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**A and G, Inc., d/b/a Alstyle Apparel and United Food and Commercial Workers Union, Local No. 324, United Food and Commercial Workers International Union.** Case 21–CA–37029

December 28, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On July 12, 2006, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel and the Charging Party filed separate answering briefs; and the General Counsel filed limited cross-exceptions and a supporting brief. On March 19, 2007, the National Labor Relations Board remanded the case to the judge for further consideration in light of the Board's decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), *Croft Metals, Inc.*, 348 NLRB No. 38 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006).

On June 26, 2007, Judge Parke issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief; the General Counsel and the Charging Party filed separate answering briefs; and the General Counsel filed limited cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as described briefly below, and to adopt the judge's recommended Order as modified and set forth in full below.

1. The judge found that the Respondent engaged in unlawful surveillance in violation of Section 8(a)(1) by checking the security badges of employees passing out

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<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening plant closure in the event of unionization, interrogating employees about their union activity, and coercively questioning a union organizer. We also adopt, in the absence of exceptions, the judge's findings that statements made by one of the Respondent's labor relations consultants regarding unions did not violate Sec. 8(a)(1) and that the Respondent did not violate Sec. 8(a)(3) by transferring Shift Leader Kiet Tuan Ly to the first shift.

union handbills on their breaktime. The Respondent excepts to this finding, but disputes only the judge's underlying factual determination that it offered no justification for the security guard's conduct. On review, we find that while the Respondent explained why the guards check the badges of employees entering the facility for security purposes, it failed to explain why the guards would need to check the badges of employees already inside the facility and on break. We thus find no basis for overruling the judge, and we adopt her finding of the violation.

2. On remand, the judge found that the shift leaders are not supervisors because they do not have the authority under Section 2(11) of the Act to assign work or to responsibly direct employees. We agree. With respect to assignment, we find that, even assuming that the shift leaders assign work to the employees, such assignments do not involve the exercise of independent judgment for the reasons stated in the judge's supplemental decision.

Regarding responsible direction, the judge found the requisite degree of accountability based on a tenuous inference rather than any record evidence. Under Board precedent, however, the Respondent must present evidence of "actual accountability" to prove responsible direction. See *Golden Crest Healthcare Center*, supra at 5. Because the Respondent failed to present any evidence of actual accountability, it has not satisfied its burden of proof. Thus, without reaching her further analysis on independent judgment, we agree with the judge that the Respondent did not show that the shift leaders responsibly directed the employees.

3. Applying *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), the judge found in her initial decision that the Respondent unlawfully discharged employees Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Shift Leader Kiet Tuan Ly in violation of Section 8(a)(3). We adopt the judge's findings. In doing so, we agree with the judge that the General Counsel met his initial burden of proving that union activity was a motivating factor in the discharges. Unlike the judge, however, we do not rely on Human Resources Director Ted Olea's statements involving the employees' union activity or the labor relations consultants' lawful statements as evidence of animus. Instead, we rely on the Respondent's unexcepted-to violations of Section 8(a)(1) set forth above. We also rely on the timing of the discharges, which strongly indicates that the discharges were motivated by the employees' union activities, not their alleged misconduct.<sup>2</sup>

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<sup>2</sup> In finding that the General Counsel carried his burden of proving that the discharges were motivated by union animus, Member Walsh would rely on Olea's statements. In Member Walsh's view, those statements are not protected by Sec. 8(c).

In finding that the Respondent failed to meet its *Wright Line* rebuttal burden regarding the discharges of employees Tuan Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong, we agree with the judge that the Respondent did not discharge the employees based on a reasonable belief of misconduct. The judge found that the employees did not play soccer on the work floor as alleged by the Respondent, and that the Respondent conducted only a limited investigation into the alleged misconduct, deciding to discharge the employees before giving them an opportunity to explain the allegations against them. These findings support the conclusion that the discharges were discriminatorily motivated and not, as the Respondent asserts, based on a reasonable belief of misconduct. See *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004), enfd. 198 Fed. Appx. 752 (10th Cir. 2006).

We also find that the Respondent failed to meet its *Wright Line* rebuttal burden regarding Shift Leader Ly. Although the Respondent discharged Ly allegedly for failing to stop employees from playing soccer on the work floor, it did not discharge, or even discipline, two other shift leaders who testified to having passively watched the same misconduct. Such disparate treatment indicates that Ly's discharge was motivated by his union activities, rather than his alleged tolerance of horseplay. See *Central Valley Meat Co.*, 346 NLRB No. 94, slip op. at 2 (2006). Moreover, the Respondent did not inform Ly of the allegations against him or give him an opportunity to explain his version of the events before discharging him, facts that further demonstrate the pretextual nature of the Respondent's defense. See *Midnight Rose Hotel & Casino*, supra at 1005.<sup>3</sup>

4. The General Counsel requests that the notice be posted in English, Spanish, and Vietnamese. The record establishes that many of the Respondent's employees speak Vietnamese or Spanish and have difficulty understanding the English language. Consistent with Board precedent in such circumstances, we shall modify the Order to require the Respondent to post the notice in English, Spanish, and Vietnamese. See, e.g., *St. Francis Medical Center*, 347 NLRB No. 35, slip op. at 1 fn. 4 (2006).

The General Counsel also requests a broad cease-and-desist order and that the notice be read aloud to employees. The General Counsel has not, however, established that the Board's traditional remedies, including a notice posting and a narrow cease-and-desist order, are insuffi-

cient to address the violations found in this case. We therefore deny the General Counsel's requests. See *Ampotech, Inc.*, 342 NLRB 1131 fn. 3 (2004), enfd. 165 Fed. Appx. 435 (6th Cir. 2006) (rejecting request for broad cease-and-desist order); and *Chinese Daily News*, 346 NLRB No. 81, slip op. at 4 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007) (denying request for notice to be read aloud).

#### ORDER

The National Labor Relations Board orders that the Respondent, A and G Inc., d/b/a Alstyle Apparel, Anaheim, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for supporting the United Food and Commercial Workers Union, Local 234, United Food and Commercial Workers International Union (the Union) or any other labor organization.

(b) Threatening employees that it will close its business if the Union or any other labor organization comes into the Company.

(c) Asking employees if they have signed a union card.

(d) Engaging in unlawful surveillance of employees' union activities.

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

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

(a) Within 14 days from the date of this Order offer Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's original decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

<sup>3</sup> Member Schaumber agrees that the Respondent did not meet its *Wright Line* rebuttal burden with respect to the discharges at issue. However, he does not believe that the record regarding the Respondent's investigatory practices is sufficient to conclude that the limited nature of the investigation conducted here warrants a finding of pretext.

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Anaheim, California, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be translated into Spanish and Vietnamese, and the Spanish, Vietnamese, and English notices shall be posted by 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 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, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 15, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 28, 2007

Peter C. Schaumber,	Member
Peter N. Kirsanow,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX  
NOTICE TO EMPLOYEES

<sup>4</sup> 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."

POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge any employee for supporting the United Food and Commercial Workers Union, Local 324, United Food and Commercial Workers International Union (the Union) or any other labor organization.

WE WILL NOT threaten employees that we will close our business if the Union or any other labor organization comes into the Company.

WE WILL NOT ask employees if they have signed a union card.

WE WILL NOT engage in unlawful surveillance of employees' union activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

A AND G, INC., D/B/A ALSTYLE APPAREL  
*Julie B. Gutman and Patrick J. Cullen, Attys., for the General Counsel.*

*Stephen C. Key and Micah P. Pardun, Attys. (The Key Firm, PC)*, of Dallas, Texas, for Respondent.  
*Joshua F. Young, Atty. (Gilbert & Sackman)*, of Los Angeles, California, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Los Angeles, California, on April 3–7 and 17–19, 2006, on complaint and notice of hearing (the complaint) issued January 31, 2006,<sup>1</sup> by the Regional Director of Region 21 of the National Labor Relations Board (the Board) based on charges filed by United Food and Commercial Workers Union, Local 324, United Food and Commercial Workers International Union (the Union or the Charging Party). The complaint alleges A and G Inc., d/b/a Alstyle Apparel (Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent essentially denies all allegations of unlawful conduct.

### I. ISSUES

1. Whether, at relevant times, Kiet Tuan Ly was a supervisor within the meaning of Section 2(11) of the Act.

2. Whether Respondent violated Section 8(a)(3) and (1) of the Act in early August by transferring employee Kiet Tuan Ly from the second to the first shift.

3. Whether Respondent violated Section 8(a)(3) and (1) of the Act on August 18 by discharging employees Kiet Tuan Ly, Tuan D. Bui, Loi Tan Nguyen, Phuong Hoang Nguyen, Frankie Trinh, and Hung Vong.

4. Whether Respondent violated Section 8(a)(1) of the Act at various times in July and August by threatening employees with plant closure and job loss if employees selected the Union as their representative, by interrogating employees about their union activities and support, by engaging in surveillance of employees' union activities, and by otherwise interfering with, restraining, and coercing employees in the exercise of their Section 7 rights by the following conduct: checking identification badges of and yelling at employees who took union flyers and directing employees not to take union flyers.

5. Whether an appropriate remedy would include an order for Respondent to read any notice to convened employees as follows: Ted Olea, human resources director, in English; Grace Au, human resources representative, in Vietnamese; Joaquim Orriols, general manager, in Spanish.

### II. JURISDICTION

At all relevant times, Respondent, an Illinois corporation, with its principal place of business, offices, and a facility at 500 East Cerritos Avenue, Anaheim, California (the facility), has been engaged in the business of manufacturing clothing. During a representative 12-month period ending December 14, Respondent derived gross revenues in excess of \$1 million and purchased and sold and shipped from the facility goods valued in excess of \$50,000 directly to points outside the State of California. Respondent admits, and I find, it has at all relevant

<sup>1</sup> All dates are in 2005, unless otherwise specified.

times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.<sup>2</sup>

### FINDINGS OF FACTS

#### A. Respondent's Business

Respondent's facility is a multistructure compound fronting on Cerritos Avenue in Anaheim, California, with a rear entrance off Claudia Street. Respondent stations security guards at both the front and rear entrances to check in visitors and employees, the latter of whom wear identification badges. Respondent maintains a canopied smoking/break area at the front of the facility's east building from which the front entrance can be seen.

Respondent primarily manufactures tee shirts, producing both fabric and finished product during the course of three shifts: the first shift, 6 a.m. to 2 p.m., the second shift, 2 to 10 p.m., and the third shift, 10 p.m. to 6 a.m. During the relevant period, Respondent employed 600 workers at the facility in its knitting, dyeing, cutting, sewing, and shipping departments. In Respondent's knitting department, the T shirt fabric is produced by machines of varying size and complexity, all of which weave fabric from spools of thread or yarn. The thread, which may vary in texture, is wrapped around cardboard cores called cones. Both cones and thread scraps fall to the floor during production and are swept up and disposed of by cleaning employees. At all times relevant hereto, the following management structure, in pertinent part, has existed at Respondent:

Joaquim Orriols (Orriols)	General Manager
Alfonso Doroteo (Doroteo)	Knitting Department Supervisor
Grace Au (Au)	Human Resources Representative
Akhtar Kahn (Kahn)	Chief of Safety

During the relevant period, about 90 percent of the employees in the knitting department were Vietnamese speaking.<sup>3</sup> All alleged discriminatees named below, except Kiet Tuan Ly,<sup>4</sup> worked in the knitting department on the second shift

Kiet Tuan Ly (Ly)  
 Tuan D. Bui (Bui)  
 Loi Tan Nguyen (Loi Nguyen)  
 Frankie Trinh (Trinh)  
 Hung Vong (Vong)  
 Phuong Hoang Nguyen (Phuong) Nguyen

Ly worked as a shift leader, Phuong Nguyen as a mechanic, and the others as machine operators.

#### B. Supervisory Status of Kiet Tuan Ly

Respondent employed shift leaders for each of the knitting department shifts. During July and August Carlos Galan (Galan), Anthony Trinh, and Ly served as knitting department

<sup>2</sup> Where not otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

<sup>3</sup> As needed, Au translated for Respondent's managers/supervisors in communications with Vietnamese employees.

<sup>4</sup> As detailed below, by early August Respondent had transferred Ly from the second shift to the first shift.

shift leaders. Ly was shift leader for the second shift until sometime prior to August 12 when he was transferred to the first shift. The shift leaders reported to Doroteo, who in turn reported to Orriols. The parties stipulated that Ly did not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or adjust grievances or to effectively recommend any of the foregoing. In issue is whether Ly had the authority to assign, discipline, or responsibly direct employees or effectively to recommend such actions within the purview of Section 2(11) of the Act. The evidence establishes that Ly had the same authority as the other shift leaders, and the following findings are an amalgam of Orriols' and the shift leaders' testimony as to shift leader authority.

During the relevant period herein, each employee in the knitting department was responsible for the operation of as many as five machines. Orriols trained the shift leaders on how to work with employees, how to find out which machine employees felt comfortable with, and how to make the assignments, as appropriate assignment is crucial to production. According to Orriols, he "spent a lot of hours every day teaching the area of the assignment."

On a daily basis, Orriols determined which machines should be run by assessing production needs and machinery operational availability. Prior to the beginning of each shift, Orriols provided the shift leaders with preprinted forms he had prepared entitled Machine Assignment Form on which were listed the machines that were to be run that shift. The shift leaders utilized the form and their knowledge of the capabilities of each worker to assign the machines.<sup>5</sup> According to Orriols, once a shift leader knew his coworkers' experience, machine assignment was an easy matter. If an employee complained that the machine assignment was too much for him, the shift leader reduced the number of machines assigned and discussed the matter with Orriols the next day. In the last 3 years, five or six employees have complained to Orriols about their machine assignments. On those occasions, Orriols met with the employee and the shift leader to resolve the problem.

After assigning machines, the shift leaders oversaw the work of and instructed and assisted other employees in operating their machines. As needed, they filled in for absent machine operators. The shift leaders monitored safety compliance and productivity.

The shift leaders were expected to report to management such employee infractions as not keeping the work station clean or safety breaches. Ly's signature appears along with those of admitted supervisors on certain documented disciplinary actions for knitting department employees. However, Ly had no authority to issue oral or written warnings and was not consulted before imposition of such.<sup>6</sup> Should a disciplinary issue

<sup>5</sup> Ly testified, contrary to Orriols, that Orriols told him which employees to assign to the machines. I do not credit Ly's testimony in this regard, as it is inconsistent with statements in his prehearing affidavit.

<sup>6</sup> No examples were given of Ly's handling any employee discipline, but Martin Bui cited the following example of how, as a shift leader, he would handle a disciplinary matter: "if that employee [left early], I would write a note and give to Grace and it depends on her decision. She would inquire how often would this person do that . . . she would

arise, Orriols expected Ly to make a note of the situation and leave it on his desk. In unusual situations, Ly could send an employee home and review the matter with Orriols the next day. Ly could also permit an employee to leave early, following the same notification procedure.

Orriols determined when overtime would be worked, what work would be done, and the number of employees necessary. When notified by Orriols that overtime workers were needed, the shift leaders chose those employees capable of running the machines to be operated during overtime. There is no evidence as to whether employees could decline or protest overtime; at times, overtime was assigned on a voluntary basis, but the record is unclear as to the frequency or circumstances of voluntary versus involuntary overtime.

### C. The Union Campaign—July and August 2005

In July, the Union conducted an organizational campaign at Respondent's facility, passing out flyers and union materials and talking with employees on the following dates:

*July 15:* Union Representatives passed out flyers, in English and Spanish, with attached union authorization cards to Respondent's employees at the front and rear entrances to Respondent's facility from about 1:30 to 3 p.m. Ly witnessed the handbilling as he stood with Doroteo at the lunchroom door. Ly told Doroteo that he wanted to pick up some flyers; Doroteo shook his head and said that the Union was no good. After Ly obtained flyers, he distributed three in the smoking area and two more inside the plant. Doroteo stood nearby as Ly gave out flyers inside the plant and again shook his head and said the Union was no good.

Between 1:30 and 2 p.m., 20–40 employees congregated in the smoking area near the front entrance. Olea, Au, Orriols, and Doroteo stood at the facility's front door, a location from which the handbilling and the smoking area were visible. While they were there, a number of employees obtained flyers from the union representatives. Vong, Trinh, and Loi Nguyen distributed flyers to employees in the smoking area. Ly and Vong translated the flyer information for employees, and Vong encouraged them to sign and return the authorization cards.

A couple of days later at quitting time, Loi Nguyen solicited another employee to sign an authorization card while Au watched from nearby.

*August 8:* Union representatives passed out flyers cum union authorization cards in English, Spanish, and Vietnamese to many of Respondent's employees at the front and rear entrances to Respondent's facility during three separate 2-hour periods: 5:15 a.m., 1 p.m., and 9 p.m. On this day or on August 12, Au stood at the front entrance for about 20 minutes looking in the direction of the handbilling before obtaining a flyer from a union representative. Vong and Loi Nguyen received flyers from union representatives and passed them out to employees in the smoking area while Olea, Orriols, and Doroteo, inter alia, stood outside the front entrance to the facility. Phuong Nguyen distributed flyers to fellow workers at the smoking area until he saw Olea looking directly at him whereupon he put the flyers

say, today or tomorrow, get that person to come up to the office and talk to her."

down. Bui distributed flyers to coworkers and urged them to sign authorization cards, as Au stood 2 to 3 feet away. Trinh distributed flyers to employees in the smoking area and urged them to sign authorization cards. When Trinh entered the facility, he gave a flyer to Doroteo and recommended he sign it to get a salary raise.

According to Ly, Dung Nguyen<sup>7</sup> gave a flyer to Ly inside the plant. Seeing Ly with the flyer, Olea asked him what he had. When Ly replied, "Nothing," Olea moved on. Olea denied ever asking any employee what he/she held and could not recall seeing Ly with a flyer but pointed out that "everybody had flyers at one time or another." In the absence of clear recall by Olea, I accept Ly's testimony.

*August 12:* Union Representatives again passed out flyers to Respondent's employees at the front and rear entrances to Respondent's facility. This flyer was headed, "Alstyle doesn't care about its workers" and detailed five employee complaints regarding extreme heat in the plant, failure to get breaks and lunches, unpaid overtime, absence of raises, unfair termination after job injury, and suspension for missing work. Two of the complaints read as follows:

I don't always get paid for my overtime and in two years I have never received a raise.—Worker in cutting  
I couldn't work on Saturday. When I showed up to work on Monday, they sent me home. That's not fair.—Worker in Knitting

*August 24:* Following Respondent's August 18 discharge of six employees, union representatives, along with a number of the discharged employees, passed out flyers at the facility addressing the terminations and urging solidarity under union aegis.

#### *D. Alleged 8(a)(1) Conduct*

##### 1. Respondent's meetings with employees

###### *a. The July 20 meeting*

On about July 20, Respondent held dual session meetings with the second shift of its knitting department employees. Present at each session were Au and two labor consultants, Gus and Carlos Flores, whom Respondent had hired to present Respondent's opposition to the Union. It is undisputed that the two consultants acted as Respondent's agents in the presentations. Gus Flores spoke to the employees about the union campaign while Au translated. Neither of the consultants nor Au testified. As recollections by the General Counsel's witnesses of what was said varied, each account is summarized below:

*Vong.* Vong attended the first session. In speaking to employees, the consultant sometimes looked into his "notes or his books." Gus Flores said that if the Union could obtain signatures of 30 percent of Respondent's employees authorizing it to represent the workers, the Union could then seek an election

<sup>7</sup> During the testimony a number of references were made to an employee named "Dung Nguyen." Respondent's records show only one employee with the name of "Dung Nguyen" (surnamed Nguyen) employed during the relevant period on the knitting department's second shift. Accordingly, I have herein referred to "Dung Nguyen" as "Dung Nguyen."

through the Federal Government. If the Union won the election, bargaining might result in a strike by employees and sometimes a strike can cause a company to close its business.<sup>8</sup> During the Savon and Albertson labor dispute, employees returned from strike to find their jobs were being worked by other employees and so they lost their jobs.

During the meeting, Vong asked about overtime and double-time wages; Bui asked how the Union knew about the company, and Trinh asked why he had not been given a raise during his 2 years of employment.

*Phuong Nguyen:* Phuong Nguyen attended the first session. Gus Flores told the employees that the Union was an organization to represent employees, but its objective was to obtain money from initial fees and monthly dues. If the Union could get 30 percent of the employees to sign authorization cards, the Union could get the Federal Government to conduct an election. If the Union won the election, it would sit with the employer to talk. If the two sides could not resolve issues, and he was sure that the employer would never agree to employee demands,<sup>9</sup> then a strike would occur, and if employees went on strike, it might come to the point that the company would be closed for business. The consultant mentioned that Vons and Savon had a strike in California, during which employees lost their jobs, their families broke down, and there was no happiness. The Union, he said, will not bring any happiness to the employees.

*Loi Nguyen:* Loi Nguyen attended the second session. Gus Flores said that if employees joined the Union and went on strike, when they returned to work, Respondent could have hired other employees already, and that would mean they would lose their jobs; it would be stupid to go on strike. Loi Nguyen recalled that Trinh and Vong asked why they never got raises and complained that the machines ran too fast; Bui asked an unspecified question.

*Bui:* Bui attended the first session. Gus Flores said, in pertinent part, that if the Union entered into the company, it would have to lay off a certain number of employees and, as the last step, close business. Under cross examination, Bui testified that his earlier testimony regarding company closure related to Gus Flores' comment about some grocery store employees who went on strike and lost their jobs.<sup>10</sup>

*Trinh:* Trinh attended the first session. Although Trinh's tes-

<sup>8</sup> Vong was not entirely clear as to what the consultant said about the company closing its business. He first testified that the consultant "meant" that Respondent would close if a strike occurred, then he testified that the consultant had actually said as much. Upon further questioning, Vong said the consultant warned that the company could close the business if employees went on strike. Vong also testified that he vaguely recalled the consultant saying something about the company closing if employees voted in the Union but could not remember specifics. I give no weight to Vong's vague and inconsistent testimony about Gus Flores' plant closure statements.

<sup>9</sup> No other employee testified that Respondent predicted futility of bargaining, and the General Counsel did not allege such. I do not, therefore, credit Phuong Nguyen's testimony that Gus Flores said Respondent would never agree to employee demands.

<sup>10</sup> I give no weight to Bui's vague and inconsistent testimony about employee layoff and plant closure statements.

timony was somewhat confused, the gist of it was that Gus Flores told the employees that a strike would lead to a situation where Respondent would have to close its business.<sup>11</sup> During the question/answer period, Trinh asked why he had not received a raise in two years.

*b. The August 16 meeting*

On August 16, Respondent held a meeting with the knitting department second shift employees.<sup>12</sup> In the meeting, Olea described the information in the union flyers entitled “Alstyle doesn’t care about its workers,” as lies.<sup>13</sup> He told employees, “It is time that you stand up and tell the Union that Alstyle cares for its employees and that you do not need them to talk for you.”

During the question/answer period that followed, Trinh loudly asked Olea why he had not received a raise in almost 2 years and said he did not trust him any more. Vong complained that the Company suspended employees unfairly and referred to a 3-day suspension he had been given in June for a 3-hour unauthorized absence. Vong asked why the Company had punished him with the unpaid suspension. Olea told Vong to see him after the meeting. Several employees, including, Phuong Nguyen, Loi Nguyen, Dung Nguyen, Hao, Bui, and Trinh urged Vong to demand an immediate answer while Olea watched their discussion. Vong and Trinh insisted that Olea answer at once. According to Olea, Trinh “was yelling and screaming that [Olea] should go get the file,” accused Olea of lying, and turned his back on him to speak to the group of employees. Olea was frustrated, believing that Trinh was causing him to lose control of the meeting by his “ridiculous question.” Olea left the meeting and obtained Vong’s personnel file.

Upon returning with Vong’s file, Olea addressed Vong and the group, saying that “because Vong had previous unexcused absences, his latest absence merited a 3-day suspension.” Olea said that Vong should have been terminated for attendance and that he was lucky he was still there.

On August 18, Olea placed a memo in Trinh’s file to the effect that Trinh had been insubordinate and disrespectful during the August 16 meeting, “inciting the group, trying to get the group to revolt,” which behavior was “not acceptable.”<sup>14</sup>

2. Alleged interrogation, surveillance, and coercion

Sometime in July or August, Au had a conversation with Martin Bui, assistant shift leader, and Ly in Respondent’s lunchroom. She told the two men that if the Union came into

<sup>11</sup> As with Vong and Bui’s testimony, Trinh’s testimony was too unclear to permit a finding that Gus Flores warned of company closure in the event of a strike.

<sup>12</sup> Witness accounts of this meeting varied, but witnesses generally corroborated one another in relevant details. The following account is an amalgam of the testimony.

<sup>13</sup> Witnesses described Olea as loud, angry, and red-faced. Olea agreed he was “animated” about the flyer.

<sup>14</sup> Although Olea’s professed perception was that Trinh was “yelling and screaming,” the evidence as a whole, including Olea’s failure to address Trinh’s behavior except for the belated memo to his file, does not support his testimony. While employees were undeniably loud and assertive in the meeting, Respondent does not argue that their behavior warranted discipline, and I find no evidence of misconduct.

the company, she would resign and Respondent would close the business and move to Mexico where it already had a facility.<sup>15</sup>

On August 8, Kahn approached union representative Matthew Bell (Bell) as he passed out flyers at the front entrance of the facility and asked what lies the Union was telling employees. When Bell responded, Kahn said loudly, “F–off, F–you, F–you, what are you going to tell these employees when the Union comes in, and the company has to leave? What will you tell the workers then?” About five to six employees stood a short distance away by the office door.<sup>16</sup>

In early August at about 10 p.m., as Vong and Dung Nguyen sat together at a table in the smoking area, Au approached them.<sup>17</sup> Vong testified that Au asked if he had signed a union card, to which Vong answered he had both signed and sent it. Au said employees should think very carefully before sending the cards. Vong’s account of this event in his prehearing affidavit of September 29 differs from his testimony at the hearing. In his prehearing affidavit, Vong said he volunteered the information that he had signed a union card after Au cautioned employees to think carefully before sending cards to the Union. Vong gave another affidavit on March 22, 2006, shortly before the hearing, in which he revised his earlier affidavit testimony to accord with that given at the hearing. Loi Nguyen testified that he overheard Au ask Dung Nguyen, not Vong, if he planned to send an authorization card to the Union. The testimony of Vong and Dung Nguyen presents some clear credibility problems: (1) whether Vong’s second affidavit and hearing testimony reflect a sincere and reliable revision of inaccurate testimony or a recent fabrication; (2) whether the inconsistency between Vong and Loi Nguyen’s testimony as to whom Au directed her question fatally damages the credibility of both witnesses. In resolving the problems, I have considered that I found both witnesses to be forthright and clear in testifying of this incident, and I have also taken into account the absence of refutative evidence from Au. I find, therefore, that although Loi Nguyen does not agree with Vong’s identification of the person to whom Au’s question was addressed, his testimony otherwise corroborate Vong’s, and I accept Vong’s revised account.

On August 24, while union representatives and discharged workers passed out flyers at the front entrance, some employees

<sup>15</sup> Au, who has not worked for Respondent since December, was subpoenaed by Respondent. Respondent represented that she appeared on the first day of the hearing but declined to attend thereafter; she did not testify. The substance of this conversation is based primarily on the testimony of Ly. Martin Bui, currently employed by Respondent, testified regarding the interchange. He was a reluctant witness, and although he stated he was unsure about the exact words Au used, his testimony essentially corroborated Ly’s.

<sup>16</sup> Kahn denied making any such statement. I found Bell to be a sincere and truthful witness, and I credit his testimony.

<sup>17</sup> Respondent introduced into evidence Au’s July/August timecard, which showed she was not on the clock at any time after 6 p.m. Respondent asserts in its post-hearing brief that the timeclock records show Au was not at the facility at 10 p.m. during that period. While the timecard evidence establishes that Au was not then on the clock, the evidence does not preclude her having been at the facility at times when she was not on the clock.

on break talked with their former coworkers through the perimeter fence. As they did so, security guard Antonio Leonor, Jr. (Leonor) yelled at them to get away from the fence. Bell told Leonor that what he was doing was illegal. Leonor grabbed the identification badge of two workers, looked at them (presumably to see the workers' names), and, in one instance, wrote on a paper.<sup>18</sup>

#### *E. Alleged 8(a)(3) Conduct*

##### 1. Transfer of Kiet Tuan Ly

In early August, Au and Orriols met with Ly and Anthony Trinh to inform them that they were to exchange shift leader places.<sup>19</sup> Ly was to assume Anthony Trinh's first shift duties and Anthony Trinh was to take Ly's place as the second shift leader. According to Ly, Orriols told him that he would be transferred from the second to the first shift to improve first shift production. According to Orriols, he transferred Ly to the first shift because Ly's production, energy, and "passion" were "completely down . . . All of a sudden, the energy was not there," and the production of the second shift dropped.<sup>20</sup> Orriols hoped that placing Ly on the first shift would permit Respondent to teach him a little more and to bring him back to the original energy. Orriols testified that he told both Ly and Anthony Trinh that second shift production was down, that Ly's energy level was not the same as formerly, and that he was being transferred to permit him to regain his "passion of working close to [Orriols] and with [Doroteo]." According to Orriols, both Ly and Anthony Trinh felt the challenge was "great" and were happy with the changes.<sup>21</sup> Ly commenced first-shift lead duties on the following day.<sup>22</sup>

In determining whether to credit Ly or Orriols' account of what Ly was told about the transfer, I have considered the fol-

<sup>18</sup> Leonor testified that he "did not think" he told any employees they were not to take flyers, and he denied checking any identification badges except when employees entered work. I found Leonor's testimony to be somewhat vague and overall unconvincing, and I credit other witnesses' accounts over his.

<sup>19</sup> It is not clear when Respondent made the transfer. Ly puts it after the second union handbilling, August 8. In its posthearing brief, Respondent refers to Ly having been transferred from the second shift "for a few weeks" as of August 18. The transfer may have taken place before August, but in conformity with Ly's testimony, I have referred to it as occurring in early August.

<sup>20</sup> Orriols' testimony was equivocal on this point, as he also testified that there had not been much of a change in Ly's performance prior to the transfer. Respondent presented no substantiating evidence as to decreased production.

<sup>21</sup> Anthony Trinh agreed that following his transfer, Ly was "happy and smiley."

<sup>22</sup> Respondent argues in its post-hearing brief that Ly gave contradictory testimony of what Orriols told him in the transfer discussion. Ly initially testified that Orriols told him that he would be transferred because Respondent needed "a good person in first shift because the first shift has a problem in production." Under cross-examination, Ly testified that Orriols told him he needed a good worker to help in the first shift, which Ly understood to mean that he would move to the first shift to help those operators who were performing weakly or poorly. I find Ly's testimony in direct and cross examination consistently avowed that Orriols said the purpose of the transfer was to improve first shift production.

lowing factors as well as witness manner and demeanor: Orriols' equivocal testimony as to Ly's performance, the lack of any corroborative evidence to substantiate decreased second-shift production, and the inherent improbability that Ly would be "happy" and feel the "challenge was great" upon being told his production and performance were so lacking as to necessitate a transfer. Further, Au testified at a December 1 Unemployment Insurance Appeals Board hearing that Ly had been transferred because the first shift had some problems, which suggests that her understanding of the transfer's purpose coincided with Ly's.<sup>23</sup> Accordingly, I accept Ly's account of what Orriols told him and find that Orriols told Ly he was being transferred to the first shift to improve production there.

##### 2. August 18 Discharges of Tuan D. Bui, Loi Tan Nguyen, Phuong Hoang Nguyen, Frankie Trinh, and Hung Vong

Respondent presented three witnesses who testified they saw certain employees playing a form of soccer during work time in July/August. All three served as shift leaders during the relevant period. Their testimony is summarized as follows:

*Carlos Galan:* According to third-shift leader, Carlos Galan (Galan), on three occasions he observed certain employees playing soccer in an aisle between the machines during work time. Galan testified that the soccer playing occurred between 8 and 8:45 p.m., a time that coincided with shift leaders leaving the production floor for a daily 9 p.m. meeting with fixers to discuss machinery problems that lasted for 10–15 minutes (the fixer meeting).<sup>24</sup> Galan's description of the soccer playing was somewhat vague: "they would play soccer . . . with the balls of the yarn . . . and sometimes, they would grab cones"<sup>25</sup> that were there as well . . . they would use cones, one on each side . . . there were five playing, sometimes." The playing occurred during periods where the employees were also operating their machines. The playing lasted only "minutes" in Galan's estimation; when the players saw anybody looking at them, they scattered back to their machines.<sup>26</sup> The first time, on an unknown date, Galan recalled Loi Nguyen, Bui, Phuong Nguyen, Vong, and (he believed) Trinh playing. Galan told Ly to be careful, to control his staff, and to avoid accidents. Ly said not to worry, that he would handle things his own way. Sometime in July, Galan observed the same employees playing soccer a second time and spoke to Ly, who said he would take the issue under consideration. Galan also told Trinh that he could not

<sup>23</sup> This finding is based on Ly's testimony. Although the transcript of the unemployment proceedings was not received into evidence, it was available for cross-examination; Respondent did not cross-examine Ly as to his testimony in this regard.

<sup>24</sup> Galan often arrived at work prior to the third shift to prepare and to attend the 9 p.m. fixer meeting.

<sup>25</sup> Cones are the spindles on which the manufacturing thread is wrapped

<sup>26</sup> Galan admitted that he testified in Trinh's unemployment hearing that the soccer playing lasted for up to 20 minutes. He maintained his unemployment testimony was consistent with his hearing testimony, saying, "When I talk about minutes, I am talking about 10, 15, 20 minutes," adding, "On some occasions, when I walked by and I saw them and then, I came back and they were still playing. . . they would observe me while I was walking by. When I got over to the other side, it was then that they would play."

play inside the plant for safety reasons. Galan testified that his third soccer sighting occurred on Friday, August 12, as “we were about to close.”<sup>27</sup> According to Galan, he saw the same employees playing in the same location in the same manner as the previous two times. Galan saw Trinh throw away a ball of wound-up thread. Galan retrieved the ball from the trash along with a smaller thread ball he found there (the thread balls). The larger ball was about half the size of a regulation soccer ball and, Galan said, could only have been created by unwinding the thread from a cone; the smaller was about the size of a tennis ball. According to Galan, Martin Bui and Anthony Trinh told him they had seen the five employees playing with the smaller thread ball “before.”

*Martin Bui:* During relevant periods of July and August, Martin Bui was assistant shift leader for the second shift; he was promoted to shift leader at the end of September. Martin Bui testified that he first saw employees playing soccer 3 to 4 months “ago.”<sup>28</sup> In initial testimony, Martin Bui said he saw three to four employees, sometimes two, “use the cone or they would wrap the thread and make it into a ball. They would kick back and forth or throw back and forth.” They also used two cones to make a goal. In later testimony, he said five employees played soccer the first and second times he saw it, and under cross-examination, he said he saw sometimes three and sometimes two employees playing soccer, but among the five alleged discriminatees, they all played. Although Martin Bui testified that he did not know the first or second time who was playing, he testified that he had seen Vong, Bui, Trinh, Loi Nguyen, and Phuong Nguyen playing at some time. Martin Bui said he spoke to Phuong Nguyen after the second sighting and told him not to play like that, as it would cause him to be fired. Martin Bui assertedly did not report the matter to management after either the first or second sighting essentially because of loyalty to Ly. On August 12, at 8:55, according to Martin Bui, he saw Phuong Nguyen knee kick the smaller thread ball toward Bui and Vong. Martin Bui told Vong not to play soccer like that because he would be fired. Phuong Nguyen immediately grabbed the ball and threw it in the trashcan. The incident lasted no longer than a minute.

*Anthony Trinh:* Anthony Trinh, second shift leader since early August, testified that after he was transferred to the second shift, he saw employees playing soccer four or five times. The first time, he saw Bui, Loi Nguyen, Vong, and Trinh. He told them not to play soccer any more and to return to work, which they did. The next day, Anthony Trinh saw Trinh, Vong, Phuong Nguyen, and Loi Nguyen kicking two objects back and forth: masking tape wrapped into a round shape like a ball (the tape-ball) and a cone.<sup>29</sup> Again, he told them to go back to

<sup>27</sup> “As we were about to close” apparently refers to the closing of the second shift.

<sup>28</sup> Martin Bui’s testimony would seem to fix his first soccer observation three to four months prior to the hearing, but as the alleged discriminatees had been fired several months before that, his timespan perception is either badly skewed or he meant some other time period. The first time Martin Bui saw any soccer playing was when he worked as a fixer.

<sup>29</sup> Anthony Trinh denied ever seeing employees playing with balls of yarn.

work; three complied, but Trinh just laughed at him. On the last occasion, Anthony Trinh saw Loi Nguyen, Vong, Bui, and Trinh playing soccer and let Au know.

At the fixer meeting, Galan asked Martin Bui if he had had seen employees playing soccer, and Martin Bui named the three he had seen. Galan said he had seen five; he named them and asked Martin Bui to write their names. According to Galan, he told Martin Bui and Anthony Trinh that since the employees continued playing despite earlier warnings, he would have to leave a note for Orriols.<sup>30</sup>

Galan wrote a note in Spanish, stating that five employees had been playing soccer in the plant at about 8:45 p.m. on August 12. Galan had Martin Bui write the names of Frankie Trinh, Tuan Bui, Hung Vong, Loi Nguyen, and “Phuong (Fixer)” on the note, as Galan did not know all of them. Galan left the note along with the balls on Orriols’ desk.

The facility was closed the weekend following Friday, August 12 from 6 a.m. on Saturday until Monday, August 15. On Monday, August 15, Orriols found on his desk the thread balls and the note from Galan. Orriols took the thread balls and the note to Au, who said she would look into the matter. When Olea came to work, Orriols showed him the thread balls and Galan’s note and told him that Au was investigating the situation.

On Tuesday, August 16, Au reported her findings to Olea.<sup>31</sup> She told Olea that Martin Bui, Carlos Galan, and Anthony Trinh had witnessed employees playing soccer, but she was unclear as to specifics, reporting that “maybe one saw two, maybe one saw three, maybe one saw five of them, and maybe they all saw five.”

Olea arranged for Martin Bui, Carlos Galan, and Anthony Trinh to meet with him. During their meeting, according to Olea, Carlos Galan told Olea that he had seen the five employees named on the note playing soccer, that the employees set up two cones as goal markers and kicked the larger thread ball trying to score goals, and that Galan had reported it to Ly, thinking he would take care of it.<sup>32</sup> According to Olea, Martin Bui said he had seen the five employees playing soccer and had told Phuong Nguyen to stop but had not reported it to management, as he thought if he did so, Ly would tell the employees and he would be in trouble.<sup>33</sup> According to Olea, Anthony Trinh said he had seen employees playing soccer on the second shift following his transfer about 2 weeks earlier but had not reported it because he wanted to see if he could work it out on

<sup>30</sup> Anthony Trinh did not testify of any discussion with Galan about soccer playing at the fixer meeting or any other time. He did testify that he told Martin Bui about the soccer playing, “in general” once or twice, which testimony Martin Bui did not corroborate.

<sup>31</sup> This date is based on Olea’s testimony that it “might” have been Tuesday when Au reported back to him. There is no evidence as to whether she delivered her report before or after Olea’s heated meeting with employees on Tuesday, August 16.

<sup>32</sup> Galan did not testify as to what he told Olea.

<sup>33</sup> Martin Bui did not recount specifically what he had told Olea, saying only that he had told him “everything.” He testified that he did not report the soccer playing to management because, essentially, such was Ly’s responsibility and not his. His testimony did not corroborate Olea’s in that regard.

his own.<sup>34</sup> After meeting with the three shift leaders, Olea asked them to document their observations.

Following his meeting with Carlos Galan, Anthony Trinh, and Martin Bui, Olea asked Ly about soccer playing on the second shift. By Olea's account, the inquiry was brief: "I brought [Ly] into my office and I asked him if he knew of any of this that was going on, the playing of soccer. He denied it. He said no, he'd never seen them play soccer." By Ly's account, he informed (or reminded) Olea that he had been transferred earlier from the second to the first shift and told Olea that he no longer knew what took place on second shift. Ly told Olea he had never seen Tuan D. Bui, Loi Tan Nguyen, Phuong Hoang Nguyen, Frankie Trinh, or Hung Vong play soccer at work.

By separate notes, each dated August 17, Carlos Galan, Anthony Trinh, and Martin Bui documented their observations for Olea. The notes, respectively, read in pertinent part:

I saw these 5 employees playing soccer inside the plant on 8/12/05 at 8:45 P.M. I saw employees Franki put the ball in the trash. I seen them playing soccer couple time before. Employees: name Loi Nguyen, Tuan Bui, Hung Vanh Vong, Phuong Nguyen, Franki Trinh.  
Lead Carlos Galan

Aug/05/2005

- |               |                              |
|---------------|------------------------------|
| 1. F. Trinh   | verbal warning <sup>35</sup> |
| 2. Tuan-Bui   |                              |
| 3. Hung-Vong  |                              |
| 4. Loi-Nguyen |                              |

Aug/08/2005

- |               |                |
|---------------|----------------|
| 1. Tuan-Bui   | verbal warning |
| 2. Loi-Nguyen |                |
| 3. Phuong     |                |

Aug/12/2005

- |              |   |
|--------------|---|
| 1. Tuan-Bui  |   |
| 2. Hung-Vong |   |
| 3. Phuong    | Leadperson: Anthony Trinh <sup>36</sup> |

From: Martin Bui

On 8/12/05 at 8:55 PM, I saw 3 operators played soccer. They were Phuong Nguyen (Fixer), Tuan Bui, Hung Vanh Vong. I said, "Phong! Stop this game because not right to play" After that I saw him put the ball into the trash. Many times before, I seen 5 operators play soccer inside the plant. They were 1/ Phuong Nguyen, 2/ Tuan Bui, 3/ Hung Vanh Vong, 4/ Loi Nguyen, 5/ Franki Trinh. I had verbal warning twice times with Phuong Nguyen. First time I don't remember the date

<sup>34</sup> Anthony Trinh testified he told Olea he had seen employees kicking the tape-ball and a cone by itself.

<sup>35</sup> Olea instructed Anthony Trinh to note "verbal warning" to signify when he had orally warned the named individuals about playing soccer.

<sup>36</sup> Anthony Trinh explained that although he witnessed four to five soccer incidents, he only noted three on his memo to Olea because the others occurred after August 12. I cannot accept his testimony. Given the seriousness of the alleged misconduct, which resulted in the discharge of six employees, it is inconceivable that Anthony Trinh observed soccer playing after August 12 but failed to report it. I discount his testimony entirely in this regard.

and second time on 8/12/05.

After receiving the notes, Olea consulted Respondent's safety specialist, Kahn, explaining that witnesses had seen five employees kicking a yarn ball in the middle of the aisle where they had set up thread cones. Kahn reminded Olea that Respondent had a zero tolerance policy for such conduct and agreed with Olea that the five should be terminated. Olea then discussed the matter with Au and Orriols, both of whom agreed the employees should be terminated.

On August 18 while at work, Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong were directed to go to the company training room. As the other employees waited in the training room, each was called separately into Olea's office where Olea, Orriols, and Au were present. Each employee interview followed essentially the same pattern: Olea showed each employee the thread balls and asked each employee if he had played soccer with them while working. After each employee denied having done so, Olea told the employee he was fired, presented him with his final check, and had him escorted from the facility.

Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong each denied ever playing soccer or any game with balls of string/thread while at work, although Phuong Nguyen admitted to pushing aside the thread that accumulated on the floor, as did all employees, to avoid slipping. Bui, Loi Nguyen, Phuong Nguyen, and Vong denied having been admonished or warned about any such activity. Trinh admitted that one evening shortly before his discharge, while he was working, Galan told him not to play soccer or "not to kick the ball," which Trinh denied having done. Phuong Nguyen and Bui, each asked to confront his accuser/accusers during his termination interview, which request Olea refused.

After considering all testimony regarding employee soccer playing at work, I find the denials of Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong more credible than the accusations of Galan, Martin Bui, and Anthony Trinh. Au initially interviewed the three to ascertain the basis for Galan's note to Orriols. Presumably, Au was disposed to give credence to their versions. After speaking with the three, however, she was unable to report clearly who had seen which employees playing soccer.<sup>37</sup> Au's report to Olea that "maybe one [of the shift leaders] saw two, maybe one saw three, maybe one saw five of them, and maybe they all saw five" justifies an inference that the three shift leaders' accounts, given soon after the alleged soccer playing, were ambiguous if not contradictory. At the hearing, the three shift leaders' testimony of what they had seen continued to be unclear and inconsistent. Galan reported seeing the five alleged discriminatees playing soccer with a ball of yarn on August 12, using cones set up on either side for goals, but Martin Bui saw only three, and Anthony Trinh saw four, although both they and Galan saw the soccer playing at essen-

<sup>37</sup> The imprecision of the three shift leaders as to what they had seen cannot be attributed to a language barrier. Presumably, Au spoke to two of them in their native languages.

tially the same time.<sup>38</sup> Moreover, Galan apparently reported an extended period of soccer playing while Martin Bui said it lasted no more than a minute. Further, although Galan and Martin Bui reported seeing Trinh put the yarn ball into the trash, Anthony Trinh insisted he saw a masking-tape ball not a yarn ball being used. Unlike Galan, neither Martin Bui nor Anthony Trinh described cone goals. The written reports of the three witnesses regarding the August 12 soccer playing were equally inconsistent. Galan reported seeing all five playing soccer but said nothing about cone goals, while Martin Bui and Anthony Trinh reported seeing three employees playing soccer, not the five Galan reported. I find, therefore, that Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong did not engage in horseplay at work to the degree or the frequency described by Galan, Martin Bui, and Anthony Trinh.<sup>39</sup>

Following his discharge, the California Unemployment Insurance Appeals Board held a hearing regarding Trinh's claim for unemployment benefits.<sup>40</sup> In Respondent's March 6, 2006 appeal from the Appeals Board's grant of benefits to Trinh, Olea described the yarn-ball soccer playing as a full-blown soccer game:

There was a goalie tending a goal where two spools of yarn were used as goal poles. The goalie defended the goal by trying to stop the ball from crossing the imaginary line by diving for the ball or kick[ing] the ball with his feet. The opposing player was moving the ball with his feet trying to fake one way and going the other way to kick the ball of yarn between the two spools of yarn. The other players would rotate in when a player would not score.<sup>41</sup>

### 3. August 18 discharge of Kiet Tuan Ly

On August 18, Ly was again called to Olea's office. With Au translating, Olea told Ly that because he had permitted employees to kick balls while he was the second-shift lead, he was fired. Olea presented Ly with a termination notice, which, in pertinent part read:

Termination due to failure to perform his duties as a lead person to enforce the company rules; allowing the employees to play soccer in the plant; and allowing it to occur and continue on various occasions.

<sup>38</sup> As a clear indication that the sightings occurred at the same time, both Galan and Martin Bui reported seeing Trinh put the yarn ball into the trash.

<sup>39</sup> I recognize that Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong's denials are not wholly free from equivocation. While three of the employees implausibly denied ever having so much as touched foot to yarn debris, Phuong Nguyen admitted pushing aside accumulated thread with his feet to avoid slipping, and Trinh acknowledged he had been warned, albeit unjustifiedly, not to play soccer. Nonetheless, as between accuser and accused, I find the testimony of the latter group, for the reasons stated above, to be the more trustworthy.

<sup>40</sup> Unemployment hearings for other of the alleged discriminatees were held on December 1.

<sup>41</sup> Olea admitted that none of the documentation supplied by Galan, Martin Bui, or Anthony Trinh supported the version of soccer playing he reported to the California Unemployment Insurance Board; he did not explain the discrepancy.

In spite of Galan, Martin Bui, and Anthony Trinh having, reportedly, seen employees play soccer during work over the course of several weeks, none was disciplined in any way for having permitted the horseplay. Indeed, there is no evidence that Olea or Orriols thereafter conducted any counseling or training with the three shift leaders concerning workplace misconduct or reporting procedures.

## IV. DISCUSSION

### A. Supervisory/Agency Status of Kiet Tuan Ly

Respondent contends that Ly was, at all relevant times, a supervisor within the meaning of Section 2(11) of the Act. Respondent carries the burden of proving supervisory status. *Kentucky River Community Care*, 532 U.S. 570, 711–712 (2001); *Dean & DeLuca New York*, 338 NLRB 1046, 1047 (2003) (“The party asserting [supervisory] status must establish it by a preponderance of the evidence [citations omitted]”). Thus, Respondent must establish that Ly had the authority to exercise at least one of the powers enumerated in Section 2(11) of the Act and that the use of that authority involved a degree of discretion that rises to the level of “supervisory independent judgment.” *Dean & DeLuca New York*, supra at 1247, citing *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). As the Supreme Court noted, “The statutory term ‘independent judgment’ is ambiguous with respect to the degree of discretion required for supervisory status...It falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies.”<sup>42</sup> The Board is careful not to give too broad an interpretation to the statutory term “independent judgment” because supervisory status results in the exclusion of the individual from the protections of the Act. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999); *McGraw-Hill Broadcasting Co.*, 329 NLRB 454, 459 (1999). Further, the Board construes any lack of specific evidence to support a finding of supervisory status against the party asserting supervisory status and conclusionary evidence is insufficient to establish supervisory status. *Armstrong Machine Co.*, 343 NLRB 1149, 1149 fn. 4 (2004) and cases cited therein; *Dean & DeLuca New York*, supra at 1247.

Section 2(11) of the Act defines a “supervisor” as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. “The possession of even one of those attributes is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner.” *Arlington Electric, Inc.*, 332 NLRB 74 (2000), quoting *Union Square Theatre Management*, 326 NLRB 70, 71 (1998). The authority effectively to recommend “generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed.” *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982).

<sup>42</sup> *Kentucky River Community Care*, supra at 711–712.

Of those powers enumerated in Section 2(11) of the Act, Respondent contends Ly possessed authority responsibly to assign work to, to discipline, to responsibly direct, or effectively to recommend such actions with regard to knitting department machine operators. This inquiry must focus not only on whether Ly possessed such authority but whether he exercised it with independent judgment and not in a merely routine or clerical manner, as such is the crucial question in deciding supervisory status.

Regarding authority to discipline employees, the evidence establishes that Ly was expected to report to management such employee infractions as area cleanliness and safety violations and that, along with admitted supervisors, he signed documented disciplinary actions. Respondent provided no examples of Ly's having imposed or initiated discipline for any employees whose work he oversaw, and the evidence revealed that Ly was not consulted before discipline was imposed. If a disciplinary issue arose, Ly was expected to note the problem for Orriols' consideration, although in unusual situations, Ly could send an employee home and review the matter with Orriols the next day. Ly's role in Respondent's disciplinary process appears to be no more than the misconduct reportorial function that a leadperson might possess without incurring supervisory status. See *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1234 (2003) (individual's report of misconduct does not constitute effective recommendation of discipline where management undertakes its own investigation and decides what, if any, discipline to impose); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998) (authority to issue verbal or written warnings that do not affect employee status or to recommend discipline do not evidence disciplinary authority); *Millard Refrigerated Services*, 326 NLRB 1437, 1438 (1998) (employees did not effectively recommend discipline when they submitted disciplinary forms to the plant superintendent who approved them only after conducting an independent investigation; the employees exercised nothing more than a reportorial function that was typical of a "leadman" position). Evidence was also adduced that Ly had the authority to send employees home in unusual situations, after which Ly was to review the situation with upper management. The authority to send employees home for engaging in misconduct is typically considered evidence of supervisory authority. *Bredero Shaw*, 345 NLRB 782, 782 (2005). However, if such authority is limited to instances of egregious misconduct, the Board does not consider the authority meets statutory supervisory indicia. *Bredero Shaw*, supra, citing *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); and *Washington Nursing Home*, 321 NLRB 366 fn. 4 (1996). Here, the evidence is insufficient to determine whether Ly's authority to send misbehaving employees home fits within the rule or within the exception. No evidence was adduced that Ly ever sent any employee home for misconduct, and no testimony clarified whether or not such a decision, if made, would turn on the egregiousness of the misconduct. Absent a showing that an individual's authority was ever exercised or that it was exercised in connection with a disciplinary matter resulting in a loss of pay, the Board has declined to find supervisory status. See *Bredero Shaw*, supra, citing *Azusa Ranch Market*, 321 NLRB 811 (1996). Since the

Board construes any lack of specific evidence to support a finding of supervisory status against the party asserting supervisory status,<sup>43</sup> I cannot find that Ly's asserted authority to send recalcitrant employees home establishes his supervisory status.

In urging that Ly be found a supervisor, Respondent relies most heavily on Ly's alleged responsibility to assign work to and responsibly to direct knitting department machine operators. There is no question that Ly oversaw the knitting work of and made daily machine assignments to the machine operators on his shift. Those facts alone do not establish that Ly exercised supervisory authority. Respondent must show that Ly's oversight and work assignments required independent judgment. *Dean & Deluca New York*, supra at fn. 13. The evidence shows that Orriols provided extensive, ongoing training to shift leaders as to their machine assignment duties, instructing them how to work with employees, how to find out which machines employees were comfortable with, and how to assign machines. Work assignments so circumscribed by managerial oversight do not signify independent judgment. See *Dynamic Science, Inc.*, 334 NLRB 391 (2001) (no supervisory status where crew leader's authority was "extremely limited and circumscribed by detailed orders and regulations issued by the Employer.") Moreover, employee assignment complaints resulted in direct management intervention, i.e., discussion among the employee, the shift leader, and Orriols. In these circumstances, it is impossible to conclude that Ly's work assignments involved significant discretion or independent judgment; rather it appears that they simply entailed implementation of detailed and specific managerial guidelines.

As to overseeing machine operators' work, there is no evidence Ly independently devised work plans or did other than follow the routines and requirements prescribed by Respondent. Ly's direction of employees in their performance of routine work does not demonstrate independent judgment. *Armstrong Machine Co.*, supra; *Central Plumbing Specialties*, 337 NLRB 973 (2002); See also *Hexacomb Corp.*, 313 NLRB 983, 984 (1994). The evidence regarding Ly's overseeing the machine operators' work is devoid of specific instances of control, which would give a clearer picture of his authority. Conclusionary evidence that an individual possesses employee oversight authority, does not, without more specificity, establish the individual as a statutory supervisor. See, for example: *Los Angeles Water & Power Employees' Assn.*, supra, slip op. at 4 (assertion of authority to grant or deny time off fails in absence of specific instances of exercise of authority); *Dean & Deluca New York, Inc.*, supra at fn. 15, citing *Jordan Marsh Stores Corp.*, supra (individual's direction and scheduling of employees does not necessarily establish that the individual is a statutory supervisor). Any lack of specific evidence to support a finding of supervisory status is construed against the party asserting supervisory status. *Armstrong Machine Co.*, supra at fn. 4; *Dean & Deluca New York*, supra at 1048. The Board has said that "general, conclusionary evidence, without specific evidence [that an employee] in fact exercises independent judgment . . . does not establish supervisory authority. *Tree-Free*

<sup>43</sup> *Armstrong Machine Co.*, supra at fn. 4; *Dean & Deluca New York, Inc.*, supra, at 1247.

*Fiber Co.*, supra at 393. In the absence of evidence that Ly's authority as to discipline, work assignment, or work oversight involved independent judgment, I cannot find his authority conferred supervisory status. See *Billows Electric Supply of Northfield*, 311 NLRB 878 (1993).

#### B. Alleged Independent 8(a)(1) Violations

##### 1. The July 20 meeting with employees

The General Counsel alleged that in his remarks to assembled employees on July 20, Gus Flores, acting as an agent of Respondent, threatened employees with plant closure and job loss if employees chose the Union as their representative. In support of the allegations, counsel for the General Counsel offered the testimony of five alleged discriminatees as to what Gus Flores said. Though somewhat vague and sometimes inconsistent, all witnesses testified essentially that Gus Flores described potential consequences of union representation as including stymied bargaining and strikes with resultant plant closure and/or job loss, drawing on recent, widespread grocery store strikes as illustrative examples. There is no evidence that Gus Flores suggested Respondent would take action on its own initiative or that the potential consequences would be unrelated to economic necessities or in any way retaliatory. There is no evidence that Gus Flores implied Respondent did not intend to abide by the law or negotiate in good faith should employees select the Union as their representative. In these circumstances, statements made during the July 20 meeting did not violate Section 8(a)(1). See *Stanadyne Automotive Corp.*, 345 NLRB 86, 93–97 (2005). Accordingly, I shall dismiss this allegation of the complaint.

##### 2. Interrogation, Surveillance, and Coercion

In July or August, Au told Martin Bui and Ly that if the Union came into the company, Respondent would close the business and move to Mexico where it already had a facility. Au's statement was a direct threat of plant closure, unrelated to economic necessities or objective factors and violated Section 8(a)(1) of the Act. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

In early August, Au asked Vong if he had signed a union card. Her question constitutes unlawful interrogation and violates Section 8(a)(1) of the Act.

On August 8, in the hearing of several employees, Kahn cursed at union representative Bell as he handbilled at the facility and asked what the union would tell employees when the company had to leave. The obvious inference to be drawn from Kahn's question was that a successful union campaign would result in closure or at least relocation of Respondent. The question coercively interfered with listening employees' Section 7 rights and violated Section 8(a)(1) of the Act.<sup>44</sup>

<sup>44</sup> The General Counsel did not specifically allege Kahn's question as a violation of the Act. However, as the issue has been fully and fairly litigated and is closely connected to the subject matter of the complaint, an 8(a)(1) finding is appropriate. *Gallup, Inc.*, 334 NLRB 366 (2001), citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2d Cir. 1990) ("Board may find and remedy an unfair labor practice not specifically alleged in the complaint if issue is closely connected to the subject matter of the complaint and has been

On August 24, Respondent's security guard Leonor, acting as agent of Respondent, unwarrantedly inspected the identification badges of employees who, while on break, attempted to talk to alleged discriminatees who were handbilling with the Union at the facility. Leonor went beyond ordinary or casual observation of employees' open union activity when he checked identification badges, and Respondent has proffered no justification for his conduct. While Respondent is not required to close its eyes when union activity is publicly and openly conducted, it may not enhance identification of participants by extraordinary means. See *Fairfax Hospital*, 310 NLRB 299, 310 (1993). It is reasonable to infer that Leonor's conduct must have signaled to employees that their interest in talking to or receiving literature from the handbillers was under company surveillance and must have had the tendency unreasonably to chill the exercise of their Section 7 rights.

#### C. Alleged 8(a)(3) Conduct

##### 1. August 18 Discharges of Tuan D. Bui, Loi Tan Nguyen, Phuong Hoang Nguyen, Frankie Trinh, and Hung Vong

The question of whether Respondent violated Section 8(a)(3) in terminating Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To prove an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel makes such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.*, 331 NLRB 1333 (2000). Put another way, "the General Counsel must establish that the employees' protected conduct was, in fact, a motivating factor in the [employer's] decision." *Webco Industries*, 334 NLRB 608, fn. 3 (2001).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, these elements are clearly met. First, the General Counsel demonstrated that the five alleged discriminatees engaged in union activity by disseminating flyers among coworkers and encouraging them to support the Union. Moreover, in the course of Olea's August 16 employee meeting, Vong, Phuong Nguyen, Loi Nguyen, Bui, and Trinh conspicuously signified their support of the Union. The Union's August 12 handbill listed employee grievances against the company, including suspensions for missing work and absence of raises. After Olea denounced the handbill as union "lies," he called for employees to rally to Respon-

fully litigated.") See also *Letter Carriers Local 3825*, 333 NLRB 343 fn. 3 (2001); *Parts Depot*, 332 NLRB 733 fn. 5 (2000).

dent's defense by telling the Union that Respondent cared about its employees. In response, Trinh demanded to know why he had not received a raise, and Vong, supported by the other alleged discriminatees, pressed for an immediate explanation of a recent suspension. The employees' protests volubly demonstrated their concurrence with, if not authorship of, the Union's condemnations and must speedily have disabused Olea of any notion that they could be counted on to champion Respondent's cause in the union campaign. The employees' conduct amounted to an open espousal of at least two of the handbill's accusations and constituted union activity.<sup>45</sup>

Second, the General Counsel has proved knowledge. Even without their August 16 demonstration of union support, Respondent knew of the alleged discriminatees' union activities through Olea, Au, Orriols, and Doroteo who had observed the employees actively disseminating union handbills. Had Olea been in any doubt of their union sympathies, it must have ended when five of them tenaciously pressed employee/union concerns during the August 16 employee meeting.

Third, the General Counsel has presented convincing evidence of Respondent's antiunion animus. Carlos and Gus Flores' dissuasive union discussions with employees, although lawful, show Respondent's keen desire to remain nonunion. Au's threat to Ly and Martin Bui that Respondent would close its business if the Union came in, her interrogation of Vong, and Ankh's threat of plant closure in the hearing of employees also demonstrated animus. Finally, Olea revealed specific animus toward the union activity of Vong, Phuong Nguyen, Loi Nguyen, Bui, and Trinh by his angry response to their protest at the August 16 meeting as well as by his August 18 memo to Trinh's file to the effect that Trinh was inciting employees during that meeting and trying to get them to revolt.

These circumstances support an inference that animus toward the protected activities of Vong, Phuong Nguyen, Loi Nguyen, Bui, and Trinh were motivating factors in Respondent's decision to discharge them. *Wright Line*, supra at 1089. Accordingly, I find the General Counsel has met his initial burden. Such a finding does not mean that the discharges were in fact "unlawfully motivated." Id. As the Board has noted, "The existence of protected activity, employer knowledge of the same, and animus . . . may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action." *Shearer's Foods, Inc.*, 340 NLRB 1093 fn. 4 (2003); see also *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). The General Counsel's establishment of the *Wright Line* factors does, however, shift the burden to Respondent to establish persuasively by a preponderance<sup>46</sup> of the evidence that it would have (not just could have) discharged Vong, Phuong Nguyen, Loi Nguyen, Bui, and Trinh even in the ab-

sence of their union activity. *Desert Toyota*, 346 NLRB No. 3, slip op. at 2-3 (2005); *Webco Industries*, 334 NLRB 608 fn. 3 (2001); *Avondale Industries*, 329 NLRB 1064, 1066 (1999); and *T&J Trucking Co.*, 316 NLRB 771 (1995).

Respondent argues that Vong, Phuong Nguyen, Loi Nguyen, Bui, and Trinh were discharged not for their protected activities but because they played soccer during worktime, a clear safety hazard warranting discharge. I have discounted the testimony of Galan, Martin Bui, and Anthony Trinh regarding employee soccer playing, but my conclusion that the five alleged discriminatees did not engage in the claimed misconduct does not resolve the issue. While Galan, Martin Bui, and Anthony Trinh may have exaggerated insignificant actions into soccer playing or wholly manufactured the alleged incidents, there is no question they reported misconduct to Olea. There is no evidence that Galan, Martin Bui, or Anthony Trinh were supervisors within the meaning of Section 2(11) of the Act at the time of their reports or that Respondent prompted them to embellish or invent their accounts. An employer is not accountable under the Act for the inaccurate accusations, innocent or malicious, of nonsupervisory employees. In circumstances where Respondent has obtained evidence of misconduct, Respondent need not prove that the accused employees committed the alleged offenses. "Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws." *Neptco, Inc.*, 346 NLRB No. 6, slip op. at 2 (2005).<sup>47</sup> However, Respondent "must show that it had a reasonable belief that the employee[s] committed the offense, and that it acted on that belief when it discharged [them]." *McKesson Drug Co.*, 337 NLRB 935, 936 fn. 7 (2002); see also *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004) (employer must establish, at a minimum, that it had reasonable belief of employee misconduct); *Yuker Construction*, 335 NLRB 1072 (2001) (discharge based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *GHR Energy*, 249 NLRB 1011, 1012-1013 (1989) (demonstrating reasonable, good-faith belief that employees had engaged in misconduct sufficient). The focus of the instant inquiry, therefore, must be on Respondent's motivation in discharging the five alleged discriminatees after Olea received reports of their misconduct. The question is whether Respondent believed in good faith that the employees had engaged in serious misconduct, or whether Respondent seized upon Galan, Martin Bui, and Anthony Trinh's reports to rid itself of union activists.

In assessing Respondent's motivation in discharging Vong, Phuong Nguyen, Loi Nguyen, Bui, and Trinh, I have considered the following pertinent timetable:

Friday, August 12	The Union passed out flyers quoting employees critical of Respondent. Galan, Martin Bui, and Anthony Trinh assertedly saw the five
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<sup>45</sup> It is unnecessary to determine whether the employees' conduct also constituted concerted protected activity under Sec. 8(a)(1) of the Act.

<sup>46</sup> A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1st ed. 1954).

<sup>47</sup> Citing *Midwest Regional Joint Board v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977).

- Monday, August 15 alleged discriminatees playing soccer when they should have been working. Galan left a note for Orriols to that effect. Orriols showed the note to Au who said she would look into the matter. Later, on this or the next day, Orriols gave Galan's note to Olea, along with the information that Au was looking into the matter. Later that day or the next, Au reported to Olea that she had talked to Galan, Martin Bui, and Anthony Trinh. She was unclear as to who had seen which employees playing soccer.
- Tuesday, August 16 Respondent held a meeting of employees in which Olea denounced the Union's August 12 criticisms, two of which concerned lack of raises and suspensions for missed work. At the meeting Trinh protested not getting a raise, and Vong demanded that Olea explain a past suspension, which demand the four other discriminatees supported alleged.
- Wednesday, August 17 Galan, Martin Bui, and Anthony Trinh gave Olea signed statements regarding their soccer observations. Olea consulted Kahn as to whether playing soccer at work warranted discharge and made the final decision to terminate the five employees.
- Thursday, August 18 Olea discharged the five alleged discriminatees and placed in Trinh's file a memo describing Trinh's conduct in the August 16 meeting as "inciting the group, trying to get the group to revolt."

Timing is a significant factor in ascertaining motive. See, e.g., *LB&B Associates, Inc.*, 346 NLRB No. 92 slip op. at 2 (2005); *Desert Toyota*, supra, slip op. 3; *Detroit Paneling Systems*, 330 NLRB 1170 (2000). Here, Olea decided to discharge the five alleged discriminatees the day after his contentious interaction with them at the August 16 meeting, and he discharged them on the day he described the conduct of one of them as inciting group revolt. Thus the timing links the employees' protected expressions of dissatisfaction to their discharges. Along with timing, the wording of Olea's memo to Trinh's file illuminates Respondent's motive. Trinh's "unacceptable" incitement to revolt could only have related to Olea's appeal to rebuff the Union and stand up for Respondent and exposes a deep-seated animosity toward the employees' refusal to endorse company labor practices.

Evidence of a discriminatory motive does not, however, end the inquiry. The fact that Respondent may have welcomed the

opportunity to discharge union supporters does not vitiate its defense if Respondent genuinely believed the five alleged discriminatees engaged in misconduct that would (not just could) result in discharge. See *Ironwood Plastics, Inc.*, 345 NLRB 1244 (2005). Respondent's investigation and discharge process must be closely examined to resolve the question. In his investigation of the alleged soccer playing, Olea considered the accounts of Galan, Martin Bui, and Anthony Trinh in three stages: Au's report of what they had to say, his own group interview of them, and their post-interview written statements. Based on all the evidence adduced at the hearing, it is apparent that at no stage of the investigation were the three witnesses clear and consistent in their accounts. After Au spoke to the three witnesses, her report to Olea of what they had seen was ambiguous. She could not say clearly who had seen which employees playing soccer. Olea's interview of the three witnesses also failed to produce clear, consistent accounts of what they had purportedly seen. Galan reported seeing the five alleged discriminatees playing soccer with a ball of yarn on August 12, using cones set up on either side for a goal. Martin Bui saw only three, and Anthony Trinh saw only four, although both they and Galan saw the soccer playing at roughly the same time.<sup>48</sup> Moreover, Anthony Trinh reportedly saw a masking-tape ball not a yarn ball being used, and neither Martin Bui nor Anthony Trinh described cone goals. Further, Galan apparently reported an extended period of soccer playing while Martin Bui said it lasted no more than a minute. The written reports of the three witnesses regarding the August 12 soccer playing were equally inconsistent. Galan reported seeing all five playing soccer but omitted any mention of cone goals. Martin Bui reported seeing not five but three employees playing soccer, as did Anthony Trinh.

An employer's reasonable belief of misconduct may justify adverse employment action. *McKesson Drug Co.*, 337 NLRB 935, 936 (2002), but I cannot find that Respondent held a reasonable belief that the five alleged discriminatees engaged in misconduct. Any reasonable and objective review of the investigation must have exposed its significant inconsistencies. Those inconsistencies would surely suggest to a sensible administrator, which I have no doubt Olea is, that it might be prudent to inquire further. A reasonable and good-faith investigation might, for example, have included asking the allegedly involved employees, or their coworkers, for information. A reasonable and good-faith investigation ought to have factored in Ly's denial of seeing any soccer playing while he was second shift leader, the discounting of which Olea failed to explain. There is no evidence of exigent circumstances requiring immediate action against the five employees and no explanation as to why the discharges were so quickly effected. Respondent's rush to penalty and its reliance on flawed investigatory findings evidence an improper motive and seriously undercut Respondent's defense. See *Midnight Rose Hotel*, supra, slip op. at 3 (failure to conduct fair investigation before imposing discipline defeats claim of reasonable belief of misconduct).

It may be, of course, that Olea, who had to have been aware

<sup>48</sup> I.e., both Galan and Martin Bui reported seeing Trinh put the yarn ball into the trash.

of the investigatory deficiencies, resolved them in favor of discharge for legitimate reasons. Olea did not, however, share those reasons at the hearing, and no evidence manifests them. Moreover, in his March 6, 2006 appeal from the California Unemployment Insurance Appeals Board grant of unemployment benefits to Trinh, Olea inflated the alleged employee misconduct to a full-blown soccer game, which none of the misconduct reports corroborated. Olea's exaggerated and unsupported post-discharge description of what occurred further undercut Respondent's defense, as it is reasonable to expect that if Olea were confident of his original assessment of misconduct he would not have felt compelled to embellish it. After considering all the factors detailed above, I find Respondent's evidence insufficient to prove its good-faith belief in the five alleged discriminatees' misconduct at the time Olea discharged them. If, as I have found, Respondent held no good-faith belief of the employees' misconduct, then the only motivation left is its animosity toward their union activities.

Respondent argues that absence of adverse action against other outspoken union adherents such as Dung Nguyen proves the legitimacy of the discharges. The Board has consistently held, however, that failure to retaliate against all union supporters does not preclude a finding of unlawful motivation as to the discharge of others. *Volair Contractors, Inc.*, 341 NLRB 673, 676 fn. 17 (2004). Accordingly, I find Respondent has not met its shifted burden of proving that it would have discharged the employees even in the absence of their protected concerted activities, and I find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Vong, Phuong Nguyen, Loi Nguyen, Bui, and Trinh on August 18.

## 2. Early August transfer of Kiet Tuan Ly

The General Counsel alleges that in early August Respondent transferred Ly from the second shift to the first shift because of his union activities and in order to discourage employees from engaging in union activities. As explained earlier, I have found that Respondent transferred Ly in hopes of improving first shift production and informed Ly of that purpose. Under the Board's *Wright Line* analysis, the General Counsel must prove that an adverse employment action occurred. Certain employment actions, i.e., those involving discipline or unfavorably altering terms and conditions of employment, are clearly adverse. The General Counsel has not, however, shown how Ly's transfer from second to first shift adversely affected him. The General Counsel adduced no evidence that Ly's post-transfer duties changed, that his prospects for benefits or continued employment were diminished, or that his job was any less convenient or pleasant. Indeed the evidence shows that Ly cheerfully agreed to the transfer and was thereafter happy in his work.

Counsel for the General Counsel argues that Respondent transferred Ly in order to separate him from other second shift union supporters, and the circumstances create at least a suspicion that Respondent was so motivated. However, even assuming the suspicion to be well-founded and Respondent's motivation discriminatory, the General Counsel must still show the transfer constituted an adverse employment action, which the General Counsel has not done. Therefore, I conclude that the

General Counsel failed to establish a necessary element of *Wright Line*, i.e., that an adverse employment action occurred when Respondent transferred Ly. Consequently, I find the General Counsel failed to meet his 8(a)(3) burden of proof. Accordingly, I shall dismiss this allegation of the complaint.

## 3. August 18 discharge of Kiet Tuan Ly

After Ly's transfer to the first shift, Respondent discharged him on August 18, which action the General Counsel alleges violated Section 8(a)(3) of the Act. To substantiate the allegation, the General Counsel must prove the requisite elements of union activity, employer knowledge, and employer animus.<sup>49</sup> As to knowledge specifically related to Ly's union activities, the General Counsel presented evidence that on July 15 Doro-tea observed Ly distribute union flyers inside the plant with head-shaking disapproval. On another occasion, Olea observed Ly with a flyer. The General Counsel has thus met its burden of proving Ly's union activity and Respondent's knowledge of it. As to Respondent's alleged animus, as noted above I have found that Respondent committed various violations of 8(a)(1) and discriminatorily discharged Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong for engaging in union activity, all of which evidence strong animus. The General Counsel has therefore adduced evidence sufficient to support an inference that Ly's union activity was a substantial or motivating factor in Respondent's decision to terminate him and has met his initial *Wright Line* burden. The burden of persuasion thus shifts to Respondent to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089.

Respondent maintains that it would have discharged Ly regardless of his union activity because he failed to prevent Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong from playing soccer during work time, essentially arguing that he condoned the alleged misconduct. Since I have already found that Respondent did not discharge Bui, Loi Nguyen, Phuong Nguyen, Trinh, and Vong for playing soccer at work but because of their protected activities, it follows that Respondent could not, in good faith, have discharged Ly for failing to prevent the claimed activity. Additional considerations further vitiate Respondent's defense: (1) Ly had not been the shift leader for some time prior to the August 12 soccer playing that assertedly prompted the discharges and, therefore, could not reasonably be held accountable for post-transfer soccer playing; (2) shift leaders Galan, Martin Bui, and Anthony Trinh had also, according to Respondent's evidence, failed to curtail soccer playing, but there is no evidence any one of them was disciplined or even counseled; (3) the investigation into Ly's role in the claimed soccer playing was cursory at best; and (4) Respondent provided no evidence to support Olea's belief that Ly had condoned any alleged soccer playing.<sup>50</sup>

<sup>49</sup> *Wright Line*, supra.

<sup>50</sup> Even accepting Olea's testimony that he was informed Ly knew of the soccer playing, there is no evidence Olea had any basis for believing that Ly condoned or failed to restrain it. On the contrary, Galan's testimony suggests he believed Ly had spoken to employees about soccer playing, and it is reasonable to assume that if Galan said anything to Olea about Ly, he conveyed that belief.

In these circumstances, I cannot find that Respondent has demonstrated it would have discharged Ly even in the absence of his protected conduct. Accordingly, I find that by discharging Ly on August 18, Respondent violated Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act on August 18 by discharging employees Bui, Loi Nguyen, Phuong Nguyen, Trinh, Vong, and Ly.

4. Respondent violated Section 8(a)(1) of the Act by threatening employees that Respondent would close its business if the Union came into the company, by asking an employee if he had signed a union card, and by engaging in surveillance of employees' union activities.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

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

Respondent having discriminatorily discharged employees Bui, Loi Nguyen, Phuong Nguyen, Trinh, Vong, and Ly on August 18, 2005, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension and/or discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The General Counsel requests that the order herein include a special remedy requiring Respondent to read the notice to employees. Although Respondent has engaged in serious unfair labor practices, the Board's traditional remedies provide a sufficient antidote. See *Yellow Ambulance Service*, 342 NLRB 804, 815 (2004). Therefore, I deny the request.

[Recommended Order omitted from publication.]

*Patrick J. Cullen, Atty.*, for the General Counsel.

*Stephen C. Key, Atty (The Key Firm, PC)*, of Dallas, Texas, for the Respondent.

*Joshua F. Young, Atty. (Gilbert & Sackman)*, of Los Angeles, California, for the Charging Party.

#### SUPPLEMENTAL DECISION

##### REMAND ORDER

LANA H. PARKE, Administrative Law Judge. By Order dated March 19, 2007, the National Labor Relations Board (the Board) remanded this matter for further consideration of the supervisory status of Shift Leader Kiet Ly (Mr. Ly) in light of its recent decisions in *Oakwood Healthcare, Inc.*, 348 NLRB

No. 37 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006).<sup>1</sup>

#### Consideration of the Underlying Decision in Light of *Oakwood Healthcare, Croft Metals, and Golden Crest*

In *Oakwood Healthcare, Inc.*, supra, under the framework of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Board adopted definitions for the terms "assign," "responsibly to direct," and "independent judgment," as used by Section 2(11) of the Act in denoting supervisory authority. The Board reiterated that the burden of proving supervisory status rests on the party asserting it.<sup>2</sup> See also *Kentucky River Community Care*, above; *Dean & DeLuca of New York, Inc.*, 338 NLRB 1046, 1047 (2003). Thus the Respondent bears the burden of proving its contentions that Mr. Ly possessed authority to assign work to and responsibly direct the work of knitting department machine operators, or effectively to recommend such actions, and that he exercised his authority with independent judgment and not in a merely routine or clerical manner.<sup>3</sup>

The question of Mr. Ly's supervisory status rests on his authority as a knitting department shift leader in which position he oversaw the work of production employees on a given shift, each of whom operated as many as five machines at a time. Machine operation varied in complexity and difficulty, and Joaquim Orriols (Mr. Orriols), the Respondent's general manager, trained the shift leaders on how to work with employees, how to find out which machine employees felt comfortable with, and how to make machine assignments, as appropriate assignment was crucial to production. According to Mr. Orriols, he "spent a lot of hours every day teaching . . . the area of the assignment." Given the frequency and duration of Mr. Orriols' training, an inference can reasonably be drawn that the training included detailed and comprehensive guidelines for determining employee capacity and experience.

On a daily basis, Mr. Orriols determined which machines would be operated by assessing production needs and machinery operational availability. Prior to the beginning of each shift, Mr. Orriols provided the shift leaders with preprinted forms entitled "Machine Assignment Form" on which were listed the machines to be run that shift. The shift leaders utilized the form and their knowledge of the capabilities of each worker to assign the machines. According to Mr. Orriols, once a shift leader knew his coworkers' experience, machine assignment was an easy matter. If an employee complained that the machine assignment was onerous, the shift leader reduced

<sup>1</sup> The Board's Order allowed the parties to file briefs on the remand issues and, if warranted, directed reopening the record to obtain evidence relevant to the principles enunciated in *Oakwood Healthcare, Croft Metals*, and *Golden Crest*. By Order dated April 2, 2007, the parties were given until April 9, 2007, to seek to reopen the record. No party responded. By order dated April 13, 2007, the date for filing briefs was set for May 8, 2007. All parties have filed briefs.

<sup>2</sup> *Oakwood Healthcare, Inc.*, supra, at slip op. at 3.

<sup>3</sup> All of the Respondent's shift leaders exercised the same degree of authority. References to shift leaders' authority comprehend that of Mr. Ly.

the number of machines assigned and discussed the matter with Mr. Orriols the next day. In the last 3 years, five or six employees have complained to Mr. Orriols about their machine assignments. On those occasions, Mr. Orriols met with employee and shift leader to resolve the problem.

In addition to assigning machines, the shift leaders oversaw the production employees' work, instructed and assisted other employees in operating machines, and monitored safety compliance and productivity. As needed, they filled in for absent machine operators. It can be inferred that shift leaders bore some responsibility for meeting production goals by the fact that the Respondent, in August 2005, transferred Mr. Ly to the first shift with the object of improving production. However, it is unclear what, if any, consequences attended failure to meet production goals.

Mr. Orriols determined when overtime would be worked, which machines would be used, and the number of employees required. When notified by Mr. Orriols that overtime workers were needed, the shift leaders chose those employees capable of running the designated machines. There is no evidence as to whether employees could decline or protest overtime; at times, overtime was assigned on a voluntary basis, but the record is unclear as to the frequency or circumstances of voluntary versus involuntary overtime.

The shift leaders were expected to report to management such employee infractions as not keeping the work station clean or safety breaches. Mr. Ly's signature appears along with those of admitted supervisors on certain documented disciplinary actions for knitting department employees. However, Mr. Ly had no authority to issue oral or written warnings and was not consulted before imposition of such.<sup>4</sup> Should a disciplinary issue arise, Mr. Orriols expected Mr. Ly to make a note of the situation and leave it on his desk. In unusual situations, Mr. Ly could send an employee home and review the matter with Mr. Orriols the next day. Mr. Ly could also permit an employee to leave early, following the same notification procedure.

In *Oakwood Healthcare, Inc.*, the Board construed the authority "to assign" to involve the act of designating an employee to a specific place (such as a location, department, or wing), to a time (such as a shift or overtime period), or to perform significant overall duties. Directing an employee to perform discrete tasks within such an assignment, as in giving an ad hoc instruction, was not, in the Board's view, indicative of supervisory authority to "assign."<sup>5</sup> Here, the Respondent's shift leaders did not designate the place or time in which the production employees would work or the overall duties they would perform. A managerial level above shift leader determined which employees would work in knitting production, the shifts they would work, and what overall work they would perform.

<sup>4</sup> No examples were given of Mr. Ly's handling any employee discipline, but Martin Bui cited the following example of how, as a shift leader, he would handle a disciplinary matter: "if that employee [left early], I would write a note and give to [Grace Au, Human Resources Representative] and it depends on her decision. She would inquire how often would this person do that . . . she would say, today or tomorrow, get that person to come up to the office and talk to her."

<sup>5</sup> *Oakwood Healthcare, Inc.*, supra, at slip op. 4-5.

The machines utilized in the knitting department were discrete components of the overall work assignment. The shift leaders did not determine which machines would operate, and their assignments of employees to specific machines were dictated solely by machine availability and employee capability, the determination or guidelines for which rested elsewhere. The shift leaders' machine assignments are analogous to the rotation of different tasks described in *Croft Metals*, which, in the Board's view, more closely resembles ad hoc instruction than work assignment and does not reflect the authority to "assign" as described in *Oakwood Healthcare, Inc.* See *Croft Metals, Inc.*, 348 NLRB No. 38, slip op. 7 (2006). Accordingly, I find Mr. Ly had no authority to "assign" employees.

The authority "responsibly to direct," arises when an individual decides "what job shall be undertaken next or who shall do it, . . . provided that the direction is both 'responsible' . . . and carried out with independent judgment."<sup>6</sup> "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly. . . . Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps."<sup>7</sup>

Here, the shift leaders selected employees for specific machines, instructed employees on proper machine operation, oversaw the operators' work, and corrected improper performance, all to achieve production goals.<sup>8</sup> Although unclear to what extent, it appears the shift leaders were accountable for the job performance of the employees assigned to them from which can be inferred that "some adverse consequence [might befall the shift leaders] if the tasks performed [were] not performed properly." See *Oakwood Healthcare*, supra at slip op. 7-8; *Croft Metals*, supra at slip op. 8. Accordingly, the preponderance of the evidence supports a finding that the shift leaders "responsibly directed" the machine operators.

It remains to determine whether the Respondent has met its burden of proving that the shift leaders' responsible direction of employees is exercised with independent judgment. The Board considers that "independent judgment" is exercised when an individual "act[s] or effectively recommend[s] action, free of the control of others and form[s] an opinion or evaluation by discerning and comparing data," which action rises above the merely routine or clerical.<sup>9</sup> "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company rules or policies, the verbal instructions of a

<sup>6</sup> *Croft Metals, Inc.*, supra at slip op. 7, quoting *Oakwood Healthcare, Inc.*, supra, at slip op. 6.

<sup>7</sup> *Id.* slip op. at 8.

<sup>8</sup> Some overlap in the concepts of "assign" and "responsibly direct" necessarily occurs in this analysis. As noted by the Board, the terms are not to be considered in isolation but read together as set forth in the Act. *Oakwood Healthcare, Inc.*, supra at fn 28.

<sup>9</sup> *Oakwood Healthcare, Inc.*, supra, at slip op. at 9-10.

higher authority, or in the provisions of a collective-bargaining agreement.”<sup>10</sup> Purely conclusory evidence is insufficient to establish supervisory status. *Austal USA, L.L.C.*, 349 NLRB No. 51 fn. 6 (2007).

In overseeing the machine operators’ work, there is no evidence Mr. Ly independently devised work plans or control procedures or did other than follow the guidelines and requirements prescribed by Respondent. Rather, the evidence shows that Mr. Orriols assessed production needs, daily specified which machines would be operated, and spent “a lot of hours every day” providing extensive training to shift leaders regarding their machine assignment duties. Once a shift leader knew his production workers’ experience—knowledge obtained through Mr. Orriols’ extensive training—machine assignment was an “easy” matter. Moreover, resolution of assignment disputes did not rest with a shift leader; rather, employee assignment complaints resulted in direct management intervention, i.e., discussion among the employee, the shift leader, and Mr. Orriols. Machine operators generally performed repetitive tasks on those machines for which they demonstrated capability and required minimal guidance. Although the shift leaders had

work oversight accountability, they only had reportorial responsibility for employee infractions and were not authorized to deal with misconduct independently.<sup>11</sup> Other than assessing employee capability (which entailed implementation of detailed and comprehensive managerial guidelines), little evidence was adduced of factors the shift leaders might have considered in directing employees, preventing a conclusion that the degree of discretion involved rose above the routine or clerical. See *Golden Crest*, supra at slip op. 8.

After reconsideration of the underlying findings of fact in light of *Oakwood Healthcare, Inc.*, *Croft Metals, Inc.*, and *Golden Crest Healthcare Center*, I find that the Respondent has failed to meet its evidentiary burden. Accordingly, having reviewed the evidence in the light of the Board’s recent decisions construing Section 2(11) of the Act, I find the evidence does not establish that Mr. Ly was a supervisor within the meaning of that section on August 31 and/or September 26, 2002, when Respondent respectively suspended and fired him.

[Recommended Order omitted from publication.]

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<sup>10</sup> *Oakwood Healthcare, Inc.*, supra, at slip op. at 10.

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<sup>11</sup> Even in circumstances warranting the unusual action of sending an employee home, Mr. Ly was expected to review the matter with Mr. Orriols the next day.