David Van Os and Associates, PC *and* Mary Louise Davila *and* Oralia Castillo *and* Mary Ann Ybarra *and* Kandace Kay Konrad, *and* Nicole Betters. Cases 28–CA–16723, 28–CA–16732–1, 28–CA–16732–2, 28–CA–16732–3, and 28–CA–16786

March 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LEIBMAN AND SCHAUMBER

On May 7, 2002, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel and Charging Party Nicole Betters each filed exceptions and a supporting brief, and the Respondent filed briefs answering their exceptions. The General Counsel also filed a brief in reply to the Respondent's answering brief.[1]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as clarified below, and to adopt the recommended Order.

The Respondent is a law firm representing unions, and is located in San Antonio, Texas. David Van Os (Van Os) is the owner of the firm, and the chief attorney in the firm. In fact, for most of the relevant time in this case, he was the firm's only licensed attorney.

The General Counsel alleged that the Respondent committed multiple violations of the Act in response to its employees' protected, concerted activities, including activities related to their desire for union representation. The judge dismissed the complaint in its entirety. We adopt the judge's decision consistent with the following observations.

I. THE DISCRIMINATION ALLEGATIONS

The judge dismissed, among other things, eight allegations of unlawful discrimination. These involved the discharges of Mary Ann Ybarra, Lorraine Perez, Mary Louise Davila, and Kandace Konrad; the allegedly constructive discharges of Oralia Castillo, Nicole Betters, and Denise Mejia; and allegedly unlawful changes in working conditions designed to discourage union activity. Although it was applicable to each allegation, the judge failed to use the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).[3]

We have reviewed the judge's determinations in light of the appropriate standard, and we conclude that, even assuming that the General Counsel had satisfied his initial evidentiary burden in each instance, the Respondent effectively rebutted it by establishing that its conduct would have been the same in the absence of the employees' protected conduct. Thus, we agree with the judge that, as detailed in his decision, employees Ybarra, Perez, Davila, and Konrad were lawfully discharged for poor work performance; employees Castillo, Betters, and Mejia left their employment voluntarily; and no significant changes in working conditions were made. Accordingly, we adopt the judge's dismissals.

II. THE ALLEGED THREATS TO CLOSE THE LAW FIRM

The judge found that the Respondent did not unlawfully threaten to close the law firm in response to an employee spokesperson's demand for union representation at all work-related discussions between employees and management. The judge also found that, although the

[1] The General Counsel moved to strike the Respondent's brief answering the General Counsel's exceptions, arguing that the brief includes material that is neither responsive to the exceptions nor based on any exceptions filed by the Respondent. In reaching our decision, we did not consider any matters in the Respondent's brief unrelated to the General Counsel's exceptions. Accordingly, it is unnecessary to pass on the General Counsel's motion. See, e.g., *Grass Valley Grocery Outlet*, 332 NLRB 1449 fn. 1 (2000).

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

Some of the General Counsel's exceptions imply, and Charging Party Betters' exceptions explicitly argue, that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

In addition, Charging Party Betters contends that the judge made off-the-record remarks that demonstrated bias and prejudice. However, the Charging Party did not object on the record at any time after the alleged comments were made. She also did not comply with Sec. 102.37 of the Board's Rules and Regulations by moving that the judge disqualify himself before the filing of a decision. Instead, she raised this matter for the first time after the judge issued a decision adverse to her interests. Accordingly, we reject her contentions as untimely. See, e.g., *Defiance Hospital*, 330 NLRB 492 (2000).

[3] As the Board stated in *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004):

> To prove a violation of Section 8(a)(3) and (1) under our decision in *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes a showing of discriminatory motivation by proving the employee's prounion activity, employer knowledge of the prounion activity, and animus against the employee's protected conduct, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* supra at 1089. [Footnote citations omitted.]

Respondent may have made an unlawful closure threat in response to the spokesperson's stated intent to represent the employees vigorously, the Respondent implicitly disavowed the threat by offering a solution that would keep the firm open.

We adopt the judge's dismissal of these allegations for the following reasons.[4]

A. Relevant Facts

At a meeting on May 26, 2000,[5] Van Os agreed to recognize a union as the representative of his employees. Nicole Betters, an associate at the firm, was the employees' spokesperson at the meeting. Later that day, Van Os met with two of his clerical employees, Mary Louise Davila and Kandace Konrad, concerning the mis-scheduling of an arbitration hearing with which they were involved. The judge found that this meeting was not part of an investigation that might lead to discipline. That night, Betters left a voice-mail message for Van Os regarding his meeting with Davila and Konrad. The message stated that she had heard about his meeting with Davila and Konrad, and that in the future he should refrain from meeting with employees on any work-related matters unless a union representative was present. Betters also stated in her message that she intended to instruct the employees not to talk with Van Os in the absence of a union representative.

Van Os responded the same day with voice mails of his own, angrily explaining his view of the limits of the *Weingarten* doctrine,[6] and rejecting Betters' position. Van Os elaborated on these voice-mail messages in an e-mail the next day, May 27. In this message, which was addressed to Betters and the other employees, Van Os again explained his view of the *Weingarten* doctrine in detail, and made it clear that any employee who refused to discuss work matters with him in a nondisciplinary context would be terminated for insubordination. However, he also expressed his faith in the collective-bargaining process and an eagerness to begin negotiations, and he offered to meet to negotiate on nights and weekends. He added that the process "can turn sour if people decide they want war instead of progress or if they want destructivity instead of constructiveness," and he used Betters' union representation requirement as an example of a destructive approach. He further pointed out that he was "swamped" with work, that the interests of the firm's clients were his first priority, and that he did not have the time to devote to an unnecessarily antagonistic bargaining relationship.

Betters responded the same day by e-mail, explaining her voice mail from the night before. Van Os replied later that day, addressing his e-mail only to Betters. He referred again to his workload difficulties, and to the practical problems that Betters' union representation demand would cause. He made clear that her intention to instruct employees not to talk to him about work matters was the critical factor in their disagreement. He said:

> My elation vanished when I heard your message last night. To me it was like a declaration of war. You clearly told me that the union was going to hassle me a lot about day to day talking with the employees. Do you frigging understand how swamped I am? If I were to have to slow down to arrange union representation just to have routine work assignment and work status discussions with employees I would be unable to operate. I just can't put it any clearer. But even so I feel I am understating the severity of the issue. I would literally be unable to operate. I would have no choice but to give this practice up, prepare a resume, put this building up for sale, go out and market myself and apply for jobs.

At the same time, he indicated that he was happy about the employees' choice to unionize, and he said that he would fully comply with all the labor laws. He ended the message by assuring Betters that her job was safe, and that there would be no reprisals against employees because of their protected union activity.

In responding, Betters characterized Van Os as "honorable and trustworthy." She then referred to an earlier dispute between Davila and another manager that she regarded as unfair. She said, "I am willing and ready to RISK MY JOB TO PROTECT THOSE SECRETARIES." (Emphasis in original.)

In his last e-mail of the day, Van Os responded that Davila was being evaluated for dishonesty and poor performance. He described Betters' e-mail as belligerent, and an expression of an intent to protect poor performance regardless of its impact on the firm's clients. Although he acknowledged Betters' protected right to conduct union business aggressively, he said he would not allow it to disrupt the business of the firm or its clients' interests.

The next day, May 28, Van Os followed up with another lengthy e-mail to Betters. He went into great detail concerning the time constraints he was under because of his workload and his dedication to the firm's clients. He explained that Betters' approach to union representation created a new "time management crisis" that "threatens

[4] In light of our finding that none of Van Os' statements were unlawful, we find it unnecessary to pass on the judge's disavowal finding.

[5] All dates hereafter are in 2000.

[6] See *NLRB v. J. Weingarten, Inc*., 420 U.S. 251 (1975).

the survivability of this business." The following passage is representative of the content and tone of the e-mail message:

> Nicole, this is a personal message, not a labor-management battle message. I am telling you this personally in the hope that I may still find some shred of friendship in you: If I have to go through a big series of obstructive battles just to make necessary personnel changes with people who are not capable of the performance this firm is obligated to provide to clients, I am going to have to close the doors rather than fight out those battles, because my time is stretched to the absolute limit right now and finding the time to fight out such battles is not humanly possible. I am not puffing or threatening, I am telling you the simple truth of this personal crisis, and I cannot put it any plainer. I am telling you this as a man of honor whose word can be trusted. I am not bluffing, I am telling you the absolute reality because I respect you and want you to be clear about the cliff we are heading toward. I am not expressing hostility to unionization, I truly do welcome union representation and collective bargaining as a process. I am only telling you to be aware of what it will do to this business-for the benefit of all the Union members-if you decide to use the Union as a battle weapon to protect incompetence at all costs. It is not humanly possible for me to stretch my time any further if I have to fight such battles.
>
> The answer is not continued toleration of ineffective work performance by the office staff. I am sorry, I will not do that to my clients. It would be more honorable for me to go out of business and advise my clients to find other lawyers who will provide them better service, than to inflict poor service on them from my office, and that is what I will do if that is the only way out of the dilemma.
>
> There is nothing wrong with a union working with an employer to remove the incompetent work performance in order to keep the incompetence from dragging the whole business down to the detriment of everybody. That is what every responsible union does . . . .

As related above, Van Os was the only licensed attorney at the firm for most of the relevant time in this case. The record establishes that prior to March he was working in excess of 75 hours per week. In March, the firm became the sole provider of legal services to District 6 of the Communications Workers of America. District 6 had 86,000 members in its 4-State jurisdiction, and it had over 400 grievances and arbitrations pending. It is apparent that the new business doubled the firm's workload. Betters and the other employees were fully aware of the firm's workload and Van Os' responsibilities.

B. Discussion

It is alleged that the Respondent, through Van Os, unlawfully threatened to close the firm in retaliation for Betters' demand for union representation at all work-related discussions, and her apparent insistence on aggressively fighting any attempt by the Respondent to remove allegedly incompetent employees. We will assume, arguendo, that in both instances Van Os was responding to activity by Betters that was protected by the Act. The legal principles controlling the resolution of the issue here are set forth in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969):

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. [Citation omitted.] If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Moreover, the Board's evaluation of an alleged threat of this nature takes into account all of the relevant circumstances.[7]

Initially, we observe that the statements in question do not arise in the more typical context for application of the *Gissel* standard: a union organizing campaign that the employer opposes. See *Gissel*, supra at 616. In fact, Van Os immediately agreed to the employees' request for union representation, and it is undisputed that, as he made clear in his e-mails, he sincerely welcomed the employees' choice. He also assured Betters that there would be no reprisals for the employees' exercise of their rights. Moreover, the Respondent engaged in no other

[7] See, e.g., *Contempora Fabrics, Inc*., 344 NLRB 851 (2005); *Aldworth Co.,* 338 NLRB 137, 143 (2002), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004).

unlawful conduct. Thus, there are no unfair labor practices in the background that, by their nature, would lend Van Os' statements a threatening quality.[8]

Certain themes recur in Van Os' e-mails: his professional dedication to the firm's clients, the severe time constraints that his workload created, and his perception of Betters' approach to the collective-bargaining relationship as combative and unnecessarily adversarial. The consistent point that Van Os communicated was that the firm would close if he did not have the time to serve his clients properly. In his view, this could occur if Betters maintained the position that the employees must be represented at every routine work discussion, and if she persisted in an over-zealous, confrontational approach to ensuring the retention of incompetent employees.[9] In effect, Van Os' position was that if his relationship with the Union resulted in his inability to devote necessary time to servicing the firm's clients and providing them with competent service he would have no choice but to close the firm.

His position was supported by objective facts readily apparent to the employees. During the relevant time period Van Os was the only licensed attorney in the firm. The law firm's workload was enormous. Even before the firm became the sole provider of legal services to District 6 of the Communications Workers of America, covering its 86,000 members in a 4-State area, Van Os was working 75 hours a week. The firm was also particularly small, consisting most of the time of Van Os, two unlicensed attorney associates and between two and four full-time clerical employees. Under these circumstances, it was not unreasonable for Van Os to predict that having to bring in a union representative whenever he discussed any routine work matter with one of the employees and having to retain incompetent employees, as he interpreted Betters' request to require, would effectively make continued operation of the firm untenable. Furthermore, absent from these circumstances is any sense that the closure Van Os predicted would be driven by retaliation against the employees for choosing, or pursuing, union representation. Rather, his response to Betters' communications was, in the words of the *Gissel* Court, supra, "a reasonable prediction based on available facts" and not "a threat of retaliation based on misrepresentation and coercion." Accordingly, we find no violation of the Act.

[8] Cf. *Harrison Steel Castings Co*., 293 NLRB 1158, 1159 (1989), review dismissed 923 F.2d 542 (7th Cir. 1991) ("In a case devoid of union animus or unlawful threats, an employer might suggest as a general economic proposition the bearing that the administrative costs of collective bargaining has on the price of the employer's product and, as a consequence, the possible change in the employer's competitive position in the market. But having manifested overt hostility to the union activists in its work force here . . . the Respondent could not lawfully go on to suggest the loss of jobs as a result of loss of business to the competition without demonstrating to employees that such a chain of causation would be brought about through forces beyond the Respondent's control.").

[9] Davila, the flashpoint of the dispute over employees Van Os deemed incompetent, was lawfully discharged for poor performance on May 30.

ORDER

The complaint is dismissed.[10]

Liza Johnson, Esq. and *David Kelley, Esq.,* for the General Counsel.

Shelton Padgett, Esq., Kris Bird, Esq., and *Glen Shook, Esq. (Akin, Gump, Strauss, Hauer & Field),* of San Antonio, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in San Antonio, Texas, on 28 days between the dates of July 10, 2001, and December 14, 2001. The charges in the captioned cases were filed by the various named individuals on August 31, 2000,[1] September 7, September 7, September 12, and October 3, respectively. On March 29, 2001, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing alleging violations by David Van Os and Associates, PC (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act

[10] In part II,B,5 of his decision, the judge concluded that the Respondent's April 17, 2000 memorandum was lawful in its entirety. We agree. Our dissenting colleague has identified two components of the memo, rules 5 and 9, as unlawful. We do not agree that the Respondent's employees, on reading either of these rules, "would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). As fully detailed by the judge, the April 17 memo, as a whole, was narrowly framed to address recent, specific problems of employee misconduct, and the employees were fully aware of this context. They would reasonably interpret rules 5 and 9 mindful of these circumstances, and without reference to the exercise of unrelated rights protected by Sec. 7.

Our dissenting colleague relies upon her dissent in *Lutheran Heritage*. We have relied upon the majority opinion inasmuch as it represents Board law.

Consistent with the dissent in *Lutheran Heritage Village*, supra, Member Liebman would find that maintenance of rules 5 and 9 in the April 17 memo violated the Act. Rule 5's truthfulness requirement concerning responses to questions about "personnel issues" would reasonably chill employees' protected activities because they would fear inquiries that would require them to disclose those activities with absolute truthfulness. Similarly, rule 9's demand for "loyalty" is ambiguous in that it purports to protect employees' expressions of opinion while forbidding conduct deemed contrary to the Respondent's employment policies. Both of these rules are overbroad; their scope exceeds the memo's stated purpose of resolving immediate issues of employee misconduct.

[1] All dates or time periods hereinafter are within 2000, unless otherwise noted.

(the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Texas corporation with an office and place of business located in San Antonio, Texas, where it operates a law firm. During the 12-month period ending August 31, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000, and provided services in the aggregate in the amount of $22,067 to clients located outside the State of Texas. I find that the Respondent is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent discharged and constructively discharged certain employees in violation of Section 8(a)(1) and (3) of the Act, and whether the Respondent engaged in various additional violations of Section 8(a)(1) of the Act.

B. Facts and Analysis

1. Background

David Van Os (David) owns and operates a labor-side law firm known as David Van Os and Associates, PC (Respondent or law firm). The law firm was originally located in Austin, Texas, where it operated for many years, and was then moved to San Antonio, Texas. In San Antonio, the Respondent initially shared office space and clerical staff with another small law firm, and then David and his wife, Rachel Van Os (Rachel), jointly purchased residential property which they renovated and converted into the law firm's current two-story office facility.

At various times material herein, the Respondent has employed from two to three or four attorneys, also referred to as associates, several law clerks, a support staff of several individuals who performed customary law office clerical duties, and a succession of several different office managers, also referred to as office administrators, who were given bookkeeping responsibilities as well as the duties customarily performed by law office managers or administrators.

In late August or early September 1999, the Respondent contracted with a consulting firm to undertake a detailed analysis of the operations of the law firm, and to recommend improvements in the manner in which all aspects of the business, including recordkeeping, bookkeeping, delegation of duties and other matters could be conducted to maximize the efficiency, productivity, and income of the firm. The consultant's investigation, including interviews with the employees, was ongoing, and from time to time the consultant would verbally share the results with David. On November 19, 1999, the final "Practice Analysis," consisting of 16 pages, was submitted to David.

Under the heading of "Organization, Compensation and Benefits:" the consultant notes:

> Your practice consists of the following personnel:
>
> *Owner/Lead Attorney*: (David Van Os) Duties consist of being the primary attorney on almost all of the cases that come into the firm. Also is the only "rainmaker" in the firm. Accountable for the entire business operation. Responsible for all aspects of the practice. Currently working 75 plus hours per week. . . .

Under the heading of "Analysis and Strategies," the consultant notes:

> *Compensation:*
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> *Staff*—It appears as if the staff's monetary compensation is competitive within your marketplace. . . . It appears as if you have had an extremely high turnover in staff. You do not have any staff with any tenure. There could be several reasons for this including compensation, bonus, benefits, or work environment.
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> . . . .
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> *New Associates*: . . . . Therefore, the minimum number of billable hours before the cut [that is, before reducing such billable hours by 40% to account for the fact that new associates will not be as productive per hour] that Gina [a new associate] must produce should be somewhere between 90 and 135 hours per month.
>
> . . . .
>
> The need to get them [the new associates] to producing closer to 100% actual billable hours is imperative. Once they get closer to this then a bonus structure would be easier to implement.
>
> . . . .
>
> *Work Plan Processes, Practice and Time Management:*
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> Effective workflow systems and time management for yourself and others in your practice can help tremendously with the profitability and functioning of the firm.
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> *Workflow systems*: Now that you have hired a person to be the office manager, bookkeeper and legal secretary, **delegate** 100% of the workflow processes to her and let her run the of-

[2] The Respondent maintains that the Board should reassess the efficacy of asserting jurisdiction over law firms in general, labor-oriented law firms in particular, and the Respondent, specifically, for a number of reasons. Regarding discretionary jurisdiction, it is argued that the Respondent barely meets the Board's jurisdictional standards established many years ago, and, taking inflation into account, the current impact on interstate commerce from the Respondent's operations, having performed only $22,067 in interstate commerce during the applicable 12-month period, is simply de minimus . This is a matter that has been preserved by the Respondent, and should be directed to the Board.

fice. Make her accountable for the complete workflow and bookkeeping functions. Even though she will be accountable that does not mean that you are not in the loop. A weekly 30-45 minute meeting between David and the office manager should occur either Monday afternoon or Tuesday in the morning. This meeting should be quick and cover a lot of ground without a lot of discussion. [Original emphasis.]

2. The discharge of Ybarra

Mary Ann Ybarra is the individual referred to above as the recently-hired "office manager, bookkeeper and legal secretary."[3] Ybarra began working for the firm in October 1999, the month preceding the final report of the consultant. Ybarra was discharged or laid off on April 14. The complaint alleges that Ybarra was discharged and that and David's confidential secretary, Oralia Castillo, who quit, was constructively discharged, infra, for engaging in one specific act of concerted protected activity when the two of them met with David and voiced their displeasure with certain conduct of Rachel.

According to the testimony of Ybarra and Castillo, this meeting was precipitated by a phone conversation that Castillo was having with Cheryl Kirby, the law firm's senior associate, when Rachel happened to come into the office and, according to Castillo, begin "screaming that we shouldn't be having any personal calls." Castillo told Rachel that it wasn't a personal call, rather it was a call from Kirby about office matters. Rachel paid no attention to her and just continued to insist there were too many personal calls and that this needed to stop. Castillo immediately went to see David about the matter, and a short time later Ybarra, who overheard the exchange between Rachel and Castillo, also entered David's office. Castillo explained what had happened. Ybarra, who had entered the room by that time, advised David that she didn't think there was a problem with personal calls. David agreed with Ybarra and Castillo.

Then, during this same conversation, Ybarra told David that Rachel had been overheard referring to the employees, including Ybarra and Castillo, as "incompetent" and "unprofessional." Ybarra explained to David that this sort of behavior had been going on for a long time. Castillo agreed, and added that it was "getting very hostile for us to work there." Apparently, Ybarra and Castillo were objecting to Rachel's presence in the office, as Rachel had no official title, was not an employee of the law firm, had no office skills, and was an annoyance to the employees. David said he would speak to Rachel, that Rachel was his wife, that she was dependent upon the law firm for her livelihood too, that she would continue be "in and out of the office like normal," but that he would try to see what he could do regarding her disparaging comments. Ybarra and Castillo testified that toward the end of the meeting Rachel happened to walk in and David told her they were in a meeting and that he would talk to her later. Rachel walked out and slammed the door very hard.

[3] I credit the testimony of David Van Os, and find that he hired Ybarra "[t]o manage the overall work flow processes, to do the bookkeeping, to do the billing, to make sure that the clerical staff and the work flow processes operated in an efficient and productive manner so that the lawyers could spend their time doing billable work that made the money and paid the bills."

The date of the foregoing meeting is important, as it is agreed by the parties that Ybarra's termination letter was prepared by David on or before April 7, the date that Ybarra, by coincidence, claims she happened to find it as it fell out of an office printer, infra; therefore, if the date of the foregoing meeting was after April 7, the meeting could not have been the catalyst for Ybarra's discharge, as alleged.

Castillo testified that at one time she and Rachel had been the best of friends and had even been "like sisters." Castillo babysat for the Van Oses young children, and she and Rachel would take extended lunches together. During these lunches, according to Castillo, Rachel would describe employees as incompetent and unprofessional; these were Rachel's "favorite words." She also would refer to employees as not being "team players."[4] Castillo testified that her sisterly relationship with Rachel had deteriorated well before the date of the aforementioned meeting in David's office. It began deteriorating in about December 1999, and became worse after February 22, when Castillo tripped on the office stairs and sustained an on-the-job injury to her leg or back. After that time, according to Castillo, Rachel would make sarcastic comments as if though Castillo was simply faking the extent of her injury. According to Castillo, Rachel "started being real mean to me after my injury but these problems were already starting since December."[5]

Further, Castillo testified that this was by no means the first time that she had complained to David about Rachel. Thus, Castillo testified that she had voiced complaints to David between 10 and 20 times about Rachel overstepping her bounds, as Castillo believed that, when it came to office matters, Rachel had no authority to supervise her or tell her what to do. Castillo testified that David never reprimanded her for coming to him with these problems about Rachel, and would basically advise her that he would take care of the situation and that Castillo should just not pay attention to Rachel and simply continue to do the work he assigned her.

David testified that Castillo and Ybarra came to his office on April 13, and complained about a personality conflict with Rachel, saying that they were having trouble getting along with her. David recalled that it was a very short conversation and was certain that it took place on April 13, because it was the day before he laid Ybarra off.

I find that the meeting took place on Thursday, April 13, as maintained by the Respondent, and further find that the discharge of Ybarra was imminent well before April 7. Both Ybarra and Castillo had previously testified under oath about the aforementioned meeting during a Texas Employment Commission hearing in July, prior to the time there was any

[4] The record evidence, including documentary evidence, contains numerous references to "teamwork" and to the expectation of the Van Oses that all the employees, clericals and attorneys alike, be "team players." This, I find, is clearly a reference to co-operativeness and willingness to assist coworkers so that the work of the firm is conducted efficiently; it should not be given a negative connotation, such as, for example, "antiunion."

[5] However, Castillo also inconsistently testified that, ". . . after [the date of the meeting with David]. . . . Our relationship was not like a sister-basis anymore. We were like employees. She was as the employer's wife."

issue as to the precise date of the meeting. Castillo, in that proceeding, placed the meeting at "about the Thursday before" she quit the Respondent's employ. Castillo quit on Monday, April 17, and the Thursday before would have been April 13. Similarly, Ybarra testified before the Texas Unemployment Commission that the meeting "was, like, I don't exactly remember the day. It was, like, a Thursday before I got let go." Ybarra was laid off on Friday, April, 14. Again, the Thursday before would have been April 13. It is significant that both employees placed the date of the meeting on the same date using different references to assist their recollections.

Further, the testimony of Lorraine Perez, who was hired on April 17, is important. Perez testified that she and Rachel had been very close friends, even "best friends" back in high school, but had not communicated for many years. In late 1999, Rachel happened to phone her just to say hello, and during subsequent conversations Rachel began to solicit Perez to come to work for the Respondent as office manager. During these discussions, according to Perez, Rachel told her that the law firm had some very incompetent office employees, and that they were "always talking bad" about her and her husband. She said that the attorneys, who had their offices upstairs, were also getting together and talking about the Van Oses,[6] and that David would be moving his office from downstairs to the upstairs conference room to watch the attorneys. Specifically, Rachel named Ybarra and Castillo, and spoke of them in very unflattering terms. She told Perez that Ybarra was supposed to have been both the bookkeeper or "accountant" and the office manager, but that after about a week as Office Manager Ybarra told her that she just wanted to do the accounting part of the job; this upset Rachel because Ybarra was being paid $16.50 per hour to do both jobs, not just the bookkeeping work.

In a lengthy document that Perez compiled following her discharge, prepared on and after July 3 as a personal account of various discussions and events surrounding her employment, Perez recounts various preemployment conversations with Rachel who told her that although "the accounting position was not a difficult job, and was strictly a part-time position . . . [Ybarra] was making it a 40-hour-a-week job, when in reality it was only a 12-hour-a-week job. Rachel said that David was very dissatisfied with both [Castillo] and [Ybarra] and wanted to get rid of both of them but had to be careful because of his reputation." Further, this same document notes that although Perez requested the opportunity to visit the office during office hours before deciding whether to accept the position, she was told by Rachel that she could only visit after hours because David did not want the employees to suspect that he was hiring a new employee. This is significant, because if the Respondent intended to retain both Perez and Ybarra, there would have been no need to keep Perez' employment a secret.

Based on the foregoing, and the credible testimony of David Van Os who testified that the layoff of Ybarra was for her inability to fulfill the functions he expected of an office administrator, I shall dismiss this allegation of the complaint.[7]

3. Alleged unlawful interrogation

Ybarra was laid off on Friday, April 14, and Perez began work the following Monday, April 17, the same day that Castillo quit. The events occurring during that intervening weekend are significant.

On Saturday, April 15, the Van Oses and part-time law clerk Billy Beckel III (Trey) and his wife, Amie Beckel (Amie), went out to dinner together. It was to be a casual, social engagement, not a work-related meeting. During the course of their conversation that evening, Amie, who would often talk with her husband about things going on at the office,[8] mentioned to Rachel something to the effect that the employees had learned of Ybarra's termination letter prior to the time Ybarra had been discharged. Then, Trey, not being able to simply deny knowledge, felt compelled to elaborate, and implicated two associates, Cheryl Kirby[9] and Nicole Betters,[10] saying that Kirby had told him that Betters had found the letter in the upstairs printer. Trey testified that David was disturbed that this information regarding the imminent layoff of an employee had been circulated around the office by the professional staff prior to the actual layoff.

During the course of the discussion, according to Trey, Rachel asked whether the employees liked her. Trey, attempting to be diplomatic but honest, told her that the employees disliked several things, including the fact that Rachel would bring the Van Oses' two small children to the office, that the children

[6] It turns out, in fact, that this was not simply a figment of Rachel's imagination. Abundant record evidence shows that all of the employees, including the office employees, the senior attorney, Kirby, and the other associate attorneys and law clerks, would frequently gather together when Rachel was not around and have almost daily gossip sessions that focused on Rachel, her idiosyncrasies, and the things she did and said around the office that offended or amused them; they would make jokes about Rachel's weight and about the Van Oses having sex, and even had a file name for Rachel, "WLA," for "whole lot of ass." There is conflicting record evidence regarding whether this file was imaginary or really existed in the Respondent's computer system. However, it seems that Rachel believed that the employees were using the computer to retain such messages: thus, Perez testified that Rachel, who was not at all computer-literate, asked her to come to the office in the evening, prior to the time she was hired, and attempt to access employee emails that complained about Rachel and spoke disparagingly of her and David. The employees would customarily have these gossip sessions near one of the upstairs office windows so that when they saw David or Rachel driving into the parking lot they could disband and go back to work.

[7] I further credit David's testimony that when he laid Ybarra off he told her that her bookkeeping skills were very good, and that she should let him know if she was ever interested in part-time work as a bookkeeper; however, she was not interested in part-time work as she needed a full-time position.

[8] In fact, Amie had spent a good deal of time at the office and knew the other employees well; she had had lunch with them on many occasions, and had been present during the employees' distasteful discussions about Rachel, her weight, the Van Oses sex life, and other similar personal matters.

[9] Kirby had worked for David for some five years and was by far the most senior attorney in the office. She gave directions and assignments to the other much younger and inexperienced attorneys, and was in charge of the office when David and Rachel went on vacation.

[10] Betters had been hired in March. She was licensed to practice in Pennsylvania, and had done so for about two years, and was preparing to take the Texas bar exam.

would remain unsupervised and make noise and leave toys lying around, and that the secretaries would have to pick up after them. Trey also stated that some employees did not particularly like the way Rachel had decorated their offices with antiques; and that some of the employees had concerns about the fact that Rachel, a nonlawyer, seemed to be participating in law firm matters or giving advice that required some legal background. At the end of the evening, David said that he was happy that Trey had informed him of these things that bothered the employees, and that it was a situation that needed to be addressed.

The next day, Sunday, David phoned the Beckels and left a message for Amie to call him. Amie testified that she returned his call, and David thanked her for letting him know about the Ybarra layoff letter, as he had been bewildered that Ybarra had found out about her layoff before he had told her. He told Amie that he respected her for shedding some light on the situation. Amie had also asked Rachel, the previous evening, if she and David could please not mention to the other employees that the Beckels and Van Oses had had dinner together, as this could reflect negatively on Trey's relationship with the other employees. Amie also indicated that there was some animosity between Rachel and Kirby. Rachel seemed surprised at hearing this, as she thought she and Kirby were "buddies." Amie mentioned to David during their phone conversation that in fact, Kirby was "just kind of corrupting the office, turning employees against him. . . ." According to Amie, the information she was relating to David was entirely voluntary, as she believed that David had a right to know about such things.

Then David talked with Trey, and told him he had spoken to some of the employees to find out exactly what was going on "upstairs," a reference to the attorneys, including Kirby, who were all officed on the second floor of the facility. During this conversation, Trey related several additional concerns to him, namely, that some of the employees did not think he ran the office very well, that Kirby made highly critical remarks about David's ethics, and that there had been a lot of employee turnover. David asked what problems the employees had with Rachel, and Trey replied that the employees felt that Rachel, who had suffered an accident in 1996,[11] was "faking her injury and that employees though it was ironic that a labor law attorney [David] would be involved in faking an injury." Trey also reiterated that employees did not like the way Rachel had decorated the offices, and that "employees made fun of Rachel's weight and the fact that she brings the kids to the office as if the office were a daycare center." He went on to tell David that Kirby was telling jokes about Rachel's weight.[12] According to Trey, David seemed upset that the "people upstairs," the attorneys, were not loyal to him or to the firm, and that he was going to find out what was really going on.

Trey then volunteered to David that Kirby was very much involved in the dissension upstairs. He also said that Kirby, from whom he received assignments, had asked him to copy some files for her on floppy disks. Trey testified that prior to this time he had been afraid to mention this to David, but decided to volunteer whatever he knew about the situation as he believed Kirby's conduct was improper. He told David that Kirby had talked about leaving the firm on a number of occasions, and had said that she wanted to take "her information with her"; further, she had asked Trey and another law clerk to help her copy all the files in her computer.[13] Trey testified that Kirby specifically instructed him not to tell David that she was doing this. Trey also testified that he may have told David at this time that Kirby had talked about taking the law firm's clients with her when she left, including one of the firms' largest clients that accounted for a significant part of the law firm's business.[14]

Certain information provided by Trey during the two conversations was obviously a matter of great concern to David, as he also phoned Betters and Mejia that Sunday to find out who was responsible for printing out Ybarra's termination letter and/or sharing that information with other employees; and, in addition, to learn what they knew about Kirby stirring up the employees and making disparaging remarks about the Van Oses.[15]

While there is conflicting evidence about the events of Sunday, April 16, it is clear that on that evening Castillo, Perez, and the Van Oses were at the law firm, that Perez was introduced to Castillo as the new office manager, and that Castillo spent approximately 2-1/2 hours there. The General Counsel maintains that David called Castillo into the office that evening purportedly to do some work but that this was merely a subterfuge to interrogate her as he had earlier interrogated Betters and Mejia over the phone. David testified that he called Castillo to

[11] In 1996, Rachel had sustained a very serious on-the-job injury to her back while working for the telephone company in Austin, Texas, and she has continued to have persistent physical problems as a result of that incident.

[12] Trey testified that he believed that Kirby was jealous of Rachel, that Kirby "extremely disliked" Rachel, that Kirby made jokes, in the presence of Trey and other employees, about Rachel's weight and about the Van Oses having sex, and that Kirby and another employee, Michael Roland, told him that there was a computer file named "WLA, meaning 'whole lot of ass,'" with comments and jokes about Rachel. Witnesses, including Castillo, who knew the Van Oses very well, testified that Rachel was very sensitive about her weight, and that they believed David would terminate any employee who made fun of Rachel's weight.

[13] Trey testified that Kirby asked him if he had any blank computer discs at home and if his wife, Amy, could bring them to the office. He copied "upwards of probably 50 disks" for Kirby. About halfway through the copying process Trey began feeling uncomfortable about this, and another law clerk, Michael Rowland, took over the copying.

[14] Trey testified that Kirby and pretty much everyone else in the office started treating him differently after they learned that he had spoken to David and Rachel. Kirby told him he was "on David and Rachel's side."

[15] Betters, in an e-mail to David and Rachel dated April 17, states, inter alia, "Finally, with respect to anything that Cheryl [Kirby] may have said to undercut David vis a vis his employees, I don't recall any personal insults directed towards David. I do, however, recall many insults directed towards Rachel. I wrote these off as being jealousy, pure and simple, and saw no reason to inform either of you as to their existence. There was no reason to hurt Rachel's feelings. . . ." Betters testified that Kirby was making fun of Rachel's weight, personal appearance, and behavior, and that Kirby joked about an offensive cartoon drawing of David and Rachel that someone had prepared but that Better had never actually seen.

assist that Sunday, as he had frequently done during past weekends, because he was busy preparing for an arbitration on Monday; and that Perez was there so that Rachel could familiarize her with the office as she would be replacing Ybarra who had been laid off on Friday. Further, David testified that there was no interrogation of Castillo about anything.

Castillo testified that on Sunday morning at about 11 a.m., she received a phone call from David who asked her to come in that evening and do some work on subpoenas for an arbitration the following morning Castillo arrived at 7 p.m. After she waited for about 30 or 45 minutes, the Van Oses and Lorraine Perez entered her office. Castillo testified that Perez, whom she had never met, was introduced to her as the new office manager; David told her that he had been looking for a good administrator and he finally found one. Castillo was told that she would be reporting to Perez.

Castillo testified that David began by first mentioning the discussion they had had, which I have found above occurred on April 13, when she and Ybarra had presented certain concerns to him about Rachel. David said that he had spoken to Rachel about the matter and that the situation had been taken care of and that Rachel would not be interfering anymore. Then he advised Castillo that a "faithful employee" had told him that that Kirby was bad mouthing him. Apparently David asked her questions about Kirby, prefacing the questions with the admonition that he wanted truthful employees working for him. He also asked her if she had known about the Ybarra discharge letter. Castillo answered that Ybarra had found the letter and had told her about it. He also asked, according to Castillo, whether she knew anything about a union.

Castillo, apparently, was equivocal, as she claims she replied, "I am here to work. I am not here to tell about other employees in this office." Then David abruptly ended the meeting, saying, "that was fine, that he had to go, because the phone rang at that moment. . . ."[16]

The meeting apparently lasted only a brief time, as Castillo testified that after the meeting she remained for about 2-1/2 hours "sitting there talking to Rachel Van Os and Lorraine Perez," and did not leave until Rachel told her that they probably were not going to get around to the work she was called in to do because it was so late. She did receive a work assignment that evening from David, namely a memorandum that she was to correct and hand out to every employee the next day, infra.

Perez also testified regarding this interrogation of Castillo. However, the testimony of Perez is significantly different than that of Castillo. Thus, Perez did not testify that David asked Castillo anything about union activity,[17] or that he mentioned anything about resolving Castillo's April 13 complaints about Rachel in Castillo's favor. Moreover, Perez testified that Castillo left the premises immediately after the interrogation, while, as noted, Castillo testified that she sat there and spoke with Perez and Rachel for an extended amount of time while she was waiting for David to give her some work to do.

I do not find that the Van Oses unlawfully interrogated Trey. Clearly that is not why the Van Oses invited Trey and his wife to dinner. Trey's wife, Amie, initiated the discussion of the Ybarra discharge letter, and that prompted further conversation implicating several of the attorneys. I do not believe that asking an employee whether the owner's wife is liked by other employees may be characterized as unlawfully asking whether the employees are conspiring to engage in concerted, protected activity. It is clear, however, that Rachel already knew or suspected that employees were gossiping about her and her husband behind her back, as Rachel had mentioned this to Perez prior to her employment by the Respondent, supra. Trey testified that he volunteered all of the information to the Van Oses. Moreover, it is clear that, as set forth infra, David was interested in just two matters, namely, who was responsible for prematurely disclosing the Ybarra termination letter, and who was responsible for maligning the Van Oses. Indeed, these are the subjects that David inquired about when he spoke to Betters and Mejia. I credit David and find that he did not interrogate Castillo; however, even if he did so, the interrogation was not unlawful, just as the interrogation of Betters and Mejia was not unlawful. In no way do such subjects involve concerted, protected communications about which an employer may not inquire. I shall dismiss these allegations of the complaint.

4. Alleged constructive discharge of Castillo

The next day, Monday, April 17, David gave Castillo six or eight subpoenas to prepare, advising her that there was a 10 a.m. deadline; in addition, he gave her some other legal documentation that had to be faxed to him at the hearing site as he was apparently under time constraints for an arbitration matter scheduled for that morning. As Castillo was doing this work, having been given strict orders from David that the work had to be done immediately, Rachel came in and, apparently countermanding David's instructions, said she wanted to introduce the new office manager, Perez, to the employees upstairs and wanted Castillo to be present, and that it would just take a few minutes. Rachel said the work could wait. Castillo told her that she couldn't climb the stairs because of her injury,[18] and Rachel got on the phone and called the attorneys and told them to come downstairs "to accommodate a cripple." According to Castillo, on direct examination, those were the very words Rachel uttered in a very harsh tone of voice, and at that point Castillo thought, "this is it. I can't take it anymore, I'm walking out, and I left."

However, on cross-examination, when confronted with her testimony at the Texas Employment Commission hearing, supra, Castillo conceded that the word "cripple" was not uttered by Rachel; rather, Rachel said to the upstairs employees either,

[16] As noted above, David testified that Castillo was called in to work that evening because there was work to be done, and that he never had a meeting with Castillo about the Ybarra letter or other matters.

[17] I do not credit Castillo's uncorroborated testimony that anything was said about union activity. At this point, insofar as the record shows, there was no union activity.

[18] There is no clear record evidence that Castillo was incapable of climbing stairs, that she did not do so on occasion in the regular course of her work, or that the Respondent had ever been told that she was not to climb stairs; rather, it appears that her doctor simply recommended certain lifting restrictions. Castillo testified that on the particular day in question her knee was swollen more than usual, and this apparently made stair-climbing particularly uncomfortable.

"Come on down because we have to accommodate Oralia because she's saying that she's hurt," or "Well, we'll have to come down because Oralia cannot go upstairs."[19]

After Castillo quit, Perez pointed out to Rachel that when Rachel was calling the employees downstairs, Castillo was "rolling her eyes, and shaking her head, and slamming her hands on the desk. . . ." Perez also related this to David, because at that time, according to Perez, she was on Rachel's side and wanted to defend Rachel, who was worried that David would be upset because Castillo had quit.

Kandice Konrad, a secretary who was hired in April, testified that during the week before Castillo quit, Castillo told Konrad something to the effect that she was "not going to be around here much longer." Konrad understood this to mean that Castillo was probably getting ready to quit. Konrad related this to Mejia when Mejia was gathering information to contest Castillo's unemployment claim.

Castillo, who testified at length about many matters, did not impress me as a credible witness, and seemed willing to testify to anything that she believed would further and support not only her constructive discharge claim, but the claims of all of the other employees involved in this proceeding. It is difficult to know what parts of Castillo's testimony to credit, but assuming arguendo that Castillo should be credited whatsoever, her testimony shows the following: that she believed Rachel harbored and overtly exhibited animosity toward her well before April 13; that on April 13, David told Castillo that he would try to resolve her problem with Rachel, as he had told Castillo some ten or twenty times in the past; that on April 16, David told Castillo that he had resolved the problem in Castillo's favor; and that Rachel's allegedly harsh or sarcastic comment on April 17, telling the upstairs employees to come down for the meeting because of Castillo's inability to climb the stairs was nothing unusual, as Rachel had made such sarcastic comments about Castillo's injury well before the April 13 meeting.

Moreover, it is clear that Castillo was not happy about the fact that Perez would be her new supervisor, and that her friend, Ybarra, had been laid off the preceding Friday. Indeed, during discussions with Ybarra over that weekend, Castillo testified that Ybarra suggested that perhaps Castillo would not want to remain working there either. Whatever her reason for quitting, I find that Castillo was not constructively discharged as a result of her April 13 complaints about Rachel or, indeed, for any other complaints about Rachel. I shall dismiss this allegation of the complaint.

5. The April 17 memorandum

The memorandum that Castillo handed out to employees on Monday, April 17, is from David Van Os to all employees and, in pertinent part, is as follows:

> 1. This memorandum is immediate required reading for all employees.
>
> 2. It has recently come to my attention, thanks to the loyalty of certain employees, that a former employee of the firm was undermining my management of the firm for several months. Employees of the firm, though uncomfortable with the former employee's actions, and though loyal themselves, did not advise me of this conduct because they were not sure if it would be proper to approach me.
>
> 3. Although I do not question the loyalty of those employees who knew about such conduct and did not inform me, it would have been far better if they had informed me. I would have taken decisive action to redress the problem for the good of everyone who works here. I could have taken care of the problem at an earlier stage before it got worse. As it is, this problem has been allowed to interfere greatly with the productivity of the law firm for much too long a time.
>
> 4. For future reference, in the future, please approach me immediately with problems of this nature.
>
> 5. All employees are expected to be absolutely truthful to management in response to any questions about firm business or personnel issues.[20] This is a mandatory condition of employment, for all future time.
>
> 6. As an individual no longer employed with the firm, Cheryl Kirby is not to remove any files from the office. Should any employee face a conflict or confrontation over this issue, please notify the Office Manager, Lorraine Perez, immediately. Cheryl may remove any personal belongings upon demonstrating that they are her personal property.
>
> 7. . . . .
>
> 8. Cheryl Kirby may have limited, legitimate reasons to call employees of this firm for a short future time. All conversations between Cheryl and any employee of this firm that take place either at this office (including on the telephone) or on work time are to be strictly limited to the essential legal business needs of the call. Any time an employee of this firm has a conversation with Cheryl either at this office (including o the telephone) or on work time, the employee shall immediately report the conversation and describe the nature of the conversation to the [sic] Lorraine. Any violation of this directive will result in immediate termination of employment for gross insubordination.
>
> 9. Loyalty to this firm and its president are mandatory conditions of employment. *This does not mean that employees sacrifice their freedom of opinion. You man honestly disagree with management policies, business decisions, or casework strategy. You should and indeed are expected to express your honest disagreements of opinion.*

[19] At the hearing herein Castillo did not state which of these two latter versions was accurate.

[20] Obviously, the employees knew that this was a reference to the fact that David Van Os was upset with the premature disclosure of Ybarra's discharge letter, and with the fact that the employees he questioned about the matter were not forthcoming. Indeed, according to Perez, Rachel told the group of employees that they each needed to initial the memorandum, and said, "that they found out that Marry Ann's [Ybarra] termination letter was given to Mary Ann, and they didn't know if it was Cheryl Kirby or Oralia [Castillo], and that her and David would not tolerate this type of behavior, that every employee is to remain loyal and to report any kind of bad mouthing that was made about Rachel or David to David or me [Perez]."

> However, loyalty means that as long as you work for this organization, despite any honest disagreements of opinion, you strive your best to carry out the policies and decisions of the organization as expressed by management. If you disagree so strongly that you can no longer do your best to carry out those policies and decisions, then you should leave the organization. Under no circumstances should you work against the policies and decisions of the organization or its president as long as you are collecting a paycheck from the organization. This requirement of loyalty is an essential and mandatory condition of employment. Any violation of this requirement will result in immediate termination of employment. [Emphasis added.]

The General Counsel contends that the foregoing memorandum constitutes an "overly-broad," and therefore unlawful rule requiring employee loyalty in that it ". . . precludes employees from taking any position on any personnel-related issue that may conflict with Respondent's position, and requires employees to report anyone who espouses such a contrary view."

I do not agree. The thrust of this memorandum is set forth in the second and ninth paragraphs. In paragraph 2, employee "loyalty" is equated with the obligation of employees to let David know immediately when other members of the firm, in this case senior attorney Cheryl Kirby, may be undermining his management of the firm. It seems reasonable to expect that Kirby, because of her experience and longstanding professional relationship with David, could have reasonably been expected to set a favorable example for the other employees. David, I find, was justifiably concerned upon learning that Kirby seemed to be the catalyst for disparaging David's ethics, making jest of Rachel's weight, and making crude remarks about the Van Oses' sex life. Clearly, it could be expected that this type of behavior would have an adverse impact upon employee morale, and would tend to undermine the efficient operations of the law firm. Moreover, Kirby's leaving the law firm and taking clients with her would certainly impact the financial operations of the law firm as well as the continued employment of the other associates.

Paragraph 9 equates loyalty with "striv[ing] your best to carry out the policies and decisions of the organization as expressed by management," but makes abundantly clear that honest disagreements with "management policies, business decisions, or casework strategy" are not only not considered to be acts of disloyalty, but are expected and invited. It is commonly understood that the terms "management policies" and "business decisions," particularly in the context of this memorandum, incorporate employer-employee relations, namely, employee concerns about wages, hours, and conditions of employment. Further, the import of the memorandum was explained by Rachel to the assembled employees. Thus, Rachel told them that "loyalty" meant that they had to be truthful when asked about such matters as premature disclosure of sensitive and confidential information (obviously referring to the premature disclosure of the Ybarra layoff letter), and that they should report any kind of badmouthing of David and Rachel.

Therefore, I find, the memorandum itself, while demanding that employees not undermine the management of the firm, advises the employees in clear terms that their honest expressions of disagreement or dissatisfaction with the employer's policies are not considered to be disloyal acts or acts that undermine the management of the firm. There is no evidence that the employees did not understand that this memorandum was not intended to inhibit legitimate concerted, protected activity. And Rachel made it clear that loyalty to the firm meant that honesty was expected and that bad mouthing of David and Rachel would not be tolerated. In this context, I find that the honesty and loyalty demanded of employees by the memorandum was perfectly lawful, and that the employees could readily understand that the "bad mouthing" to which Rachel was referring did not encompass honest criticism about legitimate work-related matters. I shall dismiss these allegations of the complaint. See *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 472 (1953) ("there is no more elemental cause for discharge of an employee than disloyalty to his employer . . .").

6. The discharge of Perez

Also on Monday, April17, David issued the following announcement to all employees of the firm regarding "the addition of Lorraine Perez to office team as Office Manager." He goes on to state, inter alia:

> As Office Manager, Lorraine has the authority to direct and assign work, to evaluate performance, to adjust grievances, to administer discipline, to grant time off, to grant sick and vacation leave, to issue personnel policies, to effectively recommend hiring and firing, and to establish systems and procedures for every aspect of office administration.
>
> As a non-lawyer, Lorraine cannot make legal decisions about the performance of legal work. . . . However, she will have the authority to speak and act on my behalf in articulating my decisions regarding assignments, deadlines and expectations to lawyers in the firm. Moreover, lawyers in the firm will be subject to Lorraine's management in matters involving personnel policies and practices, and conditions of employment.
>
> I have been searching for a long time for a solution to the problem of getting lawyers out of administrative details. Accomplishing that goal will increase the firm's productivity for the benefit of every employee and will make everyone's job more pleasant. . . . I ask and expect your fullest cooperation with her management of the office. Thank you.

Perez, the only nonlawyer of the firm who was salaried, remained with the Respondent for less than a month. She was discharged on about May 9. It is alleged that she was discharged for engaging in concerted, protected activity, namely, complaining to David Van Os about Rachel on behalf of herself and other employees. The Respondent denies that Perez was terminated for discriminatory reasons and, in addition, maintains that Perez, as a supervisor, is excluded from the Act's coverage. The General Counsel maintains that Perez, while ostensibly hired to be office manager and a supervisor, was

precluded from assuming and performing such responsibilities by Rachel Van Os, who was the de facto office manager.

The aforementioned notes that Perez prepared after her discharge contain, inter alia, a lengthy, detailed, 58-line narrative account of two particular conversations with David wherein she voiced complaints to him. Perez complained that because of Rachel's interference she was unable to perform her job as office manager. According to her notes, she initiated the discussion in David's office, by asking, "Who is in charge, me or Rachel?"; she then proceeded to tell David that Rachel was interfering with "my" work, and undermining "my" authority. David told her that Rachel was in charge until Perez received adequate training, "but you are the office manager and everyone has to respect you." At this point, Rachel was called into the office. Before she came in, however, David told Perez to "please be sympathetic towards her because she is having trouble letting go of her position here and letting you take over."[21] Rachel entered the office and began telling David that Perez was very rude to employees and was throwing her weight around. Perez said, "that was a lie." Rachel said that she was afraid Perez would fire someone just because she was the office manager. Again, Perez replied, "that was a lie." Perez told Rachel that Rachel interfered with her work, and undermined her authority, and that because of this the other employees would not respect her. Rachel claimed that she was only trying to help because Perez had asked for assistance. Perez replied that "she was lying and that I didn't need her help because she had already had (sic) shown me all she knew, which was how to write checks make copies and run faxes," and that, "the extent of my training with Rachel was over in about 15 minutes."[22] David, after listening to this, referred to the disagreement as just a "catfight," and stated that he would leave it up to the two of them to work it out, and was not going to get involved.

The next morning, according to Perez' notes, David came into Perez' office and asked what she wanted to do. She asked what he meant, and he said that if she wanted to leave he would understand, but requested that she give him 2 weeks notice so that he could find someone else. She told him that she wanted to stay, but that Rachel needed to respect her position as the office manager, and that employees needed to know that if they had concerns they could come to her, as one of her goals was to build employee morale. David asked whether the employees were unhappy, and Perez answered, "Well I know they feel that Rachel interferes too much and she is rude and hostile towards them. I said, they are having the same problem with her that I am." David said that Rachel would be like the assistant manager, and should be included in everything that goes on in the office. Perez said that she was confused, because upon accepting the position she understood that Rachel would only be there for as long as it took to train her, and then Perez would take over.[23] David said, "Rachel is a very important part of our team and she will be working with you and handling all public relation activities. That is my final decision." Then he got up and walked out.

David testified that he laid off Perez because he realized that he had made "a very regrettable mistake in judgment, in thinking that someone who had never worked in a law office could effectively manage a law office. She was completely ineffective." In fact, immediately prior to complaining about Rachel, Perez had come to David about a problem with Konrad, whom Perez supervised. Perez accused Konrad of refusing to follow her instructions about something, and David called Konrad into his office and, in front of Perez, told Konrad that Perez was her supervisor and Konrad should follow her orders and was expected to obey her. I credit the testimony of David.

Perez' testimony regarding her meeting with David differs from her written account. Thus, Perez did not testify that there were two conversations with David on 2 successive days, nor that it was only on the second occasion, after prompting by David, that Perez mentioned that other employees were also dissatisfied with Rachel. Rather, Perez testified to only one conversation on 1 day, and claims that at the outset of that conversation she advised David that she and other employees felt that Rachel was very rude and hostile and believed they should be able to come to Perez with their problems but "did not see the transition of me being in charge"; and she also claims that during the conversation she told David, in Rachel's presence, that Rachel was interfering with her work and the work of the employees. There is nothing in Perez' notes to this effect. Further, Perez testified that she approached David only after having spoken with Betters and Mejia, who agreed that they too were subjected to untoward treatment by Rachel, and who reluctantly gave Perez, as the office manager, their approval to speak to David on their behalf. If this was indeed the very reason or a principal reason for speaking with David, it is reasonable to assume that she would not have neglected to mention this in her very extensive notes. Again, there is nothing in Perez' notes to this effect.

I do not credit Perez' testimony insofar as it differs from the account of her two conversations with David contained in her notes. Nor do I credit Perez' testimony that she specifically requested and received permission from Attorneys Betters and Mejia before complaining to David about Rachel on their behalf. I find that Perez had two conversations with David regarding Rachel. During the first conversation Perez said nothing about being a spokesperson for the attorneys; rather, I find, she was an advocate for her own position. The second conversation was initiated by David, not by Perez. Except for one very brief reference to other employees in response to a question by David, Perez was pointedly and exclusively focused on her own personal grievances and concerns on behalf of herself,

[21] During her testimony, Perez acknowledges that she understood David to be inferring that he was going to tell Rachel to "let go and let me be the office manager, but he was telling me to—in other words, don't throw it in her face. Don't be harsh to her. Be sympathetic towards her. We'll break it to her gently. That's the impression I got what he meant."

[22] In another part of the memo Perez writes that ". . . Rachel didn't even know how to turn on a computer, much less work on one. . . ."

[23] Perez testified that she said to David, "You know, you told me she knew the operations of the office. She doesn't. I'm not receiving any kind of training, and I really would like to move on and learn the operations of the business. So I see no reason for her to be here. I think it's time for her to leave so that I can take over."

and not as a spokesperson for others. Moreover, the concerns she expressed on behalf of herself were for the purpose of solidifying her position as a manager, not as an employee within the meaning of the Act, and indeed were also designed to remove Rachel from the office so that there would be no doubt that Perez was the supervisor in charge.

David testified that it became apparent he had made a mistake in hiring Perez as she simply did not have the qualifications and skills to be the office manager that he was looking for; therefore he discharged her.[24] The termination letter handed to Perez, dated May 15, states that, "this office is undergoing further reorganization, which leaves your services unnecessary," and advises that she is being given a paid vacation through June 6.

Whatever the reason for the discharge of Perez, whether because of her lack of expertise and her inability to perform the functions of an office manager, or her inability to diffuse the situation with Konrad, or her demonstrated lack of tact in interpersonal relations by repeatedly referring to Rachel as a "liar" immediately after being advised by David that she should treat Rachel with sympathetic understanding, or her insistence that Rachel no longer maintain a presence at the office, or simply the inability of Perez and Rachel to get along together in an office setting, or, perhaps, a combination of the above factors, there is no showing in this record that, assuming arguendo Perez was an employee and not a supervisor, her discharge was for any reason proscribed by the Act. I find that Perez was not discharged for speaking up on behalf of other employees, as alleged, and I shall dismiss this allegation of the complaint.

7. Work deficiencies of Davila; purported union activity

The Respondent hired Mary Louise Davila on about May 13, as an administrative legal secretary. David testified that during the preemployment interview Davila had told him about her work as a secretary for Southwestern Bell Telephone Company in the labor law section, where she handled that employer's arbitration matters with the CWA, one of the unions that represented Southwestern Bell employees. David decided to give her the title of "administrative legal secretary," which was a combination of a legal secretary and administrative assistant, as there was no good candidate for the position of office manager. There was a voluminous influx of paperwork to keep track of, and there was an abundance of arbitration matters involving his CWA client. The scheduling of these arbitration matters had to be coordinated between the Respondent, various CWA representatives, and the American Arbitration Association (Triple A). There was also the need for a legal secretary. These are the things he told her she would be doing when he wrote out her job description.

Denise Mejia testified that during Davila's first week of work, Mejia and Nicole Betters were in the parking lot when Rachel approached them and apologized for Davila's performance. Mejia asked Rachel what she was talking about, and Rachel said, "Well, something's going to be done to get rid of her, because we're not going to stand for this." Mejia asked Rachel to explain, and Rachel simply replied that, "We'll do something to get rid of her." Mejia testified that she and Betters then discussed the situation that evening and decided that they needed to take some action to protect yet another employee that they believed Rachel was targeting for termination. It appears, however, that no immediate action was taken,

David testified that on the morning of May 23, he dictated an important letter regarding an imminent plant closing, walked to Davila's office and, placing the dictation tape in a dictation folder, told her "this is urgent. The client wants this sent immediately. Please do this as a top priority." On the next day, May 24, he asked her why she had not yet typed the draft of the letter, and Davila said something but, according to David, "it wasn't very responsive." He spoke to her again about it on the next day, May 25, after receiving a phone call from the union client asking if the letter had been sent. David said no, that he was sorry. He again went to Davila and, seeing that the dictation tape had not been touched, said to her in a stern tone of voice that clearly conveyed displeasure, "Since you evidently cannot or will not type this letter, I'm going to give it to somebody who will." Then he took the tape to Konrad and asked her to type it. Konrad did type it, and it was reviewed by David and mailed on the morning of May 26. I credit David's testimony.

Michael Murphy is a union organizer for an IBEW local, one of the Respondent's principal clients. Murphy testified that he worked with Kirby on many matters, and that every time he happened to meet with her Kirby would make remarks about Rachel's weight, about Rachel's faking her disability claim, about the WLA file, about David's inability to take care of clients' business properly, and about other matters that were detrimental to the Respondent's relationship with the IBEW. For example, Kirby also told him that Rachel's "rent-a-friend," Kandi Konrad, a secretary, was incompetent. Murphy testified that he believed it was very unprofessional of Kirby to be making such disparaging remarks. Nevertheless, he questioned whether the Union's business was being properly taken care of by the Respondent, and he passed the information on to the Union's business manager.

Then, after Kirby left the firm, Murphy developed a personal relationship with Betters. Betters would also tell him things that were going on in the office. And Betters also complained to him about Konrad's deficiencies as a secretary. On May 19, Betters sent him an email of a pleading in a case, with a note attached saying, "Kandy [Konrad] will get around to sending this to you someday."

[24] David Van Os hired Perez in order to minimize, not compound, his having to deal with office and administrative pressures, so that he could concentrate on his very busy practice that became even busier upon the abrupt departure of Kirby. He knew that Rachel and Perez had been very close high-school friends; and, indeed, Rachel had even recommended Perez for the office-manager position. It is likely, although not supported by direct record evidence, that David hired Perez believing that she was an individual who would be able to both serve as an effective office manager and, at the same time, diplomatically deal with Rachel's presence at the office; however he came to understand that this was simply wishful thinking after Perez, in front of both Rachel and David, repeatedly referred to Rachel as a "liar." It would have been very difficult for Perez and Rachel to remain amicable after this exchange, and, as David told Perez, Rachel's continued presence at the office was, in-effect, nonnegotiable.

Murphy testified that Betters phoned him on Friday, May 26, the day prior to the 3-day Memorial Day weekend, and told him that Davila was going to be fired. Betters asked him what could be done to stop this from happening. Murphy suggested that Betters could make a union recognition demand upon David, and that this might prevent or delay the discharge as David would understand that the recognition demand would create the presumption that Davila's discharge was motivated by her union activity. Murphy suggested that Betters do this quickly, before Davila got fired, and that this would put David in a very difficult position.[25] Pursuant to Murphy's efforts, Betters obtained some IBEW union authorization cards that she transformed into OPEIU authorization cards by whiting out the IBEW references and inserting "Local Union NO. 120 of the OPEIU." Murphy, and apparently Kirby, who was no longer an employee of the firm, also helped prepare language for a demand petition to give to David. After the union demand, infra, there was a flurry of e-mails between David and Betters and the other employees, infra, and Betters forwarded all of these emails to Murphy at his home that weekend.

On that same Friday afternoon, May 26, Betters, Mejia, Davila, and Konrad entered David's office. Betters, as the group's spokesperson, handed him the aforementioned authorization cards, together with a memorandum entitled "Unionization of Employees." The memorandum states as follows:

> The purpose of this memorandum is to advise you that we, the workers of your office, have collectively and unanimously decided to pursue unionization, for our mutual aid and protection. We want protection from, among other things, unjust firings and demotions. Additionally, we want the protection of grievance procedures and just cause.
>
> We are presenting you with cards that we have signed requesting that OPEIU represent us as our collective bargaining agent. As you can see, all four of the full time permanent employees of this office have signed both this memorandum and the cards. There should be no need for an election.

Unbeknownst to David, there was in fact no union as the OPEIU cards were fabricated by Betters who had not yet spoken to anyone from the OPEIU, and therefore did not know whether the OPEIU would even be interested in representing the employees.

David told the employees he was delighted, and, believing that the OPEIU had become the employees' bargaining representative, immediately recognized the Union.[26] He did express to the employees some concern that the attorneys, too, had elected to become a part of the collective-bargaining unit, as up to this point he had considered the attorneys, as associates, to have administrative responsibilities and supervisory authority over the secretaries. However, David did not object, and he told Betters and Mejia that he was willing to honor their desire to be included in a bargaining unit with clericals, but that they should understand that they would be giving up their supervisory status and would become bargaining unit employees. Later that very afternoon he sent a document entitled "Recognition Payroll Dues Deduction Agreement" to Tonya Cummings, the president of OPEIU Local 120. He also phoned Cummings and left a message regarding the matter; she never returned his call.

8. Events following the Respondent's recognition of the Union; David's meeting with Davila and Konrad

The complaint alleges that all four of the employees who had presented David with union cards were discharged or constructively discharged because they elected to be represented by a union. As it turned out, infra, Davila was discharged the following Tuesday, May 30; Betters quit the next day, Wednesday, May 31, immediately after being advised by OPEIU Representative Cummings that the OPEIU was not interested in representing the employees, and Mejia quit the day after that, Thursday, June 1; and Konrad worked for 3 more months and was discharged on August 25.

On the afternoon of May 26, David received a phone call from Andrew Milburn Jr., vice president of CWA District 6. District 6 represents some 86,000 members within the geographical jurisdiction of Texas, Oklahoma, Kansas and Arkansas. Milburn holds the top elected position in District 6. Since March, upon the recommendation of Milburn who had worked on many matters with David and knew him well, the Respondent had been selected to become the sole General Counsel for District 6; prior to that time District 6 utilized the legal services of both the Respondent and another law firm. In March, District 6 had over 400 grievances and arbitrations pending. Milburn testified that he knew from conversations with David that the added business would about double the Respondent's workload, that David would need to increase his legal staff and possibly his clerical staff to handle the increase, and that the acquisition of this additional business presented a significant opportunity for David and the law firm.

[25] Betters testified that the primary reason she phoned Murphy was that Rachel was trying to make the employees work on Monday, Memorial Day. Secondary reasons included the belief that Rachel was making other inappropriate demands of them, such as giving them office-cleaning duties, and that all the employees were fearful of being fired at any time due to Rachel's unpredictable behavior. According to Betters, she did not explain this to Murphy; rather, she simply told Murphy the employees wanted to unionize. Betters did specifically deny that she called Murphy because she believed Davila was about to be fired, or that she told Murphy she was afraid that Davila was to be fired. I credit the testimony of Murphy and specifically discredit the testimony of Betters.

[26] The record is absolutely clear, and I find, that David was indeed pleased that the employees had elected to become represented by the OPEIU. Prior to moving his office to San Antonio, he was proud of the fact that his was the only law firm in the State of Texas that had a collective-bargaining relationship with a union (the OPEIU represented his clerical employees in Austin); and credible record evidence shows that after moving to San Antonio he had spoken with OPEIU Representative Tonya Cummings about organizing the employees in his San Antonio office. In addition to believing wholeheartedly in the mutual benefits of collective bargaining, he also believed that union representation of his employees was simply a beneficial business practice for a union-side law firm. The record abundantly shows, and I find, that at all times material herein David was ready and even anxious to negotiate a collective-bargaining agreement with the employees' collective-bargaining representative.

Milburn testified that the reason he phoned David on the afternoon of May 26 was because of a pending arbitration matter. Milburn was to be a principal witness on behalf of the CWA in the scheduled arbitration. On May 25, Milburn had received a letter from Triple A dated May 23, advising that the arbitration had been scheduled for August 15. Milburn testified that this was very upsetting to him, as the Respondent was supposed to check with Milburn before scheduling arbitration dates with Triple A. According to Milburn, August 15 was a particularly unacceptable date because he, along with a contingent of CWA officials, was scheduled to be involved in proceedings at the Democratic National Convention on that very day. During the course of the phone call, Milburn emphasized to David that he was very unhappy about this, that it was unacceptable, that he could not have this type of thing going on, that he could not do business this way, and that this caused him some concern that perhaps the Respondent was dealing in a similar fashion with the other 15 or 20 CWA representatives in the field who worked with the Respondent in the scheduling and handling of arbitrations.

Milburn insisted that the arbitration be rescheduled.[27] David, according to Milburn, said that he would take care of it, that he would look into the matter and find out how the mistake was made, that he would fix the problem, and that it wouldn't happen in the future. David did get back to him in a few days and said that upon looking through his secretary's tray he had found the letter from Triple A that had upset Milburn. Milburn believes that David also told him he had discharged that secretary.

David's testimony corroborates that of Milburn. According to David, Milburn was angry because the law firm had let the arbitration be scheduled for hearing on August 15. He told David that he was extremely unhappy and wanted to know how it had happened and whether the law firm was taking care of his business properly, and advised that it had better not happen again. David did not know what Milburn was talking about, and during their phone conversation Milburn faxed him the letter from Triple A showing that the arbitration had been scheduled for August 15. David testified that after receiving this call he "worried a lot, and I became concerned that my relationship with my biggest client was in grave jeopardy." He called Davila and Konrad into his office and told them about Milburn's phone call, reminded them that the client always had to be contacted before a hearing was scheduled, and again "walked them through" the procedures that had been established regarding the scheduling of arbitrations and other communications with Triple A. David testified that this was not intended to be an investigatory or accusatory type meeting. Konrad's account of the meeting is as follows. David asked Davila, "[H]ow she did things in the office, and she answered his questions, and then he talked to me about some of the things that I did in the office." Konrad did not pay close attention to the conversation between David and Davila, but does recall that David asked Davila about arbitration cases. David seemed to be in agreement with Davila's responses; Konrad also testified that David seem to be satisfied with her answers when he asked her about specific work-related matters, and even apologized when she explained to him why she had not been able to send out some 50 letters that week, as David had requested. David ended the meeting by stating that when they came back to work the following Tuesday, "we'd start over with a clean slate."

Davila testified that during the meeting David asked her about office matters, and particularly about the phone call he had received from Milburn regarding the arbitration matter. David showed her the letter from Triple A that Milburn had faxed to him, and Davila replied that she didn't not know anything about it, as the letter from Triple A was dated prior to her starting date with the Respondent. David seemed to accept this explanation and did not question her further about the matter.

Davila phoned Betters that evening, and told Betters that David had questioned her and Konrad about office matters. Betters said that she believed Davila was being reprimanded and should have requested a union representative. Davila disagreed, and told Betters, "I didn't think of it that way. I thought he was just asking me questions regarding what was going on in that office, concerns that he had, that Rachel had brought up to him." However, when Davila was again asked by the General Counsel why she felt it was necessary to phone Betters, Davila inconsistently testified, "Well, I thought he was trying to accuse me of something that I hadn't done and I thought he was trying to get me fired."

The foregoing testimony of Konrad and Davila indicates that both of them left the office that Friday evening with the belief that their explanations to David about work-related matters had been accepted by him with equanimity: according to Konrad, he told them to have a nice weekend and that they would start with a clean slate on the following Tuesday; and, according to Davila, David did not seem to be reprimanding her for inattention to work, but just had concerns about work-related matters. I do not credit Davila's inconsistent testimony that she phoned Betters because she believed David was seeking to falsely accuse her of things in order to find a reason to fire her. If this had been the reason she phoned Betters, this is what she would have told Betters, and testified to, in the first place. Further, the record evidence appears to substantiate David's characterization of the meeting as noninvestigatory and nonaccusatory: He was asking them about work-related matters in order to insure that they performed their work promptly and efficiently, he accepted their responses to his questions at face value, and he gave them no reason to believe that he intended to take disciplinary action against them.

9. Voice-mails and e-mails

In any event, Davila's phone call to Betters prompted her to phone the office that evening and leave a voice mail for David. Betters testified that she advised David, "that I knew that there had been a meeting and that I thought we wanted union representatives to be present at these kind of meetings and I wasn't

[27] Milburn also testified that sometime in April he received a phone call from Kirby, who wanted to meet with him "in confidence." During their meeting Kirby said she was working with another attorney on a contract basis, and, while attempting to solicit arbitration business from the CWA, made some discrediting remarks about David and his firm; she also indicated a very strong dislike for Rachel and made some very disparaging remarks about David and Rachel's personal relationship. Milburn did tell David about this meeting with Kirby, but did not tell him about the personal matters that Kirby had related.

sure about this . . . I think I said that I was going to advise [the employees] not to talk about this kind of stuff until I could talk to a union representative."

In fact, Betters' message, which she left at 10:25 p.m. that evening, states,[28] inter alia, that although the matter was not a emergency, Betters had heard about David's meeting with Davila and Konrad, and that:

> You know, this union stuff is a little bit new to us, but my understanding was that, you know, you've been advised that we're unionizing. So, I was—I'm going to let them know that they need to tell you, until we get our collective bargaining agreement, at least, that we're not going to talk to you privately, unless a union rep is present, for obvious reasons. The same goes for Rachel. May I suggest that you let Rachel know, so that she's not asking questions of the employees in the office, so that, you know, we make this as comfortable as possible for everyone.
>
> I'm not sure if the employees actually have to state that to you directly or if my telling you is good enough, so I'm going to instruct them to tell you that directly, at least until we get some idea of the structure of the office.
>
> . . . .
>
> You know, like I said, I'm new to this. I don't know anything about it. And we're going to have to talk to our union reps about it. So, if I'm off base, I apologize, but that's my understanding, that they don't have to talk to you if they don't want to. And I'm sure that they didn't today. So, like I said, I'm going to instruct them to tell you to talk to the union rep there with them the next time you want to have a meeting with them.
>
> I was going to say, if you have any questions, call me, but I don't have any answers for you, because I just don't know enough. So, I will see you Tuesday. Bye, bye.

It is clear that David understood from this voice message that Betters, as the representative of the employees, was telling David not to speak with the employees, including Betters, about work-related matters, in the absence of a union representative; and further, that Betters intended to so instruct the employees that they need not speak to David about work-related matters unless a union representative was present.

When the Van Oses arrived home that evening David checked his office voice mail and heard Betters' message. Because he believed that this was indeed an emergency situation as it effected the operations of his office, and because he wanted to contact Betters before she contacted the other employees and instructed them not to talk with him about work-related matters, he phoned Betters that night three times within 5 minutes. It is clear from David's response and tone of voice [29] that he was livid. Betters was home, but did not answer her phone, and David left three short messages. The first message was at 1:39 a.m. David said:

> Ah, Nicole, this is David. You are right, you don't know very much. Ah, the meeting this afternoon with my employees was not a disciplinary meeting. It did not involve potential discipline. It was a meeting about work duties. I will discuss with my [sic] employees any time I feel like it, and if you instruct my employees not to discuss work issues with me, you will be infringing upon my rights as we will have trouble and I will not put up with it. That is my answer to you, do you understand? If you have any questions about it, you call me. . . . Thank you.

The second message advised Betters that

> If you interfere with my ability to manage my office by instructing my employees not to discuss work issues with me, and therefore prevent me from being . . . able to get my work done, you will be looking for a new job, very, very, quickly. Let me be clear about that . . . I will discuss work issues and work duties with my employees whenever I feel like it. If you interfere, you will be terminated immediately. Do you understand?

In this message he also advised Betters that he was fully aware that if the employees reasonably believed that discipline could result from any interrogation about work, they had a right to union representation upon their request.

During the third message David advised Betters that

> If any of my employees refuse to talk to me . . . about work issues, they will be terminated immediately and for your information, all of my employees, ah let's see that is Kandy [Konrad], Nicole [Betters], Denise [Mejia] and Mary Louise [Davila] are probationary by explicit agreement with me at the times of hiring of less that 90 days ago[30] . . . Any employee who refuses to talk to me about work issues will be terminated immediately. You can tell them that, and if you instruct them not to talk to me and therefore get them fired, I guess you can deal with them, alright? If you have any questions please feel free to call me.

The complaint alleges that by these three "hostile" and "early morning" phone calls, the Respondent harassed and threatened employees "with immediate discharge" and "with interrogation," and informed them that they were being placed on probationary status, all because of their concerted activity.

David's late night/early morning phone calls not did not occur in a vacuum. Betters' voice mail message, I find, was indeed shocking to David, as he reasonably understood that Betters, as union representative and spokesperson on behalf of all the employee, was instructing him not to talk to his employees about work-related matters, that Betters intended to "instruct" the employees that they need not talk to David about work-related matters unless a union representative was present, and that this would be the modus operandi of the office, established by Betters, until a union contract had been negotiated. Obviously, neither a law firm nor any other business can function

[28] David had kept the recording of this message, and it was received in evidence.

[29] Betters had kept the recording of the messages, and it was received in evidence.

[30] I credit David's testimony that in fact upon hiring each of these employees he advised them that they were probationary or "provisional" employees. I do not credit the employees' testimony to the contrary.

under such restrictions. I find that, under the circumstances, David's immediate response that he would terminate Betters for so instructing the employees, and that he would terminate the employees for following Betters' instructions, was entirely within David's prerogative as an employer. Further it is clear that David assured Betters that he would respect the employees' *Weingarten*[31] rights to have a union representative present under certain circumstances. It is also clear, as found above, that Betters understood David was not antiunion; to the contrary, Betters testified she had anticipated that David would be favorably receptive to his employees' request for union recognition, and indeed this was the case. I shall dismiss these allegations of the complaint.

It is unclear from the complaint whether it is the content of the foregoing messages, or the manner in which David transmitted these messages, or the two combined, that comprise the complaint allegations. Clearly, if Betters believed that her message was not important, she could have simply spoken to David about the matter the next business day, Tuesday, May 30. Rather, she deemed the matter important enough to warrant a call at 10:25 p.m. on Friday night.[32] To David, Betters' message was of critical importance as it directly effected the very operation of his business, and warranted an immediate response regardless of the hour. He was angry, his reaction was spontaneous, he phoned soon after he returned home that evening and received Betters' message, he placed the three calls within a 5-minute time span, and each of the calls conveyed a different, concise, responsive thought. Under the circumstances, I find that the timing of David's response coupled with his incensed tone of voice did not independently constitute harassment, and did not make his otherwise lawful remarks unlawful.

Betters did not respond to David's phone calls.

This was only the beginning of that weekend's exchange of messages. On Saturday, May 27, at 3 p.m., David sent a lengthy, wordy, repetitious, three-page e-mail to the office email addresses of each of the employees, and also to Betters' personal e-mail[33] in response to Betters' voice mail message the night before. David pointed out the reasons for his discussion with Davila and Konrad on Friday, and he advised the employees that Betters' understanding of labor law was not correct, and that he may not be precluded from having discussions with his staff. He again stated that anyone who refused to discuss legitimate work issues with him would be terminated, that anyone who instructed other to refuse to discuss legitimate work issues with him would be terminated, and that anyone who lies about work issues would be terminated. He further states that, "Under the *Weingarten* rule, if I conduct an investigatory interview with an employee which could possibly lead to discipline, the employee upon request has the right to a union representative. I am fully aware of this rule and will comply with it with the fullest cooperation." He states that he believed that "collective bargaining was going to be real good for the office when I first received your petition. However, if Nicole [Betters] or anyone else plans to prevent me from normal day-to-day management, especially now when I am so swamped and so badly in need of teamwork, by such ideas as the ridiculous suggestion that I cannot have meetings with employees to discuss work strategies, I am going to have to respond with a tough business attitude. I am so busy I don't have time for anything else. Weingarten rights will be respected to the maximum by me. . . ." He tells the employees that they had better get some good advice from OPEIU Business Representative Tonya Cummings, "and get it quick, because I guarantee she knows better." He states:

> Collective bargaining through union representation is a GOOD system. It works. I look forward to meeting with y'all for the excitement and challenge of negotiating a first contract. It will be fun. It can be one of the most fun things anybody can do. We really all need to be looking forward to it. But the system can turn sour if people decide they want war instead of progress or if they want destructivity instead of constructiveness. Hey, guys, you can't go around saying that the owner of the business can't talk to you about work. That ain't gonna work. [Original emphasis.]

He goes on to say that he is "neck-deep in trying to take care of my client's business, and they are my first priority next to my children." He states that he is prepared to begin meeting at 6 p.m. every evening, and earlier on weekends, to negotiate a contract. He concludes the e-mail with a bit of humor, stating that he had proposed a "union shop" in the recognition clause he sent to OPEIU Representative Tonya Cummings, even though this would be unlawful in Texas, a right-to-work State, but to neutralize this he also inserted a clause stating that contract provisions are unenforceable where prohibited by law. He ends the e-mail with, "Good luck to you all and happy bargaining."

Once again, in this e-mail David is conveying the same lawful message to the employees that he conveyed to Betters over the phone. I conclude that his reference to a "tough business attitude" may be reasonably understood to mean, as he repeated many times, that he would not tolerate the employees' refusal to speak to him about work-related matters. Further, the statement that "anyone who lies about work issues would be terminated" is a prerogative of management and seems to be a reiteration of certain statements in his April 17 memorandum, supra, wherein he makes it clear that he has very little tolerance for untruthfulness regarding matters that affect the functioning of the firm. I shall dismiss the allegations of the complaint regarding this e-mail.

Next, Betters responded to David's phone and e-mail message by a lengthy email to David and all the employees dated Saturday, May 27, apparently intended to diffuse the situation. First, she misrepresents what she said to David in her voicemail by stating, "If you listen carefully to what I actually said in the message, my message was this: I don't know whether we have

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[31] *NLRB v. J. Weingarten, Inc*., 420 U.S. 251 (1975).

[32] It appears there was a calculated motive for Betters' Friday night voice mail message: Thus, she could have waited to have a face-to-face conversation with David at the beginning of the next business day, but she wanted to preclude David from making a decision to discharge Davila over the weekend. Indeed, the operative reason for contacting Murphy, fabricating union cards, and requesting recognition, I find, was to protect Davila.

[33] E-mails were a customary way of communicating among David and the staff.

the right to have a representative with us during meetings with you regarding office discipline, but if we do, we want to assert that right." Then she says, "Instead flying off the handle and threatening our jobs, you [could] have simply informed me of the law as it stands." She relates her understanding of David's discussion with Davila and Konrad. She further states that she has been trying to get in touch with Union Representative Cummings and others but that these individuals have taken long holiday weekends and that no actions will be taken on contract issues "until we meet with our union"; further, she says that, "The minute we get in touch with our union . . . leave me out of it." She ends the e-mail by suggesting to the employees that they ask for a union representative if they feel that interrogation about matters may result in discipline.

David was not pleased with this response. He replied only to Betters. His lengthy email, dated late Saturday night, states, inter alia:

> You are correct. I was extremely offended by your voice-mail message. I did save the message and I shall keep the recording. You clearly told me that you were going to instruct the employees not to talk to me. You know very well how I am struggling like a dog to keep up with my workload and keep this office going. If I cannot talk to the employees about work issues I am dead.
>
> . . . .
>
> My elation [about the employees' unionizing] vanished when I heard your message last night. To me it was a declaration of war. You clearly told me that the union was going to hassle me a lot about day to day talking with the employees.

He states that he is extremely busy and would not be able to operate if he had to slow down to arrange union representation just to have routine work assignment and work status discussions with employees; under those restrictions he would have no choice but to give up the practice and sell the building. He states that his discussion on Friday with Davila and Konrad was about the "status of work projects. The work is not getting moved out fast enough. Important letters are languishing for 2 and 3 days. The discussion was not intended to be investigatory for possible discipline, it was intended to be a status and strategy session." He goes on to state, "I guess what I really heard as a declaration of war was your telling me what you were going to 'INSTRUCT' the employees to do and not do in my attempts to interact with them." He further states

> If you had just called me and asked me if they had a right to union representation or asked me about the nature of the meeting and whether it was possible a mistake was made by my talking to them, I would not have felt offended and would have given you a straight answer to the best of my ability and knowledge. But you really threw down a gauntlet when you told me you were going to instruct the employees not to meet with me in the office. What the hell, do I have to wait for a union representative if I want to meet with Mary and go over my day's mail . . . .

He goes on to tell Betters that although she was hired on a "provisional" basis, he wanted to assure her that he was not having second thoughts about her, that she was doing a good job, "and I just need you to keep it up." He concludes as follows:

> And regarding your concerted activities, if you think you are in any danger of losing your job because of your union activities, you not only do not know me very well, you do not know me at all. I would sooner jump off a cliff face forward than terminate an employee for exercising rights that I believe in with all my heart. Do you get it? What have I spent my adult life fighting for is not something I can trample on even if logic were to dictate that I should. I would not be capable of it. It would put me at war with my soul . . . please take this to the bank—you guys do not have to worry about reprisal for your legitimate concerted and union activities over wages, hours and conditions of employment. OK? Please. Tell everybody paranoia about that factor is not necessary. I live and breathe believing in those rights. When we disagree about labor-management issues, as we are bound to, please check the paranoia in at the gate, it is not needed. Thanks.

I shall dismiss the complaint allegations regarding this e-mail. It is mostly a reiteration of the message contained in prior communications which I have found to be lawful. In this e-mail David introduces the matter of possibly having to close down the business in the event he is unable to communicate with his employees. This makes sense, and emphasizes the seriousness of the matter; it is not a threat but simply an observation that the business would not be able to survive under the ground rules enunciated by Betters.

Importantly, the concluding paragraphs of the e-mail specifically advise in very clear terms that Betters is doing a good job and should keep it up, that there will be no reprisals against Betters or any other employees because of their union activities, that employees need not worry about this, and that Betters should please relay this to the employees so that they need not have any concerns or regrets about their decision to unionize. Assuming arguendo that David did make any statements in the various foregoing phone calls or emails that could be construed as unlawful, I find that by this explicit message the Respondent effectively and unequivocally advised the employees that they need not fear any reprisals, and that David had not intended his messages to dissuade employees from continuing to pursue unionization.

Betters replied to David with a short e-mail as follows:

> Yesterday, an employee was confronted regarding her lunch hour, and why she was not a team player.[34]
>
> I think you will know what I am talking about when I tell you that it is not YOU that I am worried about. I know that you are honorable and trust worthy. It is the other boss that I am worried about.
>
> I am willing and ready to RISK MY JOB TO PROTECT THOSE SECRETARIES. [Original emphasis.]

[34] This is not a reference to the meeting David had with Davila and Konrad; it is a different matter.

David's reply email to Betters begins by stating that the secretary whom Betters wants to protect appears to be dishonest and appears to not be doing a good job and to be hurting his client's interests. He then notifies Betters that, "based on some things I have found in the office today and some things I have been confronted with by a client I have realized that I need to investigate some conduct that has hurt my clients." He then advises Betters that he will be having investigatory meetings with Davila and Konrad on Tuesday morning, and invites Betters to so notify them if she wants to, and to attend the meetings as their union representative. Then he goes on to say, inter alia

> Nicole, I am tired of your belligerence and your attempted bullying and intimidation about these labor-management issues. *You have the right to conduct your union business that way if you want to, so long as you do not disrupt firm business, and as I have assured you your protected rights will be honored.* But this is not the constructive way to start a collective bargaining relationship . . . evidently you intend to protect poor performance at all costs regardless of the detriment to the clients. If that is your goal, we are not going to have a positive labor-management relationship. But based on your last message that is evidently what you intend. [Emphasis added.]

Then he changes the subject and says:

> By the way, you do need to make sure you keep up with your assigned legal work. To be fair, you need to follow the same expectation I have imposed on Denise [Mejia]. I need to see a minimum of 6.5 billable hours per day. And you need to leave me daily reports of your billable time before you leave for the bar review course each day. I will show you Tuesday the format that Denise uses.

The next paragraph continues the discussion of office business. David states that he wants to discuss certain office matters with Betters and Mejia on Tuesday morning following the investigatory interviews. He concludes as follows:

> Nicole, we MUST compartmentalize effectively between labor-management disputes and our legal work, and we MUST NOT permit labor-management disagreements between you as office union rep and me as manager to hurt our legal work for the clients. As lawyers we MUST work together as a team in our legal work for our clients regardless of the labor-management business. And the work for the clients must be taken care of timely and properly. I insist on this commitment and I have a right to it. [Original emphasis.]

It is clear by this message that David, who in my opinion seems to be overreacting to the situation as a result of the stresses he articulates in his various emails,[35] believes Betters is willing to risk her job to protect incompetence and dishonesty, in detriment to the interests of the firm's clients. He is very unhappy about this, and chastises Betters, in her capacity as a union representative, for what he considers to be her strong-willed and ill-considered stance. He expresses his opinion that a constructive, long-term union-management relationship must insure that employees are an asset rather than a liability. Nevertheless, he is willing to honor Betters' right to conduct union business as she pleases. He then states that he and Betters must compartmentalize, in effect, agree to disagree, and work together for the benefit of their clients regardless of labor-management disagreements. While David's directness in expressing his beliefs to Betters might cause her to feel uncomfortable in her position as self-proclaimed protector of the secretaries, this is the position that she conferred upon herself, and there is no requirement that David be sympathetic to her dilemma. I shall dismiss the allegations of the complaint pertaining to these portions of the email.

It is alleged that David, by this e-mail, imposes new and more onerous working conditions on Betters because of her union activity. Thus, David told Betters that she would be expected to have a minimum of 6.5 billable hours per day, and would have to submit daily reports of these hours. Prior to this time Betters had not been given any such specific requirements to fulfill. Mejia, however, who had been employed by the Respondent for a somewhat longer period of time, but, unlike Betters was not a licensed attorney with 2 years of practice, had been required to meet these expectations and did so. David's testimony indicates that he did have a conversation with Betters about this matter after the date of the e-mail, as David testified that Betters did not have a problem with this and told him that she understood that this had been Mejia's requirement. Betters, called as a rebuttal witness regarding other matters, did not deny that such a conversation had occurred.

The logging of sufficient billable hours had consistently been a matter of concern. It was emphasized in the report of the consultant who analyzed and made recommendations about the firm's practice, and this report was shared with the associates. Billable hours was the subject of emails from Betters and Mejia who were trying to minimize the time they spent on administrative or operational matters so that they could focus on income-producing work. For example, Betters sent an April 14 e-mail to Rachel stating: "Thanks for keeping us in the loop as to the changes in the office. I think that office management will help us to increase our billables. We're looking forward to working with Lorraine [Perez]"; an email from Betters to David, dated April 20, states, inter alia: Denise [Mejia] and I are brainstorming for some ideas as to how we can make our hours (and Yours) more billable. Here are some suggestions we've thought up. . . ." An e-mail from Betters to David dated Sunday, May 21, states, inter alia, "I appreciate your mention of incentives. I anticipate that the hours I put in henceforth will be more billable and less administrative as the staff situation settles." An e-mail from Mejia to David dated May 22, talks about Mejia's need to leave early each day in order to attend a bar review class, and that, "I will still be turning in my billing sheets and meeting the 6-1/2 hours we need to survive. Thanks for your understanding and support though this bar exam."

[35] In fact the record abundantly demonstrates, and I find, that these stresses were very real, and were exacerbated by long hours of work, days, nights, and weekends, a very heavy schedule and caseload, relatively inexperienced associates, a revolving secretarial staff, the complaint from Milburn, and a cash flow crisis due to the fact that the monthly billing had not been completed in timely fashion. Clearly, the employees were all well aware of the fact that such pressures weighed upon David.

The record evidence record shows that 6.5 billable hours 5 days a week had been the norm for the Respondent's practice even in Austin, prior to the move to San Antonio. Further, clear record evidence shows that 6.5 billable hours per day should be readily obtainable. Betters testified that this was a reasonable amount of hours for her to bill; indeed, there is no record evidence that Betters, of her own accord, did not in fact bill this number of hours prior to the time David asked her to do so.

Regarding the requirement that Betters submit daily reports of her billable hours, such a requirement seems to be simply an ordinary ministerial function that is not burdensome. Thus, it makes sense that billable hours, which must be documented, should be documented when they occur, and to turn in a daily log of these hours does not seem to be an added burden. Indeed, on Tuesday, May 30, following the Memorial Day weekend, Betters did turn in her billable hours at the end of the day, and David e-mailed her at 5:04 p.m. as follows:

> Nicole, I just want to thank you for your ready cooperation with my request for daily timesheets. It is a good tool for keeping up with what is going on in the firm—and one I clearly should have been utilizing for a long time. One of those days when we all have a few minutes to relax at a bar or a soda shop or something I will fill everybody in on some of the incredible attitudes former associates of mine have had about basic time accountability—you won't believe some of these true stories. You finally get to a point where you just get tired of asking people to do basic things, and it is nice to have on board someone like you who appreciates fundamental accountability. In the very near future I am going to get us out of the horse-and-buggy era with time reporting and set us up with the networked version of TimeSlips that will allow time reporting to be done through automation so that the data will be accessible immediately. When I am trying to make financial decisions it is impossible to forecast future incoming cash flow without data about what kind of billing is being performed. Yet mostly I don't have the data—the daily timesheets will help out not only for that reason but also to help know what people are working on for status purposes. Again, thank you for your ready cooperation, and keep your fingers crossed about getting the networked TimeSlips in the near future. [36]

It should be recalled that in the foregoing e-mail, immediately following the discussion of billable hours, David went on to discuss other business matters that had nothing to do with union activity. Unfortunately, the two subjects, union matters and work matters, were included in the same e-mail. The record is replete with e-mails to and from David and the associates, night and day and weekends, about work-related matters, as this was a customary, expedient, everyday form of communication among the staff. I conclude from the foregoing, and the credible testimony of David, that the billable hour and reporting requirements were not imposed upon Betters in reprisal for her union activity. Further, I conclude that Betters readily understood that this was the case. I shall dismiss these allegations of the complaint.

The next e-mail is from David to Betters, dated Sunday, May 28. The e-mail is entitled "off the record," and is a lengthy three-and-one-half page document, intended as "a personal side-bar message to you to try to lay out the stresses I am facing as candidly as I can." David says many things, very candidly.

He talks about Rachel and her health and the nature and purpose of her duties for the firm. He states that he knows the "office staff do not like her and that some people's interaction with her tends to lead to conflict. I also know there are those who find her a joy to work with." He states that the office staff who are "up in arms against Rachel have no loyalty or concern for me or my law practice or the practice's mission; that if they did they would have more understanding and appreciation for why she is helping at the office and would try to work with her." He goes on to state that "they have no qualms about demonizing Rachel with malicious lies in order to invoke your protection and to construct a cover for their poor work performance. I believe that they knew their work performance was poor and that they knew I was growing increasingly dissatisfied with it."

He talks about the "increased stress you have been putting me through the last two days," and that

> . . . what you are now doing absolutely threatens the survivability of this business because of the very simple reality that my time was already stretched to the limit. Dealing with the new situation as a very simple reality has caused a new and unexpected time management crisis for me that is very grave . . . for the survival of the business because it is such a distraction from the time I need to work on client business . . . the possibility is now very real that the business could go under simply because I cannot humanly stretch myself any thinner.

He talks about Davila, as follows:

> . . . you need to understand my frustration about Mary [Davila] in this context. I had high hopes that she would be a help but she has turned out not to be a help in the situation because she clearly does not have the skill and experience levels that she claimed and cannot move the work anywhere near as fast as is needed.

He mentions his health and family life, and he goes on to say:

> Nicole, this is a personal message, not a labor-management battle message. I am telling you this personally in the hope that I may still find some shred of friendship in you: If I have to go through a big series of obstructive battles just to make necessary personnel changes with people who are not capable of the performance this firm is obligated to provide to clients, I an going to have to close the doors rather than fight out those battles, because my time is stretched to the absolute limit right now and find-

[36] This email is instructive for various reasons: First, it indicates that requiring daily time sheets was for legitimate business purposes, and not simply to impose a burden upon Betters. Further, it demonstrates David's custom of expressing ideas in a rather thorough and loquacious fashion, as he has done in various emails herein. And finally, it indicates not only that David is pleased with Betters, but that he has the capacity to "compartmentalize," and separate her union advocacy on behalf of the employees from her work as a productive associate.

> ing the time to fight out such battles is not humanly possible . . . I am telling you the absolute reality because I respect you and want you to be clear about the cliff we are heading toward. I am not expressing hostility to unionization, I truly do welcome union representation and collective bargaining as a process. I am only telling you to be aware of what it will do to this business—for the benefit of all the Union members—if you decide to use the Union as a battle weapon to protect incompetence at all costs. It is not humanly possible for me to stretch my time any further if I have to fight such battles.
>
> The answer is not continued toleration of ineffective work performance by the office staff. I am sorry, I will not do that to my clients. It would be more honorable for me to go out of business and advise my clients to find other lawyers who will provide them better service, than to inflict poor service on them from my office, and that is what I will do if that is the only way out of the dilemma.
>
> There is nothing wrong with a union working with an employer to remove the incompetent work performance in order to keep the incompetence from dragging the whole business down to the detriment of everybody. That is what every responsible union does . . . .

David ends this e-mail on a positive note:

> I have not given up the search for constructive solutions. I have decided on a new step which I hope will change the dynamics of the situation, enable me to take care of my critical client work, enable me to deal appropriately with the personnel situation, keep stretched the rubber band of my time management crisis from snapping in two, and keep the firm in business. I believe this new step offers the chance to resolve these crises constructively. I am going to tell you about the new step in an "on the record" e-mail that will follow this one. I beg you to recognize the attempt I am making with the new step I am about to announce to you, to be able to keep my time crisis within the limit of toleration and keep the business afloat.
>
> This message was a personal plea as honest as I could get. . . .

I believe it is not unlawful for the owner of a business to bluntly advise a union representative, in a candid off-the-record communication, what he really thinks about particular individuals in his employ, regardless of whether his observations are correct or incorrect. Here, in a message which was not to be shared with the employees, David tells Betters, as union representative, that he believes Davila and Konrad are insensitive toward Rachel and have "demoniz[ed] Rachel with malicious lies," that they have no regard for the good of the firm, and that they have been dishonest in enlisting the assistance of Betters and the Union as advocates for their incompetence. But he does not say or imply that he intends to take any action against them for their union or protected concerted activity; rather he consistently refers to their work-related deficiencies as the basis for any disciplinary action he may decide to take. I shall dismiss these allegations of the complaint.

Clearly, by this e-mail, David expresses that he may have to shut down the business in the event the Union, by its vigorous support of unqualified employees, engages him in "big obstructive battles" that preclude him from properly attending to the needs of his clients. Were it not for the fact that David, at the end of the foregoing e-mail, and in the ensuing "on the record" email, infra, offers a constructive solution to the problem, I would find such a statement to be unlawful. However, in the foregoing e-mail he states that he has found a way to resolve these time-management crises and "keep the business afloat." And in the following e-mail he announces a specific solution to the dilemma he envisions, namely the appointment of a supervisory attorney who will handle labor-relations matters and relieve David of the burden of personnel matters and union-management relations. I believe these two e-mails, together, constitute a disavowal of any intent to close the business, and constitute sufficient, detailed, written assurance to the employees that they need not fear that vigorous efforts on their behalf by the Union may result in closure of the Respondent's business. I shall dismiss these allegations of the complaint.

The next, and final e-mail, sent on Sunday afternoon, is the follow-up "on-the-record" e-mail referred to by David. It was sent to Betters and is entitled "Announcement to employees c/o Nicole Betters, union representative." In this e-mail David announces the appointment of Tim Mahoney as supervisory attorney to be responsible for direct supervision of the bargaining unit, both nonprofessional and professional.[37] In addition, David states that Mahoney "will be responsible for all direct labor relations dealing with the OPEIU, subject to my ratification of any agreements or settlements." And he goes on to state

> I believe this is a constructive step for all of us in response to the current situation, because I need to remove myself one degree from the situation in order to get personalities out of the way and in order to be able to spend my time on critical client work. With respect to all bargaining unit employees, Tim will have all indicia of supervisory authority listed in Section 2 of the NLRA, provided that in hiring and firing his authority is to effectively recommend subject to my approval.

Further, David states that Mahoney will be conducting the investigatory meetings with Davila and Konrad on Tuesday morning, although David will probably attend.

David also states the following regarding Rachel:

> I have asked Rachel to remove herself from any interaction with the office staff in work assignment, work management, or personnel issues. She understands that there is friction between her and certain office staff. She is hurt, but she understands. This is to formally state that Rachel will no longer be involved in personnel or work assignment matters . . . Tim Mahoney as Supervisory Attorney will have the responsibility to resolve any issues that may arise regarding the interface between Rachel and the bargaining unit . . . in . . . non-personnel areas.

He concludes as follows:

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[37] Mahoney was an experienced attorney and acquaintance of David. He began working for the firm a week or so prior to May 26. His office was upstairs with the offices of Betters and Mejia.

> I am excited that Tim has accepted this offer. I believe you and the Union will find this to be a positive step. I will be able to concentrate better on client work and business development for the good of the whole organization . . . .
>
> . . . .
>
> I would appreciate your dealing with Tim rather than me, effective immediately, as your first line of contact on labor-management or OPEIU-related matters . . . .

10. The discharge of Davila; David Van Os' credibility

On Tuesday morning, May 30, the Respondent discharged Davila. David testified that over the weekend he had been conferring with a consultant, Ruben Armendarez, about the weekend's developments. Armendarez had recently retired from the Board and, it appears, was a prospect for employment by the Respondent. Armendarez, according to David, had suggested the appointment of Mahoney as supervisory attorney, a recommendation that David immediately adopted. Further, David had asked Armendarez to participate in the investigatory interviews with Davila and Konrad scheduled for Tuesday morning. Upon being advised of the situation regarding Davila's work performance, Armendarez suggested to David that in fact there seemed to be no need for an investigatory interview as the discharge of Davila was clearly warranted. David also accepted this suggestion.

To recapitulate what had happened on the previous Friday, May 26: The Respondent recognized the Union. David received a very troubling phone call from the firm's largest client. As a result of this call he held a meeting with Davila and Konrad about office procedure. This is what precipitated the phone call from Betters Friday night, and all the ensuing e-mails.

Davila began working for the Respondent on Saturday, May 13, and performed work on that Saturday and Sunday, May 14. David testified that either on Monday, May 15, or Tuesday, May 16, he sat down with Davila in the upstairs conference room and had a several hour training session with her in which he utilized the arbitration training folder for CWA cases, and reviewed with her, in detail, the procedure she was to follow in the handling of arbitrations with Triple A involving CWA grievances. He very carefully explained to her, reminding her several times, that it was necessary for her to clear all arbitration dates with the CWA representative handling the matter prior to sending Triple A the arbitration-date acceptance notification, and that when she received the CWA acceptance dates she should send them to Triple A immediately so that the dates would not be lost to some other Triple A matter. Davila said that she understood this, as she had utilized the same process in scheduling arbitrations from the management side while working in the legal department for Southwestern Bell.

David testified that he began having doubts about Davila from the beginning of her employment. Thus, during one of her first days on the job he had asked for some particular documents and knew that Rachel had given them to Davila because he had overheard Rachel doing so; yet when he asked Davila for the documents she said she didn't have them, and moreover did not offer to search for them. While this caused David to question her honesty, David did not want to make an issue of this as Davila was new on the job and he decided he would give her the benefit of the doubt. Then David had the problem, discussed above, with Davila not typing the dictation he had given her which, after repeated requests that she do so, finally had to be given to Konrad to complete on May 26. Further, according to David, when told to do things, Davila seemed to be passive or nonresponsive to his instructions. Finally, David testified that on Saturday, May 27, he discovered various documents on Davila's desk regarding three CWA arbitration matters, infra, including the one that CWA District 6 Vice-President Milburn had confronted him about on May 26, that provided clear evidence of Davila's inattention to highly important matters. As a result of these various considerations, David became convinced that Davila could not be trusted to perform the scheduling of arbitrations, which was one of the primary reasons he had hired her in the first place, or to perform other assigned work in a timely and accurate fashion.

Thus, David was faced with somewhat of a dilemma. He understood that in terms of timing it would look "terrible" to discharge Davila on the first business day after she and the other employees had requested union recognition. On the other hand, she simply could not be trusted to handle the very essential scheduling of arbitration matters, and Milburn, on behalf of CWA District 6, his largest client, had insisted that there be no more similar scheduling errors; further, Milburn would probably be monitoring the situation. David then decided that he simply could not trust Davila to do the work, and made the decision to discharge her.

David Van Os impressed me very favorably as a highly credible witness. He was subjected to extensive cross-examination regarding myriad and detailed matters; his responses and demeanor, in my opinion, underscored his credibility. He was responsive to the questions, his answers were direct and nonevasive, and he consistently made sense. He had an excellent recollection for detail and the ability to describe the nuances of situations in a manner that, in my opinion, demonstrated a conscious desire for accuracy. I credit his testimony.

Davila testified that during her preemployment interview, David seemed very impressed with her resume, and in particular focused on her experience with arbitration matters. He asked her questions about this, and she "told him the procedures that Southwestern Bell had regarding the documents, the hearings, setting of the hearings, dealing with the clients." David told her that he believed she understood the arbitration process. He offered her the position.

Up to this point, the testimony of Davila and David is consistent. However, Davila went on to testify that in fact after she began working for the firm she received no specific instruction from David about CWA arbitration matters, that there was no training session with David during which he reviewed CWA arbitration scheduling with her, and that although she already knew that the scheduling of arbitrations, and particularly the date-selection process, was an immediate priority, she learned the CWA process by asking questions of Konrad or others. Further, the only thing that David told her about the entire process was "that he had arbitrations." That was it; according to Davila, David never even mentioned the importance of expediting the arbitration process. However, as noted below,

during subsequent testimony, Davila acknowledged that in fact David had emphasized such matters to her, infra.

It would have made no sense for David to give Davila the responsibility for this essential work without specifically instructing her how to do it. The fact that she had had such prior experience with a single entity, Southwestern Bell, does not make her proficient with the more complicated system of coordinating the scheduling of CWA arbitrations between some 15 or 20 CWA union business agents *and* the Respondent, as legal representative. Further, after Davila was discharged, the firm's arbitration matters were split between Konrad and Joel Cantu, who was hired as David's executive secretary. Regarding this, Konrad testified that she and Cantu were give extensive training by David regarding the handling of arbitration matters: The training session lasted about three hours, during which David, according to Konrad, "went into extensive diagrams, and showed us books, and showed us forms, and told us exactly how the arbitration cases were to be handled"; David showed them binders containing "addresses of the reps., different things like that, documents that went to them and everything like that." It seems reasonable to conclude that David would not simply have expected Davila to pick up on such important matters through a process of osmosis or trial and error.

As noted above, Davila did testify that she was very cognizant of the importance of time constraints upon the arbitration scheduling process. She testified that "calendar picks" were a high priority that had to be taken care of immediately, and, in addition, that David had told her that calendar picks had to be sent out as soon as they were received. Clearly, she knew that time was of the essence. Davila testified, however, that none of the documents relating to the three CWA arbitration matters in question were on her desk when she left work on that Friday and that, in essence, David's testimony regarding this matter was a fabrication.

Davila's testimony is inconsistent and implausible. On direct examination, she testified that she did not know anything whatsoever about the three arbitration matters, as all the mail, including mail regarding calendar picks, is received by Rachel and is given directly to David. Later, after David testified that the calendar picks on two cases had come in by fax, not mail, on Thursday, May 25, as evidenced by the dates appearing on the faxes, Davila then testified that not only did she know abut the faxes, but also that she did remind David on Friday morning that it was important to return the faxes to Triple A that day, and that David said he would give them to her later but did not do so; therefore, she left work without faxing the documents to Triple A. While at first testifying that she made no notes about the faxes at the time they were received, she was then asked why, if she had not yet been given the documents that were to be faxed, she had prepared a fax cover sheet to Triple A, in her handwriting, dated Friday, May 26, containing the case numbers of the two cases. She then testified when the faxes first came in she noted the case numbers on a blank undated fax cover sheet so that she could fax the documents to Triple A as soon as David returned them to her, and she later completed the cover sheet, with the date of May 26 and fax number of Triple A,[38] in anticipation of David returning the documents to her sometime that day.

I find that David's version of the matter is the more likely. First, as noted, I have found David to be a highly credible witness. Secondly, Davila's testimony was inconsistent. Thirdly, it seems unlikely that, absent an established pattern to the contrary, a fax cover sheet would be completed prior to the time the documents to be faxed were ready for faxing. I find that in fact, as David testified, Davila should have sent the documents to Triple A on Thursday, the day they were received, but did not do so; and that she prepared the fax cover sheet to Triple A after she had the documents on her desk, but simply neglected to fax them by Friday evening. I further find that under the circumstances, David had a legitimate right to be very concerned about Davila's continued employment, as this and the other deficiencies exhibited by Davila directly impacted upon the firm's business relationship with all of its clients in general and its largest client in particular. I find that Davila was discharged for the reasons stated by David in the discharge letter. I shall dismiss this allegation of the complaint.

11. Appointment of Mahoney as supervisory attorney; alleged unlawful work requirements

On Tuesday morning, May 30, David assembled the three full-time employees, Betters, Mejia and Konrad (Davila had been discharged earlier that morning), and said that he was turning the meeting over to Mahoney, their new supervisory attorney.[39] David then left. Betters testified that Mahoney talked about his background, and said that the employees would have to fill out employment applications and I-9 forms and that clericals would have to take typing tests. He said the purpose of this was to "re-evaluate our employment positions there."[40] He said that Davila had been let go. He then told Betters that David wanted her to fly to Dallas to interview a witness on a case, and that Betters should phone the witness and set up a time for the interview. He also gave her a list of out of town arbitration cases, and told her that she now had enough free time on her hands to do this work.[41] Betters explained that she had an agreement with David that she would not need to travel out of town while she was studying for the Texas bar exam, and that she had to attend a bar review class most evenings; Betters

[38] It should be noted, also, that the fax number she wrote out for Triple A was incorrect; in fact, it was Triple A's phone number, not fax number.

[39] There is no complaint allegation that the appointment of Mahoney as supervisory attorney is violative of the Act.

[40] There is no evidence that employees were required to fill out new employment applications or I-9 forms, or take typing tests, or that their employment was re-evaluated; Konrad, who was then the only secretary, testified that she was not asked to do so, and neither Betters nor Mejia testified that they were asked to do so.

[41] Record evidence indicates that Betters and Mejia had been considered by David to be supervisors of the clericals, and that they performed certain administrative functions that were not income-producing; it is reasonable to assume, as the Respondent suggests, that Mahoney was probably indicating that since he was now supervising attorney, and could handle administrative matters, the associates could be relieved of such matters and could be more productive in terms of handling larger caseloads.

did not state whether Mahoney replied to this remark.[42] Mahoney, according to Betters, also told her that he wanted to review her cases with her; apparently this did not present a problem for Betters.

According to Mejia, David stated that Davila was no longer employed as she had been terminated that morning, and that Mahoney had been promoted to supervisory attorney and would be David's representative for union matters. Then David, stating Mahoney would take charge and conduct the rest of the meeting, left the room. Mejia does not recall what Mahoney said, as she was not listening because she was very upset about Davila's discharge. Later that day, she had several work-related discussions with Mahoney. He told her that he wanted to meet with her, and apparently with Betters, at 6 p.m. each day to discuss the day's events. Mejia said this would conflict with her agreement with David to leave at 5:30 p.m. in order to attend the bar review course. He said that she should take her directions from him and not from David, but Mejia continued to tell him that this created a conflict and that he should speak to David about the matter. She doesn't recall whether Mahoney replied. Mejia simply disregarded his instructions and never met with Mahoney at 6 p.m. According to Mejia, he yelled at her the next day, Wednesday, May 31, for not meeting with him, but she does not recall what he said. Further, although Mahoney never retracted the 6 p.m. meeting requirement, Mejia met with him earlier than that, and there is no showing of any interference with her bar review schedule.

Neither Betters nor Mejia ever spoke to David about the 6 p.m. meeting requirement although they had an opportunity to do so.

Mahoney started with the firm on May 18. He acted as supervisory attorney for only about a month, and voluntarily left the Respondent's employ in about August. I credit David's testimony that upon introducing Mahoney as supervisor, he told the employees that he was very glad they had chosen to organize and that he looked forward to the negotiation of their first contract. I credit his further testimony that he did not authorize or instruct Mahoney to impose any rules upon the employees that would interfere with their ability to attend the bar review course. The record is abundantly clear that David had always been very supportive of Betters and Mejia in this regard, that he had consistently attempted to balance their concerns about the bar reviews course with his business concerns, and that their becoming licensed to practice law in Texas would be a significant benefit to the Respondent for a variety of reasons.

Assuming arguendo that Betters and Mejia should be credited regarding their meeting or conversations with Mahoney, I find that whatever new rules were announced by Mahoney were not imposed as retaliation for their union activity, and that the employees clearly understood this. The fact that they simply disregarded Mahoney's instructions, and that Mejia advised him to check with David about the matter, indicates that they knew Mahoney was making rules that David would countermand. As noted, David had always been very supportive of their efforts to pass the Texas bar exam. And the fact that they did not even mention this matter to David, although Mejia spent the entire day with David during an arbitration proceeding on June 1, during which the interaction between David and Mejia was amicable and businesslike, indicates that they believed this was not a matter of immediate concern; if it had been of concern, there would have been no reason to fail to clarify the situation with David. Further, I do not credit the testimony of Betters and Mejia that the rules or requirements announced by Mahoney contributed to their decision to quit, infra. I shall dismiss these allegations of the complaint.

As noted above, Mahoney had given Betters an assignment to fly to Dallas and interview a witness. Betters testified that she asked Rachel to arrange her flight to Dallas, that Rachel asked her for a credit card as Betters would be paying for her travel up front and would apparently be reimbursed later, that Betters said she didn't have a credit card, and that Rachel replied that she could not make the reservations without a credit card from Betters.

Later that day Betters turned in her timesheets to David as she had been instructed to do. According to Betters, she started to leave the building and Rachel asked her how much longer it would be going on that she would be leaving "early." Betters said that she would be leaving at that time until after the bar exam. This exchange shows, I find, that Betters intended to pay no attention to Mahoney's request that the attorneys meet at 6 p.m. to review the day's work. Rachel, according to Betters, said she didn't think they could "give her the days off for the bar exam." Betters testified that the trip to Dallas would not have been a problem, and that she would have gone had it not been for the fact that the Respondent had not purchased her ticket up front.

When Mahoney came in to review her cases,[43] Betters said that they needed to talk about her trip to Dallas as Rachel had said she would not make the reservations without a credit card from Betters. Mahoney said he thought Betters' request that the Respondent make the reservations, rather than requiring Betters to pay up front, was reasonable, and that he would talk to Rachel. He never got back to Betters.

On Wednesday, May 31, Betters came in and noticed that David's office had been moved upstairs. Rachel, according to Betters, asked her, "Why we did this to her, why did we unionize." Betters said that they could talk about the matter after they bargained a contract. Rachel, according to Betters, said

[42] I credit David and find that on March 20, Betters first day on the job, David told her he would need her to handle some out of town arbitrations and gave her a list of them. Betters told him that she would be willing to handle out of town cases until about June 20, because the bar exam was on about July 20, and that after the bar exam she would continue handling those matters. This was fine with David. Also, according to David, Betters said that she could not afford to travel out of town because she has a dog, and she would have to board the dog in a kennel because she didn't know any of her neighbors in the apartment complex where she lived. David then offered her a $500 a month increase in her salary, and asked her if this increase would satisfy her concerns about her dog and the travel. Betters said yes. Betters simply testified that at some point she did get an increase in salary, but denies that there was any conversation about travel or her dog.

[43] Obviously this occurred before she left work that day to attend the bar review course.

that David's office was moved upstairs so that they could watch what was going on up there. Betters just walked away.

12. Alleged constructive discharge of Betters

Betters testified that she phoned OPEIU Representative Tonya Cummings and scheduled a luncheon meeting with her that day, May 31.[44] Betters testified that she, Mejia, Davila, Perez, "probably" Kirby, and Sylvia Vagara, formerly a part-time secretary, attended the meeting. Betters explained the situation to Cummings, who said, according to Betters, that the Union was not planning on doing anything for the employees.

Betters quit her employment that evening. According to Betters, she had no intention of resigning until she learned that the OPEIU was not interested in representing the employees; the Union had been "her last hope." She prepared a cordial letter of resignation to David stating, "I have immensely enjoyed working with you and your clients. Regretfully, I must resign," but offered no reason for resigning. She also states in the letter: "There is one matter pending that you need to be aware of. I was supposed to interview Mr. . . . in the . . . case on Thursday. However, I received neither a plane ticket nor a cash advance or credit card, so I so not know whether you have put this matter on hold." She left the letter on David's chair in his office at about 5:45 p.m. that evening. She did not tell Mahoney she was quitting. She only told her mother and Mejia; when she told Mejia she also asked Mejia whether she, too, wasn't going to quit.[45]

When Betters was hurriedly leaving the building that evening, after placing her letter of resignation on David's chair, she happened to encounter Rachel. Rachel told her that she had her ticket and travel itinerary for her Dallas trip the next morning, and attempted to give it to Betters. Betters lied and said she would come back for it, "and then I ran out in the parking lot, to my car, and ran home." Betters testified that she was fearful and didn't care when David or the Respondent learned that she was quitting; she just wanted to "get the hell out of there."

Betters was emphatic that despite all that had transpired she did not intend to quit and would not have quit if the Union had agreed to represent the employees. The Respondent had nothing to do with the Union's decision to decline to represent the employees. Moreover, it is clear that David had told Betters he was happy with her work, that union matters would not interfere with work matters, and that the employees need not fear any retaliation for their union activity; and on May 30, the day before, he also wrote her the folksy, positive email about being pleased with her cooperation in turning in her billing sheets at the end of the day. In addition, Betters, as union representative, had already accomplished a great deal: Thus, David, in order to resolve matters that he knew were troubling the employees, had specifically advised them, in writing, that, "This is to formally state that Rachel will no longer be involved in personnel or work assignment matters . . . Tim Mahoney as Supervisory Attorney will have the responsibility to resolve any issues that may arise regarding the interface between Rachel and the bargaining unit . . . in . . . non-personnel areas." Clearly, the Respondent was not attempting to cause Betters to quit. Finally, as noted herein, I have discredited Betters regarding numerous matters, and her testimony, I find, is simply unreliable; therefore it is difficult to give her assertions for quitting any validity whatsoever. I find that Betters was not constructively discharged. I shall dismiss this allegation of the complaint.

13. Alleged constructive discharge of Mejia

Mejia quit the following day, Thursday, June 1. Mejia claims that she quit because on the preceding evening, May 31, when David learned that Betters had quit, she heard him yelling and screaming and repeating himself over and over, "that bitch. She starts all this mess, and then she leaves." He kept changing the wording of what he was yelling, according to Mejia, but it was the same message over and over. He said, "[T]he fucking Union and then she leaves." Mejia claims that she was terrified. A short time later Mahoney came to her desk and yelled at her. He said, "Do you know what happened . . . you're not going to do this to David. You're not going to leave without notice?" Mejia said no.

Although Mejia claims she had already decided to quit, she spent the entire next day with David at a mediation matter, from 8 a.m. to 5 p.m. Nothing was said about Betters or the Union, and Mejia did not ask David about Mahoney's 6 p.m. meeting requirement. Then, that evening, Mejia phoned David and told him that her father was sick and she needed to resign and go back home. In fact this was a complete fabrication, but she was afraid to tell him the truth as she feared a confrontation and did want a good recommendation. David was very sympathetic, and he commiserated with her about her father. She went to the office the next morning and met with Mahoney to go over some cases that she had pending.

Mejia, when asked again to list her reasons for quitting, testified that, "[t]he hugest thing in my mind at that time was passing the Bar exam. And this was going to be the third time I take it. And I could not see working in that environment and passing it. So that was the hugest thing on my mind."

I credit David's testimony and find that he did not yell the things ascribed to him by Mejia.[46] Even assuming arguendo, however, that David did say these things, it appears that Mejia

[44] In fact, Cummings testified that Kirby, not betters, phoned her to set up the appointment, that she had not previously spoken to Betters, and that Kirby indeed was at the meeting. Cummings told the employees at the meeting, after learning about the situation, that she would have to check with her International Union about representing them; she did not categorically state that her local would not represent them. I credit the testimony of Cummings.

[45] However, she also called IBEW representative Michael Murphy that afternoon and told him she was leaving and volunteered to continue doing some work on a particular case.

[46] I also credit David's testimony that he was very upset about the abrupt manner in which Betters quit: Betters had been assigned to interview a client in Dallas the next business day and was given a ticket that had been purchased for her, and that, under the circumstances, it was "highly unethical" of her to leave a resignation letter not even knowing if he would see it that night. Moreover, according to David, Betters had "wiped out all of the client work product that was in the saved Microsoft Word folders in her computer." To this assertion, Betters claims that she only deleted drafts of documents, and that the hard copies of the documents were in the appropriate files.

could reasonably understand that he was upset with Betters because she had quit without notice, and that Mejia had no reason to fear a similar outburst from David unless she too quit without notice. Further, Betters had been criticized in her capacity as union representative for asserting a strong position in support of Davila; Mejia was simply a unit employee and had received no similar criticism. In addition, it is significant that Mejia did not assert, as a reason for quitting, the belief that she would not be able to take the bar review course; this is because, as I have found, she knew that David would give her permission to leave each day in time to attend the bar review course. Mejia was not asked to explain what she meant by the statement that she could no longer work in "that environment" and pass the bar. As I have found, the Respondent had not committed any unfair labor practices, and the environment in which Mejia would be working was not one designed by the Respondent to make her job so intolerable that she would quit. The opposite is true; clearly the Respondent did not want Mejia to quit, and this is why Mahoney approached her to seek assurance that she would not do so. Whatever Mejia's subjective thinking about her working environment, I find that she was not constructively discharged. I shall dismiss this allegation of the complaint.

14. Discharge of Konrad

Konrad was discharged on August 25. The record is replete with documentary and testimonial evidence regarding Konrad's deficiencies as a secretary, over many months, from the associates as well as David; and, indeed, even Konrad testified that she knew the associates were critical of her for not getting things done. A lengthy email from David to Betters, dated May 21, states, inter alia:

> I am concerned by what you have told me about Kandy's filing. This reflects some dangerous lack of knowledge or experience on her part about management of legal files.
>
> . . . .
>
> Kandy shows a lot of loyalty and dedicated work ethic which earns her some benefit of the doubt in response to her mistakes, so I want to work with her on the mistakes and counsel her on the right way to do things and give her a chance. (If she still can't do it right after being told, then we will have to consider other alternatives.)

I credit David's testimony and find that Konrad was kept on, despite her deficiencies, because he needed someone to do secretarial work; that he advertised for someone to fill the position of executive assistant; that he promoted Konrad to the position because he had provisionally promised her the position in the event a new applicant, Rhonda Compton, to whom he had offered the position, would decline the offer, and, to his dismay, this is what happened; and then he demoted Konrad when shortly thereafter he found an acceptable applicant, Joel Cantu. He counseled and spoke with Konrad thereafter about her errors on many occasions; he extended her probationary period because of her deficiencies; and finally, on August 25, he discovered that Konrad had sent a very important letter, dated August 16, to the regional director of Triple A, but had misaddressed the envelope, sending it to the wrong city, and for that reason the letter had never been received and was returned to the office on August 25.[47] This, according to David, caused him to write the following letter to Konrad, dated August 25, inter alia as follows:

> I have thought and thought about how to handle this situation. The reason it is such a struggle is that I genuinely like you and do not wish to harm you. I do not want to leave you in an impossible lurch, but I still come to the irretrievable conclusion that I cannot have you working here, because I have zero confidence that you will be 100% accurate in the daily tasks that require 100% accuracy. I just think that you do not have the kind of experience needed to handle the necessary expectations of a position like the one you have attempted to occupy in a fast-moving office like this one.
>
> . . . .
>
> As long as you are not seeking employment in a litigation firm, feel free to use me as a reference, and I will easily and happily be able to give truthful feedback that will help you with a prospective employer. Your are a very nice person and I wish you the best of luck . . . .

Konrad maintains that she did not misaddress the envelope; rather, that someone else did this in an attempt to falsely construct a reason to discharge her because of her union activity. I do not credit Konrad. I shall dismiss this allegation of the complaint.

15. Moving David's office upstairs

The complaint alleges that David moved his office from downstairs to upstairs in order to engage in surveillance of the attorneys' union activity. Abundant credible record evidence shows that it had always been the intention to move David's office upstairs, as this would make it more convenient for him to interact with the other attorneys. Further, it is clear that David had consistently used the upstairs conference room as an adjunct to his downstairs office; indeed, Konrad testified that this occurred on a frequent basis, several times a week. In addition, since Supervisory Attorney Mahoney's office was already upstairs, there would have been no reason for David to move his office upstairs for surveillance purposes, as Mahoney's presence would have been sufficient; and there was simply no need for David or anyone else to engage in surveillance, as the Respondent had readily recognized the Union and, I have found, was anxious to bargain a contract. Finally, I credit David and find that he moved his office upstairs for legitimate business reasons. I shall dismiss this allegation of the complaint.

16. The 8(a)(1) complaint allegations regarding Rachel Van Os

There are various complaint allegations that Rachel made various statements to the employees in violation of Section 8(a)(1) of the Act. Rachel, during the course of her testimony, specifically denied making any such statements. I have previously discredited each of the employees who were discharged or quit. I believe that portions of their testimony were either

[47] The letter and returned envelope are exhibits in this proceeding.

intentionally false or slanted in such a way that would reflect unfavorably up the Van Oses and would further their own individual and collective interests not only for purposes of this proceeding, but also because they feel they were treated unfairly, regardless of the merits of this instant controversy, and simply want to even the score. Moreover, their testimony exhibited such a profound, emotional disregard for Rachel, in particular, that I am unable to discern what portions of their testimony may be relied upon as an accurate attempt to convey an honest, unbiased, recollection of statements they attributed to Rachel, what parts are hyperbole, and what parts are simply fabricated, imagined, or based upon hearsay. Since, for these reasons, I am unable to credit their testimony over the denials of Rachel, I shall dismiss each of these allegations of the complaint.

17. Additional contentions of the parties

There are various additional issues that the parties have raised. The Respondent, citing *Kentucky River Community Care, Inc*., 538 U.S. 706 (2001), contends that Betters and Mejia are supervisors within the meaning of the Act, as they are professionals who responsibly direct the clericals under them. While there is considerable record evidence regarding the attorney-clerical relationship, the parties were able to stipulate this much: that the clericals or secretaries could have reasonably expected that they were required to perform whatever work was given to them by the attorneys in the office unless either of the Van Oses told them that priority should be given to other work, and, after the completion of such other assignments, the clericals or secretaries could have reasonably understood that they were to return to and complete the duties given them by the attorneys.

The Respondent also contends that Ybarra and Perez are supervisors within the meaning of the Act, and disputes the fact that Rachel usurped their authority and therefore, as contended by the General Counsel, was the de facto office manager.

In addition, the Respondent maintains that Kirby has orchestrated this entire matter, first as employee, and then from the sidelines, in an effort to disparage David and the law firm, both publicly and privately, and take the Respondent's business; and, further, that the employees are accomplices or pawns in Kirby's efforts. And lastly, the Respondent maintains that, assuming arguendo that any allegations regarding unlawful discharges or constructive discharges are found to be meritorious, such individuals have nevertheless forfeited reinstatement and backpay because of their unprofessional and unethical behavior, including the disclosure of confidential matters to clients and outside sources, leaving client matters in disarray upon quitting, deleting files from the computer, and other similar misconduct.

The General Counsel maintains that at no time during their employment were Betters and Mejia supervisors, and that Ybarra and Perez, despite their titles and job descriptions, were not supervisors because of the interference of Rachel who did not permit them to perform the functions they needed to perform in order to fulfill their nominal supervisory responsibilities. In this regard, the General Counsel maintains that Rachel, at all times herein, was the de facto supervisor/office manager, despite the fact that she did not receive a paycheck and was not an employee.

The aforementioned supervisory issues and Rachel's status were litigated extensively. In fact, a significant percentage of the transcript and exhibits in this proceeding are pertinent to these issues. Also, Kirby's involvement was explored by the Respondent. Since I have determined that the alleged discriminatees, assuming arguendo their employee status, were not discriminated against in any fashion, it seems unnecessary to resolve such issues.

On the basis of the foregoing, I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended[48]

ORDER

The complaint is dismissed in its entirety**.**

[48] 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.