**Citizens Investment Services Corporation *and* Christopher Hayward.** Case 6–CA–33153

June 30, 2004

## DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On December 23, 2003, Administrative Law Judge Paul Buxbaum 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.

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[2] 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, Citizens Investment Services Corporation, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Barton Meyers, Esq.*, for the General Counsel.
*James P. Hollihan, Esq.*, of Pittsburgh, Pennsylvania, for the Respondent.
*Daniel W. Cooper, Esq.*, of Carnegie, Pennsylvania, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on September 11 and 12, 2003. The charge was filed December 31, 2002, and the complaint was issued May 29, 2003.

The complaint alleges that the Company discharged its employee, Christopher Hayward, because he engaged in protected concerted activity and in order to discourage its other employees from engaging in such activity. The Company's conduct is asserted to be in violation of Section 8(a)(1) of the Act. The Company filed an answer to the complaint, denying the material allegations of the complaint and contending that its actions relating to Hayward were based on legitimate business considerations.

As described in detail in the decision that follows, I determine that Hayward engaged in protected concerted activities and that the Company was aware of his participation in such activities. I also conclude that the General Counsel has carried its burden of proving that Hayward's participation in those activities was a substantial motivating factor in the decision to discharge him from employment. Finally, I find that the Company has failed to meet its burden of demonstrating that it would have discharged Hayward regardless of his participation in protected concerted activities.

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

### FINDINGS OF FACT

#### I. JURISDICTION

The Company, a corporation, has been engaged in providing financial services and making retail sales of financial investment products at its offices throughout Pennsylvania, where it annually derived gross revenues in excess of $1 million from its operations within the Commonwealth of Pennsylvania and purchased and received at its Pennsylvania offices products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The Company admits[2] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### *A. The Facts*

The events in controversy arise from difficulties associated with a change in ownership and management of a financial services company. The financial services operation in question was a component of the Mellon Bank known as Dreyfus Investment Services Corporation. Its mission was to provide in-

[1] The Respondent 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 Drywall 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.

[2] In reaching this result, Chairman Battista and Member Meisburg disavow the judge's apparent reliance on Hayward's *subjective* belief that he was acting on behalf of the financial consultants as evidence that Hayward was, in fact, engaged in protected concerted activity. In their view, only the *objective* evidence in the record establishing that Hayward's actions constituted concerted activity, including the fact that Hayward repeatedly raised the consultant's compensation issues during monthly meetings conducted by management, may be considered.

[1] There are several errors in the transcript. At p. 156, I.5, the witness actually stated that the branch manager wished the customer to "buy" things. At p. 197, I.8, the witness indicated that he could speak with a colleague without being "uncomfortable." At pp. 223–224, the witness testified that managers told employees that they were "tired" of hearing about complaints. At p. 519, I.8, I advised counsel that it "would" be necessary to brief the remedial issue raised by counsel for the General Counsel. At p. 524, I.7, I asked counsel for the General Counsel if he was relying on the doctrine set forth in "*Shattuck Denn*." (I was referring to *Shattuck Denn Mining Corp*., 362 F.2d 466, 470 (9th Cir. 1966).) The remaining errors of transcription are not significant or material.

[2] See amendment to Respondent's answer filed September 9, 2003. (GC Exh. 1(f).)

vestment services to customers of Mellon's retail banking business. A group of employees known as financial consultants were key participants in this enterprise. Typically, Mellon Bank officials would refer prospective customers to these financial consultants who would meet with the clients and assist them in making appropriate investments. The consultants were paid commissions on their investment sales.

On July 1, 2001, Citizens Bank, a large New England banking concern, announced that it was acquiring both the existing retail banking business and the associated investment services operation from Mellon. The new investment services company would be known as Citizens Investment Services Corporation (CISC).[3] The formal date of this transaction was December 1, 2001. As one of the Company's officials put it, this was "the actual legal Day 1" for the new concern. (Tr. 257.)

As early as September 2001, management of Citizens realized that the transition of the investment component to their full control would be complicated. Given the need for various legal and administrative formalities, the full conversion of the investment operation to CISC could not be completed by December 1. Therefore, although the employees of Dreyfus were acquired by CISC on that target date, the actual investment portfolios and associated files and records remained within the control of Dreyfus during a protracted transition period. As will be seen, this led to a variety of problems that form a significant portion of the context of the events under consideration.

Naturally, the financial consultants were very concerned about their employment prospects after the acquisition of their employer. Among them was the Charging Party in this case, Christopher Hayward. Hayward had been employed as a financial consultant for Dreyfus for approximately 6 years.[4]

Both Mellon and Citizens expressed interest in hiring the consultants. In August, an official of Mellon, Russell Hanscom, met with the consultants, including Hayward, and presented an outline of a possible employment opportunity for them. While the consultants were interested in Mellon's thoughts, the general impression was that the plan to employ the consultants in a new role at Mellon was disturbingly vague regarding such issues as their compensation.

Shortly thereafter, on September 10, 2001, Barry Toothaker, the president of CISC, held a similar meeting with a number of the financial consultants. The meeting was held in Philadelphia. Among the consultants who attended was Edward Chess, Jr. Chess testified that one of the crucial subjects discussed at the meeting was the question of whether so-called "trail payments" would be available to the consultants. Trail payments are commissions paid to consultants for ongoing management of investments that were originally purchased in previous years. It is apparent that the scope and size of such trail payments would greatly affect the income received by experienced financial consultants. Chess reported that Toothaker indicated that such payments would be paid to CISC's financial consultants. Even better, he stated that the size of the payments would be based on the consultant's position on the compensation grid. This grid consisted of a chart that awarded a larger commission on sales to higher producing employees. In other words, the more a consultant sold overall, the higher his or her commission was on each individual sale. Chess opined that the prospect of receiving trail commissions in amounts determined by application of the compensation grid was a highly satisfactory method of compensation for experienced financial consultants.

After the meeting with Toothaker, Chess held a telephone conference with his colleagues and reported the details of CISC's proposal. Had events in our country proceeded normally, Chess would have flown back to Pittsburgh on the following day, September 11, 2001. Because of the intervention of evildoers, this became impossible. As a result, two of Chess' colleagues, Hayward and Jeffrey Russo, drove to Philadelphia to pick him up. On the ride back to Pittsburgh, the men discussed the merits of the competing job offers and decided that it would be preferable to select employment at CISC. Hayward testified that among the factors that influenced this decision were a "very satisfactory" compensation grid and the plan to pay a "full trail through the grid." (Tr. 124–125.) The upshot was that the financial consultants were "extremely hopeful and happy" about CISC's employment proposals. (Tr. 125.)

The first written information regarding the terms and conditions of employment for CISC's financial consultants was distributed during a sales meeting on October 8, 2001. This was entitled "FY 2002 Incentive Plan for Financial Consultants." It was clearly labeled as a draft.[5] (GC Exh. 2.) Both Chess and Hayward testified that it reflected a lower percentage for trail payments than had been proposed during the September meeting with Toothaker.[6] Chess was also concerned that this written proposal failed to include another source of compensation, payment to the consultants of a portion of the commissions earned by certain lower-level employees known as financial relationship managers.

Due to his anxiety regarding these aspects of the proposed compensation, Chess initiated a series of e-mails to his superior, John Halechko, a senior vice president and director of investment sales for CISC.[7] In the first e-mail, dated October 22, Chess complained that the pay plan contained in the draft was "changed so significantly" from the plan outlined by Toothaker in Philadelphia. (GC Exh. 3 p. 8.) In particular, Chess raised the question of whether trail payments would be made through the compensation grid. Halechko sent an immediate response, telling Chess that, "[t]rail is paid through the grid." (GC Exh. 3 p. 8.) Several hours later, Halechko retracted this assertion about the draft plan, observing that he had not been correct about the status of the trail payments. He now

[3] Counsel for the Company described CISC as a "subsidiary" of Citizens Bank. (R. Br. at p. 2.)

[4] At one point, he had a break in service, having obtained employment with another company. Subsequently, he returned to Dreyfus and resumed his duties as a financial consultant.

[5] The parties stipulated that the handwritten annotations on the copy of this document received into evidence are later additions that are not to be considered part of the record.

[6] More accurately, it reflects a reduction for experienced financial consultants and an increase for newer employees whose position on the compensation grid was lower. As both Chess and Hayward were experienced and highly productive consultants, it is logical that they perceived the change as negative.

[7] The initial e-mail was also addressed to Hanscom.

noted that, "[t]he trails are not paid through the base grid." [Boldface in the original.] (GC Exh. 3 p. 7.) Chess responded by thanking Halechko for the clarification and expressing the hope "that my 2 cents helps to design the best plan we can have." (GC Exh. 3 p. 7.) Halechko then replied, observing, "I don't mind your 2 cents. If you don't ask you don't get. As long as you[r] position makes sense and the wording of your e-mail doesn't *piss me off* I'm open to any of your suggestions." [Italics in the original.] (GC Exh. 3 p. 7.)

Just 1 minute later, Halechko's language provoked a response from Chess. In an obvious expression of fear and concern, he told Halechko that, "I hope I didn't piss you off . . . that was not the intention. If I did, I apologize." (GC 3 p. 6.) Halechko then attempted to reassure Chess, telling him that he was not angry and that, "[i]t was a joke." (GC Exh. 3 p. 6.)

Chess testified that during this period he felt great pressure to obtain definitive commitments regarding compensation. This pressure arose from the need to enroll in the benefit programs offered by Citizens. For example, he noted that he needed to learn more precise information regarding his expected annual earnings so that he could determine the amount of disability insurance required to protect him. As a result, on October 25, he e-mailed Hanscom, explaining the nature of what he characterized as this "urgent" problem. (GC Exh. 3 p. 4.) Hanscom sent a terse response, indicating that the issue of calculation of the benefit base "was covered in the round table with Barry [Toothaker], you were there." (GC Exh. 3 p. 4.) Chess responded by observing that he was 'trying very hard not to lose my mind with this." He contended that he was being given differing answers that were leaving him "angry and befuddled." (GC Exh. 3 p. 4.)

Several days later, Chess resumed his e-mail discussion with Halechko, explaining that although his enquiries regarding compensation issues "make me look like a complainer . . . they are important issues." He also provided information as to the attitude of his colleagues, asserting "I can honestly tell you that no one is happy right now with some of the decisions that have been made." (GC Exh. 3 p. 2.) Halechko responded in a reassuring manner, telling Chess that he did not think, "you are a complainer." He noted that "[t]he points you address are valid and important to many of your peers," including another group of employees in Philadelphia who raised the same questions. His response included an attempt to provide more information regarding the benefits base issue and, in boldface, he solicited more information from Chess by asking him to *"[p]lease elaborate on what other decisions being made are becoming dissatisfiers for the group."* (GC Exh. 3 p. 2.)

Taking advantage of the opportunity offered by Halechko, Chess responded by listing what he termed the "major" issues for the group. He reported that "trail was the 1st issue," specifically whether it would be paid through the compensation grid. He next raised the issue of payments to consultants based on sales made by financial relationship managers.[8] He characterized the Company's description regarding this issue as "Clintonesque." (GC Exh. 3 p. 1.) Chess next returned to the issue of benefit calculations. Finally, he objected to the manner in which new financial consultants were being hired, asserting that the selection of in-house employees over highly qualified outside candidates "seems to de-value" the incumbent consultants. Overall, Chess contended that the experienced consultants saw "nothing to reward them for being, well veterans. For being loyal or being productive." (GC Exh. 3 p. 1.) Halechko responded by informing Chess that it was not financially possible to pay trail commissions through the grid. He briefly addressed the payment of commissions on sales made by the financial relationship managers and forcefully asserted that management intended to promote existing employees before turning to outside candidates, noting that "[a]ll of us were new at one time. This has no impact on any FC [financial consultant] and I'm not sure why it would be anyone's concern." (GC Exh. 3 p. 2.)

As has been noted, the principal step in the transition to ownership by Citizens occurred on December 1, 2002. Although the financial consultants continued to manage investment accounts that remained technically under the control of Dreyfus, they became employees of CISC. Under examination by counsel for the General Counsel, Halechko agreed that, except for the remaining issue of Dreyfus' control of the investment accounts, the financial consultants were "working fully for Citizens after the beginning of January 2002." (Tr. 300.) At that time, the consultants received a new supervisor, Regional Sales Manager David Hunter. Hunter maintained a practice of holding monthly meetings with the financial consultants who were under his supervision.

At the monthly meeting in January 2002, Hunter distributed a new compensation plan entitled, "Financial Advisor Incentive Plan Effective January 1, 2002." (GC Exh. 4.) This contained provisions governing the compensation-related issues that had already provoked concern and controversy. Both Chess and Hayward testified that this revised plan was unsatisfactory. It contained a "much reduced" trail payment and favored lower producers over higher producers. (Tr. 55.)

As the year progressed, the experienced financial consultants began to have complaints not only about the structure of their compensation plan, but also regarding the actual amounts they were receiving under that plan. As Hayward put it, "my pay was substantially short almost every month that we got commission checks. They were late several different times and my lowest range of shortness of my pay was I remember being [$]4,000 and then the most was [$]10,000." (Tr. 128.) Halechko testified that Hayward was the first employee to bring this problem to his attention, informing him that "I don't think they're paying us right." (Tr. 267.) As Halechko put it, "Chris [Hayward] identified the problem, he figured out that there was something wrong, now we had to look into it." (Tr. 268.) In his testimony, Halechko contended that he was "happy" that Hayward had raised the problem since it was clearly a serious matter that required management investigation. (Tr. 268.) Nevertheless, it is noteworthy that Halechko also testified that it was at approximately this time that he had his first conversation with Hunter regarding problems with Hayward.

The Company's officials testified that the serious compensation problems just referenced were caused by the difficulties in

[8] His e-mail refers to the financial relationship managers by the acronym of BSS. This is an abbreviation for another title used to describe this class of employees.

obtaining accurate account information from Dreyfus. As Halechko put it, "we had to rely on the information given to us by Dreyfus and that's how we paid all of our employees." (Tr. 258.) It had been hoped that the full transfer of the accounts would be accomplished as of February 15. Unfortunately, this did not occur and the target transfer date had to be postponed to March 15 and, again, to April 15. Halechko noted that one of the reasons for the delay in implementation stemmed from the fact that the personnel who handled the Pittsburgh accounts for Dreyfus were going to lose their jobs once the transfer to Citizens was accomplished. As a result, it was in their pecuniary interest to slow down the transfer operation.

During this awkward transition period, specifically in April 2002, Halechko testified that he first began to consider discharging Hayward. He indicated that this was based upon reports from Hunter that Hayward "didn't want to change his behavior, to change with our new strategy" resulting from the transfer of ownership to Citizens. (Tr. 282.) In addition, Halechko testified that at this time Hunter told him about "a situation . . . And I'm not sure if it was Chris [Hayward] going into somebody's territory, or I'm not clear of the exact issue at the time." (Tr. 283.) This vague reference to a "situation" refers to a sales transaction that figures prominently in the Company's defense to the unfair labor practice charge.

By way of background, it must be noted that the Company's financial consultants operated out of specified territories. Each consultant was responsible for handling client referrals from particular branches of the retail bank. Generally speaking, it was improper for a consultant to solicit investment clients from the territory assigned to another consultant. One of the newer financial consultants, Gail Saunders, was responsible for the territory that included the Oakland Branch of the bank. The branch manager at Oakland was Valerie Stevens. In turn, Regional Manager Jeanine Fallon supervised Stevens.

The Oakland Branch referred an elderly woman of considerable means to Saunders as a potential investment customer. Saunders and Stevens met with this lady and began the process of selling her a fixed annuity. While preparing the documents for the sale, Saunders discovered that the lady's age precluded her from eligibility for the annuity. As a result, the meeting terminated without any sale to the potential customer. Significantly, Halechko testified that Saunders was unable to propose alternative investment options for this client because she lacked the licensure required to offer such products. The evidence indicates that this unsatisfactory outcome left Stevens "very upset." (Tr. 149.) Stevens conveyed her unhappiness to her superior, Fallon, and requested that Hayward be brought into to assist with the customer.

Fallon was familiar with Hayward's skills and experience since she had served as his supervisor in the past. She telephoned Hayward and requested his assistance.[9] Hayward testified that he told Fallon "that you have to contact David Hunter. You have to talk to him about the case. If he says it's okay, then I'll come in and do that." (Tr. 150.) Hayward further testified that he received another call from Fallon who advised him "that she had talked to Dave [Hunter]. It was okay." She also told Hayward that she had discussed another referral with Hunter as well.[10] (Tr. 150.) Hayward also testified that he had a brief discussion with Hunter about Fallon's request for his services. He indicated that Hunter authorized the transaction, saying that it was "no big deal.[11]" (Tr. 196.)

Based on his assurances from Fallon, Hayward proceeded to schedule a meeting with the elderly woman. He was favorably impressed with her acuity, but did not make any sale at that time. She indicated that she intended to seek outside advice regarding Hayward's proposed investment. At a second meeting on April 4, 2002, the client informed Hayward that her independent advisors had agreed with his recommendations. At that time, she invested in a Pennsylvania municipal bond mutual fund. Hayward received his customary commission from this transaction.

Hunter testified that after Hayward completed the transaction with the elderly investor, he received a telephone call from Saunders, "who was very upset." (Tr. 370.) She told Hunter that she had previously met with the investor and had determined that "she did not have a product that she felt was suitable for that customer." (Tr. 371.) She complained that Hayward had not spoken to her before meeting with the customer himself. As a result, Hunter scheduled a meeting with Hayward to discuss the incident. Hunter testified that Hayward told him "he thought that the regional manager [Fallon] had called me.[12]" (Tr. 371.) Hunter further testified that he told Hayward that he should have spoken to him directly before taking action.[13]

[9] Hayward reported that this type of request for his services had been "very common" throughout his career. (Tr. 150.)

[10] I credit Hayward's testimony regarding this key conversation with Fallon. While some of the significant aspects of events in the Oakland Branch are in dispute, I find it noteworthy that the Company did not present Fallon or Stevens as witnesses. As management officials at Citizens, their availability to testify was certainly within the Company's control. Citing language from a treatise, the Board has observed that it is appropriate to draw an adverse inference from a party's failure to present evidence "within the control of the party whose interest it would naturally be to produce it." *Martin Luther King Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1997). More recently, the Board applied this inference against a company that failed to present the testimony of the only management participant in a crucial meeting. *Daikichi Corp.*, 335 NLRB 622 at fn. 4 (2001). In resolving conflicts involving the incidents at the Oakland Branch, I find it appropriate to draw this type of adverse inference from the Company's failure to present the testimony of either Regional Manager Fallon or Branch Manager Stevens.

[11] I recognize that Hunter denies having had any prior consultations about the transaction with either Fallon or Hayward. I do not credit this blanket denial. As to a talk with Fallon, the Company failed to call her to corroborate Hunter on this point. With regard to Hayward, I note that Hunter has strong grounds to exhibit animus against him. The evidence showed that Hunter's perceived failure to adequately manage the experienced financial consultants resulted in his removal as Regional Sales Manager. Furthermore, Fallon's request to have Hayward meet with this client in circumstances where a less experienced consultant had been unable to offer the client an appropriate investment vehicle strikes me as, in fact, "no big deal." I am not surprised that Hunter would use this language in discussing it with Hayward.

[12] Hunter's testimony as to this point is corroboration of Hayward's testimony that Fallon told him she had spoken to Hunter.

[13] I do not credit this testimony, having already found that Hayward has credibly testified that he did have a brief conversation with Hunter

Hunter reports that he advised Hayward to handle any such future situations by calling the financial consultant involved and seeking consent. He also noted that, "[i]f the two FCs [financial consultants] could work it out themselves, it was not necessary to call me." (Tr. 372.) Hunter then telephoned Fallon. He reports that she "apologized to me and assured me that it would not happen again.[14]"

Hunter testified that no formal disciplinary action was taken against Hayward or any bank employee arising from this episode. He did speak about it to Halechko, "not with the degree of urgency, but I did in my almost daily conversations mention that this had happened and that I had dealt with it." (Tr. 376–377.) Halechko's testimony confirmed the relative lack of importance placed on this event by the two managers. He noted that Hunter told him about "a situation . . . And I'm not sure of it was Chris going into somebody's territory, or I'm not clear of the exact issue at the time." (Tr. 282–283.)

Barbara Blyth, a human resources group manager for Citizens Bank, provided further insight into Halechko's thought processes regarding Hayward at this juncture. Blyth testified that on April 10 she met with her new boss, June Barry. The first item Barry raised was a phone conversation she had with Halechko. She reported that Halechko had told Barry that Hayward "was not buying into the change within the organization, he was not displaying good teamwork, and that he felt that, that he could not have this, it was affecting the morale of the group, and he would like to terminate Chris' employment." (Tr. 478.)

One week later, Hayward reduced his complaints regarding compensation to writing. On April 17, he addressed an e-mail to Halechko reporting that his trail payments have been either missing or incorrect. Ignoring rules of capitalization in a writing style characteristic of some computer users, he observes that, "im not bitching. im just saying that the general consensus around here is that some things tend to just get swept under the rug . . . people are starting to get upset, i just wanted to let you know." (GC Exh. 7 p. 1.) Halechko responded briefly, telling Hayward he did not want things swept under the rug.

Shortly thereafter, Hayward became involved in another episode involving the Oakland Branch of the Bank. The incident arose when Saunders, in association with a bank employee, was making telephone calls to a list of prospective customers. When they reached a particular name, the bank employee suggested to Saunders, who is African-American,[15] that she may wish to skip that call since the customer was unwilling to meet with minorities and had even used the "N word." (Tr. 374.) Saunders decided to call him anyway. During their conversation, he refused to meet with her but agreed that she could call him in the future.

Hayward testified that he received a call from Branch Manager Stevens, requesting that he handle this customer. Stevens, who is also African-American, told him about this customer's racist views and asserted that, "I don't care what this guy says, you know, I want him to buy things and I want him to buy them from us." She added "I don't care what his problem is. Let's just take care of him." (Tr. 156.) Hayward did not speak to Saunders before contacting this potential investment customer. He testified that he made this decision because, "I just didn't think that that was my place being that this was all being handled through my manager and managers of other, you know, areas of the bank." (Tr. 158–159.)

Although Hayward did not contact Saunders, he testified that he was aware that "this client was a client of another Financial Consultant" who had made investment sales to him. (Tr. 156.) Hayward called this consultant and sought her consent for him to meet with the investor. She authorized him to conduct the meeting, warning him that the customer was a jerk."[16] (Tr. 157.) Hayward proceeded to meet with the client and sold him a fixed annuity and a mutual bond fund. He received the normal commissions in due course.

Several days later, the bank employee who had informed Saunders of the client's racist views told her that "we called Chris [Hayward] and Chris got a sale" from this customer. (Tr. 374.) Saunders then telephoned Hunter, who noted that she was in tears and was threatening to report the matter to the human resources department. Hunter testified that Saunders also told him that, "[s]he felt that on some level race was a part of it, but not on Chris' part, but on the part of the regional manager, the bank regional manager [Fallon]." (Tr. 374.) In consequence,

who authorized him to proceed with the meeting, telling him that it was "no big deal." (Tr. 196.)

[14] Hunter's reference to an apology from Fallon is unclear. I cannot ascertain whether Hunter means that Fallon apologized for not calling him in advance (despite having assured Hayward that she had done so) or for involving Hayward in the situation at all. Under examination by counsel for the Charging Party, Hunter asserted that the apology was for violating company policy and placing Saunders in a bad light. When pressed, he conceded that the apology may "very well" have been for inaccurately telling Hayward that she had spoken to Hunter about the referral. (Tr. 398.) This is another point that may have been clarified had the Company chosen to present Fallon's testimony.

[15] It is with a sense of discomfort that I note the racial background of certain participants in these events. In a better world, it would be irrelevant. Unfortunately, given the nature of the events about to be described, the lawyers for the parties and I have reluctantly concluded that it is necessary information regarding the context of this incident.

[16] Hayward also contended that he spoke with Hunter regarding this proposed sale. Hunter denies this. In this instance, I find that Hayward is mistaken. His testimony on this point was marked by confusion and uncertainty. He stated that he "believe[d]" that he spoke with Hunter, but also noted that it was "hard to recall." (Tr. 196–202.) While I have already noted that I credit Hayward's testimony that Hunter told him it was "no big deal" to meet with the elderly lady whom Saunders had been unable to assist, I find it likely that the same would not apply to this situation. Hunter, who is also African-American, can hardly be expected to have blithely told Hayward to proceed with this transaction. At a minimum, I conclude that Hunter would have engaged in more discussion before authorizing such a distasteful meeting. While Hayward detailed Stevens' thought processes articulated while requesting him to proceed, he does not provide such details regarding Hunter's response to his purported discussion. In any event, this point is of limited importance since Hayward did comply with Hunter's instructions. It will be recalled that Hunter testified that, after the incident with the elderly woman, he told Hayward that there was no need to involve him if he could work it out these problems with the prior financial consultant involved with the customer. Hayward complied with these instructions.

Hunter called Fallon. Fallon told him that she had not made the referral to Hayward, reporting that "the branch manager [Stevens] had–had done this without regional's permission." (Tr. 374–375.) She also told Hunter that she had just learned of the incident herself. Stevens informed her because Saunders had become very upset upon learning about it. Hunter testified that he was worried that Saunders might "take some type of legal or discriminatory action based on this." (Tr. 375.) As a result, he informed Halechko. In turn, Halechko informed the human resources department and they arranged a conference call with the bank managers and Halechko in order to obtain the details. Despite this investigation, no discipline was imposed on Hayward, Stevens, or any other bank employee.

After many postponements and the threat of litigation, Dreyfus completed the transfer of the investment services accounts to CISC on May 13, 2002. Thereafter, CISC was no longer required to rely on information provided by Dreyfus in calculating commissions and trail payments owed to the financial consultants. Coincident with the completion of the lengthy transition period, CISC issued a document entitled "FY 2002 Commission Plan Financial Consultants—Mid-Atlantic." (GC Exh. 6.) This document set forth the method and procedures for calculation of the compensation of the financial consultants.

On the following day, Chess addressed another e-mail to Halechko and Hunter complaining that his trail payment for March 2002 was "grossly wrong." He asserted that his payment should have been $754.14, but he only received $218.52. (GC Exh. 5, p. 3.) Halechko responded by disagreeing with some, but not all, of Chess' assertions. He directed another official, Andrew Kim, to investigate. (GC Exh. 5 p. 3.) Hunter also wrote an e-mail urging Kim to correct the problem and noting that, "THIS IS A HIGH PRIORITY ISSUE in the Pittsburgh Market." [Capitalization in the original.] (GC Exh. 5 p. 3.) Kim responded by rejecting Chess' calculations and continuing to plead that CISC did not have access to the "Mellon systems." (GC Exh. 5 p. 2.) At this point, an exasperated Chess e-mailed Halechko, asserting that, "I realize this isn't your top priority, but I think paying your Reps correctly should be priority one. By the way, I've done all the work here, so please don't act so put out by me wanting what is due me." (GC Exh. 5 p. 1.)

Halechko responded to Chess by informing him that he was "losing my patience with your tone when addressing your issues to me. If your [sic] not satisfied with my answer you are welcome to e-mail my direct supervisor, Barry Toothaker." (GC Exh. 5, p. 1.) Chess replied that he was not being disrespectful and said that he did not wish to "be in your doghouse again and I'm wary of that issue so I would not try to piss you off. I respect you and your position. [W]ho else am I to turn to on matters like this?" (GC 5 p. 1.) At the same time, Chess forwarded Halechko's e-mail to Hayward and other financial consultants. (GC Exh. 7 p. 3.)

While Chess was making vigorous complaints about the errors in calculation of his compensation, Hayward was taking similar action. He e-mailed Halechko and Hunter, offering to "make a little wager" regarding whether Kim would fix his compensation payments. (GC Exh. 7 p. 4.) Halechko urged him to "think positive" and asked him if he had referred his problems to Toothaker. (GC Exh. 7 p. 4.) Hayward wrote that he was "still very positive" and had addressed Toothaker by e-mail. He also described circumstances that caused him to doubt Kim's work on the compensation problem. (GC Exh. 7 p. 4.)

Russo, one of the experienced financial consultants, testified that during this period in mid-May productivity of the consultants declined "dramatically" because "there was just so much disgruntled frustration about the paperwork and sales support and everything else not happening." (Tr. 225, 231.) At approximately this time, Hayward took the opportunity to speak with Halechko after a training session. He testified that he asked Halechko "is there anything I'm ever doing, saying, that is out of line or anything you do not like, anything you would want me to change?" (Tr. 140.) Halechko responded, "Chris, everything is fine . . . You raise good concerns for the right reasons." (Tr. 140.)

In this uneasy atmosphere, the Company held a quarterly dinner meeting at the Carnegie Science Center. A group of experienced financial consultants were seated together at a table. Hayward was one of this group. Hayward asked Human Resources Group Manager Blyth to join them. He testified that she responded by observing, "do you know how bad this looks in front of everybody here . . . sitting with the Senior Financial Consultant group . . . ."[17] (Tr. 143.) Hayward told Blyth that there were problems with commissions and other compensation issues for the consultants. As Blyth put it in her testimony, "the issue that they wanted to bring to my attention was compensation . . . In particular, they weren't being paid what they felt was properly, adequately." (Tr. 481.) Hayward asked Blyth if he could contact her again regarding these issues.[18] Blyth reported that, immediately thereafter, she "made a beeline" for Hunter and told him "you have some very unhappy FCs [financial consultants], you know, in how they're being paid." (Tr. 481.) Hunter told her that management was handling the problem. She decided to accept this explanation.

When asked for his response to learning that Hayward and other consultants had complained to Blyth during the dinner meeting, Hunter replied that he "would have preferred that they would have went to their own management" rather than raise the issue with human resources. (Tr. 378.) Despite this, he contended that he was not angry or annoyed.

After the formal events at the Carnegie Center concluded, a group of employees decided to have an informal gathering at a local restaurant. While walking through the parking lot, Hunter and Hayward conversed. Hunter told Hayward that he would

[17] Blyth testified that she did not recall making this comment, but if she had made such a remark, it would have been because it "looked like a meeting with HR." (Tr. 517.) Russo confirmed Hayward's account, testifying that Blyth told the consultants that "this doesn't look good, me talking to you guys." (Tr. 230.) Russo's corroborative account, coupled with Blyth's failure to rule out the possibility of her having make the comment, lead me to credit Hayward's account.

[18] Hayward testified that he made attempts to phone Blyth in order to pursue the matter. She did not return his calls. Blyth testified that she did have a telephone conversation with Hayward about his complaint that the consultants "weren't being paid correctly." (Tr. 483.) She was unable to remember whether this occurred before or after the Carnegie dinner meeting.

have to take his compensation issues to human resources.[19] In addition, Hayward raised the incident with the racist customer. He told Hunter he had sold the man a fixed annuity, jokingly adding a comment about "what better way to treat a jerk that to sell him a fixed annuity." (Tr. 157.) Hayward's reference was to be understood in the context that he had been vocal within the organization regarding the fact that he did not generally favor this type of investment vehicle. Hayward testified that Hunter found his remark to be very amusing.

Hunter testified that he had to make an early exit from the informal gathering of employees. On the following day, several of the newer financial consultants told him that it was unfortunate that he had departed early. They complained that Hayward had told them that, "you folks are going to have to kiss a lot of ass to get ahead." (Tr. 364.)

On May 28, Hayward addressed another e-mail to Halechko regarding compensation issues, including trail payments. (GC Exh. 7, p. 5.) At the end of the month, Halechko contacted Eric Hosie, a highly regarded regional sales manager in a territory adjacent to the Western Region. Halechko sought Hosie's assistance in turning around the dismal sales situation in Pittsburgh. In particular, after a successful first quarter of the year, the second quarter saw a precipitous drop in transactions. During that quarter, the financial consultants achieved only 60 percent of the sales goal. Halechko told Hosie "there was a lot of . . . finger-pointing. Well, the FCs don't do this. Well, the bank isn't giving me any leads. Well, we just can't get along . . ."[20] (Tr. 414.) As a result, it was arranged that in early June Hosie would replace Hunter as regional sales manager in Pittsburgh.

On taking over the supervision of the Pittsburgh region, Hosie conducted a series of meetings with the individual financial consultants. His purpose was "to uncover why we didn't produce at a higher level." (Tr. 416.) Two strong themes emerged from these meetings. The newer and less experienced financial consultants complained that their veteran colleagues and the bank managers with whom they were supposed to work did not value their skills and respect them. As a result, the bank managers looked for opportunities to steer investment prospects to the veteran consultants. By contrast, the veteran consultants took the opportunity afforded by these meetings to complain to Hosie about their compensation problems. It is now appropriate to describe several of these meetings, beginning with the meetings with the newer consultants.

Hosie testified that Saunders complained about the two Oakland incidents involving Hayward. She told him that the situation "was disrupting her ability to do business in that market and in that office, because if she was to, you know, go on vacation or be unavailable, someone else would just be called in, at that time." (Tr. 425.) In other words, bank management would refer investment customers to other financial consultants in the event of her unavailability. Hosie indicated that another new consultant, Loretta Bushy, told him that Hayward was rude to the newer employees during meetings.[21] A third new consultant, Arlene Gentile, complained that the veteran consultants looked down on the newer hires. She contended that this caused bank managers to believe that, "when she [Gentile] leaves or goes on vacation or something, we can slip her referrals to other people." (Tr. 427.) Yet a fourth member of the group of newer consultants, Mike Kennedy, indicated that 3 out of 4 of his relationships with the bank branches were satisfactory. He did describe problems with the "ownership" of individual accounts. (C.P. Exh. 1.) In other words, it was unclear which financial consultant should service some particular accounts, the consultant assigned to that territory or the consultant who had worked with that investor in the past.

When Hosie interviewed the experienced consultants, he heard a different set of complaints. For example, Charles White and Jesse Datra, among others, raised issues regarding their compensation. Hosie testified that during his meeting with Chess, he complained about Chess' lack of production during May. Chess told him that part of the reason for this poor showing was that he "just didn't have the drive to produce that particular month because a lot of these things were dissatisfying to me." In making these remarks, Chess was referring to "the compensation issues." (Tr. 77.) Chess testified that Hosie warned him that he should "watch my e-mails, tone them down a little bit, you never know who is (going to be reading them." (Tr. 81.) Finally, Hosie challenged Chess by telling him that, "[y]ou're either in the game or you're out of the game. Where are you?" (Tr. 81.) Hosie testified that he told Chess that he was "salvageable." (Tr. 461.)

Hosie's meeting with Russo was characterized by pointed comments. He told Russo that it seemed like he did not want "to be here." (Tr. 232.) Russo asked why Hosie held this notion, and Hosie told him that it was "based upon the commissions and based upon complaining about the commissions and the trails and everything else." (Tr. 232.) Hosie also raised similar complaints by others, specifically mentioning Hayward, whom he accused of "complaining a lot." (Tr. 234.) Hosie described his own purpose in managing the Pittsburgh operation as to either "fix or get rid of the problem." (Tr. 236.)

Of greatest importance to this case, Hosie held a lengthy meeting with Hayward. Hosie testified that Hayward made complaints about "compensation, . . . trail payments, clear communication on when it would be paid and how it would be paid, discrepancies over the trades that he placed, that were not on his adjustment log; time frame for the adjustment log people to get back to him; and all these things."[22] (Tr. 430.) Hayward also raised the same issue referenced by Kennedy, the ownership of investment accounts. Hosie responded by telling Hay-

[19] Hayward testified that he later reported this communication to his fellow financial consultants.

[20] Hosie testified that in describing the problems in Pittsburgh, Halechko did not mention either of the incidents involving Saunders and Hayward.

[21] Interestingly, during cross examination of Hosie, counsel for the General Counsel confirmed that Hosie's notes made during this meeting do not show that Bushy specifically named Hayward as a person who was causing difficulties for the newer consultants. Examination of the actual notes reveals that Hosie listed Bushy's comments as applying to all the veteran consultants, whom he referred to as "FC3's." (GC Exh. 10.)

[22] In this testimony, Hosie agreed that these were all "legitimate issues." (Tr. 430.)

ward that his concern about assignment of accounts to consultants made it sound like he was not a team player.

After discussion of Hayward's subjective assessment of the situation, Hosie raised the incidents involving Saunders. Hosie testified that, after Hayward explained the episode concerning the elderly lady, the thing that caught his attention was "the manner in which Chris said, see, I made the sale and she didn't, so this proves that they shouldn't have her as a financial consultant." (Tr. 433.) As to the transaction involving the racist customer, Hayward confirmed that he knew the reason that the customer was being referred to him. He also repeated the joking comment he had earlier made to Hunter, telling Hosie not be worry, "because I did the worst thing you can do and sold him a fixed annuity." (Tr. 434.) Hosie testified that he was troubled by this comment since it indicated that Hayward looked down on the consultants who sold fixed annuities. Hayward's attitude also suggested that he was not respectful of the company's products.

Hayward testified that they also discussed yet another situation involving the New Kensington Branch of the Bank. In that instance, the branch manager contacted Hayward to seek his assistance in making investments for the bank's own employees. Hayward met with the employees and sold them investment products. Hosie told him that he should have held a joint meeting with the consultant assigned to that branch of the bank.[23] Hayward responded by agreeing that it was "unfortunate" that the branch employees did not wish to use the services of the consultant assigned to that branch, but noted that this was not "my call." (Tr. 161.) He told Hosie that this situation did not involve a client referral by the bank, but only concerned employees' personal business.

Hayward testified that at this point in his discussion with Hosie, he became concerned. He asked Hosie "am I in trouble here?" (Tr. 163.) Hosie told him he was not sure yet and "we'll see next week." (Tr. 163.)

During and after the meeting with Hayward, Hosie took a series of notes. He reported that Hayward's "[e]xpectations [were] too high." He also concluded that Hayward had "[c]rossed from troubleshooter to maker—should help [junior financial consultants] not hurt them." In the same regard, he noted that Hayward's "views on new reps very poor and likely fueling Retail's discontent."[24] He concluded his notes by observing that Hayward appeared "willing to circumvent colleagues and tell me it is because he is better—teamwork." (R. Exh. 2.)

Also in early June, Hayward wrote an e-mail that is one of the defining events leading to his discharge less than a month later. This e-mail, dated June 6, 2002, was addressed to Hunter. He discussed aspects of his compensation issues and asserted that, if these were satisfactorily addressed, he would "go on a month long vow of silence. (no constructive criticism)." He ended this e-mail with a letter-style conclusion as follows:

> Your[s] Truly,
>
> Christopher s. Hayward
> Union President, West[25]

(GC Exh. 7 p. 6.) Of course, no labor organization or union actually represented the financial consultants. In his testimony, Hayward made two observations in explanation of this choice of language for the conclusion of his e-mail. He noted that being the union president was "my role for the group." He also reported that this choice of words was his way of "being funny." (Tr. 140.)

Hayward's attempt at barbed humor did not meet with Hunter's favor. Hunter testified that it represented part of a pattern of "snide remarks, the sarcasm" in Hayward's e-mails and comments during meetings. He added that, "I remember when I saw that, I was cringing." (Tr. 409.)

Two weeks later, Hosie and Halechko met. Since Hosie had completed his interviews with the Pittsburgh consultants, it was decided to arrange a conference call to address disciplinary issues uncovered by Hosie's investigation. Given the intent to impose substantial sanctions on certain employees, Company policies required the participation of human resources representatives. As Blyth put it, the purpose of their participation was "[t]o validate the reasons for termination." (Tr. 479.)

The conference call was held on June 25. Management participants included Halechko, Hosie, and Hunter. Blyth and another human resource employee were also on the call. Problems related to a number of Pittsburgh employees were the subject of discussion. Blyth testified that Halechko, Hosie, and Hunter all sought Hayward's discharge from employment. She reported that they had "a host of reasons." (Tr. 492.) She noted that their "[p]rimary reason" was Hayward's "unethical behavior" consisting of his "crossing into other individuals' territories." (Tr. 492–493.) This included an allegation not raised in any of the managers' trial testimony, a contention that Hayward went into the computer system and assigned certain accounts to himself.

Blyth further testified that the Oakland situation involving the racist customer was also discussed during the conference call. Blyth testified that the managers' "issue around the Gail Saunders thing" was that Hayward had openly boasted to his peers that "he did get that business" from the customer "[a]nd they felt very strongly that this was inappropriate." (Tr. 494.) Blyth testified that Hayward's e-mails and his complaints about compensation issues were not brought up during the conference call. Finally, Blyth noted that there was discussion about the use of "progressive corrective action" to address the problems with Hayward. (Tr. 495.) This course was rejected because Halechko, Hunter, and Hosie "felt very strongly" that Hayward's unethical behavior and its impact on the morale of the newer consultants could not be changed through such corrective action. (Tr. 497.)

Blyth testified that she took contemporaneous notes during the conference call. The notes pertaining to Hayward indicate

[23] In its defense against the unfair labor practice charge, the Company specifically cites the two incidents at the Oakland Branch as justification for Hayward's discharge. It does not cite the New Kensington incident, but presumably relies upon it as a component of the contention that Hayward was not a team player.

[24] In referring to "Retail," Hosie meant Citizens' retail banking operation.

[25] Haywood's use of the term "west" is a reference to CISC's Western Region encompassing western Pennsylvania.

that "[e]thics + behavior warrant termin[ation]." Three bullets are listed beneath this conclusion: "racist client, 'rep' list, denigrated peers."[26] (R. Exh. 3.)

Halechko also testified regarding the discussion of Hayward during this crucial conference call. He reported that the recommendation was for termination due to "performance management issues." (Tr. 295.) Hayward was not contributing to a teamwork environment and was not helping his peers. Halechko also cited the two incidents involving Saunders and Hayward's alleged failure to comply with oral instructions from Hunter. Halechko indicated that Hayward's compensation issues played no role in the termination decision and the managers were "happy" that he had raised these matters. (Tr. 298.)

Hosie also provided a brief description of the conference call and its decisionmaking process regarding Hayward, indicating that he concluded that Hayward should be terminated for making derogatory comments about Saunders and Kennedy. He noted that the management team discussed the possibility of attempting to use "corrective action." The "consensus" was that it was impossible to change Hayward's "attitude about his colleagues." (Tr. 449.) As a result, the decision was made to terminate his employment.

Finally, Hunter described this key conference. His account of the participants' reasoning differs somewhat from that of his colleagues. In accord with Halechko and Hosie, he reported that Hayward's problems with being a team player and adapting to the "new culture at CISC" were components of the decision to fire him. (Tr. 380.) Significantly, Hunter also cited another factor, Hayward's "complaining, the constant lack of deportment in doing—in complaining." (Tr. 380.) Upon further examination, Hunter indicated that his reference to Hayward's complaints included those related to compensation issues.[27] The managers concluded that "the behaviors would probably not change, and so there was a feeling, since those behaviors would not change, the best thing to do was to move forward with the termination." (Tr. 380.)

In addition to the decision-making process regarding Hayward, the management group discussed problems involving at least 10 other employees of the Pittsburgh region. Blyth's notes show that the group decided to utilize a "performance action plan" regarding Ron Freedlander and an "action plan" for Charles White. As to Chess, her notes show that he was to receive a "blunt conversation." The notes also mention the possibility of a plan for "final for c/a [corrective action]," as well as, the alternative of an offer of a severance package. It was also decided to offer Russo a severance package. Another employee was referred to the Employee Assistance Program. The remaining employees were listed, but their fates were not described in Blyth's notes. (R. Exh. 3.) In his testimony, Hosie confirmed that the group discussed "corrective action" for a number of other individuals. (Tr. 448.) It was agreed that the affected employees would be informed of these decisions in individual meetings on July 2.

As planned, Halechko, Hosie, and Blyth met with Hayward on July 2. Halechko informed him that he was being terminated. Hayward testified that he attempted to persuade the managers to retain him, but they were uninterested. He also testified that he told Blyth, "I've never been put on corrective action. There's—I've never been talked to about doing anything inappropriate. There has to be something here and she said, well, you wrote business outside of your territory and that's why we're firing you." (Tr. 167–168.) Hayward also asked Halechko and Hosie for an explanation of their decision to fire him. They told him that he "didn't fit in" and wasn't a "team player." (Tr. 189.) Hayward indicated that he might have responded by remarking on the oddity of emphasizing the need for a team player "in an individual sales game." (Tr. 189.) In his testimony, Hayward confirmed that neither Halechko nor Hosie related his termination to any of his complaints about compensation issues.[28]

After his termination on July 2, 2002, the Company has not employed Hayward. On December 31, 2002, he filed this charge, alleging that his termination was the result of his involvement in protected concerted activity. (GC Exh. 1(a).)

### *B. Legal Analysis*

Assessment of the propriety of the Company's decision to discharge Hayward requires the application of core principles of labor law in a work setting dramatically different from the industrial context in which those principles were largely developed.[29] Instead of a universe of factories and foundries, the events in controversy occurred in office suites and branch banks. While the outer trappings vary greatly, the legal framework remains constant.

Section 7 of the National Labor Relations Act provides, inter alia, that "[e]mployees shall have the right . . . to engage in . . . concerted activities . . . for the purpose of . . . mutual aid or protection." Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain or coerce employees" in the exercise of this right. In a leading case, the Supreme Court addressed the contours of this right as it relates to employees who are not represented by a labor organization. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), involved employees of an aluminum fabrication shop who were not members of a union. During a period of bitterly cold weather, the shop building was unheated. After making individual complaints about the tem-

[26] Parenthetical references are made to Gail Saunders and Mike Kennedy.

[27] Shortly thereafter, Hunter asserted that Hayward's complaints about compensation issues played no role in the decision to fire him. This is totally inconsistent with his earlier description of the managers' reasoning in reaching the decision to fire Hayward. I do not credit this attempt to backtrack.

[28] At his own individual meeting on this date, Chess was told that if he continued to engage in "constant criticisms," he would be "out the door." (Tr. 83.) Chess resigned in March 2003. By the same token, Russo was told that it appeared that he did not want to remain with CISC. He was informed of the possibility of a severance package. Russo accepted a severance package and left the Company's employ on August 14, 2002.

[29] Of course, not all of the important precedents involve industrial settings. For example, *KNTV, Inc.*, 319 NLRB 447 (1995), involved a television news reporter's activities in seeking additional compensation for reporters who were assigned to be substitute news anchors. The Board found the reporter's actions to be protected concerted activity and determined that his discharge for engaging in this conduct was unlawful.

perature, which the company chose to dismiss as mere "gripes," the workers brought the "individual complaints into concert so that some effective action could be considered." 370 U.S. at 15. The employees decided to walk off the job in protest against their working conditions. Management discharged them, citing their violation of a company rule prohibiting departure from work without permission. The Board found the discharges to be unlawful under the Act.

In writing for an undivided Court, Justice Black observed that the employees,

> had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. . . . Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place to work.

370 U.S. at 15. The Court held that their decision to take concerted action to address their conditions of employment was entitled to the protection of Section 7 of the Act. As the Court put it, "an employer is [not] at liberty to punish a man by discharging him for engaging in concerted activities which §7 of the Act protects." 370 U.S. at 17.

Following this mandate from the Supreme Court, the Board has developed a framework for analysis of cases in which it is alleged that unrepresented employees have been subjected to adverse employment action for participation in protected concerted activities. In *Amelio's*, 301 NLRB 182 (1991), the standard was succinctly stated:

> The General Counsel presents a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1) when the evidence shows that the employee has engaged in protected concerted activity—that is, the individual acts with or on the authority of other employees—the employer knew of the concerted nature of the activity, and the discharge was motivated by the employee's protected concerted activity. [Footnotes omitted.]

301 NLRB at 182. The Board also observed that, "[w]e will find that an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group." (Citations omitted.) 301 NLRB at fn. 4. Once the General Counsel meets the burdens imposed by this test, the employer assumes the responsibility of persuading the fact-finder that the adverse action against the employee would have been issued even in the absence of the protected concerted activity. *Kysor Industrial Corp.*, 309 NLRB 237 (1992), citing *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I will now address each of the elements of this analytical framework. The Company contests the notion that some of Hayward's complaints were of the type that invokes the protection of the Act. For example, in his opening statement, counsel for the Company argued that Hayward's complaints about the qualifications of newly hired financial consultants were not legitimate complaints about terms and conditions of employment. As counsel put it, those complaints "constituted Chris Hayward sticking his nose in areas of management authority where had no business playing." (Tr. 20.) There is certainly some logic in this argument. When Chess presented similar complaints, Halechko responded by noting that, "[t]his has no impact on any FC [Financial Consultant] and I'm not sure why it would be anyone's concern." (GC Exh. 3 p. 2.)

It is clear that in order to constitute protected activity, an employee's complaints must relate to the terms and conditions of his or her employment. The Supreme Court has recognized that analysis of this question must be flexible. For example, in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Court found that employees' distribution on an employer's premises of a union handout containing political commentary constituted protected activity. In any event, it is unnecessary to speculate concerning the possible impact on conditions of employment of a management decision to hire less qualified employees. It is abundantly clear that the financial consultants' complaints, including those pressed by Hayward, predominantly involved issues directly related to their compensation. These complaints fall into two broad categories. First, the consultants addressed management regarding the contours of the payment structure for financial consultants. They were particularly anxious to obtain the most favorable method for calculating commissions and trail payments through an advantageous compensation grid. They were also desirous of obtaining derivative commissions on the sales made by subsidiary employees. There can be no doubt that such issues go to the heart of the concept of terms and conditions of employment. As the Supreme Court put it when addressing the same type of issues in the usual industrial context, "[f]ew topics are of such immediate concern to employees as the level of their wages." *Eastex, Inc.*, supra at p. 569.

The second aspect of the consultants' complaints regarding their compensation involves an even more basic aspect of the terms of their employment. For example, Hayward testified that during monthly group meetings with Hunter, he would raise questions

> about our compensation mostly, why our paychecks were consistently wrong, why would our trail payments be 100 percent of the time wrong, why is it that we would not get the trade detail reports prior to the commission checks coming out . . . if we didn't get the trade detail reports then we couldn't make the corrections so that our paychecks would be correct. We would just never get them. Like I said, sometimes I would complain about why we didn't even get the commissions at all . . .

(Tr. 131.) Hunter confirmed Hayward's testimony on this issue, noting that Hayward complained about "compensation . . . trail payments . . . discrepancies over the trades that he placed that were not on his adjustment log . . . and all these things." (Tr. 430.) In other words, in addition to seeking improvements in the structure of their compensation system, the financial consultants raised persistent complaints that their pay was incorrectly calculated within the existing compensation system. As

Chess put it, the paycheck he received was "grossly wrong.[30]" (GC Exh. 5 p. 3.)

Complaints about commission payments that were wrongly calculated, late, or nonexistent go directly to the heart of what is meant by terms and conditions of employment. As a result, when Hayward addressed management about the compensation structure and about the difficulties experienced by the consultants involving the amount and timeliness of their pay, he was engaging in conduct that is protected by Sec. 7 of the Act.[31]

Having found that Hayward engaged in protected activity directly related to the terms and conditions of his employment, I must determine whether the activity was also concerted within the meaning of the Act.[32] The Supreme Court has noted that the Act does not impose a restrictive test for determining whether particular conduct should be deemed concerted activity. Writing for the Court, Justice Brennan observed that

> it is evident that, in enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process.

*NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984). The Board has recognized that a "myriad of factual situations . . . have arisen, and will continue to arise, in this area of the law." *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir 1985), cert. denied 474 U.S. 971 (1985).

The evidence shows that Hayward engaged in two forms of concerted activity, individual acts taken on behalf of the group of experienced financial consultants and participation in group activities for the same purpose.[33] Turning first to the individual acts, in April 2002, Hayward addressed his initial e-mail to Halechko regarding compensation issues. He complained that the trail payments were incorrect or absent and specifically noted that there was a "general consensus around here" and that "people are starting to get upset."[34] . (GC Exh. 7 p. 1.) Of course, the most clear- cut example of an individual act by Hayward that was intended to be representative for the entire group was Hayward's June 6 e-mail in which he characterized himself as the "union president." (GC Exh. 7 p. 6.) Hayward testified that he used this expression, in part, because "[t]hat was my role for the group."[35] (Tr. 140.)

These individual acts, taken with the intention of furthering the interests of all of the experienced financial consultants, constituted concerted activity. A recent decision of the Board makes this clear. In *Phillips Petroleum Co.*, 339 NLRB 916 (2003), an employee was discharged after attempting to obtain changes in the company's family medical leave policy. The Board noted that the employee's efforts "originated because of his need to care for his wife and children," but also "embraced the larger purpose of obtaining this benefit for all of his fellow employees." It held that concerted activity occurred "when an individual attempts to bring a group complaint to the attention of management." Id. at 918.

For the same reasons, I conclude that Hayward's individual steps to address the group's compensation issues through e-mails and conversations with management officials were concerted activity within the meaning of the Act.

Beyond his individual actions, Hayward engaged in obvious group activity as well. A particularly clear example involved his conduct during the May 2002 dinner meeting at the Carnegie Science Center. The experienced financial consultants were seated at the same table. On behalf of the group, Hayward invited a human resources manager to join them for a discussion of compensation issues. In addition, Hayward was a leading advocate of the consultants' viewpoint during monthly meetings conducted by Hunter. For example, Russo testified that, during these meetings, Hayward raised compensation issues "[a]ll the time." (Tr. 218.) As to trail payments, Hayward "would lead the fight" during the meetings. (Tr. 219.) Russo also noted that Hayward raised other specific compensation problems, including the failure to pay commissions. He also broached structural problems, such as issues related to the compensation grid. Hunter essentially confirmed this testimony, agreeing that Hayward made complaints about compen-

[30] For example, Chess reported that his trail payment for March 2002 was $218.52. He contended that it should actually have been $754.14. Thus, he believed that he had been underpaid in the amount of $535.68 for the month. (GC Exh. 5, p. 3.) Hayward testified that he had been underpaid as much as $10,000 in a single month. (Tr. 128.)

[31] A recent case arising in a different legal context, *New Mexico Symphony Orchestra*, 335 NLRB 896 (2001), clearly demonstrates the Board's strongly held view of the importance of timely payment of employees' compensation.

[32] None of Hayward's activities in any way transgressed the Board's standards of employee conduct such that his behavior would lose its protected status. Compare: *Honda of America*, 334 NLRB 751 (2001), with *Mountain Shadows Golf Resort*, 338 NLRB No. 73 (2002), and *Nynex Corp.*, 338 NLRB No. 78 (2002).

[33] Indeed, counsel for the Company essentially conceded the concerted nature of Hayward's conduct in his opening statement, noting that Hayward was "complaining about these trail payments and you'll hear that he was one of all of the FC's who were complaining about this . . . Mr. Hayward was not unique in that regard and you'll see notes that there were a number of other FCs . . . who also complained about that." (Tr. 28.)

[34] Hayward was not the only financial consultant to undertake this type of concerted activity regarding compensation issues. For example, in an e-mail on October 29, 2001, Chess told Halechko that, "I can honestly tell you that no one is happy right now with some of the decisions that have been made." (GC Exh. 3, p. 2.)

[35] These examples belie the Company's contention that "there is no evidence that the group nature of these discussions [among FCs regarding the compensation issues] was ever communicated to CISC's management." (R. Br. at p. 9.) In their e-mails, both Hayward and Chess specifically informed management that their colleagues were upset with the Company's treatment of their compensation issues.

sation issues during the meetings. He reported that Hayward and Chess were the most outspoken as to these issues.

I conclude that Hayward's conduct in seeking changes to the structure of consultants' compensation and complaining about problems with the actual compensation paid within the existing structure, including both individual and group communications, constituted protected concerted activity relating to the terms and conditions of employment for the experienced financial consultants. It is evident that management at all levels was clearly aware of Hayward's participation in these protected concerted activities. His activities were not those involved in a secretive organizing campaign or other clandestine behavior. Instead, virtually all of his conduct was specifically addressed to management, including his subjective belief that he was acting on behalf of the group. This is most clearly illustrated by reference to his self-styled title as union president. It is equally clear that Hayward was subjected to adverse employment action when he was terminated on July 2, 2002.

Since Hayward engaged in a pattern of protected concerted activity of which his employer was aware, and he was subsequently terminated from his employment, the focus of analysis becomes the existence of a nexus in the employer's decision-making process between the protected concerted activity and the adverse employment action. Before delving into the question of the employer's motivation, it is necessary to set the context by considering Hayward's history as an employee.

Prior to the acquisition of Mellon by Citizens, Hayward had been employed as a financial consultant for approximately 6 years. There is no evidence that he experienced any disciplinary problems at Mellon. While at Mellon, he was a top producing consultant, typically the first or second highest producer in the office. After the corporate acquisition, his continuing value to Mellon was demonstrated by his invitation to attend a meeting for the purpose of hearing an offer of continued employment. After comparing Mellon's offer to the proposals outlined by CISC's president, Hayward elected employment with Citizens.

Hayward worked for CISC from at least January 1, 2002 through July 2, 2002. During that time, he received no disciplinary sanction. Indeed, Hayward's employer, a large financial institution, did not introduce into evidence a single document reflecting any sort of personnel action regarding Hayward. While the record is devoid of any formal documentation of Hayward's asserted deficiencies as an employee, the testimonial evidence was impressively uniform in establishing that he continued his past practice of being an outstanding producer of investment sales for CISC.

Russo testified that he competed with Hayward for the top honors in production each month. They traded first and second rankings. Hayward's managers confirmed Russo's recollection.[36] Halechko reported that Hayward was always first or second in production within the office. Hunter, his immediate supervisor, testified that Hayward was a "very good producer." (Tr. 360.) When asked if he was one of the top producers, Hunter responded, "[a]bsolutely." (Tr. 360.) Indeed, later in his testimony, Hunter characterized Hayward as "the top producer." (Tr. 361.) On cross-examination, he conceded that Hayward's record of production made him "particularly valuable" as an employee. (Tr. 384.) A more concrete measure of Hayward's value to the Company as a generator of investment sales and resultant commissions and fees was his compensation. Hayward testified that during the 6 months that he was employed by CISC, he was paid approximately $130,000 to $140,000. Thus, the evidence establishes that Hayward was an exemplary salesperson of investment products and had no documented history of disciplinary problems of any sort.[37]

I will now examine the direct and circumstantial evidence that illuminates the Company's motivation in discharging one of its most productive employees. There is a variety of direct evidence establishing that the Company's managers took a dim view of the consultants' complaints regarding their compensation. As early as October 2001, Halechko set the tone. In an e-mail response to Chess' communication about compensation issues, he observed:

> As long as you[r] position makes sense and the wording of your e-mail doesn't piss me off I'm open to any of your suggestions. [Emphasis in the original.]

(GC Exh. 3 p. 7.) Chess drew the obvious conclusion and responded a minute later by apologizing. Halechko then attempted to dismiss the incident, telling Chess that he was merely joking. This was simply disingenuous. As the Supreme Court has observed, when assessing an employer's statements, one must "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969). Such is the case here.

Another insight into management's attitude toward the financial consultants' concerted complaints was provided by Blyth. At the dinner meeting held at the Carnegie Science Center, Hayward invited her to sit with the experienced consultants. Two witnesses testified that she responded by telling the consultants "this doesn't look good, me talking to you guys." (Tr. 230.) Based on the context, I conclude that her comment reflected her awareness that management considered the experienced consultants to be pariahs due to their complaints.

Russo's testimony also provided probative evidence regarding management's animus toward the complainers in general and Hayward in particular.[38] He reported that the supervisors

[36] Counsel for the Company forthrightly conceded that Hayward was "a top producer. He was at the top of the list." (Tr. 28.)

[37] I recognize that Hunter indicated that he gave Hayward some informal admonitions regarding the tone of his complaints and his activities in response to requests for his assistance from the Oakland Branch. None of these purported admonitions is documented in any way. Even if Hunter is accurate, I place no particular weight on such admonitions since they would form a component of virtually every employment relationship. The perfect employee has yet to be born. As I will discuss later in this decision, the Company maintained a formal process for discipline. The key fact is that Hayward was never subjected to even the mildest component of that disciplinary process.

[38] I found Russo to be particularly credible. He had a long and somewhat checkered history as both a financial consultant and a regional manager responsible for supervising other consultants. In his

expressed their exasperation about the complaints by telling the consultants,

> hey, guys, I'm tired of hearing about the complaints. I'm tired of hearing about the paperwork to be resolved. How about concentrating on productivity.

(Tr. 223–224.) More specifically, Russo testified that during his meeting with Hosie, Hosie asked him if he wished to continue as an employee of CISC. When Russo asked what had prompted this rather startling question, Hosie responded that the concern about Russo's future with the Company stemmed from his "complaining about the commissions and the trails and everything else." (Tr. 232.) Significantly, Hosie also told Russo that Hayward was "complaining a lot." (Tr. 234.) Pointedly, Hosie observed that his purpose in coming into the region was to "fix or get rid of the problem." (Tr. 236.) Finally, additional insight into management's overall attitude toward the financial consultants' behavior in pressing their complaints was revealed during Hosie's meeting with Chess on the same day that Hayward was fired. In that meeting, Hosie warned Chess that if he continued to make "constant criticisms," he would be "out the door." (Tr. 83.) His meaning could not have been clearer, given the timing of this warning on the day that Chess' colleague was terminated from employment.

Finally, there was direct evidence from one of the managers regarding the impact of Hayward's complaints on the decision to terminate his employment. When asked why Hayward was fired, Hunter responded by noting Hayward's failure to become a team player. He went on to describe Hayward's "complaining, the constant lack of deportment in doing—in complaining, nothing wrong with complaining, but how you do it, those types of things." (Tr. 380.) He acknowledged that his reference included complaints about compensation. Earlier in his testimony, Hunter put this even more plainly, noting that

> Chris did not exhibit any restraint or decorum in his criticism of the structure of the investment program, even to, to peers and to others, and to folks in management. And what I mean by that is being overly demonstrative about his discontent in meetings and in other settings where there were other people.

(Tr. 361.) Thus, Hunter clearly draws the direct connection between Hayward's concerted activity with his peers and the Company's animus against him.[39]

While Hunter's testimony included a linkage between Hayward's complaints and his discharge, the other supervisors were more circumspect. They tended to describe their criticisms of Hayward by reference to his bad attitude. Realistic appraisal of employers' explanations for terminating employees suggests that citations to bad attitude are rational when coupled with a documented history of disciplinary infractions. By contrast, the Board has repeatedly cautioned that similar characterizations of an employee's attitude must be viewed with caution and concern in the absence of such corroborative evidence. In this case, the Company contends that its decision to discharge Hayward is entirely justified by his "disruptive behavior and attitudinal problems which were interfering with the efforts of CISC's management to build a teamwork atmosphere among its FCs." (R. Br. at p. 7.) Put another way, in his notes from his meeting with Hayward, Hosie observed that Hayward had become a troublemaker.

The Board has addressed the meaning of such justifications for adverse action. In *Boddy Construction Co*., 338 NLRB 1083 (2003), it observed, "employer complaints about 'bad attitude' are often euphemisms for prounion sentiments, particularly when there is no alternative explanation for the perceived 'attitude' problem." Id., citing *James Julian, Inc. of Delaware*, 325 NLRB 1109 (1998). Similarly, in *United Parcel Service*, 340 NLRB 776 (2003), the Board found that calling an employee a "troublemaker" was also evidence of animus. The Sixth Circuit endorsed this approach in a case with some similarities to this one. An employee, Hoendorf, was discharged due to a poor attitude. The company cited two examples, incidents that took place approximately 6 months and 2 months prior to the termination. Hoendorf had not been disciplined for either incident. In enforcing the Board's order for reinstatement, the Court noted that a supervisor's statement,

> that the Company was discharging Hoendorf because he had a bad attitude and created friction by pressing for resolution of the problem in front of a fellow employee supports the inference that the Company discharged Hoendorf for engaging in concerted activities.

*Dayton Typographic Service v. NLRB*, 778 F.2d 1188, 1193 (6th Cir. 1985). Similarly, I conclude that CISC's assertion that the decision to terminate Hayward arose because he was a troublemaker who had a bad attitude is simply another way of indicating that he was terminated because he engaged in protected concerted activity when he persistently complained about the structure of the compensation plan and the manner in which compensation was actually being paid under that plan.

I conclude that the General Counsel has presented an array of direct evidence that the Company's managers were angered and frustrated by the financial consultants' protected concerted activity. Furthermore, their animus regarding this activity led them to take a variety of adverse actions against the complainers, including highly specific and threatening warnings to Russo and Chess and, ultimately, the termination of Hayward.

The direct evidence of animus is reinforced by a variety of circumstantial evidence of the types that the Board has historically viewed as highly probative.[40] I find the timing of Hayward's discharge to be indicative of unlawful motivation. Counsel for the Company argues to the contrary, noting that Hayward's complaints began "almost seven months prior to the

testimony, he displayed a rueful objectivity about these matters and appeared to have gained valuable perspective from his participation in the business as both employee and supervisor.

[39] The managers' disparaging attitude toward complainers is at variance with the Company's formal policy. The handbook distributed to the consultants advised them that "it is Citizens' policy that employees have the right to speak freely about their concerns." (GC Exh. 8 at p. 15 of the handbook.)

[40] The Board has repeatedly held that animus may be established through circumstantial evidence, even in the complete absence of direct evidence. *Tubular Corp. of America*, 337 NLRB 99 (2001), and the cases cited therein.

decision to terminate Mr. Hayward's employment." (R. Br. at p. 15.) In *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531 (6th Cir. 2000), the Court enforced the Board's decision rejecting a similar argument. In that case, Craig, an employee who had engaged in a pattern of protected concerted activity, was terminated 4 days after making a comment that the facility would be a better place to work if it were unionized. The employer argued that the timing was not suspicious since it had been aware of Craig's protected concerted activities since virtually the beginning of her employment with the company. Both the Board and the Court rejected this viewpoint. The Court noted that,

> [a]lthough it is true that Craig had acted on behalf of other employees in regard to wage issues since nearly the start of her employment at Main Street, Craig's December 11 statement was the only pro-union statement she had made and could thus have been viewed by Main Street as more threatening.

218 F.3d 531 at 542. By the same token, while Hayward began his activities months before his termination, he characterized himself as the "union president," a statement that could readily be interpreted as threateningly prounion, less than a month before his discharge.

While Hayward wrote his "union president" e-mail on June 6 and was not informed of his termination until July 2, the evidence demonstrates that the decision to discharge him was reached considerably earlier. The human resources department formally approved the termination decision during a conference call on June 25. Halechko testified that he had reached a preliminary conclusion that Hayward should be terminated before convening this formal conference. I conclude that the decision to terminate Hayward was made no later than 3 weeks after he styled himself the "union president" in his e-mail to his supervisor. The timing of this decision to terminate a highly productive employee without any history of prior formal disciplinary sanction within such a brief period after his reference to a union in his correspondence is significant circumstantial evidence of an impermissible motivation.

Another of the Board's key analytical tools for evaluation of an employer's motivation is consideration of whether the employee's discharge "was inconsistent with its progressive discipline systems and its past practice." *Tubular Corp*., supra. Put another way, the Board holds that evidence establishing "blatantly disparate treatment supports an inference of unlawful motivation." *Watkins Engineers & Constructors*, 333 NLRB 818, 819 (2001), [Internal quotation marks omitted.] I will now consider the two key aspects of this question, whether the Company followed its formal procedures for imposition of employee discipline and whether the Company disciplined Hayward in a fashion that was consistent with its treatment of disciplinary problems involving other financial consultants.

CISC possessed a formal disciplinary process that was outlined in writing to its employees in an employee handbook dated March 25, 2002. (GC Exh. 8.) The handbook was distributed to all financial consultants. It defines and explains the Company's performance improvement policy, noting that

> [t]o ensure the achievement of goals and objectives and fair treatment of all employees, it may be necessary to follow Citizens' performance improvement process when an employee is not contributing to the successful operation of the business, either through his or her behavior or job performance.

(GC Exh. 8, handbook at p. 27.) Significantly, this preamble clearly demonstrates that the disciplinary process is designed to cover a wide range of issues, including technical aspects of job performance such as poor productivity and attitudinal issues encompassed by the concept of general employee "behavior." The preamble also notes that the goal of the process is to enable managers to successfully "coach the employee with an objective of bringing his or her performance to an acceptable level." (GC Exh. 8, handbook at p. 27.)

Within this framework, the performance improvement process begins with verbal commentary. If this does not resolve the problems, resort to a formal performance improvement plan is anticipated. This is a written document issued to the employee that "specifically identifies the problem and outlines management's expectations and desired results." (GC Exh. 8, handbook at p. 27.) If the issuance of a written plan fails to obtain adequate improvement from the employee, termination is authorized if it is "approved by the next level of management and Human Resources." The Plan is clearly designed to include principles of progressive discipline. As the handbook puts it,

> [p]rogression through the Performance Improvement Process should be appropriate for the severity of the problem. In certain cases, such as serious misconduct, a written PIP [Performance Improvement Plan] may be the first step in the Performance Improvement Process. Not all situations require that the manager follow a step-by-step corrective action process. Some circumstances may justify other action up to and Including termination.

(GC Exh. 8, handbook at p. 27.)

In her testimony, Blyth confirmed the nature of the progressive disciplinary process. She reported that the steps in the process are "coaching and counseling," followed by verbal warning, final written warning, and termination. (Tr. 496.) A performance improvement plan may be implemented during any stage "in that continuum." (Tr. 496.) This consists of a highly detailed written plan. Blyth also confirmed that the purpose of the various warning stages of the process is to enable managers to determine whether the employee is able to change his or her conduct so as to avoid imposition of termination. Halechko articulated a similar understanding of the purpose and mechanics of the process. He outlined the "basic process" as involving a verbal warning, written warning, final written warning, and ultimately termination. (Tr. 296.)

Halechko showed a clear understanding of the intended operation of the policy as it applied to management's belief that a financial consultant was making improper e-mail complaints regarding working conditions. Russo testified that, in May 2002, Halechko told him about his displeasure with the nature of Chess' e-mail communications and threatened to fire Chess for sending disrespectful e-mails about the trail payment issue. Russo responded by advising Halechko, "John, you can't fire

him, you know, he's not on corrective action." (Tr. 227.) When counsel for the Company asked Halechko about Russo's account of this conversation, Halechko asserted that, "I've been in management enough to know you can't fire someone for sending an e-mail. Corrective action, absolutely."[41] (Tr. 275.)

While Halechko appears to have understood the necessity of applying the progressive disciplinary system to attempt to remedy Hayward's alleged transgressions, he did not recommend that this be initiated. Several participants in the crucial June 25 conference call agreed that Halechko, Hunter, and Hosie were opposed to application of progressive discipline to Hayward's case. Hosie conceded that they could have given Hayward a final written warning that one more manifestation of the attitudinal problems such as denigration of the less experienced consultants would result in termination. He reported that the participants in the conference:

> talked about what potential corrective action we could use. We had a discussion on that. Consensus of the group, myself included, was that that was not going to be a plan, that that would not work, that between Mr. Hunter and Mr. Halechko, and myself, that we were not going to change his attitude about his colleagues.

(Tr. 449.) By the same token, Blyth testified that, in her role as human resources representative, she did not recommend application of the performance improvement process to Hayward. Counsel for the Charging Party noted that she had first become aware of Hayward's alleged performance issues in April 2002. He asked her if she had ever suggested counseling with Hayward "to identify the problems using specific examples, and provide a reasonable amount of time for improvement."[42] She responded by indicating that, "I did not have time to do that." (Tr. 512–513.) She contended that Hunter had made attempts to correct Hayward's misbehavior, but conceded that there was no documentation of these efforts.[43]

The evidence clearly shows that all levels of management were aware of the requirements of the progressive disciplinary process and chose not to employ it in Hayward's case. Counsel for the General Counsel asked Blyth if it was normal procedure for the Company to terminate an employee in the absence of any documentation of the employee's misconduct and the efforts taken to ameliorate the problems. By responding, "[g]enerally, probably not," Blyth strikingly underscored the fact that the Company abandoned its clearly articulated policy requiring application of principles of progressive discipline.[44] Instead, management close to treat Hayward, a highly productive, experienced employee with no history of disciplinary problems, in a manner that was highly inconsistent with its normal policies and procedures. This is strong circumstantial evidence that management was acting out of improper and unlawful motives.

In addition to the failure to follow proper procedures, the evidence also establishes that the Company's treatment of Hayward was in sharp contrast to its contemporaneous treatment of other financial consultants whose behavior was deemed to require disciplinary corrective action. In similar circumstances, the Board has consistently held that such disparate treatment of an employee is probative circumstantial evidence of unlawful motivation. *Sears, Roebuck & Co.*, 337 NLRB 443 (2002), citing *New Otani Hotel & Garden*, 325 NLRB 928 (1998), and *Fluor Daniel, Inc*., 304 NLRB 970 (1991).

The Western Region of CISC was a new entity, having begun its formal existence approximately 6 months prior to Hayward's discharge. As a result, it is not surprising that no evidence was presented regarding any past history of disciplinary action against financial consultants.[45] While there is no past history to provide guidance, there is considerable contemporaneous evidence of the Company's disciplinary practices regarding allegedly errant financial consultants. It will be recalled that Hosie was brought into the Western Region to make a comprehensive evaluation of its problems and to propose personnel actions based on his findings. Upon completion of Hosie's investigation, a conference was held to confirm final determinations regarding disciplinary actions affecting financial consultants in the region. At this conference, Hayward's termination was ratified.

During the conference, Blyth, one of the human resources representatives, took notes. Her notes reflect discussion of "Corrective Action" regarding at least 10 other financial consultants.[46] Hosie confirmed that the conference addressed cor-

[41] Halechko also reported that this conversation with Russo took place prior to Citizens' acquisition of Mellon, rather than in May 2002. I do not credit this explanation. I have already noted that I found Russo to be highly credible. Furthermore, Halechko did concede that, as of May 2002, he was "losing my patience" with Chess' e-mails. (Tr. 311.) This is consistent with Russo's recollection of the chronology.

[42] In phrasing his question in this manner, counsel was quoting directly from the handbook's description of how the performance improvement process was supposed to function.

[43] In itself, this appears to be irregular. The handbook notes that an employee's personnel file "[g]enerally" contains "documents used to determine . . . corrective action or termination." (GC Exh. 8, handbook at p. 11.) The Company failed to place into evidence a single such document relating to Hayward's conduct or discipline.

[44] I have considered the Company's entirely reasonable written position that some forms of misconduct justify immediate termination without resort to intermediate steps. It is apparent that this exception to the progressive action policy is designed to address misconduct so serious as to be intolerable. One may easily visualize application of this exception to employees who commit embezzlement, engage in workplace violence, or divulge clients' financial secrets. As I will discuss shortly, none of the Company's asserted reasons for Hayward's termination is remotely comparable to the types of serious misconduct that would justify immediate termination under the exception to the performance improvement policy.

[45] I note that although Citizens is a much larger and older organization, no evidence was presented regarding its past disciplinary practices elsewhere in its corporate operations. I draw no conclusions from this. In this instance, no evidence is simply no evidence.

[46] In her testimony, Blyth confirmed that these employees were the subject of disciplinary consideration and discussion. She claimed that her notes should not be interpreted to mean that they were all subject to corrective action. She asserted that her designation of "Corrective Action" applied only to Ron Freedlander. I reject this contention. Examination of her choice of format for her notes shows that she indented a list of names underneath the heading of "Corrective Action." She placed a bullet before Freedlander's name. In exactly the same manner,

rective action for at least several of the consultants under the Company's performance improvement policy. He testified that, "[w]e talked about how we were going to handle some of the corrective action . . . We talked about a number of individuals." (Tr. 448.) The only person who was foreclosed from some manner of corrective action designed to improve performance and behavior while preserving employment was Hayward. No other exception was made to the Company's policy of graduated disciplinary measures designed to improve performance and behavior. While some of the other 10 consultants were perceived to have different disciplinary issues than Hayward such as poor productivity, the fact remains that among the 10 persons under consideration were individuals who were alleged to have engaged in behaviors similar to those involving Hayward. In particular, there is no doubt that Chess and Russo were under scrutiny for alleged disrespectful treatment of newly hired colleagues and Chess was clearly in trouble for writing disrespectful e-mails to management. Yet, only Hayward, the self-styled "union president," was summarily discharged. I conclude that the disparately severe sanction imposed on Hayward was motivated by the unlawful desire to remove the self-appointed leader of the dissenting consultants and to send a warning message to his similarly inclined colleagues such as Chess and Russo.

In addition to assessment of such circumstantial factors regarding employer motivation as timing, conformity to established procedures, and disparate treatment, the Board has endorsed the probative value of examination of the employer's asserted reasons for taking adverse action against the employee. Referencing the leading case on this issue, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966), the Board has noted that

> [i]t is well settled that, where an employer's stated motive is found to be false, an inference may be drawn that the true motive is an unlawful one that the employer seeks to conceal.

*Key Food*, 336 NLRB 111, 114 (2001).[47] In assessing this question, I will consider whether the employer's asserted justifications for Hayward's termination are logical, consistent, and supported by evidence.

In evaluating the Company's asserted reasons justifying Hayward's termination, it must first be recognized that management never gave a formal written statement setting forth its conclusions. As a consequence, in order to define those reasons, it is necessary to rely on the testimony of the managers and the snippets of reasoning contained in the informal notes written by those managers. As a result, there is a lack of clarity since each manager tended to lend emphasis to his or her own chosen factors. For example, Blyth cited an allegation that Hayward had improperly gone into the computer system and assigned accounts to himself. No other witness cited this purported misconduct in explaining Hayward's termination. Hosie cited Hayward's disparagement of the Company's fixed annuity products as evidence that Hayward was disrespectful of the Company's products. No other manager mentioned this as an area of concern. Hunter cited Hayward's "constant lack of deportment . . . in complaining" and his "being overly demonstrative about his discontent in meetings." (Tr. 380, 361.) No other manager asserted this as a basis for termination.[48]

Perhaps the ultimate illustration of the lack of clarity or precision in the Company's explanations was revealed in Hayward's uncontroverted testimony regarding his final meeting with management. Upon being told that he was discharged, he wished to know the reason. Blyth told him that, "you wrote business outside of your territory and that's why we're firing you." (Tr. 168.) On the other hand, Hosie and Halechko told him that he was being fired because he "didn't fit in" and wasn't a "team player." (Tr. 189.) Thus, even during this crucial meeting, the managers were unable to articulate a consistent reason for the abrupt termination of a highly productive employee who lacked a prior history of formal disciplinary sanctions.

This lack of clarity and consistency regarding the manner in which the Company has explained its reasons for Hayward's termination is an important factor in evaluating the proffered justifications. In *Black Entertainment Television*, 324 NLRB 1161 (1997), it was noted that

> The Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.

324 NLRB at 1161, quoting *Sound One Corp.*, 317 NLRB 854, 858 (1995). The rationale for this analytical principle is that when an employer is unable to maintain a consistent explanation, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons' to justify an unlawful discharge." *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).

she placed a bullet before the names of each of the other nine listed individuals. (R. Exh. 3.) I conclude that her notes demonstrate that all 10 of these financial consultants were considered for corrective action under the Company's progressive disciplinary system.

[47] Counsel for the Company has presented a thoughtful discussion of the extent to which this principle may be properly applied. (R. Br. at pp. 26–27.) There is controversy as to whether the Board may predicate a finding of illegal motivation exclusively on evidence of pretext. See: Michael J. Hayes, *Has Wright Line Gone Wrong? Why Pretext Can Be Sufficient to Prove Discrimination under the National Labor Relations Act*, 65 Mo. L. Rev. 883, 2000. This issue is not presented by the facts of this case. I have already outlined a variety of direct and circumstantial evidence that supports a finding of unlawful motivation for Hayward's discharge.

[48] Indeed, other managers disclaimed this as a basis for Hayward's discharge. I have already noted that Hunter's testimony as to this point is highly probative direct evidence of animus against Hayward due to his participation in protected concerted activities. Hence, it is not surprising that Hunter's former colleagues did not corroborate his testimony on this. It is noteworthy that Hunter is the only one of Hayward's managers who is no longer employed by the Company. While I have found those portions of his testimony involving his direct supervision of Hayward to have been influenced by his dislike of Hayward and his desire to place himself in the best light, other aspects of his testimony may well have been more objective given his current distance from the situation.

The evidence demonstrates that out of a thicket of reasons advanced for Hayward's discharge, two themes predominate. The managers cited two specific incidents of asserted misconduct and a generalized allegation that Hayward had a bad attitude and was not a team player. I will address the two specific incidents first.

The first of these events involved a wealthy elderly customer of the retail bank. The customer sought investment assistance. Saunders, the financial consultant assigned to the customer's territory, met with the customer in the presence of the bank manager. Saunders recommended a particular investment, but during the process of preparing the necessary documents she discovered that the investor was too old to qualify. The meeting terminated and the customer was left without any proposed investment solutions. Not surprisingly, the bank manager was chagrined at this state of affairs. The manager contacted her superior, who arranged for Hayward to meet with the customer. There is no dispute that Hayward was brought into the picture by the bank's officers. He testified that this had been a common practice throughout his career. This testimony is supported by Hosie's notes, which reflected that Hayward had been a "troubleshooter" for the Company. (R. Exh. 2.) Hayward held two meetings with the customer, selling her a product after she had obtained outside advice indicating that it was a worthy investment vehicle for her.

There was a conflict in testimony concerning whether Hunter's approval for Hayward's assignment had been sought and obtained.[49] I have credited Hayward's testimony that Hunter gave his approval, telling Hayward that it was "no big deal." (Tr. 196.) Only afterward, when Saunder's lodged a vociferous complaint, did Hunter meet with Hayward and instruct him as to how to handle such situations in the future.

At trial, the Company claimed that this episode was a serious transgression, forming a significant basis for Hayward's discharge from employment. I have no difficulty rejecting this contention. First of all, the evidence shows that at the time this incident took place, management was not seriously perturbed by it. Hunter testified that he told Halechko about the incident during one of their daily telephone conversations. He informed Halechko about it without any "degree of urgency," simply "mention[ing] that this had happened and that I had dealt with it." (Tr. 376–377.) By the same token, Halechko testified that he could not even recall the basic details of Hunter's conversation about it. When Halechko briefed Hosie regarding the problems in the Western Region that necessitated his intervention, he did not mention this incident. Finally, I note that Hunter was informed of Saunder's displeasure shortly after Hayward's meeting with the client on April 4. Nevertheless, no disciplinary sanction was imposed until Hayward's termination on July 2. Hayward was paid the customary commission from the transaction.

Beyond the evidence that establishes that management was not significantly troubled by Hayward's conduct in this matter, logic and common sense lead to a firm conclusion that Hayward's conduct was in no way objectionable. Bank officials had been frustrated by their inability to assist an elderly client with her financial needs. They sought and obtained expert help from a highly productive financial consultant. As a result, key objectives of the Company were accomplished. The customer was assisted with her financial planning and Citizens derived profit from having provided such assistance. The contention that Hayward poached on the territory of Saunders is absurd. Saunders had met with the client and concluded that she was unable to offer the client any assistance. It defies reason to argue that this customer in some way belonged to Saunders. It was logical and appropriate that another consultant be assigned to provide for her unmet needs. Any subsequent concern was simply a product of Saunder's vociferous, but unjustified, complaint to Hunter. To the extent that the Company claims that Hayward's behavior in assisting the Bank's managers in providing financial services to a customer who needed them was a justification for Hayward's termination, I find that this is an obvious pretextual grasping at straws.

The second incident cited by the Company is more troubling since it involves an ugly dilemma presented by a racist customer. Once again, Hayward did nothing to initiate involvement in the situation. When the customer refused to meet with the assigned financial consultant, Saunders, the bank manager asked Hayward to assist. Hayward knew that another financial consultant had made prior sales to this customer. Following Hunter's general instructions to him, he telephoned this consultant, who, while warning him that the customer was a jerk, authorized him to proceed with the sales meeting. Hayward made the sales. Once again, Saunders complained to Hunter, going so far as to threaten to take the matter to the human resources department.

At trial, Halechko presented a high-minded explanation as to why this incident was a serious indictment of Hayward. He dismissed Saunder's complaint that Hayward had taken one of her clients, opining that this was "the least of my concerns." (Tr. 290.) He reported that his real concern was that a Company employee had met with an openly racist customer and engaged in business transactions with that customer. As he put it, such conduct

> was unethical and it was not part of what we would do at Citizens. The appointment should never have occurred. And what we should have done is closed the customer's accounts and asked him to leave the bank.

(Tr. 289.) Unfortunately, this lofty expression of the Company's goals went completely unrealized. Management was clearly informed of all of the pertinent details of this transaction. Certainly, Hayward made no effort to conceal the reasons he was brought in to make the sale. Although fully informed, management took no steps to remedy this supposedly unethical conduct by both Hayward and the bank manager. Neither was subject to formal discipline. To the contrary, Hayward received his usual commission on the sales. This is significant since the Company clearly had the right to reject an unethical transaction. The Company's plan for financial advisors in effect at that time provided that management, "in its sole discretion, reserves

[49] As Blyth put it, "I'll agree that that was very confusing as to which management team called who first." (Tr. 494.) Thus, this concededly confusing state of affairs could hardly serve as appropriate justification for Hayward's termination.

the right to accept or reject any transaction, for any reason whatsoever." (GC Exh. 4 p. 2.) When confronted with this Company policy, Halechko attempted to deflect the implications by reporting that he did not know if the Company was aware of the situation before Hayward was paid his commissions. Even if this were true, it is not a satisfactory explanation. The written policy is designed to cover this eventuality, providing that "revenues credited to a Financial Advisor's grid will be charged back any previously credited revenues that are reversed, adjusted or charged back." (GC Exh. 4 p. 7.) No such charge back was taken once management learned all of the details of the transaction.

The evidence shows that the Company failed to discipline Hayward or the bank manager for their supposedly unethical behavior. There is no evidence that the transactions were cancelled or that the customer was directed to remove his business from the Bank. In fact, it appears that the Company's ultimate decision regarding this difficult situation was to adopt the attitude of Stevens, the bank manager. As she had put it, "I don't care what his problem is. Let's just take care of him." (Tr. 156.) In concluding that the Company's attempt to cite this unpleasant episode as a justification for Hayward's termination is pretextual, it is important to note that there was no contention that Hayward's participation in the transaction was in any way designed to endorse or further the customer's racist views. Indeed, Saunder's told Hunter that

> [s]he felt that on some level race was a part of it, but not on Chris' part, but on the part of the regional manager, the bank regional manager.

(Tr. 374.) There is nothing to indicate that management took any action whatsoever regarding this allegation.[50] In sum, the evidence shows that a highly placed bank manager asked for Hayward's assistance. Following Hunter's directive, Hayward sought authorization from the financial consultant who had previously made sales to this customer. After obtaining this authorization, he met with the customer and serviced his needs, in the process earning commissions for himself and for the Company. While it is apparent that the episode was distasteful for all concerned, I do not credit the contention that it represented serious, unethical behavior in the eyes of the Company's management. The evidence reveals that to be a tardily formulated attempt to justify Hayward's discharge. I reject it as pretextual.

Having rejected as pretextual the two specific instances of alleged misconduct relied upon by the Company, I must now examine the more generalized allegation that Hayward was a troublemaker who refused to adjust to the changeover in ownership of the Company, manifested a bad attitude, and declined to be a team player. In making this assertion, the managers provided testimony regarding the change in philosophy resulting from Citizens' takeover of operations from Mellon. Halechko testified that, at Mellon, investment services were considered a "number one priority" for the bank. (Tr. 257.) After Citizens took over, investment services "weren't really a key component anymore for the bank." (Tr. 257.) Instead, investments were merely one of five such components. This represented a "total change in the philosophy," from being the dominant concern to being one of a number of competing concerns. (Tr. 264.) Hunter confirmed this description, agreeing that the investment component was no longer the primary focus. The Company contends that Hayward was unable to adapt to this new environment.

I credit the managers' description of the new working environment. The difficulty is that it proves too much. The same managers agreed that the result of the new and more challenging working conditions was that financial consultants had to focus more on providing services to the banking managers. As Hunter put it,

> they had to be more accommodating with the branch [banking] people. And they had to have a strong relationship, because it [the client referrals] was not going to be handed to them.

(Tr. 387.) Hunter agreed that a consultant's relationship with the bank managers was at least as important as his or her relationship with other consultants. Counsel for the General Counsel asked Hunter if meeting the requests of bank managers "is something generally to be favored?" (Tr. 387.) Hunter responded that, provided the requests were reasonable, "expectations were that they would be met, yes." (Tr. 387.)

Both Halechko and Hosie confirmed Hunter's view of the importance of good teamwork with the bank's managers. Halechko called them "our customer." (Tr. 255.) He agreed that it was "important" that they "be kept happy." (Tr. 304.) During a meeting with the financial consultants, he told them that

> if we're not getting the referrals that we need, it's because your partners don't want to partner with you anymore. And that just didn't happen for no reason, and we need to identify and become a better partner with the bank.

(Tr. 308–309.) Hosie agreed that "I think it was important to keep the bank people in your region happy." (Tr. 44.) Of course, it was also important for a financial consultant to maintain good relations with the other consultants. Chess acknowledged as much, noting that a consultant needed to "work with your colleagues, be a positive influence." (Tr. 118.)

The record leads to two conclusions regarding this change in banking philosophy and operations and Hayward's adaptation to it. First, it is clear that consultants' relationships with bank managers were of critical importance. There was no evidence that Hayward had any problems with those managers. To the contrary, the evidence shows that he was highly regarded by the bank's supervisors. Indeed, they viewed him as a troubleshooter who could be brought in to assist with difficult customer problems. By the same token, his willingness to become involved in the solutions to these difficult problems speaks highly of his desire to foster teamwork with the bank's offi-

[50] It is necessary to add that there was no evidence presented in this case regarding the regional manager's attitude and motivation and nothing in this decision should be interpreted as a comment regarding that question.

cers.[51] On the other hand, there is evidence that Hayward was willing to criticize the newer financial consultants. Nevertheless, it is important to note that he was simply of one a number of experienced consultants who were critical of their newer colleagues. Halechko specifically testified that Hayward was not a "ring leader" in this problem of teamwork among consultants. (Tr. 337.) The evidence supports this conclusion. For instance, the only written complaint about the newly hired consultants was made by Chess, not Hayward.

I have carefully assessed the Company's claim that Hayward's termination was due to his inability to adjust to the attitudinal and teamwork demands of the new work environment. The evidence fails to persuade me that this was a motivating factor in the decision to terminate Hayward's employment. His attitude and teamwork toward the bank managers was exemplary. His attitude and teamwork toward his fellow financial consultants was less praiseworthy, but not significantly worse than that of his peer group. All in all, I am led to the firm conviction that none of the Company's proffered explanations for Hayward's firing serve to explain the decision. There must have been something else. Based on the direct and circumstantial evidence discussed above, I find that this missing rationale was Hayward's prominent and persistent involvement in protected concerted activity culminating in his decision to refer to himself as the "union president." Only when viewed in this light, can one comprehend the abrupt termination of an outstanding performer with a prior clean disciplinary record.

Ordinarily, analysis of employer motivation under *Wright Line*, supra, continues to the final step of the process. At that step, the employer must show that it would have imposed the same adverse action regardless of the employee's participation in protected concerted activity. The Board, however, draws a careful distinction in circumstances where the trier of fact concludes that the employer's proffered reasons for the adverse action are merely pretextual. As the Board noted in *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), affd. 71 Fed.Appx. 441 (5th Cir. 2003),

> Having found that the General Counsel has met its initial burden of persuasion, we now examine the Respondent's argument that it would have taken the same action in the absence of that protected activity. In doing so, we must distinguish between a "pretextual" and a "dual motive" case. If the Respondent's evidence shows that the proffered lawful reason for the discharge did not exist, or was not, in fact relied upon, then the Respondent's reason is pretextual. If no legitimate business justification for the discharge exists, there is no dual motive, only pretext.

337 NLRB at 1126. See also, *Golden State Foods Corp*., 340 NLRB 382, 383 (2003). In this case, I have considered all of the varying reasons advanced in support of the decision to terminate Hayward. I conclude that the Company, in fact, did not rely on any of these reasons in discharging him. They are merely pretexts to mask the real motivating factor in his termination, his involvement in protected concerted activity, capped by his self-styled appointment as "union president" of the experienced financial consultants. As a result, the analytical process is complete. I conclude that Hayward's termination constituted a violation of Section 8(a)(1) of the Act.

[51] I do not place significance on the fact that Hayward's sales to difficult customers produced income to him. He was already a very high producer and his acceptance of difficult cases located outside his normal area of operations hardly seems a profitable endeavor for him.

## CONCLUSION OF LAW

By discharging its employee, Christopher Hayward, due to his participation in protected concerted activities in order to discourage its employees from engaging in these or other such activities, the Respondent has been interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

## REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because of the rather unusual work setting involved in this case, both counsel for the General Counsel and counsel for the Respondent have predicted that determination of the precise parameters of the reinstatement remedy and calculation of the back pay owing to the Charging Party will be complicated. Thus, counsel for the General Counsel observed that

> the income of financial consultants is by its nature impacted substantially by outside forces, primarily the rise and fall of the stock market and that said formula [for calculation of back pay] should take this factor into account.

(GC Br. at pp. 28–29.) Counsel for the Respondent made essentially the same point, noting that

> a backpay award may admittedly be difficult to calculate given the contingent nature of much of Mr. Hayward's compensation which was tied to sales production and likely would have been impacted by deterioration which occurred in the financial services and investment business during 2002 and 2003 as a result of economic factors unrelated to this case.

(R. Br. at p. 28.)

The Board has broad discretion in resolving remedial issues. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). It has chosen to exercise this discretion through a posttrial administrative compliance process. In *Tuv Taam Corp.*, 340 NLRB 756, (2003), the Board observed that it has a "well established policy of deferring to compliance questions regarding the specifics of the relief granted." Id. at 759 fn. 4, and the cases cited therein.

In *Alaska Pulp Corp*., 326 NLRB 522, 523 (1998), enf. in part and remanded 231 F.3d 1156 (9th Cir. 2000), after noting that resolution of remedial issues is "often problematic and

inexact," the Board summarized the appropriate administrative process involved. During the compliance phase of the proceedings, the General Counsel, exercising "wide discretion," selects a formula for resolving the issues. If the Respondent seeks to propose an alternative formula, then an administrative law judge must conduct a hearing. The judge's duty is to decide which formula

> is the proper one in view of all the facts adduced by the parties and to make recommendations to the Board as to the most accurate method of determining the amounts due.

326 NLRB 522, fn. 7, citing *American Mfg. Co. of Texas*, 167 NLRB 520 (1967). Finally, the Board will select the "most accurate method" of calculation, taking into account the views of all parties. 326 NLRB at 523. In so doing, it will resolve any uncertainties against the party whose wrongdoing created the uncertainty.[52]

While it was perceptive of both counsel to highlight some of the difficulties that may be anticipated, it is necessary to defer resolution of these issues to the appropriate phase of the Board's processes. Therefore, at the compliance stage of the proceedings, the parties should be prepared to address the amount of backpay owed[53] and the nature of the reinstatement remedy, including the quality and extent of any client list[54] required to meet the Company's obligation to provide full reinstatement to Hayward.[55]

Counsel for the General Counsel also requests an order requiring the Respondent to "rescind and expunge" references to Hayward's termination in "any reports it has made to all regulatory bodies of the securities industry, both governmental and private." (GC Br. at p. 29.) In my view, due to the potentially adverse consequences to Hayward's professional standing arising from the filing of such reports, this relief is a necessary component of the proper make whole remedy. I shall recommend that the Board include such a provision in the order. Given the nature of the Company's decentralized operations, I also recommend that the Board adopt counsel for the General Counsel's request that the employer be required to post the notice "at all locations where financial consultant employees are working." (GC Br. at p. 28.) This is necessary to accomplish the remedial purposes underlying the posting of notices to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[56]

ORDER

The Respondent, Citizens Investment Services Corporation, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Taking adverse action, including termination of employment, against Christopher Hayward or any other of its employees due to their participation in protected concerted activities.

(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 from the date of this Order, offer Christopher Hayward 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 Christopher Hayward 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) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of this Order, make every good-faith effort to rescind from its reports submitted to all regulatory bodies of the securities industry, both governmental and private, all reference to the employee's termination, and within 3 days thereafter notify the employee in writing that this has been done.

(e) 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.

(f) Within 14 days after service by the Region, post at its each of its facilities in its Western Region of Pennsylvania where financial consultant employees are working, copies of

[52] A useful list of guiding principles involved in making these determinations during the compliance process is set forth in *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995).

[53] One of the advantages of the Board's compliance procedures is that resolution of these issues may commence with informal discussion among the parties. Noting that the parties may be expected to have familiarity with "rates and methods of compensation . . . and other issues that will be used to determine gross backpay," the Board's Casehandling Manual for compliance proceedings, at Sec. 10531.2, recommends that the compliance officer ask "both Respondent and discriminatee how they think gross backpay should be determined and how much it should be."

[54] The parties have referred to such a list as a "book of business."

[55] I do note that Hosie testified that the Company had a written employment agreement with the financial consultants, specifying that CISC retained ownership of the client list. As it was not material in this phase of the proceedings, this document was not offered into evidence. At compliance, it would certainly become material. I also note that, in his opening statement, counsel for the General Counsel wisely observed that the individual investment customers have an important interest in who will act as their financial consultant. He suggested that the remedy include provision for Hayward to contact his former assigned customers to ascertain their wishes.

[56] 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."

the attached notice marked "Appendix."[57] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 facilities 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 July 2, 2002.

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

## APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against Christopher Hayward or any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, within 14 days from the date of the Board's Order, offer Christopher Hayward 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 Christopher Hayward whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

WE WILL, within 14 days from the date of the Board's Order, make every good faith effort to rescind from our reports submitted to all regulatory bodies of the securities industry, both governmental and private, all reference to the unlawful discharge of Christopher Hayward, and WE WILL, within 3 days thereafter, notify him in writing that this has been done.

CITIZENS INVESTMENT SERVICES CORPORATION

[57] 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.