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MCPc, Inc. *and* Jason Galanter. Case 06–CA–063690

February 6, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On June 7, 2012, Administrative Law Judge Michael A. Rosas 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[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

1. We agree with the judge that the Respondent violated Section 8(a)(1) by maintaining an overly broad confidentiality rule in its employee handbook stating that "dissemination of confidential information within [the company], such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination." Employees would reasonably construe this rule to prohibit discussion of wages or other terms and conditions of employment with their coworkers—activity protected by Section 7 of the Act. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 1, 12 (2011); and *Cintas Corp*., 344 NLRB 943, 943 (2005), enfd. in relevant part 482 F.3d 463 (D.C. Cir. 2007).[4]

2. We also agree with the judge, for the reasons he gives and those discussed below, that the Respondent violated Section 8(a)(1) by discharging employee Jason Galanter for his protected concerted activity. On February 24, 2011, Dominic Del Balso, the Respondent's director of engineering, held a team building lunch meeting with Galanter and several other employees. During the meeting, the group discussed the employees' heavy workloads—a well-known employee complaint—and Galanter urged the Respondent to hire additional engineers to alleviate those workloads. In support of his point, Galanter mentioned the recent hiring of a corporate executive and stated that, for the $400,000 salary the Respondent was paying to the executive, it could have hired additional engineers. Two other employees present at the meeting expressed their agreement with Galanter. The Respondent later discharged Galanter based on his comments at that meeting, in particular accusing him of improperly accessing computer files to discover the executive's salary in violation of the Respondent's confidentiality policy.

In agreement with the judge, we find that Galanter engaged in concerted activity when discussing with other employees their terms and conditions of employment—staffing shortages resulting in heavy workloads—which constituted protected concerted activity under *Meyers Industries*, 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). See *Worldmark by Wyndham*, 356 NLRB No. 104, slip op. at 2 (2011) ("[T]he Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees."). The concerted nature of Galanter's actions also is evident in the fact that the discussion about employee workloads occurred at a group meeting characterized by Del Balso himself as involving "team building,"[5] and that two of

[1] In light of our disposition of this case, we find it unnecessary to pass on the General Counsel's argument that the Respondent's exceptions contravened Sec. 102.46(b)(1) of the Board's Rules and Regulations because they impermissibly contained legal argument, given that the Respondent also filed a supporting brief.

[2] 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 findings.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, to require the Respondent to compensate employee Jason Galanter for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating Galanter's backpay award to the appropriate calendar quarters. We have substituted a new notice to conform to the Order as modified.

[4] Member Miscimarra agrees that the Respondent's confidentiality rule violated Sec. 8(a)(1) because it would prohibit protected employee discussions regarding compensation without other important justifications, and this aspect of the rule was a basis for the employer's actions in this case; but Member Miscimarra does not agree with the current Board standard regarding alleged overly broad rules and policies, which is set forth as the first prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (finding rules and policies unlawful, even if they do not explicitly restrict protected activity and are not applied against or promulgated in response to such activity, where "employees would reasonably construe the language to prohibit Section 7 activity"). He advocates a reexamination of this standard in an appropriate future case.

[5] The Board has stated that "in a group-meeting context, a concerted objective may be inferred from the circumstances." *Whittaker Corp.*, 289 NLRB 933, 934 (1988). Here, however, no inference is necessary. The several employees at the meeting were discussing with Del Balso how busy they were, how many hours they were working, and the need for the Respondent to hire more engineers. Thus, when Galanter con-

Galanter's colleagues participated in the discussion by expressing agreement with Galanter's comments.[6] Thus, the record supports the judge's finding that the Respondent discharged Galanter for activity that was protected by the Act.[7]

In so finding, we reject the Respondent's argument that its discharge of Galanter was lawful under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), because it was based on a good-faith belief that Galanter obtained confidential information about executive pay by improperly accessing the Respondent's computer records. *Burnup & Sims* does not apply here. Under *Burnup & Sims*, an employer does not violate Section 8(a)(1) when it discharges an employee based on a good-faith belief that the employee engaged in misconduct in the course of otherwise protected activity, unless the General Counsel shows that the employer's belief was mistaken. See id. at 23. Here, however, the Respondent does not contend that Galanter engaged in misconduct in the course of his protected concerted activity of voicing concerns about the employees' terms and conditions of employment at the team-building meeting. It contends that he improperly accessed confidential records sometime prior to his protected concerted activity. But even assuming the applicability of *Burnup & Sims*, and further assuming that the Respondent honestly believed Galanter improperly accessed its computer records, we agree with the judge, for the reasons he gives, that the General Counsel established that this purported misconduct did not, in fact, occur. The Respondent's *Burnup & Sims* argument thus fails in any event. See *Accurate Wire Harness*, 335 NLRB 1096, 1097 (2001), enfd. 86 Fed. Appx. 815 (6th Cir. 2003) (rejecting employer's *Burnup & Sims* argument where the General Counsel established that the employee's alleged misconduct did not occur).[8]

Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by discharging Galanter for his protected concerted activity.

ORDER

The National Labor Relations Board orders that the Respondent, MCPc, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad confidentiality rule stating that "dissemination of confidential information within [the company], such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination."

(b) Discharging or otherwise discriminating against employees because they engaged in protected concerted activities.

(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) Rescind the confidentiality rule maintained in its employee handbook stating that "dissemination of confidential information within [the company], such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination."

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

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

(d) Compensate Jason Galanter 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 Jason Galanter's unlawful discharge, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

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tributed to that discussion, it would have been apparent that he was acting "with . . . other employees, and not solely by and on behalf of . . . himself." *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985). In finding that Galanter engaged in concerted activity, Member Miscimarra relies solely on this rationale. He finds it unnecessary to rely on *Worldmark by Wyndham*, supra.

[6] See *Worldmark by Wyndham*, supra, slip op. at 2–3 (finding that any doubt about the concerted nature of one employee's statements at a group meeting was removed when a second employee joined them); *Neff-Perkins*, 315 NLRB 1229, 1229 fn.1 (1994) (finding that two employees were engaged in concerted activity when they raised questions concerning working conditions at a group meeting).

[7] Because we agree with the judge that the Respondent discharged Galanter for his protected concerted activity at the February 24, 2011 team building meeting, we find it unnecessary to reach the judge's alternative rationale that Galanter's discharge was unlawful under *Continental Group*, 357 NLRB No. 39 (2011).

[8] The Respondent also argued to the judge that its discharge of Galanter was lawful under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), but the judge rejected that argument, finding that the Respondent's proffered reason for Galanter's discharge was pretextual. The Respondent does not except to this finding.

(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) Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful confidentiality provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

(h) Within 14 days after service by the Region, post at its Pittsburgh, Pennsylvania facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 6, 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, notices shall be distributed electronically, such as by email, posting on an intranet or 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2011.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 6 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. February 6, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an overly broad confidentiality rule stating that "dissemination of confidential information within [the company], such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination."

WE WILL NOT discharge or otherwise discriminate against any of you for engaging 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 rescind the overly broad confidentiality rule maintained in our employee handbook.

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

WE WILL make Jason Galanter whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Jason Galanter for the adverse tax consequences, if any, of receiving a lump sum

[9] 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."

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

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

WE WILL furnish you with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

MCPC, INC.

Julie Stern, Esq., for the General Counsel.
Dean F. Falavolito, Esq. (Burns White, LLC), of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on March 20–21, 2012. Jason Galanter filed the charge on August 30, 2011,[1] and the General Counsel issued the complaint on December 30. As amended, the complaint alleged that MCPc, Inc. (the Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[2] by: (1) discharging Galanter on about March 4; and (2) maintaining an unlawfully broad confidentiality rule. The Company filed an amended answer denying the material allegations in the complaint.

On the entire record[3] and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, an Ohio corporation, with an office and place of business in Pittsburgh, Pennsylvania, has been engaged in the business of providing technology products and services. During the 12-month period ending July 31, 2011, the Company, in conducting the aforementioned business operations, performed services valued in excess of $50,000 in states other than the Commonwealth of Pennsylvania. At all material times, the Company has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4]

II. THE PARTIES

A. The Company

The Company's headquarters are located in the Cleveland, Ohio area. Field offices are located in Pittsburgh and Buffalo, New York. It has several field offices, including two located in Pittsburgh, Pennsylvania, and Buffalo, New York. The field office at issue here is in Pittsburgh. The Pittsburgh office has approximately 30 employees, including sales representatives, computer solutions architects, and computer network engineers.[5]

The Company's managerial and supervisory staff includes: Michael Trebilcock—chief executive officer and Chairman; Theodore Hervol—regional president,[6] Pittsburgh office; Beth Stec—vice president of human resource and communication; Domenic Del Balso—director of engineering; Jeff Kaiser—information technology manager; and Dale Phillips— supervisor.[7] The following employees are or were employed in the Pittsburgh office: Jason Galanter and Jeremy Farmer, as solutions architects; and Daniel Tamburino and Brian Sawyers, as network engineers. Nancy Damin and Greg Jurkowski are sales representatives in the Buffalo office.

All employees are issued a copy of the Company's employee handbook (the Handbook). In the absence of a written employment agreement, each employee signs an acknowledgement of the following: receipt of the Handbook; understanding that the employment relationship is "at will;" and an understanding as to the Company's guidelines for the use of its computer and telecommunications equipment and services.[8] The Handbook contains the Company's employee policies, including the following provision relating to the dissemination of confidential information:

> [The Company] is engaged in sales, service and distribution, which requires that a strict code of confidentiality be maintained. No employee will store information outside of [the Company] (either written or electronic form) about any matter pertaining to the conduct of [the Company's] business. No information regarding [the Company's] purchase prices or pro-

[1] All dates are in 2011 unless otherwise indicated.

[2] 29 U.S.C. §§ 151–169.

[3] The General Counsel's unopposed motion to correct the transcript, dated April 25, 2012, is granted and received in evidence as GC Exh. 13.

[4] The Company denied the legal conclusion that it was engaged in interstate commerce but admitted the essential jurisdictional facts ("performed services valued in excess of $50,000 in states other than the Commonwealth of Pennsylvania" in the course of its business operations).

[5] The office is actually located in the city of Strongsville, a suburb of Cleveland. As the parties tended to refer to its operations there as the Cleveland office, I refer to it as such. (Tr. 16–17.)

[6] The General Counsel does not allege that Hervol was a statutory supervisor or agent within the context of this case. He was not Galanter's supervisor at the relevant time and his testimony was limited to background information. (Tr. 145–156.)

[7] The Company stipulated that Trebilcock, Del Balso, and Phillips are supervisors within the meaning of Sec. 2(11) of the Act. It also stipulated that Stec, Kaiser, Trebilcock, Del Balso, and Phillips are agents within the meaning of Sec. 2(13) of the Act. (GC Exh. 2; Tr. 7–8.)

[8] Galanter acknowledged its receipt on October 10, 2007. (R. Exh. 1.)

cesses shall be given to anybody without permission of senior management. Conversations regarding prices, service, problems, or other information specifically about one vendor or customer to another are prohibited. Any employee who compromises information may be subject to disciplinary action or possible dismissal. *In addition, idle gossip or dissemination of confidential information within [the Company],such as personal or financial information, etc. will subject the responsible employee todisciplinary action or possible termination*.[9] (Emphasis supplied.)

B. Jason Galanter

Galanter was hired in 2007 as a solutions architect in the Company's Pittsburgh office. During his employment by the Company, Galanter was neither disciplined nor informed about any concerns with his performance. His most recent performance review, in 2009, was positive. There were several instances in which clients requested that their projects be reassigned from Galanter to someone else. However, such requests were neither unusual nor limited to Galanter's accounts.[10]

Since December 2010, Galanter had two assignments—assisting customers of the Buffalo office and designing the Company's call center. Due to a shortage of engineers, the call center assignment also required Galanter to implement the system by integrating it with the Company's computer system. In order to accomplish that objective, Galanter was granted special access to the Company's computer system by Information Technology Manager Jeff Kaiser. In addition, Galanter was working on installing certificates to encrypt traffic between websites and employee email accounts.[11]

In connection with the call center project, Galanter had access to certain files which enabled him to make changes to the Company's computer network. This access enabled Galanter to connect email accounts to voice mail accounts. He had access to human resource files, but did not attempt to access those records.[12] In or around February 2011, Galanter was notified that the internet operations of all employees with authorized access to the Company's email system would be audited. No problem was found with respect to Galanter's accessing of the Company's computer network systems.[13]

III. GALANTER COMPLAINS ABOUT EXECUTIVE COMPENSATION

Occasionally, supervisors and managers based in the Cleveland office visited the Pittsburgh office to check on the employees.[14] On or about February 24, 2011, Del Balso, the Company's director of engineering, visited the Pittsburgh office. As was customary, he invited several employees to lunch for an exercise in "team-building." His range of invitees generally included anyone who was in the office during his visit. Four employees accepted the invitation: two engineers, Dan Tamburino and Brian Sawyers; and two solutions architects, Galanter and Jeremy Farmer. During this lunch meeting, there was discussion about the heavy workload. Galanter expressed concern that he was working many hours per week and urged that the Company hire additional engineers to alleviate employee workloads. Del Balso acknowledged the shortage of engineers.[15]

In support of his point about employee workloads, Galanter mentioned the Company's recent hiring of an executive named Peter DeMarco. He explained that the Company could have

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[9] The Company's answer denied that the italicized portion of the Handbook's confidentiality provision, "in and of itself, represents a controlling policy at [the Company]." (GC Exh. 1(h), p. 2.) Since the undisputed testimony and evidence revealed that the provision remained in effect, it appears that the Company was simply asserting that the quoted portion, standing alone, was being taken out of context. (GC Exh. 3(b), p. 2; GC Exh. 9, p. 5; Tr. 32–34, 111–113, 125.)

[10] In light of an employment history in which the Company never gave Galanter a less than adequate performance evaluation or counseled him about customer and employee relations, Hervol's attempt to portray a backdrop of adversity surrounding Galanter's relationship with customers and coworkers appeared exaggerated. He explained that at least one customer asked that Galanter's work on their account be transferred to someone else after he accused the client of dishonesty. Harvol also added that Galanter's relationship with another employee was, at times, confrontational. It is evident that Galanter was not guided by the notion that the "customer is always right." Nor is it difficult to envision from his gruff demeanor on the witness stand how he might have encountered difficulty interacting with a coworker. However, Hervol conceded that customer requests for changes in assigned staff were not unusual. More importantly, Galanter was never counseled or disciplined for either situation. (Tr. 30–31, 36, 60, 65, 147, 150–151, 154–156; GC Exh. 7.)

[11] GC Exh. 11; Tr. 18, 36, 165–166, 173.

[12] The General Counsel cites *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004), enfd. 156 Fd.Appx.386 (2d Cir. 2005) in support of its contention that R. Exh. 2, a printout previously produced in response to a subpoena duces tecum, not be afforded any weight. The printout generated by Kaiser showing Galanter's access to the Company's computer network systems was not the complete document that Kaiser submitted to the human resources department. (Tr. 137–138.) The Company's failure to account for the missing portion, which would have supported Kaiser's contention that Galanter had access to human resource files, was somewhat suspicious. (Tr. 139–140, 163–164.) Nevertheless, Galanter did not dispute that he had access to those files as well. On the one hand, he denied Kaiser's testimony that he was not authorized to access certain files, including those maintained by human resources. On the other hand, he seemed to indicate that he had access to all human resources files. (Tr. 130–136, 165–173; GC Exh. 11–12.)

[13] The audit corroborated Galanter's contention that he did not engage in any unauthorized access of Company files. (Tr. 26–29.) It also undermines the testimony of Company witnesses who assumed that he did because of his access. (Tr. 115–116, 127–136, 165–173; R. Exh. 2, 12.)

[14] It appears that Del Balso and Phillips were the two most frequent visitors from the main office to the Pittsburgh office. (Tr. 18–20, 41–42, 74–75, 100, 148.)

[15] I did not credit Del Balso's testimony regarding the meeting. He had spotty recollection as to what Galanter and others discussed at this "team-building" lunch. Del Balso vaguely recalled a statement about the need to hire more engineers, but does not recall who made it or what else was discussed. (Tr. 99–108.) On the other hand, attendees Daniel Tamborino (Tr. 70–74.) and Jeffrey Farmer (Tr. 84–91.) corroborated Galanter's testimony that the subjects of heavy workloads, a shortage of engineers, and newly hired and high paid executives came up during the lunch. (Tr. 19–22, 44–45, 49–53.)

hired several engineers for the $400,000 salary that it was paying DeMarco. Sawyers and Tamburino agreed.[16] Del Balso acknowledged the point but did not ask Galanter where he acquired that information.[17] In fact, Galanter's statement was based on a combination of employee rumors and an estimate derived from internet research that he conducted several weeks earlier after learning of the new executive's hiring. In that research, Galanter focused on the newly hired executive's previous company and learned that a comparable pay salary for a similar position in 2008 was $362,500.[18]

At some point after the February 24 lunch, Del Balso informed Trebilcock of Galanter's comments regarding executive compensation. Trebilcock responded by directing Stec to review Galanter's access to the Company's computer network.[19] Stec, in turn, asked Kaiser, the Company's IT manager, to report on Galanter's access to the Company's electronic network systems. After researching the Company's systems, Kaiser informed Stec that Galanter had full access (admin rights) to all network systems and email due to his work on the call center project.[20]

IV. GALANTER'S DISCHARGE

About a week after the lunch meeting, Phillips directed Galanter to attend a meeting at the Cleveland office. Galanter complied, traveled to the Cleveland office on March 4 and was met by Trebilcock and Stec. At the outset, Trebilcock asked Galanter to tell him about the February 24 lunch meeting. Galanter explained to Trebilcock that he and the other employees complained to Del Balso about the high salary being paid to a newly hired executive at a time when they needed more engineers. Trebilcock asked Galanter where he obtained the salary information that he mentioned at the meeting. Galanter denied that anyone told him and alternated between several vague possibilities —that the information was available on the internet and was the topic of discussion among many employees (water cooler talk). Trebilcock responded that he heard that Galanter mentioned the salary amount at the February 24 lunch.[21] Galanter relented and suggested he may have heard it from Damin and Jurkowski in the Buffalo office. Trebilcock left the room and spoke to Damin by telephone. She denied any knowledge of the salary at issue, much less spreading information about it. Trebilcock returned to the meeting with Galanter, informed him of Damin's denial and showed him a printout. Trebilcock said the printout indicated that Galanter had unusual access to the Company's computer system and accused Galanter of disclosing the amount of Peter DeMarco's compensation. Galanter admitted mentioning that salary amount, but insisted he was referring to a different executive, Andy Jones.[22] Galanter admitted that he mentioned a salary in the $400,000 range, but insisted that all of his access was authorized in accordance with his assigned project. Trebilcock responded that he had a "gut feeling" that Galanter "didn't do anything wrong here, but the damage is done." He concluded with a remark that he was very embarrassed about the information "getting out," said the Company and Galanter needed to "divorce" and left the room.[23]

After an audit by Kaiser of his personal computer, Galanter was escorted from the facility.[24] Galanter was not provided with a written explanation for his termination.[25] However, the facts and circumstances indicate that he was terminated because he disclosed DeMarco's salary information in violation of the

[16] Galanter testified that he mentioned Andy Jones as the executive who was paid $400,000 (Tr. 21, 44–45), Farmer, however, testified that Galanter referred to Peter DeMarco as the executive who was recently hired at a salary of $400,000. I found the spontaneity and detail of Farmer's testimony more credible. (Tr. 84–86, 89–90.)

[17] I based this finding on the collective, but credible testimony, of Galanter, Farmer, and Tamburino that the issue of executive compensation came up at the meeting. (Tr. 21–25, 44–45, 51, 63, 71–76, 86–88.)

[18] Galanter's testimony on this point was credible and unrefuted. (Tr. 39–40, 45–48, 63; GC Exh. 6.)

[19] I did not credit Trebilcock's testimony that Doug Campbell, an engineer, was the sole source of his information about the information being circulated by Galanter about the level of executive compensation. (Tr. 114–115, 125–126.) I find it extremely likely that Del Balso, one of the Company's high level individuals who periodically visited the Pittsburgh office, informed Trebilcock about Galanter's remarks at the February 24 lunch.

[20] Trebilcock's vague explanation regarding his subsequent actions, as well as the information he obtained from the purported investigation that followed, was not credible. (Tr. 115–116.) According to Kaiser, Stec, who did not testify, specifically directed Kaiser to review and report on Galanter's IT access. She did not direct Kaiser to review anyone else's access. (Tr. 130, 132–133.)

[21] Trebilcock essentially corroborated Galanter's testimony that the former knew about the February 24 lunch meeting: "You know, my memory is that he denied having any involvement with it. I think I shared with him that, you know, the people at lunch weren't making it up." (Tr. 26–28, 116–117.)

[22] I do not credit Galanter's testimony that he mentioned Andy Jones, rather than Peter DeMarco, at the February 24 lunch. (Tr. 21–23, 49, 58.) As noted at fn. 16, infra, Farmer, whom I found more credible, testified that Galanter specifically mentioned DeMarco at that meeting. (Tr. 86.) Consistent with Galanter's defensive posture on March 4, however, I find it more likely that he only invoked Jones' name when confronted by Trebilcock at that time. (Tr. 34–35, 120–121.)

[23] Galanter's testimony revealed that he was purposely vague and evasive in his explanation to Trebilcock as to where he obtained the salary information: "At which point, I said no one told me the number. This is something that it was available on the internet. It's available from water cooler talk." (Tr. 27.) On cross-examination, he expanded on his answer to include other possible sources: "[A]nd I said I might have heard it from Greg. I might have heard it from Nancy, and I also said I got information from the internet, so there were a lot of people discussing this." (Tr. 55–58.) Notwithstanding Galanter's inconsistencies as to his statements at the meeting, Trebilcock conceded that he made the "gut feeling" remark (Tr. 28, 120–121.) and followed-up on Galanter's references to Damin and Jurkowski. (Tr. 117–119.)

[24] The clear inference from Kaiser's audit of Galanter's personal computer is that there was no confidential company information on it. (Tr. 28, 133.) I did not, however, attribute weight to Galanter's testimony that he spoke with Phillips the following day and the latter expressed surprise at his discharge, did not believe that Galanter divulged confidential information and apologized. There was insufficient evidence showing that Phillips was privy to the decision-making process that led to Galanter's discharge. (Tr. 29–32.)

[25] While it is possible that he may, in fact, have received a termination letter, Galanter did not mention that and Stec did not testify. In any event, there is no documentation that he was actually terminated for violating the Company's confidentiality provision.

Company's confidentiality policy.[26]

Legal Analysis

The General Counsel alleges that the Company violated Section 8(a)(1) of the Act by (1) maintaining an overly broad confidentiality policy; (2) discharging Galanter because he engaged in protected concerted activity; and (3) discharging Galanter because he violated the Company's unlawfully overbroad confidentiality rule. The Company denies that its controlling confidentiality policy violates the Act and contends that Galanter's activity was neither concerted nor protected under the Act. Finally, the Company claims that, regardless of any protected activity, it would have still discharged Galanter for improperly obtaining and/or disclosing another employee's confidential salary information.

I. THE CONFIDENTIALITY POLICY

The General Counsel contends that the Company's confidentiality rule violates Section 8(a)(1) of the Act. The Company's handbook contains a provision that begins by requiring its employees to maintain the confidentiality of information regarding "the conduct of [the Company's] business . . . purchase prices or processes . . . prices, service, problems, or other information specifically about one vendor or customer." There appears to be no dispute over the validity of this portion of the rule since it is "designed to protect the confidentiality of [the Company's] proprietary business information." See *Mediaone of Greater Florida*, 340 NLRB 277, 279 (2003) (upholding a confidentiality rule that employees "would reasonably understand" not "to prohibit discussion of employee wages" and that was not enforced "against employees for engaging in [Section 7] activity"); *Super K-Mart*, 330 NLRB 263 (1999) (affirming the employer's "legitimate interest in maintaining the confidentiality of its private business information" by prohibiting the disclosure of "company business and documents" without "prohibit[ing] employees from discussing their terms and conditions of employment").

However, the General Counsel challenges the final part of the Company's confidentiality rule, which prohibits "idle gossip or dissemination of confidential information within [the Company], such as personal or financial information," as unlawfully overbroad. The Company argues that its policy (1) does not violate the Act, (2) has been taken out of context, and (3) is justified by its legitimate business interests. The Board has established that to determine "whether the mere maintenance of rules . . . violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (holding that maintaining rules that are likely to chill Sec. 7 rights "is an unfair labor practice, even absent evidence of enforcement").

The first prong in this inquiry is whether the maintenance of the challenged rule "*explicitly* restricts activities protected by Section 7." See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (instructing that the rule must be given "a reasonable reading" and advising against "reading particular phrases in isolation [or] . . . presum[ing] improper interference with employee rights"). A rule is facially invalid if it functionally renders employees "incapable of organizing a union or exercising their other statutory rights under the [the Act]." See *Adtranz ABB Daimler-Benz Transportation. v. NLRB*, 253 F.3d 19, 25–26 (D.C. Cir. 2001) (dismissing a rule's "unrealized potential to chill the exercise of protected activity"). Here, the Company's confidentiality rule survives this initial test because protected concerted activities cannot be considered "idle," and its scope is otherwise limited to the "dissemination of confidential information" within the company. Cf. *Compuware v. NLRB*, 134 F.3d 1285, 1290 (6th Cir. 1998) (finding a rule against complaining about working conditions to third parties to be facially invalid because it did not "strike any sort of balance between employee rights and the legitimate concerns" of the employer). The Company's rule is facially neutral in that it does not condemn conduct that is "inherently entwined with Section 7 activity." See *Fiesta Hotel Corp.*, 344 NLRB 1363, 1368 (2005) (explaining that the "principle [of construing ambiguities against the drafter] has generally been applied to rules limiting solicitation or distribution of literature"). Moreover, the Company's failure to clearly define the term "confidential information" is not determinative. See *Lafayette Park Hotel*, 326 NLRB at 827 (finding that "[d]espite [an] undefined term, the rule [was] not ambiguous").

Nonetheless, the policy is still unlawfully overbroad if "(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." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646; *Lafayette Park Hotel*, 326 NLRB at 828 (explaining that "any ambiguity in the rule must be construed against the Company as the promulgator of the rule"). The Board has established that "discussion of wages is part of organizational activity and employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid." *Mediaone*, 340 NLRB at 279; *NLS Group*, 352 NLRB 744, 745 (2008) (striking down a confidentiality policy as unlawfully overbroad because "[e]mployees would reasonably understand [its] language as prohibiting discussions of their compensation with union representatives"); *Northfield Urgent Care*, 358 NLRB No. 17, slip op. at 23 (2012) (prohibiting rules "against discussions among employees regarding their pay"). Furthermore, an employer policy violates the Act if it "proscribes statements and conduct that consist of complaints about management's conduct or other working conditions." See *Salon/Spa at Boro*, 356 NLRB No. 69, slip op. at 14 (2010) (declaring a policy overbroad because it "chill[ed] the employees' exercise of their Section 7 right[s]"); *KSL Claremont Resort*, 344 NLRB 832 (2005) (invalidating a rule that "would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions").

The Company's confidentiality rule specifically identifies "personal or financial information" as confidential information that cannot be disclosed. Employees could reasonably interpret this language as prohibiting activities protected under the Act.

[26] The parties concur that that Galanter was terminated because he violated the Company's confidentiality policy. (GC Exh. 5.)

For example, in *Cintas Corp.*, the Board held that an analogous confidentiality rule covering personal and financial information was unlawfully overbroad because it "could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union." 344 NLRB 943 (2005); see also *IRIS U.S.A.*, 336 NLRB 1013, 1018 (2001) (invalidating a rule that prohibited "disclosure of employee information to fellow employees"). The Company's confidentiality rule, as reasonably construed, is unlawfully overbroad in violation of the Act because it might reasonably deter employees from engaging in legally protected activities such as discussing the terms and conditions of their employment or raising complaints about their working conditions. Cf. *IBM*, 265 NLRB 638 (1982) (upholding an employer's policy "not to inform employees what it pays others and . . . [to treat] as confidential the information it has compiled for its internal use" where it also did "not itself bar employees from compiling or determining wage information on their own").

It is therefore unnecessary to reach the Company's argument that its confidentiality policy is not "controlling" because it is not enforced in a manner that restricts the exercise of activities protected by the Act. In the alternative, the argument is still unavailing. First, this very case demonstrates that the Company's rule applies to inhibit employees from engaging in protected concerted activities. Second, the Company's more limited enforcement of the rule in other situations does not undercut its unlawfulness in this case, but rather evidences disparate treatment supporting the inference that its "asserted reasons for discharging [Galanter] were pretextual." *American Industries Container Corp.*, 324 NLRB 391 (1997).

The Company also claims that it "established substantial and legitimate business justifications for its policy" prohibiting the disclosure of employee salaries. See *IBM*, 265 NLRB at 638 (recognizing that, as a general rule, employees' "distribution of wage data . . . constitute[s] protected concerted activity"). Indeed, an otherwise overbroad rule "can nonetheless be lawful if [it] is justified by significant employer interests." *Lafayette Park Hotel*, 326 NLRB at 825 fn. 5. But the Company has failed to demonstrate that it has legitimate business and proprietary interests in the type of wage information at issue here, which its confidentiality policy is meant to protect. Cf. *IBM*, 265 NLRB at 639 fn. 5 (Jenkins dissenting) (describing how the respondent showed its "closed" pay system was necessary "to attract, motivate, and retain employees by allowing managers to reward employees on performance alone without . . . creating dissatisfaction among other employees" as well as to prevent competitors from "stealing employees" and to minimize "resistance to transfers"). Nor can the Company defend its policy as narrowly tailored to be reasonably understood as only covering its "proprietary business information" and not workers' "terms and conditions of employment." Cf. *Fiesta Hotel Corp.*, 344 NLRB at 1388–1389 (upholding a rule protecting the confidentiality of employer "policies and practices" based on its particular language and because the employer "itself publishe[d] information" about employee wages and benefits and never "enforced [it] to prohibit employees from discussing their terms and conditions of employment").

Under the circumstances, the Company maintained an overly broad confidentiality policy in violation of Section 8(a)(1) of the Act.

II. GALANTER'S DISCHARGE

A. Protected Concerted Activity

The General Counsel also alleges that the Company violated Section 8(a)(1) because it discharged Galanter for engaging in protected concerted conduct. Under Section 8(a)(1) of the Act, 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." In order for a conversation to constitute concerted activity, "it must appear . . . that it was engaged in with the object of . . . . [promoting] group action or that it had some relation to group action in the interest of the employees." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). The Board has directed that this standard be applied to new factual circumstances by determining "(1) whether the comments involved [and the issue was framed as] a common concern regarding conditions of employment . . . and (2) the context under which the alleged concerted activity occurred." *Air Contact Transport, Inc.*, 340 NLRB 688, 695 (2003). Here, the first consideration is clearly satisfied because Galanter "acted with the purpose of furthering group goals" regarding staffing shortages. See *Compuware*, 134 F.3d at 1288 (clarifying that "[s]pecific authorization [by other employees] is not needed to show 'concerted activity'"); cf. *Mushroom Transportation*, 330 F.2d at 685 (distinguishing concerted activity from "mere talk" by a single employee that is only intended "to protect or improve his own status").

The question then becomes whether Galanter's conduct was "looking toward group action." Id. The Company contends that Galanter's activity was not concerted because there was no (1) prior group activity, (2) future group action planned, (3) evidence that he was speaking on behalf of a group of employees, or (4) actual complaint raised at the lunch. I am not convinced. First, employees need not meticulously organize their conduct beforehand for a specific purpose, but may act "concertedly by raising impromptu complaints." See *Worldmark by Wyndham.*, 356 NLRB No. 104, slip op. at 3 (2011) (finding it irrelevant to the "concerted" inquiry that employees do "not agree in advance to protest together" and refusing to require "evidence of a previous plan to act in concert"); *Walls Mfg.*, 128 NLRB 487, 491 (1960) (proclaiming that "[g]roup action is not deemed a prerequisite to concerted activity" since "a single person's action may be the preliminary step to acting in concert"). Second, conduct may be concerted without any actual or planned future group action if it is "the type of preliminary groundwork necessary to initiate group activity." See *Salon/Spa at Boro*, 356 NLRB No. 69, slip op. at 10–11 fn. 31 (involving complaints that "did not produce . . . group protest to management" but "did produce some group activity [by causing] other employees to voice support for [the] complaints"); *Timekeeping Systems*, 323 NLRB 244, 247 (1977) (reaffirming that "the object of inducing group action need not be express"). Third, "in a group meeting context, a concerted objective may be inferred from the circumstances," even in the absence of explicit authoriza-

tion from other employees. *Air Contact Transport*, 340 NLRB at 695; Worldmark by *Wyndham*, 356 NLRB No. 104, slip op. at 2 (declaring that "an employee who protests publicly in a group meeting is engaged in initiating group action… even when the employee had not solicited coworkers' views beforehand"). Fourth, a complaint need not concern a matter of which the employer is unaware or "present a specific demand upon [the] employer to remedy a[n objectionable] condition" to be protected as a concerted activity under the Act. See *NLRB v. Washington Aluminum*, 370 U.S. 9, 14, 16 (1962) (rejecting the relevance of "[t]he fact that the company was already making every effort to repair" the conditions at issue because the objective reasonableness of a "concerted activity is irrelevant").

Galanter engaged in concerted conduct because group concerns were implicated in the course of a group activity.[27] First, the content of Galanter's comments expressed concern over matters that were a "logical outgrowth" of shared concerns related to the Company's staffing shortage. See *Amelio's*, 301 NLRB 182 fn. 4 (1991) (concluding that the worker was "acting on the authority of other employees"). It does not matter whether support among other employees for Galanter's sentiments failed to resemble or approach unanimity. *Tex-Togs, Inc.*, 112 NLRB 968, 973 (1955). Second, Galanter's concerns were "raised at a group meeting called by [his] employer." *Neff-Perkins Co.*, 315 NLRB 1229 fn. 1 (1994); *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946, 949 (3d Cir. 1981) (explaining that an employer demonstrates its concerted view of interactions with employees when it has "lumped [the employees] . . . together" by assembling them as a group). In the context of a group meeting, "whether initiated by the employees or by [the Company]," Galanter's complaints became concerted. See *ILD Corp.*, 2001 NLRB LEXIS 249, at *63–64 (Apr. 18, 2001) (clarifying that concertedness "exists whenever an employer assembles its employees as a group"); *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (describing how, in a group meeting, an individual employee "implicitly elicit[s] support from [his or her] fellow employees" by raising group concerns). To be sure, the Board has long held that concerted activities include "individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 887 (1986).

The Company also contends that Galanter's complaints are not protected under the Act because "the amount of [a Company] executive's salary had nothing to do with [the Company's] ability to find and hire engineers." R. Br. at 6 (emphasis omitted). But it is well established that concerted activities may be entitled to protection even when they seem "unnecessary and unwise." *Washington Aluminum*, 370 U.S. at 16. Here, Galanter's comments were made for the purpose of "mutual aid or protection" because they were motivated by shared staffing concerns, a matter concerning the terms and conditions of employment. See id. at 17 (characterizing "concerted activities by employees for the purpose of trying to protect themselves from [uncomfortable] working conditions" as "unquestionably activities" that the Act protects). It was entirely legitimate for Galanter to voice concerted grievances in such a manner. See id. at 14 (ruling that concerted activity lacking a specific demand was protected because the workers, "who were wholly unorganized . . . had to speak for themselves as best they could"). While "at some point the relationship [between concerted activity and employees' interests as employees] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause," there is no doubt about the issue in this case. See *Eastex v. NLRB*, 437 U.S. 556, 567–568 fn. 18 (1978) (criticizing "[t]he argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within 'mutual aid or protection'"); cf. *NLRB v. Motorola*, 991 F.2d 278, 285 (5th Cir. 1993) (holding that "[e]mployees acting as members of outside political organizations" are not covered by the Act); *Timekeeping Systems*, 323 NLRB at 248 (refusing to protect activities intended "merely to belittle management").

B. Galanter's Discharge for Violating the Confidentiality Policy

The General Counsel further claims that the Company's discharge of Galanter for violating its overly broad confidentiality rule violates the Act. "The Board has long adhered to and applied the principle that discipline imposed pursuant to an unlawfully overbroad rule is unlawful." See *Continental Group*, 357 NLRB No. 39, slip op. at 2–3 (2011) (justifying the doctrine as based on the "potential chilling effect on employees' exercise of the Section 7 rights"). This is true "even if [the overbroad rule] is enforced against activity that could havebeen proscribed by a properly drawn rule." Id.[28] However, the Board has recognized that "it is not unlawful for an employer to discipline an employee pursuant to an overbroad rule, in situations in which the employee's conduct is not similar to conduct protected by the Act." *Continental Group*, 357 NLRB No. 39, slip op. at 4."

In determining whether certain employee activity is protected under the Act, the Board generally attempts to balance the

[27] The Company's reliance on *Asheville School* is misplaced. There, the Board explicitly refused to "pass on whether [the employee's] conversations with other employees were concerted under Sec. 7." See 347 NLRB 877 fn. 2 (2006) (finding that the "disclosure of confidential wage and salary information was not protected" because the employee "possessed special custody" of the records and "was aware that her established job duties . . . required that she maintain the confidentiality of this information").

[28] However, this doctrine does not apply if the employer "can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or . . . with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline." See id. (noting that "[i]t is the employer's burden . . . to [assert and] establish that the employee's interference . . . was the actual reason for the discipline"). This is not the case here. See Washington Aluminum, 370 U.S. at 17 (identifying "normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract . . . [or] 'indefensible' because they… show a[n unnecessary] disloyalty to the workers' employer"); Timekeeping System, 323 NLRB at 248–249 (finding communications that "render the employee unfit for further service," "concerted behavior [that] has been truly insubordinate or disruptive of the work process," and "public disparagement of the company product" to be unprotected).

Section 7 interest of employees with the business interests of the employer." *Cook County College Teachers Union*, 331 NLRB 118, 120 (2000). As previously discussed, the Company did not have a valid proprietary interest in maintaining its confidentiality policy. Moreover, it is evident that the salary information mentioned by Galanter on February 24 was already known to several employees and comparable to other salaries in the industry. See id. at 121–122 (analyzing "the confidentiality or privacy interests" of employers); see also *IBM*, 265 NLRB at 642 (describing Board precedent holding that an employer may not demand its wage rates be kept confidential once it "incorporate[s] other companies' wage scales into its own"). The absence of any malicious dimension to Galanter's conduct is crucial to the determination that his particular communications fell within the protection of the Act. See id. at 638 (holding that the method of distributing information known to the employee to be considered confidential and prohibited from dissemination was not innocent, placing his activities "outside the protection of Sec. 7"); *Compuware*, 134 F.3d at 1291 (explaining that communications concerning working conditions must "not be so disloyal or maliciously false to remove the employees from the protection of the Act").

The Company's arguments to the contrary are unavailing. It cites *Clinton Corn Processing* for the proposition that, despite the presence of protected concerted activity, employers may still legitimately discharge employees "for the sole reason that [they] disclosed confidential information." 253 NLRB 622, 625 (1980). But in that case, the discharged employee actually "testified that she assumed that the payroll information she worked with [and disclosed] was also confidential." Id. at 624. Moreover, the cases cited by the Board in *Clinton Corn* are even more problematic. See *Farlow Rubber Supply*, 193 NLRB 570, 575 (1971) (involving an employee's "effort to obtain confidential company records" from another employee against her will, which caused his supervisors "to conclude that they could not trust him"); *Vitronic*, 183 NLRB 1067, 1081 (1970) (involving an employee's admitted "secret theft of company property in the form of valuable company customer data for the purpose of . . . conducting a boycott against Respondent for an unlawful purpose"); *Clearwater Finishing*, 100 NLRB 1473, 1474–1475 (1952) (distinguishing the lawful discharge of an employee for disclosures that were "clearly inconsistent with the performance of his duties" and were not for the purpose of "engaging in concerted activities" with the unlawful discharge of the employee who procured the disclosures because the latter employee was unaware that the information was considered confidential and "was, in fact, discharged for engaging in activity designed to aid the Union").

The Company's references to the Board's decisions in *Cook County* and *Asheville School* are also inapposite. First, neither case involved disclosing information for the purpose of otherwise protected concerted activity. See *Asheville School*, 347 NLRB 877, 881 (2006) (determining that there was "no agenda for group action" underlying the employee's disclosure); *Cook County*, 331 NLRB at 118–119 (finding that the employee was not "engaged in protected activity" when she disclosed personal information of individuals who did not have "anything to do with bargaining or labor relations"). Second, both cases involved the disclosure of confidential information by employees who were specifically responsible for properly keeping that information on behalf of their employers. See *Asheville School*, 347 NLRB at 881 (describing that the discharged employee divulged confidential information "of which she was aware by virtue of her [special] position as accountant"); *Cook County*, 331 NLRB at 118 (stating that the disciplined employee "ha[d] custody of the official" information that was disclosed). Third, both cases involved employees who "breach[ed their employer's] trust" by engaging in prohibited conduct despite understanding the impropriety of "disclosing confidential information." See *Asheville School*, 347 NLRB at 881–882 (describing the employee's "aware[ness] that divulging information . . . was not proper"); *Cook County*, 331 NLRB at 119 (detailing the employee's improper use of confidential information "after being warned not to do so").

C. Allegations of Misconduct

Finally, the Company maintains that it discharged Galanter based on its good-faith belief that he improperly obtained confidential information and later lied about his actions, and that, therefore, it would have taken the same action regardless of Galanter's protected activities. However, the Supreme Court has established that "§ 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred." See *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964) (covering terminations based on "an alleged act of misconduct in the course of [protected] activity");[29] *Rubin Brothers Footwear*, 99 NLRB 610, 611 (1952) (explaining that the burden of proof is initially on employers to establish their "honest belief" that misconduct occurred, and "unless it *affirmatively* appears that such misconduct did not in fact occur," the General Counsel must then produce "evidence to

[29] Contrary to the Company's suggestion, the *Wright Line* test applies only "when an employer has discharged (or disciplined) an employee for a reason assertedly *unconnected to* protected activity." See *Shamrock Foods v. NLRB*, 346 F.3d 1130, 1135–1137 (D.C. Cir. 2003) (explaining how "*Wright Line* is inapplicable to cases . . . in which the employer has discharged the employee because of alleged misconduct 'in the course of' protected activity"); *G & H Towing Co.*, 2008 NLRB LEXIS 162 (June 2, 2008) (applying *Burnup & Sims* analysis to allegations of lying). The Company's only contention that could qualify for *Wright Line* analysis is its allegation that Galanter's "discharge was caused by unrelated job performance." *NLRB v. Tri-County Mfg.*, 76 Fed. Appx. 1, 6 (6th Cir. 2003); *Wright Line*, 251 NLRB 1083, 1089 (1980) (ruling that in cases "turning on employer motivation," the General Counsel must show "that protected conduct was a 'motivating factor' in the employer's decision," and then "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct"); cf. *Yuker Construction. Co.*, 335 NLRB 1072, 1073 (2001) (describing how discharges for conduct "intertwined with any protected activity" have a "potential deterrent effect on the exercise of Section 7 rights"). However, as noted by the General Counsel, this argument represents a "shifting defense" that supports a finding that Respondent's proffered reasons are pretextual. See *Sound One Corp.*, 317 NLRB 854, 858 (1995); *Wright Line*, 251 NLRB at 1089 fn. 14 (instructing that when "the employer [is] unable to carry its burden," it will suffice that the "protected activities are causally related to the employer action").

prove that the employees did not, in fact, engage in such misconduct"). The Act is violated "whatever the employer's motive" for discharging an employee so that there is no "deterrent effect on other employees." *Burnup & Sims*, 379 U.S. at 23 fn. 2 (rejecting any requirement to show an employer's "anti-union bias").

Admittedly, "Board precedent establishes a relatively low threshold for showing" an honest belief of misconduct. See *Roadway Express, Inc.*, 355 NLRB 197, 215 (2010) (requiring only that "some specific record evidence linking particular employees to particular allegations of misconduct" support the allegation, which "may be based on hearsay" without "interview[ing] the employee before taking disciplinary action"). But even assuming, arguendo, the Company honestly believed Galanter engaged in the alleged misconduct despite its failure to produce the complete record of Galanter's access to its computer network systems, the argument fails for several reasons.

First, the Company has failed to show that its confidentiality policy was not the reason for discharging Galanter. Cf. *Asheville School*, 347 NLRB at 877 fn. 2 (affirming the discharge of an employee as valid despite the employer's maintenance of an unlawful confidentiality policy because "the record fail[ed] to demonstrate a nexus between [the disclosure] prohibition and [the employee's] disclosure of confidential information within her special custody"). Second, the Company's sparse investigation, explanation to Galanter, and shifting defenses indicate that its claim that Galanter engaged in misconduct is merely a pretext designed to "manufacture [his] termination" for unlawful motives. See *Pratt Towers, Inc.*, 338 NLRB 61, 96–98 (2002) (describing an employer's effort "to find anything that would be of significance to prove that [its] striking employees committed acts of misconduct"). Third, and most importantly, the Company's contention that Galanter actually engaged in the alleged misconduct has been refuted "by a preponderance of the evidence." *Alta Bates Summit Medical Center*, 357 NLRB No. 31, slip op. at 2 (2011); *Shamrock Foods*, 346 F.3d at 1136, 34 (announcing that "the only question is whether the alleged misconduct actually occurred" since "the employer's good faith is simply not relevant if the misconduct did not occur"). Galanter's own "direct testimony" that he did not engage in the alleged misconduct, which "was corroborated in important part," is sufficient to overcome the Company's speculative accusations of misconduct. See id. at 1135 (suggesting that evidence beyond mere "disbelief in the testimony of one party's witnesses" is sufficient to satisfy the General Counsel's burden of proof).

Under the circumstances, the Company violated Section 8(a)(1) of the Act by discharging Galanter because he engaged in protected concerted activity and violated the Company's unlawfully overbroad confidentiality rule.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Company engaged in unfair labor practices by: (1) maintaining an overly broad confidentiality policy; (2) discharging Galanter on March 4, 2011 because he engaged in protected concerted activity; and (3) discharging Galanter because he violated the Company's unlawfully overbroad confidentiality rule.

3. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company 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.

The Respondent, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits. 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, MCPc, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad confidentiality policy.

(b) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity or violating the Company's unlawfully overbroad confidentiality rule.

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

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

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

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

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him 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 designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other

[30] 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.

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 office in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2011.

(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 the Respondent has taken to comply.

Dated, Washington, D.C. June 7, 2012

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 discharge or otherwise discriminate against any of you for engaging in protected concerted activity.

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

WE WILL NOT maintain an overly broad confidentiality order prohibiting employees from engaging in protected concerted conduct.

WE WILL rescind the present confidentiality provision in the company handbook and replace it with one that does not restrict the rights of employees to discuss their terms and conditions of employment with each other.

WE WILL, within 14 days from the date of this Order, offer Jason Galanter full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jason Galanter whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

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

MCPC, INC.

[28] 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."