Matrix Equities, Inc. *and* Brian Burns. Case 29–CA–168345

May 15, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On July 12, 2016, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

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, and conclusions and to adopt the recommended Order dismissing the complaint.[1]

The issue before the Board is whether the Respondent unlawfully discharged Charging Party Brian Burns in an attempt to suppress future protected concerted activity. For the reasons discussed below, we find that the facts of this case warrant a finding that it did not. We therefore adopt the judge's conclusion that the Respondent did not violate Section 8(a)(1) by discharging Burns.

I. BACKGROUND

The Respondent provides real estate services and has its headquarters in Port Jefferson Station, New York, where about 25 people are engaged in executive or administrative functions. At all times material, Kathryn Puma was the office manager of the Port Jefferson Station location and oversaw the human resources department.[2] In July 2015,[3] the Respondent began searching for a replacement for its human resource specialist, who was leaving the company in August. To fill the expected vacancy, the Respondent placed a job advertisement for a human resources assistant. The advertisement stated that the Respondent sought "an ambitious HR professional to assist in the overall operations of the HR department . . . who is willing to go above and beyond in the best interest of the company." It listed a number of preferred skills and abilities, including familiarity with employment laws and human resources topics, recruiting, interviewing applicants, and payroll entry. According to Puma, the Respondent's business was growing and, as a result, it needed to hire a candidate who was knowledgeable about the various laws governing the employment relationship so that he or she could fill a role of working to insure that the Respondent was in compliance with those laws.

Charging Party Brian Burns responded to the job advertisement by sending his resume representing his qualifications, work experience, and educational background in human resources. Burns' resume stated that he was well versed in analyzing and executing recruitment strategies and human resource functions, had a "compliance mindset," and possessed expertise in various areas of employment and labor law. In addition, the record establishes that, during the interview process, Burns was informed that part of his job would be to assist the Respondent in reviewing its personnel practices for the purpose of achieving compliance with the law. Burns told the Respondent that he had conducted internal audits in the past and was knowledgeable about compliance issues.

Burn reported for his first day of work on August 10 and, as explained below, was discharged shortly thereafter on August 25. During his brief tenure with the Respondent, Burns engaged in typical onboarding activities, as well as receiving some initial job training from the outgoing human resources specialist. He also performed some substantive duties, such as initial hiring process actions, conducting background checks, inputting data into the payroll system, and reviewing employee timecards for accuracy. As part of his duties, Burns had access to the Respondent's payroll software and background investigation services. He was also given keys to the Respondent's filing cabinets where employee personnel files were kept and was responsible for placing certain items into those files.

The record establishes that, each day at work, Burns met with Puma to discuss the tasks for the day. During one such conversation on August 19, Puma stated that she needed to know if, in the course of conducting background checks on job applicants, Burns found any "red flags" – meaning adverse information pertaining to ap-

[1] The General Counsel has implicitly 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.

We have corrected several inadvertent typographical errors in the judge's decision, which had no impact on our disposition of the case.

[2] The Respondent admits Puma was a supervisor pursuant to Sec. 2(11) and its agent pursuant to Sec. 2(13).

The General Counsel excepts to the judge's finding that the Respondent had a two-person human resources department, but does not state, either in its exceptions or supporting brief, any grounds on which this purportedly erroneous finding should be overturned. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we shall disregard this exception.

[3] All dates herein are to 2015 unless otherwise noted.

plicants. Burns then revealed to Puma that he previously had been arrested for larceny but had pled guilty to a lesser offense. Burns had disclosed the arrest and conviction in his application materials, but Puma was never aware of the information. Puma stated that if she had known about the conviction, she would not have hired him.

Following that encounter, Burns, by going into employee personnel files and reviewing payroll records, accumulated a batch of information and then proceeded to draft a letter to Puma. Burns began the letter by stating he had "some major concerns about the workplace." He asserted that one of the Respondent's employees "is a self-proclaimed racist," and he took issue with the workplace radio because it played uncensored music. Turning to compliance issues, Burns asserted that state-required pay forms were missing from employee files; employees were not receiving state-required tax forms; mandatory workplace notices were not posted; and employees were not properly clocking out for their breaks. Further, Burns asserted that the Respondent's paid-time-off policy "is subpar," that some employees were making below average demographic salary, and also that some employees, including Burns himself, were improperly classified as exempt under the Fair Labor Standards Act (FLSA) and should be reclassified. Burns asserted that because of the employees' wage, benefits, and FLSA exemption issues, he "ha[s] and will continue to give serious thought in regards to contacting the NLRB and attempting to organize and eventually hope to form a union [*sic*]." As to his own FLSA classification, Burns requested that he be reclassified as FLSA non-exempt and provided with back wages. He stated that he "will seek further redress through the courts or the NY Department of Labor accordingly."

Burns then transitioned the focus of the letter to his August 19 conversation with Puma regarding background checks and, in a comparatively lengthy paragraph, he addressed extensively his prior criminal record. He asserted that he included the conviction on his employment application materials, that Puma incorrectly believed he was convicted of grand larceny instead of petit larceny, and that, instead of hiding the conviction, he was forthcoming about it when Puma asked him to look for "red flags" in the background checks. In subsequent paragraphs, Burns went on to allege that one of the Respondent's managers was age- and sex-biased. Despite his short tenure with the Respondent and the fact that he had not spoken to any of his coworkers about the workplace issues he raised, Burns concluded the letter by stating that the workplace issues he mentioned were "very serious," that he had been "deeply affected" by them, and that he "[would] not tolerate them anymore." As a result, Burns stated he was going to report the issues to various governmental agencies, including the NLRB. Burns' letter contains no statements or indications that he planned to work with Puma in order to help the Respondent address the issues and come into full compliance with the law, as his job duties required him to do.

Burns emailed this letter to Puma on the morning of Monday, August 25.[4] Prior to sending her the letter, Burns did not discuss with any fellow employee any of the issues described in the letter, nor did any employee speak to Burns about concerns over wages or working conditions, and there was no talk of a union at the workplace. After emailing Puma the letter, Burns went to her office and asked her to check her email. Burns then closed the door and sat down, and Puma read the letter on her computer as she printed it. When Puma finished reading the entirety of the letter, she told Burns that he was not a team player and discharged him.[5]

II. JUDGE'S DECISION

The judge dismissed the allegation that the Respondent violated Section 8(a)(1) of the Act by discharging Burns. He rejected the General Counsel's theory that the discharge was unlawful under *Parexel International, LLC*, 356 NLRB 516 (2011), as a preemptive strike to prevent Burns from engaging in statutorily protected conduct. In doing so, the judge reasoned that, given Burns' knowledge of employment law and his recent conversation with Puma about his prior conviction, "the only reason he wrote [the] letter was to see if he could retain his job by threatening legal actions against the company, or if that failed to establish a foundation for a retaliation claim." The judge also found that Burns "had no interest in promoting, supporting, or assisting other employees in seeking to address" any of the issues raised in the letter and had no intention of trying to convince other employees to join or assist a union. Further, although the Respondent at no point called into question whether Burns was a statutory employee under the Act, the judge sua sponte found that Burns' position as a human resources professional was "more aligned with management," rendering him a managerial employee who does not enjoy the protections of the Act. Accordingly, the judge dismissed the complaint.

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[4] The judge inadvertently found that Burns sent the email on August 24.

[5] The judge found that Puma credibly testified that after she read the letter, Burns stated to her that he could not work under these conditions and that he was sending the information to all of the government agencies. However, the record establishes that Burns made these statements in the letter, not orally to Puma after she read the letter.

The General Counsel excepts to the judge's dismissal, asserting that Burns is a statutory employee and that the Respondent unlawfully discharged him as a preemptive strike against the future protected activity that Burns referenced in his letter. We agree with the judge that the discharge was lawful, but for different reasons. In so doing, we find it unnecessary to pass on the judge's finding that Burns was a managerial employee and thus did not enjoy the Act's protections.[6] Even assuming Burns is a statutory employee, we find, for the reasons explained below, that his discharge did not violate the Act.

III. ANALYSIS

Under *Parexel*, an employer violates Section 8(a)(1) when its discharge of an employee constitutes a "preemptive strike" to prevent the employee from engaging in activity protected by the Act. 356 NLRB at 518. The Board's holding in *Parexel* is aimed at guarding against employers erecting "a dam at the source of supply" of potential protected concerted activity and thereby interfering with employees' exercise of their Section 7 rights and restraining the same. Id. at 519. In reaching this conclusion, the Board rejected the view that an employee already must have engaged in protected concerted activity for it to find that the employee was unlawfully discharged in order to prevent such activity. Id. at 519. The Board stated: "If an employer acts to prevent concerted protected activity – to 'nip it in the bud' – that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more." Id.[7] Pointing to established precedent holding that in certain circumstances employees who have engaged in no concerted activity at all are protected from adverse action, the Board held that what is critical is "not what the employee did, but rather the employer's intent to suppress protected concerted activity." Id. at 519, 519 fns. 10 & 11.[8] Thus, under *Parexel*, the General Counsel has the burden of demonstrating that the employer's intent to suppress protected activity was a motivating factor in its decision to take an adverse action against an employee.

Here, it is undisputed that prior to being discharged, Burns did not engage in any conduct that is protected by Section 7. That is, he did not take any action that was "concerted" and for the purpose of "mutual aid or protection," nor did he engage in any union activity. In his letter, Burns sought to raise a number of workplace issues to Puma and communicate his dissatisfaction with those issues. Many of the issues Burns raised amounted to individual complaints. For example, Burns complained about the music played on the office radio and devoted a substantial portion of the letter to discussing his prior criminal conviction and recounting in elaborate detail his recollection of how he disclosed that conviction to Puma on August 19. Nothing in the letter suggests that he planned to raise these matters to other employees in an effort to induce future group action. Similarly, Burns referred to missing tax forms in employee files, improper posting of workplace notices, and employees' failure to properly clock in and out for their breaks, but none of these references contained any suggestion that Burns intended to engage in future concerted activity for purposes of addressing them. The same is true for the portions of the letter alleging that a certain manager engaged in hiring practices with bias toward the sex or age of the applicant – these allegations were made without any discernible suggestion that in response Burns planned to take action protected by Section 7.

In raising issues of wage disparities, FLSA classification, and benefits policies, however, Burns stated that these matters caused him to give "serious thought in regards to contacting the NLRB and attempting to organize and eventually hope to form a union [*sic*]." In addition, in closing his letter, Burns stated that the issues he identified "can be detrimental to the . . . integrity of the employees," that he would not tolerate them anymore, and that he planned to report the issues to various government agencies, including the NLRB. In this regard, the law is settled that talking to coworkers about forming a union and/or contacting the NLRB to file a representation petition or unfair labor practice charge, with limited exception, is activity that Section 7 protects. Further, Burns' statement made in connection with the FLSA misclassification issues that he "will seek further redress through the courts or the NY Department of Labor" may be construed as a statement of intent to engage in Section

[6] Chairman Miscimarra would adopt the judge's finding that Burns was a managerial employee for the reasons set forth in the judge's decision.

[7] The judge appears to misunderstand the Board's *Parexel* decision in this regard. Specifically, he states that because the employee in *Parexel* had already engaged in protected concerted activity and was unlawfully discharged for doing so, the Board's further finding that the respondent violated Sec. 8(a)(1) for seeking to prevent her from engaging in protected concerted activity in the future was "simply gilding the lily." However, the *Parexel* Board made clear that it assumed for the purposes of deciding that case that the employee had not yet engaged in protected concerted activity. Thus, the question was whether the employee's discharge constituted an unlawful preemptive strike against future protected concerted activity, regardless of whether the employee had already engaged in such activity. See *Parexel*, 356 NLRB at 518 fn.7.

[8] The Board also noted that the respondent in *Parexel* failed to show that it would have discharged the discriminatee in the absence of its fear that she would engage in protected activity in the future. 356 NLRB at 520 fn. 12.

7 activity. See generally *Beyoglu*, 362 NLRB No. 152, slip op. at 1–2 (2015) ("[A] single employee who files a lawsuit ostensibly on behalf of himself and other employees is engaged in protected concerted activity.").[9]

The General Counsel contends that the Respondent discharged Burns to suppress his stated plans of engaging in Section 7 activity. Under *Parexel*, such a discharge would be unlawful. Contrary to the General Counsel's contention, however, we find that the evidence does not support a conclusion that the Respondent discharged Burns to prevent him from taking actions protected by Section 7.[10]

The record makes clear that the Respondent hired Burns to fill a role in which he would identify aspects of its human resources practices that were out of step with the law or in need of improvement and help it correct those issues. Puma credibly testified that the Respondent needed to hire someone to perform these functions because its business was in a growth stage and it suspected that there were areas of non-compliance requiring prompt correction. She also credibly testified that the reason she hired Burns was because he proved himself during the interview process to be knowledgeable about compliance issues. Because Burns was discharged so soon after he was hired, he never actually began helping the Respondent achieve its desired compliance. Nonetheless, Burns acknowledged at the hearing that one of the reasons he was hired was to review company files to determine if the Respondent was in compliance with various employment-related laws and regulations. Specifically, Burns testified that he understood that it was his duty to report misclassifications and other human resources issues to Puma. Thus, Burns was hired largely because of his compliance experience, and he and the Respondent shared an expectation that he would bring to Puma's attention instances of potential non-compliance with the law and work with her on remedying those situations.

Having hired Burns to assist with compliance matters, Puma's reaction to Burns' letter upon reading it centered entirely on his failure to perform the very duties he was hired to perform. Puma testified that as she began reading the letter, she initially was pleased that Burns had found areas in need of improvement – because he was hired to do just that. But as she continued reading, she realized Burns was not raising the issues to her so that they could work together on developing and implementing solutions. She testified that she was "taken aback" by the letter and felt that Burns had betrayed the company and her by pursuing a course of action plainly inconsistent with the basic purpose for which the Respondent had hired him.[11]

Further and significantly in this case, Puma did nothing before or after reading the letter that would suggest she harbored animus toward Section 7 activity or discharged Burns to prevent such activity from occurring in the future. She did not, for example, inquire whether Burns had talked to other employees about the issues he raised. Cf. *Parexel,* 356 NLRB at 519 (prior to discharging employee, employer inquired whether she discussed matters with anyone else). Nor did she accuse Burns of "stirring up" other employees or make any other accusations that would indicate she was worried that he either had spoken with coworkers already or would soon do so. Cf. *Lou's Transport, Inc.*, 361 NLRB No. 158, slip op. at 2 (2014) (unlawful for employer to discharge employee for posting signs in his truck window that the employer believed were "stirring up the crowd"). Moreover, there is no evidence or allegation of other unfair labor practic-

[9] The judge found that Burns' motive for threatening legal action was to protect his job. It is well settled, however, that an employee's subjective motive for taking an action is not relevant to whether that action constitutes protected concerted activity. See *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014), and cases cited therein. In any event, the focus here is not why Burns wrote the letter, but whether the Respondent responded to it with an intent to suppress future protected concerted activity. See *Parexel*, 356 NLRB at 519.

[10] Chairman Miscimarra notes that he does not agree with the Board's decision in *Parexel*. The "preemptive strike" (preemptive restraint) theory of *Parexel* resembles the discredited pre-*Meyers I* and *II* theory of "inherently" concerted activity: under both, a violation is found despite a lack of evidence that any employees sought to initiate, induce, or prepare for group action. Accordingly, the "preemptive strike" theory, like the "inherently concerted" theory, is contrary to the holdings of *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) and *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964). Chairman Miscimarra agrees with the majority, however, that *Parexel* is distinguishable from the instant case and that the General Counsel did not establish that the Respondent acted with the intent to suppress future protected concerted activity.

[11] The judge found that Puma credibly testified that she discharged Burns because "he threatened to initiate. . . legal proceedings that could potentially cause the company to incur substantial liabilities." Puma did not, however, testify to that being the reason for his discharge. Instead, as noted above, she testified that she felt betrayed by Burns' letter given the reasons he was hired and the understanding that Burns was going to raise concerns internally and help develop solutions.

With respect to the Respondent's defense that Burns was disloyal and Puma's testimony that Burns was discharged because she felt he had betrayed her and the Respondent, we acknowledge that employer accusations of disloyalty can, and often do, stem from employee engagement in Sec. 7 activity or employer suspicions of the same. Such accusations may form the basis of an unfair labor practice where an employer equates protected concerted activity with disloyalty. See generally *Carrier Corp.*, 336 NLRB 1141, 1148 (2001), and cases cited therein. Here, however, as explained below, there is no evidence from which to conclude that the references in Burns' letter to future Sec. 7 activity formed the basis of, or contributed to, the Respondent's belief that he was disloyal.

es by the Respondent. In sum, there is nothing in the record from which it could be reasonably inferred that Puma or any other management official bore animosity toward Section 7 activity, nor does the record evidence establish that the Respondent discharged Burns to extinguish any plans for such activity in the future. As such, we find that the General Counsel failed to prove that, in discharging Burns, the Respondent was motivated by an unlawful intent to suppress future protected activity.

Instead, what the record shows is that Burns, after having been employed for about 2 weeks and without having spoken to any of his coworkers about the workplace issues raised in his letter, approached Puma and presented her with an extensive letter from him as an individual about the problems he saw in the Respondent's workplace. The letter communicated a range of information, the vast majority of which did not touch on Section 7 activity and instead addressed his individual impressions and complaints about workplace issues, as well as his obvious concern that the Respondent might fire him for his prior criminal conviction. Further, in identifying the potential federal and state law compliance issues, Burns offered no suggestions for how the Respondent could formulate a plan to improve those areas. In this way, the letter was drafted in a manner plainly inconsistent with the purposes and duties for which the Respondent hired Burns, and it was for this reason that Puma discharged Burns. Although Burns appears to have conveyed some intention in the letter, however veiled, to engage in activity that would be protected by Section 7, there is, as discussed above, insufficient evidence to conclude that his references to such activity formed the basis for Puma's decision to discharge Burns.

Having considered all of the circumstances, we find that the record fails to support a conclusion that Puma discharged Burns to suppress future protected concerted activity. We therefore find that the Respondent did not, as alleged in the complaint, violate Section 8(a)(1) by discharging Burns.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. May 15, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Brent E. Childerhose Esq., for the General Counsel.
Gerard J. McCreight Esq., counsel for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on June 7, 2016, in Brooklyn, New York. The charge in this proceeding was filed on January 25, 2016. The complaint that was issued on March 25, alleged that the respondent discharged Brian Burns because he complained about the wages hours and working conditions of the employees.

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

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The employer is an enterprise that is engaged in providing real estate services. It operates in several states including New York, New Jersey, and Connecticut. The company employs about 250 people throughout its various locations. The respondent's headquarters are located in Long Island, New York, where it employs about 25 people who are engaged in executive or administrative functions. Among these functions is a two-person human resources department.

Kathryn Puma is the office manager and head of the two person human resource department. Prior to the hiring of Brian Burns this department consisted or herself and Joe Farruggio. The latter's title was human resource specialist. Because Farruggio was leaving the company in August, an advertisement was placed for the hire of his replacement. In pertinent part, this read as follows: Human Resources Assistant

> We are seeking an ambitious HR professional to assist in the overall operations of the HR department. Standard duties will include but not be limited to; recruiting, employee relations, payroll, benefits and employment law.
>
> . . . .
>
> Preferred Skills and Abilities:
>
> Full cycle recruiting; job descriptions, posting, screening and interviewing
> Familiar with employment law and main HR topics

[1] At times, the transcript lists the Judge as Judge Davis. This is incorrect and should be changed.

> Able to develop and assist in the employee orientation process
> Familiar with ADP Workforce or similar payroll systems
> Payroll, Time and Attendance, 401K and Custom reports preferred
> Entry in payroll/ADP for Direct Deposit, Payroll changes, etc.
> Communications oriented: Draft, Revise and Release Memos as needed.
> Familiar with FMLA, COBRA & other notices
> Familiar with I-9 documents and other HR paperwork
> Knowledge of ACA compliance is a major plus
>
> Preferred Education:
>
> Bachelor's, Master, MBA, PHR and SHRM-CP all major pluses

In response, Brian Burns sent in his resume. In his resume, he represented his qualifications, work experience, and educational background in human resources. In part this states:

> Qualifications
>
> Well versed in analyzing and executing recruitment strategies, human resource functions, building the internal/external customer experience and leading change management.
>
> Successfully supported and executed the strategic direction of HR, including the implementation of high-value added HR processes that support business goals/objectives.
>
> Proficient in creating a diverse workforce and having a compliance mindset as it correlates to building an all-inclusive working environment.
>
> Expertise in various areas of local, state and federal employment and labor law and effectively applying them to real life practical scenarios.
>
> Demonstrated knowledge and abilities of various computer and HRIS systems
>
> Education
>
> Doctor of Business Administration – Human Resource Management
> Walden University – Online.
> Anticipated Graduation Date – June 2017…
>
> Master of Science in Human Resource Management – General Human Resource Management
> Capella University
>
> Master of Science in Human Resource Management Functional HR Management
> Walden University
>
> Bachelor of Science in Business Management and Economics with a concentration in Human Resource Management
> SUNY Empire State College

On August 7, 2015, the company offered Burns the position of human resources assistant. His starting salary was $45,000 per year with eligibility for medical, dental, long term disability, and life insurance benefits after the standard probationary period. The offer also provided for a 401K plan after 4 months of employment.

With respect to the hiring of Burns, Kathryn Puma testified that the company, in looking for a replacement for Joe Farruggio, needed someone who would be able to replace his functions. She also testified that a reason she decided to hire Burns was because from his resume and interview, he represented himself as being knowledgeable about compliance issues. That is, she credibly testified that the company was growing pretty fast, and that it needed someone who was familiar with Federal, State, and local laws relating to employment so as to insure that the company would be in compliance with those laws.

Burns began his employment on August 10 and lasted until August 25. At the start of his employment Burns was trained in the company payroll, computer, and other systems by Farruggio who remained on for a few days. It should be noted that because Burns was employed for only 2 weeks, he did not actually get to perform many of the functions for which he was hired. And so in his brief tenure, his ultimate job duties and responsibilities never fully jelled. He did, however, have access to confidential employee files, which were kept under lock and key.

On Wednesday, August 19, during a discussion with Puma about employee background checks, Burns told her that he had been arrested for larceny and had pleaded guilty to a lesser offense. She told him that if she had known that, she wouldn't have hired him.

Over the next several days, Burns, by going into the employee personnel files and reviewing payroll records, accumulated a batch of information that he put together into a document that he emailed to Puma on August 24. When he arrived at work on the 25, Burns met with Puma and she read this document as it was being printed out. At the conclusion of her reading, she told Burns that he was fired.

Before describing this document, I note that Burns did not discuss with any employees any of the issues that are set forth in the document. Burns spoke to no employees and no employees spoke to him about any complaints that they may have had about their wages or working conditions. No employee expressed any interest in forming or joining a union and he had no conversations with any employee about unionization. Indeed, given his conversation with Puma on Wednesday and given Burns' knowledge of employment law, it is obvious to me that the only reason he wrote this letter was to see if he could retain his job by threatening legal actions against the company; or if that failed to a establish a foundation for a retaliation claim. I don't believe that he was interested in furthering the interests of the other employees.

> That said, the memorandum states in pertinent part:
>
> I have some major concerns about the workplace at Matrix …
>
> The first thing I want to discuss is that Chris Nelson is a self-proclaimed racist. On August 7, he stated that he is a … racist and was proud of it…
>
> The second aspect I am very concerned about is that the company radio plays a plethora and variety of different song/genres throughout the day every day. The radio does not have colorful and expletive language censored…. This is certain not professional for anyone to have to listen to in the

workplace.

In New York State, each and every employee regardless of whether they are exempt or nonexempt needs a Notice of Pay form. This form is defined within section 195 of the NYSLL. I have found with spot-checking employee files…. that they do not have this form or perhaps an incomplete form within their folders…

I have also spot checked a lot of NYS employee file folders and have found that they are not receiving the NYS IT-2104 form. This form is the NYS tax form that must be in each employee's folder along with the W-4 form or can be in lieu of the W-4 form, according to the NYS Department of Taxation.

On another note, I do not see anywhere in the workplace the required minimum wage poster, discrimination is unlawful poster, the workers compensation certificate, Article 23-a of the Correction Law of NYS and other required posters both state and federal ones posited conspicuously in the workplace.

Moving on towards payroll related issues, I notice that there are employees … in payroll that do not earn enough to be placed in the exempt level status….

I also noticed that many NYS employees are not punching in and out for the mandatory 30 minute breaks when working a shift of more than 6 hours….

The paid time off policy… is subpar at best. Between the misclassification of employees from exempt and nonexempt, wage disparities and subpar compensatory, medical, dental etc. benefits… I have and will continue to give serious thought in regards to contacting the NLRB and attempting to organize and eventually hope to form a union.

Salaries of some of the workers are below the average demographic salary range for what is required of them and I believe that many employees are classified in the exempt status are more than likely misclassified and should be reclassified in nonexempt status. My position for example, does not rise to the level of an exempt level classification. I merely perform tasks that are given to me, have direct oversight from an hourly manager (Kathryn Puma) and do not have the level of discretion and independent judgment, amongst other requirements that an exempt level position should be. Therefore, I request that I am reclassified as a nonexempt level employee. I am requesting back wages with interest and will seek further redress through the courts or the NY Department of Labor accordingly.

On Wednesday August 19, 2015, I presented information to you regarding my background check results from Castlebranch… I came forth to you… and stated that I had a conviction that came up on my background check. When I returned with my background screening results … you looked at my background check and said that, "if I would have known about this before, I would not even have hired you." I stated that I put this information on my employment application and was honest from the beginning. You stated… that my conviction was for a grand larceny and I stated that that was the original arrest charge and that you cannot go by that because it was dropped down to a misdemeanor petit larceny conviction….

In regards to hiring … Christina Whitehurst is clearly age biased and sex biased as well. She stated to me… that she would rather fill Peter's position with a girl than a guy. Her stated reasoning for this is because she and her team will be able to get along with a girl better than a guy.

On August 21, 2015, Ms. Whitehurst spoke to me about the same staff accountant position. She said that she wants someone young, fresh and still "hungry" to fill the upcoming vacancy. I informed her that we needed to pick the most qualified candidate regardless of anything else. She stated that she would rather have a girl fill the vacancy rather than a guy, citing alleged team dynamic issues.

All of these workplace issues are very serious, can have severe repercussions and can be terminally detrimental to the overall stability and integrity of the employees and the company alike. These issues are severe and pervasive enough in some instances to rise to the level of a racially hostile work environment, age biased, sex biased and previous conviction biased workplace. I have been deeply affected by these issues and will not tolerate them anymore. Therefore, due to the severity, frequency and continuity of these egregious violations, I am going to report them to various governmental agencies accordingly. These agencies will include but not be limited to the following: The New York State Department of Labor, the New York State Division of Human Rights, the Equal Employment Opportunity Commission, the New York State Attorney General, the National Labor Relation Board and any other agency that I deem suitable to report these violations to.

With respect to the conversation on August 25, Puma credibly testified that after she read the email, Burns stated that he couldn't work under these conditions and that he was sending all of this information to all of the governmental agencies. Puma testified that she felt betrayed and that she told Burns that he was not a team player and that he needed to go.

Puma's testimony was that she fired Burns not because he raised issues about wages or terms of employment (which was part of his job), but because instead of seeking to discuss and resolve those issues internally as a member of the human resources department, he threatened to initiate (without the consent or support of any other employees), legal proceedings that could potentially cause the company to incur substantial liabilities.

Analysis

It is the General Counsel's theory that by discharging Burns for writing the letter of August 24, the Respondent violated Section 8(a)(1) because it sought to prevent Burns from engaging in some future protected concerted activity. Thus, the General Counsel, relying on *Paraxel International LLC*, 356 NLRB 516 (2001), asserts that it is unlawful for the employer to "preemptively" discharge an employee to prevent him from engaging in protected activity. He argues that this is true even in instances where an employee has not yet actually engaged in concerted activity.

I do not agree for the following reasons.

In *Paraxel* the facts were that the charging party, Therese Neuschafer, had engaged in discussions with fellow employees about the relative wage rates given to some but not other employees. She thereupon reported those discussions to her immediate supervisor and suggested that perhaps everyone should quit and come back with a raise. This was reported to management and Neuschafer was called in for a meeting. When satisfied that Neuschafer had not yet stirred up any concern about wages or possible discrimination among other employees, the Respondent discharged her before she could do so.

The facts in Paraxel show that the charging party had engaged in discussion with other employees about their respective wage rates, which would be protected concerted activity for which she could not be discharged. Therefore, under existing law, a discharge of an employee for engaging in that kind of activity would have, by itself, been a violation of the Act. The fact that the Respondent may also have been motivated by a desire to prevent her from continuing to engage in similar concerted activity in the future is simply gilding the lily.

In the present case, Mr. Burns, although reciting a litany of alleged labor violations in his August letter, never had any discussions with any employees about any of these issues. And I don't believe that he ever intended to. Indeed, it is my conclusion that he was interested only in protecting his own job by threatening to initiate a variety of legal actions and that he had no interest in promoting, supporting, or assisting other employees in seeking to address any of those issues. Nor do I believe that he had any intention of trying to convince other employees to join or assist a union.

In addition, although Burns did not work long enough for us to be certain as to what his ultimate functions would have been, it seems to me that both his and the company's intention was that he would be utilized in a professional/managerial position. In this regard, the company's job advertisement was for a person with a professional education in human resources who would be involved, inter alia, in addressing legal issues relating to employment. For his part, Burns represented that he was soon going to obtain a PHD in human resources and that he had "expertise in various areas of local, state and federal employment and labor law and effectively applying them to real life practical scenarios." It is therefore my conclusion that the intention of both parties was that Burns would be utilized to formulate labor relations policies so that the company would be in compliance with the various Federal, State, and local laws that regulate employment relations.

It seems to me that one of the functions of a human resource professional is to help his or her employer avoid (but not evade), potential legal liabilities that can arise in the course of doing business. In my opinion, a person in Burn's position is essentially more aligned with management and has the job of advising his employer as to how to comply with the law. And if he finds during the course of his employment, that there are practices or procedures that may be contrary to law, his function is to devise, in consultation with his superiors, remedies to redress those situations where potential liabilities may arise. In my opinion, it is not the job of such a person to surprise his employer by first initiating, on his own initiative, legal actions against his own company.

In short, I conclude that because Burns was hired as a human resources professional, his position was aligned with management and he should be construed as a managerial employee. As such, I conclude that he does not enjoy the protection of the Act. See *NLRB v. Bell Aerospace Co., Div. of Textron, Inc*., 416 U.S. 267 (1974). Cf. *Solartec, Inc.,* 352 NLRB 331 (2008), where the Board although finding that the employee was not a managerial employee, nevertheless opined that managerial employees are not protected by the Act.[2]

For the reasons described above, I therefore recommend that the complaint be dismissed.

Dated, Washington, D.C. July 12, 2016

[2] In *NLRB v. Yeshiva University*, 444 U.S. 672, 687–688 (1980), the Supreme Court pointed out that the purpose of exempting managerial employees from the Act's protection is to ensure "that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union."