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Laurus Technical Institute and Joslyn Henderson.
Case 10–CA–093934

June 13, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On December 11, 2013, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and

¹ In the absence of exceptions, we adopt the judge's finding that the Respondent maintained and enforced an overly broad no-gossip policy.

We agree with the judge that the Respondent violated Sec. 8(a)(1) by discharging employee Joslyn Henderson. Our colleague notes that one of the Respondent's asserted reasons for the discharge was Henderson's "attempts to . . . solicit and recruit coworkers to work for another company, a direct competitor." We agree with the judge that there is no evidence that Henderson attempted to recruit a coworker to work for a competitor of the Respondent. But even assuming such conduct would be unprotected, and further assuming the Respondent discharged Henderson based on a good-faith (but mistaken) belief that she had engaged in such conduct during the course of her protected activity of discussing job security concerns with her coworkers, we would still find the discharge unlawful. See *NLRB v. Burnip & Sims, Inc.*, 379 U.S. 21, 23 (1964) ("[Sec.] 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.")

Member Miscimarra agrees that the Respondent unlawfully discharged employee Joslyn Henderson. He does not rely, however, on the judge's analysis under *Atlantic Steel Co.*, 245 NLRB 814 (1979). Rather, this is a dual-motive case that is appropriately evaluated under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and the record does not establish that the Respondent can satisfy its burden of proving it would have terminated Henderson's employment in the absence of her protected activity. The Respondent's reasons for discharging Henderson included, among others, Henderson's discussion of "work related issues with [her] peers instead of [her] supervisor." Some of those discussions constituted protected concerted activity—for example, concerns that "leads" were being distributed inequitably—and Henderson together with two other employees raised this issue with management. However, the Respondent also maintained that Henderson's employment termination resulted in part from the unprotected conduct of "attempt[ing] to . . . solicit and recruit coworkers to work for another company, a direct competitor." See *Abell Engineering & Mfg.*, 338 NLRB 434, 434–435 (2002); *Clinton Corn Processing*, 194 NLRB 184 (1971). The judge found that Henderson did not attempt to recruit a coworker to work for a competitor of the Respondent. But if the Respondent be-

to adopt the recommended Order as modified and set forth in full below.²

ORDER

The Respondent, Laurus Technical Institute, Decatur, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing its overly broad no-gossip policy or rule.

lieved Henderson had done so, and if it could show that it would have discharged Henderson based on that belief even in the absence of her protected concerted activities, her discharge would be lawful. Under *Wright Line*, Member Miscimarra finds that the General Counsel satisfied his initial burden of establishing that protected concerted activities were, in part, a motivating factor in her discharge. Respondent argues that it would have discharged Henderson based solely on its belief that she engaged in the unprotected activity referenced above, but Member Miscimarra concludes that the record does not warrant such a finding. Member Miscimarra does not join his colleagues' finding that the purported recruitment (had it occurred) arose in the course of concerted activity, and therefore disagrees with their analysis and findings under *NLRB v. Burnip & Sims, Inc.*, 379 U.S. 21 (1964). In this regard, he does not rely on the judge's citation of *Hoodview Vending Co.*, 359 NLRB No. 36 (2012), for the proposition that discussions about job security are "inherently concerted"; Member Miscimarra believes such a position is contrary to the principles articulated by the Board in *Meyers Industries* and its progeny. See *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand 281 NLRB 882 (1986), affd sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

² We shall amend the remedy and modify the judge's recommended Order to conform to her unfair labor practice findings and the Board's standard remedial language. Specifically, we shall order the Respondent to rescind its unlawful no-gossip policy (which, as far as the record shows, was distributed to employees electronically only) and inform employees that it has been rescinded. Further, in her recommended Order, the judge inadvertently neglected to order the Respondent to offer Henderson reinstatement. Accordingly, we shall order the Respondent to offer Henderson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position. We shall also issue two notices, one for the Decatur, Georgia facility, where all the unfair labor practices took place, including the maintenance of the unlawful no-gossip policy, and a second notice for the Jonesboro and Atlanta, Georgia facilities, where the Respondent also maintained its no-gossip policy. We shall substitute new notices to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

(b) Disciplining any employee, including warning, suspending, or terminating any employee, because the employee violated Respondent's overly broad and unlawful no-gossip policy.

(c) Disciplining any employee, including warning, suspending or terminating any employee, because the employee engaged in protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, rescind the no-gossip policy and inform employees that it has been rescinded.

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

(c) Make Joslyn Henderson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(d) Compensate Joslyn Henderson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Joslyn Henderson, and within 3 days thereafter, notify Henderson in writing that this has been done and that the suspension and discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and 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.

(g) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A" at its Decatur, Georgia facility, and copies of the attached notice marked "Appendix B" at its Jonesboro and Atlanta (Fulton Industrial Boulevard campus), Georgia facilities.³

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the Na-

Copies of the notices, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 2012.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 13, 2014

Mark Gaston Pearce, Chairman

Phillip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

tional 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."

LAURUS TECHNICAL INSTITUTE

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 maintain or enforce any overly broad no-gossip policy or rule.

WE WILL NOT discipline any of you, including warning, suspending, or terminating you, for violating the overly broad no-gossip policy.

WE WILL NOT discipline any of you, including warning, suspending, or terminating you, because you engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind our no-gossip policy and inform you that it has been rescinded.

WE WILL, within 14 days from the date of the Board's Order, offer Joslyn Henderson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Joslyn Henderson whole for any loss of earnings and other benefits she suffered as a result of her unlawful suspension and termination, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and termination of Joslyn Henderson, and WE WILL, within 3 days thereafter, notify Joslyn Henderson in writing that this has been done and that the suspension and termination will not be used against her in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Joslyn Henderson for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

LAURUS TECHNICAL INSTITUTE

The Board's decision can be found at www.nlr.gov/case/10-CA-093934 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C., 20570 or by calling (202) 273-1940.



APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain any overly broad no-gossip policy or rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind our no-gossip policy and inform you that it has been rescinded.

LAURUS TECHNICAL INSTITUTE

The Board's decision can be found at www.nlr.gov/case/10-CA-093934 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C., 20570 or by calling (202) 273-1940.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD



Lauren Rich, Esq. and Nicholas A. Rowe, Esq., for the General Counsel.

Jeffrey A. Schwartz, Esq. and Erin J. Krinsky, Esq. (Jackson Lewis, LLP) of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Atlanta, Georgia, on May 9 and 10, 2013. The Charging Party, Joslyn Henderson (Henderson/the Charging Party), filed a charge in this case on November 28, 2012. She filed a first amended charge on December 13, 2012, and a second amended charge on March 4, 2013. The Acting General Counsel (General Counsel)¹ issued the complaint and notice of hearing (the complaint) on March 14, 2013. The complaint alleges that Laurus Technical Institute (Respondent/Company/Laurus) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing an overly broad “No Gossip Policy,” and by suspending and terminating the Charging Party for violating the “No Gossip Policy” and engaging in protected, concerted activities. Respondent filed its timely answer, generally denying any and all unlawful conduct.

After the trial, counsel for the General Counsel and Respondent filed briefs, which I have read and considered. Based on the entire record in this case, including testimony of witnesses, my consideration and my observations of their demeanor, I make the following

FINDINGS OF FACT²

I. JURISDICTION

Respondent, a corporation with an office and place of business in Decatur, Georgia (Respondent’s primary facility), has been operating a private, for-profit technical school with three campuses in the Greater Atlanta, Georgia Area. During a representative 1-year period, ending December 31, 2012, Respondent purchased and received at its Decatur, Georgia facility goods and services valued in excess of \$50,000 directly from

¹ For purposes of brevity, the Acting General Counsel is referenced as General Counsel.

² The General Counsel’s unopposed motion to correct the transcript and exhibits, dated June 25, 2013, is granted and received into evidence as General Counsel’s Exhibit 19. For the reasons stated in this Motion, the documents attached thereto will completely replace the documents currently admitted in General Counsel’s Exhibits 3(a) and 3(b). (See GC Exh. 19, fn. 2).

points outside the State of Georgia. During that same representative period, Respondent received gross revenues in excess of \$1 million. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Laurus Technical Institute and the Charging Party*

1. Company overview

As noted above, Respondent operates its for-profit technical school with 3 campuses in the Greater Atlanta, Georgia area: Decatur, Jonesboro and Atlanta (Fulton Industrial Boulevard campus). Laurus Technical Institute provides post-secondary technical education in medical/allied health programs, heating, ventilation and air conditioning and other technical fields to individuals as an alternative to traditional 2 or 4-year colleges. It offers a number of courses throughout the year, with day courses lasting about six weeks and evening courses lasting about seven weeks. Certification programs last from about 7 to 12 months. (Tr. 30–31, 36, 233–234).³

The incidents relevant to this case occurred at Respondent’s Decatur, Georgia campus, where Respondent employs approximately 50 employees. Employees work in various departments including, but not necessarily limited to, Admissions, Education (includes instructors), Career Services, Financial Aid, Bursar, Registration, Information Technology (IT), Business and Human Resources. Terry Hess is the president and chief executive officer (CEO) of Laurus Technical Institute, and is responsible for all three campuses.⁴ (Tr. 31, 231–234). He was also Henderson’s second line supervisor. During the relevant time period,⁵ Respondent’s other department heads and managers relevant to the case included: Charlene Gatewood (Gatewood), human resources director; Waldo Bracy (Bracy), former admissions director (through about April 18, 2012); Larry Williams (Williams), former admissions director (July 2012 through early 2013); Sinclair Nicholson (Nicholson), education director; Steve Austin (Austin), vice president of operations; and Sonja Walker (Walker), financial aid director. (Tr. 32, 34).

2. Henderson’s employment history with Laurus Technical Institute

Henderson worked as an admissions representative for Respondent’s Decatur campus from October 2007 through November 12, 2012, when she was terminated. (Tr. 29.)

Respondent’s admissions representatives report to the director of admissions, and recruit and enroll students into various courses or programs through leads provided to them from internet, telephone and walk-in inquiries. During the relevant time period, the admissions department receptionist provided these

³ Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s Exhibit; “R. Exh.” for Respondent’s Exhibit; “GC Br.” for General Counsel’s Brief; and “R Br.” for Respondent’s Brief.

⁴ Hess has been the CEO at Laurus for over 7 years. (Tr. 231).

⁵ The relevant time period is 2012 unless otherwise specified.

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leads, consisting of contact information of prospective students, to the admissions representatives on a rotational basis. The admissions representatives also closely monitor students' progress to make sure they become and remain active students. (Tr. 33–35).

3. Henderson's prior complaints

In 2011, Henderson filed a charge against Respondent with the Equal Employment Opportunity Commission (EEOC), alleging sexual harassment and retaliation by one of Respondent's managers (education director, Sinclair Nicholson). On January 13, Henderson presented Hess with a letter in which she raised additional harassment, hostile work environment and retaliation issues in connection with her prior EEOC charge. Despite Hess' responses to her January complaints, in February and March, Henderson was not completely satisfied with how Respondent handled these matters. (GC Exhs. 3(a), 3(b), 19; R. Exhs. 4, 5, 7).

B. Respondent's No Gossip Policy

1. Predecessor policy—Hess' oral prohibition

On February 13, CEO Hess met with Henderson to chastise her for discussing her work issues and complaints with one of Laurus' managers who was not in her chain of command. Notwithstanding the reason for this meeting, Hess orally banned Henderson from discussing any work issues with anyone except her supervisor at the time, Waldo Bracy, and him.⁶ He even threatened to terminate Henderson if "anyone in the company [came] to [him] with knowledge of her issues, and the source was from [Henderson]." He insisted that they (Bracy and Hess) were "the only ones that she [was] permitted to speak with about her LTI company issues."⁷ (Tr. 246–248; GC Exh. 4). Thus, she was not only prohibited from discussing work issues with other managers, but also with any of her coworkers.

In a subsequent meeting with Hess on February 15, Hess informed Henderson that management had created a "gossip policy," a copy of which would soon be distributed to all Laurus employees. (Tr. 44–45).

2. No gossip policy

On February 22, Respondent issued its new "No Gossip Policy," via email, to all Laurus employees. This policy, in relevant part, read:

Gossip is not tolerated at Laurus Technical Institute. Employees that participate in or instigate gossip about the company, an employee, or customer will receive disciplinary action. Gossip is an activity that can drain, corrupt, distract and

down-shift the company's productivity, moral, and overall satisfaction. It has the potential to destroy an individual and is counterproductive to an organization. Most people involved in gossip may not intend to do harm, but gossip can have a negative impact as it has the potential to destroy a person's or organization's reputation and credibility. . .

Gossip is defined as follows:

- (1) Talking about a person's personal life when they are not present
- (2) Talking about a person's professional life without his/her supervisor present
- (3) Negative, or untrue, or disparaging comments or criticisms of another person or persons
- (4) Creating, sharing, or repeating information that can injure a person's credibility or reputation
- (5) Creating, sharing, or repeating a rumor about another person
- (6) Creating, sharing or repeating a rumor that is overheard or hearsay. . .

If an employee is found to have been involved (instigated, encouraged, or contributed to) gossip against another employee, a written warning is provided to the employee and the employee is directed to immediately cease the gossip...Further incidents will result in further disciplinary action and may include termination.

The policy also listed examples of "the consequences of gossip." It informed that documentation from "the meeting" would be placed in the employee's personnel file, but did not define "the meeting." The parties stipulated that this policy was published in Respondent's employee handbooks in February and the summer of 2012. (Tr. 141; GC Exh. 5).

C. Shake-up in the Admissions Department

1. Mass firings

The tides drastically changed in the admissions department in the beginning of April when Respondent terminated all admissions representatives in the department, except for Henderson (three of four).⁸ Within a week of the mass firing, the director of admissions (Bracy) hired three replacement admissions representatives: Florence Coram and Angela Cooper, with whom he had previously worked at another school, ITT Technical Institute (ITT), and Marcus Beard. Within the next two weeks, without warning, Hess terminated Bracy. On April 18th Hess held a meeting with the admissions department employees to advise them of Bracy's termination. He advised that he would be assuming the role of acting director of admissions and immediately moving into one of the cubicles in their work area. He did not offer any explanation, but did tell them to see him if they had any questions. (Tr. 52–54, 240, 265). Hess testified that he made the decision to fire Bracy and to temporarily assume the admissions director position because the department had not been functioning properly, and it was the only

⁶ This was not the first time that Hess had forbidden Henderson from talking about any work issues she had with coworkers.

⁷ Hess memorialized this meeting in a type-written document dated February 13, to which Henderson subsequently made handwritten annotations. Notwithstanding Hess' type-written portions of this document, and Henderson's comments and changes thereto, their versions of what took place in the meeting are substantially and materially consistent. (Tr. 39–42, 247–248; GC Exh. 4).

⁸ The three terminated admissions representatives were Rob-in Fields, Cedrica Laster, and Quadell Spradley (Tr. 51–52).

department in which he had not directly worked. (Tr. 240, 265).

2. Admission representatives' response to terminations

There is no dispute that on April 18, immediately after learning that Bracy had been fired, Henderson, Coram, and Cooper gathered together in their work area to discuss what had just transpired. They were "shocked" and very worried about their job security at Laurus Technical Institute. Despite Coram's attempts, at times, to downplay her reaction to Bracy's firing, both she and Cooper acknowledged they were not only very concerned about their job security, but were "terrified" that they might lose their jobs after hearing the news about Bracy.⁹ They admitted their fear was primarily fueled by the three terminations right before Bracy hired them, and Bracy's termination within two weeks after they were hired. Coram recalled saying "what is going on here. . . this is crazy," and "why is [Hess] coming in here." Cooper said she "didn't know what was going on," or "what to expect." (Tr. 168-171, 208-209). I have little, if any, doubt, as Coram and Cooper testified, that at this time, Henderson also shared some of her past harassment and retaliation issues (mentioned above), along with her dissatisfaction with how the company and Hess had handled her complaints. However, based on all of the evidence, including Coram's and Cooper's testimony, I find there is no doubt that the admissions representatives' concerns and fears regarding job security mostly resulted from what they were experiencing at the time, i.e., the turnover in staff and firing of Bracy.

On April 18, during the discussions described above, Coram asked Henderson what had happened to Bracy's predecessor. Henderson explained that the prior admissions director, Jackalyn Majors, had also been fired (sometime in 2011), but now worked for another school, Westwood College. This prompted Henderson to call Majors to tell her about Bracy's termination, and to ask if Westwood College had any available positions for Bracy. (Tr. 56, 290-291). Since Majors did not answer her call, she texted her instead.¹⁰ In the interim, Coram left the area to call Bracy to ask how he was doing. Upon her return, she told Cooper and Henderson that Bracy was "okay," but did not think he would be interested in working at another technical school.

Shortly thereafter, Majors returned Henderson's call, which Henderson answered within earshot of Coram and Cooper. During this conversation, Coram asked Henderson to ask Majors if Westwood was hiring admissions representatives. Henderson advised Coram and Cooper that they would need a degree to work for Westwood, to which Coram replied that she had a "bachelor's" and Cooper replied that she had an "associate's."¹¹ Henderson then told Majors that "these girls are afraid

⁹ On direct examination, Coram readily testified she was "terrified." However, on cross-examination, she reluctantly admitted "[she] was just concerned about her job security."

¹⁰ She texted "[t]hey just fired Waldo . . . I hope Waldo talks to EEOC." (GC Exh. 6, p. 3).

¹¹ I credit Henderson's testimony that she was told, and believed, that Westwood required admissions representatives to have a bachelor's degree. Majors corroborated Henderson's

for their jobs . . . they want to know if you have any positions over there for admissions." Majors advised them to send their resumes, but she was "not promising them anything." (Tr. 55-59). Coram, but not Cooper expressed interest in applying for a position at Westwood, saying she was going to email her resume "that evening." (Tr. 59-60).¹²

In the beginning of May, Henderson told Steve Austin, operations director, and Sonja Walker, financial aid director, that Coram and Cooper were concerned about their job security, and that she had given them information about "another job they asked [her] for." Both Austin and Walker assured her they would be fine. Henderson testified that Austin also said he would talk to Hess to let him know how they were feeling. These conversations were not disputed, but there is no evidence that either Austin or Walker conveyed the admissions representatives' concerns about job security, or Henderson's inquiry on their behalf, to Hess. (Tr. 72-73, 122-123, 266).

3. Coram's application to Westwood College

As previously mentioned, Coram immediately jumped at the opportunity to apply for a job at Westwood. On April 18, after the discussions described above, Coram sent an email, with her resume attached, to Majors. It was she who sent text messages to Henderson to ask Majors about salary, and to inquire if Westwood was really interested in her. (GC Exh. 6). On May 1, she voluntarily went to a group interview and presentation at

testimony with her explanation that during her years working at Westwood (she had previously worked there before she worked for Laurus), she had never known the school to hire any "non-degreed people." (Tr. 294). Furthermore, a recent 2013 vacancy announcement reflected in two sections that a bachelor's degree was preferred. (R. Exh. 1).

¹² Although Coram and Cooper testified that Henderson was first to say she knew of another school that might hire them, and that they should apply for a position there, I give more credence to Henderson's testimony (over theirs) that fear of job security and Coram's interest, led her (Henderson) to ask Majors if there were any admissions jobs available at Westwood. I will note several reasons for my determination. First, Coram's testimony was not entirely consistent with Cooper's. Cooper testified that Henderson merely "suggested or said" there was another school hiring and they should apply. Coram, on the other hand, claimed that Henderson urged them to leave because they might be fired, and intentionally and maliciously tried to get them to leave Laurus. Cooper never implied ill or premeditated intent on Henderson's part. Nor was there any evidence, in April or thereafter, of such intent on Henderson's part. Second, Coram admitted that she said, "at this point it's like maybe we do need to look somewhere else", and "[s]o that's how that whole thing came up, and then [emphasis added] she [Henderson] said, well, I know somebody that would be willing to hire you." Coram even said that she "would be glad to go look and see what's going on." Third, neither Coram nor Cooper denied hearing Henderson's conversation with Majors on April 18. Finally, there is no evidence that after April 18, Henderson even attempted to suggest that Coram and Cooper should seek work elsewhere.

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Westwood College, and on May 9, she interviewed one-on-one with Westwood's admissions director, Andrea Berry (Berry).¹³ However, at about 2 a.m. on May 10, she sent an email to Berry withdrawing her application for consideration. (GC Exh. 15, R. Exh. 8). There is no evidence that Henderson was upset or chastised Coram for withdrawing her application.

4. Henderson promoted to senior admissions representative

Effective June 20, 2012, Hess upgraded Henderson's job title to senior admissions representative. Although this change in title came without a raise or additional duties, there is no dispute that Hess upgraded her job title because of her good work, and assistance with training the new admissions representatives hired in April 2012. (Tr. 30, 74–75, 124; R. Exh. 3). In fact, Hess described Henderson as an "excellent" employee who "had excellent customer service with the students . . . [and had] maintained wonderful working relationships with . . . her colleagues and others outside of the department." He found her to be "a very good performer in terms of production, the number of students she enrolled in a period of time." Hess never indicated any problems he had with Henderson's job performance prior to her termination. (Tr. 29–30, 241).

C. New admissions director and workplace changes

In July 2012, Hess hired Larry Williams as director of admissions, but remained in one of the cubicles alongside the admissions representatives. On July 25, Williams sent an email to the admissions representatives notifying them of new start and individual goals effective in August. (GC Exh. 8). Henderson raised concerns about these goals with her coworkers and management because she believed them to be illegal or in violation of Department of Education rules and regulations. She based her beliefs on information provided to her in 2011 from former employees Majors and Robin Fields. Hess, on the other hand, testified the goals were not illegal, and that Laurus followed the applicable government rules and regulations. I will not determine whether or not these goals were illegal, but accept that they were conditions of employment about which Henderson and several of her coworkers took issue with and discussed.

In the summer and fall, Henderson complained that Shashanta Norwood (Norwood), the admissions department receptionist, had been showing favoritism towards Cooper in the assignment of leads.¹⁴ There is no dispute that she was not

¹³ Overall, Coram was not a reliable witness. During cross examination on these matters, Coram was generally evasive, hesitant, and even defiant at times. She vehemently denied, even when confronted with evidence to the contrary, that she sent her resume the same day she learned about Westwood, went to a group interview session at Westwood on May 1 and met and spoke with Majors at the group interview. Because of the documented text messages to Henderson and email to Majors, I discredit Coram's testimony. (Tr. 173–174; GC Exhs. 6, 15).

¹⁴ Norwood assigned leads to the admissions representatives. Norwood, like Coram and Cooper, had been brought to Laurus by Bracy, and worked with them at ITT.

the only employee who complained about the inequitable assignment of leads, and that others including Coram and Beard expressed their concerns to Henderson and to management. (Tr. 82–83). Coram actually raised her concerns with Henderson about walk-in lead assignments in conversations and a text message as early as May. (GC Exh. 9). She told Henderson that "Angela and Shashanta were starting the same thing they were doing over at ITT, and . . . she hadn't gotten a walk-in in like two weeks."¹⁵ Cooper also initiated meetings with management and raised her own concerns. (Tr. 82–86, 90–91; GC Exh. 9).

In September, Henderson solicited aid and assistance from other employees, including Cooper, regarding paid time off requests. She had become quite upset when Williams asked her to resubmit her paid time off request to reflect 10 hours of leave used for each day off instead of 8 hours for each day. He explained that since they were working 10 hours a day instead of 8 hours, "[they] should not be putting in 8 hours." Cooper told her that Williams had approved her time off request for 8 hours per day, without question. When Henderson confronted Williams with this information, he said he did not "recall that," but would look into it.¹⁶ (Tr. 86–91; GC Exh. 10).

In late September, Henderson went out on paid leave, and returned the week of October 1. On October 8, Henderson attended a "call to class"¹⁷ meeting with Coram, Williams, and representatives from the financial aid, education and registrar departments. Henderson took offense when Williams interrupted her presentation about one of her students, but had not interrupted a similar presentation by Coram. She believed Williams had publicly chastised and singled her out when he told her, "we don't want to hear about the drama." When she complained to Hess about Williams' comments, Hess divulged that he had been present during the meeting, and that her account was "not what he heard." Henderson became distressed, and accused Hess of preferring that she just quit. Hess responded, "don't put words in my mouth, that's not what I said." (Tr. 93–97).

Henderson went out on medical leave on October 8. This was the last day she actually worked at Laurus' Decatur facility.

E. Coram and Cooper's Accusations

On October 8, Coram apparently made several accusations against Henderson to Williams, Hess, and Gatewood. She first told Williams, and then Hess and Gatewood, that shortly after she had come onboard with Laurus, Henderson had tried to

¹⁵ I credit Henderson's testimony in light of the text message that Coram sent to her on May 2, as well as Cooper's testimony that they met several times with management regarding this issue. (Tr. 84–85).

¹⁶ Since there is no evidence to dispute that Williams had approved Cooper's paid leave request in 8-hour-per-day increments, I credit Henderson's testimony.

¹⁷ These "call to class" meetings were routinely conducted in the first week or so of each semester or 6-week session to discuss any issues students might have with remaining active in their classes or programs. (Tr. 35–36).

solicit them (Coram and Cooper) to leave Laurus and to go to another school. She also reported that Henderson had talked negatively about the company and some of its managers, constantly yelled and screamed about issues she had with company policies and tried to instigate a work slow-down to make Williams look like a bad manager and generally created a bad work environment.¹⁸ Nevertheless, her biggest issue with Henderson was that right before she left (apparently on October 8), she became verbally aggressive by getting close to her, pointing her finger and yelling and screaming about how she was tired of the ITT Connect (the former ITT employees, Coram, Cooper, and Norwood).

F. Investigation and Suspension of Henderson

On October 29, Henderson, who was still on paid medical leave, returned to the Decatur campus to discuss some leave issues. While there, Hess and Gatewood (human resources director) informed her she was suspended pending an investigation of allegations made against her. They refused to tell her what she had been accused of, but did give her a suspension, with pay, notice dated October 29. (Tr. 96–97, 99–100; GC Exh. 11). Henderson left the school and did not hear from management again until she received a termination notice and separation letter in the mail, both dated November 12. (GC Exhs. 12–13).

According to Hess, they (Hess and Gatewood) decided to suspend Henderson and conduct an investigation right after they learned from her supervisor that she had tried to recruit Coram and Cooper to work for a competitor school. On Octo-

¹⁸ I discredit Coram's characterization of Henderson's behavior (in both her testimony and transcribed statements). She wavered back and forth, depending on who was asking the questions, about when Henderson became "paranoid," and when her complaints about Laurus and work issues became too uncomfortable for her. Further, her testimony was inconsistent with her transcribed statements. In those statements, she said she knew from the beginning that Henderson wanted her gone. However, other evidence reveals that she was friendly with and sought out Henderson in numerous text message exchanges through August 2. In fact, she sent Henderson a text message on August 2, complaining about how sick she was of Laurus. (GC Exhs. 6–9, 17). She even said at one point that their relationship did not deteriorate until right before Henderson left Laurus, when Henderson yelled and screamed about the ITT. I do not believe this accusation. There were no witnesses to this incident which allegedly occurred in the open cubicle area at work, nor did Hess consider the accusation worthy of including in the termination letter (discussed below). Similarly, Coram's testimony and statements about Henderson's daily ranting and raving, and screaming were not corroborated by Cooper or Hess, who also sat in cubicles near Henderson. Hess testified that there were no out of the ordinary complaints or issues after March, until October when he learned that Henderson had tried to recruit Coram and Cooper. (Tr. 258–259). I believe he certainly would have noticed such behavior, as described by Coram, since he sat in a cubicle near the admissions representatives.

ber 31, Hess had Coram meet with him to provide tape recorded statements detailing her accusations against Henderson. About the same time, he also had Cooper provide a tape recorded statement. Coram's, but not Cooper's statements were introduced as evidence. (GC Exh. 18).¹⁹ It is undisputed that Hess did not give Henderson an opportunity to respond to the charges, or make any kind of statement. Nor were other employees interviewed.²⁰

G. Henderson's Termination

The termination letter, prepared and signed by Westwood, stated that she was terminated, effective November 12, for "willful breach of company policies and counterproductive behavior." It explained that Respondent's agents had lost confidence in Henderson's ability to perform her job because "[her] behavior [was] counterproductive to the team environment...and [was] having a direct negative impact on [her] fellow coworkers." The letter listed the following evidence and reasons which "directed" the decision to terminate: (1) "attempts to actively solicit and recruit coworkers to work for another company, a direct competitor;" (2) multiple complaints and repeated discussions with Laurus employees that had "gone outside the chain of command by discussing work related issues with your peers instead of your supervisor, which is an obvious distraction and impedes your coworkers' ability to effectively do their job;" (3) multiple complaints about repeated violations of "the company's written 'no gossip policy,' as outlined in the company's handbook," which had "a direct and negative impact on your coworker's ability to effectively perform their job responsibilities;" and (4) "multiple complaints that your ability to communicate and work with your peers has been virtually non-existent and is negatively impacting morale." (Id.). Gatewood also enclosed a Separation Notice listing the reason for separation as "Unsatisfactory Performance." (GC Exh. 13).

H. Respondent's Position Statement

During the investigation of the charge in this case, Respond-

¹⁹ At trial, part of the tape recording was played to refresh Coram's memory. However, due to technical/audio difficulties with it the tape recording, which made it impossible for the court reporter to record Coram's tape recorded statements, the parties agreed that one or both of them would provide a transcription of them. Therefore, I held the record open, and received and admitted the General Counsel's transcription of this recording as GC Exh. 18. Respondent did not join in the introduction of this exhibit, but did not object. There was some reference at trial of written statements, but none were introduced.

²⁰ Respondent also sought the opinion of an outside counsel, Adam Appel, Esq. (Appel). However, I discredit Appel's opinion and testimony as irrelevant. I will note that while Respondent apparently relied on Appel's opinion, in part, to terminate Henderson, Appel was hired only for his expertise in employment discrimination law, and to give an opinion as to whether Henderson's termination would be legally defensible in an EEOC retaliation case. (Tr. 217–218, 220–221, 224, 256–260; GC Exhs. 6, 12).

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ent's counsel submitted a position statement, dated January 28, 2013. In this statement, Respondent, through its counsel, admitted that the alleged evidence of Henderson's attempts to actively solicit coworkers to work for another competitor company was the real reason Henderson was terminated. Respondent's counsel wrote, in pertinent part, that :

With regard to Ms. Henderson, as we stated in the initial position Statement, Laurus discharged her because she was actively soliciting Employees to leave Laurus' employ in order to work for a competitor . . . I have also attached the termination letter Laurus sent to her. You will see that the first item noted as the cause of her discharge is the . . . improper co-employee solicitation. While the letter details additional wrongdoings, it is the first offense that was the proverbial straw that broke the camel's back. In other words, but for that transgression, Laurus would not have discharged her." (GC Exh. 2).

III. DISCUSSION AND ANALYSIS²¹

8(a)(1) Violations

A. *The No Gossip Policy Violates Section 8(a)(1)*

Since February 2012, Respondent has maintained a no gossip policy that has since been incorporated in its employee handbooks.²² The General Counsel has alleged in Complaint paragraphs six and eight, that this policy violates Section 8(a)(1) of the Act. (Also see GC Exh. 6). While Respondent generally denied any unlawful activity as alleged in the Complaint, Respondent did not provide any argument in its brief to support its position that this no gossip policy was lawful. (See R. Br.). For the reasons set forth below, I find that Respondent's no gossip policy violates Section 8(a)(1).

The General Counsel has the burden to prove, by a preponderance of the evidence, that a rule or policy violates the Act. In making this determination, the appropriate inquiry is whether

²¹ During the trial, I denied the Respondent's motion to dismiss on the grounds that the Board, and its agents or delegates, such as the Regional Director, lacked the authority to prosecute this complaint. The Board has acknowledged the United States Court of Appeals for the District of Columbia Circuit's conclusion that the President's recess appointments to the Board were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (petition for certiorari filed April 25, 2013). However, the Board has noted that same Court's acknowledgement that its decision was in conflict with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). In addition, the Board has determined that while the question regarding the validity of the recess appointments remains in litigation, and is pending a definitive resolution, it will continue to fulfill its responsibilities under the Act. See *Bloomingdale, Inc.*, 359 NLRB No. 113 (2013); *ORNI 8, LLC*, 359 NLRB No. 87 (2013). Accordingly, I reaffirm my ruling, and reject Respondent's arguments in this regard.

²² At the hearing, the parties stipulated this policy was incorporated in Respondent's February and July personnel handbooks. (Tr. 141).

the rule, and its prohibitions, "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf'd. 203 F.3d 52 (D.C. Cir. 1999). Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), a rule that explicitly restricts Section 7 activities is unlawful. If a rule does not explicitly restrict Section 7 activities, one of the following factors must be shown: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

In assessing the lawfulness of a rule, fact finders must "give the rule a reasonable reading . . . refrain from reading particular phrases in isolation, and . . . not presume improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646. The Board has also instructed that if the suspect rule could be considered ambiguous, any ambiguity in the rule must be construed against the employer as the promulgator of the rule. See *Lafayette Park Hotel*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)). Finally, it is well established that an employer violates Section 8(a)(1) of the Act when it prohibits employees from speaking to coworkers about discipline and other terms and conditions of employment. *SNE Enterprises*, 347 NLRB 472, 492-493 (2006), enf'd. 257 Fed. Appx. 642 (4th Cir. 2007); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990); *Guardsmark*, 344 NLRB 809 (2005).

I find that Respondent's rule on its face prohibits protected activity. Indeed, the Respondent does not even defend the no gossip rule in its brief. The language in the no gossip policy is overly broad, ambiguous, and severely restricts employees from discussing or complaining about any terms and conditions of employment. The scope of Respondent's definition of "gossip" is an expansive ban against any discussion about one's personal life when they are not present; professional life "without his/her supervisor present;" or any "[n]egative . . . or disparaging comments or criticisms of another person or persons." It further bans any "[c]reating, sharing, or repeating information that can injure a person's credibility or reputation[;] . . . a rumor about another person[; or] . . . a rumor that is overheard or hearsay . . ." (GC Exh. 5). A thorough reading of this vague, overly-broad policy reveals that it narrowly prohibits virtually all communications about anyone, including the company or its managers. In fact, read literally, this rule would preclude both negative and positive comments about a person's personal or professional life unless that person and/or his/her supervisor are present. Such an overly broad, vague rule or policy on its face chills the exercise of Section 7 activity, and violates Section 8(a)(1). A reasonable employee would certainly view it as doing so.

Thus, I agree, with the General Counsel, that Respondent's no gossip policy far exceeds the rule banning "false, vicious, profane, or malicious statements" toward or concerning the employer or its employees found to be unlawful in *Lafayette Park Hotel*, supra. See also *Cincinnati Suburban Press*, 289 NLRB 966 at 975 (1988) (handbook provision prohibiting employees from making "false, vicious or malicious statements

concerning any employee, supervisor, the Company...” unlawful); *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enf.d. 600 F.2d 132 (8th Cir. 1979) (provision banning “merely” ‘false’ statements deemed “overbroad”); *University Medical Center*, 335 NLRB 1318, 1320–1321 (2001), enf. denied in relevant part 335 F.3d 1079 (D.C. Cir. 2003) (rule against “disrespectful conduct” unlawful); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (rule prohibiting “negative conversations” about managers unlawful); *Southern Maryland Hospital Center*, 293 NLRB 1209, 122 (1989), enf.d. in relevant part 916 F.2d 932 (4th Cir. 1990) (rule against “derogatory attacks” unlawful); *American Medical Response*, Case 34–CA–12576, Advice Memorandum dated October 5, 2010 (rule against “disparaging comments” about superiors and coworkers unlawful).

In contrast, cases in which rules could not reasonably be construed to cover protected activity involved situations in which the rules clarified their scope by including examples of clearly illegal or unprotected conduct. See *Lutheran Heritage*, supra (rules prohibiting abusive or profane language, harassment of others and verbal, mental or physical abuse found to be unlawful); *Palms Hotel and Casino*, 344 NLRB 1363, 1367 (2005) (prohibition against “injurious, offensive, threatening, intimidating, coercing” conduct aimed at ensuring “civility and decorum” in the workplace, and does not refer to conduct that is an inherent aspect of Section 7 activity).

As the Board in *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990) stated, such a restriction or requirement (as Respondent’s rule in this case) “reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent and restrains the employees’ Section 7 rights to engage in concerted activities for . . . other mutual aid or protection.” Such a policy also “fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities.” *American Cast Iron Pipe*, supra at 137.

In the instant case, Respondent has not sufficiently narrowed, clarified or defined the scope of its broad no gossip rule. Thus, I find Respondent’s maintenance of the rule violates Section 8(a)(1) of the Act.

B. Respondent Admittedly Discharged Henderson for Violating the Unlawful No Gossip Policy, and Thus Violated Section 8(a)(1) of the Act

In its termination notice issued to Henderson, Respondent admitted that it discharged Henderson for violating its unlawful no gossip policy. (GC Exh. 12, par. 4). As indicated by the General Counsel, Board precedent holds that discharging an employee for violating an unlawful overbroad rule is likewise unlawful. *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enf.d. 414 F. 3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006), clarified by the Board in *Continental Group, Inc.*, 357 NLRB No. 39 at 6 (2011). In *Continental Group, Inc.* (reason for the warning- employee sleeping/living on work premises- lawful because employees’ conduct was clearly unprotected), the Board stated that discipline pursuant to an unlawful rule is also unlawful where an employee violated the rule by “(1) engaging in protected conduct or (2) engag-

ing in conduct that otherwise implicates the concerns underlying Section 7 of the Act” (i.e., protected but not necessarily concerted activity).²³ See also, *Taylor Made Transportation Services*, 358 NLRB No. 53 at 1 (2012) (Board deemed it unnecessary to decide if employee engaged in protected concerted where disclosing wage rate clearly was conduct implicating Section 7 concerns); *SNE Enterprises, Inc.*, supra at 492–493 (Board affirmed finding that employer violated the Act by prohibiting employees from speaking to coworkers about a disciplinary incident and then discharging the employee for violating that prohibition).

Accordingly, I find that Respondent in this case violated the Act when it terminated Henderson for violating its unlawful no gossip rule by speaking to coworkers, and managers not in her chain of command, about terms and conditions of employment. Nevertheless, I will proceed with discussion, analysis and findings regarding how the other conduct for which she was terminated was also protected by the Act.

C. Respondent’s Other Reasons Show that it Discharged Henderson for Engaging in Protected Concerted Activity in Violation of Section 8(a)(1) of the Act

1. Legal standard

Employers who discharge employees for otherwise engaging in protected concerted activity also violate Section 8(a)(1) of the Act. The complaint alleges that Respondent violated Section 8(a)(1) when it suspended and terminated Henderson for engaging in protected concerted activity. Respondent argues, in its defense, that Henderson did not engage in any such protected activity, but if she did, she is not afforded the protection of the Act because of her disruptive behavior and its effects on her coworkers. For the reasons discussed above and below, I conclude that Respondent did suspend and terminate Henderson for engaging in protected concerted activity, including discussions with Coram and Cooper about job security on April 18, and subsequent discussions with coworkers about inequitable terms and conditions of employment. I further find that Henderson did not, in the course of that protected activity, forfeit the Act’s protection.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” See *Brighton Retail, Inc.*, 354 NLRB 441, 441, 447 (2009). In *Meyers Indus-*

²³ The Board in *The Continental Group, Inc.*, also established an affirmative defense for employers who can show that the employee’s conduct actually interfered with operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. However, the employer must assert this defense; a mere citation of the employee’s violation of a rule is not enough. 357 NLRB No. 39 at 6. Respondent in this case merely cited that Henderson violated the no gossip policy.

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tries (*Meyers I*), 268 NLRB 493 (1984), and in *Meyers Industries Meyers II*, 281 NLRB 882, 886–887 (1986), the Board held that “concerted activities” protected by Section 7 are those “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” However, the activity of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.²⁴ It has also been established that individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whitaker Corp.*, 289 NLRB 933, 934 (1988) (Board found employee’s remark to be concerted activity when it concerned a common condition of employment). *Id.* A conversation constitutes concerted activity when “engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees.” *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). The object of inducing group action, however, need not be expressed depending on the nature of the conversation. See *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 4–5 (2012).

The Board established, however, that this type of protection is not absolute, and that an employer may impose discipline for concerted activity which is disruptive or which impairs the maintenance of discipline generally. See *NLRB v. Blue Bell, Inc.*, 219 F.2d 796, 798 (5th Cir. 1955); *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972).

2. Henderson engaged in concerted activity protected by the Act

As shown above in the factual statement, the discussions between Henderson and Coram and Cooper, as a group, on April 18 arose out of mutual concern and real fear for job security resulting from Respondent’s own actions, i.e., the multiple, unexplained terminations in the admissions department, including that of the admissions director who had just hired Coram and Cooper. I find these discussions, and Coram’s interest in pursuing other work, prompted Henderson’s inquiry to Majors about job opportunities at Westwood College on behalf of her coworkers. Although Henderson may have naturally shared some of her own negative experiences with Coram and Cooper right after they learned about Bracy’s termination, including her frustration with how Respondent had handled (or not) her pending sexual harassment and retaliation charges, Henderson’s inquiry to Majors jobs on April 18 would not have occurred but for the company’s recent overhaul of their department and discharge of their supervisor. I find that these group conversations, and Henderson’s inquiry to Majors, took place in further-

²⁴ The “mutual aid or protection” clause of the Act includes employees acting in concert to improve their working conditions through administrative and judicial forums. Whether or not an activity is protected must turn on the peculiar facts in a case, and protection may not be stripped from employees simply because their activity may include criticism of an employer. *Miscordia Hospital Medical Center v. NLRB*, 623 F.2d 808 (2d Cir. 1980).

ance of job security and in the mutual aid and protection of coworkers, and were therefore concerted activities protected by the Act.²⁵

I also find that Henderson engaged in protected concerted activity after July 2012, when she raised with management several concerns that she and other admissions representatives had regarding management’s (largely Williams’) changes in the terms and conditions of their employment. These issues included Williams’ institution of new goals and favoritism shown by the receptionist, Norwood, towards Cooper in the assignment of leads. The evidence, as discussed earlier, shows that these issues were raised individually and in group meetings with management. Cooper even testified that there were several meetings concerning the concerns about favoritism. In fact, it was Coram who sent Henderson an urgent text message as early as May 2, raising concerns about and questioning the assignment of walk-in leads. The Board has established that employees’ discussions with each other and management about favoritism, even that which is perceived, are sufficient to establish the protected concerted nature of the complaints. *McClain & Co.*, 358 NLRB No. 118, slip op. at 1 (2012).

3. Respondent’s other reasons for terminating Henderson are based her protected concerted activity in violation of Section 8(a)(1) of the Act

I have already determined that Respondent violated the Act when it suspended and terminated Henderson for violating its no gossip policy (the third reason cited in Henderson’s termination notice). I now find that the other reasons set forth by Respondent, in Henderson’s termination notice, and in its position statement to the NLRB, are also based on conduct which is also clearly concerted protected activity.

Respondent defends its action as being justified by Henderson’s behavior, which had become disruptive to the team and uncomfortable for coworkers, causing Henderson’s behavior, if protected, to lose the protection of the Act. For the reasons discussed below, I conclude that a violation of Section 8(a)(1) is shown because Henderson was engaging in protected concerted activity, protected by Section 7, when she discussed her concerns about various company policies which affected all of the admissions representatives. I further find that Henderson did not in the course of that protected activity engage in any conduct that caused her to forfeit the Act’s protection. *Frese-nius USA Mfg.*, 358 NLRB No. 138, slip op. at 4 (2012); *Atlantic Steel Co.*, 245 NLRB 814 (1979).

In the termination notice, Respondent gave as the second reason for Henderson’s termination: “multiple complaints and evidence of repeated . . . discussions . . . with employees of the company . . . outside of the chain of command by discussing work related issues with [her] peers instead of [her] supervisors,” as being a distraction impeding coworkers’ ability to effectively do their jobs. I find this reason is related if not much the same as termination of Henderson for violation of Respondent’s no gossip policy. This is a general prohibition against and

²⁵ For reasons stated earlier, I do not credit Coram’s testimony and statements that Henderson told them they *would* be fired if they stayed at Laurus.

discipline for discussions with coworkers about terms and conditions of employment, which are clear violations of the Act.

The first reason given in the termination notice was Henderson's attempts "to solicit and recruit coworkers to work for another company, a direct competitor." Since I have found that Henderson's discussions in this regard were protected concerted activity under the Act, I find that Respondent violated the Act when it terminated her for this reason. The General Counsel argues in the brief that the real reason that Respondent suspended and terminated Henderson was its belief that she had solicited other employees to work for a competitor school, and that the other reasons set forth in the termination letter, and discussed above, constituted a pretext. This argument is primarily based on Respondent's admission in its position statement, submitted during the investigation of this case, that Henderson's solicitation of employees to work for a competitor was "the proverbial straw that broke the camel's back," and that but for that conduct, Henderson would not have been discharged. (GC Exh. 2).

But, as I have found above, discussions among employees about job security constitute protected concerted activity. And, as the General Counsel points out, such discussions do not lose the protection of the Act "even if the activity looks toward employment by another employer." In *QIC Corp.*, 212 NLRB 63, 68 (1974), the Board found that a group of employees had not exhibited "disloyalty," or lost protection of the act for attempting, on their own initiative, to seek employment with a competitor during a pay dispute with respondent. More recently, the Board held that an employee's conversations about job security with another employee, like those about wages, are inherently concerted. *Hoodview Vending Co.*, supra at 4. The respondent in *Hoodview*, like Laurus in this case, was found to violate the Act when it discharged an employee for discussing with another employee whether an internet job posting meant that someone would be discharged. *Id.*

In *Technicolor Government Services*, 276 NLRB 383, 388 (1985), affd. *NLRB v. Technicolor Government Services*, 795 F.2d 916 (11th Cir. 1986), the Board found the union's conduct—distribution of competitor applications—was "purely defensive," and did not constitute a solicitation to quit because there was a real possibility of layoff, and that distribution of the applications was intended to ensure continued employment. As in *Technicolor Government Services*, I do not find that Henderson's actions, in response to job insecurity among coworkers, constituted a solicitation to quit or to harm Laurus.

I reject Respondent's argument that Henderson deceptively and maliciously tried to get Coram and Cooper to leave Laurus to better her own position and/or because she felt threatened by their presence. This theory is mere speculation, and unsupported by the evidence. I have already discredited Coram's and Hess' testimony in this regard as mere speculation.²⁶ There is

²⁶ I rejected Respondent's argument that Henderson intentions were malicious because she lied to Coram and Cooper about needing a bachelor's degree to work at Westwood. As I found earlier, the evidence supported Henderson's testimony she was told and believed that a bachelor's degree was required to work at Westwood. (Tr. 152, 294; R. Exh. 1). Moreover, in

no evidence that Henderson was acting on her own behalf, or that she had anything to gain if Coram and Hess had left Laurus. Based on Respondent's history, they would have been immediately replaced. The fact that Hess rewarded Henderson for her good work, and assistance in training Coram and Cooper, belies this theory. Further, it was Coram who immediately sent her resume to Majors, and spent the next couple of weeks trying to get a job at Westwood. As documented in emails and text messages from Coram, it was also she who sought Henderson's assistance in getting salary information and feedback from Majors, and she who did not tell the truth about her own actions and complicity in trying to find other work. (GC. Exhs. 6–7, 15).²⁷ Likewise, Cooper's testimony did not corroborate testimony that Henderson was virtually pushing them out the door. Rather, Cooper confirmed that Henderson was very helpful and friendly to her in her first few months at Laurus.

Respondent relied on *Boeing Airplane Co.*, 110 NLRB 147 (1954), revd. 238 F.2d 188 (9th Cir. 1956), in support of its position. *Boeing* is easily distinguishable from the instant case, however. In *Boeing*, the Court overturned the Board's finding that a union sponsored manpower availability conference with competitor companies (to encourage Boeing engineers to seek employment elsewhere) was concerted activity protected by Section 7 of the Act. The Board, in *Technicolor Government Services*, supra, also found the employees' conduct and purpose was "starkly" different in contrast to that in *Boeing*, describing the union's conduct in *Boeing* as "aggressive, disruptive, and damaging to the company's business." *Id.* What happened in the case before me on one day, April 18, pales in comparison to the employees' conduct in *Boeing*. There is no evidence that Henderson's discussions with Coram and Cooper, and inquiry to Majors, rose to such a level to constitute solicitation and disruption. Cooper confirmed that Henderson did not raise the topic of job opportunities at Westwood after April 18.

I also distinguish another case on which Respondent relies. In *Clinton Corn Processing Co.*, 194 NLRB 184, 185–186 (1971), the Board found the respondent did not violate Section 8(a)(1) of the Act when it directed another company, with whom it did business, not to allow one of that company's employees onto its premises to work because that employee had been trying to get respondent's employees to quit. There is no evidence in this case that Henderson's purpose on April 18, or any other time, was to get her coworkers to leave Laurus' employ, or that her conduct was so "indefensibly disloyal" or malicious as to remove it from the protection of the Act. *Technicolor Government Services*, supra at 388. Respondent's reli-

the three tape recorded statements that Coram made to Hess in October, she never mentioned that she had applied to or interviewed with Westwood, or for that matter that Henderson had even tried to get them to leave Laurus. (GC Exh. 18).

²⁷ Coram was not forthcoming regarding her independent, ongoing efforts to seek work at Emory University (Emory). At first, she denied she had interviewed with Emory, but then backtracked a bit to say she got a "callback." After further questioning, she admitted having had an telephonic informational interview in her car during the work day. (Tr. 179–181.)

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ance on selective text from the dissenting/minority opinion in *LRB v. Interstate Builders*, 351 F.3d 1020, 1036–1040 (10th Cir. 2003) (“[t]o convince other workers to quit and work for competitors is an act of disloyalty, injurious to the employer, and is a legitimate basis for discharge.”) is also misplaced. In this mixed motive case, the Court of Appeals for the Tenth Circuit merely assumed that employees’ conduct was not protected so they could move on to their conclusion that absent other protected activity, the company would not have terminated the employee.

Respondent’s fourth (and last) reason for terminating Henderson was receipt of “multiple complaints that [Henderson’s] ability to communicate and work with [her] peers has been virtually non-existent and is negatively impacting morale.” Although Respondent argues that Henderson’s disruptive behavior alone would have taken her activity outside the protection of the Act, the evidence shows that what Hess viewed as Henderson’s disruptive behavior was in fact her protected concerted activity.²⁸ At trial this was quite evident, as Hess’ expressed his disdain for Henderson discussing any work issues with anyone other than her immediate supervisor or him, and considered her conversations about such issues to be “gossip.” (Tr. 261–262). At one point, he even referred to her complaints about various work policies that affected all employees as “garbage.” (Tr. 260–262, 272–274). In fact, the termination notice did not include or specify any conduct except Henderson discussions with other employees about terms and conditions of employment common to all of the admissions representatives. Therefore, this last reason for termination is also based on and inextricably intertwined with protected concerted activity.

Given that Respondent suspended and terminated Henderson for conduct protected by the Act, such action violated Section 8(a)(1) unless Henderson’s activity was so threatening, egregious, or opprobrious as to cause her to lose that protection. *Random Acquisitions, LLC*, 357 NLRB No. 32, slip op. at 14 (2011); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 fn.5 (2000). Under the Board’s decision in *Atlantic Steel*, the determination about whether otherwise protected activity has lost the Act’s protection is based on a “careful balancing” of the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. *Atlantic Steel Co.*, supra at 816. The Board has cautioned that while an em-

²⁸ I have already discredited Coram’s characterization of Henderson’s behavior and conduct. Similarly, I discredit Hess’ as well. As discussed, his testimony was also inconsistent regarding his observations. At first, he said that Henderson presented no out of the ordinary issues between March and October. He later changed his testimony, stating that he sat in one of the cubicles in the admissions department from April until Henderson’s termination, and “bore witness and experience to everything.” He then stated that he had a “very strong sense that there was some animosity or a negative tone, an unproductive environment in the admissions office,” but had no clue how intense it was. In my opinion, it is evident that Hess did not tell the truth in an attempt to legitimize his actions.

ployer may lawfully discipline an employee engaged in protected activity for statements that threaten others with, for example, physical harm, it may not discipline an employee for making statements that simply make others annoyed or uncomfortable, or which are viewed as “harassment” by employees because they disagree with the statement. *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004); *Alpine Log Homes*, 335 NLRB 885, 894 (2001), *RCN Corp.*, 333 NLRB 295, 300 (2001), *Nor-Cal Beverage Co.*, supra. The Board has also recognized that an employer may not discipline an employee for conduct, otherwise protected by the Act, which has a negative effect on other employees’ morale. See *In Re St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007). There is no credible evidence or testimony that any of Henderson’s conduct came close to being threatening or egregious, or such that under the *Atlantic Steel* factors, it would have caused Henderson’s otherwise protected activity to lose the Act’s protection.

Respondent analyzes these allegations under the frame work set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, *Wright Line* is inapplicable in this case, because a review of the evidence and reasons set forth in Henderson’s termination notice show that she was terminated for her protected concerted activity. None of the reasons offered by Respondent for the termination necessitate the application of the dual motivation *Wright Line* rule. See *American Steel Erectors, Inc.*, 339 NLRB 1315, 1316 (2003).

Accordingly, I find that Respondent clearly violated Section 8(a)(1) of the Act when it suspended and terminated Henderson based on violation of its unlawful gossip policy and her other protected concerted activity described above.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent has violated Section 8(a)(1) of the Act since February 21, 2012 by maintaining and enforcing an overly broad no gossip policy.
3. The Respondent violated Section 8(a)(1) when, on October 29, 2012, it suspended Henderson, with pay, and then on November 12, 2012, terminated her because of her protected concerted activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent make Henderson whole for any losses, earnings and other benefits suffered as result of the unlawful discipline imposed on her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar

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quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum back pay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.²⁹

ORDER

The Respondent, Laurus Technical Institute, Decatur, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing any overly broad no gossip policy and rule that prohibits employees from talking about another person's personal life when they are not present; talking about another person's professional life without his/her supervisor present; making negative or disparaging comments or criticisms about anyone; creating, and sharing or repeating a rumor about another person; and/or otherwise discussing work issues or terms and conditions of employment with other employees.

(b) Disciplining any employee, including warning, suspending or terminating any employee, because such employee violated Respondent's overly broad and unlawful no gossip policy.

(c) 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) Make Joslyn Henderson whole for any loss of earnings and other benefits suffered as a result of her unlawful discipline and discharge, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any and all references to the unlawful suspension and termination, and within 3 days thereafter notify Henderson in writing that this has been done and that the discipline will not be used against her in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and 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.

(d) Within 14 days after service by the Region, post at its three facilities in Decatur, Jonesboro, and Atlanta (Fulton Industrial Boulevard campus), Georgia copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms

provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to former employees employed by the Respondent at any time since February 21, 2012.

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

Dated Washington, D.C. December 11, 2013

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce any overly broad rule that prohibits you from talking about another person's personal life when they are not present; talking about another person's professional life without his/her supervisor present; making negative or disparaging comments or criticisms anyone; creating, and sharing or repeating a rumor about another person; and/or otherwise discussing terms and conditions of employment with other employees.

WE WILL NOT suspend, terminate or otherwise discriminate against you because you have talked about another person's personal life when they are not present; talked about another person's professional life without his/her supervisor present; made negative or disparaging comments or criticisms about anyone; created, shared or repeated a rumor about another person; and/or otherwise discussed with other employees work issues or terms and conditions of employment.

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

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁰ 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 "Post-

ed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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WE WILL, within 14 days from the date of the Board's Order, offer Joslyn Henderson full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Joslyn Henderson whole for any loss of earnings and other benefits she suffered as a result of the unlawful suspension and termination, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and

termination of Joslyn Henderson, and within 3 days thereafter notify Joslyn Henderson in writing that this has been done and that the suspension and termination will not be used against her in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate Joslyn Henderson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

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