Quicken Loans, Inc. *and* Austin Laff. Case 28–CA–146517

April 10, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On March 17, 2016, Administrative Law Judge Dickie Montemayor issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

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, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

Employees Austin Laff and Michael Woods were mortgage bankers employed by the Respondent at its Scottsdale, Arizona facility. On February 11, 2015,[3] Laff met Woods, who looked upset, as they were entering a restroom that is open to the public and customers. While they were both in the restroom, Woods complained that a client that he had assisted 4 years ago had "been dropped into his pipeline . . . and had been trying to get in touch with a Client Specialist for over a week, and that client should get in touch with a fucking Client Care Specialist and quit wasting [Woods'] fucking time." Laff responded that he "understood why [Woods] was frustrated."[4] Jorge Mendez, a supervisor, overheard this conversation and saw Laff after he exited his stall.[5] After overhearing this conversation, Mendez forwarded an email to all employees at the Scottsdale facility reminding them of proper employee conduct in public areas. This email specifically admonished employees, "Never, EVER, should we be swearing in the bathroom especially about clients. Also please refrain from stating that clients are wasting your (***swear word***) [sic] time." (emphasis in original).

Immediately after Mendez sent this email, the Respondent's site vice president, Matt Stoffer, and regional vice president, Drew Glomski, met with Mendez to find out what prompted his email. Mendez told them about the conversation he overheard while in the restroom stall. Mendez also said that when he exited his stall, he saw Laff. After this discussion, Stoffer contacted human resources team relations specialist Greg Oenning. Oenning informed Stoffer that Laff had previously been accused of "making rude comments about homosexuals" and, in a separate incident, asking a female coworker if she "put out" on a first date. Glomski and Stoffer told Oenning to prepare two sets of documents. As the judge found, citing Glomski's testimony, the plan was to meet with Laff, go over the incident, and see if he admitted his involvement. If he was forthcoming, he would receive a written final warning. If he denied his participation in the incident and management "felt like he was not being truthful," they "would move for separation."

Glomski and Director Jordon Smith, Laff's supervisor, met with Laff on February 11 and questioned him about the incident. Glomski asked Laff if he had any part in the conversation that had prompted the emails sent earlier in the day, specifically asking him about "being in the bathroom speaking about clients, saying that clients were wasting his fucking time and that they should call the fucking CCS." Laff said that he had "no clue" what prompted the emails. The judge found that Glomski then gave Laff the separation documents, at which point Laff admitted he had been involved in the restroom conversation that morning but insisted that he had not used profanities. The separation documents were signed and Laff was escorted from the building.

On the evening of February 11, Laff emailed Glomski and stated that he now remembered the conversation, but it was another person in the conversation who was swearing about clients. Laff also left a voicemail for Smith regarding the incident.

On February 12, Oenning called Laff in response to the voicemail. Laff asked if his email had been read, and Oenning informed Laff that he was still being discharged and further responded that "the fact of the matter is that you shouldn't have been talking about clients at all."

II. DISCUSSION

The judge found that Laff and Woods' restroom conversation was protected concerted activity and that Laff was unlawfully discharged for participation in that conversation. Contrary to the judge, we find that the record evidence does not show that this brief conversation involved

[1] On August 6, 2018, the Respondent filed a Motion for Leave to File Supplemental Brief in Support of Exceptions, Due to Recent Change in Law. We deny this motion as moot in light of our disposition of this case.

[2] Chairman Ring is recused and took no part in the consideration of this matter.

[3] All dates hereafter are in 2015.

[4] This account of the restroom encounter is based on Laff's credited testimony.

[5] Mendez did not know Laff by name at the time but was able to positively identify him as the man he had seen in the restroom when Laff was pointed out to him.

protected concerted activity. Laff's credited testimony, objectively viewed, shows that the brief conversation focused only on a personal complaint by Woods about receiving the customer call and that neither he nor Laff contemplated taking any concerted action about this event that would be for improvement of their working conditions or those of fellow employees. We further find that the judge erred by relying on an impermissible adverse inference, drawn from Woods' failure to testify, in order to provide the missing "evidence" needed to prove the General Counsel's case. Accordingly, we reverse and dismiss the allegation that Laff's discharge was unlawful.[6]

Section 7 of the Act protects the right of employees to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." For employees to enjoy this Section 7 protection, the activity they engage in must be "concerted," and the concerted activity must be engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 152–153 (2014). Although these concepts are closely related, our precedent makes clear that they are analytically distinct:

> "[W]hether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers. . . . The concept of 'mutual aid or protection' focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'"

Id. at 153 (citations and quotations omitted, emphasis in the original).

The Board has held that concerted activity includes cases "'where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.'" *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Specifically, activity may still be concerted even if it involves:

> "only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees. . . . Activity which consists of mere talk must, in order to be protected, be talk looking toward group action . . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'"

Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964).

The judge concluded that the conversation between Laff and Woods constituted concerted activity because "there is no question that Laff and Woods were discussing common concerns regarding terms and conditions of their employment specifically relating to how calls are forwarded and whose responsibility it was to field calls." The judge further found that Laff's testimony that he told Woods that he "understood why he was frustrated" constituted "vocalized support." Contrary to the judge, we find that the General Counsel failed to prove that the bathroom conversation was concerted.

There is no record evidence that employees as a group had any preexisting concerns about the routing of customer calls. Further, Laff's credited testimony about his conversation with Woods does not support a finding that either employee was seeking to initiate or induce group action about this issue. Woods complained that the client call was a waste of *his time*, but there is no evidence that he sought thereby to move Laff to join him in protest of the routing incident. Similarly, Laff's response did not suggest any contemplation of group action. According to his testimony, Laff only said that he understood why Woods was frustrated. This perfunctory reply, without more, cannot objectively be construed as implying that Laff recognized Woods' complaint as referring to a group workplace problem. Even more improbable is the judge's

[6] The judge also found that that the Respondent committed several additional unfair labor practices, including maintaining and enforcing unlawful work rules, unlawfully interrogating Laff regarding his conversation with Woods, creating an impression of surveillance regarding that conversation, and unlawfully disciplining Woods for his participation in the protected conversation. Based on his finding that the Respondent's work rules were unlawful, the judge further found that Laff's discharge was pursuant to one of those rules and thus also unlawful under the principles stated in *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 US 1170 (2006) and *Continental Group, Inc.*, 357 NLRB 409, 411–412 (2011).

The Respondent excepted to all these findings. On July 19, 2018, subsequent to the filing of the Respondent's exceptions, the Board approved an informal settlement agreement that resolved all the unfair labor practice allegations in this case with the exception of the discharge of Laff. The settlement agreement included a nonadmissions clause. Pursuant to the parties' joint motion, the Board severed the Laff discharge allegation.

Because the parties settled the allegation that the Respondent maintained and enforced unlawful work rules, without any admission by the Respondent that the rules were unlawful, there is no basis for finding that Laff was discharged pursuant to an unlawful rule. Accordingly, for these reasons, we reverse the judge's finding that Laff's discharge was unlawful under *Double Eagle* and *Continental Group.*

view that Laff's "understanding" somehow reflected the need or intent to take future joint action to address such a problem. In sum, Woods complaint and Laff's response "look[ed] forward to no action at all," and thus the conversation amounted to "mere 'griping.'" *Mushroom Transportation*, 330 F.2d at 685; *Jeannette Corp.*, 217 NLRB 653, 657 (1975) (noting that entirely individual action is not concerted "and may amount to no more than an unprotected personal gripe or complaint"), enfd. 532 F.2d 916 (3d Cir. 1976).[7]

Having found that the restroom conversation did not constitute concerted activity, our analysis may stop here. But even if the conversation qualifies as concerted *action* between Woods and Laff with respect to the routing of customer calls, we find that it was not for a *goal* of "mutual aid or protection" and, therefore, would still be unprotected. Laff did not testify about *any* goal of his conversation with Woods, much less that it involved a goal of improving the working conditions shared by them or with coworkers. Although Woods clearly objected to the customer being placed in his "pipeline," there is no record evidence that the referral was based on any policy or practice established by the Respondent, that the two employees or any other employee had experienced or anticipated similar referrals, or that such referrals adversely affected their terms and conditions of employment.[8]

The judge acknowledged that there was "an evidentiary hole in the record" regarding the protected concerted nature of the restroom conversation. He attempted to fill this hole by drawing an adverse inference against the Respondent for failing to call Woods to testify at the hearing. The judge reasoned that "Woods . . . is the person whose 'goals' are in issue" and that, because Woods was a current employee, he was an agent within the Respondent's control. He further noted that the General Counsel subpoenaed Woods to testify at the hearing, but Woods did not appear. The judge reasoned that, if Woods had testified: "he could have testified whether he had previously complained to management and whether his bathroom complaint was a logical outgrowth of those complaints. He could have testified regarding whether he was aware that Mendez was in the bathroom and whether his comments were in fact meant to be overheard as an indirect method of bringing the matters to Respondent's attention." Finding that drawing an adverse inference was the only "only logical, and appropriate remedy" for Woods' failure to testify, the judge implicitly found that Woods *would* have testified as the judge supposed he *could* have testified. On that basis alone, he found that Woods was sharing workplace concerns with the goal of improving terms and conditions of employment.

We find that the judge abused his discretion in drawing this adverse inference against the Respondent. See *Parksite Group*, 354 NLRB 801, 804 (2009) (reviewing a judge's decision to draw an adverse inference for abuse of discretion). Contrary to the judge, an adverse inference may not be drawn simply because a party failed to call as a witness a person employed by the party or within its control. Instead, the Board has held that an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988) (citations omitted). "[T]he key in determining whether an adverse inference should be drawn against a party for not calling a witness is whether the witness could reasonably be expected to corroborate *its* version of events." *NC-DSH, LLP*, 363 NLRB No. 185, at slip op. 6 (2016) (emphasis added),

Woods was an alleged *discriminatee* in this very case. As such he would be reasonably disposed to testify *against* the Respondent and favorably to the General Counsel.[9] Further, as the judge effectively acknowledged, Woods' testimony would be essential to filling a hole in the General Counsel's case. Standing alone, the credited testimony of Laff—the General Counsel's witness—is insufficient to meet the General Counsel's burden of proving that Woods and Laff were engaged in protected concerted activity during their bathroom conversation. The Respondent had no need to present Woods as a witness in its own defense, and there is no basis for reasonably inferring

[7] In finding that the conversation between Woods and Laff was concerted activity, the judge cited *WorldMark by Wyndham*, 356 NLRB 765 (2011). That decision was recently overruled in relevant part in *Alstate Maintenance LLC,* 367 NLRB No. 68 (2019), but it is inapposite in any event to the facts of this case, which does not involve an employee's questioning a manager about working conditions in a group employee setting. Member McFerran dissented in *Alstate*, but she agrees that the facts in this case fail to show any concerted activity and are distinguishable from the facts in *Alstate* and in *WorldMark by Wyndham*.

[8] Because Member McFerran agrees that the conversation between Laff and Woods was not concerted, she would dismiss the complaint on that ground alone and not reach any aspect of the judge's "mutual aid or protection" analysis.

[9] We reject the judge's unsupported finding that Woods was the Respondent's agent within the meaning of Sec. 2(13) of the Act. However, we recognize that an adverse inference may be drawn against an employer for failing to call a nonagent rank-and-file employee in certain circumstances not present in this case. In this respect, the precedent relied upon by the judge is inapposite. For example, the judge relied upon *NC-DSH, LLP*, supra, at slip op. 6–7 (2016), in which the Board affirmed a judge's decision to draw an adverse inference against an employer for failing to produce a rank-and-file employee whose testimony was central to corroborating the employer's version of events. By contrast, as discussed in the text, Woods' testimony was central to proving the case against the Employer.

that Woods would ordinarily be disposed to testify in support of any defense. The purpose for having Woods testify would be to provide evidence missing from Laff's credited version of events that is critical to the General Counsel's case. In this circumstance, "the judge's use of the adverse inference to fill this evidentiary gap sweeps too broadly." *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995) (reversing judge's reliance on adverse inference to prove General Counsel's joint employer allegation); see also *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 652 (1989) (rejecting judge's reliance on adverse inference to prove General Counsel's hiring hall discrimination allegation), enfd. 70 F.3d 1256 (3d Cir. 1995). We therefore reverse the judge on this point.

In sum, the General Counsel has failed to establish, on this record, that Laff was discharged because he engaged in protected, concerted activities. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 10, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Fernando J. Anzaldua, Esq., for the General Counsel.
Robert J. Muchnick, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge**.** This case was tried before me on August 18–20, 2015, in Phoenix, Arizona. Austin Laff (Charging Party) filed a charge on February 17, 2015, which was later amended on April 24, 2015, alleging violations by Quicken Loans, Inc. (the Respondent) of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed an answer denying that it violated the Act. At the start of the hearing, on August 18, 2015, the General Counsel moved to withdraw the allegations contained in paragraph 4(e) of the complaint and amend the complaint by alleging that Respondent also violated Section 8(a)(1) of the Act by disciplining Michael Woods, a coworker of Austin Laff. Respondent opposed the amendment and also denied that it violated the Act with respect to the discipline of Michael Woods. The General Counsel's motion to withdraw the allegations in paragraph 4(e) of the complaint and its motion to include the discipline of Michael Woods was granted and the motion to amend the complaint to add allegations regarding Michael Woods was granted.[1]

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of witnesses as they testified and I rely on those observations here. I have studied the whole record, and based upon the detailed findings and analysis below, I conclude that the Respondent violated the Act as alleged.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent in part admits and I find that:

1. At all material times, Respondent has been a corporation with an office and place of business in Scottsdale, Arizona (Respondent's facility), and has been engaged in providing mortgage loan services to the public.

(a) In conducting its operations during the 12-month period ending February 17, 2015, Respondent performed services valued in excess of $50,000 directly from points outside the State of Arizona.

(b) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Drew Glomski -	Regional Vice President
Jorge Mendez-	Executing Solutions Consultant
Jordan Smith -	Director of Mortgage Banking
Adam Swanson-	Team Lead

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Austin Laff was employed as mortgage banker in Respondent's Arizona office beginning on August 25, 2014, and ending on February 11, 2015, the date that he was terminated. He began his employment as an associate mortgage banker and was later, after completing training in November of 2014, placed into the mortgage banker position. His immediate supervisors were Adam Swanson who held the title of team captain, and Jordon Smith, the director of mortgage banking. His basic duties

[1] Applying the standards set forth in *Redd-I Inc*., 290 NLRB 1115 (1988), it is apparent that the allegations regarding Woods involved the same legal theory, arose from the same set of facts and that Respondent would raise similar defenses and thus the amendment was proper.

revolved around negotiating the terms of loans with clients. (Tr. 206.) Michael Woods is a current employee and was a mortgage banker during the same timeframe that Laff was employed. Woods reported to Ryan Cooper who was the director of mortgage banking. (GC Exh. 9.)

A. Austin Laff and Michael Woods Engage in a Short Conversation in a Bathroom Located in Respondent' Facility

On or about February 11, 2015, a conversation ensued between Austin Laff and Michael Woods in the restroom which is adjacent to the Quicken Loans reception area and open for use to members of the public as well as Respondent's employees. During the time of the conversation there were four persons present in the restroom, Austin Laff, Michael Woods, Jorge Mendez, a president's club/executive solutions consultant, and Luis Santacruz, a mortgage banker. Of those present at the time of the conversation, only Mendez and Laff testified at the trial. An unsworn statement in the form of an email from Santacruz regarding the incident was admitted into the record and Woods did not appear at the hearing to testify. The testimony of the two witnesses and the statement from Santacruz yielded three different versions of events. Laff testified as follows regarding the event:

> I cross path with Woods on the way to the restroom. He looked kind of upset so I said something to the effect of, "Hey Mike, Smile." And he proceeded to tell me that he had a client who had been dropped in his pipeline who had refinanced about four years ago and had been trying to get in touch with a Client Specialist for over a week, and that "client should get in touch with a fucking Client Care Specialist and quit wasting his fucking time." (Tr. 213). He then testified that he responded to Wood's by telling him he "understood why he was frustrated." [Tr. 214.]

Regarding the same conversation, Mendez testified that he had not been feeling well, was in the restroom to use the facility and was occupying one of the stalls. He testified that "two gentlemen came in having a conversation. One gentleman asked the other gentleman how his day was going." He said, "it's been kind of crazy." He felt that every client that was calling in was just wasting his "fucking time," and he did not know why they were calling him because they were already in process and that they should be calling CCS to help them out. (Tr. 154.) He further testified that at the time he did not know who made the statement regarding clients "wasting my fucking time" but hurried to finish and walked out of the stall. (Tr. 154.) After leaving the stall he testified, "the gentleman was still talking and I matched the voice and I ID'd the person based upon what he was wearing and his appearance." (Tr. 155.) He did not know Laff's name at the time but after speaking with others including Paul Conway, one of Respondent's directors, and describing the dress of the individual, he learned the identity of the person to be Austin Laff. (Tr. 156, 157.) (GC Exh. 6.)

Santacruz did not testify at trial. Regional Vice President Andrew Glomski on February 12, 2015, the day after Laff's termination, asked him to write a statement detailing what he heard in the bathroom that day. The statement provided as follows:

> Whilst I was in the men's restroom using the last stall, two men came in and were talking really loudly about each other's negative experiences with clients and client care specialists. They were both using the urinals and I could not recognize their voices until I came out and saw who they were. The two were Austin and Mike W. I am not sure who initiated the conversation, but both of them shared the same complaints. Both used the F-word when talking about client and care specialists and both were equally as negative. Some of the comments were "this just got drop in (sic) me I don't know what the fuck you're talking about." This is all I can remember as I was in the restroom for a short period of time. The conversation from what I heard wasn't about one client care specialist. I do recall Austin using ". . . Fuck . . ." really loud at one point in the conversation. [GC Exh. 5.]

Laff's version has Woods making the statements, Mendez ascribes to Laff responsibility for the statements, and Santacruz indicates that they both made statements which included the use of profanity.

1. Witness credibility

As noted in the summary above, three different versions of what happened in the restroom emerged. It is not without some difficulty that three versions of the same event are examined in an effort to determine which version of the events to credit as truthful. In doing so, I have relied on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). I am also keenly aware that credibility findings need not be all-or-nothing propositions—indeed, and it is common and a judicially accepted practice to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

After studying the record, I find that Laff's version of events to be the most believable. In making this finding, I note that I agree with Respondent that some aspects of Laff's testimony were not worthy of credence. For example, I did not find Laff's testimony particularly credible when he testified that he "did not recall" making statements to another female employee asking if she, "put out on the first date." (Tr. 261.) Nevertheless, regarding the bathroom incident, I find that Laff's version of events more credible.

Santacruz' version of events contradicts both Mendez and Laff. He did not testify in person; his statements were not given under oath and there is nothing in the record which suggests that his version is more accurate than that of Laff. Mendez' version is very similar to that of Laff, and in many ways almost mirrors it, except that Mendez asserts that it was Laff and not Woods that made the comments. Of particular note is that Mendez in his reports and subsequent email describing the events never mentions Woods. Mendez testified he never described Woods because, "he barely talked throughout the conversation." This is exactly how Laff described his own participation in the conversation. Mendez never saw Laff or Woods make the comments directly, he just overheard their voices in the restroom. (Tr. 133.)

Although Mendez asserts he put a voice to a face, I do not find this particularly credible given efforts made to identify Laff by his clothing. I find that, more likely than not, when Mendez came out of the restroom Laff was the only person left washing his hands and he became the target of the investigation. (Tr. 101.) I also find support in Laff's version of the events in Laff's invitation to Glomski to investigate the calls the mortgage bankers received, and by determining who received the call-in question, Respondent could trace the call back to the person who would have received it. Thus, Respondent could identify in fact who received the call and who would have been complaining about that particular call. I also find support of Laff's version in the Opportunity Letter of Woods wherein the Respondent notes that it had "confirmed" that Woods was discussing company business in an unprofessional demeanor "especially with the use of profanity." (GC Exh. 9).

B. Mendez' Email to All Employees

After Mendez went through the identification process described above at 10:24 a.m. on February 11, 2015, he sent an email to all of the employees in the Arizona office. The email had as its subject heading "Clients in the building?" and a designated level of importance of "High." The font of the email type was enlarged so that what amounted to a six and a half-sentence email took up the entire email page. The email provided as follows:

> I know that this email has been sent out before and I will send it out again!!!! Under no circumstances should we be discussing the pay we receive, in an area that a client or potential client could ever hear us. This goes along with discussion specific clients, client profiles, credit costs and rates that we have given to clients. Never, EVER should we be swearing in the bathroom especially about clients. Also, please refrain from stating that clients that call in are wasting your (***swear word***) time. This is NOT who we are and NOT what we stand for. Check yourself at the door. [GC Exh. 10b.]

Mendez also attached to his email a February 3, 2015 email from Deon Dyer, the director of mortgage banking which contained some of the exact language that Mendez included in his email. (GC Exhs. 10(a), (b), (c).)

Immediately after Mendez sent the email, he was called by Site Vice President Matt Stoffer to inquire about what triggered the email. He spoke with Mendez who thereafter met with Stoffer and Glomski. During this meeting Mendez relayed his version of events. At the meeting, when asked by Stoffer who the other person was in the restroom Mendez "just said he saw Mr Laff." (Tr. 101.) At Stoffer's request Mendez walked past Laff's desk to again confirm his identity. Stoffer at 11:41 a.m. on February 11, 2015, sent his own email to the Arizona employees. The email forwarded what had already been sent by Mendez but had language that Stoffer himself added. The language was in the same enlarged font as the Mendez email. The email provided as follows:

> I want to be very clear . . . Things like this WILL NOT be tolerated in this culture and will be dealt with swiftly. ELITE PROFESSIONALS. THAT IS WHO WE ARE AT QUICKEN LOANS AND HERE IN THE ICON NATION. LIVE IT. The I in ICON stands for INTEGRITY. LIVE IT. Every Client, Every Time, No Exceptions, No Excuses. LIVE IT. [GC Exh. 10 (a).]

C. Respondent's Investigation

After the meeting with Mendez, Stoffer and Glomski contacted Gregg Oenning, the team relations specialist who functions as the head of the human resources department at the facility. Stoffer specifically wanted to inquire about Laff's prior work history because he recalled some allegations of misconduct. Oenning reported that Laff, "was making rude comments about homosexuals and then also made a pass at another banker making them feel uncomfortable." (Tr. 83.) Regarding the incident with the female, Glomski testified that he " didn't know the specific verbiage that he (Laff) used but it was some sort of asking another female if she's put out on the first date or something of (sic) that." (Tr. 84.)

After speaking with Oenning, Stoffer and Glomski discussed the next steps. They decided to prepare two documents an "Opportunity Letter" and separation of employment documents. (GC Exh. 3, 4(a-h.) Their plan was to meet with Laff, "go over the incident, see if he had a—if he admitted the incident. If he owned up to it [they] were going to put him on (sic) opportunity letter. If he denied the incident [they] felt like he was not being truthful then [they] would move for separation." (Tr. 52.) Glomski instructed Oenning to prepare both documents.

D. Laff's Discharge

In the afternoon on February 11, 2015, Glomski and Director Jordon Smith (Laff's immediate supervisor) met with Laff. At no time prior to the meeting were any written statements taken from any other employees including Mendez. At the beginning of the meeting, Glomski asked Laff, "if he had seen the email that went out earlier that day." (Tr. 87.) He also asked if, "he had any part in the situation that went down." (Tr. 87.) He then specifically asked him "about being in the bathroom speaking about clients, saying clients were wasting his fucking time and that they should call the fucking CCS." (Tr. 87.) Laff responded, "that he had no clue." (Tr. 88.) Glomski then gave Laff the separation documents and when he was given the separation letter Laff admitted to having a conversation in the restroom but asserted that he wasn't using profanities. (GC Exh. 4(a), 7(a), Tr. 89.) After Glomski gave Laff the separation documents, he discussed the COBRA portions of the documents but did not discuss items 1–5 of the document. (Tr. 50.) The meeting ended after Laff, Smith, and Glomski all signed the separation of employment documents. (Tr. 50–51.) Laff was escorted out and on the way out reiterated to Glomski that he didn't say the things attributed to him. (Tr. 221.)

E. Laff's Actions After his Discharge

Later in the evening of February 11, 2015, at 8:21 p.m. Laff sent Glomski an email. (GC Exh. 7.) In this email Laff set forth the following:

> When you called me into your office this afternoon I was shocked at your accusations and a bit flustered. Now that I've calmed down, I realize exactly what transpired: Another

> banker and I were walking together towards the men's room. In the hall and the continuing into the bathroom, he was telling me about a client who had dropped in his pipeline. The client refinanced four years ago and has been trying to get a hold of someone for a week. The banker said, "why doesn't he call a client care specialist and stop wasting my fucking time?' The other banker left the men's room while I was still washing my hands. Your informant who said he heard it "over the stall," must have only seen me when he came out. In fact, I have never had a client with that set of circumstances. If you check the other banker's calls, I am sure you'll be able to identify that particular client. I sincerely hope you will reconsider your actions. [GC Exh. 7(a).]

The next morning, at 6:48 a.m. on February 12, 2015, Oenning responded to an email from Jordon Smith advising him that Laff had been separated. In Oenning's email, he indicated, he would "take it from here" and asked the question "I am assuming he lied?" (GC Exh 7(c).) In response to Oenning's question Glomski forwarded Laff's email from the prior evening to Oenning, Smith and Stoffer. (GC Exh. 7.) Glomski responded to Oenning's question indicating, "Yes Greg, FYI. We can talk more about it but at first he denied everything and then he stated the he said it but without the swear words. Now he is saying someone else said it." (GC Exh. 7(a).)

On February 12, 2015, Oenning called Laff in response to a voicemail that Laff left for Jordon Smith. During the conversation, Laff asked if Glomski had received his email and asked Oenning if, given the email, Glomski was going to reconsider the termination decision. Oenning advised that they would continue on the same course of action. During the conversation with Oenning, he reiterated that he did not make the statements attributed to him and specifically identified Michael Woods as the person who made the statements. At some point during the conversation, Oenning advised Laff, "the fact of the matter is that you shouldn't have been talking about clients at all." (Tr. 225.) Thereafter, on February 13, 2015, Laff sent another email asserting that his termination was wrongful and in violation of federal statutes. (GC Exh. 8.).

F. Michael Woods' Discipline

On February 12, 2015, Glomski received the above-referenced email from Santacruz which implicated Woods in the restroom incident. Glomski discussed the matter with Oenning. Gloomski recommended that Oenning speak to Woods to find out what happened and then issue "an Opportunity Letter" to Woods because he had no prior issues. (Tr. 65.) On February 13, 2015, the "Opportunity Letter" was issued to Woods. The "Opportunity Letter" contained the following language:

> We have confirmed that on Tuesday February 11, 2015, you were observed and heard by other team members in the men's restroom discussing your company business in regards to clients in an unprofessional demeanor, especially with the use of profanity. Moving forward your professionalism must be corrected immediately. Any further instances in this manner will result in immediate separation from the company.

G. Analysis

1. Laff and Woods engaged in concerted activity

The concept of concerted activity has its basis in Section 7 of the Act. Section 7 of the Act in pertinent part states: "Employees shall have the right to self-organization 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 and protection." In order for the actions to be protected under the statute they must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). In general, to find an employee's activity to be "concerted," the employee must be engaged with or on the authority of other employees and not solely by and on behalf of the employee himself. Whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The Supreme Court has observed, however, that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. at 835. *Fresh & Easy Neighborhood Market,* supra.

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d. Cir. 1988). The Board has found an individual employee's activities to be concerted when they grew out of prior group activity. Every *Women's Place*, 282 NLRB 413 (1986). The Board has found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). An employee's activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.*, 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), enfd. 853 F.2d 966 (1st Cir. 1988).

a. Concerted activity

I find that considering the totality of the evidence, the conversation of Woods and Laff falls within the umbrella of the Board's broad definition of "concerted activity." As new factual circumstances arise, the Board considers additional factors in determining if activity is concerted, such as (1) whether the comments involved a common concern regarding conditions of employment, and was the issue framed as a common concern; and (2) the context under which the alleged concerted activity occurred. In the first instance there is no question that Laff and Woods were discussing common concerns regarding terms and

conditions of their employment specifically relating to how calls are forwarded and whose responsibility it was to field calls. The conversation between Woods and Laff falls in the category of those types of preliminary actions necessary to lay the groundwork for group activity i.e., causing another employee to voice support for his complaints. *Walls Mfg*., 128 NLRB 487, 491 (1960) (holding 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"). 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 444, 453–454 fn. 31 (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"). "The activity of a single employee in enlisting the support of his fellow employees for their mutual aid or protections is as much concerted activity as is ordinary group activity." *Whittaker Corp*, 289 NLRB 933 (1988). See also *Amelio's*, 301 NLRB 182 fn. 4 (1991). In this case, Woods' actions indeed produce vocalized support from Laff wherein he verbally concurred with Woods asserting that he understood his frustrations. See *World Mark by Wyndham*, 356 NLRB 765 (2011), holding that when a single employee protested a change in company dress code and a second employee joined the action "any doubt of the concerted nature of [the employees] action is removed by [a second employee joining that action]."

b. Protected activity under the Act

In order for concerted activity to be protected it must be undertaken "for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157 (1976), and actions taken for mutual aid or protection include those intended to improve conditions of employment. The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Under Section 7, both the concertedness element and the "mutual aid or protection" element are analyzed under an objective standard. An employee's subjective motive for taking action is not relevant to whether that action was concerted. "Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one." *Circle K Corp*., 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). Nor is motive relevant to whether activity is for "mutual aid or protection." Rather, the analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees. The motive of the action in a labor dispute must be distinguished from the purpose for his activity. The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of "mutual aid or protection" of employees. The Board has long held, however, that for conversations between employees to be found "protected" concerted activity, they must look toward group activity and that mere "griping" is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d. Cir. 1964).

If an employee's action benefits others then this is proof that the action comes within the mutual aid or protection clause of Section 7. *Fresh & Easy Neighborhood Market*, supra at 7, citing *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II),* affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). The Board has found a broad range of employee activities regarding the terms and conditions of employment fall within Section 7's mutual aid and protection clause. *Fresh & Easy Neighborhood Market*, supra, at 7. See, e.g., *Dreis & Krump Mfg*., 221 NLRB 309, 314 (1975) (employees' complaints over supervisory handling of safety issue); *Tanner Motor Livery*, 148 NLRB 1402, 1404 (1964), enfd. in relevant part 349 F.2d 1 (9th Cir. 1965) (employees' protest of racially discriminatory hiring practices); *Jhirmack Enterprises*, 283 NLRB 609, 609 fn. 2 (1987) (one employee's communication to another in an attempt to protect the persons continued employment). The resolution of the question of whether the activity was protected under the Act is directly related to the imposition of the adverse inference rule more fully discussed below.

c. The adverse inference

There exists an evidentiary hole in the record due to the lack of testimony of Michael Woods, the person whom I have found to have made the statements that were attributed to Laff. Both the General Counsel and Respondent assert that the adverse inference should be imposed against the other based upon Woods' failure to testify. I find that an adverse inference against the General Counsel is clearly unwarranted as the General Counsel actively sought to have the witness participate in the investigation and testify at the hearing. These efforts included including issuing a subpoena addressed to Respondent's facility, the location at which Woods was employed. (GC Exh. 13.)

Unlike the General Counsel, Respondent made no showing of any bona fide attempts to call its own employee to testify. Clearly, Woods was an employee and was an agent and within the authority and control of Respondent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see *also Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) ("The decision to draw an adverse inference lies within the sound discretion of the trier of fact"). In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. International *Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). Respondent argues that an adverse inference against it is unwarranted because there is "no reasonable expectation that that an employee favors one party over another" *citing Global Contact Services*, Case No. 29–RC–134071, 2015 WL 1939736, slip op. at 1 fn. 1 (NLRB Apr. 28, 2015). I join my other colleagues who have rejected the notion that the adverse inference rule could only be appropriately drawn when a supervisor and not an employee is not called to testify. See *Ready Mix Concrete Co*., 317 NLRB 1140, 1141–1142 (1995), Judge Mary Cracraft; *DPI New England*, 354 NLRB 849, 858 (2009), Judge Paul Bogas; *Associated Builders, Inc*., 2001 WL 1589691 (2001); Judge Thomas Patton, *Nc-Dsh,*

LLP d/b/a Desert Springs Hospital Medical Center and Theresa Van Leer, 28–CA–127971, 2015 WL 1169324 (Mar. 13, 2015); Judge Ira Sandron, all applying in varying circumstances an adverse inference when a Respondent failed to call an employee. I find considering all of the above that given the critical nature of the missing testimony that drawing an adverse inference against the Respondent is appropriate.

The matters about which Woods could have testified go to the heart of the complaint. For example, he could have testified whether he had previously complained to management and whether his bathroom complaint was a logical outgrowth of those complaints. He could have testified regarding whether he was aware that Mendez was in the bathroom and whether his comments were in fact meant to be overheard as an indirect method of bringing the matters to Respondent's attention. In reality, it is Woods who is the person whose "goals" are in issue. Eastek at 565. Given Woods' absence, and the fact that he is the person who made the statements which form the basis of Laff's discipline, I find that the only logical, and appropriate remedy is to apply the adverse inference and resolve any ambiguities regarding the concerted and/or protected nature of the conversation in the General Counsel's favor. Applying the adverse inference rule, I specifically find that Woods was sharing workplace concerns with the goal of improving terms and conditions of employment and thus was engaged in concerted and protected activity with Laff.

(1) Laff's discharge violated the Act

In *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21 (1964), the Supreme Court found that Section 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. The Court delineated the scope of its holding by noting that Section 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. The Court reasoned that, "otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees . . . A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." Id. at 173.

Applying the reasoning and rationale of Burnup & Simms to the facts of this case, I find that all of the above-mentioned elements requisite to finding a violation of the Act were present in Laff's termination. Laff was engaged in protected activity which the Employer knew of and which formed the basis of the misconduct, which Laff was in fact not guilty of.

Accordingly, I find that Laff's discharge violated the Act.

(2) Woods' discipline violated the Act

In order to determine whether an adverse employment action was effected for prohibited reasons, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management. Corp*., 462 U.S. 393 (1983).

To establish an unlawful discipline under Wright Line, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activities were a substantial or motivating factor in the employer's decision to take action against them. *Manno Electric, Inc*., 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc*., 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004).

Once the General Counsel has met its initial burden under Wright Line, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*., 316 NLRB 771 (1995); *Manno Electric, Inc*., 321 NLRB at 280 fn. 12. In applying *Wright Line* the Board has cautioned that, "a judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken [cannot be] a substitute for evidence that the employer would have relied on this reason alone." *Ingramo Enterprise*, 351 NLRB 1337, 13380 fn. 10 (2007), review denied 310 Fed.Appx. 452 (2d Cir. 2009). The Board has also reminded that "[a]n employer has the right to determine when discipline is warranted and in what form . . . . The Board's role is only to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts." *Cast-Matic Corp.*, 350 NLRB 1349, 1358–1359 (2007).

Applying the law to the facts of the case, I find that the General Counsel has established a prima facie case. Woods engaged in protected and concerted activity when he complained about work policies including the manner in which calls were forwarded to him. See *Chromalloy Gas Turbine Co*., 331 NLRB 858, 863 (2000), enfd. 262 F.3d 184, 190 (2d. Cir. 2001). See also, *Worldmark by Windham*, 356 NLRB at 765. Thus, I find that the first element of the prima facie case has been met.

The second element of the prima facie case is also met as it is undisputed that the Employer was aware of Woods' complaints. This is necessarily true because the complaints were made while Mendez one of Respondent's managers was present.

The third element of the prima facie case is also met as the discipline took place within a time frame in which improper motives can be inferred. Wood's discipline was set in motion the day after he complained. I find the timing of the discharge sufficient to support an inference of animus. See *Sawyer of Napa*, 300 NLRB 131 (1990), *Olathe Health Care Center*, 314 NLRB 54 (1994), *Daniel Construction Co*., 264 NLRB 569 (1982),

enfd. 731 F.2d 191 (2d. Cir. 1984).

Having concluded that the General Counsel satisfied his initial burden under *Wright Line*, the burden shifts to the Respondent to prove, as an affirmative defense, that it would have disciplined Woods even in the absence of his protected activities. This burden may not be satisfied by proffered reasons that are found to be pretextual, i.e., false reasons or reasons not in fact relied upon for the discharge. Rather, as the Board has consistently held, a finding of pretext defeats an employer's attempt to meet its rebuttal burden. Stevens *Creek Chrysler Jeep Dodge*, 357 NLRB 633, 637 (2011), enfd. sub nom. *Mathew Enterprises, Inc. v. NLRB*, 498 Fed.Appx. 45 (D.C. Cir. 2012). Further, an employer does not carry its *Wright Line* burden merely by asserting a legitimate reason for an adverse action, where the evidence shows it was not the real reason and that protected activity was the actual motivation. *T&J Trucking Co*., 316 NLRB 771, 771–773 (1995), enf. mem. sub nom. *NLRB v. T&J Container Systems*, 86 F.3d 1146 (1st Cir. 1996); *Stevens Creek*, supra at 637; *Metropolitan Transportation Services*, 351 NLRB 657, 659–660 (2007). Applying these principles, I find that the Respondent failed to satisfy its burden under *Wright Line.* In particular, I concur with the General Counsel's analysis and I find Respondent's assertions that the discipline would have been effectuated in the absence of the protected activities because of the use of profanity is insufficient to carry its burden because various management witnesses all testified to regular and tolerated use of profanity in the workplace including the use of the word "fucking." Similarly, I find that Woods did not lose protection of the act by his use of profanity. In order to answer this question, the factors set forth in *Atlantic Steel Co*., 245 NLRB 814 (1979); require me to analyze (1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the employees outburst (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. In this case, the discussion took place in a public place, the subject concerned terms and conditions of employment, the outburst was not particularly egregious given it occurred in a location with an inherent degree of privacy away from the regular work force. All of these factors, including the undisputed fact that profanity was used regularly and tolerated in and outside of the workplace weigh in favor of finding that in fact Woods did not lose protection under the Act. I therefore find that Respondent violated the Act when it disciplined Woods.

3. The unlawful work rules

a. The Mendez email

In order to determine whether a work rule violates NLRA Section 8(a)(1), the Board considers "whether the rule would reasonably tend to chill employees in the exercise' of their statutory rights." *Lafayette Park Hotel*, 326 NLRB 824, (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). In making this assessment, the Board engages in a two-step inquiry. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), First, the Board examines whether the rule "explicitly restricts" section 7 activity; if it does, the rule violates the Act. But if nothing in the rule explicitly restricts Section 7 activity, then the Board moves to the second step, under which the rule violates the Act if it satisfies any one of the following three conditions: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union or other Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." The mere maintenance of a rule likely to chill Section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice "even absent evidence of enforcement." *Community. Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088 (D.C.Cir.2003) (citing the Board's "mere maintenance" rule). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Lafayette Park* at 825, 827.

The General Counsel argued that the Mendez email contained rules that were unlawful on their face because they specifically prohibited employees from discussing their terms and conditions of employment and their pay. I concur. In *The Loft*, 277 NLRB 1444, 1461 (1986), the Board clearly recognized that a rule prohibiting discussions of pay "constituted a serious impediment to, and a clear restraint upon, and interference with the employees' Section 7 rights to engage in protected and concerted activity." See also *Waco Inc*., 273 NLRB 746 (1984), holding that, "there can be little question that Respondent's rule prohibiting employees from discussion wages constitutes a clear restraint on employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment." Id. at 748. I also find that like wages, the discussion of specific clients, client profiles, credit, costs and rates that are given to clients all relate to the most particular aspects of the mortgage banker's work and discussions surrounding these matters lies at the heart of what constitute their terms and conditions of employment. Of particular importance in considering the overly broad and restrictive nature of the rule is the admonition that discussions are precluded in any location that a "potential client" may hear. A "potential client" could be anyone and the location of a "potential client" could be anywhere therefore (at least in theory) the rule could be interpreted to preclude any conversations regarding pay and terms and conditions anywhere. I find that these restrictions unlawfully restrain employees Section 7 rights. See *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006).

The General Counsel argues that other rules that provided that, "Never, EVER should we be swearing in the bathroom, especially about clients," and the prohibition against stating, "that clients that call in are wasting your (*swear word*) time" also violated the Act. (GC Exh.10(b)). I agree. Applying the applicable legal principles enunciated in *Lutheran Heritage*, I find that all of the rules set forth above violate the Act because they were all promulgated in direct response to what I have found to be Section 7 protected and concerted activity. In fact, the rules were promulgated after Woods and Laff engaged in protected and concerted activity for the specific purpose of terminating Laff and later disciplining Woods. So too, the rules were specifically applied to restrict the exercise of Section 7 rights meeting not only the second prong of the test set forth in Lutheran Heritage but also the third.

b. The separation documents

The General Counsel argues that the separation documents that were provided also Laff violated the Act.

> (1) The confidentiality rule contained within the separation documents which requires employees to keep secret "employee information" is overly broad;

The separation documents which Laff received upon his termination require that he keep secret all proprietary /confidential information, including "client information, employee information, financial information, or any other internal information about Quicken Loans." (GC Exh. 4(a).) In *Advance Transportation Co.*, 310 NLRB 147 (1993), the Board found that a rule which prohibited "discussing company affairs, activities, personnel, or any phase in operations with unauthorized persons; to be on its face unlawful because it failed "to define the area of permissible employee conduct thus it is calculated to cause employees to refrain from engaging in protected activities." Similar reasoning is applicable to this case as the requirement to keep secret employee information is so broad as to potentially encompass directly Section 7 activity and could reasonably be construed by employees to restrict Section 7 activities.

> (2) The obligation to return all company property is overly broad because it restricts employees from providing items like employee handbooks to government agencies and private counsel.

General Counsel argues that the return of property rule is overly broad because it restricts employees from providing employee handbooks from government agencies. I agree. At the very least without any language to except the provision of company property to government agencies for lawful investigative purposes the rule is ambiguous and as such is susceptible to the reasonable interpretation that it bars Section 7 activity.

> (3) The prohibition in the rules to "Refrain from Contacting or Soliciting Quicken Loans' Employees or Clients" "For Any Reason" is Overly Broad.

I also find that the rule which restricts employees from contacting or soliciting Quicken Loans' employees or clients "for any reason" to be overly broad. As noted in *Quicken Loans, Inc.*, 359 NLRB 1201 (2013). "within certain limits, employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometime do so in appealing to the public, or to their fellow employees, in order to gain their support." Id. See also *Arlington Electric, Inc*., 332 NLRB 845 (2000). I find an employee reading the document could reasonably conclude that the prohibition contained in the separation documents directly restrict Section 7 rights and thus the rule violates the Act.

1. The interrogation of Laff

In determining whether an interrogation is coercive in violation of Section 8(a)(1), the Board applies a totality of the circumstances test which considers whether under all circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Bloomfield Health Care Center*, 352 NLRB 252 (2008). Relevant factors for consideration were set forth by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and derived by the Board from standards articulated by the court in *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964). The underlying premise of the Board's holding in *Rossmore House* is that on many occasions interrogations can be completely lawful acts. *Rossmore Hous*e sets forth factors to consider in determining whether any particular interrogation falls outside the bounds of a lawful interrogation. The factors are as follows: (1) The background, i.e. is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e., how high was he in the company hierarchy? (4). Place and method of interrogation, e.g., was employee called from work to the boss' office? Was there an atmosphere of "unnatural formality"? (5). Truthfulness of the reply. See *McClain & Co.*, 358 NLRB 1070 (2012), see also *Camarco Loan Mfg. Plant*, 356 NLRB 1182 (2011). *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). *Donaldson Bros. Ready Mix*, Inc., 341 NLRB 958 (2004). *Rossmore House* provides relevant factors for consideration however, the factors are not meant to be "mechanically applied" and it is not essential to a finding of a coercive interrogation that each and every element of *Rossmore House* be met. The fundamental issue is whether the questioning would reasonably have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 Rights. This is an objective standard and does not turn on whether the employee was actually intimidated. *Multi-Aid Service*, 331 NLRB 1126 (2000), enf. 255 F.3d 363 (7th Cir. 2001).

The interrogator, Glomski was seeking information to use to take action against the employee, the meeting was held in his office, the office of the regional vice president, the meeting was conducted in the presence of Laff's supervisor, Jordon Smith. In addition, the meeting came at the heels of what I have already found to be an overly broad email which limits discussion of wages. Of critical importance is the manner in which the interrogation was conducted. Instead of directly asking Laff if he had engaged in any specific misconduct Glomski began the meeting by referring to the email asking Laff had seen it and then asking, "if he had any part in the situation that went down." Applying the totality of the circumstances test enunciated in *Rossmore House* to the facts of this case, I find that a reasonable employee who had read the email could have concluded by Glomski's questions that they were being interrogated about the overly broad and unlawful rules i.e. discussing their pay and/or clients. Thus, I find that the interrogation was coercive and in violation of Section 8(a)(1) as it would reasonably tend to restrain, coerce, or interfere with Section 7 rights.

2. Respondent created the impression of surveillance among its employees

The test for determining whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored. *Mountaineer Steel, Inc.,* 326 NLRB 787 (1998), enfd. 8

Fed.Appx. 180 (4th Cir. 2001). The Board has held that an employer "creates the impression of surveillance when it monitors employees' protected concerted activity in a manner that is "out of the ordinary" even if the activity is conducted openly. I find that any employee who underwent an interrogation about a conversation he had in the restroom (a location that has inherent in it some level of privacy), with another employee in which in which a company vice president tells them he has information, "from someone he trusted" about what another said in the bathroom after receiving an email that referenced discussing client and pay would reasonably conclude that their protected activities were being monitored. The Board has held that, "employees should not have to fear that "members of management are peering over their shoulders" or as in this case peering over or under the bathroom stall taking note of their concerted activities. *Conley Trucking*, 349 NLRB No. 30 (2007) (not published in Board volumes).

3. The Respondent's discharge and discipline of Laff and Woods violates Section 8(a)(1) pursuant to the Board's "*Double Eagle*" rule

After the occurrence of the bathroom incident, Respondent via email created rules the violation of which Respondent specifically warned, "things like this WILL NOT be tolerated in this culture and will be dealt with swiftly." (GC Exh.10(a)). After promulgating the rules Respondent thereafter proceeded to discharge Laff and discipline Woods pursuant to the unlawfully over broad rules. The Board has consistently held that discipline imposed under an unlawfully overbroad rule violates the Act (the "Double Eagle rule"). See *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Opryland Hotel*, 323 NLRB 723 (1997). In *Continental Group, Inc.*, 357 NLRB409, 412 (2011), the Board outlined limits to the application of "the Double Eagle rule." The Board held there that discipline imposed under an unlawfully overbroad rule only violates the Act where an employee violated the rule by (1) engaging in protected conduct (e.g., concerted solicitation, distribution, or discussion of terms and conditions of employment); or (2) engaging in conduct that "implicates the concerns underlying Section 7 of the Act."

Applying *Continental Group Inc.*, to Laff's discharge raises an important issue which apparently the Board has not had occasion to address. The analysis is Continental Group Inc., contemplates a situation in which the employee actually violated the over broad rule. It does not however address the question of what rule applies when in fact the employee did not violate the rules for which he is disciplined.

In any event, I find that Laff and Woods were both engaged in protected conduct and conduct that implicates the concerns underlying Section 7 the Act. Namely engaging in protected and concerted activity discussing their concerns regarding their terms and conditions of employment. Thus, the termination and discipline fall within the ambit of Continental Group, Inc.'s standards upon which I find that liability is established.

CONCLUSIONS OF LAW

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

2. By discharging Charging Party for engaging in protected and concerted activities Respondent violated the Section 8(a)(1) of the Act as alleged in the complaint.

3. The Respondent has also violated Section 8(a)(1) by:

(a) Since February 11, 2015, promulgating and maintaining overly broad rules prohibiting employees from discussing pay, clients and terms and conditions of employment.

(b) Applying the overly broad rules to discipline Michael Woods and discharge Austin Laff

(c) Maintaining overly broad confidentiality rules pertaining to employees who are separated that restrict employees' Section 7 activity.

4. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

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

The General Counsel requests that Laff be reimbursed for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee).) I concur that in order to make the employee whole such expenses ought to be recoverable. However, as the Board has not yet authorized such a remedy, I decline to order such.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall file a report with the Regional Director for Region 28, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016). 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, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Quicken Loans, Inc., Scottsdale, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) Terminating or disciplining any employee for engaging in protected concerted activities, including but not limited to expressions of concern regarding policies relating to which calls are fielded by mortgage bankers.

[2] 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.

(b) Maintaining any rule that prohibits employees from discussing pay, or clients and/or terms and conditions of employment in the workplace including the restroom located at its facility.

(c) Discharging or disciplining employees because they violated an overly broad rule which restricts their Section 7 rights.

(d) Maintaining overly broad confidentiality rules pertaining to employees who are separated that restrict employees' Section 7 activity.

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

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

(a) Within 14 days from the date of this Order, offer Austin Laff 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 Austin Laff whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him, in the manner set forth in the remedy section of the decision. Compensate Austin Laff for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and shall file a report with the Regional Director for Region 28, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(c) Rescind the overly broad rules which prohibit discussion of pay, clients and terms and conditions of employment and notify all employees that such rules have been rescinded.

(d). Rescind and remove the overly broad confidentiality rules from Respondent's separation documents.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Austin Laff and the unlawful discipline of Michael Woods and within 3 days thereafter notify him in writing that this has been done and that the materials removed will not be used as a basis for any future personnel action against him and/or referred to in response to any inquiry whatsoever including but not limited to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker or otherwise used against him in any way.

(f) 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 back pay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Scottsdale, Arizona, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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, if the Respondent customarily communicates with its employees by such 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 February 24, 2011.

(h) 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. March 17, 2016

APPENDIX

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

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.

YOU HAVE the right to discuss wages, hours, and working conditions with other employees and we will not do anything to interfere with your exercise of that right.

WE WILL NOT maintain the following unlawful rules in our separation of employment documents.

"Your continuing obligation to keep secret all Proprietary/Confidential Information. This includes, but is not limited to, information relating to proprietary software, business methods, client information, employee information, financial information, or any other internal information about Quicken Loans;"

"Your obligation to return all Company Property and Information and to delete any residual Information stored on any of your personal devices or other electronic storage means. Company Property and Information includes, but not limited to, computers, monitors, pagers, lists, reports, employee handbooks, manuals, business cards, diskettes or nay other Quicken Loans equipment or material;" and

"Your continuing obligation to refrain from contacting or soliciting Quicken Loans' employees or clients, for any reason, even if you cultivated the clients while working here."

[3] 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."

WE WILL NOT maintain unlawful rules that prohibit you from discussing your terms and conditions of employment with your coworkers, including discussions about clients.

WE WILL NOT prohibit you from discussing your terms and conditions of employment with your coworkers, including discussions about clients.

WE WILL NOT interrogate you about your protected concerted activities.

WE WILL NOT create the impression that your concerted activities are under surveillance by us.

WE WILL NOT discharge you because you engaged in protected concerted activities, including discussing clients with your coworkers.

WE WILL in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the unlawful rules in our employment documents.

WE WILL pay Austin Laff for the wages and other benefits he lost because we unlawfully discharged him, with interest.

WE WILL remove from our files all references to the discharge of Austin Laff and the written discipline of Michael Woods and WE WILL notify them in writing that this has been done and that the discharge and discipline will not be used against them in any way.

WE WILL offer Austin Laff immediate and full reinstatement to his former job, or if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges he previously enjoyed.

QUICKEN LOANS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-146517 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.