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Security Walls, LLC *and* Randall Kelley. Cases 15–CA–224596 and 15–CA–255865

March 14, 2022

DECISION AND ORDER

BY MEMBERS KAPLAN, WILCOX, AND PROUTY

On July 7, 2021, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

We affirm the judge's findings, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by threatening employee Randall Kelley with suspension, issuing him a verbal warning, and discharging him because he engaged in protected concerted activity and in order to discourage that activity.[3] However, as set forth below, we reverse the judge's dismissal of allegations that the Respondent violated Section 8(a)(1) of the Act by suspending Kelley and by threatening to initiate a criminal investigation because Kelley provided evidence to the Board. In addition, we find that the Respondent violated Section 8(a)(1) of the Act by restricting Kelley to a stationary post.[4]

Facts

The Respondent provides security services for the National Aeronautics and Space Administration (NASA) at its Michoud Assembly Facility (MAF) in New Orleans, Louisiana. The Respondent employs approximately 40 security officers at the MAF.[5] The Respondent's security officers are responsible for, among other things, controlling entry and access to the MAF and to buildings within the MAF, and responding to calls for service and emergencies.

Randall Kelley was employed by the Respondent as a security officer at the MAF from January 16, 2018, until his discharge on July 30, 2018.[6] Kelley worked on the second shift, which was supervised by Lieutenant Jordan Robinson. Soon after he was hired, Kelley began discussing group complaints about working conditions with other security officers. With the encouragement of his coworkers, Kelley communicated the group complaints to his supervisors, managers, and the Respondent's owner.

In early February, Kelley discovered that the Respondent had underpaid him and Mandie Lockwood, another security officer who started the same day as Kelley, by almost $700 for their first week of employment and failed to reimburse them as promised for mileage and other out-of-pocket expenses incurred during training. With Lockwood's encouragement, Kelley reported the underpayment and reimbursement issues to on-site managers Captain Henry Conravey and Chief Jules Perrie. After several weeks passed without resolution, Kelley contacted the Respondent's corporate human resources department directly and, within a matter of hours, Kelley and Lockwood each received a wire transfer in the full amount that was missing from their first paychecks.

Kelley continued to ask Conravey for assistance in obtaining reimbursement for his and Lockwood's training expenses. In late February or early March, Kelley asked Conravey if he should contact the Respondent's human resources department again, since that had been effective before. Conravey responded that if Kelley called "corporate" again without Conravey's permission, he would be "suspended on the spot."

[1] 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.

In the absence of exceptions, we do not pass on the judge's failure to rule on the complaint allegation that the Respondent violated Sec. 8(a)(1) of the National Labor Relations Act by suspending employee Randall Kelley on July 23, 2018.

[2] We shall amend the judge's Conclusions of Law and Remedy and modify his recommended Order to reflect the additional violations found below, and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[3] We correct the following error in the judge's decision. The judge found that the Respondent, through Captain Henry Conravey, unlawfully threatened Kelley with suspension in April 2018. The record reflects, however, that the unlawful threat occurred in late February or March 2018. This error does not affect our disposition of this case.

[4] The judge failed to address this allegation in his decision.

[5] At all relevant times, the Respondent's security officers were represented by the International Union, Security, Police and Fire Professionals of America and its Amalgamated Local 711 (the Union). On March 26, 2018, the Respondent and the Union executed a collective-bargaining agreement which was effective retroactively from October 1, 2017, to September 30, 2020.

[6] All dates are in 2018 unless otherwise indicated.

Around April, an issue arose over how mandatory overtime was assigned. The Respondent's practice was to select officers for overtime in reverse order of seniority and officers were not selected a second time until all officers had served mandatory overtime. However, when Lieutenant Robinson first started supervising the second shift, he started at the bottom of the seniority list instead of where the previous supervisor left off. As a result, officers with the lowest seniority were selected to serve mandatory overtime twice before officers with higher seniority were selected. In April, after consulting with other employees who were adversely affected, Kelley complained to Robinson about the inequitable assignment of overtime. Robinson admonished Kelley for talking to others about the issue instead of coming directly to him, saying that "it was a ho move that [Kelley] went behind his back."

In May, an issue arose over Robinson's treatment of subordinates. About May 28, security officer Emanual Rahman stopped a vehicle attempting to enter the MAF because the occupants appeared to be intoxicated. Rahman notified Robinson, Kelley, and officer Thomas Benasco, and all three reported to the scene. Robinson directed Rahman to escort the vehicle off MAF property and not to detain the vehicle or make contact with the occupants. Kelley and Benasco questioned Robinson's directive, arguing that they had a duty to stop the driver from going back out on the road. Kelley noted that the adult occupants of the vehicle appeared to be highly intoxicated and/or under the influence of narcotics, and they had two children between the ages of one and four in the back without car seats or other restraints. Robinson asked Benasco if he agreed with Kelley, and Benasco said yes. Robinson became extremely agitated, punching his fist into his hand while yelling and cursing at Kelley, Benasco, and Rahman. Robinson then prohibited the officers from discussing the incident, telling them "nobody better talk shit about me when I leave here" and "let me find out that anyone's talking behind my back."[7] Notwithstanding Robinson's instruction, Kelley, Benasco, and Rahman met later that day to discuss Robinson's behavior, and they decided the matter should be brought to the attention of higher management. The next morning, Kelley reported the incident to Captain Conravey, who was Robinson's superior. Conravey said he would take care of the matter.

About June 6, Robinson told Kelley that NASA was investigating Kelley's arrest of a FedEx driver the day before and that until the investigation was complete, Kelley was restricted to a stationary post.[8] Kelley was never contacted by NASA, however, and therefore, on June 13, he asked Robinson for more information about the investigation. Robinson then said that FedEx, and not NASA, was conducting the investigation, and Kelley would be permitted to return to a roving patrol on July 1.

Later the same day, Kelley was discussing his restriction to a stationary post with union representative Roman Davis when Robinson approached and accused Kelley of "talk[ing] shit behind his back."[9] Robinson then suggested that they go in the back office and have a conversation. According to Robinson's testimony, Kelley then performed a "leg sweep" on him, causing him to fall against the wall and his boot to come off.[10] Kelley, in contrast, testified that there was no violence or physical contact of any kind, and he denied performing a leg sweep on Robinson. Kelley testified that Robinson said that if somebody was going to talk behind his back he was going to "do something to them," which Kelley understood to be a threat of violence. Robinson and Kelley then squared off, but another officer stepped between them and calmed them down, after which they each went their separate ways.

After Kelley and Robinson separated, Kelley reported the incident to Chief Perrie. Perrie told Kelley that he was not under investigation at all and that Robinson had told Perrie he just wanted to "ground" Kelley for 30 days because Robinson "got tired of hearing [Kelley's] name come up."[11] Kelley worked the rest of his shift without incident. The next day, however, on June 14, Kelley was suspended for two days without pay for violating Article

[7] In describing this incident, the judge did not mention Kelley's and Benasco's testimony that Robinson instructed them not to talk about him after he left. However, their testimony on this point is uncontroverted.

[8] Officers are either assigned to stationary posts or roving patrols. When assigned to a stationary post, officers are required to stay within a designated building or area of the MAF. When assigned to roving patrols, officers are permitted to drive around designated areas of the MAF in Respondent-owned vehicles. Post or patrol assignments are made on a daily basis by the shift supervisor. However, it is common practice for officers to swap assignments. Thus, an officer assigned to a stationary post can agree to swap with another officer for a roving patrol. It was well known to the other officers and to Robinson that Kelley disliked stationary posts and preferred roving patrols.

[9] Kelley and Benasco both testified that Robinson approached Kelley and accused Kelley of talking behind his back. Robinson did not contradict Kelley's and Benasco's testimony about how the altercation began. Indeed, he acknowledged that "[he] went and [he] approached [Kelley]" because he "had gotten word that [Kelley] was talking -- about [him]."

[10] According to the record, a leg sweep involves using one's leg to sweep an opponent's legs out from under them.

[11] Kelley's testimony on this point is uncontroverted. Perrie did not testify. Although Robinson testified, he did not deny falsely telling Kelley—twice—that he was restricted to a stationary post because he was under investigation.

8.2 of the collective-bargaining agreement by "initiat[ing] a verbal altercation" with Robinson.[12]

Analysis

I. THE RESPONDENT VIOLATED SECTION 8(A)(1) BY RESTRICTING KELLEY TO A STATIONARY POST BECAUSE HE ENGAGED IN PROTECTED CONCERTED ACTIVITY

The Amended Consolidated Complaint alleges that the Respondent violated Section 8(a)(1) of the Act by restricting Kelley to a stationary post. The judge, however, neglected to make pertinent findings of fact or set forth conclusions of law with respect to the allegation. The General Counsel excepts to this omission. In agreement with the General Counsel, we find that the Respondent, through Robinson, violated Section 8(a)(1) by restricting Kelley to a stationary post.

Under *Wright Line*,[13] the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. The General Counsel meets this burden by proving that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity.[14] Once the General Counsel sustains her initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity.

We find that the General Counsel has satisfied her initial burden under *Wright Line*. The judge found, and we agree, that Kelley engaged in protected concerted activity and the Respondent had knowledge of that activity.[15] Specifically, before Robinson restricted Kelley to a stationary post on June 6, Kelley discussed with other employees and communicated to the Respondent group complaints about working conditions, including the un-

[12] Art. 8.2 of the collective-bargaining agreement lists "Fighting on Government property or while on duty" and "Participating in disruptive or disorderly conduct which interferes with the normal and efficient operations of the Government or Company" as gross misconduct not subject to the parties' progressive disciplinary procedures.

[13] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[14] *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1, 6 (2019) (clarifying that "the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee"). Member Wilcox notes her agreement with Chairman McFerran's concurring opinion in *Tschiggfrie*, wherein she found the majority's "clarification" of *Wright Line* principles was unnecessary as the "concepts [discussed by the majority there] are already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases." Id., slip op. at 10. Member Prouty did not participate in *Tschiggfrie Properties* and expresses no opinion as to whether it was correctly decided. Applying the Board's well-established *Wright Line* framework here, Member Wilcox and Member Prouty agree that the General Counsel met her initial burden of establishing that Kelley's protected activity was a motivating factor in the Respondent's adverse employment actions against him, and that the Respondent failed to establish that it would have taken the same actions in the absence of Kelley's protected activity.

[15] On exceptions, the Respondent argues that Kelley's conduct was unprotected because he approached the Respondent directly instead of going through the employees' bargaining representative, citing *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). We disagree. In *Emporium Capwell*, a group of employees refused to participate in the contractual grievance procedure and instead picketed and instituted a consumer boycott of their employer's store in an attempt to circumvent the union and bargain separately with the employer. 420 U.S. at 52–57. The Court held that the employees' conduct was unprotected because it undercut the principle of exclusive representation set forth in Sec. 9(a) of the Act. 420 U.S. at 67–70. The facts in the instant case contrast sharply with those in *Emporium Capwell*. Kelley did not resort to economic coercion to pressure the Respondent to bypass the Union and deal with him directly, and there is no evidence that Kelley's demands or statements were inconsistent with the terms of the collective-bargaining agreement then in effect or in derogation of the Union's bargaining position. Accordingly, there is no basis to conclude that Kelley's conduct was unprotected under *Emporium Capwell*. See *Bridgeport Ambulance Services, Inc.*, 302 NLRB 358, 364 (1991) (holding that walkout, although not authorized or sanctioned by the union, was still protected because "the employees' demands and statements . . . w[ere] not in derogation of the Union or contrary to, or inconsistent with, the Union's bargaining position"), enfd. 966 F.2d 725, 729 (2d Cir. 1992) (agreeing that *Emporium Capwell* does not transform all unauthorized concerted activity into unprotected activity); see also *The Singer Company, Climate Control Division,* 198 NLRB 870, 870 (1972) (explaining that "while under Sec[.] 9(a) and its proviso an employer may lawfully refuse to resolve, without the presence of a union representative, an employee's grievance which poses demands which are in conflict with the contract in effect, Sec[.] 9(a) does not confer on an employer the right to discharge an employee for presenting such a grievance"), and cases cited therein. Rather, we agree with the judge that when Kelley discussed with other employees and communicated to the Respondent group complaints about working conditions—including the underpayment of wages, the inequitable assignment of overtime, supervisory mistreatment of employees, and the prospect of going to 12-hour shifts—Kelley was engaged in protected activity.

The Respondent has also excepted to the judge's finding that Kelley's activities were concerted. However, the Respondent does not state, either in its exceptions or supporting brief, any grounds on which the judge's purportedly erroneous finding should be reversed. Therefore, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we shall disregard this exception. See *Holsum de Puerto Rico, Inc*., 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). In any event, we agree with and affirm the judge's findings that Kelley was engaged in concerted activity when he discussed group complaints about terms and conditions of employment with his coworkers and communicated those complaints to the Respondent.

In sum, we find that the Respondent threatened to suspend Kelley, assigned Kelley to a less desirable post, suspended him, issued him a verbal warning, and ultimately discharged him, because he engaged in protected concerted activity and in order to discourage such activity.

derpayment of wages and the inequitable assignment of overtime. The judge found that Robinson in particular exhibited animus toward Kelley's protected activity by repeatedly admonishing Kelley not to talk about working conditions behind his back or outside the "chain of command," and the Respondent has not excepted to that finding. Animus is also shown by the Respondent's multiple other violations, found by the judge and adopted herein, directed at Kelley's protected activity, including his unlawful suspension, verbal warning, and discharge, with which Robinson was directly and personally involved. Further, we find that the Respondent's proffered reason for restricting Kelley to a stationary post was pretextual. As discussed above, Robinson initially informed Kelley that he was restricted to a stationary post pending an investigation by NASA into his arrest of a FedEx driver. One week later, Robinson changed his story and said that the investigation was being conducted by FedEx. Chief Perrie ultimately conceded that Kelley was never under investigation and that Robinson simply wanted to "ground" Kelley. At the hearing, Robinson presented vague and generalized testimony regarding the Respondent's practice of occasionally implementing a "no swap" day or week for training purposes, but he failed to explain with any particularity why Kelley was assigned to a stationary post and prohibited from swapping for a roving patrol from June 6 to June 13.[16] These shifting and inconsistent explanations are indicative of pretext and provide strong evidence of unlawful motive.[17] We accordingly find that the General Counsel has met her initial *Wright Line* burden of establishing that Kelley's protected activity was a motivating factor in the Respondent's decision to restrict him to a stationary post.

We further find that the Respondent has not met its *Wright Line* rebuttal burden of showing that it would have restricted Kelley to a stationary post even absent his protected activity. As just noted, Robinson's purported reason for restricting Kelley to a stationary post—that he was under investigation – was false, and the Respondent has failed to present any legitimate reason for that action. "[W]here an employer's purported reasons for taking an adverse action against an employee amount to a pretext—that is to say, they are false or not actually relied upon—the employer necessarily cannot meet its *Wright Line* rebuttal burden."[18] Accordingly, we find that the Respondent violated Section 8(a)(1) by restricting Kelley to a stationary post.

II. THE RESPONDENT VIOLATED SECTION 8(A)(1) BY SUSPENDING KELLEY ON JUNE 14 BECAUSE HE ENGAGED IN PROTECTED CONCERTED ACTIVITY

The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(1) by suspending Kelley on June 14 because he found that Kelley's testimony as to who initiated the confrontation with Robinson was no more credible than that of Robinson. We reverse.

Applying *Wright Line*, we find that the General Counsel easily satisfied her initial burden of showing that Kelley's protected concerted activity was a motivating factor in his suspension, even assuming, arguendo, that Kelley initiated the confrontation with Robinson. Specifically, as discussed above, Kelley engaged in protected concerted activity; the Respondent had knowledge of that activity; and the Respondent, and in particular Robinson, bore animus toward that activity. Additionally, the record shows that the Respondent has tolerated similar conduct by other employees. Kelley testified that he witnessed two other incidents involving verbal and physical altercations between officers. In one incident, Kelley stepped in to separate two officers who were involved in a heated verbal disagreement that was about to turn physical. In another incident, an officer refused to obey a command, and another officer, who was an acting supervisor, angrily grabbed the first officer by the arm and collar. Kelley brought both incidents to the attention of Chief Perrie and submitted witness statements, but the officers were not disciplined. Further, the Respondent produced no evidence that it has ever disciplined any other employee for initiating a verbal altercation, fighting, or other disruptive behavior in violation of Article 8.2 of the collective-bargaining agreement. This disparate treatment evinces a strong causal relationship between Kelley's protected activity and his suspension.[19]

We further find that the Respondent has not met its *Wright Line* rebuttal burden. The Respondent does not explain why it did not discipline other employees who engaged in similar conduct, nor does it explain why Kelley's conduct was more serious than that of employees whom it did not discipline. The Respondent's disparate treatment of Kelley precludes a finding that it

[16] Robinson did not deny falsely telling Kelley he was restricted to a stationary post because he was under investigation.

[17] See *Healthy Minds, Inc*., 371 NLRB No. 6, slip op. at 6 (2021) (citing *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999)) ("[T]he Board has long held that shifting reasons constitute evidence of discriminatory motivation.").

[18] *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019); see also *Healthy Minds,* supra, 371 NLRB No. 6, slip op. at 6 (citing *Parkview Lounge, LLC d/b/a Ascent Lounge,* 366 NLRB No. 71, slip op. at 2 (2018), enfd. mem. 790 Fed. Appx. 256 (2d Cir. 2019)).

[19] *Constellium Rolled Products Ravenswood, LLC*, 371 NLRB No. 16, slip op. at 3 (2021); *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 2–3 (2020); *Overnite Transportation Co*., 335 NLRB 372, 375 (2001).

would have suspended Kelley even absent his protected activity.[20]

As discussed above, there is conflicting testimony regarding whether Kelley performed a leg sweep on Robinson on June 13. We find it unnecessary to resolve this conflict in testimony for two reasons. First, the Respondent's official reason given for Kelley's suspension was that he "initiated a verbal altercation" with his shift supervisor. Thus, even assuming Kelley performed a leg sweep on Robinson, the Respondent did not rely on that conduct in suspending him. Second, given the evidence of disparate treatment, the Respondent has failed to demonstrate that it would have suspended Kelley for that conduct in the absence of his protected activity. As discussed above, the record contains two instances of other officers involved in similar altercations, yet the Respondent produced no evidence that it has ever disciplined any other employee for fighting in violation of Article 8.2 of the collective-bargaining agreement.[21]

Accordingly, we find that the Respondent violated Section 8(a)(1) by suspending Kelley on June 14 because he engaged in protected concerted activity.

III. THE RESPONDENT VIOLATED SECTION 8(A)(1) BY THREATENING TO INITIATE A CRIMINAL INVESTIGATION BECAUSE KELLEY PROVIDED EVIDENCE TO THE BOARD

After Kelley filed the unfair labor practice charges in this case, he asked another officer to obtain copies of the Respondent's post orders. The other officer photographed the post orders and gave them to Kelley. Kelley then gave the photographs to the Board Agent investigating the charges. On February 5, 2020, the Respondent's counsel filed a motion to reschedule the hearing. In support of the motion, the Respondent's counsel asserted, among other things, that Kelley violated an unspecified Federal law by photographing the post orders, and the Respondent was in the process of bringing in NASA security as well as the Federal Bureau of Investigation (FBI) to investigate Kelley's "criminal activity." The Region then notified Kelley of the Respondent's threat. The Respondent subsequently retracted the threat, informing the Region that it had "re-trained our officers . . . and told them that NASA's policy on taking pictures is highly regulated," and it had "no plans to do more." There is no evidence that the Respondent ever initiated a criminal investigation or referred the matter to NASA or the FBI.

Applying *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the judge dismissed the complaint allegation that the Respondent violated Section 8(a)(1) by threatening to initiate a criminal investigation because Kelley provided evidence to the Board.[22] For the following reasons, we reverse.

The Board has explicitly declined to apply *BE&K* to threats to initiate litigation or to file criminal charges against employees where, as here, no lawsuit or charges were ever filed.[23] The Board has also consistently held that threats to bring legal action against employees or to prosecute employees for engaging in protected concerted activity violate Section 8(a)(1) because they reasonably tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights.[24]

Kelley was clearly engaged in protected concerted activity when he requested that another employee obtain post orders so that he could provide them to the Board.[25] Employees have a Section 7 right to provide evidence to the Board and to cooperate in Board investigations without interference. Congress has made it clear that it wishes all persons with information about unfair labor practices to be completely free from coercion in reporting them to the Board,[26] and the Supreme Court has long recognized the "special danger" of witness intimidation

[20] *Constellium*, supra, 371 NLRB No. 16, slip op. at 4 (citing *General Motors LLC*, 369 NLRB No. 127, slip op. at 10 fn. 26 (2020)) (explaining that "the Board would find a violation under *Wright Line* when an employer is unable to rebut the General Counsel's burden because it had a history of tolerating inappropriate conduct").

[21] See *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117, slip op. at 4 (2021) (finding employer failed to meet its rebuttal burden where it had never disciplined an employee for similar conduct before) (citing *Septix Waste, Inc.,* 346 NLRB 494, 496–497 (2006) (holding that, in order to establish a valid *Wright Line* defense, an employer must establish that it has applied its disciplinary rules regarding the conduct at issue consistently and evenly)).

[22] In *BE&K*, the Supreme Court held that the Board could not find all unsuccessful litigation unlawful simply because it was initiated or maintained with a retaliatory motive. Rather, the Court held that, due to the compelling First Amendment interests at stake, the General Counsel must ordinarily prove that even an unsuccessful action was both baseless and retaliatory in order for the Board to conclude that its maintenance was an unfair labor practice. On remand, the Board articulated the following standard for determining whether a lawsuit is baseless: "[A] lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.'" *BE & K Construction Co.*, 351 NLRB 451, 457 (2007) (quoting *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993)).

[23] See *DHL Express, Inc*., 355 NLRB 680, 680 fn. 3 (2010); *Networks Dynamics Cabling*, 351 NLRB 1423, 1427 fn. 14 (2007); *Postal Service*, 350 NLRB 125, 126 (2007), motion for reconsideration denied 351 NLRB 205 (2007), enfd. 526 F.3d 729 (11th Cir. 2008).

[24] *DHL Express,* supra, 355 NLRB at 680 fn. 3, 692 (citing *S.E. Nichols Marcy Corp*., 229 NLRB 75 (1977)).

[25] The record indicates that the employees have access to post orders in the regular course of their duties.

[26] *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967); see also *Victory Casino Cruises II*, 363 NLRB 1578, 1580 (2016) ("[E]mployees have a Section 7 right to discuss their conditions of employment with third parties, such as union representatives [and] Board agents.").

in NLRB proceedings.[27] Further, it is well established that employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present.[28] Although employers can lawfully maintain rules prohibiting photographing or videotaping,[29] it is unlawful to apply such rules to restrict protected concerted activity.[30]

Accordingly, we find that the Respondent violated Section 8(a)(1) by threatening to initiate a criminal investigation because Kelley provided evidence to the Board.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law:

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

2. By threatening employee Randall Kelley in late February or early March 2018 with suspension if he engaged in protected concerted activity, the Respondent violated Section 8(a)(1) of the Act.

3. By restricting Kelley to a stationary post from June 6 to June 13, 2018, because he engaged in protected concerted activity, the Respondent violated Section 8(a)(1) of the Act.

4. By suspending Kelley on June 14, 2018, because he engaged in protected concerted activity, the Respondent violated Section 8(a)(1) of the Act.

5. By issuing Kelley a verbal warning on July 17, 2018, because he engaged in protected concerted activity, the Respondent violated Section 8(a)(1) of the Act.

6. By discharging Kelley on July 30, 2018, because he engaged in protected concerted activity, the Respondent violated Section 8(a)(1) of the Act.

7. By threatening in February 2020 to initiate a criminal investigation because Kelley provided evidence to the National Labor Relations Board, the Respondent violated Section 8(a)(1) of the Act.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of 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. Specifically, we amend the judge's remedy in the following respects.

Having found that the Respondent unlawfully suspended Randall Kelley, we shall order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay for the suspension shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, we shall order the Respondent to compensate Kelley for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In accordance with our decision in *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), the Respondent shall also be required to file with the Regional Director for Region 15 a copy of Kelley's corresponding W-2 form(s) reflecting the backpay award. We shall also order the Respondent to remove from its files any reference to Kelley's unlawful suspension and to notify him in writing that this has been done and that the unlawful suspension will not be used against him in any way.

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[27] *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 239–242 (1978).

[28] See, e.g., *White Oak Manor*, 353 NLRB 795, 795 fn. 2, 798–799 (2009) (finding that photography was part of the *res gestae* of employee's protected concerted activity in documenting inconsistent enforcement of employer dress code), reaffirmed and incorporated by reference at 355 NLRB 1280 (2010), enfd. 452 Fed. Appx. 374 (4th Cir. 2011).

[29] See *The Boeing Co*., 365 NLRB No. 154 (2017) (holding that no camera/no recording rules are presumptively lawful).

Member Wilcox and Member Prouty were not members of the Board when *Boeing* issued, and they express no opinion as to whether it was correctly decided. Member Wilcox and Member Prouty note that in *Stericycle, Inc.*, 371 NLRB No. 48 (2021), they joined Chairman McFerran in issuing a notice and invitation to file briefs regarding whether the Board should continue to adhere to the standard adopted in *Boeing* when analyzing the lawfulness of facially neutral employer work rules.

[30] See *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 4 (2021) (finding that employer lawfully maintained rule prohibiting employees from recording telephone or other conversations without advance approval from employer's legal department, but that it unlawfully relied on the rule to threaten an employee for recording a unit employee's termination meeting that he attended in his capacity as union steward) (citing *Valley Hospital Medical Center*, 351 NLRB 1250, 1254 (2007) ("[E]mployees engaged in [protected concerted] activity generally do not lose the protection of the Act simply because their activity contravenes an employer's rule or policies."), enfd. sub nom. *Nevada Service Employees Union, Local 1107, SEIU v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009)); *ADT, LLC*, 369 NLRB No. 23, slip op. at 1 fn. 3 (2020) (finding that employees were engaged in protected union activity when they made an audio-visual recording of a preelection captive-audience meeting).

ORDER

The Respondent, Security Walls, LLC, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, issuing verbal warnings to, discharging, or otherwise discriminating against employees because they engage in protected concerted activities, including discussing with other employees and communicating to the Respondent group complaints about terms and conditions of employment and mistreatment by supervisors.

(b) Threatening employees with discipline if they engage in protected concerted activities.

(c) Restricting employees to a stationary post or otherwise imposing more onerous working conditions on employees because they engage in protected concerted activities.

(d) Threatening to initiate a criminal investigation of employees because they provide evidence to the National Labor Relations Board.

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

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

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

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

(c) Compensate Randall Kelley for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

(d) Compensate Randall Kelley for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) File with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Randall Kelley's corresponding W-2 form(s) reflecting the backpay award.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension, verbal warning, and discharge of Randall Kelley, and within 3 days thereafter, notify him in writing that this has been done and that the suspension, verbal warning, and discharge will not be used against him in any way.

(g) 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.

(h) Post at the New Orleans, Louisiana, NASA Michoud facility copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or 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 other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2018.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the

[31] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 14, 2022

Marvin E. Kaplan, Member

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discipline, discharge, or otherwise discriminate against any of you because you engage in protected concerted activities, such as discussing with other employees and communicating to us group complaints about your terms and conditions of employment and mistreatment by supervisors.

WE WILL NOT threaten you with discipline if you engage in protected concerted activities.

WE WILL NOT restrict you to a stationary post or otherwise impose more onerous working conditions on you because you engage in protected concerted activities.

WE WILL NOT threaten to initiate a criminal investigation because you provide evidence to the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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

WE WILL make Randall Kelley whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Randall Kelley for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Randall Kelley's corresponding W-2 form(s) reflecting the backpay award.

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

SECURITY WALLS, LLC

The Board's decision can be found at www.nlrb.gov/case/15-CA-224596 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Zachary E. Herlands, Esq., for the General Counsel.
Milton D. Jones, Esq. (Morrow, Georgia), for the Respondent.
Randall Kelley, an Individual.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried via Zoom video technology on May 5 and 6, 2021. Randall Kelley filed the initial charges in these matters on July 27, 2018 [regarding his discipline and discharge], and February 6, 2020 [regarding a threat of criminal investigation]. The General Counsel issued a complaint on May 23, 2019, and then a consolidated complaint on June 29, 2020.

The General Counsel alleges that Respondent violated Section 8(a) (3) and/or 8(a)(1) of the Act, as follows:

Threatening Charging Party Kelley on about February 23, 2018, with suspension if he contacted Respondent's corporate office to report wage issues;

Assigning Kelley to a stationary, rather than a mobile post on about June 6, 2018;

Suspending Kelley on about June 14, 2018;

Issuing Kelley a verbal warning on about July 17, 2018;

Suspending Kelley on July 23;

Terminating Kelley on about July 31.

Threatening in February 2020 to pursue a criminal investigation of Kelley because he provided evidence to the NLRB.

On the entire record, including my observation of the demeanor of the witnesses,[1] and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with headquarters in Knoxville, Tennessee provides guard services under contract to the United States Government, valued in excess of $50,000 a year and performs services valued in excess of $5000 in states other than Tennessee and Louisiana. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Union, Security Police and Fire Professionals of America and its Local 711 (the Union) is a labor organization within the meaning of Section 2(5) of the Act. Charging Party Kelley was a member of Local 711's bargaining unit while employed by Respondent.

II. ALLEGED UNFAIR LABOR PRACTICES

In 2017, Respondent obtained a contract with the U.S. Government to provide security guard services to the Marshall Space Flight Center in Huntsville, Alabama and the NASA Michoud Assembly plant in New Orleans, Louisiana. Security Walls began operating at Michoud on May 1, 2017. Various contractors such as Boeing and Lockheed construct rockets for NASA at this facility.

In January 2018 Respondent hired the Charging Party, Randall Kelley, as a security guard at Michoud. He was initially sent for training at a NASA facility in Florida before assuming his duties at the Michoud plant. While in Florida Kelley was paid $10 per hour. When he commenced working at Michoud his wage rate was $19.71 per hour. Kelley was assigned to the second shift 1:15 p.m. to 9:45 p.m. and worked 5 days a week, 8 hours a day.

Kelley noticed his first paycheck was at the $10 rate for periods during which he should have been paid the higher rate. He also noticed that he had not been reimbursed for mileage and other out-of-pocket expenses he incurred while in training. Kelley consulted with several other employees, including some who were apparently also paid incorrectly. He then complained about this to Supervisor/Captain Henry Conravey. At some point, Kelley indicated that he would call Respondent's headquarters in Knoxville about this matter. According to his uncontradicted testimony, Conravey[2] told him that if he called headquarters, he would be suspended on the spot.

Eventually, Respondent paid Kelley the correct amounts and reimbursed him for all out-of-pocket expenses except for rental car taxes and the windshield wipers he replaced on his rental car.

In March 2018 Security Walls signed a collective-bargaining agreement with the Union (GC Exh. 3).

In April 2018, Lieutenant Jordan Robinson replaced a Lieutenant Mitchell as Kelley's supervisor. Robinson was assisted by Sergeant Larry Wilson. At this time an issue arose regarding how guards were selected for mandatory overtime. Respondent's practice had been to select employees in reverse order of seniority. However, low seniority employees were not supposed to be selected a second time until all rank and file guards had served mandatory overtime. Apparently, Mitchell did not communicate with Robinson and Wilson where he had left off, so they started at the bottom of the list. Charging Party Kelley complained to Robinson that this was not equitable. After consulting with other guards who were adversely affected, Kelley complained to higher management. Robinson chastised him for going over his head.

On or about May 28, 2018, a car showed up at the entrance to the Michoud assembly whose adult occupants appeared to be intoxicated and/or under the influence of drugs. Two unrestrained children were in the back seat. Kelley wanted to detain them. Robinson told Kelley and other security officers that this was not the responsibility of the Security Walls guards since the car was not on government property. Robinson also spoke with guard Thomas Benasco, who agreed with Kelley. Robinson became very angry. The next day, Kelley complained to Conravey, Robinson's superior, who agreed with Kelley. There

[1] While I have considered witness demeanor, I have not relied upon it in making any credibility determinations. Instead, I have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers*, 296 NLRB 711 fn. 1 (1989).

[2] Conravey was no longer employed by Respondent when it terminated Kelley in July 2018. He did not testify in this proceeding. In its brief at page 12, Respondent states that Conravey's whereabouts are unknown. It made no such assertion at the hearing and offered no explanation as why it did not call Conravey as a witness to contradict Kelley.

apparently were no repercussions to Kelley as a result of this incident.

In early June 2018, Kelley, who was on a mobile (roving) post, stopped a Fed Ex driver for speeding on NASA property. The next day he was moved to a stationary post, which he regarded as less desirable. When Kelley spoke with Jules Perrie, Security Walls' Chief of Guards/Project Manager, who was Robinson's boss. Perrie said he agreed with everything Kelley did except for telling the Fed Ex driver to "get the F out of the truck." Jordan Robinson informed Kelley that he was being moved to the stationary post while an investigation of the incident was being conducted. Robinson first told him that NASA was investigating the incident, then told Kelley that it was Fed Ex that was doing the investigation. Chief Perrie informed Kelley that he was not under investigation and that Robinson, "wanted to ground you". At some point, Robinson told Kelley he could go back on mobile posts on July 1.

Kelley raised his removal from the mobile post with another guard who was apparently a union steward. While Kelley was talking to the steward, Robinson came by and told Kelley not to talk about him behind his back.

On about June 13, 2018, there was an altercation between Kelley and Robinson. According to Robinson, the dispute started when Kelley objected to Robinson implementing a "no swap" day on which guards could not change posts with other guards. Kelley was apparently unhappy about being stuck on a stationary post. He went to see the chief of guards, Jules Perrie. Robinson left his post also to see Perrie. There is conflicting evidence as to who initiated the confrontation and whether there was physical contact. As a result of the incident Robinson may have been suspended for 4 days for leaving his post and Kelley was suspended for 2 days pending investigation of the incident (GC Exh. 10).[3]

In late June or early July there were rumors that Respondent was going to change from a 5 day, 8 hour per day schedule to a 3 day, 12 hour a day schedule. Randall Kelley came up with a written analysis of the change and showed it to several other guards. Pursuant to this analysis, the day shift guards' income would be significantly reduced. Respondent never implemented such a scheduling system.

On July 9, 2018, Kelley emailed Juanita Walls, Respondent's owner, complaining about an atmosphere of threats, intimidation and retaliation at Michoud. He also complained about what he understood was Respondent's consideration of moving to 12 hours shifts. By objecting to this perceived disparity as to how this change would effect officers on the day shift and night shift, it is apparent that Kelley was raising a group concern to Walls. That was also true of his complaint to Walls concerning Respondent's management personnel at Michoud. She replied the next day, stating that she would make time to talk to Kelley and would have her newly hired program manager [Brenda Hunter] look into the issues Kelley had raised.

Kelley also gave the analysis to Brenda Hunter when she visited Michoud in mid-July. He and Thomas Benasco met with Hunter on July 17, 2018. Kelley complained to Hunter about the Chief of Guards, Jules Perrie and accused other supervisors of incompetence (Tr. 353). He also raised his concerns about 12-hour shifts. According to Hunter, Kelley did not specifically mention Jordan Robinson.

Very shortly after Kelley's meeting with Hunter, Robinson issued Kelley a verbal warning for calling off of work without proper documentation 5 days earlier (Tr. 164, 399–400, 417–419, GC Exh. 24).[4] Robinson testified that he relied on Kelley's attendance card and the collective-bargaining agreement in issuing Kelley this warning. These documents establish that Kelley did not violate the collective-bargaining agreement which only requires medical certification only after 3 ***consecutive*** absences, General Counsel Exhibit 3, Section 10.4. Kelley called out sick or to stay home with a sick child on May 17, June 2, June 23 and July 12 (GC Exh. 25). Respondent did not rely on any other rule apart from the collective-bargaining agreement in issuing this verbal warning, Tr. 418.

Incident of July 20, 2018

On Friday, July 20, 2018, Randall Kelley was assigned to guard post 3, a mobile post. At about 3:14 p.m. (15:14 military time). Kelley picked up guard Thomas Benasco and drove to Building 101, the main building for the Michoud facility. The two guards remained at Building 101 until 4:01 (16:01) until directed to return to their posts by Jordan Robinson.

On July 23, Security Walls suspended Kelley pending investigation of what occurred on July 20 (GC Exh. 16). The suspension document, prepared by Jordan Robinson, states that Kelley was observed on closed circuit television lounging in a chair and using a cell phone for approximately 41 minutes. This conduct was alleged to be "gross misconduct" and a violation of Section 8.2 of the collective-bargaining agreement.[5] The same day, Robinson issued a verbal warning to Officer Thomas Benasco, whose conduct was identical to that of Kelley (GC Exh. 21).

On July 30, Juanita Walls terminated Kelley ostensibly for abandoning his post (GC Exh. 17). There is no evidence as to what Ms. Walls considered or what evidence was provided to her.[6] However, I infer some of the information provided was the suspension document prepared by Jordan Robinson (GC Exh. 16).

Project Manager Brenda Hunter apparently submitted a report to Ms. Walls, but that report is not in the record (Tr. 357). There is no evidence as to where Ms. Hunter acquired the facts she submitted to Walls. Whatever evidence was submitted to Ms. Walls was apparently submitted by Jules Perrie, who was

[3] As the General Counsel points out, there is no documentation that Robinson was suspended, although it was requested by the General Counsel's subpoena.

[4] The meeting with Hunter appears to have occurred on July 17, 2018, which I infer from the signatures on GC Exh 24 and Kelley's testimony as to when he received the write-up.

[5] Sec. 8.2 of the collective bargaining agreement, GC Exh. 3, list offenses considered to be gross misconduct and thus not subject to Security Walls' progressive discipline policy. Among these offenses is use or display in plain sight of personal electronic devices such as cellphones and post abandonment/leaving post prior to being properly relieved.

[6] Walls' testimony is inconsistent as to whether she considered anything other than the July 20 incident in deciding to terminate Kelley, Tr. 62, 69.

the chief of the guards at Michoud in July 2018, and who did not testify in this proceeding.[7]There is also no explanation for why Ms. Walls was not provided with evidence as to Officer Thomas Benasco, who was more clearly guilty of post abandonment than Kelley.[8]

On July 20, Benasco was assigned to Post 4B. Kelley picked Benasco up at his post and drove to Building 101, which is not part of Post 4B. As with Kelley, Jordan Robinson, the supervisor of Kelley and Benasco was aware that both officers were sitting in Building 101 for about 40 minutes. While Kelley was terminated, Respondent issued Benasco a verbal warning for being on his cellphone (GC Exh. 21). There is no evidence that Benasco's misconduct was referred to Juanita Walls or an explanation of why it was not.

Kelley contends that Building 101 was within Post 3, that Respondent's rule against personal cellphone use was not enforced and he was being treated disparately. It may be that Building 101 was not within Post 3. However, officers on Post 3 routinely made building checks inside Building 101 with the knowledge of their supervisors. This is not only established by Respondent's Patrol Activity Reports, General Counsel Exhibit 5, e.g. p. 43, 74, 77, 81, 85, 139, but also the credible testimony of Officer Emanual Rahman, who currently works for Security Walls at Michoud (Tr. 208–209, 215–216).

Benasco received a verbal warning for unauthorized cellphone use on July 20. He was not disciplined for post abandonment. Officer Claude Harkless whose post included Building 101 was also observed "lounging" in the Building 101 lobby for 40 minutes, He received a verbal warning for eating in the lobby and not properly performing his assigned tasks (GC Exh. 22). Two guards, Roman Davis and Hoskins were not disciplined because they were assigned to Building 101.

The February 2020 threat to pursue a criminal investigation of Randall Kelley and/or other employees (Complaint paragraph 7(a))

On February 5, 2020, Respondent's counsel, Milton Jones, filed a motion to reschedule the hearing in this matter, which was then scheduled for February 19, 2020. One of the grounds for the motion was an assertion that Randall Kelley and/or others had violated federal law by photographing Respondent's post orders. In support of his motion, Jones stated that Respondent was in the process of involving NASA security and the FBI. There is no evidence that Respondent did anything further to pursue this assertion other than asking the Region to notify the appropriate persons (R. Exh. 9).

Kelley asked another security officer to photograph the post orders. When he received them he provided the photographs to the Board Agent investigating the charge (Tr. 307–310).

Analysis

Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging or otherwise discriminating against employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection …* (Emphasis added)"

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

To establish an 8(a)(1) violation based on an adverse employment action where the

motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line,* 251 NLRB 1083 (1980). The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity that is sufficient to create an inference that the employee's protected activity was a motivating factor in his or her discharge. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[9]

Randall Kelley engaged in protected concerted activity as follows:[10]

Complaining about the shortage in his and other employees'

[7] Respondent considered calling Perrie, but did not do so. The record does not establish whether he still works for Security Walls or not.

[8] Benasco was terminated in 2019 for a different offense.

[9] I grant the motions made at the beginning of the hearing by the General Counsel to amend the complaint to allege the protected activity regarding Kelley's complaints about the selection of employees for mandatory overtime (drafting) and the proposed change to 12 hour shifts. Respondent was not prejudiced by either amendment. Kelley's concerted complaint about the proposed 12 hour shifts was included in his July 9, 2018 letter to Juanita Walls; GC Exh. 14. Thus, Respondent could hardly claim prejudice with regard to this amendment.

Kelly testified at length about the drafting process for mandatory overtime and his discussions about its inequitable impact on junior officers, Tr. 117–124. He specifically testified as to his discussions about this process with Lt. Robinson and Robinson's reaction. Although he had the opportunity to contradict Kelley when he testified, Robinson did not do so, Tr. 422.

In cases in which the employer's motive for allegedly discriminatory discipline is at issue, the *Wright Line* test applies regardless of whether the employee was engaged in union activity or other protected concerted activity, *Hoodview Vending Co.,* 362 NLRB 690 (2015); 359 NLRB 355 (2012).

[10] I need not decide nor discuss whether Kelley engaged in protected activity in relation to the May incident regarding the drunken driver or his traffic stop of the Fed Ex driver. I also find it unnecessary to discuss or decide whether Kelley's complaints about the "no swap" day in June for which he was suspended was concerted.

I also find that the General Counsel has not established that the June 2018 suspension was motivated by animus towards Kelley's protected activities. I find Kelley's testimony as to who initiated the confrontation on June 13 with Robinson no more credible than that of Robinson..

paychecks in April 2018.

Complaining about the inequity in the manner in which officers were selected for mandatory overtime in April 2018.

Writing to Respondent's owner, Juanita Walls, on July 9, 2018, complaining on behalf of himself and others about the consequences of going to 12 hour shifts and supervisory staff at Michoud.[11]

Complaining to Project Manager Brenda Hunter on July 17, about Respondent's managers and supervisors at Michoud and the possibility of Respondent's implementing 12-hour shifts.

Respondent contends that Kelley's concerted activities were not protected because he did not go through the Union to present them to management.. This contention flies in the face of the language of Section 9(a) and Board caselaw, *Audio Systems, Inc.,* 239, NLRB 1316, 1318 (1979); *The Singer Company, Climate Control Division,* 198 NLRB 870 (1972). In this regard Section 9(a) provides:

> Sec. 9 [§ 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

An employer cannot engage in direct dealing with represented employees, but it cannot legally discharge or discriminate against employees for concertedly attempting to get it to do so. Moreover, Respondent has not demonstrated that any of Kelley's concerted activities were inconsistent with the terms of the collective-bargaining agreement between Respondent and the Union. In fact, his complaints about the drafting process for mandatory overtime were consistent with the requirements of the collective-bargaining agreement.

It is clear that Respondent was aware of all of this protected activity. Kelley's uncontradicted testimony established that Respondent by Cpt. Conravey violated Section 8(a)(1) in threatening him with suspension if Kelley called Respondent's headquarters about the shortfall in the compensation due him and at least one other officer.

As to Kelley's protected activity in July 2018, it is clear that Respondent by Lt. Jordan Robinson, bore animus towards Kelley as a result. His restriction on Kelley from taking complaints about working conditions outside of his "chain of command" or prohibiting Kelley from going over his head or behind his back, is a clear violation of the Act, *Kinder Care Learning Center*, 299 NLRB 1171 (1990)*; Guardsmark, LLC*, 344 NLRB 809–810 (2005) enfd. in relevant part 475 F. 3d 369 (D.C. Cir. 2007); *Trinity Protection Services*, 357 NLRB 1382 (2011); *Greenwood Trucking*, 283 NLRB 789, 792 (1987); *Central Security Services*, 315 NLRB 239, 253–254 (1994).

More importantly, the verbal warning that Robinson issued to Kelley almost immediately after his meeting with Hunter on July 17 establishes Robinson's animus towards Kelley's protective activity as well as constituting an independent violation of Section 8(a)(1). First of all, the record indicates that Kelley did not violate any of Respondent's rules. Secondly, the timing of the warning, 5 days after Kelley's last call out and immediately after his meeting with Hunter reeks of discriminatory motive.

The General Counsel has met his initial burden of proving a causal relationship between Kelley's protected activities and his discharge due to the timing of his discharge [soon after his letter to Walls and his meeting with Hunter] and the pretextual nature of Respondent's explanation for his discharge. Thus, the burden of proof shifted to Respondent to establish that it would have terminated Kelley in the absence of his protected activity. It has failed to meet this burden.

Pretext is established first of all by the lack of any explanation for why Kelley was treated differently than officer Benasco for the July 20 incident. The only difference between the 2 officers was Kelley's leading role in making concerted complaints to Walls and Hunter.[12] The lack of any evidence as to what facts were provided to Walls and who decided what information she would review is another reason I find that Respondent did not meet is burden.

Finally, it stands to reason that Juanita Walls' information came at least in part from Jordan Robinson, who bore animus towards Randall Kelley in part due to his protected concerted activities. Regardless of whether Walls bore animus towards Kelley's protected activities, the animus of Robinson taints her decision to discharge Kelley, *Boston Mutual Life Insurance,* 692 F.2d 169, 171 (lst Cir. 1982); *Parts Depot,* 332 NLRB 670 (2000) enfd. 24 Fed. Appx 1 (D.C. Cir. 2001); *C & L Systems Corp.,* 299 NLRB 366, 379 (1990). Thus, Respondent has failed to meet its burden of establishing that it would have terminated Randall Kelley in the absence of his protected activities.

Threat to pursue a criminal investigation

When a lawsuit lacks a reasonable basis of law or fact and contains retaliatory motive, the Board may prohibit it as an unfair labor practice. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson's v. NLRB,* 461 U.S. 731, 748–749 (1983). To avoid chilling the First Amendment right to petition, the Court in *BE&K* concluded that the Act only prohibits lawsuits that are both objectively and subjectively baseless. *BE&K* at 528.

[11] Concerted complaints about managers and supervisors are protected by Section 7, *Dreis and Kumpf Mfg., Inc.,* 221 NLRB 309 (1975), enfd. 544 F. 2d 320 (7th Cir. 1976).; *Mitsubishi Hitachi Power Systems Americas, Inc,* 366 NLRB No. 108 at pp. 1, fns. 3 and 17–18 (2018).

[12] Even assuming that Benasco's protected activity was equivalent to that of Kelley, discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all those engaged in union or other protected activity, *Nachmnn Corp., v. NLRB,* 337 F. 2d 421, 434 (7th Cir 1964).

A lawsuit is objectively baseless or lacks a reasonable basis of law or fact if no reasonable litigant could realistically expect success on the merits. *BE&K II*, 351 NLRB 451, 457 (2007) (quoting *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 60 (1993)).

The Board has held that retaliatory motive may be inferred from, among other things, the fact that the lawsuit was filed in response to protected activity; that the employer-plaintiff bore animus toward the union-defendant and particularly toward its protected activity; and that the lawsuit obviously lacked merit, *Allied Mechanical Services,* 357 NLRB 1223, 1232–1233 (2011*)*, enforcement denied, *NLRB v. Allied Mechanical Services, Inc.*, 734 F.3d 486 (6th Cir. Oct. 30, 2013).

The fact that Respondent never filed a lawsuit against Randall Kelley is not dispositive. The General Counsel has not established that Respondent's implied threat to do so or seek criminal prosecution was objectively and subjectively baseless. This record does not establish that Respondent had no reasonable basis to seek redress for Randall Kelley's role in obtaining its post orders. It has not been established that Kelley had no role in obtaining the post orders or that he was entitled to obtain them by soliciting others to obtain them for him.

This complaint allegation is therefore dismissed.

CONCLUSION OF LAW

Respondent, Security Walls violated Section 8(a)(1) of the Act by discharging Randall Kelley on July 30, 2018, threatening him with suspension in April 2018 and issuing him a verbal warning on Jul 17, 2018.

REMEDY

The Respondent, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth C*o., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall also compensate Randall Kelley for any reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Respondent shall reimburse Randall Kelley in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on their Social Security earnings records. To this end, Respondent shall file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

Respondent, Security Walls, LLC., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, including but not limited to criticism of supervisors and managers.

(b) Threatening employees for engaging in or planning to engage in protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

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

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

(c) Compensate Randall Kelley for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

(d) Compensate Randall Kelley for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

(e) File with the Regional Director for Region 15 a copy of Randall Kelley's corresponding W-2 form(s) reflecting the backpay award.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and attendance warning and within 3 days thereafter notify Randall Kelley in writing that this has been done and that the discharge and warning will not be used against him in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at the

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

NASA Michoud facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 the Michoud facility at any time since April 1, 2018.[15]

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

Dated, Washington, D.C. July 7, 2021

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, including concertedly criticizing supervisors and management, or objecting to schedule changes.

WE WILL NOT threaten you with discipline or discharge if you engage in and/or are planning to engage in protected concerted activity.

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

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

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

WE WILL compensate Randall Kelley for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 15 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Randall Kelley for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

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

SECURITY WALLS, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-224596 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[14] 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."

[15] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.