in the legal sense, rather he just felt Machroli picked on him, that he used to be Putnam's friend, and now he acted like he is a manager. Long told Putnam that Respondent's policy required her to ask him about the protected classes pertaining to discrimination, to which Putnam answered there was no discrimination based on any of those reasons. Long credibly testified that, during the conversation, she asked Putnam if he called Machroli an asshole, and Putnam responded, "I don't recall what I said." Long testified that Putnam never denied calling Machroli an asshole. Hurtado's notes of the meeting state, in pertinent part:

T. No Matt's responsibility is to delegate and ask you to do things after you get done with a customer. Did you (call) Matt a name on the floor?

J. No I don't recall calling Matt a name

T. You didn't call matt an A..hole

J. No I don't recall saying that to anyone

Similarly, Putnam testified that when Long asked if Putnam called Machroli a name, Putnam asked what name, and Long said a curse word, then Long said the word "asshole."

testimony did not serve to corroborate that of Putnam's. Neri testified that Putnam initiated a conversation about a website with him, but Putnam was merely inquiring whether Neri knew if such a website existed. More importantly, Neri testified the conversation took place in the early afternoon, lasting in total about 15 minutes between the hours of 1 and 3 p.m. Thus, Neri's testimony serves to undermine Putnam's claim that they were discussing the matter in the evening on August 13. Given the circumstances here, including the witnesses' demeanor, and the record as a whole, I do not credit Putnam's claim that Machroli heard him discussing the need for a venue to discuss grievances in the face of Machroli's credible denial that he heard Putnam engaging in such a conversation.

²⁴ Machroli confirmed that he reported the incident to Long on August 14. The testimony established that Putnam did not work on August 14.

Putnam testified he asked at what point in the conversation to which Long said she did not know. Putnam testified, that he responded, "I don't think so. I don't know why I would have, you know." Putnam testified he told Long he did not remember using that term. Putnam testified he did deny using that term, "but I also, at first, you know, said I didn't recall it because I was -- you know, I was trying to think, you know, is there any way I could have called him, you know, and so -- but no, I denied it then -- I just said I didn't recall." He then testified that later in the discussion he denied using the term.

In examining the testimony, and in considering the demeanor of the witnesses, I have credited Long that Putnam never denied Machroli's accusation that Putnam called his supervisor an asshole. Here again, I do not find Putnam's testimony or explanation worthy of belief. Putnam is a bright individual with a sharp mind. On August 13, he initiated a conversation with his supervisor in which he refused a directive to perform an assignment, accused his supervisor of discrimination, and the credited evidence reveals he also called his supervisor an asshole. Putnam next reported to work on August 15, the morning of which he was called into a meeting with Long. Putnam's statements to Long that he did not recall whether he made the remark, or could not place the context as basis for his lack of recall are simply not credible. Moreover, Long had a reasonable basis in which to conclude that Putnam did not deny making the remark as well as for her crediting Machroli without questioning Pugliani about the incident.²⁵

Following their meeting with Putnam, Long and Hurtado met with Machroli on August 15. Long's testimony reveals that Machroli repeated to her his description of the incident on August 13, including that in response to Machroli's giving Putnam an assignment Putnam accused Machroli of discriminating against him, and Putnam called Machroli an asshole. Machroli also told Long that he felt intimidated by Putnam, and that he did not know if he could work with him. Hurtado's notes of the incident reveal that Machroli told Long that Putnam was really angry, and that every time Machroli asked Putnam to do something it was like pulling teeth. Long also credibly testified that Machroli told her at the time of the incident there were a few customers in the sale room.²⁶

The credited testimony of Long and Menke reveals that, following Long and Hurtado's meeting with Machroli on August 15, they participated in two conference calls with Menke, with the second one also attended by Neugebauer. During the calls, Menke was told Putnam did not feel discriminated against in the legal sense. Rather, he felt Machroli was picking on him by asking him to put shoes away. Long also told Menke that Putnam did not deny calling Machroli an asshole, rather he said he did not remember. Long testified that Menke made the decision to terminate Putnam citing items 2 and 3 in Respondent's Code of Conduct. However, Menke

²⁵ I do not credit Putnam's testimony that, during their conversation, Long told him that if he had specific grievances that he needed to bring them to Long and Hurtado. However, even if such a statement was made as testified by Putnam, it was made in the context of his causing an incident on the sales floor because he felt his supervisor was picking on him. Long's making such a remark would have been a reasonable response to prevent further incidents on the sales floor, and I do not attribute it as part of a plan by management to prevent Putnam's initiating a grievance procedure on the internet. For, I have concluded that management had no knowledge that Putnam was trying to initiate such action.

²⁶ I have credited Machroli's testimony that he saw two customers walk into the sale room. I have credited Long's testimony that he reported that to her. I do not credit Long's claim that Putnam also told her there were customers on the floor or in the sale room. Rather, I find this claim to be an exaggeration in support of Respondent's cause.

testified it was she and Neugebauer who made the decision. Long testified that when Menke made the announcement of the termination decision, she asked if the others in the meeting were all in agreement, and they all responded in the affirmative. Menke credibly testified that Putnam was discharged because he was involved in a conversation with his department
5 manager in which he called the department manager an asshole, and that is not tolerated under Respondent's code of conduct. Menke credibly testified she did not consider any of Putnam's prior disciplines in making the decision. Menke credibly testified she did not consider it necessary to have Pugliani interviewed concerning the asshole remark, because Putnam was not denying that he made the statement. Both Menke and Long credibly testified that they were
10 not aware that Putnam engaged in conversations with co-workers about the use of an internet website for a grievance procedure at the time the decision was made to discharge him.

I find, due to the credibility resolutions made herein, that the General Counsel has failed to establish a prima facie case under *Wright Line* that Putnam was discharged for engaging in
15 the protected concerted activity of discussing the establishment of a grievance procedure with his co-workers by using an internet website. In this regard, I have concluded that Respondent's officials were not aware that Putnam engaged in such discussions at the time the decision was made to discharge him. In reaching this result, I have considered but rejected the General Counsel's arguments pertaining to disparate treatment. Respondent's Code of Conduct
20 specifically states the employees were at will employees, and it did not require a progressive disciplinary procedure. The written warnings submitted by the General Counsel for other employees largely related to attendance and sales performance. None involved cursing a supervisor on the work floor in response to a work assignment tendered by that supervisor.

I have considered the testimony of General Counsel witness Pugliani that he had cursed at supervisors on several occasions in response to written discipline he was receiving, and that
25 on the work floor on one occasion he used an obscenity while engaging in friendly banter with a customer. I do not consider Pugliani to be most reliable of witnesses. First, I have concluded that he intentionally left critical information out of his pre-hearing affidavit relating to the underlying incident with Putnam and Machroli taking place on August 13. Second, I have
30 concluded based on his demeanor and descriptions of profanity levied against his supervisors that his description of the events was somewhat exaggerated to come to the aid of Putnam and because Pugliani, who quit under duress, harbored a grudge against Respondent's officials. Nevertheless, I have concluded there was some truth to what he said in that he had used
35 obscenities towards and in the presence of management officials in the past without receiving written discipline. In this regard, Pugliani had no reason to exaggerate the circumstances in which he quit his employment which demonstrated he had anger control problems and was prone to outbursts. I find it likely that Long and Machroli were aware that Pugliani had used obscenities in the past, and do not credit their testimony to the contrary. I also credit Pugliani's
40 testimony that Machroli, who was at one time a friend of Pugliani's, made gratuitous remarks about some of the female customers in Pugliani's presence, although I do not credit Pugliani's claims that customers were in hearing distance of those remarks.

Notwithstanding, Pugliani's testimony, I find that as Long testified, when Putnam levied
45 an accusation of discrimination against his supervisor, in accord with Respondent's policies, Long notified Menke and Neugebauer of the incident. I find the allegation of discrimination in combination with Putnam's cursing at his supervisor on the work floor because his supervisor gave him an assignment caused Long to send Menke an email marked urgent. Thus, as part of his discrimination complaint, Putnam's behavior on the work floor was brought to Menke's
50 attention. There is no showing that Menke was informed that behavior such as Pugliani's had been tolerated by local management in the past. I find that her decision to terminate Putnam for conduct in violation of Respondents rules 2 and 3, which was insubordinate in nature was

reasonable based on what had been reported to her, particularly when there was no objection from her management staff. Moreover, I find that the General Counsel has failed to establish that Putnam engaged in any protected concerted activity that was known to Respondent's officials or played a role in Putnam's termination.²⁷ Accordingly, the complaint is dismissed in its entirety.

5

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner encompassed by the complaint.

10

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

15

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 8, 2009.

20

Eric M. Fine
Administrative Law Judge

25

30

35

40

²⁷ Putnam's claim of discrimination was only based on his assertion that Machroli had been picking on him as an individual, thus it was not concerted in nature. As set forth above, I have concluded that no member of management was aware that Putnam had spoken to co-workers about at grievance procedure on the internet at the time of Putnam's discharge.

45

²⁸ 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.

50