

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 04-1317 & 04-1334

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CITIZENS INVESTMENT SERVICES CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The National Labor Relations Board ("the Board") had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. §§ 160(e) and (f)). The Board's Decision and Order issued on June 30, 2004, and is reported at

342 NLRB No. 26. (A 7-27.)<sup>1</sup> The Board's order is a final order under Section 10(e) and (f) of the Act.

Citizens Investment Services Corporation ("the Company") filed its petition for review of the Board's order on September 15, 2004. The Board filed its cross-application for enforcement on September 30. Both were timely filed, as the Act places no time limitation on filing for review or enforcement of Board orders.

#### STATEMENT OF THE ISSUES PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging financial consultant Christopher Hayward because of his protected concerted activity of protesting compensation terms and payments for financial consultants.

#### RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in an addendum to this brief.

#### STATEMENT OF THE CASE

Acting on a charge filed by Christopher Hayward, the Board's General Counsel issued a complaint, alleging that the Company had violated Section

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<sup>1</sup> "A" refers to the record materials contained in the appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Hayward because he engaged in protected concerted activities. (A 25.) After a hearing, an administrative law judge issued a decision and recommended order on December 23, 2003, in which he found that the Company had violated the Act as alleged.

The Company filed exceptions with the Board to the judge's decision. (A 7; 85-93.) On June 30, 2004, the Board (Chairman Battista and Members Liebman and Meisburg) affirmed the judge's rulings, findings, and conclusions and adopted his recommended order. (A 7.)

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Background: the Company Purchases Mellon's Banking Operations and Part of the Assets of Its Affiliated Investment Arm, Dreyfus, and Recruits Dreyfus' Financial Consultants

On July 1, 2001, Citizens Bank, the Company's parent, announced that it planned to purchase Mellon Bank's retail banking business and some of the assets of its related investment services company, Dreyfus Investment Services Corporation. Citizens intended to operate Mellon's retail banking business, through its own banking arm, and to offer investment services to interested customers, through the Company. As a result, the Company was interested in hiring many of the financial consultants who sold investment products for Dreyfus. (A 8; 132-33.)

Among the financial consultants affected by the impending transfer of assets from Dreyfus to the Company was Christopher Hayward. Hayward had worked for Dreyfus for about six and half years and was consistently ranked as the number one or two producer among financial consultants working out of the western region, whose hub was Pittsburgh. (A 18; 216-17.) After accepting employment with the Company, Hayward consistently maintained his position as the highest or second highest producer in the western region until his discharge in July 2002. (A 18; 217.)

On September 10, company president Barry Toothaker met with a number of Dreyfus's financial consultants to present the Company's plans and compensation package for the financial consultants. Edward Chess and Jeffrey Russo, who were senior financial consultants in Dreyfus's western region, attended this meeting, representing the financial consultants of that region. Toothaker presented a compensation package that provided for, among other things, "trail payments," or commissions to consultants for ongoing management of investments that a customer had purchased in a previous year. (A 8; 132-35.) A financial consultant's commission rate would vary according to his position on the compensation grid, which ranked consultants according to sales. As a result, higher producing employees received higher commission rates. The financial consultants in the Pittsburgh region were impressed with the financial incentives

that the Company was offering and decided to accept that offer rather than a competing one from Dreyfus. (A 8;137.)

B. The Company Changes the Terms of Its Compensation Offer and the Financial Consultants Complain

On October 8, the Company distributed a draft of its “FY 2002 Incentive Plan for Financial Consultants.” (A 8-9; 638-41.) Senior financial consultant Chess disliked the draft plan because its terms seemed less favorable than those Tohtaker had orally presented in September. Between October 22 and 30, Chess exchanged a series of e-mails with John Halechko, a senior vice president and director of investment sales for the Company. Among other things, Chess complained about the benefit calculations and that the draft plan did not appear to provide for trail payments through the grid. He also 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. Chess contended that the experienced consultants saw “nothing to reward them for being . . . veterans[, i.e] [f]or being loyal or being productive.” (A 9; 642.)

In one e-mail, Chess told Helechko that "I can honestly tell you that no one is happy right now with some of the decisions that have been made." (A 9; 643.) At one point in the exchange, Chess said that he hoped that raising his concerns

did not make him "look like a complainer" but noted that the compensation problems "are important issues." (A 9; 647.)

Halechko replied that he did not think that Chess was "a complainer[,] " and the points he raised were "valid and important to many of your peers." He asked Chess to "[p]lease elaborate on what other decisions being made are becoming dissatisfiers for the group." (A 9; 643) Halechko added, "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." (A 9; 648.)

On December 1, Citizens Bank took legal control of Mellon's retail banking operations. Regulatory complications, however, prevented the Company from taking full control of Dreyfus Investment Services' operations until May. (A 9; 354.)

#### C. Hayward and Other Senior Financial Consultants Complain About Shortages in their Paychecks

On January 1, 2002, the Company appointed David Hunter as the Regional Sales Manager of the west region, including Pittsburgh. Hunter initiated a practice of holding monthly meetings with the financial consultants. (A 9; 311.)

At the January monthly meeting, Hunter distributed a new compensation plan entitled, "Financial Advisor Incentive Plan Effective January 1, 2002." (A 9; 650-56.) The plan covered various compensation terms. From the view point of

the senior financial consultants, the plan seemed to "favor[] lower producers over higher producers." (A 9; 150.)

In subsequent monthly meetings throughout the winter of 2002, a number of the senior financial consultants complained about errors in their payments under the new compensation plan. For example, Hayward complained at almost every monthly meeting that he was being shortchanged on his commissions or the Company was late in paying him.<sup>2</sup> (A 9-10; 223, 364.)

In addition to his complaints in the monthly meetings, Hayward complained about the compensation problems directly to Senior Vice President Halechko. On April 17, he sent an e-mail to Halechko stating that he wanted to give Halechko some "feedback on the trail [payment] issue." Hayward told Halechko that the "financial consultants were all troubled this morning because of the fact that you didn't know how the trail should be derived" and that "those people who did receive a commission statement have found that it is a joke to see what they have down for [D]reyfus assets." Hayward concluded by advising Halechko "that the general consensus around here is that some things tend to just get swept under the rug. . . . [P]eople are starting to get upset, [I] just wanted to let you know." (A 11;

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<sup>2</sup> The Company paid financial consultants based not only on their current sales but on past sales that were under company management.

666.) Halechko responded by saying that he did not want things swept under the rug. (A 11; 666 .)

During the next several weeks, Hayward continued to voice his concerns regarding compensation issues. Specifically, he e-mailed Company President Toothaker, Manager David Hunter, Vice President and Finance Manager Andrew Kim and the office of human resources at the Company's Rhode Island headquarters about resolving his trail payments. (A 667-70.)

On May 13, the Company completed acquisition of Dreyfus's investment services accounts. On that same date, it issued "FY 2002 Commission Plan Financial Consultants—Mid-Atlantic," which set forth the method and procedures for calculating the compensation of the financial consultants. (A 12; 660-65.)

On the following day, Chess addressed another e-mail to Halechko and Hunter complaining that his trail payment for March 2002 was "grossly wrong." (A 12; 659.) Halechko took issue with some of Chess' assertions and referred Chess' complaints to Kim. Meanwhile, Hunter wrote an e-mail to Kim urging him to correct the problem because "THIS IS A HIGH PRIORITY ISSUE in the Pittsburgh Market." (A 12; 659.) Kim responded by rejecting Chess' calculations and asserting that the Company did not have access to the "Mellon systems." (A 12; 658.) At this point, 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." (A 12; 657.)

Halechko e-mailed Chess that he was "losing . . . patience with [his] tone when addressing" the compensation issues. He told Chess that if you are "not satisfied with my answer you are welcome to e-mail my direct supervisor, Barry Toothaker." (A 12; 657.) 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?" (A 12; 657.) Chess forwarded Halechko's e-mail to Hayward and the other financial consultants. (A 12; 680.)

In May, the Company held a quarterly dinner meeting at the Carnegie Science Center. Hayward sat with a group of senior financial consultants. When he saw Human Resources Group Manager Blyth, Hayward asked her to join the group. Blyth responded, "do you know how bad this looks in front of everybody here . . . sitting with the Senior Financial Consultant group . . . ." (A 12; 236.) Hayward told Blyth that the financial consultants had problems with commissions and other compensation issues. (A 12; 578.) Hayward asked Blyth if he could contact her again regarding these issues. Afterwards, Blyth told Hunter "you have some very unhappy FCs [financial consultants], you know, in how they're being

paid." (A 12; 578.) Hunter replied that management was handling the problem. (A 12; 578.)

When the Carnegie Center event ended, a group of employees gathered informally at a local restaurant across the street. On the way to that gathering, Hunter told Hayward that he would have to take his compensation issues to human resources. Hayward then told Hunter about a racist customer he had dealt with recently.<sup>3</sup> Hayward said he had sold the man a fixed annuity, and added "what better way to treat a jerk tha[n] to sell him a fixed annuity[.]" Hayward made this comment because he thought fixed annuities were bad investments. (A 13; 252.)

On May 28, Hayward sent another e-mail to Halechko containing estimates of the backpay he thought he was owed as a result of errors in calculating his commissions and the basis for calculating that backpay. (A 13; 670.)

D. The Company Investigates Declining Sales in the Western Region; the Financial Consultants Continue to Complain about Compensation Issues; Weeks after Hayward Identifies Himself As Union President the Company Discharges Hayward

At the end of the month, Halechko contacted Eric Hosie, the regional sales manager in a territory adjacent to the western region. Halechko appointed Hosie

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<sup>3</sup> At the request of Oakland branch manager Valerie Stevens, Hayward solicited and sold investments to a customer of the Oakland bank branch, who had refused to deal with her because she was African American. (A 11; 471.)

to replace Hunter as the manager of the western region and assigned him the task of investigating the causes of declining sales there. (A 313; 511.)

After his appointment, Hosie conducted a series of meetings with the individual financial consultants “to uncover why [the region] didn’t produce at a higher level.” (A 13; 512.) His goal was to either "fix or get rid of the problem." (A 13; 331.) Hosie interviewed the newer and less experienced financial consultants and concluded that they believed that the veteran financial consultants and bank managers did not value their skills or respect them and that the managers looked for opportunities to steer customers to the veteran consultants. (A 13; 522-24.)

Hosie also interviewed the experienced financial consultants, including Chess, Russo, and Hayward. Their complaints centered on the compensation issues. In his meeting with Chess, Hosie complained about Chess’ lack of production during May. Chess replied that he "just didn’t have the drive to produce" because of his frustration with compensation problems. (A13; 172.) Hosie warned Chess that he should “watch [his] e-mails, tone them down a little bit, you never know who is going to be reading them.” (A 13; 176.) Hosie also advised Chess that, “[y]ou’re either in the game or you’re out of the game[, and asked,] Where are you?” (A 13; 176.)

In his meeting with Russo, Hosie told Russo that it seemed like he did not want "to be here." (A 13; 327.) 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." (A 13; 327.) Hosie commented to Russo that Hayward was another financial consultant who was "complaining a lot." (A 13; 329.)

Hosie also interviewed Hayward. Hayward complained about the Company's failure to reconcile promptly his adjustment log, to correct errors compensation, including trail payments, and the Company's failure to promptly fix these problems or tell employees when they would be fixed. Hayward also raised the issue of the ownership of investment accounts. Hosie responded by telling Hayward that his concern about assignment of accounts to consultants made it sound that he was not a "team player." (A 13; 527.)

After Hayward gave his assessment, Hosie asked Hayward about reports that he had "poached" two customers from Oakland branch financial consultant, Gail Saunders. Hayward explained that he had been brought in by management to service one of Saunders' customers, because Saunders lacked the license required to recommend or sell an appropriate investment to the customer. He explained that, in the other instance, he was referred to the customer, because that customer

was racially biased and refused to deal with Saunders, an African American. (A 11; 529-34.)

Hayward also discussed a situation involving the New Kensington branch of Citizens' bank. In that instance, Hayward explained that 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 appropriate investments. Hosie told him that he should have held a joint meeting with the consultant assigned to that branch of the bank. 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." (A 14; 256.) He told Hosie that this situation did not involve a client referral by the bank, but only concerned the employees' personal business. (A 14; 257.)

Hayward became concerned about Hosie's inquiries and asked, "[A]m I in trouble here?" (A 14; 258.) Hosie told him he was not sure yet and "we'll see next week." (A 14; 258.) Hosie recorded his impressions of his interview with Hayward and, among other things, noted that Hayward's "[e]xpectations [were] too high[.]" and that Hayward had "[c]rossed from troubleshooter to maker—should help [junior financial consultants] not hurt them." (A 14; 714.)

On June 6, Hayward e-mailed Hunter to inform him about a conversation he had with Halechko concerning compensation issues and the promises Halechko had made to resolve the problem. Hayward asserted that, if Halechko kept his promises, he would “go on a month long vow of silence. ([i.e., offer] no constructive criticism).” Hayward closed his e-mail, self-identifying himself as "christopher s. hayward, union president, west." (A 14; 671.)

Two weeks later, Hosie and Halechko met to discuss the results of Hosie's investigation and how to proceed. Halechko proposed a conference call including himself, Hosie, Hunter, and human resources representative, Blyth, to discuss what action to take as a result of the investigation. On June 25, Halechko and the other managers held their conference call. In that conference, the Company decided to discharge Hayward and to dispense warnings and offer severance to Russo and Chess. They decided to impose lesser or no discipline on seven other employees that Hosie had identified for corrective action. The group decided to inform the affected employees individually on July 2. (A 14; 545.)

Halechko, Hosie, and Blyth met with Hayward on July 2. Halechko informed him that he was terminated. Hayward attempted to persuade the managers to retain him, but they were uninterested. He appealed to Blyth, pointing out that he had "never been put on corrective action . . . [or] talked to about doing anything inappropriate." (A 15; 262-63.) Hayward asked

Halechko and Hosie for an explanation of their decision to fire him. They told him that he "didn't fit in" and was not a "team player." (A 15; 284.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista, Members Liebman and Meisburg) violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Christopher Hayward because of his protected concerted activity of protesting the terms and payment of compensation. (A 7, 25.)

The Board's order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's order requires the Company to offer Hayward immediate and full reinstatement to his former position, to make him whole for any loss of earnings and benefits suffered as a result of the discrimination against him, to remove from its files any reference to his unlawful discharge, and to post an appropriate notice. (A 25.)

### SUMMARY OF ARGUMENT

## ARGUMENT

## SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING FINANCIAL CONSULTANT CHRISTOPHER HAYWARD BECAUSE OF HIS PROTECTED CONCERTED ACTIVITY OF PROTESTING COMPENSATION TERMS FOR FINANCIAL CONSULTANTS

## A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to engage in "concerted activities" not only for self-organization, but also "for the purpose of . . . mutual aid or protection . . . ." The broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must "speak for themselves as best they [can]." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

The right to engage in concerted activities is protected by Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Accordingly, an employer violates Section 8(a)(1) of the Act by discharging an employee for engaging in concerted activities protected by the Act. *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 263-64 (D.C. Cir. 1993).

Determining whether activity is concerted and protected within the meaning of Section 7 is a task that "implicates [the Board's] expertise in labor relations." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984). *Accord NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 577 (7th Cir. 1983) (Congress provided "that the Board is to determine in the first instance whether a specific activity is protected" by the Act). Thus, the Board's finding that an employee has engaged in protected concerted activity is entitled to considerable deference if it is reasonable. *City Disposal Systems, Inc.*, 465 U.S. at 829.

It is well settled that "[c]oncerted activity" encompasses activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.*, 281 NLRB 882, 885 (1986), *remanded sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Further, as the Board has explained, concerted activity "encompasses those circumstances where . . . individual employees [bring] . . . truly group complaints to the attention of management." *Id.* at 887. *Accord NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). For "[t]he law recognizes that employees have a legitimate interest in 'acting concertedly to make their views known to management without being discharged for that interest.'" *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1350 (3d Cir. 1969) (quoting *NLRB v. Phoenix Mut. Life Ins. Co.*, 164 F.2d 983, 988 (7th Cir. #).

Whether a discharge violates Section 8(a)(1) of the Act depends on the employer's motive. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the test for determining unlawful motivation first articulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981).

Under that test, a violation of the Act is established where the General Counsel has shown that an employer's opposition to protected activity was a motivating factor in the employer's decision to take adverse action against an employee, unless the employer is able to demonstrate, as an affirmative defense, that the same action would have been taken even in the absence of the protected conduct.

*Transportation Management Corp.*, 462 U.S. at 397, 401-03; *Southwire Co. v. NLRB*, 820 F.2d 453, 459 (D.C. Cir. 1987).

The question of an employer's motivation for discharging an employee is a question of fact to be decided by the Board in the first instance. *See Passaic Daily News v. NLRB*, 736 F.2d 1543, 1551-52 (D.C. Cir. 1984). The Board may rely on circumstantial as well as direct evidence in determining motive. *Id.* at 1552. The Board's disposition of that issue is entitled to acceptance by the reviewing court if supported by substantial evidence, "even though the court would justifiably have made a different choice de novo." *Universal Camera Co. v. NLRB*, 340 U.S. 474, 487-88 (1951). *Accord Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991).

Thus, the "Board is to be reversed only when the record is 'so compelling that no reasonable factfinder could fail to find' to the contrary." *Steelworkers Local 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992)). Finally, a reviewing court will not overturn the Board's resolution of conflicting testimony unless the Board's determinations are "hopelessly incredible" or "self-contradictory." *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988).

B. The Company Discharged Christopher Hayward Because of His Protected Concerted Activities

As shown in the Statement of Facts, Hayward was always among the top one or two producers in the six years he worked as a financial consultant for Dreyfus. Hayward continued to produce at those levels after he was recruited to work for the Company and in the six months of his employment with the Company. Moreover, in the six months of his employment with the Company, Hayward had an unblemished work record. Nonetheless, on July 2, the Company discharged Hayward. The Board found that the Company discharged Hayward because he engaged in the protected concerted activity of protesting the terms and conditions of compensation of the financial consultants. We show below that substantial evidence supports the Board's findings.

1. Hayward was engaged in protected concerted activity

Initially, the record firmly establishes that Hayward was engaged in protected concerted activity. Indeed, as shown above, he was an outspoken critic of the Company's handling of payments to the financial consultants. Thus, he was the first financial consultant to complain to Halechko that the financial consultants were being shortchanged on their commissions. When he did not receive satisfaction from Halechko, Hayward pressed his complaints with Company President Toothaker, vice president and finance manager Kim, and with the Company's office of human resources in Rhode Island. In addition, Hayward openly advocated for correction of the financial consultants' pay problems in the monthly meetings that manager Hunter held for the financial consultants. As the Board here recognized (A 16), such complaints regarding compensation are plainly protected. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978).

Moreover, given the background and context in which Hayward complained about the compensation problems, it is clear that Hayward was engaged in concerted activity and the Company knew that he was so acting. Indeed, by speaking out in the monthly meetings about the compensation issues Hayward was engaged in overt concerted activity in the presence of management. *See NLRB v. Talsol Corp.*, 155 F.3d 785, 791, 796-97 (6th Cir. 1998) (where employee speaks out in employer sponsored "group meeting" concerning working conditions, there

is no need to show prior authorization for employee's remarks or management knowledge that remarks reflect the sentiment of other employees ); *El Gran Combo*, 853 F.2d 996, 1003, 1005 (1st Cir. 1988) (concerted objective “can fairly be assumed” from an individual’s “continued complaints” at a group meeting); *Rockwell Int’l Corp. v. NLRB*, 814 F.2d 1530, 1534-35 (11th Cir. 1987) (same).

Moreover, the e-mails of Chess, Hayward, and even Halechko refer to the "group" nature of the employees' complaints. For example, Chess expressly informed Halechko that the veteran consultants felt "de-value[d]," and Halechko asked to be kept apprised of other "dissatisfiers for the group." (A 642-43.) Similarly, when the problems with underpayments persisted, Hayward informed Halechko that people are getting "upset" because the "general consensus" is that things "get swept under the rug[.]" (A 666.)

Finally, when Hayward raised the compensation issues with human resources manager Blyth at the Carnegie Center dinner meeting, he was also engaged in indisputably concerted activity. As the Board observed (A 17), in that public, group setting "Hayward invited a human resources manager to join them [the senior consultants] for a discussion of compensation issues." As shown, such actions constitute classic concerted activity. *See cases cited above, p. #.*

2. The Company discharged Hayward because of his protected concerted activity

Ample evidence also supports the Board's finding (A 18-20) that the Company's discharge of Hayward was unlawfully motivated. Factors supporting the Board's finding of unlawful motive include the Company's hostility toward financial consultant's protected activity, the timing of the Company's actions, the Company's disparate treatment of Hayward, its failure to follow its own disciplinary policy, and the pretextual nature of the Company's asserted reasons for discharging Hayward.

As the record shows, the Company exhibited increasing hostility as the senior financial consultants pressed their complaints about their terms and receipt of compensation. Thus, from the start of the Company's relationship with the financial consultants, Halechko conveyed his limited tolerance for such complaints, when he told Chess that he was prepared to hear his complaints about the draft compensation package so long as his they did not "piss [him] off." (A 648.) Thereafter, in May, Halechko reiterated this point in even stronger terms when he told Chess that he was "losing [his] patience with [Chess'] tone when addressing [the compensation] issues." <sup>4</sup> (A 657.) At the Carnegie dinner meeting

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<sup>4</sup> The Company contends (Br 40-41) that this and other evidence shows that Chess was the most outspoken financial consultant concerning the compensation issues

that same month, Blyth's uncomfortable reaction to Hayward's invitation to sit with the senior financial consultants confirms the extent of the Company's disaffection with the senior financial consultants and their compensation complaints. As the Board observed (A 18), Blyth's comment that "'this doesn't look good, me talking to you guys' . . . reflected her awareness that management considered the experienced consultants to be pariahs due to their complaints." (A 578.) Such animus toward the financial consultants' protected activity strongly supports the Board's finding that the Company was unlawfully motivated.

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and claims that, because it did not discharge Chess, it is a "non-sequitor" for the Board to conclude that it discharged Hayward for also complaining. That argument ignores the contrast between the mostly private e-mail communication that Chess conducted with Halechko and the openly concerted manner in which Hayward raised many of his concerns. As noted, it was Hayward who was consistently outspoken in the monthly employee meetings and, according to the uncontradicted testimony of Russo (A 314), was the most persuasive of those consultants who did speak out. Also, it was Hayward who openly solicited Blyth's support for the senior financial consultants at the Carnegie dinner meeting. And only Hayward, by declaring himself "union president," proclaimed his leading role in the effort to win senior consultants the compensation they thought they were due. In any event, the Board may reasonably infer that an employer's general animus toward protected concerted activity motivated its decision to discharge an outspoken activist, such as Hayward, even if other activists are not dealt with as harshly. See *NLRB v. Instrument Corp. of America*, 714 F.2d 324, 329-30 (4th Cir. 1983) (fact that employer promoted one union activist and retained other principal activists does not satisfy employer's burden of showing that it would have laid off other employees even absent their union activity); *NLRB v. Quick Find Co.*, 698 F.2d 355, 358-59 (8th Cir. 1983) (layoffs unlawful even though employer retained the two employees most responsible for bringing in the union).

Even more revealing of the Company's hostility toward the compensation complaints of the senior financial consultants are the comments made by Hosie in his June and July interviews with Chess, Russo, and Hayward. In the course of those interviews, Hosie clearly linked his problems with them to their complaints. Thus, Hosie warned Chess to “tone[] down” his e-mails regarding compensation problems. Similarly, Hosie told Russo that he was concerned about Russo’s future with the Company because of Russo’s complaining and singled out Hayward as another “complain[er]” with whom he had a problem. (A 329.) Thereafter, Hosie told Hayward that he was not a “team player” and noted that Hayward had “[c]rossed from trouble-shooter to maker.” Those statements further support the Board’s finding that the Company was unlawfully motivated.

Furthermore, as the Board found (A 19), Hunter virtually admitted that Hayward's complaints about compensation factored into his decision to recommend Hayward's discharge. Thus, Hunter testified that Hayward "did not exhibit any restraint or decorum in his criticism of the structure of the investment program, even to . . . peers[,] and to others, and to folks in management." Hunter explained that what he meant by that is that Hayward was "being overly demonstrative about his discontent in *meetings and in other settings where there were other people.*" (A 458) (Emphasis added.) As the Board noted (A 19), in his

testimony, Hunter "clearly draws the direct connection between Hayward concerted activity with his peers and the Company's animus against [Hayward]."

The Board's finding of unlawful motive is further supported by the discriminatory manner in which the Company dealt with Hayward as compared to other complainers. In particular, no other complainer, such as Chess and Russo, was discharged, as was Hayward, even though there was no substantial difference in the nature of the employees' complaints.

For example, Chess, like Hayward, was critical of management as well as the terms of the Company's proposal to split commissions between junior and senior financial consultants. Thus, Chess complained that the Company's hiring practices seemed to "de-value" the work of the senior financial consultants and that the Company's draft proposal contained nothing "to reward [the veterans] for being, well, veterans." (A 642.) Chess also complained about management, specifically, about being shortchanged on his commissions and the Company's failure to resolve the problem even after he supplied it with the necessary information to do so.

Russo was also an outspoken critic of the Company's compensation practices. Like Hayward, he spoke out at the monthly meetings about the errors in his commission checks. (A #.) But, notwithstanding, the similarity between Chess' and Russo's conduct and Hayward's actions, Chess and Russo were given a

final warning, while Hayward was discharged. This disparate treatment of Hayward further bolsters the Board's finding of unlawful motive. *See Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (disparate treatment of prominent union supporter constitutes powerful evidence of unlawful motive); *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 264-65 (D.C. Cir. 1993) (same).

Moreover, the Company's explanation for not considering Hayward for corrective action does not withstand scrutiny. Thus, the Company suggests that Hayward was not a candidate for corrective action because he already had been repeatedly warned by Hunter and had failed to modify his conduct. However, even if the Board had believed that Hunter had warned Hayward previously, which it did not (A 12 n.37), that would not have justified Hayward's discharge by the terms of the corrective action plan set out in the employee handbook. Rather, the handbook provides that "[s]hould discussions with an employee fail to result in a positive outcome, a written Performance Improvement Plan (PIP) should be developed by the manager." (A 689.) As the Board noted (A 20-21), the Company's failure to provide a persuasive explanation for not following the handbook is an additional reason for not believing the Company's explanation for

Hayward's discharge.<sup>5</sup> *See SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 991 (7th Cir. 2004) (the employer's failure to use progressive disciplinary system in discriminatee's case supported inference of unlawful motive); *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1321 (11th Cir. 1999) (same).

Finally, the timing of Hayward's discharge further supports the Board's findings. Indeed, the Company discharged him just two weeks after he identified himself as "union president west."<sup>6</sup> *See Tasty Baking Co. v. NLRB*, 254 F. 3d 114, 125-26 (D.C. Cir. 2001) (and cases cited therein).

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<sup>5</sup> The Company also suggests (Br 45-46) that Hayward was not given corrective action because he was a vice-presidential level employee subject to a higher standard. The Company's argument is meritless. There is no evidence, other than counsel and Halechko's bald assertions, that Hayward was a vice president, or that he was a member of management and not subject to the handbook. Indeed, Chess, who in his e-mail correspondence with Halechko, occasionally referred to himself as a vice president of investments, although while employed by Dreyfus, received the benefit of the handbook.

<sup>6</sup> The Company notes (Br 39-40) that there is no evidence that anyone other than Hunter saw the e-mail in which Hayward declares himself to be "union president, west" and argues, therefore, that the e-mail could not have factored into its decision to discharge Hayward. The Company's argument is without merit because it dismisses Hunter's participation in the conference that decided upon Hayward's discharge and his recommendation that Hayward be discharged based, at least in part, on Hayward's complaints about the compensation issues.

C. The Company Did Not Show that It Would Have Discharged Hayward Even Absent His Protected Concerted Activity

The Company alleges that it would have discharged Hayward, even absent his protected concerted activity, because he solicited two customers from financial consultant Saunders' territory and because he was not a team player. The Board found (A 22-25) that these explanations for the Company's discharge of Hayward were not credible. *See Teamsters Local 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988) (credibility resolutions are within the province of the Board and must be sustained unless they are "hopelessly incredible or self-contradictory"). *Accord Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). Rather, as shown below, those explanations appear to constitute excuses rather than reasons for Hayward's discharge and only further support the Board's finding of unlawful motive. *See Justak Bros. and Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (The Board is under no obligation to accept at face value the explanation advanced by the employer "if there is a reasonable basis for believing it furnished the excuse rather than the reason for [its] retaliatory action.") .

It is undisputed that Hayward solicited and sold products to two customers nominally assigned to Saunders. However, the Board found that, in each case, Oakland branch bank management requested Hayward's assistance in making sales that Saunders' appeared unable to make.

In one case, the customer was an elderly lady, who had special investment requirements because of her age. Saunders had recommended to the customer an investment product that the customer was unqualified for because of her age. After she failed to make the sale, bank management decided that Saunders was too inexperienced and lacked the necessary licenses to handle the customer's needs. At that point, Regional Manager for the Oakland bank, Jeannine Fallon, who once worked with Hayward, called upon him to contact the customer. Hayward agreed to do so after obtaining assurances from Fallon that she would have the contact approved by Hunter and after Hayward had spoken to Hunter and obtained his authorization. (A 10-11, 22; 243-50.) Ultimately, Hayward made a sale to the customer and received his usual commission. Afterwards, Hunter told Hayward that his making the sale to the customer was "no big deal." (A 291.)

Considering this evidence, the Board reasonably found that this incident played no part in Hayward's discharge. After all, Hayward had acted at the direct request of bank management and obtained the approval of Hunter for the contact.<sup>7</sup>

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<sup>7</sup> Significantly, the Company did not call manager Fallon or Stevens (see below) as a witness to rebut Hayward's testimony concerning the bank's initiating the requests for Hayward's assistance. Instead, and incredibly, the Company argues (Br 54) that "[t]he significance of these transactions is not dependent on resolution of the factual nuances of who called who[m] first." But that assertion only establishes, as the Board found (A 23), that the Company did not regard Hayward's contacts with the customers as transgressions of company policies.

Although the Company knew of this incident at the time, it took no action against Hayward nor any bank personnel. Instead, it paid Hayward his regular commission on the sale and Hunter told Hayward that the incident was "no big deal."

For similar reasons, the Board found (A 23) that the Company did not base its termination of Hayward on his sale of products to another of Saunders' customers. Thus, bank management knew that customer was biased and refused to do business with Saunders because of her African American ethnicity. Although Saunders spoke to the customer, she could not get the customer to meet with her to transact business. At that point bank manager Stevens, herself African American, intervened and requested Hayward's help in making the sale. According to the credited testimony of Hayward, he then contacted another financial consultant, who had conducted business with the customer, obtained his permission and made the sale. Again, Hayward received his regular commission for the sale without receiving, at the time, any admonishment for the contact. Nor was any bank personnel ever disciplined for seeing that this customer was serviced, despite his offensive biases. (A 11-12, 23; 250-52.) Under the circumstances, the Board was warranted in finding that Hayward's service to this customer did not form part of the basis for his discharge.

There is similarly no merit to the Company's claim (Br 54) that Hayward was discharged because he was not a team player. For this argument, the Company alleges that, upon taking over Mellon and Dreyfus, it put in place a new operating plan that put an emphasis on the banking side of the operation rather than the brokerage side, as Mellon/Dreyfus formerly had operated the businesses. Citing the sales to Saunders' customers, the Company contends (Br 54) that Hayward showed he was unable to adapt to this new emphasis on the bank's leading role. The Board reasonably found this argument to be meritless.

The Board found (A 24), "[t]here was no evidence that Hayward had any problems with [bank] 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." As shown, this was the precise role that Hayward played in going to the aid of Oakland branch management to retain the business of two of Saunders' customers. Thus, as the Board observed (A 24 & 24 n.51), while Hayward's "acceptance of difficult cases [from other financial consultants] hardly seems profitable" for him in light of his consistently high sales, it does "speak[] highly of his desire to foster teamwork with the bank's officers."

Likewise, there is no merit to the Company's claim (Br 54-57) that Hayward's criticism of junior financial consultants played a part in the discharge

decision. As the Board noted (A 13 & 13 n.21), many of the senior financial consultants, not just Hayward, expressed the same criticism of the junior financial consultants. Moreover, the junior financial consultants, whom Hosie interviewed, lodged their complaints about not being respected against the senior financial consultants as a group, not against Hayward, individually. Further, even financial consultant Saunders did not blame Hayward for losing those sales. Rather, she blamed the bank's management. (A 24; 471) In these circumstances, the Board reasonably rejected the Company's claim (Br 55) that Hayward was responsible for undermining Saunders' "credibility and relationship-building efforts."<sup>8</sup>

The cases cited by the Company (Br 21-22) do not support its position that it lawfully fired Hayward. In those cases, unlike here, the employees engaged in unprotected conduct. Here, as the Board found (A 17 n.32), there is no claim and the record does not support a finding that Hayward engaged in any unprotected conduct. The cases cited by the Company are thus inapposite.

For example, in *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d

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<sup>8</sup> The Company's reliance (Br 54) on Hayward's criticism of financial consultant Kennedy is also misplaced. Hayward, who recommended Kennedy's hiring, did not have a problem with Kennedy's qualifications but with Kennedy selling to customers that Hayward thought belonged to him. (A 13; 259.)

1095, 1105 (D.C. Cir. 2001) (the Court found that the activity that the employee engaged in--sending a letter in which he stated his refusal to work with his supervisor--was unprotected); *Alldata Corp. v. NLRB*, 245 F.3d 803, 808-09 (D.C. Cir. 2001) (employee's conduct unprotected where he sought to undercut competing sales by the employer's business partner); *Carleton College v. NLRB*, 230 F.3d 1075, 1077 (8th Cir. 2000) (professor's conduct unprotected where he disparaged department to students and threatened to withhold grades of students to challenge the college); *St. Luke's Episocopal-Presbyterian Hospitals Inc. v. NLRB*, 268 F.3d 575, 582 (8th Cir. 2001) (employee's conduct unprotected where she publicly disparaged the quality of the hospital's care in a television interview).

Plainly, as the Board reasonably concluded (A 25), the Company "did not rely on any of these [asserted] reasons in discharging [Hayward]. 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." *See, for example, Power, Inc. v. NLRB*, 40 F.3d 409, 419 n.6 (D.C. Cir. 1994) (proffer of false explanation permits the Board to infer unlawful motive); *Property Resources Corp. v. NLRB*, 863 F.2d 964, 964 (D.C. Cir. 1988) (same); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d, 470 (9th Cir. 1966) (same)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's order in full.

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