

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

WALL STREET SOURCE, INC.

and

Case No. 2-CA-38727

NIKI LEE, An Individual

Audrey Eveillard, Esq., of New York, New York,
for the General Counsel.
John Albert and Nerissa A. Alexis, Esqs.,
of New York, New York, for the Respondent.

DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed on April 8, 2008, by Niki Lee.¹ Lee, an individual, herein called Lee, the Director for Region 2, issued a Complaint and Notice of Hearing on June 26, alleging that Wall Street Source, Inc., herein called Respondent or WSS, violated Section 8(a)(1) of the Act, by prohibiting its employees from discussing working conditions, and by discharging Lee because she engaged in protected concerted activities.

The trial with respect to the allegations raised in said complaint was held before me in New York, New York on September 23 and 24. At the start of the trial, I granted General Counsel's motion to amend the complaint. Briefs have been filed and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. JURISDICTION

Respondent is a corporation with an office and place of business at 27 W 17th Street, New York, New York, where it is engaged in the operation of providing web-based financial news and information to the Wall Street community.

Annually, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its New York, New York facility, goods and services valued in excess of \$5,000 directly from suppliers located outside the State of New York.

It is admitted and I so find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

¹ All dates hereafter are in 2008, unless otherwise indicated.

II. FACTS

5 Respondent provides a subscription financial news service to traders and financial professionals. The subscribers receive this service by accessing the WSS website. Further, Respondent's employees send news items to subscribers by email or instant messaging. (IM): Respondent's founder and Chief Executive Officer is John Albert. His wife, Nerissa Alexis although employed by another firm, is a "partner" with Albert in the business.

10 Respondent employs approximately 25 employees. Some employees work at its location on 17th Street in New York, New York and others work out of their homes.

15 Respondent's supervisors and managers include Richard Malinowski, supervisor of the newsroom and technology, Marciano DeZesare, sales manager and Paul Drinkard, Chief Financial Officer and Controller.

20 Lee is Albert's sister, and has been employed by Respondent since October of 1999. Lee's job responsibilities include reviewing and summarizing articles from the financial sections of approximately 50 newspapers and posting those summaries on the WSS website. Albert conceded that Lee was doing a good job and that he had no complaints about her work.

25 Lee, similar to some of Respondent's employees did not work out of WSS's office, but from her home, which was located in Catonsville, Maryland. Consequently, Lee's communications with Respondent's supervisors and employees was conducted by email, IM or by telephone. Employees of Respondent, including Lee, received fringe benefits, including medical insurance provided by Aetna Life Insurance Company (Aetna). Each employee covered by the insurance, made copayments of \$85.00 bi-weekly for this coverage, which is deducted from their payments by Respondent, and forwarded to Aetna along with Respondent's contribution.²

30 Starting in the summer of 2007, Respondent fell behind in its payments to Aetna. This resulted in two cancellations of its policy and eventual reinstatement, when payments were made.

35 On December 14, 2007, Aetna again terminated Respondent's policy, due to the failure to make a premium payment for the period of October 15 is through November 14, 2007. As of that date, Respondent was also past due on its November premium, which covered the period from November 15 to December 14, 2007. On December 14, 2007, Respondent paid Aetna the 40 October premium, but the November premium was still outstanding. On December 20, 2007 an Aetna representative in a discussion with Drinkard, agreed to reinstate once again Respondent's policy, but only if Respondent agreed to a payment plan, consisting of paying the November premium of \$12,544 by December 31, 2007. Drinkard agreed to this plan, and faxed Respondent's agreement to Aetna on that date. Drinkard was informed that if the agreed upon 45 premium was not paid by December 31, 2007, the policy would be terminated.

Respondent failed to make the payment by the agreed upon December 31, 2007

50 ² Respondent also contributed \$85.00 bi-weekly for each employee covered by its policy with Aetna.

deadline. As a result, Aetna terminated Respondent's policy on or about January 4. Sally Gallo a representative of Aetna called Respondent and notified Drinkard that its policy had been terminated retroactive to November 15, 2007.³

5 Drinkard testified that he did not make the promised payment by December 31, 2008, because he was told by an unknown Aetna representative that Respondent was going to receive a new bill from Aetna, with deductions for credits due to Respondent, since some employees had been laid off.⁴

10 Throughout January, Mortak and Drinkard attempted to convince representatives of Aetna to reinstate Respondent's policy. They were not successful. During this period of time, Respondent did not notify its employees that its policy had been cancelled, or that they did not have medical coverage retroactive to November 15, 2007.

15 On January 26, Lee went to a pharmacy near her home to pick up a prescription. The pharmacist informed Lee that her insurance had been terminated, and that she had to pay full price for the medication. At Lee's request, the pharmacist ran her card through, and it again showed that the insurance had been terminated. Lee then telephoned Albert from the pharmacy and informed him what had happened. Albert replied, "what are you talking about?
20 Of course we have insurance." The conversation ended, and Lee paid full price for the medication and left the store.

The next day, January 27, Lee called Albert again. Lee asked Albert to "come clean with" her and tell her if the employees had insurance. Albert responded that WSS has
25 insurance that Aetna made a clerical error, and that Respondent was waiting for new insurance cards. Albert added that he and Drinkard "are going to settle the whole thing."

On January 28, between 10:25 am and 10:31 am, Lee exchanged IM's with employee Steve Joseph. During this exchange, Lee and Joseph discussed the insurance problem, and
30 both Joseph and Lee revealed that their insurance cards had been rejected. Joseph added that it was "rejected in front of a lot of people and was pretty embarrassing." Joseph also informed her that Drinkard had told him that the employees "have to wait for a new card, something has changed."

35 After this exchange, Lee telephoned another coworker in the news department, Craig Bowles. Lee informed Bowles that their insurance had been cancelled, and asked Bowles if he had any problems with the insurance. Bowles replied that nothing negative happened to him.

40 ³ While Drinkard testified that he believed that he was notified by Aetna of the cancellation in the second week of January, I credit the testimony of Campbell, Aetna's representative corroborated both by Aetna's notes and by the letter of Mary Mortak, Respondent's broker. That letter reflects that she was aware of cancellation on January 8, and that she and Drinkard began attempting to rectify the situation.

45 ⁴ I note in this regard that there is no documentation of this alleged call by an Aetna representative, nor any promise by Aetna to send a new bill. Further, Mortak's letter explaining the circumstances, does not mention such an understanding. Rather, Mortak attempted to justify Drinkard's failure to make the promised payment, based on Drinkard's alleged understanding that Respondent had an additional grace period to pay. In need not resolve this issue, nor decide whether Drinkard's testimony in this regard is truthful. The relevant facts are
50 that the policy was cancelled and that Respondent and as detailed below, make efforts to rectify the situation.

Later that morning, Joseph forwarded a copy of his IM correspondence with Lee to Malinowski. At 10:40 am, Malinowski in turn, forwarded a copy of the exchange to Albert. Albert at 10:52 am, transmitted a copy of the exchange to his wife. The exchange is as follows:⁵

5

From: John Albert
Sent: Monday, January 28, 2009 10:52 AM
To: Nerissa.Alexis@ubs.com
Subject: Insurance

10

mallin07722 (10:49:19 AM): users 1186 (10:40:19 AM): Missniki101 (10:25:12 AM): do you have health insurance through WSS

users 1186 (10:25:27 AM): Nope

users1186 (10:25:55 AM): I found out on Saturday

15

users1186 (10:27:26 AM): there is a problem it was denied

Missniki101 (10:27:34 AM): me too

Missniki101 (10:27:43 AM): I thought you said you didn't have the insurance

Missniki101 (10:28:13 AM): do you have Aetna

users1186 (10:28:16 AM): Now I don't

20

Missniki101 (10:28:21 AM): so wait

Missniki101 (10:28:24 AM): what are you saying

users1186 (10:29:43 AM): Paul said we have to wait for a new card, something has changed

Missniki101 (10:29:48 AM): bullshit

25

Missniki101 (10:29:54 AM): I'm on hold with Aetna

Users1186 (10:30:43 AM): I went through that on Saturday, was rejected in front of a lot of people was pretty embarrassing

Missnicki101 (10:30:48 AM): me too

Missnicki101 (10:30:50 AM): I cried

30

Missnicki101 (10:30:55 AM): at the fucking drug store

users1186 (10:31:07 AM): yup⁶

Both Joseph and Bowles notified Drinkard of their communications with Lee about Respondent's insurance being cancelled. Drinkard admitted to Bowles and Joseph that the Aetna policy had been cancelled, and that Respondent was in the process of trying to alleviate the situation, and obtaining a new policy, Drinkard informed Joseph and Bowles that if they had any unpaid claims that Respondent would reimburse them for any out of pocket expenses.

35

Albert, after receiving a copy of the IM exchange approached Joseph and Bowles, who both sit together, and asked them if they had any issues with the insurance? They both said no, and added that Lee had been calling them about this. Either Bowles or Joseph added that she "was being Niki." They did not explain what they meant by "being Niki." Albert explained to Bowles and Joseph that they should not worry about the insurance, that "it's all getting fixed," and "we're taking care of it."

45

Joseph also spoke to Malinowski about the insurance issue. Joseph told Malinowski that he had been in communication with Lee about the insurance being terminated. Malinowski replied that he would find out from Drinkard and Albert what was going on. Malinowski also

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⁵ The record also reflects that several other employees saw copies of this IM exchange.

⁶ In this document, Malin07722 is Malinowski, users 1186 is Joseph and Missniki101 is Lee.

received a complaint from employees Fred Grimm, that he had not received his insurance card.

5 Malinowski asked Drinkard what was happening with the insurance. Drinkard told Malinowski that either Aetna or the broker had “screwed up”, that the policy was cancelled and that he was rectifying the situation as soon as he could. This explanation did not satisfy Malinowski and he eventually spoke to the broker. The broker told Malinowski that there had been a problem with a payment, and they were rectifying it with Aetna.

10 Albert asked Mary Frasson, a 12 year WSS employee, whose job responsibilities included collections, to telephone Lee and assure her that the insurance problem would be resolved. Albert told Frasson (who was also friendly with Lee) that there was a problem with Aetna that Respondent had called the broker, and they were in the process of getting it rectified. Albert said that he had received a call from Lee, and that Lee was upset, and asked her to call Lee and try to calm her down.

15 Frasson complied and telephoned Lee. Frasson said that she had heard from Albert that Lee was upset about the insurance. Lee replied that she was very concerned, and that she wanted to see what was going on. Frasson responded that she was sure that Respondent would “make it right.” She added that Drinkard probably “dropped the ball,”⁷ but that it was going to be rectified. Lee replied, “I hope that’s right,” but did not seem to be convinced. Frasson stated that she was going to talk to Drinkard, but that Lee should not worry, because “money is coming into the firm, the firm is safe we’re okay.” Frasson concluded by telling Lee that “everything will be okay, I’m not leaving Wall Street Source.”

25 After her conversation with Lee, Frasson testified that since she was a mother of four, she was concerned about insurance, so she called Drinkard to find out what was going on. Drinkard told Frasson that the broker was looking into all options, and was working on obtaining coverage for the employees. Drinkard also told Frasson that if she received any bills, Respondent would reimburse her as well as other employees for out of pocket expenses.

30 Dezesare was approached by Jack Hall, a salesman under his supervision. Hall informed Dezesare that Lee had called employees and IM’d Steve Joseph stating that Respondent’s employees had no insurance. Hall asked Dezesare what was going on. Dezesare then asked Albert about the issue. Albert told Dezesare that although there was a problem with the insurance, that it was being rectified, and instructed him to tell his employees that Respondent would pay any claims that were not covered by insurance.

35 Dezesare also was aware that other employees were complaining about the problem with insurance as a result of Lee’s complaints. Albert admitted that Dezesare complained to him as follows: “Listen, Niki is running around telling a bunch of people stuff, you’ve got to stop it,” and that Lee was “stirring the pot.”

40 Sometime in the early afternoon on January 28, Albert telephoned Lee. Albert told Lee that everything was fine with the insurance and that she was getting everyone upset about nothing. Albert then told Lee that she was fired, and hung up the telephone.

45 While Albert denied telling Lee that she was fired during this conversation, I credit her that Albert did make that statement. I rely primarily, on the email Albert sent to Lee at 3:43 PM, which notified her that she was not fired. I find it unlikely that Albert would make such a

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⁷ At one point in his testimony, Albert conceded that Drinkard had “screwed up.”

comment, unless he had fired Lee, and then had a change of heart. Further, Albert provided no other explanation in his testimony as to why he would say to Lee in the email, “you are not fired.”

5 The email is set forth below:

Subj: Issues
Date: 1/28/2009 3:43:02 P.M. Eastern Daylight Time
From: john@wssource.com
10 To: missniki101@aol.com, Nerissa.Alexis@ubs.com
CC: john@wssource.com

Niki:

15 You are not fired. Wall Street Source is working with AIG and Aetna to fix the administrative problem. I will have an answer as soon as I hear back from them. Don't worry. If there is an expense either Aetna or WSS will pay for it. I found out that Aetna made a clerical error in December and is in the process of fixing it.

20 Niki the reason why I am upset that you talked to Craig about it. Is that if you have a problem come to me and I will fix it. I have always taken care of you and will still will do so. There is no reason for you to be upset. The insurance issue will be resolved in the next few days.

25 John

Between January 28 and January 29, Mortak continued to attempt to persuade Aetna to rescind their decision to terminate Respondent's insurance. She spoke to various supervisors at Aetna, but was not successful. Mortak meanwhile was also making efforts to obtain other
30 coverage, and Respondent was able to obtain coverage for its employees from Oxford effective February 1.

On January 30, Lee sent an email to Albert. Prior to sending this email she had made inquiries with the National Labor Relations Board to find out what her rights were. The email
35 reads as follows:

Subj: employee rights
Date: 1/30/08
40 To: john@wssource.com

here's the deal...I really want to believe you about the health insurance but I don't have that luxury -- you've lied to me too many times in my life

so, he's the deal:

45 i need facts

i've been doing research – if you're doing what you're telling me, trying to reinstate the aetna policy, we have no problem

50 if not, you have a big problem...i won't pursue a case against you if you're honest with me – but if you're not 100% honest with me about what's happening, i will have to take

further actions and you can't fire me for that – it's within my rights as an employee under the federal government

5

i've talked to lawyers and it is illegal to stop employees from talking each other about the terms and conditions of their employment

it is also illegal to not notify employees of the cancellation of fringe benefits which have already been established by the company

10

the company is not obligated to provide health insurance but once it is established it has to be continued unless proper notification has been given

it is also *very illegal* to take money out of employee's check for a non-existent health plan

15

i need facts in order to for me to stop from going forward, otherwise i will have no other option – i need to take care of myself and my life

20

i can also have a lien put on your bank account and house if anything happens to me because of my lapsed health insurance

make it right with me john and we will have no problem – i won't make a fuss...

niki

25

On January 31, Respondent sent an email to all employees, including Lee, explaining Respondent's efforts with regard to obtaining insurance, and setting forth three possible options for employees. The email is set forth below:

30

Subj: Insurance

Date: 1/31/08 9:34:35 A.M. Eastern Standard Time

From: pauld@wssource.com

To: john@wssource.com, Marciano@wssource.com, mfrasson@wssource.com,
davidn@wssource.com, jackc@wssource.com, aaronw@wssource.com,
35 jweiner@wssource.com, gwilson@wssource.com, rmalin@wssource.com,
sobrien@wssource.com, ishaberly@wssource.com, craig@wssource.com,
missniki101@aol.com, sjoseph@wssource.com, sandeep@wssource.com

35

Memo:

40

I want to inform everyone of some difficulties we are having with Aetna. Currently WSS is in a dispute with Aetna over our policy. We are currently working on two fronts to solve the issue.: 1. Our insurance broker is working with Aetna to resolve the issue, and 2. we are also working with Oxford to move our policy on Feb. 1. Our insurance broker from Mercer will come to the office next week to explain the plans.

45

There are 3 potential outcomes that we will find out next week.:

50

A. Aetna resumes coverage

B. Aetna activates conversion coverage until we move to Oxford Feb. 1

C. If Aetna drags this out WSS will cover any outlays you had in Dec. and Jan that would have been paid by Aetna.

Please see or email Paul to pick up your Oxford enrollment form, as we plan to start the coverage on February 1st, and all forms need to be sent to Mercer Health Benefits on Thursday, January 31st. If you have any questions, please email Paul. Thank you so much for your patience and understanding. We apologize for the confusion.

John

On February 1, Lee telephoned Aetna, to find out what was going on. She spoke to Jim Brown, an attorney for Aetna. Brown informed Lee that Respondent's policy was terminated as of November 15, 2007. He explained to Lee that she had the option of applying for an individual conversion policy from Aetna. This was necessary, because employees with pre-existing conditions would not be covered for these conditions, for a period of 12 months, with WSS's Oxford policy. Brown told Lee that since Respondent's policy was terminated effective November 15, 2007, that Lee, as well as other employees who might be interested in an independent conversion policy, would need to submit applications for such a policy to Aetna, by February 15, 2008, (90 days after November 15, 2007). Brown forwarded such an application to Lee, and confirmed their conversation in an email. Lee completed and sent back the application to Aetna on that same day February 1.⁸

The policy was subsequently approved by Aetna. Lee paid a premium of \$2812.00 covering the period from 11/16/07 to 2/15/08. Lee sent a request to Respondent for reimbursement of this amount, plus reimbursement of \$340 for the deductions taken out from Lee's salary for coverage from November 15, 2007 through February 1, 2008, which amounts were not forwarded by WSS to Aetna, and during which period, Lee was not insured. Respondent did not reimburse Lee for either of these sums. Albert testified that Respondent did not do so, because it had arranged for its employees to obtain conversion coverage from Aetna at a rate of \$600, and if Lee had waited she could have obtained that coverage as well. Albert conceded that it owed Lee the \$340, for the money deducted from her salary and not forwarded to Aetna. However, Albert gave no explanation for why Respondent did not reimburse her for this amount.

During the first week in February, Lee telephoned Drinkard. She told him that she had spoken with someone from Aetna, who informed her that Respondent's policy had been cancelled, because "you guys aren't paying the bill." Lee added that "I know what you guys are doing." She accused Respondent of making the deductions from the employees and just deciding not to pay into the plan. Drinkard tried to explain that Respondent was trying to resolve the situation and see if Aetna can reinstate the policy. Lee continued to accuse Respondent of deducting money from employees and not paying the bill, and added that Albert was "a criminal."

Drinkard mentioned that Respondent's broker was working on a conversion plan for employees, and is emailing employees to sign up. Lee replied that she had already taken care of it, and had signed up.⁹

Lee went on vacation from February 2 through February 11. On February 7, Lee IM'd

⁸ Lee had an unspecified pre-existing condition, which would not be covered by Respondent's Oxford policy, for some period of time.

⁹ Drinkard testified that he thought that Lee had signed up with Respondent's plan that Mortak had been working on. Thus he didn't discuss the issue any further.

Joseph and informed him about the Aetna conversion policy, and the application deadline of February 15. She asked if he and Bowles were aware of such a policy. Joseph responded to Lee that he and Bowles had taken care of it.

5 That same day, Oxford approved Respondent's application for group coverage, effective February 1. The policy contained restrictions regarding coverage for WSS employees with pre-existing conditions, limiting coverage for such conditions for up to twelve months. Consequently, Mortak continued to attempt to arrange for a group conversion plan through Aetna. She finally was able to arrange for a plan to cost \$600 per quarter. This plan would be effective from November 15, 2007 to February 1, 2008. As of February 1, 2008, The Oxford plan was effective. If employees signed up for the Aetna conversion plan, negotiated by Respondent, Oxford would waive its pre-existing conditions restrictions, and employees would be covered for all conditions from February and thereafter.

15 On February 13, Drinkard sent an email, to all employees except for Lee, detailing for them a choice of applying for the Aetna conversion, or being reimbursed by Respondent for any medical expenses incurred between November 15, 2007 and February 1, 2008.

20 Drinkard explained that he did not send this email to Lee, because at that time, she was "not a current employee," and only current employees received the email. Drinkard didn't detail why he thought that Lee was not "a current employee" at that time, since it is clear that she had not yet been terminated as of February 13.

25 Since Lee was not aware when she returned from vacation, that Respondent had finalized a conversion plan for its employee, she was concerned that employees were not aware of the February 15 deadline for the submission of the application to Aetna to obtain an individual conversion policy.

Thus on February 13, at 9:45 A.M., Lee sent an email to Albert, as follows:

30 From: missniki101@aol.com [mailto: Missniki101@aol.com]
Sent: Wednesday, February 13, 2008 9:05 AM
To: John Albert
Cc: Paul Drinkard
35 Subject: Insurance conversion policy

i have sent you both a bill for my conversion policy with aetna

40 you are legally obligated to pay this bill because you failed to tell your employees that their insurance was terminated, by aetna, on nov. 15 2007

if you fail to tell all the employees that they need to get a conversion policy from aetna in order not to have a lapse in their policies you will be open to legal action

45 perhaps a class-action suit

it is illegal to prohibit employees from discussion the terms and conditions of their workplace – check with the national labor relations board or the labor dept. if in doubt also...i will require you to pay me \$340 for the medical premiums taken out of my paycheck from nov. 15 until jan. 1

50 they were taken out for a non-existent health plan

jim brown, an attorney at aetna, knows all about this

5 you guys better let everyone know about the conversion policy because they only have until feb. 15 to get them in

after that, anyone with preexisting conditions whose coverage lapses can sue you—sue you big time

10 niki

Albert replied to Lee in an email at 4:18 A.M. It stated, “we have already addressed this with the employees. I would appreciate it if you just worried about your situation.”

15 Lee responded to this email, with another email, as set forth below:

Subj: Re: Insurance conversion policy
Date: 2/13/08
To: john@wssource.com

20

i'm taken care of...i've sent my plan in..but after feb. 15 you won't be taken care of if everyone isn't informed today – they need to be informed that:

25

THAT ON THEIR OWN THEY HAVE TO GET A CONVERSION POLICY THROUGH AETNA IN ORDER FOR PREEXISTING CONDITIONS TO BE COVERED FOR THE REST OF THEIR LIVES

just thought i'd warn you...and give you a head's up

30

800-435-8742
800-892-5291

35

At 4:18 A.M. Lee sent another email to Albert, entitled personal note. It reads, “this is what happens when you fuck with people's health. I will see to it that you don't get away with this.”

At 9:26 A.M., Albert replied as follows:

40

Subj: Re: personal note
Date: 2/13/2008 9:26:43 A.M. Eastern Standard Time
From: john@wssource.com
To: Missniki101@aol.com
CC: pauld@wssource.com; john@wssource.com

45

Niki:

50

I love you and care for you and want you to work at WSS. However, You are trying my patience. If this would have been anyone else using this language other than my sister I would have terminated their employment. WSS is located in NYC which is in NY State where employment is at will. I have a responsibility to honor peoples insurance. I don't have the responsibility to take this behavior. Not one other employee of WSS is concerned with the situation at this point or talks to me in this manor. They are

respectful and discuss the situation they do not threaten me. They have been told and offered options. That is my responsibility. I have dealt with the issue and it is resolved. Each employee is pursuing the insurance option that works for them.

5 John

The next day, February 14, Christina Valenti¹⁰ and a co-worker, informed Lee that Albert had fired her. Valenti told Lee that she was not sure of the reason, but it might have something to do with her hours. Lee said to Valenti that she would talk to Albert and try to get her job back.

10

Lee then telephoned Albert, and said that Valenti had been a loyal employee for nine years and just had a baby. Lee informed Albert that she did not think it was right that he terminated Valenti, and Lee thought that Respondent should rehire her.

15

Lee followed up this conversation with an email on February 15 at 2:47 P.M., regarding Valenti.

You fire her and I will open my mouth to all at Wall Street Source on Monday about all the illegalities of what your trying to pull with everyone's insurance.

20

Hire her back tomorrow.

Thank you.

25

Lee testified credibly that her use of the phrase, "all of wall street source" in the email, was referring to the employees of WSS, and not a reference to Respondent's clients or subscribers. The "illegalities" referred to in the email encompassed the facts that Respondent deducted money out of employees' paychecks for non existent healthcare coverage.

30

Albert responded by email on February 16 at 6:42 A.M. This email reads as follows:

Niki:

35

Christina brought this upon herself. I hired Christina to work 5 hours per day. In the past Christina had a strong work ethic and was on time everyday. Last week she worked on average of 3.25 hours a day with roughly 70 stories/day. She did not notify her manager (Richard) that she would not be working her agreed upon time. I have started helping out and doing newsroom work scraping the web. I work roughly 3 hours per day and do over 130 stories a day for the 3 hours while running WSS.

40

Richard her manager brought this to my attention and asked me to fire her. I sent the email. She took advantage of her situation. Everyone at WSS busts their ass in this market. Most people at WSS work at 9-10 hour day. I cannot afford to have someone that doesn't pull their weight. When I hired her she agreed to work a 5 hour day.

45

I run a business not a charity not a place where people can do as they please. When people come to work they have obligations to do their work and to be on time and work the time allotted.

50

¹⁰ Valenti is also known as Bruscoe.

FYI in the next week we will be automating the newspapers. For example your job is going to change in about 2 weeks because the way we are doing newspapers will end in 2 weeks because of this automation.

5 Niki their was an administrative error with insurance. We have switched everyone to
oxford. We have offered conversion to everyone who wanted it (only 3 people wanted it)
and we have paid claims to anyone that had them. My lawyer has gone over all of this
with a fine tooth comb and says that we are in 100% compliance. If you want your
10 lawyer to talk to my lawyer just let me know. Every employee of WSS has signed up for
their respective insurance plans or conversion. I have personally talked to every
employee about the issue and they are happy. Several employees even opted not to do
conversion and we reimbursed them for the money we deducted from their pay as per
my lawyers instructions. We are in 100% compliance as per my attorney and AIGs
attorney.

15 Niki I appreciate your diligence in the last month. Once you brought the insurance issue
to my attention. I did an investigation with AIG. We took action immediately to solve the
administrative error. We now have talked to all employees and they are all happy with
the insurance outcome.

20 FYI WSS pays 50% of peoples insurance premiums. WSS does not have to do that.
That is a perk. Most companies the employees have to pay 100% of the insurance
premiums. In addition to the employees contribution WSS pays on average \$400 a
month per employee per month for health benefits. That is roughly \$5000/ month we
25 donate to the employees health plan.

Can we finally put this behind us and can you go back to you being my sister and having
a job you enjoy and having a relationship with Nerissa.

30 John

Lee replied to Albert's email on February 16, at 7:36 A.M. as follows:

35 john...

you are a thief

you took money from people's paychecks from nov. 15 until jan.

40 now, you may say it's an administrative error because you don't believe me when I tell
the truth so...one more time:

1. aetna cancelled w.s.s. insurance for late or no payments on more than one occasion

45 2. aetna dropped wall street source because they were sick of dealing with you

3. you freaked out and decided not to tell anyone – why you kept taking money out of
people's paychecks is beyond me – that was your second biggest error

50 4. you didn't warn your employees that they had no insurance as of nov. 16

5. when i told you you needed to do that you ignored me

6. no one new of the conversion package in the correct manner

5

7. you have no remorse: you don't care for others...you have no empathy (look it up)
but you've got a lot of arrogance

10

this time it's not gonna work because the area of insurance, especially employee insurance, is my area of expertise

and how about this

15

8. you haven't discussed this with a lawyer because now you know you're screwed

so...Christina gets her job back or everyone knows every detail about their insurance on tues.

20

i tried to protect you...but this is not gum or records out of my room, you're dealing with human lives

what if someone in there has aids or cancer and they haven't told you about it?

25

as of yesterday they can sue you so hard for not telling them the truth

so don't talk to me about ethics and morals and all that bullshit when you talk about Christina because you don't know what they are

30

i am now soley an employee of wall street source, forget that i exist as a sister

that's gone forever after you tried to take my livelihood away by not warning me about the insurance and by trying to trick me into thinking you cared

35

i'm sorry i have to lose nerissa in this deal...but you're displaceable and i don't want to know you as a person, you disgust me

40 Lee testified concerning her accusation in that email that Albert was "a thief". The basis for that statement was that money was taken from employees paychecks from November 16 to January, without sending the money to the insurance company. The "details about their insurance", that she asserted that she would tell employees, referenced the deductions from their paychecks for nonexistent insurance, the failure to notify employees that there was no insurance, and the failure to timely notify them about an individual conversion policy. Lee denied that she ever intended to notify any clients or subscribers of these matters, or that she
45 ever told Albert, Drinkard, Alexis, Bowles, Joseph, or anyone else that she intended to notify clients or subscribers of Respondent about these issues.

50 In this regard, Albert testified that Lee in an alleged telephone conversation with him on February 15 or 16, said that she was going to "tell the world" about the alleged "illegalities" at WSS, and by Albert, by using WSS's website. However, when asked about specific details of this alleged conversation, Albert could not recall. Albert was not even sure that the alleged threat by Lee to "harm his business," was made by phone or in an email or in an IM.

Alexis testified that she had a conversation with Lee on or about February 16, during which Lee continued to insist that Albert stole money from employees and was a “thief,” and that she (Lee) was going to make sure that this was going to be corrected. Lee also told Alexis that she had not trusted her brother since childhood. Alexis testified that she felt that Lee was being so “irrational” that she asked Albert to change the locks on their house.¹¹

According to Alexis, she asked Albert to change the locks, because Lee was willing to throw away her relationship with her brother over the insurance issue, and “she wouldn’t let the insurance issue go.” Alexis further testified that Lee said nothing to her about “telling the world” about her beliefs, but states that she believes that she saw such a “threat” in one of Lee’s emails.

The record also reflects that Lee sent an email to Albert, dated February 13. it was entitled “re” personal note.” The email reads “Nerissa....consider yourself warned.”

Lee furnished no testimony explaining what she meant by this statement.

On February 16 at 8:07 AM, Albert sent Lee an email terminating her employment. It reads as follows:

Niki:

Based upon the last 2 threatening emails, WSS sees no other recourse other [than] to terminate your employment as of February 16, 2008. I am forwarding these emails to Wall Street Sources lawyers so they are aware of the situation.

Lee sent 3 emails in reply to Albert’s termination of her. The first email, sent at 8:18 AM reads as follows:

you can’t fire someone when they are a whistleblower

again, you will come under legal action

tell your lawyer to call my lawyer

you have no just cause to fire me other than the fact that I know too much

you should take it back or you’re going to bring more sadness upon you and nerissa

does nerissa know the truth about what you’re trying to cover up?

The next email was sent at 8:27 AM:

firing me will bring the national labor relations board and the labor department right into wss

is that what you want?

¹¹ Lee had a key to the Albert’s home.

or I could call the ny attorney general's office

they might be interested in my termination

5 how about the EEOC

there's another good one for me

(have you thought all this through)

10 Email #3 was sent at 8:32 AM:

i wish you would swallow your pride and recognize that I've been trying to help you even as you continued to lie to me

15 don't go down this road, john, it doesn't look good for you if you do

all the people who didn't get the proper warning for their conversion policies will come back to haunt you

20 i know you're history—you really should try and listen to me this time

it is taking incredible restraint for me not to take this to a completely emotional level but maybe it's because i don't care what you think anymore

25 you don't scare me anymore—

Albert replied to Lee by email at 8:42 AM:

30 Niki:

- a. You threatened WSS
- b. You tried to extort WSS to hire back Christina
- c. You are trying to blackmail wss to hire Christina and keep you employed
- 35 d. You personally insulted me
- e. You threatened to falsely accuse WSS of wrongdoings to other employees

Here is the EEOC's #1-800-669-4000

40 John

At 7:57 AM Lee sent another email to Albert:

And I know all about why

45 Aetna no longer has relationship with you

It's very simple:

50 You lied and you stole

You put your employees at risk and you fire them indiscriminately

On Sunday, February 17, Lee sent two more emails to Albert, one at 7:26 AM, and another at 7:29 AM:

5 John...jim told me that this was not an isolated incident and that aetna was sick of dealing with you

The fact is you told no one of the troubles you were having and aetna has not made anything retroactive to nov. 15

10 You really can convince yourself of anything, can't you...

You have until tues. morning to address what you've done

15 I'm giving you that much time

There was no clerical error: aetna dropped you

20 whether you figured it out too late or not is not the fault of aetna or your employees you have until tues. morning and then I have to tell the truth about what happened

At 7:29 a.m., Lee emailed as follows:

25 In a message dated 2/17/2008 7:08:57 A.M. Eastern Standard Time, john@wssource.com writes:

30 we notified employees) luckily I got in touch with steve and craig and they moved fast enough to get their own conversion policies

i told them to tell the rest of the employees how little time they had

35 the only letter I got was dated jan. 18, 2008 – and at that point I only had three weeks to figure out, on my own over the course of three days, that I could get a conversion policy

plus, I have a squeaky-clean legal record—not even a speeding ticket

can you say the same?

40 The next day, Monday February 12, Lee sent, still another email to Albert at 4:19 PM:

i want to thank you for everything you've done for me

45 our relationship has never been a particularly good one but I've tried to be there for you maybe I'm a fucked up sister...who knows

it doesn't matter anymore

50 this is best for both of us –

i know that you will look deep inside and think about all the people who work for you...those people and their children—which would be like you and Stanley or you and Stephanie

5 and think about mom...even though it might hurt a lot..think of what mom would be proud of

love niki

10 The record does not reflect whether or not Albert replied to these several emails from Lee.

Albert as noted above appeared pro se and conducted the trial on behalf of Respondent. Consequently, Albert made an opening and closing statement, and gave testimony under oath, and was subject to cross examination. His testimony and statements concerning his discharge decision was somewhat rambling, and at times inconsistent. Thus in his opening statement, Albert emphasized the fact that Lee was his sister and that he had “protected” her and hired her as an employee and paid her \$50,000 per year, for working 3-4 hours a day, while other employees performing the same job work 10-11 hours a day, for the same salary. He conceded that Lee had spoken to employees about the insurance, but asserts that he did not fire her for that conduct and that he did not care if employees discussed their working conditions. However, according to Albert, the insurance issue was resolved, while Lee was on vacation, but that Lee would not “let it go,” and continued to harass employees, himself and his wife, with accusations that Albert was a thief and a criminal and was stealing from employees. Although Albert conceded that he was upset with this conduct, which he characterized as “slandering” him, he testified that he could have fired her for that, but he had not. Albert also made reference to Lee’s threat to Albert, if he did not take Valenti back which be characterized as “extortion.” However, Albert asserted that although Lee engaged in this conduct, for which he could have fired her, and he would have, if she were not his sister, he didn’t fire her for these reasons. According to Albert, he terminated Lee because she threatened to go to his clients with her accusations.

When Albert testified under oath, he conceded that his discharge decision was based on a number of factors, including Lee’s emails, her talking to people about the company, and her threat to tell the “world” about her accusations, by virtue of her access to Respondent’s computer system.

In his closing statement, Albert asserted that he fired her because she “melted down”, because she sent “inappropriate” emails and because she threatened to harm WSS’s business. Albert again emphasized that the insurance issue had been resolved, all of its other employees were happy and were not complaining, and asked what was Lee “trying to accomplish at that point? Why could Ms. Lee not have been like every single person in my company and just done her job.”

45 III. ANALYSIS

A. THE ALLEGED PROHIBITION OF EMPLOYEES DISCUSSING WORKING CONDITIONS

50 As I have detailed above, in the facts, Lee was notified on January 26, at a pharmacy that Respondent’s insurance had been terminated. After complaining to Albert about this development, she further contacted several employees by phone or IM to discuss the problem.

The IM revealed that fellow employee Joseph had an embarrassing experience at a pharmacy, similar to that of Lee. The record also establishes that a number of other employees were naturally concerned about the loss of insurance when they found out about it, (some from Lee) and inquired about the issue with various supervisors of Respondent. It is thus clear and not
 5 disputed, that Lee and the other employees were engaging in protected concerted activity by discussing the insurance issue amongst themselves and with supervisors.

On January 28, Albert sent an email to Lee. In that email, Albert wrote the following.
 10 “Niki, the reason why I am upset with that you talked to Craig about it. Is that if you have a problem come to me and I will fix it.”

Further, in another email dated February 13 which was preceded by several other emails between Albert and Lee concerning the insurance issue, Albert stated as follows: “We have
 15 already addressed this with the employees. I would appreciate it if you just worried about your own situation.”

The record does not reflect whether or not Albert replied to these last several emails from Lee.

The complaint alleges and General Counsel contends that these comments by Albert
 20 are unlawful prohibitions on employees discussing their terms and conditions of employment in violation of Section 8(a)(1) of the Act. *Double Eagle Hotel and Casino*, 341 NLRB 112, 113 (2004), enf. In pert. part, 414 F.2d 1249 (10th Cir. 2005); *R.J. Liberto Inc.*, 235 NLRB 1450, 1453 (1975). I agree.

By informing Lee that he was upset about her discussing the insurance issue with
 Bowles, instructing her to come to him (Albert) with any problems, and he will fix it, and then in a subsequent email telling her to just worry “about your own situation,” Albert was interfering with
 25 the employees’ rights to discuss with each other issues relating to their working conditions. Such conduct is violative of Section 8(a)(1) of the Act. *Dickens, Inc.*, 352 NLRB 84 (2005) (employer instructing employees not to discuss bonuses with one another); *R.J. Liberto*, supra (statement to employee to direct any and all complaints to the boss, and not other employees); *Webasto Sunroofs Inc.*, 342 NLRB 1222, 1223 (2004). (Rule unlawful as it prohibits employees from speaking to management and questioning management policies); *Double Eagle*, supra.
 30 (Rule prohibiting employees from discussing working conditions). *Kreter Char-Broil Inc.*, 248 NLRB 1158, 1163 (1980) (statement to employee to keep her mouth shut and that she talked too much to the girls). *Jeannette Corp.*, 217 NLRB 653, 657 (1975); enf’d 532 F.2d 916, 919-920 (3rd. Cir. 1976); (rule prohibiting employees from discussing wages among themselves, violation of Section 8(a)(1) of the Act.)
 35

40 B. THE ALLEGED SOLICITATION OF GRIEVANCES

General Counsel also asserts, as alleged in the complaint, as amended, that Albert’s
 45 statement in his January 28 email to Lee, violated 8(a)(1) of the Act, by soliciting complaints and grievances, and promising employees benefits if they refrain from discussing working conditions with other employees. General Counsel argues that when Albert said to her, “if you have a problem, come to me and I will fix it” after chastising her for discussing the insurance issue with Bowles, Respondent solicited grievances and impliedly promised to remedy same, in order to dissuade employees from engaging in Section 7 activity. *Electric Hose and Rubber Co.*, 267
 50 NLRB 488, 490 (1983); *Grede Foundries*, 205 NLRB 39, 44-45 (1973); *Rotek Inc.*, 144 NLRB 453, 455 (1971).

The principles underlying this violation is set forth by the Board in *Reliance Electric.*, 191 NLRB 44 (1971).

5 Where, as here, an employer, who has not previously had a practice of soliciting
employee grievances or complaints, adopts such a course when unions engage in
organizational campaigns seeking to represent employees, we think there is a
compelling inference that he is implicitly promising to correct those inequities he
discovers as a result of his inquiries and likewise urging on his employees that the
combined program of inquiry and correction will make union representation
10 unnecessary. *Id.* at 46.

Violations of the Act based on these principles has consistently been found in numerous
cases, wherein employer's used similar and/or nearly identical language to that used by Albert
in his email. *Center Services System*, 345 NLRB 224, 232 (2005) (president and owner of
15 employer told employees, "if you have any problems with the company, I'm the president...you
need to discuss it with me"); *Federated Logistics and Operations*, 340 NLRB 255, 265-266
(2003) (supervisor told employee that she knew there were problems that should be solved and
she should bring them to management's attention); *Laboratory Corp.*, 333 NLRB 284, 285
(2001); (Executive Vice President of employees gave employee his personal phone number and
20 instructed employee to call him with any problem and he could fix it."); *St. Francis Medical
Center*, 340 NLRB 1370, 1380-1381 (2003); (Administrator invited employee to bring their
problems to him); *Medicare Associates*, 330 NLRB 425, 440-441 (2000), (Director of Nursing
and Administrator told employees at meeting that "nurses" should be coming to them with any
problems they might have); *Insight Communications Co.*, 330 NLRB 431, 456 (2000),
25 (Management officials informs employee that employer and "employees could take care of the
problems on their own"); *Avondale Industries*, 329 NLRB 1064, 11001-1102 (1999) (supervisor
told employees that if anyone had any safety problems, bring them up to their supervisors. If
their supervisor did not take action on them, come to him. That is what he was there for");
Traction Wholesale Center, 328 NLRB 1058, 1059 (1999) (Vice President of employer told
30 employees at meeting, that "management was always there to help them if they had any
personal or job related problems."; *Sweet Desserts*, 319 NLRB 307 (1995), *enfd.*, 107 F.3d 7 (3rd
Cir. 1997); (production manager told employees that if she had problems she could come to her
or employees' immediate supervisor).

35 Here the statement made by Albert in his email, is clearly sufficient to raise the inference
that Respondent was implicitly promising to remedy any grievances that Lee might have.
Indeed Albert explicitly promised to "fix" any problems that she may have, if she came to him,
rather than discussing it with her coworkers. *Laboratory Co.*, *supra*. Respondent has not
40 rebutted this inference of illegality, since the record does not establish that Albert or any
supervisor had ever similarly solicited employees to bring their problems to them. *Clark
Distribution Systems*, 336 NLRB 747, 742 (2001); *Grove Health Care Center*, 330 NLRB 775
(2000); *Capitol EMI Music*, 311 NLRB 947, 1007 (1993); *Tractor Wholesale*, *supra* at 1058.

45 I recognize that all of the above cases dealt with solicitation of grievances in the context
of union representation, and involved conduct by employers motivated by an attempt to
discourage or forestall employees from supporting unions. However, in my view the principles,
reasoning and analysis in these cases should be equally applicable to attempts by employers to
discourage concerted activities, whether or not a union is involved. After all, union activity is
50 another form of concerted activity, protected by the Act. Here, Respondent after being upset by
Lee's concerted activities of discussing the health insurance issue with her coworkers, informed
Lee that if she has any problems, she should come to him (Albert) and he will fix it. Thus Albert
by soliciting Lee to inform him of any problems or grievances that she may have, (rather than

discussing it with her coworkers), and stating that he will fix it (i.e. he will remedy her grievances, without the necessity of her engaging in concerted activity, by involving other employees in her “problem”), Respondent has promised to remedy any such concerns that Lee may have. Such conduct based on the reasoning and precedent cited above, is violative of Section 8(a)(1) of the Act. I so find.

C. THE ALLEGED DISCHARGE ON JANUARY 28

While Respondent denied that it terminated Lee on January 28, I have credited Lee’s testimony, supported by Albert’s subsequent email, that he did in fact inform Lee that she was fired on January 28, changed his mind later on in that day, and informed her by email that she was not fired.

Notwithstanding the fact that Respondent rescinded the discharge, later in the day, it is still appropriate to decide the issue of whether the initial, albeit temporary decision to terminate her was unlawful.

In that regard, the evidence establishes that between January 26 and 28, Lee discussed with several employees by IM or by phone the issue of the cancellation of health insurance for the employees. Further Lee had several conversations with Albert about the issue, and several employees discussed their concerns about the issue with several different supervisors of Respondent. It is undisputed that between January 26 and 28 the health insurance issue was a matter of common concern for Respondent’s employees, and that Lee was the employee who was the primary complainer about the matter. Thus there is no question that Lee was engaged in concerted activity during this period of time. *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003); (Employee discussed common complaint about sick days policy with employees and management); *Timekeeping Systems Inc.*, 323 NLRB 244, 247 (1995) (email sent by employee to fellow employees and to management complaining about employer’s vacation policy, concerted activity), *Salisbury Hotel*, 283 NLRB 685 (1987), (Employees’ discussions with fellow employees about lunch time policy, concerted activity).

The evidence also overwhelmingly demonstrates that Respondent’s decision to discharge Lee on January 28, was motivated by such protected concerted activity.¹² Lee was terminated two days after her first complaint about the health insurance termination, and on the very same day that she IM’d employee Joseph about the issue, and spoke to several employees about the cancellation. Indeed animus towards Lee’s conduct is firmly established by Dezesare’s comment to Albert that Lee was “running around telling a bunch a people stuff you’ve get to stop it” and that Lee was “stirring the pot.”

Further in the email to Lee, wherein Albert rescinded the discharge, he continued to demonstrate animus towards Lee’s concerted activity, by as I have found above, violating Section 8(a) (1) of the Act, by directing her not to talk to other employees about terms and conditions of employment, and by soliciting grievances and promising to rectify any problems she may have in the future, in order to discourage concerted activities.

Therefore, it is clear and I find that Albert complied with the request of Dezesare to “stop” Lee’s concerted activities, by terminating her on January 28. By such conduct

¹² No serious contention has been or could be made that Lee’s conduct, prior to January 28, rendered her concerted activity unprotected. That issue is raised concerning her discharge on February 16, and will be discussed below.

Respondent has violated Section 8(a) (1) of the Act. I so find.

D. THE DISCHARGE OF LEE ON FEBRUARY 16

5 The evidence discloses that notwithstanding Albert’s admonition to Lee to cease her concerted activities and his temporary termination of her on January 28, Lee continued to engage in vigorous and extensive concerted activities until her discharge on February 16.

10 This activity consisted of further discussions with employees concerning the issue, particularly involving the option of a conversion policy, and the necessity to do so, prior to February 15, which information Lee had discovered during her discussions with a representative from Aetna, Respondent’s carrier. She also had discussions with Albert and Drinkard about these issues and sent emails to Albert complaining about Respondent’s conduct with regard to the termination of insurance, including its failure to notify employees of the cancellation, and its
15 conduct of taking money out of employee’s checks for a non-existent health plan. Lee also complained in emails to Drinkard and Albert about Respondent’s failure to notify employees about the conversion option, and advised Respondent to notify all employees about the conversion and the deadline for such an application to be submitted. In an email to Albert, Lee warned that Respondent’s failure to notify employees about the cancellation and about the
20 conversion option could leave Respondent open to a class action suit.

 Respondent argues that Lee’s activities in this regard i.e. subsequent to February 1, can no longer be considered concerted, since Respondent had resolved the insurance issue by arranging for alternate coverage with Oxford as of February 1.¹³ Therefore Respondent
25 contends that no other employees shared Lee’s concerns after February 1, and her activities subsequent to that date, cannot be considered concerted. I disagree.

 Lee’s activities subsequent to February 1, was clearly a continuation of and logical outgrowth of her earlier concerted activity of protesting Respondent’s conduct in connection with
30 the health insurance termination. Lee was continuing to speak to management on behalf of other employees, as well as herself. In these circumstances, Lee’s conduct was at all times concerted and in pursuit of “mutual aid or protection.” *Timekeeping Systems*, 323 NLRB 244, 248 (1995) (email sent to management complaining about vacation policy); *Emarco Inc.*, 284 NLRB 832, 833-834 (1987)(Remarks of charging party an extension of dispute over employer’s
35 failure to make payments to Union’s welfare fund, even though at the time of statements, payments had been made); *Salisbury Hotel*, 283 NLRB 685, 686-687 (1985) (Charging Party’s call to Department of Labor logically grew out of employees – prior concerted complaints about lunch hour policy and continuation of that activity); *Every Woman’s Place*, 282 NLRB 413 (1986) (call to Department of Labor logical outgrowth of prior complaint by employees about overtime, when Employer had informed employees that the mater was being investigated), *Jhirmark Enterprises*, 283 NLRB 609 fn. 3 (1987) (conversation between two employees concerning the employees complaints about one of employee’s performance, connected to and a logical
40 outgrowth of and continuation of prior concerted complaints about the employee’s performance); *Dayton Typographic Service*, 273 NLRB 1205 (1984), *enfd. in pert. part*, 228 F.2d 1188, 1141-1142 (6th Cir. 1985) (complaint made by employee about Saturday work, without compensation, continuation of prior complaints made by other employees, although other employees had
45 decided not to pursue issue); *JMC Transport*, 272 NLRB 545 fn. 2 (1984) (exchange between employee and supervisor over alleged discrepancy in employee’s paycheck concerted, as it

50 ¹³ Respondent also asserts that it arranged for a conversion option for its employees, at a lower cost than the policy with Aetna, selected by Lee.

grew out of earlier concerted complaints by two employees concerning same subject matter, pay structure, although issue complained about was not the same).

5 I also note the Supreme Court's decision in *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962), cited in *Emarco* supra. The Court held (id at 370 U.S. at 16).

10 The fact that the company was already making every effort to handle the employees running dispute by rectifying the problem, does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to a determination of whether a labor dispute exists or not.

15 Accordingly, based on the foregoing analysis and authorities Lee's complaint to Respondent about its conduct with regard to the insurance plan, continued to be concerted, notwithstanding the fact that Respondent had obtained replacement insurance and a conversion policy option for its employees.

20 Even apart from this concerted activity, the record reflects that in mid February Lee protested to Albert, Respondent's decision to terminate a fellow employee. It is well settled that this conduct of Lee also constitutes the exercise by Lee of concerted activity. *The Continental Brand*, 353 NLRB 31 (2008); *Racer Protection Service*, 328 NLRB 334, 341 (1999); *Burt Brown Contracting Co.*, 283 NLRB 488, 489 (1987); *The Loft*, 277 NLRB 1444, 1465 (1986); *International Rural Electric Association*, 252 NLRB 1153, 1163 (1981); *Richboro Community Hospital*, 242 NLRB 1267 (1979).

In fact Lee combined the exercise of both aspects of her concerted activity by asserting both issues in the final two emails sent to Albert, which immediately precipitated her termination.

30 Respondent argues however, that it did not discharge Lee because of her exercise of any concerted activity engaged in by her, but rather because Lee made insulting, libelous and profane statements about Albert and Respondent to Drinkard and in emails to Albert, as well as her alleged threat to communicate these statements to Respondent's customers and clients. Although Respondent has not cited *Wright Line*, it seems to be articulating *Wright Line*, 251 NLRB 1083, 1088 (1980) enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1988), principles, by arguing that it would have and in fact did discharge Lee, because of conduct other than her concerted activity. However that analysis is not appropriate, where as here, Lee's conduct, alleged by Respondent to have motivated her discharge, was part of the *res gestae* of her concerted activity. *Noble Metal Processing*, 346 NLRB 745 (2005); *Stanford Hotel*, 344 NLRB 558 (2005); *Hahmer, Foreman & Harness*, 343 NLRB 1423, 1425, fn. 8 (2004); *Mast Advertising & Publishing*, 304 NLRB 814, 820 (1991).

45 In such circumstances the appropriate inquiry is whether Lee, in the course of the exercise of her concerted activity, engaged in sufficiently egregious conduct to remove it from the protection of the Act. *Datwyler Rubber & Plastics Co.*, 350 NLRB 669, 670 (2007); *Noble Metal*, supra; *Stanford Hotel* supra.

50 In that connection the standard for determining whether specified conduct is removed from the protections of the Act, is whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Merry Healthcare Centers*, 350 NLRB 203, 204-205 (2007); *Dreis Rump Mfg. v. NLRB*, 544 F.2d 320, 324, (7th Cir. 1976).

The rationale behind such a stringent standard, for assessing discharges for conduct occurring in the course of an employee's exercise of concerted activity, is set forth by the Board in *Consumers Power Company*, 282 NLRB 131, 132 (1986).

5 The protections of Section 7 would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, bonus, and working conditions are among the disputes most likely to engender ill feelings and strong responses. *Id.* at 132.

10 Thus, Board law supported by the courts establishes that “employees are permitted some leeway for impulsive behavior when engaging in concerted activity, subject to the employer’s right to maintain order and respect.” *Tampa Tribune*, 351 NLRB 96, *slip op.* at 3; *Piper Realty Co.*, 313 NLRB 1289,1290 (1994); *NLRB v. Ben Pekin Co.*, 452 F.2d 205, 207 (7th Cir. 1991); *NLRB v. Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

15 In deciding whether the employee’s conduct crossed the line into unprotected conduct, the Board balances four factors, as detailed in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). The factors are: (1) the place of discussion; (2) the subject matter for the discussion; (3) the nature of the employees’ outburst; and (4) whether the outburst was in any way, provoked by employees’ unfair labor practice. *Tampa Tribune*, *supra*; *Datwyler Rubber & Plastic*, *supra*.

20 It is first necessary to review the alleged inappropriate conduct committed by Lee in the course of her concerted activity, which Respondent has in effect contended, rendered her activity unprotected.

25 In her IM exchange with Joseph on January 28, after ascertaining from Joseph that he also had a problem with his insurance, and that Drinkard had informed Joseph that employees had to wait for a new card, Lee responded “bullshit.” After Joseph told her that he also had his card rejected and in front of a lot of people and it was “pretty embarrassing,” Lee responded, “me too, I cried at the fucking drug store.”

30 In her January 30 email to Albert, Lee accused Respondent of illegal conduct by taking money out of employee’s paychecks for a non-existent health plan. Lee also expressed skepticism about Albert’s prior comments about insurance, and added “you’ve lied to me too many times in my life.” Finally, Lee threatened to “have a lien put on your bank account and house if anything happens to me because of my lapsed health insurance.”

35 In early February Lee phoned Drinkard. She informed Drinkard that she had spoken to Aetna that knows “what you guys are doing.” She accused Respondent of making deductions from the employees and just decided not to pay into the plan. After Drinkard explained that Respondent was trying to resolve the situation and see if Aetna can reinstate the policy, Lee continued to insist that Respondent had deducted money from employees and not paid the bill. Lee added that Albert was “a criminal.”

40 On February 13, Lee sent another email to Albert, demanding payment for the conversion policy that she had paid. She asserted that Respondent was obligated to pay this bill, because it had failed to tell employees that their insurance was terminated, on November 15, 2007, and observed that Respondent could be open to “legal action, perhaps a class action suit.”

45 Albert responded to Lee that Respondent had addressed these issues with employees and “I would appreciate it if you just worried about your own situation.”

This response produced two more emails from Lee, including one which stated, “This is what happens when you fuck with people’s health. I will see to it that you don’t get away with this.”

5

On February 15, Lee sent another email to Albert, demanding that Respondent rehire Valenti, and if not, Lee would “open my mouth to tell all of Wall Street Source on Monday about all the illegalities of what you’re trying to pull with everyone’s insurance.”

10

After Albert sent an email to Lee, explaining why he terminated Valenti, and that there was an “administrative error” with the insurance, Lee responded, again by email. In this email, (the final email prior to the discharge), Lee detailed her complaints about Respondent’s conduct with regard to the cancellation of insurance, and disputed Albert’s claim that it was an “administrative error.” She also accused Albert of being a “thief,” because he “took money from people paychecks from November 15 until January.” She also stated therein, “you have no remorse and you don’t care for others.” You have no empathy (look it up) but you’ve got a lot of arrogance.” Lee again pressed for Valenti’s reinstatement, and threatened to tell “everyone every detail about their insurance, unless Valenti is rehired.” Further, Lee’s email states as follows:

15

20

“So don’t talk to me about ethics and morals and all that bullshit when you talk about Christina because you don’t know what they are.” Lee concluded the email by asserting, “you’re displaceable and I don’t want to know you as a person, you disgust me.”

25

Respondent also relies on the email sent by Lee to Albert, but making reference to his wife Nerissa. It reads, “Nerissa ... consider yourself warned.”

30

As I have detailed above in the facts, Albert testified and Respondent claims that in a phone conversation, Lee threatened to “tell the world” about her accusations against Respondent. However, for the reasons described above, I did not and do not credit Albert’s testimony in this regard, and find that Lee made no such comment. I also credit Lee’s testimony that she had no intention of communicating with Respondent’s clients or customers about her complaints, and that her references to “all of Wall Street Source,” meant only that she would tell all its employees about her views of the conduct of Respondent and Albert with respect to the insurance cancellation.

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The best that can be said for Respondent in this regard, is that Albert may have “believed,” that Lee intended to spread her accusations to Respondent’s clients or customers. Even if that were true, it would not help Respondent’s position. Even if Respondent had a good faith belief that Lee intended to contact its customers, and that such conduct would be unprotected,¹⁴ since I have in fact concluded that Lee had no such intent, and it is undisputed that she made no accusations to clients or customers, Lee did not lose the protections of the Act, based on such belief of Respondent. *Jhirmack Enterprises*, 283 NLRB 609, 610 (1980);

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¹⁴ In this regard, I agree with General Counsel that even if Lee did threaten to make her accusations to customers or clients, this does not necessarily establish such conduct is unprotected, unless the comments are disloyal, reckless or maliciously untrue. *Local 1229, IBEW (Jefferson Standard)*, 346 U.S. 464 (1953). See also *Allied Aviation Service of New Jersey*, 248 NLRB 229, 231 (1980), enfd. memo 636 F.2d 1210 (3rd Cir. 1980). I need not reach that issue however, in view of my findings above that Lee did not make such threats.

NLRB v. Burnip & Sims, 379 U.S. 21 (1964); *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1970); *American Hospital Association*, 230 NLRB 54, 56 (1977).

Turning to the four *Atlantic Steel Factors*, I conclude that all four factors favor Lee retaining the Act's protection. Factor one is the place of the communications. The allegedly unprotected statements were made primarily in emails to Albert and conversations with Albert and Drinkard. The communications were not made to or in the presence of other employees, and therefore had no impact on workplace discipline, nor did the communications undermine the authority of Albert or Drinkard. *Tampa Tribune*, supra. slip op at 3; *Felix Industries*, 331 NLRB 144, 145 (2000); *Stanford Hotel*, supra. 344 NLRB at 558.

The subject matter of the communications was Lee's criticism of Respondent's conduct with respect to insurance, as well as its decision to terminate employee Valenti. Thus the alleged unprotected conduct was directly related to discussions of employee complaints about terms and conditions of employment, and this factor therefore weighs in favor of protection. *Datwyler Rubber & Plastics* supra. 350 NLRB at 670; *Tampa Tribune*, supra. at 3.

The third factor, the nature of the outbursts also weigh in favor of protection. While Lee did use profanity in several emails, it is significant that none of the profanity was directed towards Albert or any official of Respondent. *Tampa Tribune*, supra. at 3. Lee was merely characterizing Respondent's explanations of the termination of their insurance as "bullshit," and she characterized Respondent's conduct as "fucking" with peoples health; and in her IM to Joseph reflected that she had "cried at the fucking store," when she was told that her insurance was terminated. Such profanity does not come close to meeting the stringent standard of "egregious conduct" requiring loss of Act's protection. Indeed, far more serious instances of profanity, which were made directly to or about management officials, have been held insufficient to lose the Act's protection. *Alcoa Inc.*, 352 NLRB No. 141 (2008), (referring to supervisor as "egoistical fucker"); *Tampa Tribune* supra, (calling supervisor a "stupid fucking moron."); *Union Carbide Corporation*, 331 NLRB 356, 359 (2000) (Calling supervisor a "fucking liar"); *Burle Industries*, 300 NLRB 498, 502, 504 (1990) (Calling supervisor a "fucking asshole"); *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964), enf. 351 F. 2d 584 (7th Cir. 1965), (Referring to supervisor as a "horse's ass"); *U.S. Postal Service*, 241 NLRB 384, 390 (1979) (Referring to acting supervisor as an "asshole"); *NLRB v. Cement Transport Company*, 490 F.2d 1024, 1030 (6th Cir. 1974) (Employee referred to President of Company as a "Son of bitch").

Respondent also relied upon Lee's comments in her emails and in phone conversations with Drinkard, that Albert was a "criminal" and a "thief" and that Respondent had committed "illegal" acts. Respondent also asserts that Lee made "threatening" remarks to Respondent, including threats to file class action suits and place a lien on Albert's house, as well as threatening statements concerning his wife. Finally it accuses Lee of engaging in "extortion" by threatening Respondent with telling employees about her accusation, unless Respondent rehired Valenti. All of this conduct in Respondent's view, justified its decision to discharge Lee. However, as I have detailed above, the appropriate inquiry is whether such conduct, rendered Lee's concerted activity, unprotected.

Considering the latter contentions first, the alleged "extortion," by Lee, consisted merely of Lee's decision to combine her exercise of two areas of concerted activity. Thus, I have found that her accusations about Respondent's conduct *vis-à-vis* insurance, was a continuation of her concerted activity, and that her attempting to convince Respondent to rescind its discharge of Valenti is also the exercise of concerted activity. I see nothing unprotected or improper, in her attempting to combine these activities and by informing Respondent that unless it reinstated Valenti, she would tell all of Respondent's employees of her contentions with regard to how

Respondent handled the insurance termination. (i.e., that it was not truthful with the employees concerning why and when their insurance was cancelled.)

5 While Lee did mention the possibility of a class action suit and placing a lien on Albert's house, as possible consequences of Respondent's failure to properly notify employees of the cancellation, I find nothing improper or unprotected about such statements. It is simply her opinion of what could happen as a result of Respondents conduct, and the fact that Respondent viewed it as a "threat" does not make it indicative of unprotected conduct.

10 As to the alleged "threat" to Albert's wife, I agree with General Counsel, that the statement in Lee's email, "Nerissa ... consider yourself warned," is vague and ambiguous, and does not threaten Nerissa with physical harm. This comment could just as easily be construed as referring to Lee's previous alleged "threat" to have a lien placed on the Albert house which I have found above to be part of Lee's exercise of protected concerted activity.

15 This brings me to the accusations made by Lee, which appeared to have troubled Albert the most. That is her assertion that Albert was a "criminal" and a "thief" and that Respondent engaged in "illegal" conduct. Respondent characterized these statements as "slanderous and libelous". Respondent argues in this regard that neither he nor Respondent engaged in any criminal or illegal conduct, that a clerical error resulted in the termination of its insurance, and that it immediately and in good faith sought to and did rectify the situation, and obtained new coverage for its employees. Thus for Lee to make such insulting and slanderous statements to Albert and its employees, warrant Lee's discharge, and implicitly renders her concerted activity unprotected.¹⁵

25 However, the truth or falsity of Lee's accusations against Albert and/or Respondent is not the test for determining whether Lee's concerted activity became unprotected by virtue of such accusations. The Supreme Court in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), applied the stringent standards of *New York Times v. Sullivan*, 376 U.S. 254, 89 S.Ct. 710 (1964) to libel or slander actions involving labor disputes or other conduct deemed protected by the Act. Thus the Court held "construing the Act to permit recovery of damages in a state cause action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they true of false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act ". 383 U.S. at 64, 86 S. Ct. at 664.

40 The Board supported by the Courts has consistently applied this standard in assessing whether statements alleged to be libelous, slanderous or untruthful renders concerted activity unprotected. *Valley Hospital Medical Center, Inc.*, 351 NLRB No. 88, slip. at 3-4 (2007); *Honda of America Manufacturing, Inc.*, 334 NLRB 751, 752 (2001); *Titanium Metals Corporation*, 340 NLRB 766, 772, 773 (2003); *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995); *Delta Health Center, Inc.*, 310 NLRB 26, 43 (1993); *Tradewest Incineration*, 336 NLRB 902, 407 (2001); *KBO, Inc.*, 315 NLRB 570, 571 (1994); enfd. Mem. 96 F.3d 1448 (6th Cir. 1996); *New York University Medical Center*, 261 NLRB 822, 824 (1982); *Veeder-Root Company*, 237 NLRB 45 1175, 1777 (1978); *Dreis & Krump Manufacturing, Inc.*, 221 NLRB 309, 315 (1975); enfd. 544 F.2d 320 (7th Cir. 1956); *Asplundh Tree Expert Company*, 336 NLRB 1106, 1108 (2001); *Jacobs*

50 ¹⁵While Respondent who was unrepresented, did not phrase his arguments in terms of protected versus unprotected conduct, it did raise these issues in arguing that the discharge was lawful. It is therefore appropriate for me to decide the issue of whether Lee's conduct lost the protection of the Act.

Transfer, Inc., 201 NLRB 210, 218 (1973); *Texaco v. NLRB*, 462 F.2d 812, 815 (3rd Cir. 1972); *Owens Corning Glass v. NLRB*, 407 F.2d 1357, 1365, 1366 (4th Cir. 1964); *Ben Pekin Corporation*, 181 NLRB 1025, 1028 (1970).

5 Thus in assessing Lee’s comments, the fact that they may be false, misleading or inaccurate is insufficient to demonstrate that they are “maliciously untrue,” *Valley Hospital* supra, or that they were made with “knowledge of their falsity or with reckless disregard of whether they were true or false,” *Mediplex of Wethersfield* supra.

10 Here I cannot conclude that Lee made her accusations “with knowledge of its falsity or with reckless disregard of whether it was true.” *KBO, Inc.*, supra; *Linn v. United Plant Guard*, supra. While Lee did refer to Albert as a “criminal” and a “thief,” and accused Respondent of illegal conduct concerning the termination of the employees, she did have some basis for her
15 accusations. It is undisputed that Respondent did withheld monies from the paychecks of Lee and other employees, and failed to send them to Aetna to partially cover the employees insurance, for some period of time. It also appears that Respondent and Albert were less than candid, in explaining the reasons for their failure to do so, and that Respondent was not timely in notifying employees that their coverage had been cancelled. In that connection, Respondent told Lee and other employees that they still had insurance, it was clerical error by Aetna, or
20 employees were waiting for new cards. In fact the policy had been cancelled due to Respondent’s negligence in failing to pay timely premiums. Indeed, Albert himself conceded that Drinkard had “screwed up,” and Frasson testified that Drinkard had “dropped the ball.” Further Lee, after speaking with Aetna’s attorney, had found out that Respondent had missed premium payments, several times in the past.

25 Accordingly, I conclude that Lee had a basis for suspecting that Respondent was acting unlawfully, particularly since it had not been candid with Lee or other employees concerning the circumstances of the termination.

30 Thus, while Lee’s comments were stinging, harsh, and not accurate, nevertheless, they had some reasonable connection to objective facts, that Lee could form the perception, even if erroneous, that Respondent and Albert might have engaged in illegal conduct. *Delta Health Center*, supra.

35 Therefore while Lee’s comments could be construed as “hyperbolic” or “biased,” *Valley Medical Center* supra, they were not made with knowledge of their falsity with reckless disregard for the truth. Thus, they are not sufficient to render her conduct unprotected, *KBO, Inc.* supra. (Accusation that Employer financed antiunion campaign from the employees’ profit sharing accounts); *Mediplex of Wethersfield*, supra (Employer had “cheated” employees in the
40 past concerning alleged paid time off for employees who work more than 24 hours a week); *New York University Medial Center*, supra. (Accusation that Employer used “security guards for fascist Gestapo tactics to intimidate black and Spanish workers.”); *Asplundh Tree Expert* supra. (Accusation that supervisor was “pocketing” savings from not paying employees proper per diem rate); *Jacobs Transfer, Inc.*, 201 NLRB 210, 218 (1973) (Accusing management of
45 “collaborating” with the Union, against the interest of Union members); *Ben Pekin Corporation*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1971), (Accusation that Employer made “payoff” to Union to agree to wage increase less than contract provided.)

50 Based on the foregoing analysis and authority, I conclude that none of the conduct engaged in by Lee, singly or collectively, renders her concerted activity unprotected, and that the third factor, in *Atlantic Steel*, weighs in favor of Lee retaining the protection of the Act.

The fourth factor in *Atlantic Steel*, supra. is the question of whether Lee’s conduct was provoked by Respondent’s unfair labor practices? I find in agreement with General Counsel, that Lee’s alleged unprotected conduct was at least partially provoked by Respondent’s unfair labor practices. Thus, as I have found above, Lee’s alleged unprotected conduct all occurred, subsequent to the January 28, unlawful discharge of Lee, as well as the violations of Section 8(a)(1) of the Act, of prohibiting employees from discussing the insurance issue and unlawfully soliciting grievances, in order to discourage the exercise of concerted activity.

It is also significant that after these events, Lee checked with the Labor Board, and found out that Respondent had violated the Act by prohibiting such discussions of its employees, as well as by terminating Lee. Further, Lee referred to these illegalities in her January 30 email, wherein she also accused Respondent of committing “illegal” actions by “taking money out of employee’s checks for a non-existent health plan.” She also threatened to place a lien on Albert’s bank account and house in this same email.

Lee’s statements did not stop Respondent’s unlawful conduct. Lee continued to complain about Respondent handling of the insurance issue, in subsequent emails, resulting in another unfair labor practice, as I have found above, in Albert’s email of January 13 at 4:18 a.m., wherein he implicitly ordered her to cease her concerted activity, by saying, “I would appreciate it if you just worried about your own situation.” In an immediate response to this email, Lee used profanity by stating “this is what happens when you fuck with people’s health.”

Albert replied to this email at 4:26 a.m., wherein he continued to criticize Lee for concerted activity. He told her that she was trying his patience, and added “if this would have been anyone else using this language other than my sister I would have terminated her employment.” Albert later added “not one other employee talks to me in this manner,” they are respectful and discuss the situation they do not threaten me.”

I conclude that Albert’s statements in this email constituted an implicit threat to terminate Lee because of her concerted conduct. While Albert made his critical comments concerning the language used by Lee, and her alleged “threats” to Albert, in fact the language and the alleged threats, (i.e. filing a class action suit, placing a lien on Albert’s house and bank account,) were all made in conjunction with her concerted protests. Since these comments are clearly not unprotected, as I have detailed above, Albert’s implied threat to terminate her, would be a violation of Section 8(a)(1), if it had been so alleged. While I cannot make such a conclusion, since it was not alleged, I can and do rely on this conduct in assessing whether Lee’s conduct was provoked. *Felix Industries*, supra. 331 NLRB at 145.¹⁶

Therefore, I find that Lee was provoked, at least in part, by these unfair labor practices, when she in her February 16 email accused Albert of being a thief, and Respondent of “illegalities” in dealing with the insurance issue. *Felix Industries, Inc.*, 339 NLRB 145, 146-147 (2003) (In evaluating the case, after the Court’s remand as detailed above, the Board placed substantial reliance on provocation finding, to conclude that employees conduct did not lose the protection of the Act, despite accepting as the law of the case, that the nature of the outburst, weighed toward losing protection of the Act.); *Datwyler Rubber and Plastics, Inc.* supra. 350 NLRB at 670 (Board relies on unlawful threat of discharge for engaging in protected activities, in concluding that outburst of employees, i.e. calling General Manager the devil, was provoked.);

¹⁶ While I recognize that *Felix Industries*, supra. was reversed in part by the D.C. Circuit, 251 F.3d 1051 (D.C. Cir. 2001), the Court agreed with the Board’s finding on this issue, and reversed and remanded only on the issue of the nature of the outburst.

5 *Stanford Hotel* supra. 344 NLRB 558, 554 (Board relies on provocation of threat of discharge, to conclude that statement of employee that manager was “a fucking son of a bitch,” did not forfeit the loss of the Act’s protection); *Winston Salem Journal*, 341 NLRB 124, 126-127 (1994), enf. denied 344 f.3d 207 (4th Cir. 2005) (Board finds that employee’s calling supervisor a “racist,” provoked by Employer’s unlawful threat of discharge.)

Therefore, I conclude that the fourth factor in *Atlantic Steel*, also weighs in favor of Lee retaining the protection of the Act.

10 Since all four factors of *Atlantic Steel* weigh in favor of protection, I find that Lee’s conduct did not forfeit the protection accorded to her substantial exercise of two areas of concerted activity. *Datwyler Rubber & Plastics* supra.

15 Accordingly, based on the foregoing analysis and precedent, I conclude that although some of Lee’s comments were intemperate, insulting and even inaccurate, that they were not so opprobrious or of such a character as to render her unfit for further service. *St. Margaret Mercy Healthcare Center*, 350 NLRB 203, 204, 205 (2007), *Alcoa* supra; *Sanford Hotel* supra; *Datwyler Rubber* supra; *Asplundh Tree* supra; *Timekeeping Systems* supra; *Burke Industries* supra; *Veeda-Root* supra; *Dreis & Krump* supra.

20 I therefore find that Respondent has violated Section 8(a)(1) of the Act by its February 16 termination of Lee.

Conclusions of Law

25 1. The Respondent Wall Street Source Inc., is an Employer within the meaning of Section 2(6) and (7) of the Act.

30 2. Respondent, by prohibiting employees from discussing their terms and conditions employment and directing said employees not to do so, has violated Section 8(a)(1) of the Act.

35 3. Respondent, by soliciting grievances from employees and implicitly promising to rectify same, in order to discourage employees from engaging in protected concerted activities, has violated Section 8(a)(1) of the Act.

4. Respondent, by terminating the employment of Niki Lee on January 28 and February 16, because she engaged in protected concerted activities, has violated Section 8(a)(1) of the Act.

40 5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

45 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

50 I shall recommend that Respondent offer reinstatement to Niki Lee to her former position of employment and make her whole for the discrimination against her plus interest, as computed in *F.W. Woolworth*, 90 NLRB 289 (1950) and *Horizons for the Retarded*, 283 NLRB 1173 (1980).

Based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

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ORDER

The Respondent, Wall Street Source, Inc., New York, NY, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

(a) Directing and instructing its employees not to discuss health insurance or any other term and condition of employment with one another.

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(b) Soliciting grievances from and promising benefits to employees in order to discourage them from engaging in protected concerted activities.

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(c) Discharging or refusing to reinstate their employees, because said employees engaged in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Niki Lee full reinstatement to her former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

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(b) Make Lee whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

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(c) Within 14 days from the date of the Board's Order remove from its files any reference to the unlawful discharge of Lee, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

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

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¹⁷ 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.

(e) Within 14 days after service by the Region, post at its New York, New York, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 28, 2008.

Dated, Washington, D.C., April 1, 2009.

Steven Fish
Administrative Law Judge

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT direct or instruct our employees not to discuss health insurance or any other term and condition of employment with one another.

WE WILL NOT solicit grievances from and promise benefits to employees in order to discourage them from engaging in protected concerted activities.

WE WILL NOT discharge or refuse to reinstate our employees, because said employees engaged in protected concerted activities.

WE WILL NOT in any like in related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days form the date of the Boards, Order offer Niki Lee full reinstatement to her former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Lee whole for any loss of earnings and other benefits suffered as a result of the discrimination against her plus interest.

WE WILL within 14 days from the date of the Boards Order, remove from our files any reference to the unlawful discharge of Lee and within 3 days thereafter notify the employees in writing that this has been done and that the discharge will not be used against her in any way.

WALL STREET SOURCE, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

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, 212-264-0346.