JD(SF)-50-08
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

SUSAN OLES, an Individual,
d/b/a SUSAN OLES, DMD

and **Case 28-CA-21951**

SUSAN STRICKLAND, an Individual

and **Case 28-CA-22095**

ANN WILLIAMS, an Individual

William Mabry III, Esq., Phoenix, AZ,
for the General Counsel.
Frederick C. Miner, Esq., and *Cyrus B. Martinez, Esq.,* Phoenix, AZ, for the Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard these cases in Phoenix, Arizona, on August 26, 27, and 28, 2008. Susan Strickland (Strickland), an individual, filed an unfair labor practice charge in Case 28-CA-21951 on May 30, 2008. Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a Complaint and Notice of Hearing (the complaint) on July 10, 2008. The complaint alleges that Susan Oles, an Individual, d/b/a Susan Oles, DMD, (the Respondent, the Employer, or Oles) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[1]

On August 26, 2008, Ann Williams (Williams), an individual, filed an unfair labor practice charge in Case 28-CA-22095, which charge alleges that the Respondent violated Section 8(a)(1) of the Act. On August 26, 2008,[2] upon motion of counsel for the General Counsel, I consolidated both Cases 28-CA-21951 and 28-CA-22095 for trial.[3] The Respondent denied the commission of the alleged unfair labor practices in Case 28-CA-22095.[4]

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[1] All pleadings reflect the complaint and answer as those documents were finally amended.

[2] All dates are in 2008 unless otherwise indicated.

[3] Although counsel for the Respondent initially objected to the consolidation of these two cases, he later withdrew his objection.

[4] The Respondent, in its answer to the complaint, and by oral representation of counsel, has acknowledged service upon it of both charges.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observations of the demeanor of the witnesses, I now make the following findings of fact and conclusions of law.[5]

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits, the parties stipulated, and I find that the Respondent is owned by Susan Oles (Oles), an individual, as a sole proprietorship, doing business as Susan Oles, DMD, with an office and place of business in Phoenix, Arizona, where it has been engaged in the business of providing dental care. Further, I find that during the 12-month period ending May 30, 2008, the Respondent, in conducting its business operations, derived gross revenues in excess of $250,000; and purchased and received at its office in Phoenix, Arizona, goods valued in excess of $50,000 directly from points outside the State of Arizona.

Accordingly, the parties agree and I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. The Dispute

The dispute between the Respondent and a number of its employees had its inception with the delivery of a letter of complaint from five employees to the Respondent's principal, Susan Oles, DMD. It is the position of the General Counsel that by submitting this letter to Oles, the employees were engaged in protected concerted activities, as their complaints involved the wages, hours, and working conditions of the Respondent's employees. According to the allegations in the complaint, the Respondent, thereafter, violated Section 8(a)(1) of the Act by discharging two of those employees because of their involvement with the letter, and by also threatening and interrogating employees regarding their concerted activities, by creating an impression that their concerted activities were under surveillance, by denying employees paid leave/vacation benefits, and by imposing more onerous working conditions on employees because of those activities. The General Counsel contends that the primary reason for the Respondent's course of conduct was Oles' displeasure with having received her employees' letter of complaint.

It is the position of the Respondent that any subsequent course of its conduct was either unrelated to the letter of complaint, or was an effort to remedy the complaints raised in the letter. Further, the Respondent denies the commission of any unfair labor practices, and contends that

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[5] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

its discharge of two employees was for cause, unrelated to any concerted activity engaged in by the employees.

B. The Facts

Unfortunately, many of the facts in this case are in dispute, with considerable disagreement among the involved principals regarding what was said or done. It sometimes seemed as if the critical events were playing out in two separate arenas. Often, the only way to resolve these disputes was through a credibility analysis. In any event, what follows is my evaluation of the facts, resolving disputes of those facts where ever necessary.

Dr. Oles is engaged in the business of providing dental care to patients. She has been in practice for 21 years, and has been in her current office location since 1994. Her dental office is open Monday through Thursday, from 8:00 a.m. to 5:00 p.m. However, employees frequently work before and after the hours the office is open to the public. Oles works on Wednesdays and Thursdays. She employs as an independent contractor dentist Dr. Terry Berkley, who provides dental services to patients on Mondays and Tuesdays. The office is closed on Fridays.

The office contains five "operatories," which are the individual areas where patients are treated. Each operatory contains a dental chair, dental equipment, supplies, and cabinets. While all are very similar, certain of the operatories differ somewhat depending upon what kind of dental equipment, such as hand pieces, are available. Generally, the small differences will depend on whether the operatory is primarily used by the dentists and their assistants, or by the dental hygienists. The operatories are about 10 by 15 feet in size, with walls that are about a foot short of the ceiling. It is undisputed that at least some sounds can be heard from one operatory to the next.

In addition to Drs. Berkley and Oles, a number of other employees worked for the Respondent on a regular basis. Office manager Andrea Diegel, an admitted supervisor, worked mainly in the front office. All the employees reported directly to her or to Dr. Oles, who was the sole proprietor of the dental practice and, obviously, an acknowledged supervisor. Also working primarily in the front office as an office assistant was Jennifer Barth. Oles employed two dental hygienists, Nancy Grace and Ann Williams, and two dental assistants, Susan Strickland and Cindy Benallie. The Respondent gave Benallie the title of "back office manager," and even though she worked full time as a dental assistant, it was the position of the Respondent that she was a statutory supervisor. To the contrary, the General Counsel strongly argued that Benallie was not a supervisor as that term is defined in the Act.

The burden of proving supervisory status authority rests with the party asserting it, which in this case is the Respondent. Such proof must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.,* 348 NLRB No. 37, slip op. at 3 (2006); *Dean & Deluca,* 338 NLRB 1046, 1047 (2003). Purely conclusory evidence is not sufficient to establish supervisory status. The Board requires evidence that the employee actually possesses the supervisory authority at issue. *Golden Crest Healthcare Center,* 348 NLRB No. 39, slip op at 5 (2006).

In the case of Cindy Benallie, there is absolutely no credible evidence that she possessed any of the indicia of supervisory authority as found in Section 2(11) of the Act. To begin with, I was impressed with Benallie's testimony, and I found her to be highly credible. She was an intelligent witness who answered questions in a calm, straightforward way, and who tried to be helpful regardless of which side was questioning her. She worked for Oles for over nine years, and until near the end of her employment she apparently had a good relationship

with both Oles and Diegel. Oles was highly complementary of Benallie's technical skills as a dental assistant and testified that she had encouraged Benallie to consider attending dental school.

Benallie testified at length under the direct examination of counsel for the General Counsel. She was candid and open in her testimony, which left no doubt that she simply did not exercise any supervisory indicia. Further, while she cooperated fully under cross-examination, counsel for the Respondent was unable to obtain any admissions regarding her exercise of supervisory authority. She acknowledged that she would sometimes assist new or temporary employees by showing them which operatory they would work from, where supplies could be found, and about the office procedures. Also, when asked by Oles to do so, she would assist Susan Strickland with making temporary crowns and would occasionally review the resumes of job applicants. However, it is clear from the totality of the evidence that Benallie helped in these ways because of her long tenure with the practice and due to her technical proficiency. These were not indicia of supervisory authority.

While both Oles and Diegel testified about duties that Benallie performed, which if true, would have clearly constituted supervisory authority; their testimony was denied by Benallie. For the reasons that I will discuss later in this decision, I found both Oles and Diegel less than fully credible. They seemed most inclined to exaggerate and embellish their testimony in order to support their particular positions. For example, I simply did not believe Oles' contention that Benallie effectively recommended the hiring of new employees. There was no documentary evidence to support such testimony from Oles and Diegel, and the testimony of the other witness did not support them.

The fact that Benallie's successor, April Nall, testified that she hired employees and exercised other indicia of supervisory authority was not probative evidence that Benallie had previously also done so. Further, counsel for the Respondent's contention that "secondary" evidence, such as the ordering of supplies and the use of the office credit card, arguably establish supervisory authority is totally insufficient to show such in the face of Benallie's and other employees' credible denials. Accordingly, I am of the view that the Respondent has failed to meet its burden to establish supervisory authority. I conclude, therefore, that Cindy Benallie was not a supervisory as defined in Section 2(11) of the Act during her employment with the Respondent.

Employees Strickland, Grace, Benallie, Williams, and Barth had been concerned for some time about certain work related problems in the office. After discussions among themselves, it was decided to prepare a letter of complaint and present it to Dr. Oles. Nancy Grace was selected by the group to prepare the letter. Apparently, Grace got some of her ideas from a poster hanging in the office, which was published by the State of Arizona and advised employees of their rights under the State's constructive discharge statute. Grace captioned the letter, "Notice of Claim."[6] The Notice of Claim letter (hereinafter referred to as the NOC letter) is dated March 30, 2008, addressed to Dr. Oles, and is signed by the five employees, namely Strickland, Grace, Benallie, Williams, and Barth. (G.C. Ex. 4.) The letter was redrafted several times, with a number of the signers having input into the construction and content of the letter. The actual typist of the letter was Grace. As noted, while the letter bears the date of March 30, it was actually signed about April 3 and was delivered to Oles on that date.

[6] This was somewhat odd, as the state statute, A.R.S. Sec. 23-1502, contains no reference to any Notice of Claim.

Considerable time was spent at the hearing discussing precisely how the letter was delivered to Oles. On reflection, it hardly seems to matter. Oles testified that the NOC letter was place "in" her purse, which was in her personal office. She was alerted to the letter by Strickland as employees were departing at the end of the day. However, according to Strickland, while she had originally intended to leave the letter for Oles "on" Oles' purse, and had told her so, ultimately she hand delivered the letter to Oles as she and Benallie were leaving the office for the day. As I said, it now seems to make little or no difference how the letter was delivered to Oles. What is important, of course, is what the NOC letter said.

The letter, which is divided into three (A-C) parts, refers to "grievances" that the employees have against Oles. The first part of the letter (A) refers to "unethical and unprofessional conduct." Oles is accused of "over diagnosing" patients, performing unnecessary dental procedures, and running late, which may result in liability issues and causes patients to become upset with the staff. The second part of the letter (B) refers to "hours of employment and breaks." It mentions that employees are frequently required to work late, and have to do without lunch breaks. In particular it names Cindy Benallie, who is said to be a diabetic and needs to eat on a regular basis. The letter criticizes Oles for "making disparaging remarks" about employees, failing to show appreciation to employees, failing to award merit raises, and for insulting those employees who ask for a raise. It is suggested that "there should be a set time for merit raises," and also that the office hours be changed. Further, Oles is accused of changing employee time cards. In part three of the letter (C), Oles is told that the "working environment has become quite toxic," and that the "stress level" has led to "headaches, nausea, irritability, exhaustion, sleep disturbances, and low morale." Finally, Oles is told that she has a "narcissistic and selfish attitude." She is warned that she should give the matters raised in the letter "careful thought," and that "hopefully no other actions will be required." (G.C. Ex. 4.)

As with almost everything else, the parties disagree as to what happened on April 3 after the letter was delivered. However, all agree that Oles read the letter and then called Andrea Diegel over to read it too, after which Oles left for the day with her daughter. According to Susan Strickland, Diegel asked her and Cindy Benallie, "Do you always sign whatever's put in front of you? Who came up with this?" Strickland replied that, "Nancy brought it to our attention." Apparently, both Strickland and Benallie then walked away, with Strickland leaving for the day. Diegel did not specifically deny asking these questions.

Both Strickland and Diegel testified that within about 10 minutes, Strickland called Diegel, who was still in the office at the front desk. According to Strickland, she told Diegel that, "Nancy did not put us up to this" [presenting the letter], and that the employees had all "signed it of our own free will." Strickland testified that Diegel told her that, "It looked like she [Nancy] had done something like this before." Strickland replied that they had "all reviewed the statute, and …we decided to do it." Strickland testified that there was nothing said about a "lawyer" being involved. Diegel testified similarly, however, she claimed that Strickland added that she was "sorry" about the letter, but that, "we had to do this. The lawyer said that's the only way we'll get money and get things changed." Diegel claimed that she asked why the employees didn't come to her first with their "list of complaints," to which Strickland replied that they just could not, and hung up.

Grace testified that near closing time on April 3 by the front desk, she and Ann Williams were approached by Diegel who was "out of control." According to Grace, Diegel began to make accusations about her and ask questions including: "This is all [your] fault… [You] instigated this… [Have you] done this before?… [Are you] concerned over anybody else but

[yourself]?… [Are you] concerned about Ann Williams and her financial obligations?" According to Grace, she replied that no one was forced to sign the letter. For the most part, her testimony was corroborated by Ann Williams.

Diegel recalls the conversation differently, claiming that Grace approached her and said, "I'll bet you're mad at us," and "If you're upset, then fire me." Diegel replied that she was not mad at her, and that she had no authority to fire anyone, adding that she could not believe Grace had involved a lawyer. According to Diegel, Grace denied that the employees had any legal assistance.

Grace testified that she solicited Williams' agreement that she (Grace) had not held anybody's "head underwater" to make them sign the letter. Grace ended the conversation with Diegel by saying that she did not want to discuss the matter further with Diegel, as it had nothing to do with Diegel.

Apparently, Diegel was not done talking to the signers of the letter, because according to Jennifer Barth, she received a voice message on her phone from Diegel on the evening of April 3. Barth had not been at work that day because of illness. Barth testified that Diegel stated in the message that she was upset that Barth had signed the letter, and had not confided in her before doing so. Diegel did not specifically deny making these statements.

Barth had one final conversation with Diegel regarding these matters. Barth resigned from Oles' dental practice effective April 23. She had submitted a resignation letter to Oles dated April 10, in which she indicated that she was resigning in order to find full time employment that also offered a benefit package. (Res. Ex. 2.) In any event, she testified that on Monday, April 27 she went to the Respondent's office to return some keys. According to Barth, Diegel approached her and said that "both Nancy [Grace] and Sue [Strickland] had been fired over the weekend, and that if we had not signed the letter, Cindy would've been paid her vacation." Diegel did not deny making these statements, and I find Barth credible. Barth no longer worked for Oles, was not a named discriminatee, had no pecuniary interest in the case, and there was no reason for her to be untruthful. She testified in a simple, straight forward, unemotional way, and I believe her testimony.

Oles testified that it took her about five minutes to read the NOC letter because she "was so stunned at the first few paragraphs that [she] had to read it over again to make sure that [she] was really seeing what was written on this paper." She was disappointed by the letter, testifying that she had an "open door policy" in her office, and she was surprised that the employees had not come to her first to discuss their complaints.

Significantly, Dr. Berkley testified that he first heard about the letter "about a week or so" after Oles received it, when Oles called him at home to say that she was replacing a number of the office staff that he normally worked with. Berkley had been absent from the office for over a week on vacation when he received the call from Oles. The employees that she mentioned replacing were "Cindy [Benallie], Sue [Strickland], and maybe Nancy [Grace.]" In that same conversation, Oles indicated that she had received this letter from a number of the employees, and that "she was very upset with the letter…that it was very hurtful to her." According to Berkley, Oles did not discuss with him the contents of the letter. However, when asked by counsel for the General Counsel if Oles indicated why she was replacing these employees, Berkley responded, "Well, she was --- yeah, because she was upset with the letter." When examined by counsel for the Respondent, Berkley added that Oles told him in that conversation that she was "very affronted by the letter, and the tone of the letter, and she was totally taken aback and upset about it," and that it was a "surprise" to her.

I found Dr. Berkley to be a very credible witness. It was clear from his demeanor and the careful way in which he answered the questions, that he felt uncomfortable testifying, as he did not want to take sides between the employees that he had previously worked with and the person employing him as an independent contractor, namely Dr. Oles. However, I also got the sense that while being very careful and exact in testifying, he was doing his utmost to testify truthfully. His testimony was plausible, certainly had the "ring of authenticity" about it, and was inherently consistent with the other credible evidence of record.

Following the delivery of the NOC letter, there was no discussion of its contents between the signatory employees and Oles. However, according to Oles, she made a number of efforts to remedy some of the complaints from the employees as expressed in the NOC letter.[7] Oles freely admitted that she runs perpetually late, and that it sometimes upsets people. According to Oles, in an effort to better service her patients who were being treated by the hygienists, she decided to reconfigure the office. One of the complaints in the NOC letter was that patients undergoing hygienist treatments had to wait too long to be examined by Oles. In order to speed the process up, Oles testified that she decided to move Nancy Grace from the back most operatory to the front most operatory, which was closer to the operatory where Oles worked. According to Oles, this would enable her to know immediately when Grace's patient was ready for the dentist to perform an examination. However, the General Counsel contends that moving Grace to an operatory closer to Oles was in retaliation for Grace's concerted activity in drafting and signing the NOC letter.

It is important to note that all five operators are in very close proximity to each other, with the front and back operatories only about 15-20 feet apart, and are for the most part interchangeable. They are all approximately the same size, and are separated from each other by partitions that do not rise all the way to the ceiling. There are some minor differences, specifically that the operatories used by the hygienists are equipped with a device known as the Titan, which the hygienist uses as a scaler to clean teeth. Also, the water flow to some of the hand devices is different, and, of course, the way in which the hygienists set up their individual work stations and position supplies is different, depending on their individual preferences.

In any event, on April 8, near the end of the work day, Diegel, at Oles' instruction, advised Grace that she needed to move her belongings and supplies to the front operatory. However, Grace took no action to move, and, so, the following morning Oles personally went to Grace and asked her to make the move. According to Oles, she told Grace that she was moving Grace to improve "patient flow… to do exams faster…and that way [Grace] would not be running behind." However, Grace testified that Oles gave her as a reason for the move that, "It seems from the letter that I can't get to you on time to do exams, so I'm moving you where I can see you."

Grace still made no effort to move, complaining that she was with a patient, so Oles instructed Jennifer Barth to help her move. Barth accomplished the move as Grace worked with patients, and by the end of the day the move had been accomplished. However, another week went by before the operatory was equipped with the Titan and fully supplied for a hygienist. Oles testified that the move cost her about $100 to provision the operatory properly for a hygienist. Apparently, there was no disruption of patient care, despite the inconvenience to Grace.

[7] Oles instructed Diegel to arrange future schedules to provide the dental assistants with a fixed period for lunch, which had previously not been the case.

Finally, it should be noted that at the end of the day on April 9, after Grace had been moved to the front operatory, she presented Oles with a document to sign. Basically, this document stated Grace's position that the move was unnecessary, and her opinion that the move was forced on her "to harass" her in retaliation for "participat[ing] in a Grievance Letter signed by all the employees in the office [on] April 3, 2008." (G.C. Ex. 9.) Oles refused to sign the document, and Grace testified that Oles crumbled it up and threw it at her. Oles denied doing any such thing.

Oles testified that after seeking advice from counsel, she prepared a written response to the NOC letter. Her response was dated April 16 and addressed to the five employees who had signed the NOC letter. In her response, which was delivered to employees with their paychecks on April 17, Oles challenged the various assertions that the employees had made. In summary, she stated that she maintains the "highest degree of ethical and professional conduct" in her office; compensates employees who are required to work late or through lunch and provides breaks as needed; and denied that the working environment was "toxic" as claimed by the employees. Of particular interest, she reminded employees that they were "free to leave at any time," and also that while she was willing to listen to any constructive criticism, she would "not tolerate loose-cannon, slanderous gossip and remarks." (G.C. Ex. 5.)

Dr. Oles has always provided paid vacation benefits for her employees. Depending upon their length of service with Oles, employees earn between one and three weeks of vacation a year. Normally employees post their vacation schedule on a large door-sized calendar located on the side of a closet in Oles' personal office. Typically, employees post scheduled vacations on the calendar at the beginning of the year when they have planned to take time off, but they also post shorter duration leave/vacations on the calendar as soon as they realize that they will need to take time off.[8]

Under the Respondent's original vacation policy, an employee was free to use her full benefit at any time during the calendar year, as long as it had been fully accrued, even if that meant taking her vacation at the very beginning of that year. For example, as a long term employee, Cindy Benallie was entitled to three weeks of paid vacation a year. As the policy had previously been applied, Benallie was free to take her three weeks of vacation in the month of January, even though the full three weeks had only just been accrued.

Oles and Diegel testified that because of the abuse of the original policy by a former employee,[9] Oles announced at a staff meeting in mid-2007 that the office vacation policy would be revised to limit the amount of accrued vacation available to use early in a calendar year. According to Oles and Diegel, the revised vacation policy was effective in January 2008. Under the revised policy, each employee would have accrued and have available to use one third of her annual vacation in each of three trimesters, which would cover the calendar year. Diegel prepared a chart to track the accrual and use of paid vacation by each employee. The chart broke down each employee's annual vacation allotment into three four-month long trimesters so that the chart illustrated both the amount of vacation time that had been used, and how much cumulative vacation time remained to be used. (Res. Ex. 1.)

[8] Apparently, in the Respondent's office they use the terms leave and vacation interchangeably.

[9] This employee had allegedly used all her accrued paid vacation early in the calendar year, and then returned, only to resign her position with the Respondent.

However, the five employees, Williams, Benallie, Strickland, Barth, and Grace, all testified, more or less, that they were never informed about a new vacation policy during any staff meeting, and all understood simply that employees earned between one and three weeks of vacation pay a year, depending on length of service. This led to significant disagreements between the Respondent's managers, Oles and Diegel, on the one hand and Williams and Benallie on the other hand.

Benallie testified that in March of 2008 she had requested 50 hours of paid leave for a vacation scheduled to be taken the following month. She alleges that the hours were approved by Diegel. However, Diegel denies approving any more than one hour of paid vacation, as that was all that Benallie had allegedly accrued and had available for use by the start of her vacation. On April 17, she returned from vacation and went into the office to pick up her paycheck. Instead of being paid for the 50 hours of vacation pay that she had requested, Oles informed Benallie that she would receive only the one hour that she had accrued and had available for use. Oles supported Diegel's contention that Benallie was aware of the new policy and Diegel's denial that she had approved 50 hours of vacation pay. Benallie argued that as a long term employee, it was her understanding that the policy that had been in effect when she was hired remained in effect for her. In any event, when she finally understood that Oles was only going to pay her for one of the 50 hours of vacation pay that she had requested, Benallie left the office indicating that she had no intention of returning. Thus, she quit her employment with the Respondent. It is the General Counsel's contention that the Respondent denied Benallie's vacation pay in retaliation for her protected concerted activity in signing the NOC letter. The Respondent contends that the denial of vacation pay to Benallie was merely a uniform application of the new vacation policy, which had allegedly gone into effect in January.

Williams' situation was similar. She testified that she had made plans a year in advance and was told June 25, the day before she was to leave, that her vacation pay was not going to be approved. According to Williams, Oles informed her that she had not accrued and had available enough vacation time for the entire period for which she sought to be paid. Oles explained the new formula to her, but Williams responded that she was "totally unaware of it," and that she had "never seen it" before. Further, she informed Oles that she had assumed the policy in effect at the time that she was hired had continued in effect. In any event, she was not paid for the entire period that she had requested. It continues to be the General Counsel's position that the Respondent's conduct in denying vacation pay to Williams was in retaliation for her protected concerted activity. The Respondent denies any disparate treatment of Williams, and argues that it was merely applying the new vacation policy uniformly. Finally, it should be noted that as of the date of the hearing, Williams was still an employee of the Respondent.[10]

Following the resignation of Cindy Benallie, Oles began a search for a new dental assistant. April Nall had first worked in Oles' office as a temporary dental assistant on April 9. She returned on April 23[11] for a working interview to determine whether Nall would be a good fit

[10] Of the five employees who signed the NOC letter, she was the only one who remained an employee of the Respondent as of the date of the hearing.

[11] I will take administrative notice that April 23 was a Wednesday, 24 was a Thursday, 25 was a Friday, 26 was a Saturday, 27 was a Sunday, and 28 was a Monday. Some of the witnesses may have been confused about the day of the month when testifying. However, it is obvious, based on the day of the week, what the correct day of the month was. In those instances, I have taken the liberty of correcting the witnesses as to the day of the month, so that the chronology will be accurately reflected in their testimony. There are no credibility issues involved in the witnesses' simple confusion regarding days of the month.

to join the staff permanently. On that date she had a discussion with Oles, who offered her full time employment. However, she had not yet made up her mind, and told Oles she would return the following day to continue the working interview, and would give Oles her decision at that time. According to Nall, she also had a conversation with Sue Strickland on that date. They were together in the sterile room when Strickland asked her if she was doing a working interview. Nall replied that she was, after which Strickland said, "I would think twice about taking a position here." Nall did not respond, and that was the extent of their initial conversation.

Nall returned the following day, April 24, to continue the working interview. According to Nall, she had three of four conversations that day with Strickland. Nall testified that in the morning, she was once again alone with Strickland in the sterile room. Strickland asked if she could trust Nall, and then proceed to tell her, "There have been some problems in the office." Strickland mentioned that staff members had written a letter of complaint and given it to Oles. Among her complaints, Strickland said that she had never received a raise, and did not believe that she was being paid what she should have been considering her job description and duties. Further, she mentioned that a former employee, Cindy Benallie, had quit because she was not paid her vacation time. According to Nall, she listened to Strickland's complaints without comment, and the conversation ended when their next patients arrived.

Later in the day, in Strickland's operatory, Strickland again told Nall, "If I were you, I really wouldn't take this job." According to Nall, Strickland just seemed very unhappy with the way things were going in the office, and was discouraging her from taking a position there. Nall testified that still later in the day, in the sterile room, Strickland again repeated, "I'm just telling you I wouldn't take the position here." Finally, as they were cleaning up and closing for the day, Strickland asked Nall if she had talked with Oles yet about the job opening. Nall testified that she was now rather annoyed that Strickland was getting into her personal business, having asked her three or four times about her decision. Nall replied that she was going to be talking with Oles before leaving for the day, and a decision would be made at that time. However, once again Strickland said, "If it were me, I wouldn't take it, so don't take it." That ended their conversation.

Susan Strickland recalled her conversations with Nall somewhat differently. She testified that she had a conversation with Nall in the sterile room on April 24. According to Strickland, Nall approached her and asked, "Why is Dr. Oles so desperate to hire me?" Strickland responded that Oles needed to replace Cindy Benallie. Allegedly, Nall mentioned that she had overheard Oles and Andrea Diegel discussing Benallie. According to Strickland, she then said, "You better think hard before you take a job." That was the end of the conversation. However, in response to a question from counsel for the General Counsel, Strickland testified that this was the only conversation she had with Nall about working for Oles.

In general, I found Nall to be a credible witness. She testified in a calm, believable way, and seemed to have a fairly good recall of the events in question. I do not believe that she would have had any particular reason to lie about the events which occurred before she became a full time employee. In my view, it makes no sense to think that she invented these conversations "out of whole cloth." Her testimony was inherently plausible and consistent with the other credible evidence of record. It had the "ring of authenticity" to it.

On the other hand, I also found Strickland to be generally credible. She seemed sincere, with no indication that she was deliberately lying. Although, as a named discriminatee, she clearly had a strong personal and financial interest in the outcome of the case, I did not get

the sense that she was exaggerating or embellishing her testimony. Her testimony seemed reasonably plausible and was also consistent with the other credible evidence of record.

In fact, the testimony of Nall and Strickland was not all that different. Strickland acknowledged telling Nall, "You better think hard before you take a job." While she only recalls the one conversation, and Nall recalls three or four such conversations, the exact number is likely somewhere in the middle. I believe that at least two, perhaps three such conversations did occur. Further, it is obvious from the testimony of both Nall and Strickland that Strickland was trying to discourage Nall from accepting employment with the Respondent. Strickland's motives are irrelevant. She was advising Nall not to accept Oles' employment offer. Further, I think it likely that, as testified to by Nall, Strickland did mention certain complaints about the office, including raises, salaries, and vacations, the fact that Cindy Benallie had quit, and, significantly, that the employees had written a letter of complaint to Oles.

In addition to her conversations with Strickland, Nall also testified about some significant interaction that she had with Nancy Grace on April 24. According to Nall, she was in an operatory with her first patient for the day, Rolf, when Grace entered the room. Nall claims that Grace approached her from the side and said, "That bitch wants burrs and hand pieces." Allegedly, Grace had her mask down below her chin, and made no effort to lower her voice, so that Nall could both clearly hear her words as well as see her mouth move. Nall testified that Grace was only about six inches from her and about two feet from her patient who was in the dental chair when Grace said these words. Nall did not respond, but merely handed Grace the burrs and hand pieces. Grace then left the operatory. Nall simply assumed that Grace's reference to "bitch" was directed at Oles, apparently because Oles was the only dentist in the office on that day, and, therefore, the only person who could have made such a request.[12]

Grace specifically denied that she had ever called Oles a "bitch," and also denied that she had any conversation with Nall. She testified that on April 24, the only patient that she went to get hand pieces and burrs for was "Debra B," and that was in the afternoon. In that regard, counsel for the General Counsel produced a copy of the Respondent's "Daily Operatory Schedule" for Thursday, April 24. (G.C. Ex. 7.) That document indicates the patients who were undergoing treatment on that date, and also the precise time of their appointments. A number of witnesses offered testimony about the document, specifically: Grace, Strickland, Williams, Oles, and Diegel. Much testimony was given about which employee was working on which patient, in which operatory, and at what time; what treatment certain patients were receiving; and whether it was possible for Nall to have been working on patient Rolf at a time when Grace, following the direction of Oles, could have come into Nall's operatory and requested burrs and hand pieces. Frankly, I found the document, along with the sometimes conflicting testimony of the various witnesses, to be highly confusing. In fact, I found that evidence so confusing, disjointed, and contradictory, as to be essentially meaningless. In my opinion, the document and the witness testimony concerning it was dispositive of nothing. It neither proves nor disproves that Grace made the comment attributed to her by Nall. It is entitled to no weight in deciding the issue before me.

As I mentioned above, I generally found Nall to be a credible witness. However, I can not say the same for Grace. She testified with a "cocky" demeanor, as if she had something to prove. Even beyond being a named discriminatee, Grace seemed to want to make a statement.

[12] I will take administrative notice that April 24, 2008, was a Thursday. Only two dentists work for the Respondent. Terry Berkley worked on Monday and Tuesday, Oles worked on Wednesday and Thursday, and the office was closed on Friday.

She clearly had a lot of her personal pride at stake in the proceeding. I found her to display a hostile attitude when answering questions from counsel for the Respondent. Her visceral dislike and animosity towards Oles and Diegel was visible for all to see. As such, I credit Nall and discredit Grace.

I believe that Grace did in fact refer to Oles as a "bitch" in the presence of Nall and a patient.[13] After watching and listening to Grace testify, it seems to me that her reference to Oles in that way would have been well within her character, capacity, and style, considering her extreme hostility towards Oles. She was certainly angry enough with Oles to have abandoned decorum, caution, and common sense, and to have used profanity in the presence of others when referring to Oles.

Nall's testimony is inherently plausible when considered in the context of Grace's hostility towards Oles. Further, her testimony is consistent when compared with the other credible evidence of record.[14] Accordingly, I find that Grace referred to Oles as a "bitch" on April 24.

Nall testified that on April 24 she had a conversation with Oles about whether she would accept employment with the Respondent as a full time dental assistant. According to Nall, she told Oles that she felt "uneasy at taking a position" with Oles, just because of the conversations that she had with Strickland about how "the office was so unhappy." She mentioned to Oles that Strickland had told her not to accept a job with the Respondent. Allegedly, Oles seemed shocked. During this same conversation, Nall informed Oles that Nancy Grace had referred to Oles as a "bitch" while in the presence of Nall and a patient when Grace came into Nall's operatory to get burrs and hand pieces.

Dr. Oles corroborated Nall's testimony that on April 24 Nall informed her that Sue Strickland had told Nall not to accept an employment position in her office. According to Oles, Nall indicated that Strickland had also said that Oles was "unfair to [her] employees" and "disrespected them." Further, Oles corroborated Nall's testimony that on the same date, Nall informed her that Nancy Grace had called Oles a "bitch" in the presence of a patient. According to Oles, Nall indicated to her that she was shocked at hearing Grace refer to Oles as a "bitch" in the presence of a patient.

Oles testified that after hearing from Nall what Grace and Strickland had said on April 24, she decided to consult with her attorney. After doing so, she was prepared to fire both employees. On Friday, April 25, a day the office was closed, Oles made her first attempts to call Strickland and Grace. She did not reach Strickland and so, on Sunday, April 27, she left a voice message on Strickland's phone advising her that she had been terminated. Oles testified that in this message she did not inform Strickland of the reasons for the discharge, and she did not subsequently so inform Strickland. Similarly, on the same date, Oles left a voice message on the home phone of Grace advising her that her employment had been terminated. She testified that in this message she did not advise Grace of the reasons for the discharge, and she did not thereafter so inform Grace.

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[13] Which specific patient heard the comment is not particularly relevant or probative.

[14] While testifying, Nall acknowledged making a mistake in her affidavit given to the Board during the investigation of this case, regarding the approximated time that Grace was present in her operatory and called Oles a "bitch" in the presence of a patient. I find this discrepancy between her testimony and her affidavit regarding the time of day to be of minor evidentiary value, and award it little weight in evaluating Nall's credibility.

When testifying under direct examination by counsel for the General Counsel,[15] Oles indicated that she had terminated Strickland because of the information that she had received from Nall, specifically that Strickland had recommended that Nall not accept employment with Oles. It was Oles' position that by discouraging Nall from accepting employment with the Respondent, that Strickland was threatening her dental practice by jeopardizing her ability to hire Nall, or potentially any other employees. Significantly, Oles also mentioned that Strickland had hurt her business not only by advising Nall not to accept her offer of employment, but also by telling Nall that Oles was "unfair and treated employees with disrespect." She characterized this conduct by Strickland as "trying to sabotage my business." Oles admitted that she never confronted Strickland with Nall's accusations, and did not conduct an investigation of the accusations, but merely accepted Nall's word of what was allegedly said by Strickland.

During counsel for the Respondent's direct examination of Oles in his case-in-chief, she added for the first time that she had also discharged Strickland because Strickland had inadequate organizational and technical skills. Apparently, by this comment Oles was referring to her contention that Strickland had difficulty preparing "temporary caps" for patients, and was forgetful in recording patient information and in supplying the operatories. She testified that in the seven months that Strickland was employed as a dental assistant, she had to warn Strickland a number of times regarding her deficiencies. According to Oles, the reason that Strickland failed to receive an increase in her compensation after her 90 day review, or thereafter, was because of her poor job performance.[16] Oles admitted during cross-examination from counsel for the General Counsel that earlier, she had testified that the "only" reason she fired Strickland was because of Strickland's efforts to discourage Nall from accepting employment with Oles. However, in reference to her change in testimony in which she added other alleged reasons for terminating Strickland, Oles said simply that she "changed [her] mind."

When testifying under direct examination from counsel for the General Counsel, Oles indicated that she had terminated Grace because of the information that she had received from Nall, specifically that Grace had referred to Oles as a "bitch" in the presence of Nall and a patient. Counsel for the General Counsel asked Oles whether the only reason she fired Grace was because Grace called her a "bitch," to which Oles responded, "Yes. That is cause enough." However, Oles also mentioned that she had previously issued two verbal warnings to Grace about offending patients, when patients had allegedly jumped out of their treatment chairs while Grace was treating them. Grace was told not to offend patients, and that they must be comfortable with her treating them. After the second incident, Oles allegedly told Grace to go home and get an "attitude adjustment," and to come back to work with a positive attitude to "treat the patients as decent human beings." In any event, Oles admitted that she never confronted Grace with Nall's accusations, and did not conduct an investigation of the accusations, but merely accepted Nall's word of what was allegedly said by Grace.

During counsel for the Respondent's direct examination of Grace in his case-in-chief, she added for the first time that she had also discharged Grace because of a combination of the "bitch" epithet, which was inappropriate, profane, and undermined her practice, and because of

[15] Counsel for the General Counsel initially called both Oles and Diegel as adverse party witnesses under Rule 611(c) of the Federal Rules of Evidence.

[16] Strickland admitted that she had difficulty making acceptable "temporaries," and testified that she had assumed that was the reason she had not received an increase in her pay after 90 days of employment.

Grace's unsatisfactory performance history. She mentioned that Grace was "sloppy about her work," insulted patients, made "rude, snide" remarks about them, and had a "rattlesnake type of personality." Oles admitted during cross-examination from counsel for the General Counsel that earlier, she had testified that the "only" reason she fired Grace was because of Grace's "bitch" comment. However, in reference to her change in testimony in which she added other alleged reasons for terminating Grace, Oles said simply that she "changed [her] mind.

It is the General Counsel's position that the Respondent discharged both Strickland and Grace because they engaged in protected concerted activity, specifically their involvement with drafting and signing the NOC letter. Counsel contends that the reasons originally alleged for the terminations, namely Strickland's and Grace's comments to Nall, were merely a pretext, and that the additional reasons subsequently added show a "shifting defense," which is patently and transparently false.

Following her notification of discharge on Sunday, April 27, Grace decided to visit the Respondent's office, which she did on Monday, April 28.[17] According to Grace, she returned to the office to get a copy of her timecard. Andrea Diegel showed Grace the timecard, after which there was some disagreement regarding Grace's recent hours of employment and how much money she was entitled to receive. Grace made a copy of her card and returned the original to Diegel. There was apparently at least one patient in the reception area near where Grace and Diegel were talking. From the testimony of both Diegel and Grace, it is clear that the atmosphere was heavily charged. According to Diegel, as Grace left, she said that Dr. Oles was "a fat, cow, blind, bitch." As she exited, Grace allegedly slammed the door. Diegel testified that she immediately apologized to the patient, and did so again later, after speaking with Oles about the incident and being told to do so. Grace testified that she had said no such thing about Oles in the presence of Diegel or a patient.

As I have noted in detail earlier in this decision, I found Grace not to be a credible witness. However, in my view, Diegel was also not a particularly credible witness. She was highly partisan, and when answering questions from counsel for the General Counsel, she obviously tried to avoid directly answering certain questions and instead would go off on a tangent of her own. She was a very evasive witness. Further, as will be discussed later in this decision, I found her denials of certain statements attributed to her by employees to be incredible for various reasons.

In any event, in resolving credibility between Diegel and Grace as to this particular incident, I find that I must credit Diegel. I believe that Grace did refer to Oles as "a fat, cow, blind, bitch," or words to that effect. As I mentioned earlier, Grace's visceral dislike and animosity towards Oles and Diegel was clearly visible through her testimony and demeanor for all to see. The words attributed to her by Diegel fit the pattern of profane language used by Grace and directed towards Oles, as established through Nall's testimony. Having found, for the reasons that I expressed above, that Grace on April 24, in the presence of Nall and a patient, referred to Oles as a "bitch," I find it reasonably probable that she again referred to Oles

[17] Over counsel for the General Counsel's objection, I admitted into evidence testimony regarding certain events that occurred on April 28, which was the day after Grace's termination. While I agree with counsel's assessment that these events, occurring post-discharge, are not likely relevant as to the issue of termination, they potentially related to post-discharge misconduct, which certainly might be relevant as to any remedy or compliance issues. Further, as these events occurred only one day after Grace was terminated, it seemed at least prudent to hear the evidence.

in a similar way only four days later, this time in the presence of Diegel and another patient. Grace was simply unable to control her extreme hostility towards Oles. Accordingly, I conclude that on April 28, Grace referred to Oles in the derogatory and profane way claimed by Diegel.

C. The Concerted Activity

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations… and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…." Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Electric Co.,* 335 NLRB 1037, 1038 (2001); *Meyers Industries,* 268 NLRB 493, 479 (1984).

In the matter before me, there is no doubt that the five signatories of the NOC letter, Barth, Williams, Benallie, Grace, and Strickland, were engaged in concerted activity. An employee is engaged in concerted activity if the activity is "engaged in with or on the authority of other employees and not solely on [the employee's] own behalf." *Triangle Electric Co., supra; Meyers Industries, supra.* All five employees testified that they collectively discussed the wages, hours, and working conditions of their employment with the Respondent. Specifically, they discussed their treatment by Oles, the stresses it created, their hours of employment, having to work late or without lunch or breaks, disputes involving time cards, wages, and the overall office atmosphere. In addition to these discussions, the employees collectively drafted a letter of grievance, which they entitled Notice of Claim (NOC), memorializing their concerns. See *Champion Home Builders Co.,* 343 NLRB 671, 680 (2004). Each of the five employees signed the letter, which was then delivered to Oles. See *East Buffet and Restaurant, Inc.*, 352 NLRB No. 116 (July 31, 2008).

The five employees, who comprised the Respondent's entire non-supervisory staff, were clearly engaged in concerted activity in its most obvious, basic form. However, what remains to be determined is whether the Respondent retaliated against them for exercising their right to engage in that protected activity.

III. Analysis and Conclusions

A. Unlawful Statements

In paragraphs 4(b) and (c) of the complaint, the General Counsel alleges that Andrea Diegel made certain unlawful statements to various employees. While the complaint mentions two dates, April 3 and 8, 2008, the evidence establishes that the conversations during which the General Counsel contends Diegel made unlawful statements actually all occurred on April 3. As noted earlier, the NOC letter was delivered to Oles on Thursday, April 3. The conversations in question all occurred shortly after Diegel and Oles read the NOC letter.

For the reasons that I expressed earlier in this decision, I do not find Diegel to be particularly credible. She was highly partisan, and when testifying tried to avoid directly answering questions from counsel for the General Counsel, was evasive, and often would go off on a tangent of her own. Further, the statements attributed to her by employee witnesses fit a pattern, showing her anger and hostility towards the employees who signed the NOC letter. Based on their testimony, she appeared to be overly emotional and quick to accuse and pass judgment on the others. As all five of the employees who signed the letter testified regarding

Diegel's oral conduct during which she allegedly made unlawful statements, I find their testimony credible. Their testimony is inherently plausible and consistent as they support each others statements. Accordingly, I accept their testimony as accurate concerning what Diegel is alleged to have said to them on April 3.

In determining whether a supervisor's questions to an employee about her union activities (or by analogy concerted activities) were coercive under the Act, the Board looks to the "totality of the circumstances." *Rossmore House,* 269 NLRB 1176 (1984), affd. *sub nom, HERE Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In *Westwood Health Care Center*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

Shortly after reading the NOC letter, Diegel asked Strickland and Benallie, "Do you always sign whatever's put in front of you? Who came up with this?" These questions constitute unlawful interrogation. The questions were directed to the employees by their immediate supervisor, in a hostile manner, in the Respondent's office, and immediately following their exercise of protected concerted activity. Not knowing what to say, Strickland indicated the truth, namely that Nancy Grace had "brought it to our attention." However, Strickland was obviously upset about having suggested to Diegel that Grace was the primary drafter of the NOC letter, and, so, within about 10 minutes she called Diegel to say that all the employees had signed the letter of their own "free will."

Also, on April 3, near closing time, Diegel addressed Nancy Grace, who was with Ann Williams, stating: "This is all [your] fault… [You] instigated this… [Have you] done this before?... [Are you] concerned over anybody else but [yourself]?... [Are you] concerned about Ann Williams and her financial obligations?" According to Grace, whose testimony I credit in this limited regard,[18] Diegel seemed "out of control." Here again, for the reasons that I just indicated, Diegel was engaging in the unlawful interrogation of Grace, and also Williams, who was present.

In addition, Diegel's questions also created the impression among the employees that their concerted activities were under surveillance by the Respondent. She seemed to know, and was certainly suggesting that Nancy Grace was the ring leader of the group. The test for whether an employer creates an unlawful impression of surveillance is whether, under the circumstances, an employee could reasonably conclude that her union activities (or by analogy concerted activities) are being monitored. *Mountaineer Steel Inc.,* 326 NLRB 787 (1998), enfd. 8 Fed. Appx. 180 (4th Cir. 2001). That would certainly be the impression that Diegel would be leaving with the employees concerning her knowledge of which employee was the leader of the effort to have their grievances addressed. The Board has held that under the Act "[e]mployees should not have to fear that 'members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.'" *Conley Trucking*, 349 NLRB No. 30 (2007), quoting *Fred'k Wallace & Son, Inc.,* 331 NLRB 914 (2000).

[18] I recognize that I have earlier declined to credit Grace's testimony as to another issue. However, the Board has long held that failure to credit part of a witness' testimony does not preclude crediting other parts of her testimony. *Service Employees International Union Local 1877, Division 87 (American Building Maintenance, et. al.),* 345 NLRB 161, fn. 3 (2005).

Further, because of Diegel's hostile demeanor when addressing Grace and Williams, described by Grace as being "out of control," and obvious animosity towards them, I conclude that the statements made by Diegel also constituted an unlawful threat of unspecified reprisals because the employees had engaged in concerted activity. The only reasonable conclusion that the employees could have gathered was that they were going to be punished in some way for their concerted activities in drafting and presenting the NOC letter.

Diegel was not yet finished making threats, as she called Jennifer Barth on the evening of April 3 and left a voice message for her. In that message, Diegel stated that she was "upset" that Barth had signed the letter, and had "not confided" in her before doing so. What reasonable conclusion could Barth reach, other than Diegel intended to take her disappointment and unhappiness with Barth out on Barth in some way. This was again an unlawful threat of unspecified reprisals because Barth had signed the NOC letter.

In considering communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). In any event, I believe that Diegel's remarks to employees on April 3 were clearly hostile and threatening, and the employees would reasonably have assumed that they were made because Diegel was upset with them for having presented Oles with the NOC letter.

Diegel's comments would have reasonably interfered with, restrained, and coerced the Respondent's employees in the exercise of their Section 7 rights. According, I find that the Respondent, through Diegel, violated Section 8(a)(1) of the Act on April 3 when she interrogated and threatened the employees, and created an impression among them that their concerted activities were under surveillance, all as alleged in paragraphs 4(b), (c), and 5 of the complaint.

B. More Onerous Working Conditions

It is alleged in complaint paragraph 4(d) that on April 8, 2008, the Respondent imposed more onerous working conditions on Nance Grace by separating her from other employees and placing her under closer supervision. Paragraphs 4(e)(1) and (2) allege that on April 9, the Respondent created an impression among its employees that their concerted activities were under surveillance, and also that employees were threatened by telling them more onerous working conditions were being imposed on them for having engaged in that concerted activity. These allegations center around Susan Oles' decision to move Grace from the back most operatory to the front most operatory. The General Counsel contends that this action was taken in retaliation for Grace's involvement with the NOC letter, while the Respondent contends it was merely an effort on Oles' part to reconfigure the office, and, thus, make it more efficient. The facts as to the move itself are, for the most part, uncontested.

One of the complaints from the signatory employees in the NOC letter was "the unnecessary long waits for patient treatment on Wednesday and Thursday [the days that Oles was in the office]. The patients are becoming angry over 15-30 minute waits for hygiene exams and because you're not in the office until 8:45-9:00am for your own patient's treatment." (G.C. Ex. 4.) During her testimony, Oles freely admitted that she runs perpetually late. Further, she testified that in an effort to address the complaint from the dental hygienists that the patients' unnecessarily wait for a dental exam, she decided to bring Grace from the back most operatory to the front most. The front operatory was unquestionably a little closer to the operatory from which Oles worked. According to Oles, this would allow her more timely access to the patients

in Grace's operatory, because she would know as soon as Grace finished cleaning their teeth, and, therefore, were ready for a dental exam. She would have more immediate access to the patients, thus, facilitating the process.

It is important to note that all five operatories are in very close proximity to each other and are for the most part interchangeable. They are all approximately the same size, and are separated from each other by partitions that do not rise all the way to the ceiling. Some sounds can be heard from one operatory to another. There are some minor differences, specifically that the operatories used by the hygienists are equipped with a device know as the Titan, which the hygienists use as a scaler to clean teeth. Also, the water flow to some of the devices is different, and, of course, the way in which the hygienists set up their individual work stations and position supplies is different, depending on their individual preferences.

Clearly, Grace did not want to move. However, it is unclear to the undersigned why she so strongly opposed the move. Although counsel for the General Counsel suggests that the move was ordered by Oles so that she could more closely observe Grace, that did not initially appear to be Grace's concern. In her letter of April 9 protesting the move, Grace acknowledged that from the operatory that "the dentist works out of [,] she can see either op[eratory] equally…." (G.C. Ex. 9.)

As was noted earlier, on April 8, near the end of the work day, Grace chose to ignore Diegel's order, as relayed from Oles, to move to the front most operatory. The following morning, Oles personally told Grace to move. Further, Oles testified that she told Grace that the move was being made to improve "patient flow… to do exams faster…and that way [Grace] would not be running behind." However, even if I fully credit Grace's testimony that Oles told her that she was being moved because, "it seems from the letter that I can't get to you on time to do exams, so I'm moving you where I can see you," I fail to see why Grace was so opposed to the move. After all, the employees complained in the NOC that Oles was not getting to the patients quickly enough. Oles was attempting to remedy that problem by placing the hygienist in an operatory where Oles would more easily be able to see when the hygienist had finished cleaning, and the patient was ready for an exam. Why was that a problem for Grace, especially when she acknowledged in her letter that Oles could see into either operatory?

Despite counsel for the General Counsel's contention that the move was some sort of big project, it appears that it was not. Grace, still refusing to move on April 9, had all her belongings and supplies essentially moved by Jennifer Barth on that same day. Within a week, the front operatory was equipped with the Titan and fully supplied for a hygienist. Further, Oles' testimony that the entire move cost her only about $100 went unrebutted by any probative, credible evidence. Finally, there was apparently no disruption of patient care, despite the alleged inconvenience to Grace.

I do not see Grace's move to the front operatory as "onerous." She was not "separate[ed] from other employees" as the complaint alleges. All the operatories are in very close proximity. The dentist, assistant, and hygienist are working in a very small area, with the dentist and hygienist separated at most by partitions that do not go from floor to ceiling, and do not prevent sounds from being heard outside the operatory from which they emanated. By Grace's own admission, Oles could observe her from whichever operatory Grace worked. There was no credible, probative evidence that Oles wanted Grace moved so that Oles could more closely observe Grace's protected concerted activity. To the contrary, the evidence points to Oles wanting Grace moved in order to remedy one of the employee complaints by improving the flow of the patient care, thereby reducing the waiting time.

Oles' efforts to reconfigure the office by moving Grace from the back to the front operatory were supported by a reasonable business justification. Oles' interest in reconfiguring the office to provide her with more immediate access to the patients having just undergone hygienist treatments and waiting for their dental exams was understandable in view of one of the complaints contained in the NOC letter. Further, I do not view the move as having imposed more onerous working conditions on Grace. See *Angelica Healthcare Services Group, Inc.,* 284 NLRB 844, 850 (1987) (moving an employee's work station a short distance where she will continue to do the same work). It is unreasonable to suggest that merely because Grace has been moved a very short distance, and because it took a week for the operatory to be fully equipped for hygienist use, that the change in her operatory was in some way "onerous." She was not "separate[ed] from other employees" as the complaint alleges. Also, while the move may have placed Grace a matter of feet closer to Oles' operatory, it is simply hyperbole to suggest that within the confines of this small office that Grace was now "under closer supervision."

The credible evidence does not establish that Oles made the change in Grace's operatory for the purpose of retaliating against her because she was involved in the preparation and presentation of the NOC letter, nor does it establish that Oles' intention was to place Grace under closer supervision in an effort to restrict her future protected concerted activity. The evidence shows that Oles was merely trying to improve the quality of patient care in her office, with which endeavor Grace was apparently not interested in cooperating.

Accordingly, as I have concluded that Oles' action in changing Grace's operatory was unrelated to her protected concerted activity, it was not a violation of the Act. Therefore, I shall recommend that complaint paragraph 4(d) be dismissed.

Concomitantly, as complaint paragraphs 4(e)(1) and (2) are apparently linked to the General Counsel's allegation concerning the alleged onerous working conditions, and as counsel for the General Counsel offered no independent evidence to support these allegations, I shall recommend their dismissal as well.

C. The Discharge of Grace and Strickland

As noted in detail earlier in this decision, on April 27, Oles left a message on Grace's voice mail terminating her. For the reasons that I expressed above, I credited April Nall and discredited Grace, concluding that Grace did in fact refer to Oles as a "bitch" on April 24 in the presence of Nall and a patient, and that Nall so informed Oles on the same date. It is the Respondent's position that Grace was fired because of that profane reference to Oles, as well as two previous verbal warnings issued to Grace for offending patients. Of course, the General Counsel contends that Grace was terminated because of her protected concerted activity in preparing the NOC letter. Therefore, it is obviously necessary for me to determine the Respondent's motivation in discharging Grace.

In *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivation factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have

taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.,* 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a prima facie showing that Nancy Grace's protected concerted activity was a motivating factor in the Respondent's decision to terminate her. In *Tracker Marine, L.L.C.,* 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the judge held that the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act.[19] To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, Inc.,* 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991).

As I have already found, by preparing, drafting, and signing the NOC letter, and by discussing work related complaints with fellow employees, there is no doubt that Grace was engaged in protected concerted activity. Of course, there is also no doubt that the Respondent was aware of that activity. The NOC letter was delivered to Oles on April 3, and she responded to it by letter dated April 16. Also, in conversations with employees, Diegel made numerous references to Grace, essentially accusing her of being the ring leader of the complaining employees. As Grace was discharged on April 24, there is no question that she suffered an adverse employment action.

Further, I believe that there was a clear link or nexus between Grace's involvement with the NOC letter and her subsequent termination. To begin with, as I have already found, immediately following the delivery of the NOC letter to Oles on April 3, Diegel made statements to Grace and other employees, which indicated her belief that Grace was the leader in the effort to confront Oles with the employees' complaints. I have found that these statements by Diegel violated Section 8(a)(1) of the Act, as constituting the unlawful interrogation of employees, creating an unlawful impression of surveillance among the employees, and threatening employees with unspecified reprisals. Diegel was credibly described as being "out of control," and her animus towards Grace and the other signatory employees because of their concerted activity was obvious to all the employees.

Also, I find it very significant and probative that Dr. Berkley credibly testified that in a telephone conversation with Oles "about a week or so" after she received the NOC letter, that Oles told him that she was replacing a number of the employees that he normally worked with. He recalled that she including Benallie, Strickland, and maybe Grace, and that she indicated that she was replacing them because of the NOC letter. Oles told Berkley that "she was very

[19] Recently, the Board has indicated that "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.,* 352 NLRB No. 103, fn. 5 (2008), citing *Gelita USA Inc*., 352 NLRB No 59 fn. 2 (2008); *SFO Good-Nite Inn, LLC*, 352 NLRB No. 42 slip op at 2 (2008).

upset with the letter…that it was hurtful to her… that she was very affronted by it…, and that she was totally taken aback and upset about it."

Of course, the timing of Oles' discharge of Grace is also suspect, coming only three weeks after the delivery of the NOC letter. While Oles initially testified that Grace was fired only because of her use of the pejorative "bitch" when referencing her in the presence of Nall and a patient, she later changed her testimony to say the Grace's poor work history also played a part in the termination decision. While it may be true that Oles had previously counseled Grace on several occasions about disrespecting patients, it does not appear that such past conduct was considered by Oles prior to discharging Grace. I give such a "shifting defense" little weight in deciding Oles' true motivation. Oles testified that she was very upset by Grace's reference to her as a "bitch," and I have no doubt that she was quite upset. However, the added reason for which she allegedly fired Grace, because of her poor work history, was, in my opinion, nothing more than a pretext.

Based on all the above, I believe that the General Counsel has met his burden of establishing that the Respondent's action in terminating Nancy Grace was motivated, at least in part, by Oles' animus towards Grace because of her protected concerted activity. The burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community,* 330 NLRB 1100 (2000); *Regal Recycling, Inc.,* 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company, Inc.,* 310 NLRB 865, 871 (1993). I am of the view that the Respondent has met this burden.

For the reasons that I previously gave, I credited Nall and discredited Grace, and found that on April 24, in the presence of a patient and Nall, Grace referred to Oles as a "bitch." Further, I believe that this profane and offensive conduct on the part of Grace was so egregious as to have resulted in her termination, even in the total absence of Grace's protected concerted activities. As counsel for the Respondent points out in his post-hearing brief, the Board has repeatedly condemned the sort of abusive epithet used by Grace. See *Aluminum Co. of America,* 338 NLRB 20, 21-22 (2002) (employee lost the protection of the Act due to the severity of the profane outburst).

Further, where medical facilities are involved, such as Oles' dental office, there is a greater expectation that employees will use civil language and conduct themselves with a respectful demeanor. In *Diagnostic Center Hospital Corp.,* 228 NLRB 1215 (1971), the Board dismissed a complaint alleging the discharge of a union supporter, because the discharge was the result of her use of obscenity directed towards a supervisor in a medical facility, when a patient was present. The judge said that the employee's words "were a breach of the atmosphere of tranquility owed to hospital patients by [r]espondent's employees." In that regard, the judge also stated that, "[A] hospital is not the equivalent of a terminal, factory or warehouse." *Id.* at 1227.

Even in cases, unlike the one before me, where the epithet is directed to a supervisor in the immediate context of ongoing protected concerted activity, the Board has held certain profane language need not be tolerated. See *Cellco Partnership,* 349 NLRB 640 (2007) (employee lost the Act's protection when referring to her supervisor as a "bitch," even though epithet used while directly engaged in efforts on behalf of the union); *Canandaigua Plastics,* 285 NLRB 278 (1987) (union supporter properly discharged for calling fellow employee a "bitch" and a "crybaby" during an organizing campaign).

Upon learning from Nall that Grace had referred to Oles as a "bitch" in the presence of Nall and a patient, Oles was understandably extremely upset. Such language certainly has no place in a dental office in the presence of patients who have come to the office seeking medical treatment. At the time that the epithet was used, Grace and Nall were working. They were not engaged in protected concerted activity, and even if they had been, there was simply no justification for Grace's profane language. Oles indicated that she considered such conduct egregious, and in my view she had the right to feel this way.

Grace's reference to Oles as a "bitch" was not protected by the Act. While I continue to believe that Grace's concerted activity in preparing and signing the NOC letter and by discussing work related complaints with the other employees may well have been a motivating factor, I also believe that Oles would have fired Grace upon learning of her use of profanity directed towards Oles while in the presence of others, even if Grace had not engaged in any protected concerted activity. Accordingly, the Respondent has met its burden and rebutted the General Counsel's prima facie case.

Therefore, I shall recommend that complaint paragraph 4(h) be dismissed.

Regarding Susan Strickland, as noted earlier in this decision, on April 27 Oles left a message on Strickland's voice mail, terminating her. For the reasons that I expressed above, I found both Strickland and April Nall reasonably credible and concluded that they had a series of conversations at the Respondent's office on April 23 and 24 during which Strickland advised Nall a number of times not to accept full time employment with Oles. Further, Strickland informed Nall that there were problems in the office regarding wages and vacation pay, that the employees had written a letter of complaint to Oles, and that a former employee, Cindy Benallie, had quit over not receiving her vacation pay.

It is the Respondent's position that Strickland was fired because she tried to prevent Oles from hiring Nall as a full time employee and also because of Strickland's allegedly poor organizational and technical skills. Of course, the General Counsel contends that Strickland was terminated because of her protected concerted activity in preparing and presenting the NOC letter. Therefore, it is obviously necessary for me to determine the Respondent's motivation in discharging Strickland.

Using the framework established in *Wright Line, supra*, and its progeny, the General Counsel has been able to establish that Strickland was engaged in an activity protected by the Act. As repeatedly noted above, Strickland was involved in discussions with fellow employees regarding their wages, hours, and working conditions, which discussions resulted in the NOC letter, signed by Strickland and the other employees, and subsequently presented to Oles. Further, there is no question that Oles was aware of this protected activity as she received a copy of the NOC letter on April 3 and responded to it with a letter of her own dated April 16. Also, immediately following the delivery of the NOC letter, Diegel had several conversations with Strickland and other employees about their involvement with the letter.

Obviously, Strickland's discharge constitutes an adverse employment action. Its timing was suspicious, having occurred only three weeks following Oles' receipt of the NOC. Further, the Respondent displayed significant animus towards the signatory employees, including Strickland. Earlier, I found that Diegel's immediate response to learning of the NOC letter was to violate Section 8(a)(1) of the Act by unlawfully interrogating employees, creating an impression of surveillance among them, and threatening them with unspecified reprisals. Diegel

was credibly described as being "out of control," and her animus towards Strickland and the other signatory employees because of their concerted activities was obvious to all the employees.

Further, as I said earlier, Dr. Berkley's testimony was credible, significant, and probative. He had a telephone conversation with Oles after she received the NOC letter, during which she named Strickland as one of the employees that she was going to replace because of their involvement with the letter. Oles made it very clear to Berkley how "upset" she was with the letter, having been "affronted" by it, finding it "hurtful," and being "taken aback" by it. This is the most obvious evidence of a link or nexus between the letter and Strickland's termination.

It is important to note that when first testifying under examination by counsel for the General Counsel, Oles indicated that she had terminated Strickland solely because of the information that she had received from Nall, specifically that Strickland had recommended that Nall not accept employment with Oles. It was Oles' position that by discouraging Nall from accepting employment with the Respondent, that Strickland was threatening her dental practice by jeopardizing her ability to hire Nall, or potentially any other employees. Significantly, Oles also mentioned that Strickland had hurt her business not only by advising Nall not to accept her offer of employment, but also by telling Nall that Oles was "unfair" and treated employees with "disrespect." She characterized this conduct by Strickland as "tying to sabotage my business."

However, during her subsequent direct examination by counsel for the Respondent, Oles changed her testimony and testified for the first time that she decided to terminate Strickland not only because of what Nall had told her, but also because Strickland was forgetful in recording patient information, in supplying the operatories, and because she had difficulty preparing "temporary caps" for patients. Allegedly, in the seven months that Strickland was employed as a dental assistant, Oles had to warn Strickland a number of times regarding her organizational and technical deficiencies, which had resulted in Strickland's failure to receive a raise.

When asked by counsel for the General Counsel why the discrepancy in her testimony between her examination by him and her examination by Respondent's counsel, Oles said simply that she "changed [her] mind." However, while I have no doubt that Oles was very upset about what Nall told her that Strickland had said, I believe that the added reasons for which she allegedly fired Strickland, because of Strickland's organizational and technical deficiencies, were nothing more than a pretext.

In my view, the General Counsel has established by a preponderance of the evidence that Strickland was engaged in protected activity, that Oles was aware of that activity, that the Respondent exhibited significant animus towards Strickland because of her protected activity, that Strickland was subsequently fired, and that there was a link or nexus between her discharge and her protected activity. Accordingly, I conclude that the General Counsel has made a prima facie showing that Strickland's protected concerted activity was a motivating factor in the Respondent's decision to terminate her. *Tracker Marine, supra.* To rebut this presumption that Strickland's discharge constituted a violation of the Act, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, supra; Farmer Bros., supra.*

Counsel for the Respondent argues in his post-hearing brief that "[d]issuading and discouraging employees from working is intolerable." He contends that Strickland's conduct on April 24 jeopardized Oles' ability to hire Nall and threatened Oles' practice. Further, he argues that the Board repeatedly has held that quitting or urging coworkers to quit, as opposed for

example to striking, is not protected conduct even if it is motivated by opposition to the employer's employment practices. Counsel then proceeds to site a number of Board cases that he contends stand for that proposition. However, I am of the view that the situation before me is different and the cases counsel sites are distinguishable from the issue at hand.

Strickland was not trying to get existing employees to quit the Respondent's employ. Rather, she was advising a prospective employee, Nall, to be very cautions about accepting full time employment with the Respondent.[20] Further, she was advising Nall about certain employment conditions in the office, specifically that employees had recently written a letter of complaint to Oles, that Cindy Benallie had quit over Oles' failure to give her vacation pay, that there was a problem in the office with salary, raises and vacations, and Strickland's contention that she was not being paid her correct salary, consistent with her experience and time in the office. Reasonably, it did likely appear to Nall that Strickland was advising her not to accept the job, and that was what she told Oles.

Oles acknowledged that Nall told her that Strickland had advised Nall not to accept employment with the Respondent. However, she added that Nall also told her that Strickland had said that Oles was "unfair to [her] employees," and "disrespected them." This obviously upset Oles greatly.

I agree with counsel for the General Counsel's argument in his post-hearing brief that the conversations between Strickland and Nall, a prospective employee, constituted "classic, protected concerted activity." It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that communications between employees "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit Systems,* 337 NLRB 510 (2002), citing *Container Corporation of America,* 244 NLRB 318, 322 (1979).

As counsel for the General Counsel argues in his brief, the topics raised by Strickland in her conversations with Nall were the very "essence" of protected concerted activity. Strickland was concerned about the treatment of the employees by Oles, and she sought to alert Nall, a prospective employee, to her concerns by describing for Nall some of the recent employment issues raised in the employees' letter of complaint. Although the consequences of receiving such information might have been a decision by Nall declining to accept Oles' offer of employment, that does not diminish the protected nature of those communications.

The Respondent must persuade by a preponderance of the evidence that it would have discharged Strickland even in the absence of her protected concerted activity surrounding the NOC letter. *Peter Vitalie Company, supra.* The Respondent has failed to meet this burden.

From the evidence previously discussed, it is clear that Oles was very upset about the complaints made by her employees in the NOC letter. She was apparently equally, or even more, upset about the things that Strickland said to Nall, which included Strickland saying Oles was "unfair to [her] employees," and "disrespected them." Oles' claim that she discharged Strickland in part because of the things that Strickland told Nall on April 24, which conversation itself constituted protected activity, obviously does not help to support the contention that she would have fired Strickland even had she never been involved with the NOC letter. Whether

[20] At the time Nall was a temporary employee participating in a "working interview."

Oles fired Strickland because of her involvement with the NOC letter or because of her conversations with Nall, either would be a violation of the Act, as both constituted protected concerted activity.

Accordingly, the Respondent has failed to rebut the General Counsel's prima facie case by any standard of evidence. As I noted above, the contention that Strickland was fired in part because of her poor organizational and technical skills was nothing more than a pretext. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because Strickland engaged in protected concerted activity. *Williams Contracting, Inc.,* 309 NLRB 433 fn. 2 (1992); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd., 705 F.2d 799 (6th Cir. 1982); and *Shattuck Denn Mining Corp. v. NLRB* 326 F. 2d 466, 470 (9th Cir. 1966).

I, therefore, find that the Respondent has violated Section 8(a)(1) of the Act by discharging Sue Strickland on April 27, 2008, as alleged in complaint paragraphs 4(g),(i), and 5.

D. The Denial of Vacation Pay

It is alleged in complaint paragraph 4(f) that on about April 16, the Respondent denied accrued paid leave to Cindy Benallie. As noted earlier, I concluded that Benallie was not a supervisor as defined in the Act. Despite her title as the "back office manager," she was primarily a dental assistant with no supervisory authority. The parties disagree strongly over what constituted the Respondent's vacation policy, which dispute is discussed in detail earlier in this decision.

Dr Oles has always provided paid vacation benefits for her employees. Depending upon their length of service with Oles, employees earn between one and three weeks of vacation a year. Under the Respondent's original vacation policy, an employee was free to use her full benefit at any time during the calendar year, as long as it was fully accrued at the time the vacation was taken. For example, as a long term employee, Cindy Benallie was entitled to three weeks of paid vacation a year, which, if fully accrued, could be taken at any time during the calendar year.

Oles and Diegel testified that because of the abuse of the original policy by a former employee, Oles announced at a staff meeting in mid-2007 that the office vacation policy would be revised to limit the amount of accrued vacation available to use early in a calendar year. According to Oles and Diegel, the revised vacation policy was effective in January 2008. Under the revised policy, each employee would have accrued and available to use one third of her annual vacation in each of three trimesters, which would cover the calendar year. Diegel prepared a chart to track the accrual and use of paid vacation by each employee. (Res. Ex. 1.)

The problem with this alleged change in the vacation policy was that the five signatory employees all testified, more or less, that they were never informed about a new vacation policy during any staff meeting, and all understood simply that employees earned between one and three weeks of vacation pay a year, depending on length of service, which, after accrual, could be used at any time during the calendar year. There is no way to resolve this dispute without a credibility determination. For the reasons that I expressed earlier, I determined that Diegel was not a credible witness.

I find Oles also to be a less than credible witness. Her testimony was filled with self serving statements. It was clear that she saw herself as a victim in some grand conspiracy by her employees to harm her dental practice. From her testimony and that of Dr. Berkley it was obvious that she was very personally offended by the NOC letter. Her written response of

April 16 was quite defensive, and she reminded her employees in that letter that, "you are free to leave at any time." (G.C. Ex. 5.) While it would be natural for someone in Oles' position to testify in a partisan way, I found her testimony unreasonably emotional. On several occasions during her testimony, she began to cry, and the hearing needed to be paused so that Oles could compose herself. Frankly, I did not believe that these were genuine manifestations of emotion. Rather, I thought that Oles was engaging in histrionics and theatrics in an effort to appear more sympathetic and influence the outcome to the hearing.

Regarding the Respondent's vacation policy, I found the collective testimony of the five employees much more credible than that of Oles and Diegel. For the most part, the testimony of the five employees supported each other. Further, it should be noted that when Ann Williams testified, she was still employed by the Respondent. As an active employee of the Respondent, Williams' willingness to testify in contradiction to her employer's supervisors, Oles and Diegel, impressed me with her veracity. On this matter, the testimony of the five employees was consistent and had the "ring of authenticity" to it. Therefore, in reference to the issue of vacation pay, when their testimony was in conflict, I credited the employees over Diegel and Oles.

If the Respondent changed its vacation policy, none of the employees were aware of the change. All five employees assumed the policy remained the same, and they took actions consistent with that belief. Perhaps the Respondent did intend to change the policy at some time, and perhaps there were conversations to that effect between Diegel and Oles, but a new policy that employees are totally unaware of is no policy at all. Rather, it appears to me that the Respondent simply denied Benallie her vacation pay because Oles and Diegel were unhappy with Benallie's involvement with the NOC letter.

Benallie testified that in March of 2008 she had requested 50 hours of paid leave for a vacation scheduled to be taken the following month. She alleges that the hours were approved by Diegel. However, Diegel denies approving any more than one hour of paid vacation, as that was all that Benallie had allegedly accrued by the start of her vacation. On April 17, she returned from vacation and went into the office to pick up her paycheck. Instead of being paid for the 50 hours of vacation pay that she had requested, Oles informed Benallie that she would receive only the one hour that she had accrued. At their meeting, Oles supported Diegel's contention that Benallie was aware of the new policy and Diegel's denial that she had approved 50 hours of vacation pay. Benallie argued that as a long term employee, it was her understanding that the policy that had been in effect when she was hired remained in effect for her. In any event, when she finally understood that Oles had no intention of paying her for 49 of the 50 hours of vacation pay that she had requested, Benallie left the office indicating that she was unlikely to return.

As noted, I credit Benallie. I believe that the Respondent denied her vacation pay because of her protected concerted activity. Benallie had been involved with the other employees in the preparation of the NOC letter, which involvement was well known to the Respondent. The Respondent's animus towards the employees because of their concerted activity was clearly established through Diegel's unlawful remarks made shortly after the delivery of the NOC letter. Also, the denial of Benallie's vacation pay on April 17 occurred a mere two weeks following the receipt of the NOC letter by Oles.

In any event, the strongest evidence of the Respondent's unlawful denial of vacation benefits was the testimony of Jennifer Barth. As noted earlier, Barth, a signer of the NOC letter, voluntarily quit her job with the Respondent in order to pursue other employment opportunities. On April 27, several days after she had quit her job, Barth returned to the Respondent's office to return some keys. According to Barth, Diegel approached her and said that, "both Nancy

[Grace] and Sue [Strickland] had been fired over the weekend, and that if we had not signed the letter, Cindy would've been paid her vacation." When she testified, Barth no longer worked for Oles, was not a named discriminatee, had no pecuniary interest in the case, and there was no reason for her to be untruthful. She testified in a simple, straight forward, unemotional way, and I believe her testimony.

I conclude that there was no "new" vacation pay policy. Benallie and the other employees were aware of only the original policy, under which Benallie was entitled to 50 hours of vacation pay. On April 17, she was denied all but one of those hours because the Respondent was retaliating against her due to her protected concerted activity. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 4(f),(i), and (5).

Ann Williams' situation was similar.[21] She testified that she had made plans a year in advance and was told June 25, the day before she was to leave, that her vacation pay was not going to be approved. According to Williams, Oles informed her that she had not accrued enough vacation time for the entire period for which she sought to be paid. Oles explained the new formula to her, but Williams responded that she was "totally unaware of it," and that she had "never seen it" before. Further, she informed Oles that she had assumed the policy in effect at the time that she was hired had continued in effect. In any event, she was not paid for the entire period that she had requested.

As noted above, I credit Williams. The fact that she testified against the interest of the Respondent, for whom she still worked, made her all the more credible. I believe that the Respondent denied her vacation pay because of her protected concerted activity. Williams had been involved with the other employees in the preparation of the NOC letter, which involvement was well known to the Respondent. The Respondent's animus towards the employees was clearly established through Diegel's unlawful remarks made shortly after the delivery of the NOC letter.

As I have said, there was no "new" vacation pay policy. Williams and the other employees were aware of only the original policy, under which Williams was entitled to the hours of vacation pay that she requested. On June 25, she was denied some of her requested hours because the Respondent was retaliating against her due to her protected concerted activity. Accordingly, I find that this action by the Respondent violated Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent, Susan Oles, an Individual, d/b/a Susan Oles, DMD, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Interrogating its employees regarding their concerted activities and the concerted activities of other employees;

(b) Threatening its employees with unspecified reprisals because they engaged in concerted activities;

[21] During the hearing, Williams' charge in case 28-CA-22095, alleging an unlawful denial of her vacation benefits, was consolidated with case 28-CA-21951 for trial. (G.C. 2.)

(c) Creating an impression among its employees that their concerted activities were under surveillance;

(d) Denying paid leave/vacation to its employees Cindy Benallie and Ann Williams because they engaged in concerted activities; and

(e) Discharging its employee Susan Strickland because she engaged in concerted activities.

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

4. The Respondent has not violated the Act except as set forth above.

Remedy

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

The Respondent having discriminatorily discharged its employee Susan Strickland, my recommended order requires the Respondent to offer her immediate reinstatement to her former position, displacing if necessary any replacement, or if her position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges. My recommended order further requires the Respondent to make Strickland whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her discharge to the date the Respondent makes a proper offer of reinstatement to her, less any net interim earnings as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[22]

The recommended order further requires the Respondent to expunge from its records any reference to the discharge of Susan Strickland, and to provide her with written notice of such expunction, and inform her that the unlawful conduct will not be used as a basis for further personnel actions against her. *Sterling Sugars, Inc*., 261 NLRB 472 (1982). Further, the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against Strickland in any other way.

Further, the Respondent having discriminatorily denied paid leave/vacation to its employees Cindy Benallie and Ann Williams, my recommended order requires the Respondent to make them whole for those losses in earnings, plus interest as computed in *New Horizons*.

[22] In his post-hearing brief, counsel for the General Counsel requests that simple interest on backpay and other monetary awards be replaced by compounding interest on a quarterly basis. However, the Board has repeatedly declined to deviate from its current practice of assessing simple interest. See *Morse Operations, Inc., d/b/a Sawgrass Auto Mall,* 353 NLRB No. 40 fn. 3 (2008), citing to *Carpenters Local 687 (Convention & Show Services),* 352 NLRB No. 119 fn. 2 (2008). Accordingly, I deny the General Counsel's request.

Finally, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Susan Oles, an Individual, d/b/a Susan Oles, DMD, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Interrogating its employees about their concerted activities and the concerted activities of other employees;

(b) Threatening its employees with unspecified reprisals because they engaged in concerted activities;

(c) Creating an impression among its employees that their concerted activities were under surveillance;

(d) Discharging, denying paid leave/vacation to, or otherwise discriminating against any of its employees because they engaged in concerted activities; and

(e) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to 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 Susan Strickland full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed;

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

(c) Make Cindy Benallie and Ann Williams whole for any loss of earnings and other benefits for the failure to award them paid leave/vacation as a result of the discrimination against them, in the manner set forth in the remedy section of this decision;

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Susan Strickland, and inform her in writing that this has been done, and that her unlawful discharge will not be used against her as the basis of any

[23] 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.

future personnel actions, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her;

(e) 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 and other earnings and benefits due under the terms of this Order;

(f) Within 14 days after service by the Region, post at its office in Phoenix, Arizona, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the office 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 April 3, 2008; and

(g) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C., December 1, 2008.

Gregory Z. Meyerson
Administrative Law Judge

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

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT coercively question you regarding your activities with fellow employees taken in an effort to collectively improve your wages, hours, and working conditions.

WE WILL NOT threaten you with reprisals because you have taken action with fellow employees in an effort to collectively improve your wages, hours, and working conditions.

WE WILL NOT make it appear to you that we are watching to see whether you are involved in efforts with fellow employees to collectively improve your wages, hours, and working conditions.

WE WILL NOT deny you paid leave/vacation because you have been involved in activities with fellow employees taken in an effort to collectively improve your wages, hours, and working conditions.

WE WILL NOT discharge or otherwise discipline you because you have been involved in activities with fellow employees taken in an effort to collectively improve your wages, hours, and working conditions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights guaranteed you by Federal labor law.

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

WE WILL make Susan Strickland whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all reference to the unlawful discharge of Susan Strickland, and notify her in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against her, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her.

WE WILL make Cindy Benallie and Ann Williams whole for any loss of earnings and other benefits, plus interest, resulting from our unlawful denial of paid leave/vacation to them.

SUSAN OLES, an Individual,
d/b/a SUSAN OLES, DMD

(Employer)

Dated _____ By _____

(Representative) (Title)

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

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.