Costco Wholesale Corporation *and* Teamsters Local 592, International Brotherhood of Teamsters.
Case 05–CA–169958

February 2, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

On February 24, 2017, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed a cross-exception and a supporting 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[1] and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Costco Wholesale Corporation, Glen Allen, VA, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 2, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joseph E. McGlew-Castaneda, Esq. and *Thomas J. Murphy, Esq.*, for the General Counsel.
Paul Galligan, Esq., for the Respondent.
James R. Smith, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Richmond, Virginia, on October 11, 2016. The Charging Party Union filed the charge on February 18, 2016,[1] and the General Counsel issued the complaint on June 6, 2016.

The complaint alleged that Respondent violated Section 8(a)(1) of the Act by denying an employee the right to representation during an investigatory interview. At trial, the General Counsel's motion to amend the complaint was granted to include the allegation that Respondent also violated Section 8(a)(1) of the Act when Respondent instructed the employee not to discuss the incident under investigation with anyone.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent (Costco), a corporation, has been engaged in the sale and distribution of merchandise and services at its warehouse facility in Glen Allen, Virginia,[2] where during calendar year 2016, it derived gross revenues in excess of $500,000. During the same time period, Respondent purchased and received at its facility, products, goods and materials valued in excess of $5000 directly from points located outside the State of Virginia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section

[1] There are no exceptions to the judge's dismissal of the allegation that the Respondent denied employee Justin Daniels the right to union representation at an investigatory interview.

[2] In affirming the judge's grant of the General Counsel's motion to amend the complaint, we find that both the new allegation and the timely filed charge involve the same legal theory and arise under the same factual circumstances and series of events, thereby satisfying the requirements of *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). With regard to the legal theory, we find that the new allegation—that an employee was directed not to speak with anyone about an incident of purported misconduct under investigation—and the complaint's *Weingarten* allegation both implicate an attempt to prevent an employee from exercising the statutory right to speak with and receive assistance from other employees about a disciplinary matter.

[3] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by directing employee Justin Daniels not to speak to anyone about an incident of purported misconduct under investigation, we do not rely on the cases, cited by the judge, involving the promulgation of unlawful work rules, as the violation here involves an unlawful instruction to refrain from discussing a disciplinary matter and not the promulgation of a work rule. See generally *Dish Network LLC*, 365 NLRB No. 47, slip op. at 3 fn. 8 (2017) (instruction to one employee not to discuss investigation was unlawful, but was not the promulgation of an unlawful rule); *Food Services of America, Inc.*, 360 NLRB 1012, 1016 fn. 11 (2014) (single statement instructing employee not to talk to another employee not a promulgation of an unlawful rule but rather an implicit threat of retaliation for engaging in protected concerted discussions), vacated pursuant to settlement by 365 NLRB No. 85 (2017).

[1] All dates are in 2016 unless otherwise indicated.

[2] This store is also referred to by the parties as the West Henrico facility.

2(2), (6), and (7) of the Act.

Respondent further admits, and I find, that the Union Local 592 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates its Costco warehouse store with approximately 240 employees. At all relevant times, Marc Cibellis served as the store's general manager over 3 assistant store managers, and various department managers and supervisors.

The following of Respondent's employees (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> The employees of Respondent in classifications set forth in Appendix A of the collective-bargaining agreement between the Respondent and the Eastern Area Teamsters and who are employed in warehouse operations of Respondent located [in] Maryland, New Jersey, New York, and Virginia.

At all material times, Respondent has recognized the Eastern Area Teamsters, which includes the Charging Party, as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective March 15, 2013, through February 1, 2016. The Union administers the agreement at Respondent's facility. There are two shop stewards at the facility, Raymond Daniels (Raymond) and John Coleman.

B. The February 4 Incident and Subsequent Investigative Interviews

In July 2015, employee Justin Daniels (Justin) began working for Costco as a tire installer in the tire center.[3] His immediate supervisor, Wes Hooker, managed the tire center, along with several subordinate supervisors, including Justin Moore (Moore). Justin's father happens to be shop steward Raymond, who also works at the same facility as a forklift operator and packer.

On February 4, Justin engaged in a verbal altercation with several of the tire center employees. On February 6, Hooker informed Cibellis about the altercation.

Cibellis began investigating the incident by interviewing the employees involved, including Justin. On about February 8, he summoned Justin to his office, with Associate Store Manager Eddie Johnson as a witness, and asked for his (Justin's) version of what transpired on February 4. At Cibellis' request, Justin also made a written statement. Cibellis admitted that he also instructed Justin not to "have any conversations with anyone else pertaining to this incident." (Tr. 111.) It is undisputed that Justin did not ask for a union representative to be present with him before or during this meeting.[4]

On about the same date, Cibellis interviewed and received statements from tire center installer Matt Mercantante, Supervisor Moore and Tire Center Manager Hooker.[5] Apparently, Moore accused Justin of making "racially charged and discriminatory comments" during the February 4 incident in the tire center. (Tr. 95–97.) On about February 10, Cibellis told Justin that he needed to meet with him at 11a.m. on February 11 to ask some follow-up questions.[6] Justin agreed to do so. On the evening before the meeting, Justin told Raymond that Cibellis wanted to question him about the February 4 incident. In response, Raymond advised his son that "he had the right to have [union] representation in the meeting." (Tr. 65.)

On the morning of February 11, at about 10:45 a.m., Justin approached his father and asked him if he would be attending the meeting with him. Raymond responded that the "rules" required that Justin first request a union representative before he would be called into the meeting. Justin testified that on his way to meet Cibellis, he ran into him on the stairwell leading up to his office. He further testified that during that encounter, he asked Cibellis for a union representative to be present during their meeting, but was denied one. More specifically, he testified that after they greeted each other, "I asked him for a union rep, and he told me that the meeting—it's not going to be long. He just got a quick question or two that he needs to ask me about the statement, and he was going to let me be on my way." (Tr. 28.) Cibellis, on the other hand, not only denied seeing Justin on the staircase before the interview, but also denied that Justin requested a union representative at any time before or during the interview. (Tr. 97–98.)[7]

Cibellis and Justin met alone in Cibellis' office, and Cibellis informed Justin that Moore had accused him (Justin) of making a racist comment on February 4. Cibellis denied making any racist remarks. After Cibellis questioned him about the comment several times, Justin requested that Cibellis bring in his

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[3] He installed, rotated, and repaired tires.

[4] I credited Cibellis' testimony, corroborated by Justin's February 8 interview statement, that this interview took place on February 8 (Monday). Justin recalled on the stand, and in his Board affidavit, that it happened on February 10 (Wednesday) because he was off on Mondays. But when presented with his statement, he testified that, "I can't remember…if it was the 8th now. We're in October." (Tr. 42–43.) Unbelievably, he later claimed for the first time that he did not think that he put the date on his statement, but wrote the rest of it. Nevertheless, I find that his statement, dated February 8, more accurately reflects the date of the interview since there is no way to determine (without an expert) that he did not date it or that someone else did. I gave no weight to a document shown to refresh Justin's memory about working on the 8th since it was not introduced into the record. (Tr. 42–49, 53, 55, 91, 93.)

[5] Cibellis interviewed the other tire installer involved in the incident on February 9.

[6] I discredited Cibellis' testimony that he summoned Justin to meet for the second interview on the morning of February 11, and that he was off work on February 10; he offered no evidence to substantiate this. It is more believable that he did so on February 10, or perhaps on February 9, as Raymond corroborated Justin's testimony that Justin told him "[o]n one night at home" that he would be meeting with Cibellis the next morning. Justin did not tell Raymond about his first interview with Cibellis, nor did he tell Raymond when he was told to meet Cibellis on February 11. (Tr. 66, 97–99.)

[7] For reasons discussed further in this decision, I fully discredit Justin's version of how and when he requested a representative before the February 11 interview.

accusers so that he could question them.[8] At some point, Justin took out a copy of his union handbook, which consisted of the union contract. He testified that he told Cibellis that he was "going to do some research and look into that," and that Cibellis responded, "well, okay, I'm not worried about that…it's discrimination." Cibellis testified that he explained that witnesses in investigations did not get to confront and/or question each other. According to Cibellis, Justin became agitated, showed him the union contract, and said that he (Cibellis) was discriminating against him (Justin) by not allowing him to talk to the other employees involved. Cibellis testified that Justin left Cibellis' office. Although Justin did not mention that he asked to confront his coworkers, I find that Cibellis' testimony that he did so, along with Cibellis' version of what Justin said about the union contract, was more logical and believable. This was in contrast to Justin's vague, disjointed testimony. The meeting was brief, and only lasted about 10 minutes. There is no dispute that Justin never requested or mentioned union representation in this meeting. (Tr. 99–100.)

After the meeting, Justin saw Raymond, and told him that he asked for union representation for the meeting, but was denied.[9] Both Justin and Raymond testified that Raymond immediately called Union President Smith, and reported that Justin's request for a shop steward to be present during an investigatory meeting had been rejected. Both testified that Smith told them to meet with him at the union office to file a grievance. However, Justin recalled that they went to see Smith the next day, while Raymond recalled that they went the same afternoon. Smith initially testified that he did not recall when they visited him, but when asked again, believed that they came the same day of the incident. (Tr. 80–83.)

On either February 11 or 12, Justin and Raymond met with Smith in the union office and told him what had occurred during the second interview with Cibellis. However, there is some disagreement, or rather confusion, about the particulars of this meeting. Justin and Raymond recalled that Smith's assistant or secretary typed up Justin's statement, and both believed or assumed that a grievance would be filed that day. (Tr. 33, 70–71.) Smith recalled that during the meeting, Justin explained that he got called into Cibellis' office, and asked to have a shop steward present, but was denied one. He said that Justin also told him that he had the contract with him, and that Cibellis told him that "we don't go by that book." (Tr. 78–79.) Smith was sure that he did not have Justin sign or write up a statement, or have a secretary do so. He testified that after they left his office, he "got with [the Union's] attorney, and filed a labor charge on that and another incident that had occurred…[a] labor charge on that, on him not getting his Weingarten rights and on another incident that had occurred, which there were two totally separate incidents." Smith was not certain that his attorney filed the charge on the same day, but believed that one was filed "probably that week." (79–83.)

The charge in this case was signed by the Union's attorney, Jonathan Axelrod, and dated on February 12, but not filed until February 18. It states in relevant part the following:

> On February 11, 2016, Costco Manager Marc Cibellis called employee Justin Daniels into his office to question him about potential misconduct. Employee Justin reasonably believed that he might be disciplined and requested the assistance of a Union steward. Manager Cibellis refused the request and continued to interrogate Employee Justin. At the conclusion of the meeting, Manager Cibellis told Employee Justin that he would let him know whether discipline would be imposed.

(GC Exh. 1(A).) During the Board investigation of this charge, neither Justin nor Raymond mentioned the meeting in Smith's office, but the date on which the charge was signed by Axelrod confirms that they must have met on or before February 12.[10] More concerning is the fact that neither Justin nor Raymond mentioned in their Board affidavits that Justin requested a union representative on the stairwell. In fact, in his affidavit, Justin swore that he requested one during the February 11 meeting with Cibellis. (Tr. 57–58.)

Respondent suspended Justin pending termination on February 13, and terminated him on February 18 for making racist, threatening and/or harassing statements. On or after February 18, the Union also filed a grievance, but only on Justin's termination. About 2 weeks after Justin's discharge, Smith and Justin met with Cibellis and other Costco managers to discuss the termination grievance. During this meeting, Justin and Smith also confirmed that a charge had been filed alleging that Respondent had denied Justin union presentation.[11]

III. DISCUSSION AND ANALYSIS

A. Credibility Determinations[12]

The main controversy in this case is whether or not Justin requested a union shop steward to represent him in the second meeting with Cibellis on February 11. After reviewing all of the evidence, I must conclude that the General Counsel failed to show that he did.

I find that Justin's testimony that he requested a union repre-

[8] Justin testified that Cibellis asked him if he had called one of his coworkers a "white boy," and that Cibellis asked several times if he made the comment. Cibellis testified that he read Moore's statement to Justin, and asked him about it. (Tr. 99–100.)

[9] There is no evidence that Justin told Raymond that he had asked for a representative before the meeting, on the stairs.

[10] There was no explanation provided as to why the Union waited until the date that Justin was terminated to file the charge. But since there was no evidence that Axelrod falsified the date on which he completed and signed the charge, I credit testimony that Justin and Raymond met with Smith on February 11 or 12. (GC Exh. 1-A.)

[11] I credit testimony that Smith and Justin mentioned the Board charge during this particular meeting since Respondent referenced the exchange in its position statement. (Tr. 110, 119–121.)

[12] A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. Such is the case here.

sentative when he met Cibellis on the stairs prior to the February 11 meeting is simply not credible based on the various inconsistencies in his testimony and other statements. First, in his Board affidavit taken on March 2, less than a month after that meeting, Justin swore under oath that on February 10, he met Cibellis in his office, and asked for a union representative in his office. Neither he nor his father mentioned in their affidavits that Justin made such a request on the staircase before the actual meeting. When confronted with his affidavit statement, Justin equivocally, and with hesitation, testified that, "[y]eah, I'm – that's the way I might have wrote it, but I know for sure I asked him on the staircase." I credit the Board affidavit over his trial testimony on this critical point since it was provided shortly after the second meeting, and he had no plausible explanation as to why his statement changed since that time. This is not the same as failing to remember a specific date of a meeting which took place several months or a year ago. Moreover, there is absolutely no evidence that he mentioned the stairwell request for a union representative to Smith or his father. Raymond never mentioned this in his testimony, and I believe that had he known, he would have done so. The charge in this case, which alleges that Justin requested the assistance of a union steward after he was called into Cibellis' office, further diminishes Justin's credibility about his version of events on February 11. (GC Exh. 1-A.)

In summary, it is beyond belief that had Justin asked for a representative on the steps or in the stairwell before the interview, he would have failed to mention this crucial, unique detail to Raymond, Smith or the Board investigator. Therefore, I find that at some time after the February 11 interview and after his meeting with Smith, Justin fabricated his story about requesting a union representative on the staircase. Since he did not do so before or during his February 11 interview, I must conclude that he never requested union representation.

The General Counsel asks that I discredit Cibellis' testimony because Respondent's counsel violated the sequestration order by reviewing Justin's Board affidavit with Cibellis outside of the hearing room. (Tr. 35–36.) Respondent's counsel did in fact agree to exclude Cibellis, its company representative, from the hearing room pursuant to the order. I find, however, that Cibellis' testimony in this case was not tainted by this action. As determined, it was Justin's own testimony, along with other inconsistencies in the record, which caused me to disbelieve his claim. Further, Cibellis probably would have been permitted to remain throughout the entire trial as a party representative. *Greyhound Lines*, 319 NLRB 554 (1995). Therefore, no material harm was caused.

Next, I discount the General Counsel's contention that Cibellis' credibility as a witness should be vitiated by his testimony that Justin's charge was never discussed during the termination grievance meeting. After reading an excerpt from Respondent's position statement, Cibellis admitted that the Board charge was briefly discussed at that meeting. However, this particular inconsistency in Cibellis' testimony does not alter the outcome of this case, nor does my finding that Cibellis did not summon Justin on the morning of February 11.

B. Respondent Did Not Violate the Act by Denying Justin Union Representation

Applicable in this case is the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), which holds that an employer violates Section 8(a) (1) of the Act when it denies an employee's request for union representation at an investigatory interview that he or she reasonably believes may result in his or her discipline. See also *Kohl's Food Co.*, 249 NLRB 75 (1980); *Lennox Industries*, *Inc.,* 244 NLRB 607 (1979); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). In determining whether an employee's belief is reasonable, the Court set forth an objective standard, considering all of the surrounding circumstances. *Weingarten* at 257. Once an employee requests that a union representative be present during an investigatory interview, the employer may grant the request, discontinue the interview or offer the employee the choice to either continue the interview without a representative or not having the interview at all. *Weingarten* at 258–259; *YRC Inc.*, 360 NLRB 744, 745 (2014); *Consolidated Freightways Corp*., 264 NLRB 541, 542 (1982); *General Motors Co*., 251 NLRB 850, 857 (1980), enfd. in relevant part 674 F.2d 576 (6th Cir. 1982); *USPS,* 241 NLRB 141 (1979).

In the instant case, the General Counsel avers that Justin requested union representation prior to entering his second investigatory interview, while Respondent avers that he did not. There is no dispute that Justin was aware of the right to do so. There is also no dispute that Cibellis conducted two investigative interviews with Justin, in order to determine his culpability in an altercation with coworkers on February 4. Since Justin did not ask for a union representative at any time prior to or during the February 11 investigatory interview, there was no duty for Cibellis to have discontinued the interview or to have initiated a request for a shop steward to represent Justin. Consequently, I find that Justin never asserted his *Weingarten* rights, and that Respondent did not violate the Act in this regard. Therefore, this allegation is dismissed.

C. Respondent Violated Section 8(a)(1) of the Act When Cibellis told Justin Not to Have Any Conversations With Anyone Regarding the February 4, 2016 Incident

1. Motion to amend granted

During the trial, the General Counsel requested that the complaint in this case be amended to add an allegation that Respondent violated Section 8(a)(1) of the Act when in the first interview with Justin, Cibellis told him not to talk to anyone else about the February 4 incident. Respondent primarily argued that the amendment was untimely. Section 102.17 of the Board's Rules and Regulations authorize an administrative law judge to grant motions to amend complaints. The judge may do so "upon [terms that] may seem just" during or after the hearing. See also *Folsom Ready Mix, Inc.*, 338 NLRB 1172, at fn. 1 (2003). This provision allows the judge "wide discretion" to grant or deny a motion to amend; however, in exercising that discretion, the judge should consider: "1) whether there was surprise or lack of notice, 2) whether there was a valid excuse for the delay in moving to amend, and 3) whether the matter was fully litigated." *Rogan Bros. Sanitation, Inc.*, 362 NLRB

No. 61, slip op. at 3 fn. 8 (2015), enfd. 651 Fed Appx. 34 (2d Cir. 2016); *Stagehands Referral Service*, 347 NLRB 1167, 1171 (2006).

Here, the General Counsel moved to amend the complaint immediately after Cibellis admitted under oath that he told Justin not to have any conversations "pertaining to" the February 4 incident. (Tr. 111.) The General Counsel explained that the reasons for the delay in moving to amend included "newly discovered evidence provided in response to a trial subpoena deuces tecum" received only a couple of days before trial, along with Cibellis' admission on the stand. (GC. Br.) I concluded that the motion to amend met the standards set forth in *Rogan Bros. Sanitation, Inc.* and *Stagehands Referral Services*, above. There was no surprise or lack of notice regarding the new evidence since it was contained in the information furnished by Respondent, and the General Counsel's reasons for delay were valid. Further, given an opportunity to fully litigate and provide additional evidence, Respondent's counsel chose not to do so. Respondent argued in its brief that the General Counsel failed to question Justin about this statement. However, I find there was no need to do so in light of Cibellis' admission.

I also found that the allegation regarding Cibellis' instruction to Justin is sufficiently related to the timely *Weingarten* allegation to allow it to be added to the complaint. The decision in *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988), provides that a complaint may be amended to allege conduct outside the 10(b) period if the conduct occurred within 6 months of a timely filed charge, and is "closely related" to the allegations of the charge. Also see *Fry's Food Stores*, 361 NLRB 1216, 1217 (2014), citing *Redd-I, Inc*., above. In evaluating whether the timely and alleged untimely allegations are "closely related," the Board: (1) considers whether the allegations involve the same legal theory; (2) considers whether the allegations arise from the same factual circumstances or sequence of events; and 3) "may look" at whether the respondent would raise the same or similar defenses to both allegations. *Nickels Bakery of Indiana*, 296 NLRB 927–928 (1989); *Earthgrains Co.*, 351 NLRB 733, 734 (2007).

In *Earthgrains Co.*, above at 736–737, the Board permitted an amendment alleging that the respondent "coerced employees to sign false statements to impede a Board investigation" and ultimately support a motion to dismiss the timely claims alleging instances of interference with Section 7 rights. In doing so, the Board determined that the two allegations arose out of the same facts or sequence of events, "in that the alleged coerced statement concerned the very conduct that gave rise to the timely 8(a) (1) allegations that the Respondent attempted to have dismissed by using the statement." Id. "[E]ven assuming that the Respondent would raise dissimilar defenses to the timely allegations . . . and the untimely amendment . . . ," the Board concluded that the facts sufficiently satisfied the *Redd-I* "closely related" test. Id. at fn. 18, citing *The Carney Hospital*, 350 NLRB 627 fn. 8 (2007) (the third prong of the *Redd-I* test is not mandatory).

Here, I find that the timely and untimely alleged prohibited conduct arose out of the investigation of the same underlying incident. First, the timely and untimely allegations involve the same legal theory. Both involve alleged interference with, restraint of and coercion of an employee's Section 7 rights in violation of Section 8(a) (1) of the Act. The Supreme Court in *Weingarten* recognized that an employee has an "individual right [under Section 7 of the Act] to engage in concerted activity by seeking the assistance of his statutory representative." It also found that it is a "serious violation" of that right when an employee seeks such assistance and is denied. *Weingarten*, 420 U.S. 251 at 256–257. Similarly, Section 7 of the Act permits discussions about pending disciplinary investigations since they are "vital to employees' ability to aid one another in addressing employment terms and conditions with their employer." *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 2. An employer violates that right under Section 7 and 8(a) (1) of the Act when it prohibits such discussions without showing that "its need for confidentiality with respect to that specific investigation outweighs employees' Section 7 rights." *Boeing Co.*, 362 NLRB No. 195, slip op. at 1. Here, the General Counsel had to show that Justin requested, but was denied a union representative during the second of two investigative meetings. Concerning the otherwise untimely allegation, the General Counsel had to show that Justin instructed him not to discuss the incident under investigation, which I find would reasonably be construed to include subsequent interviews. Both of them "portend" Cibellis' alleged unlawful conduct (retraining Cibellis' Section 7 rights) during the same investigative process of the same verbal altercation on February 4. See *Davis Elect. Constructors, Inc.*, 291 NLRB 115, 116–117 (1988) (the allegations involved similar conduct during the same time period with a similar object as required under the *Redd-I* test).

As stated, the allegations arose from the same factual circumstances and sequence of events. Next, Respondent chose not to offer evidence in defense of the second allegation, but did argue in its brief that certain Board law is inapplicable because Costco did not have any formal rule prohibiting "employees" from discussing investigations. That particular defense will be addressed below. Since there is no requirement that defenses to the timely and untimely allegations be the same or similar, the amendment here is valid. *The Carney Hospital*, above at 627 fn. 8.[13]

2. Cibellis' instruction violated the Act

It remains undisputed that Cibellis told Justin not to discuss the February 4 altercation with anyone else. Therefore, I find that Cibellis' prohibition interfered with Justin's Section 7 rights in violation of Section 8(a)(1) of the Act.

As previously stated, an employer violates that right under Section 7 and 8(a) (1) of the Act when it prohibits such discussions without showing that "its need for confidentiality with respect to that specific investigation outweighs employees' Section 7 rights." *Boeing Co.*, above at 1. Here, Respondent did not offer any evidence to support a claim of confidentiality, or as the Board requires in such instances, evidence that witnesses needed protection, evidence might be destroyed, testi-

[13] I also rejected Respondent's argument that the amended claim should be dismissed because Region 5 failed to discover Cibellis' instruction to Justin during its investigation of the charge in this case.

mony was in "danger of being fabricated" and "there was a need to prevent a cover up." *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011).[14]

Respondent argues in its brief that the facts in this case are inapposite to those in *Banner Health System*. Respondent further argues that the Board's ruling that the employer violated the Act by maintaining and applying an unlawful policy of requesting "employees" not to discuss ongoing investigations, is inapplicable here because Respondent had no written or formal policy that it communicated to its employees. Rather, only one employee, Justin, received an oral instruction not to discuss his altercation with anyone. I disagree with and reject Respondent's interpretation. Board law does not require that a rule or policy be set forth in writing or presented in some manner to multiple employees for it to be unlawful. See *In Re Lucky Cab Co.*, 360 NLRB 271, 272 (2014) (Board found the employer's human resource manager violated the Act by "orally promulgating and enforcing" an unlawful rule prohibiting an employee from discussing her discharge with others).

CONCLUSIONS OF LAW

The Respondent has not violated Section 8(a)(1) of the Act by failing to grant Justin's request for a union representative to accompany him in the February 11 investigatory interview. Therefore, this allegation is dismissed.

By instructing employee Justin Daniels not to discuss the February 4 incident and investigatory interview with anyone else, Respondent violated Section 8(a)(1) of the Act.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Costco Wholesale Corporation, Glen Allen, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to discuss disciplinary investigations or other terms and conditions of employment with others.

(b) 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 after service by the Region, post at its Glen Allen, Virginia facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 5, 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 any time since February 8, 2016.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 5 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. February 24, 2017

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 instruct employees to not discuss disciplinary investigations or other terms and conditions of employment with others.

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.

COSTCO WHOLESALE CORP.

The Administrative Law Judge's decision can be found at

[14] Cibellis' explicit instruction would reasonably tend to chill employees in the exercise of their Section 7 rights, in violation of the Act. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

[15] 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.

[16] 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."

www.nlrb.gov/case/05–CA–169958 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.