Stephens Media, LLC, d/b/a Hawaii Tribune-Herald *and* Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL–CIO. Cases 37–CA–7043, 37–CA–7045, 37–CA–7046, 37–CA–7047, 37–CA–7048, 37–CA–7084, 37–CA–7085, 37–CA–7086, 37–CA–7087, 37–CA–7112, 37–CA–7114, 37–CA–7115, and 37–CA–7186

February 14, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

On March 6, 2008, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions and an answering brief, and the Respondent filed a reply brief.[1]

The National Labor Relations 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 modified herein,[3] and to adopt the recommended Order as modified and set forth in full below.

We agree with the judge, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(1) of the Act by: interrogating employees; disparately and discriminatorily enforcing its security access policy against the Union; discriminatorily prohibiting employees from wearing buttons and armbands in support of discharged or suspended employees; and promulgating and maintaining a rule prohibiting employees from making secret audio recordings of conversations in response to protected activity.[4] We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) by: issuing a written warning to employee Koryn Nako; suspending employees Hunter Bishop, Peter Sur, and David Smith; and discharging employees Bishop and Smith.

In agreeing with the judge that the Respondent's suspension and discharge of Smith violated Section 8(a)(3) and (1), we rely on his finding that Smith did not lose the Act's protection by secretly tape recording a meeting with Editor David Bock that Smith reasonably believed could result in discipline, but to which Bock refused to allow Smith to bring a union representative. As found by the judge, Smith was instructed by Union Administrator Wayne Cahill to go to the meeting and to take notes because he had been denied union representation. Thereafter, Smith and other employees agreed that Smith should, instead, record the meeting. Thus, Smith and others engaged in protected activity by acting in concert to document what they perceived to be a potential violation of employee rights under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). Smith's tape recording, which led to his suspension and discharge, was the culmination of these protected concerted activities. It is clear that the Respondent knew of those activities when it suspended and discharged him. In this context, the "pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Hacienda Hotel, Inc.*, 348 NLRB 854, 854 fn. 1 (2006), quoting *Stanford Hotel*, 344 NLRB 558, 558 (2005); see generally *Atlantic Steel Co.*, 245 NLRB 814 (1979). Here, where the Respondent had no rule barring such recording and where it was not unlawful in the State of Hawaii,[5] there was no such showing.[6]

With respect to the suspension and discharge of Bishop, we agree with the judge that, by this conduct, the Respondent violated Section 8(a)(3) and (1). We also agree with the judge that the Respondent failed to prove that Bishop engaged in postdischarge misconduct—including statements made at a public meeting and blog

[1] Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent filed a postbrief letter calling our attention to recent case authority. The General Counsel filed a letter in response.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. However, in adopting the judge's decision to discredit the testimony of employee Margaret Premo, we do not rely on his consideration of Premo's status as a *Beck* objector. See *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[3] We shall modify the judge's conclusions of law, remedy, and recommended Order, and substitute a new notice to conform to the violations found.

We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[4] *Gallup Inc.*, 334 NLRB 366 (2001), enfd. mem. 62 Fed. Appx. 557 (5th Cir. 2003) (finding that promulgation of a rule prohibiting taping by audio or video violated Sec. 8(a)(1) where the rule was promulgated immediately after the employer discovered the union's organizing efforts). See also *City Market*, 340 NLRB 1260 (2003) (promulgating otherwise lawful solicitation policy violated Sec. 8(a)(1) where the employer instituted the rule in response to employees' organizing activities), and *Ward Mfg., Inc.*, 152 NLRB 1270 (1965) (same).

No party excepted to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employee Koryn Nako in January 2006 and by creating the impression of surveillance among its employees on March 9, 2006.

[5] Haw.Rev.Stat. section 803-42(b)(4).

[6] Member Hayes would find that, even in the absence of an existing rule, the Respondent lawfully suspended and discharged Smith.

postings disparaging the quality of the Respondent's news coverage—that would eliminate its remedial obligation to reinstate him and cut off his entitlement to backpay. However, we find it appropriate to address the relevance of *NLRB v. Electrical Workers Local 1229 (Jefferson Standard*), 346 U.S. 464 (1953), in evaluating the remedial impact of Bishop's postdischarge statements.

The question at issue in *Jefferson Standard* was whether an employer could lawfully terminate employees for statements disparaging its products that were part of what would otherwise have been protected concerted efforts to communicate with the public in support of the union's position in collective bargaining. The Court's decision in *Jefferson Standard* turned on the duty of loyalty employees owe their employer—"the underlying contractual bonds and loyalties of employer and employee." Id. at 473. The Court specifically noted that the employees' disparaging remarks concerned "the very interests which the attackers were being paid to conserve and develop." Id. at 476.

As stated, *Jefferson Standard* involved disparagement of the respondent by current employees. If such conduct is known by an employer prior to an allegedly unlawful discharge, the rationale of *Jefferson Standard* may be the basis for a valid defense. In the alternative, if the employer only becomes aware of such predischarge conduct after an unlawful discharge, it may be the basis for cutting off backpay and denying reinstatement on the ground that the conduct, if known, would have justified discharge.[7]

Here, however, the alleged disparagement occurred postdischarge. There can be no issue whether it did or could have justified that discharge. Bishop's discharge *was* unlawful. The only question is whether he can still be denied reinstatement and have his backpay tolled because of what he said about his former employer after that unlawful action. Resolution of this remedial question requires consideration of the distinctions between predischarge and postdischarge situations. Simply put, employees who are unlawfully fired, like Bishop, often say unkind things about their former employers. As the Board explained in *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), enfd. 548 F.2d 391 (1st Cir. 1977), an "evaluation of postdischarge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge." Employers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims' natural human reactions to the unlawful acts.

For these reasons, the standard the judge should have applied to Bishop's postdischarge comments is the standard articulated in *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398 (1969). In that case, the Board adopted the relevant part of a trial examiner's decision which expressly rejected an argument based on *Jefferson Standard*. The trial examiner explained, "[t]he Board and Court decisions in *Jefferson Standard* stressed the fact that the employees were not on strike at the time of the distribution but were still at work and receiving wages from their employer, even while seeking to alienate his customers." Id. at 404. The examiner then concluded, "[w]hen seeking to be excused from his obligation to reinstate or to pay backpay to a discriminatee because of misconduct which was not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant." Id. at 405 (internal quotations and citations omitted).

The Board has applied the "unfit for further service" standard in many cases involving postdischarge conduct analogous to Bishop's,[8] and we shall apply that standard here. In doing so, we acknowledge that in a limited number of prior cases, the Board has applied principles drawn from *Jefferson Standard* in evaluating whether postdischarge conduct disqualified unlawfully discharged employees from reinstatement and cut off their right to backpay.[9] None of these cases cite or distinguish the

[7] E.g., *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69–70 (1993).

[8] See, e.g., *Geo. A. Hormel & Co.*, 301 NLRB 47, 47 (1991), enf. denied on other grounds 962 F.2d 1061 (D.C. Cir. 1992); *C-Town*, 281 NLRB 458, 458 (1986); *Timet*, 251 NLRB 1180 (1980), enfd. 671 F.2d 973 (6th Cir. 1982); *Teamsters Local 705*, 244 NLRB 794 797 (1979), enf. denied on other grounds 630 F.2d 505 (7th Cir. 1980); *Pincus Bros., Inc.-Maxwell*, 241 NLRB 805, 809 (1979), enf. denied on other grounds 620 F.2d 367 (3d Cir. 1980); *Golden Day Schools, Inc.*, 236 NLRB 1292, 1297 (1978), enfd. 644 F.2d 834 (9th Cir. 1981); *Mandarin*, 228 NLRB 930, 931–32 (1977), enfd. sub nom. *M Restaurant, Inc. v. NLRB*, 621 F.2d 336 (9th Cir. 1980); *Retail Clerks Local 588*, 227 NLRB 7, 11 (1976).

[9] See *Owners Maintenance Corp.*, 232 NLRB 100 (1977) (rejecting disloyalty argument), enfd. 581 F.2d 44 (3d Cir. 1978); *Firehouse Restaurant*, 220 NLRB 818 (1975) (former employees maliciously publicized allegations that the respondent's restaurant served adulterated and contaminated food); *Sahara Datsun*, 278 NLRB 1044 (1986) (former employee distributed newsletter accusing the respondent's owners of involvement in prostitution and the use and sale of cocaine, and informed bank loan officer that the respondent was falsifying information on customers credit loan applications), enfd. 811 F.2d 1317 (9th Cir. 1987); and *Studio S.J.T.*, 277 NLRB 1189 (1985) (former employee made telephone call to customer asking that it not buy the respondent's products because its owners were lesbians), all cases

earlier Board decisions rejecting this standard, address the fact that *Jefferson Standard* concerns a duty possessed by current employees, or consider the remedial implications of relying on *Jefferson Standard* in this context. For those reasons and only to the extent the prior holdings apply the standard in *Jefferson Standard* to postdischarge conduct, the prior decisions are overruled.[10]

Having clarified the standard that should be applied in cases where the employer is relying on postdischarge conduct by a terminated employee alleged to be disparaging to relieve it of the obligation to reinstate the employee and to cut off its backpay liability, we find that Bishop's postdischarge statements, considered singly or collectively, do not bar his reinstatement or toll backpay under the "unfit for further service" test, as applied in the cases cited above.

We further agree that the Respondent violated Section 8(a)(5) and (1) by refusing to provide or delaying the provision of relevant information requested by the Union. However, we do not decide the question of whether the Respondent had a duty to provide the Union with Nako's October 19, 2005 statement or any other statements that it obtained in the course of its investigation of Bishop's alleged misconduct. Board precedent establishes that the duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Fleming Cos.*, 332 NLRB 1086, 1087 (2000), quoting *Anheuser-Busch, Inc.*, 237 NLRB 982, 985 (1978). Compare *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (employer notes of investigatory interviews of employees held confidential). This case illustrates, however, that Board precedent does not clearly define the scope of the category of "witness statements." This case also illustrates that the Board's existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product. We have therefore decided to sever this allegation from the case and to solicit briefs on the issues it raises.

involving a discriminatee's postdischarge disparagement of the respondent's product or officials.

[10] In making clear that the rationale of these prior decisions was erroneous, we do not pass on the question of whether any of the conduct at issue in those cases would have been grounds for denying reinstatement or backpay under the correct standard.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 5.

"5. The Respondent violated Section 8(a)(5) and (1) of the Act by:

Since October 19, 2005, refusing to provide or refusing to timely provide the Union with information necessary and relevant to its duties as collective-bargaining representative of employees in the following unit:

> All employees at the Respondent's location on the island of Hawaii, in the Editorial Department, Circulation Department, Advertising Department, Business Office, Commercial Printing Department, and Maintenance Department. Excluding the News Editor, Advertising Manager, Circulation Manager, Office Manager, Assistant Office Manager, confidential clerical employees, and supervisors as defined in the Act."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent maintained an overly broad rule prohibiting employees from making secret audio recordings, we shall order the Respondent to rescind the rule and notify its employees in writing that the rule is no longer in force.

Having found that the Respondent unlawfully suspended Hunter Bishop, David Smith, and Peter Sur, and unlawfully discharged Bishop and Smith, we shall order the Respondent to offer Bishop and Smith immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. We shall order the Respondent to make Bishop, Smith, and Sur whole for any loss of earnings and other benefits suffered because of their suspensions and discharges. Backpay shall be computed on a quarterly basis, from the date of the suspension to the date of a proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, the Respondent shall be required to remove from its files any references to Bishop's and Smith's unlawful suspensions and discharges, Sur's unlawful suspension, and Koryn Nako's unlawful warning, and to notify Bishop, Smith, Sur, and Nako in writing

that this has been done and that the suspensions, discharges, and warning will not be used against them in any way.

Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish, and delaying in furnishing, the Union relevant and necessary information that it has requested, we shall order the Respondent to furnish the Union with the requested information, excluding Koryn Nako's October 19, 2005 witness statement and any other witness statements that the Respondent obtained in the course of its investigation of Bishop's alleged misconduct.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Stephens Media, LLC, d/b/a Hawaii Tribune-Herald, Hilo, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to furnish, and delaying in furnishing, requested information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All employees at the Respondent's location on the island of Hawaii, in the Editorial Department, Circulation Department, Advertising Department, Business Office, Commercial Printing Department, and Maintenance Department. Excluding the News Editor, Advertising Manager, Circulation Manager, Office Manager, Assistant Office Manager, confidential clerical employees, and supervisors as defined in the Act.

(b) Promulgating and maintaining an overly broad rule prohibiting employees from making secret audio recordings.

(c) Disparately and discriminatorily enforcing its security access policy by requiring union representatives to obtain permission from management in order to enter the Respondent's work area.

(d) Discriminatorily prohibiting employees from wearing buttons or armbands in support of other employees.

(e) Interrogating any employee about union support or union activities.

(f) Warning, suspending, discharging, or otherwise discriminating against any employee for supporting Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL–CIO, or any other labor organization.

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

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

(a) Furnish to the Union in a timely manner the information requested by the Union on October 19, November 3 and 15, 2005, except for Koryn Nako's October 19, 2005 witness statement and any other witness statements that it obtained in the course of its investigation of Bishop's alleged misconduct.

(b) Rescind the overly broad rule prohibiting employees from making secret audio recordings, and notify employees in writing that this has been done and that the rule is no longer in force.

(c) Within 14 days from the date of the Board's Order, offer David Smith and Hunter Bishop full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Hunter Bishop, David Smith, and Peter Sur whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning of Koryn Nako, the unlawful suspensions of Hunter Bishop, David Smith, and Peter Sur, and the unlawful discharges of Hunter Bishop and David Smith, and within 3 days thereafter notify the employees in writing that this has been done and that the discriminatory actions will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Hilo, Hawaii, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 20, after

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

being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 18, 2005.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to furnish, or delay in furnishing, requested information that is necessary and relevant to the Union's performance of its duties as your exclusive collective-bargaining representative of the employees in the following unit.

> All employees at our location on the island of Hawaii, in the Editorial Department, Circulation Department, Advertising Department, Business Office, Commercial Printing Department, and Maintenance Department. Excluding the News Editor, Advertising Manager, Circulation Manager, Office Manager, Assistant Office Manager, confidential clerical employees, and supervisors as defined in the Act.

WE WILL NOT promulgate and maintain an overly broad rule prohibiting you from making secret audio recordings.

WE WILL NOT disparately and discriminatorily enforce our security access policy by requiring union representatives to obtain permission from management in order to enter our work area.

WE WILL NOT discriminatorily prohibit you from wearing buttons or armbands in support of other employees.

WE WILL NOT interrogate you about union support or union activities.

WE WILL NOT warn, suspend, discharge, or otherwise discriminate against any of you for supporting Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL–CIO, or any other labor organization.

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

WE WILL furnish to the Union in a timely manner the information requested by the Union on October 19, November 3 and 15, 2005, except for Koryn Nako's October 19, 2005 witness statement and any other witness statements that we obtained in the course of our investigation of Bishop's alleged misconduct.

WE WILL rescind the overly broad rule prohibiting you from making secret audio recordings.

WE WILL, within 14 days from the date of the Board's Order, offer David Smith and Hunter Bishop full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Hunter Bishop, David Smith, and Peter Sur whole for any loss of earnings and other benefits resulting from Bishop's suspension and discharge, Smith's suspension and discharge, and Sur's suspension, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning of Koryn Nako, the unlawful suspensions of Hunter Bishop, David Smith, and Peter Sur, and the unlawful discharges of Hunter Bishop and David Smith, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that these actions will not be used against them in any way.

HAWAII TRIBUNE-HERALD

Meredith A. Burns, Esq. and *Trent K. Kakuda, Esq.*, for the General Counsel.
L. Michael Zinser, Esq., Glenn E. Plosa, Esq., and *Scott A. Larmer, Esq. (The Zinser Law Firm, P.C.),* of Nashville, Tennessee, for the Respondent.
Wayne E. Cahill, Administrative Officer Hawaii Newspaper Guild, of Honolulu, Hawaii, for the Charging Party.
Matthew L. Hall, Esq. (King, Nakamura & Chun-Hoon), of Honolulu, Hawaii, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Hilo, Hawaii, from October 23 to 31, 2007, upon the consolidated complaint, as amended, issued on March 30, 2007, by the Regional Director for Region 20.

The consolidated complaint[1] (the complaint) alleges that Stephens Media, LLC, d/b/a/ Hawaii Tribune-Herald (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees regarding their and other employees' union and concerted activities; selectively and disparately enforcing a security policy by requiring union representatives to obtain Respondent's permission to enter Respondent's facility; creating the impression that employees' union and concerted activities were under surveillance; prohibiting the wearing of union paraphernalia; and issuing and maintaining an overly broad rule prohibiting the making of secret audio recordings.

It is alleged that Respondent violated Section 8(a)(3) of the Act by disciplining employees Koryn Nako (Nako) and Peter Sur (Sur) and by terminating employees Hunter Bishop (Bishop) and Dave Smith (Smith).

Finally, the General Counsel alleges Respondent violated Section 8(a)(5) of the Act by failing to provide information to the Union.

Respondent filed a timely answer to the consolidated complaint stating it had committed no wrongdoing.

FINDINGS OF FACT

On the entire record herein, including the briefs from the counsel for the General Counsel (CGC) and Respondent, I make the following findings of fact.

I. JURISDICTION

Respondent admitted it is the business organization that owns and operates the Hawaii Tribune-Herald, with an office and place of business located in Hilo, Hawaii, where it is engaged in the publication of a daily newspaper. Annually, Respondent in the course of its business operations derived gross revenues in excess of $200,000; held membership in or subscribed to various interstate news services, including Associated Press; published various nationally syndicated features, including George Will, Cal Thomas, and Dear Abby; and advertised various nationally sold products including automobiles manufactured by Honda, Ford, Chevrolet, Nissan, and Mazda.

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

II. LABOR ORGANIZATION

Respondent admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent publishes the Hawaii Tribune-Herald, a daily newspaper from its facilities located in Hilo, Hawaii. The Tribune-Herald is published by Ted Dixon (Dixon) and the day-to-day operation of the news staff is supervised by editor David Bock (Bock). Respondent and the Union have been parties to a succession of collective-bargaining agreements covering the news staff for over 50 years. Wayne Cahill (Cahill) is the Union's administrative officer. Koryn Nako (Nako) is a circulation clerk for Respondent and was a union shop steward from December 2004 to October 2005. Hunter Bishop (Bishop), Dave Smith (Smith), and Peter Sur (Sur) are reporters for Respondent. Bishop was union shop steward from 1996 to October 2005, unit chair from 2000 to 2004, and a member of the bargaining committee from 1996 to October 2005. Smith was a union steward from 2003 to April 2006 and a member of the bargaining committee from 2004 to April 2006.

1. Respondent's security policy

Respondent's policy concerning security is set forth in a series of memos and letters. In a July 17, 2003 memo[2] to employees, former Publisher Jim Wilson states in pertinent part:

> Since bygone days, we've had problems with visitors coming into the Hawaii Tribune-Herald and going wherever they want. Well, that is going to stop-no more visitors coming in without an appointment, to vent about something they did not like in the paper, stopping by to use the toilet facilities, just wondering (sp) around, etc.
>
> We've installed two security gates in the lobby. Hopefully, this will help control traffic throughout the building, making the building secure and conducive to business. Attached you will find the rules for the security gates.[3]

On February 17, 2004, Publisher Dixon wrote to Union Administrator Cahill advising of Respondent's policy on its building security. The letter states in part:[4]

> The lobby area is set aside as a public area. Security gates were installed in 2003 and are meant to restrict the public to that area. All other areas of the plant are for em-

[1] At the outset of the hearing, counsel for the General Counsel (CGC) made a motion to amend the consolidated complaint to reflect Respondent's correct name as Stephens Media, LLC, d/b/a Hawaii Tribune-Herald and by replacing par. 9(c) with language that states: from about November 3, 2005, until about January 26, 2006, Respondent unreasonably delayed in furnishing the Union with the information requested by it as described above in subpar. 7(c). The motion to amend was granted. Respondent denied the allegations of the consolidated complaint, as amended.

[2] R. Exh. 347.

[3] The attachment was not made part of the record.

[4] GC Exh. 32.

ployees only. The only exceptions to that are for those that have prearranged business with the Hawaii Tribune-Herald.

If you choose to enter our place of business to talk to employees of the Hawaii Tribune-Herald you may do so in the lobby area provided they are on a break. I would prefer you do it outside to cause the least amount of interference with those that are working.

There is no evidence that this policy was disseminated to bargaining unit employees.

In a March 3, 2004 memo from Dixon to employees titled "INTERNAL SECURITY PROCEDURES," Dixon writes:[5]

Security is more and more important every day in our changing world. I know the security gates are a relatively recent addition and a good decision. As I understand it they have substantially reduced the amount of folks wandering around in our work areas. After observing our current practices I just want to make a couple of changes and clarify the procedures to follow regarding the public in our front lobby. We want to provide good customer service while at the same time providing a secure work environment for you.

The attached sheet lists the procedures that should be followed.

The sheet attached to the memo states in pertinent part:

Internal Security Procedures

With the following exceptions the only persons allowed behind the counters are employees of the Hawaii Tribune.

1) *Customers here to do business with an employee* may be allowed past the gate.

a) If the customer has an appointment to see one of our employees the receptionist will direct the customer to the phone at the counter. The customer will call the employee to let them know they are here. The employee will come up and meet the person, allow them access, and take them back to their access gate.

. . . .

c) If the customer does not have an appointment and wishes to see one of our employees, the customer will be directed to the phone, and asked to call for the employee they wish to meet. Once contact is made the same procedure use in "a)" will apply.

d) No customer is allowed through the security gates without an employee escort.

2) All others whether vendors, outside organizations of any kind, friends,family or acquaintances will have to do "c)." The employee will then meet with the person wishing to see them in the lobby. It is appreciated that the meeting is completed in a timely manner as the Newspaper is a place of business.

The record establishes that Respondent's employees regularly brought nonemployees, including friends, family members, and vendors into Respondent's newsroom through the employee entrance without prior management permission. These visits occurred at all times of the day in an open work environment where supervisors were regularly present. Crawford, Palmer, and Bock all had offices that opened onto the newsroom, giving them a clear view of what was happening there. Further, the record reflects that Supervisor Sledge gave approval for an employees' child to come into the newsroom on a regular basis after school.

2. The Nako discipline

On October 18, 2005, Union Representative Ken Nakakura (Nakakura) called circulation clerk Koryn Nako at work and advised he needed to see her. Nako told Nakakura about a list Nako had for him. Nako met Nakakura in the employees' parking lot outside Respondent's facility. Respondent's production manager, Arlan Vierra, was in the parking lot on his cell phone and Nako asked Vierra if it was alright to bring Nakakura into Respondent's facility. Vierra shrugged his shoulders and Nako assumed this meant Nakakura could enter with her. Nako and Nakakura went to the employee breakroom, located near the employee door they had just entered. Reporter Hunter Bishop joined Nako and Nakakura in the breakroom. A short time later, editor David Bock and Advertising Director Alice Sledge came into the breakroom. Bock said, "What's going on? Who let you (referring to Nakakura) in?" Nako replied, "I did." Bock told Nakakura, "You are not allowed in the building." Immediately, Bock escorted Nakakura out of the facility. When Bock returned to the breakroom a short time later he told Nako that he wanted to speak to her. As Nako was leaving the breakroom, employee Maeda asked Bishop if someone should go with Nako. Nako looked at Bishop and said, "[O]kay," and Bishop followed her out the door.

In Bock's office, Bock asked Nako why she had let Nakakura into the facility.[6] Nako replied so that Nakakura could pick up a note from her. Bock asked if Nako knew that union officials were not allowed on company property according to Publisher Dixon. Bock said Nako should be aware of this policy and that it had been sent to the Union. Bock said the Union had to receive permission before coming into the building.

On October 19, 2005, Nako was called into a meeting with Kathy Higaki, Respondent's circulation manager, and Sledge. Sledge said they were interested in getting Nako's version of what happened yesterday. When Nako began reciting the facts, Sledge said they were only interested in the conversation between Bishop and Bock. After Nako explained what she had heard, Sledge asked Nako to sign a short statement Sledge prepared. After making a few additions, Nako signed the statement.[7]

On October 21, 2005, Nako had a conversation with William Crawford, Respondent's circulation director, in Crawford's office together with Bock and Nako's witness reporter David Smith. Crawford said this is an investigation about what oc-

[5] R. Exh. 330.

[6] Bock admitted asking Nako if she let Nakakura into the building and he did not deny asking Nako why she let Nakakura into the building. Based on my observance of Nako's demeanor on the stand, including her responsiveness on direct and cross-examination, her detailed answers, and her lack of hostility or bias, I credit Nako's statement that Bock asked her why she let Nakakura into Respondent's facility.

[7] GC Exh. 6.

curred on October 18. He asked, "What happened?" "Why did you let Nakakura in?" Nako said that Nakakura was picking up a note from me and I let him in the side door to go to the breakroom. Crawford asked Nako if she was aware of the gate policy and if she had gotten Dixon's memo. Nako replied that she would have to look at her notes. Nako retrieved the memo[8] from her desk and showed it to Crawford. Nako and Crawford confirmed that this was the memo he was referring to but Smith said the memo said nothing about union officials. Crawford said to Nako, "Are you aware of the company policy regarding Union officials?" Nako said she was and Crawford asked if Nako hade management approval. Nako replied she did not. Crawford asked Nako if she knew Nakakura was coming into the building and Nako said she did not. Crawford then asked Nako if Bishop knew Nakakura was coming into the building. Nako said, "No." When Crawford asked if this was to challenge Bock Nako replied it was not. Crawford then asked Nako if Nakakura was at Respondent's facility to meet anyone and Nako said he was not. Crawford asked why Nakakura had come and Nako said it was to meet union members later in the evening not during work. Crawford wanted to know if Nakakura was meeting with anyone specifically and Nako said no. Crawford asked if Nakakura was there to meet with any department and Nako said yes. Crawford asked which department and Nako said circulation. Crawford asked if there was any reason why Nakakura was meeting with the circulation department employees and Nako replied no just to touch bases with members. Crawford asked Nako why Nakakura called her and Nako said because it concerned circulation. Crawford asked what the note was about and Nako asked, "Do I have to tell you?" Crawford said, "Yes, if it was regarding Union business."[9] Nako said, "Yes." Crawford inquired if the note could have been sent through the mail and whether Nako intended to challenge the company policy regarding meeting with Union officials on company property. Nako said she did not intend to challenge the policy. Crawford asked Nako if she knew she was doing something wrong in bringing Nakakura into the building. Nako replied she did not. Finally, Crawford asked Nako if she understood the company policy regarding Union officials. Nako stated that Union officials are not allowed on company property, including the parking lot, without management approval and an appointment. Crawford confirmed that was the policy. Nako testified that the first time she became aware of the company policy regarding union officials access to the Respondent's building was in her October 18, 2005 meeting with Bock.

[8] R. Exh. 330.

[9] Both Crawford and Bock denied that Crawford asked Nako about the contents of the note. Nako's recollection that she did not want to divulge the contents of the note and that Crawford directed her to do so, was inherently more probable than both Bock and Crawford's mere denial, particularly in view of Crawford's admission that he wanted to know if Nakakura had business with new hires. Bock's recollection of the events of this meeting was much more circumscribed than either Crawford or Nako's. I do not credit Bock or Crawford but as noted above in fn. 6, I find Nako's testimony more credible than either Bock or Crawford.

On October 26, 2005, Crawford handed Nako a written warning for allowing Nakakura into Respondent's building without management's permission.[10] The warning states further that if this type of misconduct occurred again, there would be further discipline.

In early January 2006,[11] Crawford wanted to be sure Nako was aware the Union had filed a grievance on her behalf concerning her warning. Crawford explained how complex and lengthy the grievance process could be and that she would have to give testimony before a judge. Crawford said that the Union could not file a grievance without her consent.

Again in early February 2006, in Crawford's office Crawford told Nako that he had spoken with Union Administrator Cahill and wanted to know why the Union was pursuing Nako's grievance if she acknowledged responsibility. Crawford asked Nako if she knew what was going on. Crawford then said, "The Union couldn't file a grievance if you told them not to." Crawford asked why Nako, ". . . had allowed them (Union) to file a grievance if (Nako) accepted (her) discipline?" Nako said she would look into it.[12]

3. The Bishop discipline

Around noontime on October 18, 2005, after Bock had escorted Union Representative Nakakura from the building, he returned to the breakroom a short time later and he told Nako that he wanted to speak to her. As Nako was leaving the breakroom, employee Sharon Maeda asked Bishop if someone should go with Nako. Nako looked at Bishop and said, "[O]kay," and Bishop followed her out the door into the newsroom. Near employee Cliff Panis' desk Bock turned to Bishop and said, "This does not involve you." Bishop asked if it involved discipline and Bock replied it was a discussion. Bishop again asked if this was a disciplinary action and Bock said this is just a discussion and does not involve you. Bishop said, "Would this lead to discipline?" Bock answered, "This is none of your business." According to Bishop, he and Bock were 2 to 3 feet apart and speaking in a normal tone of voice. According to Nako, both Bishop and Bock were using normal speaking voices and were firm but not yelling. Bishop turned away from Nako and Bock and while walking back to the breakroom, about 20 feet from Nako said that if anytime during the meeting Nako needed someone present she should come out and get him. Since Bishop was faced away from Nako and at a distance of about 20 feet, his voice was elevated so that Nako could hear him but according to copy editor Leigh Critchlow and Nako he was not shouting.

According to copy editor Margaret Premo, a *Beck* objector, who began working for Respondent on October 15, 2005, she heard voices across the newsroom between 10 and 11 a.m. She claims she heard Bishop speaking in a loud voice near her desk, however, she also said when she first heard voices they were

[10] GC Exh. 7.

[11] Crawford claims this conversation took place in November 2005.

[12] Crawford denies this conversation occurred. However, I credit Nako's testimony, particularly in view of Crawford's admission that such a conversation occurred in November 2005. Based on my observations of Nako's demeanor, she testified in an honest and forthright manner with great detail and precision and without inconsistency.

not loud enough to hear what was being said. While claiming to have seen the parties arguing, she admitted she was facing away from where Bock and Bishop were located and her desk had a shoulder high partition that would have made viewing unlikely. I do not credit this witness. Her voice was affected and she was overly dramatic while testifying. Her recent hiring, her inconsistencies, her overly dramatic testimony, and antiunion sentiments as reflected in her *Beck* objections make her bias apparent.

Production Manager Arlan Vierra said Bishop was speaking to Bock in a moderately loud voice during the conversation that lasted about 3 minutes. According to Bock, Bishop was speaking in a moderately loud voice during much of the conversation and at the end Bishop yelled, "So you're not going to give me an answer." Advertising Director Sledge, who heard only the first part of the Bock-Bishop exchange, said that while Bishop was speaking in a strong projecting voice, he was not yelling at Bock. Moreover, if as Premo and Bock claimed, Bishop was yelling at Bock, it is inconceivable that Sledge would not have heard this exchange from her office only about 25 feet from where the exchange took place where her door was open. It is not surprising that Bock was the only witness to claim that Bishop yelled at him during this encounter. Bock was the object of Bishop's repeated demands that he be allowed to participate in what Bishop believed to be a *Weingarten* meeting. As a union steward, Bishop was no doubt being forceful in his advocacy that Nako's rights be respected. As the object of those demands, Bock no doubt felt under pressure and believed Bishop was yelling when the weight of the evidence reflects he was simply being a forceful advocate for Nako. Based on the probabilities and my observation of the witnesses' demeanor, I credit those witnesses who testified that at no time did Bishop yell at Bock.

On October 19, 2005, Bock told Bishop that he wanted to see him in his office. Bishop wanted to know what the meeting was about and Bock said he would tell him in the office. Bishop replied that if it involved discipline he wanted a witness. Bock said he could not allow that. In Bock's office with Sledge present, Bock told Bishop that Bishop's conduct the day before was insubordinate and he was being suspended without pay. Bock said Bishop had been warned about this in the past and that there would be a further investigation.

On October 25, 2005 at about 5 p.m. Bishop received a voice mail from Bock stating he wanted to see Bishop. Bishop called and left a message for Bock. Twenty minutes later Bock called back and said he wanted to see Bishop at 6 p.m. that evening as he had something in writing for Bishop. Bishop said that was not convenient as he was at home 25 miles from Respondent's office. Bock told Bishop to come to the office at 6:30 p.m. but Bishop said that was not convenient. Bishop said he would see Bock the next day but Bock said he would mail the letter.

On October 29, 2005, Bishop received a letter from Bock dated October 27, 2005,[13] stating that he had been terminated because of his misconduct on October 18, 2005. The letter added:

> You were disrespectful of supervisory authority, insubordinate and disruptive of my efforts to have a conversation with one of our employees. You engaged in this conduct in the presence of other employees, which makes the situation even more egregious.

On December 6, 2005, a meeting took place at the student center at the University of Hawaii, Hilo campus. Bishop spoke at this meeting and claimed that Respondent failed to adequately staff the newsroom, causing faxes and mail to pile up. Bishop admitted he considered starting a rival newspaper but has never done so.

After his termination, Bishop maintained an internet blog. In a posting on April 1, 2007, Bishop, in commenting on an article that appeared in the Hawaii Tribune Herald, wrote, "Why the Tribune-Herald allows statements like these to go into print without challenge or qualification is stupefying."[14]

In an April 5, 2007 posting Bishop wrote:

> Privately I've noted with skepticism that the proof of Stephens-owned BIW's (Big Island Weekly) alternative voice would be its willingness to criticize its sister publications Hawaii Tribune-Herald and West Hawaii Today. . . .The Tribune-Herald's failure to support its photographer in this instance, its apparent lack of interest in reporting all that's happening in the community to its readers, and its silence on the issues of journalism and First Amendment rights involved, are sorry reflections on the local daily newspaper's role in the community.[15]

In a September 10, 2007 posting Bishop wrote:

> Sunday's lead-story in the Hawaii Tribune-Herald on the Office of Mauna Kea-management swept several red herring into the net, but managed to avoid the whale on board the boat.
>
> With all the hand-wringing over how complicated it is to manage the summit, no one mentioned the fact that a "comprehensive" management plan is **required by court order** before any new development can occur on Mauna Kea.
>
> . . . .
>
> Yet it is mind-boggling that the media continue to publish OMKM and the Institute for Astronomy's press releases and discussions about new projects and plans as though the ruling doesn't exist.[16]

On February 28, 2006, Bishop received another letter from Bock.[17] This letter cited additional reasons for Bishop's discharge including poor productivity and participation in a forum at the University of Hawaii-Hilo where Bishop allegedly made disparaging, defamatory, disloyal remarks about the Hawaii Tribune-Herald. In the letter, Bock claims he failed to compile Bishop's productivity numbers at the time of his termination on October 27, 2005, and that a later review of the number of stories Bishop produced shows he failed to meet productivity

[13] GC Exh. 2.

[14] R. Exh. 292.
[15] R. Exh. 294.
[16] R. Exh. 300.
[17] GC Exh. 5.

standards. According to Bock, Bishop was producing .81 stories per day and the standard was one story per day. Bishop had previously been counseled about his low productivity in May 2002 and September 2003, he received a warning for low production in October 2003 and was suspended for low production on May 6, 2004.[18]

4. The union buttons

After Bishop's termination, for about 5 working days Respondent's employees wore buttons at work during working hours with Bishop's likeness that stated, "Bring Hunter Back." Employees stopped wearing the buttons after Dixon issued a November 1, 2005 memo[19] prohibiting the wearing of the buttons at work. The memo stated:

> Yesterday, I noticed some of you were wearing a button with Hunter Bishop's photograph on it and the caption "Bring back Hunter." Please remove those buttons when you are on working time. Working time includes not only working time on our premises, but also time spent away from the Hawaii Herald-Tribune facility, on job assignments for Hawaii Herald-Tribune, i.e. covering events as a journalist, and/or meeting with advertisers.
>
> When you are out acting as an ambassador of Hawaii Tribune-herald, the image you project to the public should be neutral, non-confrontational, and reflect the integrity of our newspaper. The button is distracting from your job, potentially and/or actually disrupts your work, and the button is not endorsed by the company.

The record reflects that prior to Dixon's November 1 memo, employees wore various buttons during working hours, including American flags, breast cancer awareness pins, Red Cross pins, and various holiday pins. In addition, employees have worn T-shirts on working time with union logos and the words "A fair contract. Nothing less." In addition, Respondent appears to have no dress code policy and permits wearing jeans and flip flops (slippers).

5. The Smith and Sur discipline

On March 3, 2006, Bock told reporter Dave Smith he needed to meet with him. At the same time reporter Jason Armstrong (Armstrong) told Smith that Bock was giving him a warning and he needed a witness. When Smith sat down in Bock's office with Armstrong, Bock told Smith this is not a *Weingarten* meeting. When Armstrong said he wanted a witness, Bock said that was not allowed. Smith left Bock's office. Smith then called Union Administrator Cahill and explained what had just occurred. Cahill advised Smith to attend his meeting with Bock and to take notes.

Reporter Peter Sur heard what had taken place and suggested that Smith take Sur's voice recorder into Smith's meeting with Bock. Sur showed Smith how to operate the recorder and Smith put the recorder in his shirt pocket. Reporter Christine Loos (Loos) and photographer William Ing (Ing) encouraged Smith to surreptitiously use the voice recorder. Reporter Karen Welsh (Welsh) overheard the conversations among Loos, Ing, Sur, and Smith.

Later that day, Smith went into Bock's office with the voice recorder hidden in his shirt and met with Bock and Associate Editor Richard Palmer (Palmer). Smith asked Bock for the presence of a witness and Bock said he could not allow it as it isn't that complicated. Bock said he wanted to talk to Smith about his productivity. When bock asked why Smith needed a witness, Smith said it seemed warranted under the circumstances. Bock said this is a verbal not a written warning because you have been cooperative. Smith asked Bock if he recalled that Smith asked him how he was doing and Bock said Smith was doing great. Bock said I recall but we went further back and you are at .84 or .85 stories a day and Armstrong is .92. Smith asked if they counted stories still in the computer. Smith and Bock discussed the types of stories Smith did to account for days per story and Bock told Smith to do his own count.

On March 6, 2006, Welsh told Bock that Smith had recorded their March 3, 2006 meeting.

a. The interrogations of Sur, Smith, Ing, and Loos

At about 2 p.m. on March 9, 2006, Sur was called into Bock's office with Palmer present. Bock began the meeting by telling Sur that he was not in trouble. Bock said he was made aware a recording was made of my meeting with Smith. Bock asked Sur if he was aware of this. Sur replied that he gave Smith the recorder to take into the meeting to prevent a *Weingarten* violation. After having a witness come into the meeting, Bock again asked Sur if he gave Smith the recorder. When Sur repeated he gave Smith the recorder, Bock asked why and Sur said because Smith had been denied a witness, to make an impartial recording of the meeting and to ensure there were no *Weingarten* violations. Bock asked who else was involved in deciding to make the recording. Bock asked if Loos or Ing were involved. Sur denied they were involved. Bock asked where the recorder was located and Sur said Smith had it. Bock wanted to know what led up to Sur's discussion with Smith and Sur explained that since Armstrong had been denied a witness, it was likely Smith's request would be denied as well. Bock said he needed the recorder in his possession and that this was the biggest act of disloyalty he had ever seen. Bock advised Sur he was suspended indefinitely without pay.

At about 3:30 p.m. on March 9, 2006, Smith was called into a meeting with Bock and Palmer. Bock asked Smith if he had recorded their March 3, 2006 meeting. Smith admitted he had recorded the meeting. When Bock asked Smith why he had recorded the meeting Smith responded that he was being denied a witness and wanted an accurate record. After initially refusing to say who gave him the voice recorder, Smith admitted that it was Sur. Smith initially denied knowing where the recorder was then admitted his wife had it. Smith admitted the recording had been transcribed. When Bock asked why Smith had not gotten permission to record the meeting, Smith responded that he did not need permission since there was no company policy or law prohibiting making a recording. Bock said Respondent was not required to have a written policy for everything. After some additional discussion about Hawaii's wiretapping law, Bock said that what Smith did was the worst

[18] R. Exh. 322.
[19] GC Exh. 9.

case of defiance in the newsroom. Bock suspended Smith immediately without pay.

After Smith left Bock's office, photographer William Ing was called into a meeting with Bock and Palmer. Bock told Ing that something serious had happened; that Smith had made an illegal recording. Bock asked Ing what he knew and whether Ing had given Smith advice about how to use or conceal the recorder. Ing answered he did not discourage Smith and that he had seen the recorder. Bock asked if Ing gave Smith any advice and Ing replied he was frustrated and did not understand *Weingarten* rights. Bock then asked Ing and his witness, Maria Ella, if they were concealing recording devices.

Finally, Christine Loos, a reporter for Respondent from November 1998 to March 2006, was called to meet with Bock and Palmer. Bock told Loos she was a witness to a secret recording of him last week and what she knew about it.[20] Loos said she heard there was a *Weingarten* meeting. Bock asked Loos if it was Sur or Smith's idea to use the recorder and if she tried to talk Smith out of making the recording. Loos replied she had not tried to talk Smith out of the recording. When Bock asked why, Loos told him because Smith had been denied a witness. Bock asked if Loos was using a recorder at this meeting and if she had ever tape recorded a meeting with him. Bock asked Loos if she was aware of wiretapping laws and if she had ever taped a source. Loos replied she had taped a source without the source's permission. When Palmer said that was illegal, Loos, said it was not illegal in the State of Hawaii. Bock responded that that was not the point but that this was a conspiracy to be disloyal.

On March 10, 2006, Bock called Sur and told him he wanted Sur's permission to get the recorder from Smith and that if Sur refused he would give him an order to get the recorder. Bock told Sur to return to work on March 11, 2006.

On March 15, Dixon issued a letter to employees prohibiting the making of secret audio recordings.[21]

b. Armbands

On March 10, 2006, Respondent's outside advertising executive, Maria Ella Burns, went to the union hall in Hilo where she spoke to Bishop about doing something to support Smith. Burns suggested employees wear red armbands to signify their support for Smith. Burns made the armbands and distributed them to employees who wore them at work on March 13, 2006. All of the employees in the advertising department wore the armbands to a meeting the morning of March 13 in the presence of Sledge. Around 11:30 a.m., the advertising employees were given a letter from Dixon prohibiting wearing of armbands on working time.[22]

c. Respondent's ongoing contact with Smith

On March 13, 2006, Bock left a phone message for Smith stating that Sur had given Bock permission to have the recorder and to bring the recorder and any recording to the office. Later that day, Smith called Bock and said that he had turned the recording over to the Union.

On March 17, 2006, Smith received a letter from Bock which directed Smith to get the recorder from the Union and turn it over to Bock by 5 p.m. on March 17, 2006.[23] The letter stated that:

> This is a direct order to retrieve the recorder, with the original recording intact, from the union and immediately return it to me. If you refuse, I will consider it another act of disloyalty and insubordination.

Smith called Cahill and advised him of the situation. Smith did not meet with Bock on March 17, 2006, and instead Cahill wrote[24] to Bock on March 17, 2006, advising that he was filing a grievance over Smith's suspension. Cahill said that he was Smith's representative and that Smith wanted union representation in any meeting with a company representative regarding his suspension. Cahill requested that Bock call him to set up a meeting regarding Smith.

On March 23, 2006, Smith received another letter from Bock dated March 22, 2006.[25] The letter stated that Smith's failure to meet with Bock on March 17, 2006, and to produce the recorder and recording were additional acts of insubordination. Bock reiterated his demand that Smith produce the recorder and recording.

On March 27, 2006, Smith and Cahill met with Bock and Crawford at the Hilo Hawaiian Hotel. Bock asked if Smith intended to make future recordings. Smith replied that he had not been told it was improper to make recordings. Bock said he told Smith at their last meeting that surreptitious recordings were improper. Smith denied that making such recordings was illegal. Bock then said that Smith had not responded to either the March 17 or 22, 2006 letters. Cahill replied that he was Smith's representative and that he had replied. Cahill asked Bock if Respondent had a policy regarding making recordings. Bock replied that Respondent did not have to have a policy on everything. Bock then said Smith told him he gave the recorder to Cahill. When Smith replied he said he gave it to the Union, Bock asked Smith who he gave the recorder to and Smith said Bishop. Bock then asked if Sur had given permission to give

[20] Loos testified that Bock told her she, ". . . had been a witness to a discussion about secretly tape recording a meeting with him the previous week . . ." Loos' witness at her interrogation, reporter William O'Rear testified that Bock said to Loos, "Chris, you were a witness to this secret recording . . . ," Bock testified he said, "So we asked her if she was aware of what had occurred on the 3d, that Dave Smith had recorded the meeting after being denied a witness." Palmer testified that Bock said to Loos, ". . . he had understood that there had been a general discussion in the newsroom about secretly recording the meeting he was about to have with Mr. Smith and that Chris was there, had witnesses it, . . ." I find the testimony of Loos, O'Rear, and Palmer is consistent with Bock saying that Loos had been a witness to the discussion of the secret taping. I credit the testimony of Loos and O'Rear. Loos and O'Rear's testimony is particularly credible given the overall demeanor of their testimony. It was precise, detailed, and consistent. Neither witness demonstrated any bias or prejudice toward Respondent. Loos had no axe to grind with Respondent as she had taken a new job before this proceeding began. O'Rear's version is credible particularly since he took notes of the meeting.

[21] GC Exh. 38.

[22] GC Exh. 10.

[23] GC Exh. 12.

[24] GC Exh. 33.

[25] GC Exh. 13.

the recorder to the Union. Smith said Sur entrusted the recorder to him. Bock then asked if Smith had recorded previous meetings. When Smith replied he had not, Bock asked if he knew of anyone else who had previously recorded meetings and Smith answered he did not.

On April 8, 2006, Smith received another letter from Bock.[26] The letter directed Smith to meet Bock on April 11, 2006, at 5 p.m. at the "front door of the newspaper."

On April 11, 2006, at 5 p.m., Smith appeared at Respondent's front door. He was escorted into Bock's office where he was given a letter[27] outlining Respondent's investigation into Smith's recording of the March 3, 2006 meeting. Smith said that there were errors in the letter but Bock said no changes could be made. Smith refused to sign the acknowledgment form attached to the letter which stated that Smith admitted that surreptitious recording in the workplace was serious misconduct and that further surreptitious recording would subject Smith to discharge. Bock told Smith to think over the letter.

On April 27, 2006, Smith received a discharge letter dated April 26, 2006, from Bock.[28]

6. The information requests

a. The Bishop information requests

On October 19, 2005, the Union sent Respondent a written request for the reason for Bishop's suspension together with all information considered by Respondent in making its decision to discipline Bishop.[29]

In response to the Union's October 19 information request, on October 31, 2005, Respondent provided the Union with its October 27, 2005 discharge letter of Bishop.[30]

On November 3, 2005, the Union renewed its October 19 information request of Respondent and requested five items:[31]

1. What Bishop did that caused Respondent to suspend and terminate him.
2. Copies of the policies Bishop violated.
3. The names of employees who witnesses the event.
4. The names of employees Respondent interviewed in the course of any investigation in the Bishop discipline and the information the employee provided.
5. Bishop's personnel file.

Responding to the Union's November 3, 2005 information request, on November 7, 2005, Respondent stated that its reasons for discharging Bishop were contained in Bishop's discharge letter.[32] Respondent agreed to furnish Bishop's personnel file.

On November 15, 2005, at the Naniloa Hotel in Hilo, at a grievance meeting concerning Bishop, Cahill asked Bock for information concerning what Bishop had done to cause the company to terminate him. Specifically, Cahill asked what Bishop did or said that was disrespectful to supervisory authority, what he did or said that was insubordinate and what he did or said that interfered with the employer's right to meet with one of its employees. Cahill said that he had not yet received any information responsive to his previous information request. Bock told Cahill that Bishop was disrespectful, insubordinate, confrontational, and rude while Bock tried to conduct a meeting with another employee. Cahill asked for specifics and Bock said that he was not going to give the Union any minutiae that would be presented in the arbitration. Bock told Cahill to put his questions in writing and Bock would entertain them at a latter date.

The parties stipulated that Respondent furnished Bishop's personnel file on January 26, 2006. The file was mailed to the Union on January 26, 2006, but was unclaimed by the Union until February 24, 2006, when it was returned to Respondent on March 7, 2006. Other than the personnel file and Bishop's October 27, 2005 discharge letter, Respondent has furnished no other information to the Union concerning the Bishop grievance.

b. The Nako information requests

On November 15, 2005, the Union made information requests concerning Nako's grievance requesting any company policies Nako violated, Nako's statement given to Respondent and any material Respondent considered in disciplining her.[33]

On November 22, 2005, Bock responded by letter to Cahill's November 15, 2005 information request.[34] Respondent refused to provide any information.

On November 29, 2005, Cahill met with Bock and Crawford concerning Nako's grievance. Cahill asked Bock for information concerning why Nako had been given a warning letter. In response, Respondent furnished Dixon's February 17, 2004 letter[35] to Cahill regarding union access to Respondent's facility and Dixon's March 3, 2004 memo to employees concerning internal security procedures.[36]

B. The Analysis

In order to provide an analytical framework for this decision, I will track the allegations of the consolidated complaint.

1. The 8(a)(1) allegations

a. The October 18, 2005 interrogation of Nako

Paragraph 10(a) of the consolidated complaint alleges that on October 18, 2005, Bock interrogated employees concerning their union activities.

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Act. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). See, e.g., *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959).

[26] GC Exh. 14.
[27] GC Exh. 3.
[28] GC Exh. 15.
[29] GC Exh. 20.
[30] GC Exh. 21.
[31] GC Exh. 22.
[32] GC Exh. 23.
[33] GC Exhs. 25–26.
[34] GC Exh. 27.
[35] GC Exh. 32.
[36] R. Exh. 330.

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board discussed the test to determine whether interrogation is unlawful under Section 8(a)(1) of the Act. In *Westwood* the Board applied the totality of the circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984). The Board said it would look at five factors to determine whether the questioning of an employee constitutes an unlawful interrogation:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

The Board said:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB [935, 941] No. 141, slip op. at page 7 (2000). See also *Rossmore House*, 269 NLRB 1176, 1178 fn. 2 (1984). See *Cumberland Farms*, 307 NLRB 1479 (1992).

In circumstances where an employer questions employees in an investigation of alleged employee misconduct, in *Bridgestone Firestone South Carolina*, 350 NLRB 526, 530 (2007), the Board concluded no unlawful interrogation occurred where the employer had a legitimate basis for investigating an employee's misconduct, where its investigation was entirely consistent with its policy prohibiting employees from using profane, threatening, or indecent language, where it made reasonable efforts to circumscribe its questioning to avoid unnecessarily prying into the employee's union views, and where the limitations on its inquiry were clearly communicated to the employee.

In another case of employer interrogation of an employee during an employer investigation into employee violation of employer no-distribution policy, the employee had engaged in concerted activity. In *United Services Automobile Assn.*, 340 NLRB 784, 785–786 (2003), the Board held that an employer had unlawfully interrogated an employee about her distribution of flyers throughout its facility and that the employer's defenses lacked merit since the no distribution policy was admittedly invalid and its no access policy had never been disseminated to employees. Thus, there was no valid basis for the investigation and interrogation. In finding the interrogation unlawful the Board said:

> We find that the Respondent coercively interrogated employees Williams and Snyder about the employees' protected concerted activities. We find unpersuasive the Respondent's argument that it lawfully interrogated Williams and Snyder to determine whether either employee remained in the building after hours in violation of the Respondent's alleged unwritten no-access policy. We find this conclusion inescapable because, from its own security records, the Respondent already knew the employees who were in the building that evening. That the Respondent was focused on determining who was engaged in the protected activity, namely, the flier distribution, is clear from the questions that were asked each employee.

Respondent contends that its questioning of Nako was part of a legitimate investigation into the violation of its security policy.

Initially, a review of Respondent's security policy as of March 3, 2004, reflects ambiguity as to where nonemployees other than customers can access Respondent's facility. It is helpful here to view that policy again:

> Internal Security Procedures
>
> *With the following exceptions* the only persons allowed behind the counters are employees of the Hawaii Tribune.
>
> *1) Customers here to do business with an employee* may be allowed past the gate.
>
> a) If the customer has an appointment to see one of our employees the receptionist will direct the customer to the phone at the counter. The customer will call the employee to let them know they are here. The employee will come up and meet the person, allow them access, and take them back to their access gate.
>
> . . . .
>
> c) If the customer does not have an appointment and wishes to see one of our employees, the customer will be directed to the phone, and asked to call for the employee they wish to meet. Once contact is made the same procedure use in "a)" will apply.
>
> d) No customer is allowed through the security gates without an employee escort.
>
> 2) All others whether vendors, outside organizations of any kind, friends, family or acquaintances will have to do "c)." The employee will then meet with the person wishing to see them in the lobby. It is appreciated that the meeting is completed in a timely manner as the Newspaper is a place of business.

Paragraph (2) of Dixon's March 3, 2004 internal security procedures memo indicates that vendors, outside organizations of any kind, friends, family, or acquaintances will have to do "c)." Subparagraph(c) directs this group of nonemployees to go to the phone and contact the employee they wish to meet and then use procedure "a)." Subparagraph a) directs visitors to contact the employee and have them escort them into the facility. The ambiguity is created as paragraph 2) continues and tells visitors to meet with the employee in the lobby. Thus, it would appear that a reading of this security poIicy would allow noncustomers access to Respondent's facility as long as they met the employee in the lobby and were accompanied by an employee into the facilty. No mention is made of prior approval

by management. This policy, directed at "outside organizations of any kind," which would include the Union, seems to have superseded Respondent's letter to the Union of February 17, 2004, where the Union was directed to meet employees in the lobby of Respondent's facility. The new policy notwithstanding, nothing in Respondent's February 17 letter to the Union requires prior management approval for union representatives to meet with employees. Moreover, there is no evidence that employees were made aware of the February 17, 2004 policy as there is no evidence it was distributed to bargaining unit employees. There is no other evidence, including past practice, that Respondent required prior management approval before admitting nonemployees into Respondent's facility. Further, there is ample evidence that noncustomer visitors, including friends, family, and vendors were regularly allowed access into Respondent's facility with supervisor's knowledge.

On October 18, 2005, Bock questioned Nako in his office about why she let Nakakura into Respondent's building. Bock had already discovered from his earlier questioning of Nako that she had done so. The essence of the alleged offense was that Nako had admitted Nakakura without management permission in violation of Respondent's security policy. Accordingly, Bock's question was irrelevant to the alleged violation of Respondent's security policy.

As in *United Services Automobile Assn*., supra, and unlike *Bridgestone Firestone South Carolina*, supra, Bock had no valid basis for questioning Nako about why she had allowed Union Representative Nakakura into Respondent's facility, since Respondent had no policy requiring prior management approval for a union representative's access to its facility, its security policy was at best ambiguous as to where "other organizations" were to meet with employees and its security policy was not enforced as to friends, family, and vendors' access to the newsroom. Moreover, since Bock already knew Nako had admitted Nakakura without management approval, his further inquiry into why Nako had admitted a union representative was an unwarranted interrogation aimed at discovering Nako's union activity in violation of Section 8(a)(1) of the Act.

b. The March 9, 2006 interrogations of Sur, Smith, Ing, and Loos

Paragraph 10(b) of the consolidated complaint alleges that on March 9, 2006, Bock interrogated employees concerning their concerted activities and the concerted activities of other employees.

As a threshold matter, it must be determined if the conduct engaged in by Smith, Sur, Ing, and Loos was concerted conduct protected by Section 7 of the Act.

Counsel for the General Counsel contends that the four employees engaged in protected concerted activity when they discussed recording and recorded Smith's March 3, 2006 meeting with Bock in order to protect their *Weingarten* rights to a witness.[37]

Respondent contends that surreptitious recording is unprotected activity and the employees were not engaged in concerted activity.

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

In *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), and *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), the Board defined when an individual engages in concerted activity for other mutual aid or protection. The Board in *Meyers I* stated:

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.

In *Meyers II*, the Board emphasized that its definition of concerted activity included individual activity where, "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB at 887.

Employees do not have to accept the individual's call for group action before the invitation itself is considered concerted. *Whittaker Corp.*, 289 NLRB 933, 934 (1988); *El Gran Combo*, 284 NLRB 1115 (1987). The Board in *Meyers II* held that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

Here, four employees agreed in concert before Smith made the secret recording that Smith should tape the meeting to protect not only his but other employees' *Weingarten* rights. *Weingarten* provides that the right to have representation present during an employer's investigatory interview that may reasonably lead to discipline is protected-concerted activity under the Act. However, this right does not apply where the adverse action has been decided and the employee is only being informed. *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979).

Contrary to Respondent's argument, Smith was not acting on his own behalf but in concert with four other employees to safeguard their *Weingarten* rights which the employees thought had been violated that day in not just Smith's case but in employee Armstrong's meeting with Bock just prior to Smith's meeting. The employees uniformly agreed that the recorder would take the place of a witness in what they reasonably believed could be an investigatory meeting leading to discipline. The reasonableness of their belief is supported by the fact that although Bock told Smith the meeting was not a *Weingarten* type meeting, the meeting digressed into a discussion of the accuracy of Respondent's calculation of Smith's productivity. Bock encouraged Smith to make his own story count, leaving open further investigation into Smith's productivity. The Board has held that where an employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision, the employee's right to representation applies. *Becker Group, Inc.*, 329 NLRB 103 (1999).

I conclude that Smith, Sur, Ing, and Loos were engaged in concerted activity on March 3, 2006.

Respondent had no policy prohibiting making secret recordings on March 3, 2006. In *Williamhouse of California, Inc.*,

317 NLRB 699 fn. 1 and JD fn. 2 (1995), the Board found surreptitious tapes admissible in evidence. See also *McAllister Bros. Inc.*, 278 NLRB 601 fn. 2 (1986). In *Opryland Hotel*, 323 NLRB 723 fn. 3 (1997), the Board suggests that where the General Counsel has established a prima facie case of discrimination, in the absence of a policy or practice prohibiting employees from making secret recordings at work, an employer cannot justify its termination of an employee for making recordings in the workplace. The Board stated at footnote 3 regarding termination of an employee for making secret recordings in the workplace:

> And in the absence of such rule, practice, or prohibition, we do not find-as does our colleague-that such possession or use constitutes misconduct that would defeat reinstatement. In our view, Garramone's conduct was not *malum in se*.

The State of Hawaii does not make it illegal to surreptitiously record a conversation, as long as one of the participants is aware of the recording.[38]

The cases cited by Respondent for the proposition that secret recording is not protected activity and thus a valid reason for termination are not apposite as none of those cases dealt with an interpretation of concerted activity under the Act but involved a host of other statutes including Title VII. *Dana Corp*., 318 NLRB 312 (1995), cited by Respondent, is also inapposite as it neither deals with secret recording nor with whether recording constituted concerted activity. Contrary to Respondent's assertion, the Board in *Sam's Club*, 342 NLRB 620 (2004), did not find surreptitious taping to be unprotected activity. Rather, the administrative law judge simply found that under the circumstances of the case the employee's secret taping was not concerted activity.

I conclude that no employer policy or law was violated when Smith made the secret recording of his March 3, 2006 meeting with Bock. Moreover, under current Board law there is nothing improper per se about making a surreptitious recording. I conclude that the secret recording of Smith's meeting with Bock was protected by Section 7 of the Act.

Respondent contends the questioning of Smith, Sur, Ing, and Loos was part of a legitimate investigation. As noted above in *Bridgestone Firestone South Carolina* and *United Services Automobile Assn*., for an employer's interrogation to be part of a legitimate investigation it must be entirely consistent with the policy being investigated, the employer must make reasonable efforts to circumscribe its questioning to avoid unnecessarily prying into the employee's union views, the limitations on the employer's inquiry must be clearly communicated to the employee and the employer must be investigating employee violation of a lawful policy that has been disseminated to employees.

On March 9, 2006, Bock questioned Sur, Smith, Ing, and Loos concerning Smith's surreptitious recording of his March 3, 2006 meeting with Bock.

Bock's meeting with Sur included the following questions by Bock:

> Bock admitted that he asked Sur if he was aware a recording was made of his meeting with Smith. Bock asked whose recorder was it and whose idea it was. After having a witness come into the meeting, Bock again asked Sur if he gave Smith the recorder. Bock asked why Sur gave Smith the recorder. Bock asked who else was involved in deciding to make the recording. Bock asked if Loos or Ing were involved. Bock asked where the recorder was located and what led up to Sur's discussion with Smith.

Bock's interrogation of Smith included the following questions:

> Bock asked Smith if he had recorded their March 3, 2006 meeting. Bock asked Smith why he had recorded the meeting. Bock asked who gave Smith the recorder, whose recorder it was and whose idea it was to use the recorder. Bock asked where the recorder was now located and what he intended to do with the recorder.

During Ing's interview Bock asked Ing:

> What his involvement was in the secret recording of Bock's meeting with Smith and whether Ing had given Smith advice about how to use or conceal the recorder. Bock asked if Ing gave Smith any advice about using the recorder. Bock then asked Ing and his witness Maria Ella if they were concealing recording devices.

When Bock met with Loos he asked:

> What she knew about a secret recording of him made last week. Bock asked what Loos' involvement was. Bock asked Loos if it was Sur or Smith's idea to use the recorder and if she tried to talk Smith out of making the recording. When Loos replied she had not tried to talk Smith out of the recording, Bock asked why. Bock asked Loos if anyone in the newsroom disagreed with making secret recordings. Bock asked if Loos was using a recorder at this meeting and if she had ever tape recorded a meeting with him.

Having found that the activities of Smith, Sur, Ing, and Loos were protected/concerted activities, when Respondent questioned them about their and their coworkers' protected/concerted activities in the absence of any policy or practice proscribing making secret tapes in the workplace, Respondent engaged in interrogation designed to discover who was engaged in protected/concerted activity and violated Section 8(a)(1) of the Act. *United Services Automobile Assn.*, supra. Further, Respondent failed to make reasonable efforts to circumscribe its questioning to avoid unnecessarily prying into the employee's union and protected/concerted activities and failed to clearly communicate to the employees the limitations on the employer's inquiry. *Bridgestone Firestone South Carolina* and *United Services Automobile Assn.*, supra.

I find that the interrogations of Sur, Smith, Ing, and Loos violated Section 8(a)(1) of the Act.

c. The March 27, 2006 interrogation of Smith

Paragraph 10(c) of the consolidated complaint alleges that on March 27, 2006, Bock interrogated employees concerning their

[38] Haw. Rev. Stat. sec. 803-42(b)(4).

union and concerted activities and the union and concerted activities of other employees.

During Smith's March 27, 2006 meeting with Bock and Cahill at the Hilo Hawaiian Hotel, Bock asked Smith when he gave the recorder to the Union, to whom he had given the recorder, if Sur had given him permission to give the recorder to the Union and whether Smith had recorded any prior meetings or if anyone else had recorded meetings.

The questions Bock put to Smith were designed to elicit information concerning his and others protected/concerted activity. For the reasons set forth above, I find this interrogation violated Section 8(a)(1) of the Act.

d. The disparate enforcement of respondent's security policy

Paragraph 11 of the consolidated complaint alleges that on October 18, 2005, Respondent enforced its internal security policy regarding access to its premises selectively and disparately by requiring union representatives to obtain permission of Respondent's management to access Respondent's facility while permitting other nonemployees to access Respondent's facility without the permission of Respondent's management.

As noted above, Respondent's security policy had no requirement for prior management approval of the entry of "other organizations" into Respondent's facility and is at best ambiguous as to the location where "other organizations" may meet with employees. Respondent's interpretation of its security policy was also not enforced as to the entry of family, friends, and vendors into the newsroom. Friends, family, and vendors were regularly given access to the newsroom without prior management approval.

There is no dispute that on October 18, 2005, Bock enforced Respondent's security policy in a manner that prohibited access by union representatives to its newsroom in Hilo without prior management approval.

Respondent contends that there was no disparate enforcement of its security policy because while family and friends were admitted to the newsroom, there is no evidence that other organizations were allowed access.

In *Register-Guard*, 351 NLRB 1110, 1122 (2007), a majority of Chairman Battista and Members Kirsanow and Schaumber with Members Liebman and Walsh dissenting reversed a long line of Board cases dealing with discriminatory enforcement of work rules. Citing two 7th Circuit decisions[39] the Board adopted a new standard for determining if an employer's discriminatory enforcement of work rules violates Section 8(a)(1) of the Act. The Board held it would no longer be sufficient to show that an employer merely disparately enforced its rules but it must be shown that, ". . . unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status, and we shall apply this view in the present case and in future cases."[40] In an attempt to define what constitutes similar activities the Board elaborated:

> For example, an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by anti-union employees but not by prounion employees.[FN17] In either case, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non business-related use. [Id. at 12.]

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Supreme Court held that an employer could preclude access to non employee union organizers from its parking lot if the employer does not discriminate against the union by allowing other nonemployees to distribute items in the parking lot. The Board has held that *Babcock & Wilcox* and *Lechmere*[41] do not protect an employer who discriminates and permits access to other group but not to a union. *Big Y Foods*, 315 NLRB 1083 (1994); *Victory Markets*, 322 NLRB 17 (1996); *Salmon Run Shopping Center, LLC*, 348 NLRB 658 (2006).

Respondent's assertion that *Register-Guard* controls this case begs the question since there was no requirement that anyone get prior management approval for access to Respondent's newsroom. Here, the discrimination was not entirely in the disparate enforcement of the security policy as in *Register Guard*. In the instant case, Respondent's written security policy did not require prior management approval for "outside organizations" to meet with employees. At best it was ambiguous as to where those meetings could take place. Under these circumstances, Respondent's imposition of the requirement that the Union get prior management approval to access is contrary to its own security policy, amounting to a discriminatory enforcement of the security policy.

Even under a *Register Guard* analysis of the disparate enforcement of the security policy, Respondent has discriminated against the Union. Even the Seventh Circuit recognized that if an employer allowed notices for anything except unions, "that is anti-union discrimination by anyone's definition."[42] The requirement of prior management approval has been applied only against the Union. Respondent did not enforce its interpretation of its security policy and permitted all visitors entry into its facility without prior approval of management. By requiring the Union to get prior management approval before gaining access to its facility, Respondent has discriminated against the Union in violation of its own policy in violation of Section 8(a)(1) of the Act.

[39] 349 F.3d 968 (7th Cir. 2003); and 49 F.3d 317 (7th Cir. 1995).
[40] 351 NLRB at 1122.
[41] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).
[42] 49 F.3d 319, 321 (7th Cir. 1995).

e. The October 21, 2005 interrogation of Nako

Paragraph 12(a) of the consolidated complaint alleges that on October 21, 2005, Crawford interrogated employees about their union activities and about the union activities of other employees.

At the October 21, 2005 meeting in Circulation Director Crawford's office with editor Bock and Smith present, Crawford questioned Nako about Nakakura's presence in Respondent's facility on October 18. Crawford asked Nako a series of questions including: What happened? Why did you let Nakakura in? If she knew Nakakura was coming into the building? If Bishop knew Nakakura was coming into the building? If this was to challenge Bock? If Nakakura was at Respondent's facility to meet anyone? Why Nakakura had come? If Nakakura was meeting with anyone specifically? If Nakakura was there to meet with any department? Which department? If there was any reason why Nakakura was meeting with the circulation department employees? Why Nakakura called her? What the note was about? If the note could have been sent through the mail and whether Nako intended to challenge the company policy regarding meeting with union officials on company property?

As noted above, Respondent had no policy requiring prior management permission for outside organizations to enter its premises. Moreover, the security policy was discriminatorily applied to the Union. Crawford's interrogation of Nako on October 21, has as its object the discovery of her and others' union activities and is prohibited by Section 8(a)(1) of the Act. *United Services Automobile Assn*., supra; *Bridgestone Firestone South Carolina*, supra.

f. The January and February 2006 interrogations of Nako

Paragraphs 12(b) and (c) of the consolidated complaint alleges that in early January 2006 and early February Crawford interrogated employees about their union activities.

In early January 2006, Crawford said she wanted to be sure Nako was aware the Union had filed a grievance on her behalf concerning her warning. Crawford explained how complex and lengthy the grievance process could be and that she would have to give testimony before a judge. Crawford said that the Union could not file a grievance without her consent.

The January 2006 conversation with Crawford is not interrogation. Crawford simply informed Nako that a grievance was a complex process. I will dismiss this allegation.

Again in early February 2006, in Crawford's office Crawford told Nako that he had spoken with Union Administrator Cahill and wanted to know why the Union was pursuing Nako's grievance if she acknowledged responsibility. Crawford asked Nako if she knew what was going on. Crawford then said, "The Union couldn't file a grievance if you told them not to." Crawford asked why Nako, ". . . had allowed them (Union) to file a grievance if (Nako) accepted (her) discipline?" Nako said she would look into it.

Having previously found that Respondent had no valid basis for questioning Nako concerning the circumstances surrounding her admission of Union Representative Nakakura into Respondent's facility, it follows that his inquiry into the Union's handling of her grievance is an unwarranted attempt to discover Nako's union activity and violates Section 8(a)(1) of the Act as alleged in paragraph 12(c) of the complaint.

g. The March 9, 2006 creation of the impression of surveillance

Paragraph 13 of the consolidated complaint alleges that on March 9, 2006, Bock created the impression among its employees that their union and/or concerted activities were under surveillance by Respondent.

In *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1352 (2004), the Board reaffirmed long held Board law that an employer who creates the impression employees' protected/concerted activities are under surveillance violates Section 8(a)(1) of the Act.

The Board's test for determining if an employer has created an impression of surveillance is:

> [W]hether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance [citation omitted]. *[U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001).]

The Board has found that a supervisor's statement that "it's an open secret that you've joined the Union." *Daikichi Sushi*, 335 NLRB 622, 623 (2001); that she had "heard that there was a list circulating with 80 names," *Martech MDI*, 331 NLRB 487 fn. 4 (2000); that he had "heard" rumors about the employee's union activity; *Flexsteel Industries*, 311 NLRB 257 (1993); asking employee Barnes how the conversations went that he and other employees had had with union organizers on the roof at the Birney school earlier that day, *In re Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000); that "I know you are the one that is disbursing Union cards out." *U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001), all ctreated the impression employees' union activities were under surveillance in violation of Section 8(a)(1) of the Act.

Counsel for the General Counsel contends that the statements made by Bock to employees during the March 9, 2006 interrogations created the impression their protected concerted activities were under surveillance.

Respondent takes the position that there was no impression of surveillance conveyed by Respondent since the employees questioned by Bock on March 9 knew that Karen Welsh had informed Bock of Smith's secret recording.

In this regard, Smith said he had seen fellow reporter Welsh in Bock's office prior to Bock's meeting with Sur on March 9, 2006. Sur was the first of the four employees questioned on March 9, followed by Smith, Ing, and Loos. Smith added that at the time of the meeting with Bock, he did not know how Bock found out about the recording. Sur also testified he did not know how Bock found out about the recording. However, Ing said that on March 9 he knew how Respondent had found out about the recording because when Smith left Bock's office after the March 9 meeting Smith pointed to Welsh's cubicle and said, "The walls have ears." Smith added, "It's obvious, Karen Welsh told him. She has to be the one."

Contrary to Smith's testimony, it is clear that he knew who had informed Bock of the secret recording. Given the proximi-

ty of the four employees' workspaces to each other on March 9 as well as Smith's declaration that it was Welsh who had informed on them, it is unlikely that the four employees could have reasonably assumed that their protected/concerted activities had been spied upon by Respondent. Rather, the four employees involved knew that welsh had been the informant. *U.S. Coachworks, Inc.*, supra. I will dismiss this allegation of the complaint.

h. The rule prohibiting wearing union buttons

Paragraph 14(a) of the consolidated complaint alleges that on October 31, 2005, Respondent, by letter, discriminatorily prohibited employees from wearing a union button.

While working, an employee's right to wear and display union insignia is protected by Section 7 of the Act. *Republic Aviation Inc. v. NLRB*, 324 U.S. 793 (1945); *Albertson's Inc.*, 319 NLRB 93, 102 (1995). This right is balanced against an employer's right to operate its business. An employee's right to wear insignia can be limited or prohibited only if the employer can show such a ban on Section 7 rights is mandated by "special circumstances." *Mack's Supermarkets*, 288 NLRB 1082, 1098 (1988). Such special circumstances include employee safety, protecting the employer's product or image, and ensuring harmonious employee relations. *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). Mere exposure of customers to union insignia does not constitute a special circumstance. *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

In the *Register-Guard*, 351 NLRB at 1110 fn. 2, a case involving newspaper employees, the Board found that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad rule prohibiting employees from wearing or displaying union insignia while working with the public. The Board agreed with the judge that the Respondent failed to show special circumstances for the rule.

In *Register-Guard* the administrative law judge found that:

> Respondent has failed to show any special circumstance that would justify its ban on Kangail's armband and placard in his auto while dealing with the public. Thus, no probative evidence was adduced that Kangail's display adversely affected Respondent's business, employee safety, or employee discipline. Moreover, Respondent's vague, unwritten insignia policy has not been enforced in a wide variety of other situations. District managers wore insignia, including baseball caps and shirts with various logos, while dealing with the public. I find that by promulgating and enforcing its unwritten insignia rule prohibiting the display of union insignia in December 2000, Respondent violated Section 8(a)(1) of the Act.

Respondent takes the position that the Bishop Button is not union paraphernalia as it bore no union insignia and Respondent had no idea of the button's purpose. Further, Respondent contends the buttons are not protected as they have no connection to a labor dispute or protected concerted activity and amount to self help and picketing.

The initial determination is whether employees who wore a button protesting Bishop's suspension were wearing union paraphernalia protected under *Republic Aviation*. Respondent would limit the holding in *Republic Aviation* to only those rules which prohibit union paraphernalia. However, that narrow reading of *Republic Aviation* would fly in the face of the Court's rationale grounded in Section 7 of the Act which guarantees, inter alia, the right to engage in concerted activities for the purpose of other mutual aid or protection. Thus, while the Respondent's employees wore buttons which bore no union insignia, it is clear that the buttons they wore were a protest of Bishop's suspension and were an expression of their exercise of their rights guaranteed in Section 7 of the Act to engage in concerted activity for their mutual aid or protection.

Respondent's contention that wearing the buttons was unprotected picketing or self-help is unsupported by the case law. *Five Star Transportation, Inc*., 349 NLRB 342, 344 (2007), is not apposite to the facts of this case as it does not involve a *Republic Aviation* situation.

A cursory look at the button in question establishes its purpose. The button was a request by Respondent's employees to return Bishop to work. The buttons said on their face, "Bring Hunter Back." Respondent's position that it was unaware of the purpose of the buttons, is not supported by the evidence.

I find that the wearing of buttons supporting Bishop was protected/ concerted activity under *Republic Aviation*.

Shortly after employees wore a button in support of Bishop, Dixon issued a November 1, 2005 memo prohibiting the wearing of the pins at work.

The record reflects that prior to the memo, employees wore various buttons during working hours, including American flags, breast cancer awareness pins, Red Cross pins, and various holiday pins. In addition, employees have worn T-shirts on working time with union logos and the words "A fair contract. Nothing less." In addition, Respondent appears to have no dress code policy and permits wearing jeans and flip flops (slippers). No evidence was adduced that the wearing of buttons at or away from Respondent's facility adversely affected Respondent's business, employee safety, or employee discipline.

I find that the policy promulgated and maintained by Respondent since November 1, 2005, was justified by no special circumstances and violated Section 8(a)(1) of the Act. *Register-Guard*, supra.

i. The rule prohibiting wearing armbands

Paragraph 14(b) of the consolidated complaint alleges that on March 13, 2006, Respondent, by letter, discriminatorily prohibited employees from wearing union paraphernalia.

Respondent's employees in the circulation department decided to do something to protest Smith's termination. They went to the union office in Hilo and decided to make red armbands to wear as a sign of support for Smith. The employees in the advertising department wore the armbands protesting the suspension of Smith to a meeting the morning of March 13, 2006, in the presence of Sledge. Around 11:30 a.m., the advertising employees were given a letter from Dixon prohibiting wearing of armbands on working time. There is no evidence Respondent was aware of the armband's purpose. There was no evidence offered to establish the wearing of these armbands adversely affected Respondent's business, employee safety, or employee discipline.

Respondent contends that this allegation should be dismissed since there is no evidence Respondent was aware of the purpose of the armbands.

Respondent has no dress code. It has never banned employees wearing a variety of pins and buttons until Dixon unlawfully banned the Bishop buttons. The fact that the armbands were worn within days of Smith's suspension together with the absence of evidence that Respondent has banned buttons or other items of apparel, leads to the inference that the Respondent was aware that the armbands were a protest of Smith's suspension. In the absence of evidence that wearing the armbands adversely affected Respondent's business, employee safety, or employee discipline, I find that the Dixon ban on the red armbands was to discourage its employees exercise of their protected concerted activity in violation of Section 8(a)(1) of the Act.

j. The rule prohibiting making surreptitious recordings

Paragraph 15(a) of the consolidated complaint alleges that on March 15, 2006, Respondent, by letter promulgated and has maintained an overbroad rule prohibiting the making of surreptitious audio recordings.

On March 15, 2006, Publisher Dixon issued a letter to employees prohibiting the making of secret audio recordings. This was the first time Respondent had issued a policy regarding surreptitious voice recordings.

Counsel for the General Counsel contends that Respondent cannot promulgate a rule prohibiting all secret recording if that would restrict employees' exercise of Section 7 rights.

Respondent argues that surreptitious recording is not protected activity.

In assessing the validity of a work rule, the Board in *Stanadyne Automotive Corp*., 345 NLRB 85, 86–87 (2005), held that it first considers "whether the rule explicitly restricts activities protected by Section 7." If the rule does not explicitly restrict Section 7 activities then the violation depends on showing either that employees would reasonably consider the rule to limit Section 7 activity, that the rule was issued in response to Section 7 activity or that the rule has been applied to restrict the exercise of Section 7 activity.

I have previously found that Smith's secret recording of the Bock meeting is not unprotected but was protected/concerted activity because it was group action for the purpose of mutual aid and protection, namely safeguarding employees' *Weingarten* rights. There is no dispute that the publication of the rule on March 15, 2006, was in direct response to employees' exercise of their rights to engage in concerted activity under Section 7 of the Act. Respondent's rule was an attempt to restrict its employees' exercise of their Section 7 rights and violated Section 8(a)(1) of the Act.

2. The 8(a)(3) allegations

Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's, "tenure of employment . . . to encourage or discourage membership in any labor organization."[43]

In 8(a)(3) cases the employer's motivation is frequently in issue, therefore, the Board applies a causation test to resolve such questions. *Wright Line*, 251 NLRB 1083, 1088 (1980). The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. "The critical elements of discrimination cases are protected activity known to the employer and hostility toward the protected activity." *Western Plant Services, Inc.*, 322 NLRB 183, 194 (1996). Although not conclusive, timing is usually a significant element in finding a prima facie case of discrimination. Id. at 194. In dual motivation cases, once the General Counsel has established a prima facie case the burden shifts to Respondent to show that it would have disciplined the employee even in the absence of protected activity.

a. The Nako warning

Paragraph 16(a) of the consolidated complaint alleges that on October 26, 2005, Respondent issued a written warning to Nako.

On October 26, 2005, Crawford handed Nako a written warning for allowing Union Representative Nakakura into Respondent's building without management's permission. The warning states further that if this type of misconduct occurred again, there would be further discipline.

There is no doubt that Nako was engaged in union activity when she met with Nakakura. As a result of its unlawful interrogation, Crawford and Bock discovered that Nako's purpose in allowing Nakakura into Respondent's facility was to give him a note that dealt with union business. Nako was disciplined for violating Respondent's security policy. However, that policy does not require prior management permission for nonemployees or union representatives to enter Respondent's facility. Since there was no valid basis for Respondent's discipline of Nako, I find that the Respondent's real reason for the discipline was Nako's union activity. I find that in issuing the warning to Nako, Respondent violated Section 8(a)(1) and (3) of the Act.

b. The Bishop suspension and termination

Paragraph 16(b) of the consolidated complaint alleges that on October 19, 2005, Respondent suspended Bishop and paragraph 16(c) of the consolidated complaint alleges that on October 27, 2005, Respondent discharged Bishop.

On October 19, 2005, Bock told Bishop that Bishop's conduct on October 18 was insubordinate and he was being suspended without pay. Bock said Bishop had been warned about this in the past and that there would be a further investigation.

On October 29, 2005, Bishop received a letter from Bock, dated October 27, 2005, stating that he had been terminated because of his misconduct on October 18, 2005.

Counsel for the General Counsel contends that Bishop was suspended and discharged for engaging in his duties a union shop steward.

Respondent contends that Bishop was suspended and terminated due to his insubordinate and disrespectful conduct toward Bock.

Respondent's contention that Bishop was not engaged in his capacity as a union representative is not supported by the evidence. The record establishes that Nako indicated she wanted Bishop present in her meeting with Bock. As a union steward,

[43] 29 U.S.C. § 158(a)(3).

Bishop was fulfilling his union duties toward Nako in seeking to be present during what turned out to be a *Weingarten* investigative meeting. The Board has held that a union representative must be provided the opportunity to give advice and active assistance to a represented employee in a *Weingarten* interview. *Washoe Medical Center*, 348 NLRB 361 (2006). I find that Bishop was engaged in union and protected/concerted activity during his confrontation with Bock.

Since Respondent contends that Bishop's conduct while engaged in his duties as shop steward were insubordinate and disrespectful an review of Board law concerning employee conduct while engaged in protected activity is in order.

The Board has repeatedly held that strong, profane, and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity. *Max Factor & Co.*, 239 NLRB 804, 818 (1978); *Postal Service*, 250 NLRB 4 (1980).

A member of a union grievance committee lost his temper during a grievance discussion and called the plant superintendent a "horse's ass." This conduct, however, was not found to be so egregious that the committee person lost the protection of the Act. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

A union steward who spoke out at an employee meeting and told his employer that he could not make unilateral changes was disciplined for engaging in insubordinate, disorderly, antagonistic, disrespectful conduct, and disturbing and interfering with associates. The Board affirmed the administrative law judge who found that the Steward's discipline violated Section 8(a)(3) of the Act. *Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006).

An employee's "disrespectful, angry, and shocking outbursts" toward his manager and president occurred in the context of concerted activities and did remove the employee from the protection of the Act. *Lana Blackwell Trucking, LLC*, 342 NLRB 1059, 1065 (2004).

An employee's conduct in raising a collective-bargaining issue did not take him outside the protection of the Act. While the Board noted that the employee's behavior was rude and disrespectful in calling his supervisor a "fucking liar," his conduct was not so "out of line" as to remove him from the protection of the Act. *Union Carbide Corp.*, 331 NLRB 356 (2000).

A union bargaining committeeman called the employer's president a son-of-a-bitch and threatened to discredit the president's personal reputation as he protested a vacation pay issue. The Board affirmed the administrative law judge who found that despite the employer's contentions that the conduct was insubordinate, disrespectful, and belligerent, the conduct was nonetheless protected concerted activity and protected by Section 7 of the Act. *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991).

A union steward who pointed his finger angrily at the employer's representative and threatened him with an unspecified "problem" if employees' grievances were not remedied was not found sufficiently egregious to remove the protections of the Act. *Syn-Tech Window Systems*, 294 NLRB 791 (1989).

The Board has articulated the factors to be balanced in determining whether an employee's concerted protected activity loses the protection of the Act due to opprobrious conduct. The factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814 (1979).

In applying the above precedents in this case, it is noted that the confrontation took place in the newsroom, a large open area where employees were working but there is no evidence that they were prevented from performing their jobs as a result of this incident. Clearly, the subject matter of the discussion between Bishop and Bock involved protected activity. While Bishop challenged Bock in order to determine whether Nako was entitled to have a *Weingarten* representative in her meeting with Bock, there is no evidence that Bishop challenged Bock's authority to conduct the meeting with Nako. Bishop did not force his way into the meeting between Bock and Nako but accepted his exclusion by Bock and walked away from the confrontation.

As to Respondent's contention that Bishop was rude and insubordinate to Bock, the record reflects that after Nako requested his presence, Bishop again and again attempted to find out from Bock if the meeting would be one that triggered what he thought were Nako's *Weingarten* rights. Bock repeatedly told Bishop it was none of his business. I have previously found that on October 18, 2005, while Bishop's tone of voice was forceful and even raised with Bock, Bishop did not yell at Bock. No profanity was used by Bishop and there is no evidence that Bishop in any way threatened Bock.

While Bishop confronted Bock concerning the nature of his meeting with Nako, there is no allegation that Respondent engaged in a violation of Section 8(a)(1) of the Act in denying Nako a *Weingarten* representative. However, it appears that in fact the meeting with Nako proved to be an investigative meeting that led to her discipline. Thus, Bock asked Nako why she had let Nakakura into the building and if Nako knew that union officials were not allowed on company property. Thus, Bishop's confrontation with Bock occurred under circumstances where Nako was denied a *Weingarten* representative. Accordingly, there is evidence that Bishop's comments and conduct were provoked by unfair labor practices.

The overall record does not demonstrate that Bishop's conduct on October 18 was so egregious as to be considered indefensible. As noted above, the Board has allowed a degree of latitude in circumstances where employees are engaged in allegedly inappropriate, yet protected activities. I find that Bishop's conduct on October 18, 2005, was not so opprobrious as to remove his protected/concerted and union conduct from the protection of the Act. *Atlantic Steel Co.*, supra.

c. Bishop's postdischarge conduct

Respondent also contends that after his termination, it discovered evidence of low productivity that would have warranted Bishop's discharge that warrants denying him reinstatement.

(1). The alleged evidence of low productivity

In *Berkshire Farm Center & Services for Youth*, 333 NLRB 367 (2001), the Board held reinstatement and backpay may be denied to an unlawfully discharged employee if an employer can show it discovered conduct after discharge that would have resulted in a lawful discharge. In such a case "reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct. *Marshall Durbin Poultry Co*., 310 NLRB 68, 70 (1993); *John Cuneo, Inc.*, 298 NLRB 856 [, 856]–857 (1990)."

The findings and award of Arbitrator Kenneth Perea[44] disclose that Bishop had previously been counseled about his low productivity in May 2002 and September 2003, that he received a warning for low production in October 2003, when his production was .4 stories per week less than Armstrong, and that he was suspended for low production on May 6, 2004, when he produced 15 fewer stories than Armstrong during the 17 week period October 2003 to February 2004. According to Bock, after Bishop's discharge on October 27, 2005, it was discovered Bishop was producing .81 stories per day at the time the standard was one story per day.

The record also reflects that reporter Armstrong had been counseled for low production in September 2003, March 2004, and March 2006. There is no evidence that Armstrong was disciplined following his counseling in 2003, 2004, or 2006.

After Respondent closely monitored Bishop's story count from May 2002 to May 2004, resulting in warnings and a suspension, Respondent would have me believe that for the 18 months from May 6, 2004, to October 27, 2005, it had no idea of Bishop's productivity. I find this contention implausible. I find it more likely that Respondent was well aware of Bishop's productivity at the time he was discharged and did not find it a basis for his termination. The "discovery" of Bishop's low productivity after his termination is a belatedly discovered pretext for Bishop's discharge.

(2). The alleged disparagement of Respondent's newspaper

Respondent contends that after his termination, Bishop engaged in disparagement of Respondent's newspaper in his blog and at a meeting at the University of Hawaii that precludes reinstatement.

An individual that engages in protected/concerted activity under Section 7 of the Act may lose that protection under certain circumstances. The Supreme Court in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), held that employee conduct involving a disparagement of an employer's product, rather than publicizing a labor dispute, is not protected. The leaflet found unprotected in *Jefferson Standard* was an employee handbill that contained an attack on the quality of the employer's television broadcasts and management policies without reference to a labor dispute or to wages, hours, or working conditions. Likewise, in *Sahara Datsun*, 278 NLRB 1044 (1986), the Board found that an employee's statements that the employer falsified customer credit applications, which were made to the bank that granted financing to the employer's customers, were unprotected. The Board found that the statements, although related to terms and conditions of employment, were, nevertheless, unsubstantiated assertions that could have ruined a longstanding business relationship based on trust and fair dealing.

On the other hand, the Board in *Veeder-Root Co.*, 237 NLRB 1175 (1978), found that employee literature did not lose the protection of the act because it was false, misleading or inaccurate, provided that the statements were not deliberately or maliciously false or made with reckless disregard for the truth. The Board has also found that employee action is protected whether or not employees were reasonable or correct in a good-faith belief. *Fredericksburg Glass & Mirror*, 323 NLRB 165, 179 (1997).

The Board's decision in *New York University Medical Center*, 261 NLRB 822, 824 (1982), reflects how the Board applied this standard. In that case, the Board found that the statement, "[T]he NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them," was not deliberately or maliciously false because it was based on employee reports that the employer's guards were searching black and Hispanic employees. See also *Alaska Pulp*, 296 NLRB 1260 (1989) (references offensive to Japanese culture); *Felix Industries*, 331 NLRB 144 (2000); and *CKS Tool & Engineering, Inc.*, 332 NLRB 1578 (2000) (use of foul language directed at a supervisor); *New River Industries*, 299 NLRB 773 (1990) (use of humor or sarcasm).

More recently in *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006), the Board concurred that

> [E]mployee appeals concerning working conditions made to parties outside the immediate employer-employee relationship may be protected by the Act." *Endicott Interconnect Technologies*, 345 NLRB [448, 450] No. 28, slip op. at 3 (2005). However, such communications are not protected without limit, and will lose the protection of the Act if maliciously false, i.e., statements made with knowledge of their falsity or with reckless disregard for their truth or falsity". *Sprint/United Management Co.*, 339 NLRB 1012, 1018 (2003). Such communications may also lose protection where they constitute a "public disparagement of the employer's product or [an] undermining of its reputation." *Veeder-Root Co.*, 237 NLRB 1175 (1978).

There is no dispute that at a meeting at on December 6, 2005, at the student center at the University of Hawaii, Hilo campus Bishop claimed that Respondent failed to adequately staff the newsroom, causing faxes and mail to pile up.

In addition, after his termination, Bishop wrote an internet blog in which he commented on Respondent's failure to support its photographer, its apparent lack of interest in reporting all that was happening in the community, its silence on the issues of journalism and First Amendment rights, and its stories in the Hawaii Tribune-Herald for failing to mention a judicial ruling, and for not challenging facts given by sources.

I have previously found that Bishop was terminated for engaging in protected/concerted and union activities. The ques-

[44] R. Exhs. 321–322.

tion is whether Bishop's subsequent actions justify losing the protection of the Act. Here, there is no evidence that Bishop's comments at the University of Hawaii or in his blog were maliciously false, i.e., statements made with knowledge of their falsity or with reckless disregard for their truth or falsity. *TNT Logistics North America, Inc.*, supra. Bishop's comments in both forums do not rise to the level of disparagement that the Board has found to justify termination. The blog comments are no more than literary criticism. There is no evidence that the comments are maliciously false or so disparaging of Respondent's product as to cause an undermining of its reputation.

Accordingly, I find no post termination justification for denying Bishop reinstatement.

d. The Sur suspension

Paragraph 16(d) of the consolidated complaint alleges that on March 9, 2006, Respondent suspended Sur.

Counsel for the General Counsel contends that Sur's suspension was for his union and protected/concerted activity on March 3, 2006.

With respect to what constitutes concerted activity, the Board in *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), and *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), defined when an individual engages in concerted activity for other mutual aid or protection. The Board in *Meyers I*, supra at 497 stated:

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

Once the General Counsel has established its prima facie case under *Meyers I* and *II*, supra, the burden shifts to the Respondent to show that the same action would have taken place in any event. *Wright Line*, 251 NLRB 1083 (1980).

On March 9, 2006, Bock advised Sur he was suspended indefinitely without pay as a result of his involvement in the March 3, 2006 surreptitious recording. On March 10, 2006, Bock told Sur to return to work on March 11, 2006.

I have previously found that Sur together with Smith, Ing, and Loos were engaged in protected/concerted activity on March 3, 2006, when they planned, discussed, and recorded Smith's meeting with Bock.

In addition, Sur was engaged in union activities in attempting to insure other employees' right to a union representative in a *Weingarten* interview.

I find that in suspending Sur for engaging in the secret recording of the Bock-Smith meeting on March 3, 2006, Respondent discriminated against Sur for engaging in protected/con-certed and union activity in violation of Section 8(a)(1) and (3) of the Act.

e. The Smith suspension and termination

Paragraphs 16(e) and (f) of the consolidated complaint allege that Respondent on March 9, 2006, suspended and on April 26, 2006, discharged Smith.

On March 9, 2006, Bock suspended Smith without pay because Smith had secretly recorded their meeting on March 3, 2006. After refusing to execute a form acknowledging that surreptitious recording in the workplace was serious misconduct and that further surreptitious recording would subject Smith to discharge, on April 27, 2006, Smith received a discharge letter dated April 26, 2006, from Bock.

Smith engaged in protected/concerted and union activity when he planned, discussed and recorded his meeting with Bock. There is no dispute that he was suspended and discharged for engaging in those activities.

Respondent contends that Smith's later insubordination gave it additional valid grounds for his discharge. In support of this position, Respondent points to evidence that after Smith's March 9, 2006 suspension he refused to turn over the recorder to Respondent, he refused to meet with Bock and he refused to sign the acknowledgement form attached to Bock's April 11, 2006 letter that was a condition of his return to work.

Initially, Smith was under no obligation to furnish Respondent with the recorder. Smith was engaged in protected activity when he used the recorder to capture the Bock meeting. Accordingly, Respondent's investigation into Smith's protected activity, particularly in the absence of valid policy prohibiting secret recording, was improper.

Smith did not refuse to meet with Bock after his suspension. In response to Bock's directive that Smith meet and turn over the recorder on March 17, Smith had his union representative respond to Bock by letter. Cahill's March 17 letter advised Bock that he was representing Smith. Cahill stated that a grievance would be filed and that Bock should call Cahill to set up a meeting with Smith and Cahill.

On March 27, 2006, Smith and Cahill met with Bock and Crawford at the Hilo Hawaiian Hotel. Bock asked if Smith intended to make future recordings. Smith replied that he had not been told it was improper to make recordings. Bock said he told Smith at their last meeting that surreptitious recordings were improper. Smith denied that making such recordings was illegal. Bock then said that Smith had not responded to either the March 17 or 22, 2006 letters. Cahill replied that he was Smith's representative and that he had replied.

On April 8, 2006, Smith received another letter from Bock. The letter directed Smith to meet Bock on April 11, 2006, at 5 p.m. at the "front door of the newspaper."

On April 11, 2006, at 5 p.m. Smith appeared at Respondent's front door. He was escorted into Bock's office where he was given a letter outlining Respondent's investigation into Smith's recording of the March 3, 2006 meeting. Smith said that there were errors in the letter but Bock said no changes could be made. Smith refused to sign the acknowledgment form attached to the letter admitting that surreptitious recording in the workplace was serious misconduct and that further surreptitious recording would subject Smith to discharge.

It is apparent that Smith did not refuse to meet with Bock. Smith, through Cahill, responded to every request Bock made

to meet. Moreover, Smith's refusal to sign the acknowledgement form, admitting that he engaged in misconduct, did not justify Respondent's discharge. Smith was under no obligation to admit that his protected activity amounted to misconduct as a condition to his continued employment.

I find that Smith's suspension and discharge were caused by his protected/concerted and union activities and violated Section 8(a)(1) and (3) of the Act.

3. The 8(a)(5) allegations

Paragraphs 9(a) through (e) allege that Respondent refused to furnish information to the Union dealing with the Bishop and Nako grievances.

a. The Bishop information requests

The Union made multiple information requests of Respondent. On October 19, 2005, the Union sent Respondent a letter requesting the reason for Bishop's suspension together with all information considered by Respondent in making its decision to discipline Bishop. In a November 3, 2005 letter, the Union renewed its October 19 information request of Respondent and requested five items: what Bishop did that caused Respondent to suspend and terminate him; copies of the policies Bishop violated; the names of employees who witnesses the event; the names of employees Respondent interviewed in the course of any investigation in the Bishop discipline and the information the employee provided; and Bishop's personnel file. At a meeting on November 15, 2005, the Union orally requested what Bishop had done to cause the company to terminate him, what Bishop did or said that was disrespectful to supervisory authority, what he did or said that was insubordinate and what he did or said that interfered with the employer's right to meet with one of its employees.

b. The Nako information request

In a November 15, 2005 letter, the Union requested any company policies Nako violated, Nako's statement given to Respondent together with any material Respondent considered in disciplining her.

The only information Respondent furnished the Union was Bishop's October 27, 2005 discharge letter; Bishop's personnel file on January 26, 2006; Dixon's February 17, 2004 letter to Cahill regarding Union access to Respondent's facility; and Dixon's March 3, 2004 memo to employees concerning internal security procedures as well as Bock's oral statements that Bishop was fired because he was disrespectful, insubordinate, confrontational, and rude while Bock tried to conduct a meeting with another employee.

c. Respondent's defenses

Respondent contends that it furnished the Union with all the information to which it was entitled in a timely manner, that the Union had all the information it needed to process Bishop's grievance, that its information requests amount to pre-arbitration discovery, that the Union is not entitled to witness lists or witness statements under *Anheuser Busch, Inc.,* 237 NLRB 982, 984 (1978), and that the Union is not entitled to Nako's statement since it is protected by the attorney work-product privilege.

(1) The duty to furnish information

The Supreme Court has held that employers have a duty to furnish relevant information to a union representative during contract negotiations. *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956). This obligation extends beyond contract negotiations and applies to administration of the contract, including grievance processing. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *Ormet Aluminum Mill Products,* 335 NLRB 788, 790 (2001). In order for the obligation to furnish information to attach there must be a request made and the information requested must be relevant to the union's collective-bargaining need. *Saginaw Control & Engineering,* 339 NLRB 541 (2003). An ambiguous request may not be denied by an employer rather the employer is under an obligation to seek clarification. *International Protective Services, Inc.,* NLRB 701 (2003).

I find that the information requested by the Union in its written requests of October 19 and November 3 and 15, 2005, and in its oral request of November 15, 2005, were relevant and necessary to the Union's duty as collective-bargaining representative.

(2) The duty to furnish witness statements

With respect to Respondent's argument that it has no obligation to provide witness' statements, it cites *Anheuser-Busch, Inc.,* 237 NLRB 982, 984 (1978), for the proposition that a union is not entitled to receive witness statements an employer had obtained in the course of an internal disciplinary investigation.

In *Anheuser-Busch,* supra, the witnesses had adopted their statements and received assurances that their statements would not be divulged. In this regard, the Board relied heavily upon the rationale of the Supreme Court in *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214 (1978), where the Court found that the FOIA did not require the Board to disclose witness statements given to Board agents. The Board said the Court discussed the potential dangers of the premature release of witness statements:

> Including the risk that employers, or in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all. The Court also expressed concern that witnesses may be reluctant to give statements absent assurances that their statements will not be disclosed at least until after the investigation and adjudication are complete. [Id. at 984.]

However, the Board held that the employer had an obligation to furnish the union with the witness' names. *Anheuser-Busch, Inc.,* supra at fn. 5.

Since the Anheuser-Busch decision, the Board has had occasion to rule on what constitutes a "witness statement." In *New Jersey Bell Telephone Co.,* 300 NLRB 42 (1990), the Board concluded that notes made by an employer's representative of comments made by the employer's customer was not a witness statement as it had not been adopted by the customer nor did the employer give assurances that the statement would remain confidential.

Respondent's argument that *Anheuser-Busch* precludes the disclosure of witness statements is not applicable as the facts here are distinguishable. In *Anheuser-Busch*, supra, as revealed in *New Jersey Bell Telephone Co.*, supra, a witness statement is protected from disclosure only if two conditions are met. First, the employee must adopt the statement and second the employee must be given assurances that the statement will remain confidential. In this case, the statement in issue is that of Nako as well as any other information supplied by other employees interviewed. Nako adopted Sledge's handwritten statement as her own but there were no assurances of confidentiality given to Nako. I find that Nako's statement is not protected by the holding in *Anheuser-Busch.* To the extent there are other employee statements or information provided to the extent they were not provided assurances of confidence or did not adopt their statement they too are not protected and must be provided to the Union. The refusal to provide this information violated Section 8(a)(5) of the Act.

With respect to the Union's November 3, 2005 request for names of witnesses and employees interviewed in the Bishop investigation, this information is presumptively relevant. *Anheuser-Busch, Inc.*, supra at fn. 5; *Dynacorp/Dynair Services, Inc.*, 322 NLRB 602 (1996). Failing to produce names of witnesses and employees interviewed in the Bishop investigation violated Respondent's duty to furnish information under Section 8(a)(5) of the Act.

(3) Attorney work product privilege

Respondent contends that *Central Telephone Co. of Texas*, 343 NLRB 987 (2004), protects witness statements prepared in anticipation of litigation from discovery under the work product privilege.

In *Sprint Communications*, supra at 988, the Board held that the work product privilege will be applied where a document was created in anticipation of litigation. The party directing the creation of the document must have a reasonable belief that litigation was a possibility. This belief must be objectively reasonable.

Respondent argues that the Nako statement was prepared in anticipation of litigation at the direction of counsel and is protected by the work-product privilege.

The Nako statement was created on October 19, 2005. At this time while Bishop had been suspended, no decision had been made concerning his discipline. Accordingly, the Union was not yet in possession of the information to make a decision whether to pursue a grievance much less decide to proceed to arbitration. At this point in time, there was no subjective or objectively reasonable possibility that the Union would request arbitration. The Nako statement is not protected by the work-product privilege.

(4) Prearbitration discovery

Respondent contends it has no obligation to furnish the Union with any information as it amounts to a request for prearbitration discovery. In *California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362 (1998), the Board held there was no violation of Section 8(b)(3) of the Act with respect to the CNA's refusal to provide names of witnesses it intended to call in an arbitration. The Board said that there was no right to pretrial discovery. However, the Board in *Ormet Aluminium Mill Products Corp.*, 335 NLRB 788, 789 (2001), distinguished its decision in *California Nurses Assn*. In *Ormet*, the requests for information were made before the third-step grievance had been denied and the grievance was referred to arbitration. In this regard the Board said:

> Thus, since the grievances were not pending arbitration when the Union made its information requests, it cannot be said that the Union is, in effect, seeking pretrial discovery through them--and our dissenting colleague's labeling the information requests as "interrogatories" does not make it otherwise. . . . In arguing otherwise, our dissenting colleague would simply make the arbitration procedure a "safe harbor" for parties that unlawfully refuse to furnish requested information during the grievance process.

In the instant case the Union demanded arbitration of the Nako grievance on November 29, 2005, and the Bishop grievance on January 14, 2006. All of the information requests were made before either grievance was referred to arbitration. Accordingly, at the time the information requests were made they could not have been requests for prearbitration discovery. *Ormet Aluminium Mill Products Corp.*, supra.

(5) The delay in furnishing the Bishop personnel file

Respondent contends that it furnished the Bishop personnel file in a timely manner despite a 12-week delay from the time of the request on November 3, 2005, until the file was provided on January 21, 2006. Respondent's proffered reason for the 3-month delay in furnishing the information was that this was a busy time of year for Respondent.

An unreasonable delay in furnishing relevant information is a violation of Section 8(a)(5). In *Regency Service Carts, Inc.*, 345 NLRB 671 (2005), the Board found a 16-week delay in furnishing information unreasonable. The Board has found delays of 14 weeks, *Pan American Grain*, 343 NLRB 318 (2004); 9 weeks, *Bundy Corp.*, 292 NLRB 671 (1989); and 7 weeks, *Woodland Clinic*, 331 NLRB 735, 737 (2000), unreasonable. Respondent's vague and unsupported explanation does not justify the delay in furnishing the information to the Union. By unreasonably delaying in furnishing Bishop's personnel file, Respondent violated Section 8(a)(1) and (5) of the Act.

(6) The union did not need the information requested

Respondent contends that the Union had all of the information necessary to process the Bishop and Nako grievances. However, Respondent provided the Union only the Bishop discharge letter, Bishop's personnel file, belatedly, and the two memos dealing with access policy. It failed to provide the information considered by Respondent in making its decision to discipline Bishop, what Bishop did that caused Respondent to suspend and terminate him, copies of the policies Bishop violated, the names of employees who witnesses the event, the names of employees Respondent interviewed in the course of any investigation in the Bishop discipline and the information the employee provided, Bishop's personnel file, what Bishop

did or said that was disrespectful to supervisory authority, what he did or said that was insubordinate, what he did or said that interfered with the employer's right to meet with one of its employees, Nako's statement given to Respondent and any material Respondent considered in disciplining her.

It is not for Respondent to decide what is necessary and relevant to the Union's duty as collective-bargaining representative. The Union's right to relevant information is not defeated merely because it might have acquired the information by its own means. *ACF Industries, AMCAR Div.*, 231 NLRB 83 (1977). The Board has adopted a liberal definition of relevancy, requiring only that the information be directly related to the union's duty as bargaining representative. *Otis Elevator*, 170 NLRB 395 (1968). Thus, information must be disclosed unless it is plainly irrelevant. *Teleprompter Corp. v. NLRB,* 570 F.2d 4, 8 (1st Cir. 1977).

I find that by refusing to furnish the information requested by the Union in its written requests of October 19 and November 3 and 15, 2005, and in its oral request of November 15, 2005, Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

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

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

(a) Interrogating its employees about their and other employees union and protected/concerted activities.

(b) Disparately and discriminatorily enforcing its security policy by requiring union representatives to seek management approval to access Respondent's facility.

(c) Discriminatorily prohibiting employees from wearing a button in support of employee Hunter Bishop.

(d) Discriminatorily prohibiting employees from wearing an armband in support of employee David Smith.

(e) Promulgating and maintaining an overly broad rule prohibiting employees from making secret audio recordings.

4. Respondents violated Section 8(a)(1) and (3) of the Act by:

(a) Issuing a written warning to Koryn Nako for engaging in protected, concerted, and union activity.

(b) Suspending Peter Sur for engaging in protected/concerted and union activity.

(c) Suspending and terminating Hunter Bishop for engaging in union and protected/concerted activity.

(d) Suspending and terminating David Smith for engaging in union and protected/concerted activity.

5. Respondents violated Section 8(a)(1) and (5) of the Act by:

> Since October 19, 2005 refusing to provide the Union with information necessary and relevant to its duties as collective bargaining representative of employees in the following unit: unit.
>
> > All employees at the Respondent's location on the island of Hawaii, in the Editorial Department, Circulation Department, Advertising Department, Business Office, Commercial Printing Department, and Maintenance Department. Excluding the News Editor, Advertising Manager, Circulation Manager, Office Manager, Assistant Office Manager, confidential clerical employees, and supervisors as defined in the Act.

6. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

7. The Respondents did not otherwise violate the Act as alleged in the complaint and the remaining complaint allegations will be dismissed.

THE REMEDY

Having found that the Respondents violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

The Respondents having discriminatorily discharged and suspended employees, they must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]