

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 00-1332

EPILEPSY FOUNDATION OF NORTHEAST OHIO

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of the Epilepsy Foundation of Northeast Ohio ("the Foundation") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a final order of the Board. The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)) ("the Act"). The

Board's order is a final order with respect to all parties under Section 10(f) of the Act (29 U.S.C. § 160(f)). 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)), which provides that petitions for review of Board orders may be filed in this Court.

The Board's Decision and Order issued on July 10, 2000, and is reported at 331 NLRB No. 92 (D&O 1-32).¹ The Foundation filed its petition for review on July 27. The Board filed its cross-application for enforcement on September 18. The petition and cross-application were timely filed; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary affirmance of its findings that the Foundation violated Section 8(a)(1) of the Act by interrogating, threatening, and reprimanding employee Arnis Borgs because of his protected concerted activity, and by promulgating a rule prohibiting employees from discussing wage information with other employees.

¹ "JA" references are to Joint Appendix filed by the Foundation. "SJA" references are to the Supplemental Joint Appendix, also filed by the Foundation. "Br" references are to the Foundation's opening brief. "ABr" references are to the brief of the amici curiae. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that the Foundation violated Section 8(a)(1) of the Act by discharging employee Borgs, and by reprimanding and discharging employee Ashraful Hasan, because of their protected activity.

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provisions that were not included in the addendum to the Foundation's brief are included in the addendum attached to this brief.

STATEMENT OF THE CASE

Acting on charges filed by Arnis Borgs and Ashraful Hasan, the Board's General Counsel issued a consolidated complaint on November 14, 1996, alleging that the Foundation violated Section 8(a)(1) of the Act by interrogating, threatening, reprimanding, and discharging employee Borgs because of his protected activity, by reprimanding and discharging employee Hasan because of his protected activity, and by promulgating a rule prohibiting employees from discussing wage information with other employees. Following a hearing, the administrative law judge issued his decision and recommended order, finding that the Foundation violated the Act by interrogating, threatening, and reprimanding Borgs, and by promulgating an unlawful rule. The judge dismissed the allegations that the Foundation unlawfully discharged Borgs, and unlawfully reprimanded and discharged Hasan. After the General Counsel filed timely exceptions to the judge's findings and conclusions regarding the

discharges, the Board issued its Decision and Order, affirming most of the judge's findings of fact and conclusions, but reversing his dismissal of allegations relating to the discharge of Borgs, and the reprimand and discharge of Hasan. (JA 305-11.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Foundation Receives a Grant To Conduct a Research Project

The Foundation provides services to persons throughout Northeastern Ohio affected by epilepsy. (JA 305, 328; 91-92.) It is an affiliate of the Epilepsy Foundation of America ("EFA") and participates in EFA-sponsored programs. (JA 328; 92.) In 1993, the National Institute of Disability and Rehabilitation Research ("NIDRR") awarded EFA a grant to conduct a research project involving school-to-work transition for teenagers with epilepsy. (JA 305, 328; 93-94.) The EFA selected the Foundation to conduct the project. (JA 328; 93-94.) The Foundation was responsible for hiring, supervising, and evaluating the staff needed to conduct the project. (JA 328; 95.)

The Foundation began work on the project in October 1993. (JA 328; 93.) Foundation Executive Director, Christine Loehrke, oversaw the project. (JA 305, 329; 90.) Rick Berger, the Foundation's Director of Vocational Services, was the on-site supervisor of the project. (JA 305, 329; 18-19, 103, 113-14.) The Foundation hired

Borgs and Hasan to work on the project as a transition assistant and a transition specialist, respectively. (JA 305, 329; 44-45, 52-54, 101, 156-57.) Berger directly supervised Borgs' and Hasan's work on the project. (JA 305, 329; 17, 55.)

**B. Hasan Protests the Placement of Warnings
in his and Borgs' Personnel File**

In June 1995, Hasan and Borgs had a disagreement with Berger regarding the hiring of an interpreter for a participant in the project. (JA 309, 331; 58-60, 187-90.) Hasan, Borgs, and Berger eventually resolved the problem, and Berger assured them that it had been a misunderstanding and that he would not put anything negative in their personnel files. (JA 309, 331; 58, 87-88, 202-03.) Shortly thereafter, Berger drafted a memorandum, dated June 7, stating that Hasan and Borgs had been given a verbal warning as a result of the incident. (JA 309, 331; 234-36.) Berger placed copies of the memo in Hasan's and Borgs' personnel files. (JA 309, 331, 120-21.)

In October 1995, Hasan reviewed his personnel file and discovered the June 7 memo. (JA 309, 331; 58, 120-21.) In response, Hasan wrote a letter to Berger, which he copied to Borgs and Loehrke, challenging the written warning and demanding an explanation. (JA 309, 331; 56-57, 122-23, 220-21.) Loehrke assisted Berger in drafting a response to Hasan, informing Hasan that Berger considered his letter to be insubordinate. (JA 309, 331; 122-27, 174-76, 173, 222.)

C. The Foundation Interrogates, Threatens, and Disciplines Borgs Because He Discussed Salary Information

In late fall 1995, Borgs engaged other employees in discussions about their wages. Some employees shared with Borgs the amount of their salary, while others did not. (JA 329; 22-25.) On December 28, Loehrke called Borgs into a meeting with Berger and her. (JA 305 n.5, 329; 25-26, 159.) At the meeting, Loehrke and Berger repeatedly asked Borgs if he had been discussing salaries with other employees and where he had gotten salary information. (JA 305 n.5, 329; 26-27.) After interrogating him, Berger told Borgs that he was being given "a warning" not to discuss salaries again. (JA 329; 27-28, 158.) Loehrke then told him that the Foundation had a policy against salary disclosure, and that he should not be getting or disclosing such information. (JA 329; 27-28, 159-60.) Loehrke informed him that he was being given a verbal warning. (JA 329; 27-28.) On January 3, 1996, Loehrke had Berger give Borgs a written warning notice for unauthorized access to and dissemination of confidential salary information. (JA 329; 28-29, 161, 204-05.) When Borgs failed to return a signed copy of the notice quickly enough, Loehrke had Berger give Borgs a second warning notice. (JA 329, 30-32, 161-66, 206-07.)

D. Borgs and Hasan Draft Two Memoranda Critical of Supervisor Berger; Loehrke Demands that Borgs and Hasan Individually Meet with Berger and Her; Borgs Requests Hasan's Presence at the Meeting; the Foundation Discharges Borgs

Throughout their work on the NIDRR project, Borgs and Hasan experienced problems with Berger, their supervisor on the project. For example, Berger acted in an unprofessional manner towards them and others, and failed to carry out tasks relating to program outreach. (JA 332; 34-37.) They also had difficulty completing certain aspects of the project because, in their view, the staffing of the project was "top heavy"--that is, there were too many supervisors, and too few clericals, working on the project. (JA 332; 62-64.)

In response to these problems, on January 17, 1996, Borgs and Hasan drafted a memorandum to Berger. (JA 305, 309, 332; 34, 61-62.) The memorandum stated:

Mr. Jim Troxell and Dr. Bob Fraser have continued to provide supervisory input to service delivery and the research component of the study. During the past several months, Ms. Christine Loehrke has also provided input and assistance to the NIDRR School-to-Work Project.

As mentioned during previous discussions (albeit brief) with you, both Dr. Ashraful Hasan and Mr. Arnis Borgs reiterate that your supervision of the program operations performed by them is not required.

Your input to the NIDRR project in the past is appreciated. At this stage, the major area which has to be addressed - deals with outreach. *Only* support staff assistance is needed in this regard.

(JA 208.) Borgs and Hasan submitted the memorandum to Berger, with a copy to Executive Director Loehrke. (JA 305, 332; 37, 63, 90.)

Thereafter, Borgs and Hasan learned that Berger and Loehrke were angry about the memorandum. (JA 305, 332; 38-39, 51.) In response to that negative reception, on January 29, Borgs and Hasan prepared a more comprehensive memorandum, addressed to Loehrke, which elaborated on their assertion in the first memorandum that Berger's supervision was no longer needed. (JA 305, 332; 38-39, 51, 64-65, 209-18.) Specifically, the memorandum was critical of Berger's involvement in the program, and cited several examples of incidents where, in their view, Berger had exercised poor judgment and acted inappropriately and unprofessionally. (JA 305, 332; 209-18.) The memorandum also detailed other problems with Berger's supervision that Borgs and Hasan felt were undermining the project. (JA 332; 38-39, 51, 64-65, 209-18.)

On February 1, Berger came into Hasan's office, while Borgs and Hasan were in a meeting, and informed them that Loehrke wanted each of them to meet, individually, with Berger and her. (JA 332; 40, 49.) Hasan responded that he and Borgs were in a meeting, and could not meet at that moment. (JA 332; 40.)

A short time later, Loehrke came in and informed them that they had to meet with Berger and her. (JA 332; 40, 49-50, 167.) Loehrke then directed Borgs to meet with them. (JA 332; 40, 49-50, 167.) Borgs told Loehrke that, because of the

interrogation, threats, and reprimanding that occurred at the December 28 meeting with Berger and her about wage information, he felt intimidated by the prospect of meeting with them together. (JA 305, 332; 40-42, 49-50, 167.) Borgs asked if he could meet with Loehrke alone. Loehrke said that that was not an option. (JA 305, 332; 41, 49-50, 167.) Borgs then asked if Hasan could be present with him at the meeting, but Loehrke refused this request. (JA 305, 332; 41-42, 49-50, 167.) When Borgs continued to express opposition to meeting alone with Loehrke and Berger, Loehrke told him to go home for the day and to report back the next morning. (JA 305, 332; 42-43, 167.)

After initially refusing, Hasan agreed to meet with Loehrke and Berger. (JA 332; 66, 129; 271-72.) At this meeting, Loehrke expressed her displeasure with the memoranda about Berger. (JA 309, 332; 66-67, 130-31, 273-76.) Hasan told her that the memoranda were "needs assessments," intended to identify problems in the project and to propose ways to revitalize the program. (JA 309, 332; 67, 130.) Loehrke then gave Hasan a written warning stating that the January 17 memorandum constituted insubordination, and that any further act of insubordination or misconduct by Hasan would result in his immediate discharge. (JA 309, 332; 68, 132-34, 226-27, 273-76.)

When Borgs returned to work on February 2, he met with Loehrke and the Foundation's director of administration. (JA 309, 332; 42-43.) Loehrke told Borgs

that his refusal to meet the previous day constituted gross insubordination and that he was terminated. (JA 305-06, 332; 43, SJA 341.)

E. The Foundation Discharges Hasan

On approximately March 6, Berger gave Hasan a copy of his performance evaluation. (JA 309; 69, 138, 237- 48.) Hasan did not sign off on the evaluation, but instead told Berger that he would be adding some comments, as he had done on previous evaluations. (JA 309; 78-80, 82, 182.) About a week later, Berger presented Hasan with written performance goals. As with the evaluation, Hasan wanted to add some comments and, therefore, did not sign off on the document upon receiving it. (JA 309; 72-74, 144-45.) Subsequently, Berger reminded Hasan to sign the documents. (JA 73-74, 148-49.) Again, Hasan requested the opportunity to write comments on them. (JA 73-74, 148-49.)

On March 25, Berger informed Loehrke that Hasan still had not signed the documents. (JA 148-49.) Loehrke, having decided that this was the "final straw[,]," called Hasan to her office, at which time she informed Hasan that he was being terminated. (JA 309, 332; 74-75, 149.) On March 29, Hasan received a letter of termination which stated that "over the course of the past nine (9) months, the [Foundation] has brought to your attention concerns about your conduct," including, your "refusal to accept [Foundation] supervision of your work on the NIDRR project." (JA 309, 332; 75-76, 228.) The letter concluded by informing him that his "continued

work in the NIDRR project would not be in the [Foundation's] best interests[,] and, therefore, that he was terminated. (JA 309, 332, 228.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Truesdale and Members Fox, Liebman, Hurtgen and Brame), in agreement with the administrative law judge, found that the Foundation violated Section 8(a)(1) of the Act by interrogating, threatening, and reprimanding Borgs because of his protected activity. (JA 305 n.5.) The Board also found, in agreement with the judge, that the Foundation violated Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from discussing wage information with other employees. (JA 309 n.13.) Further, the Board (Chairman Truesdale and Members Fox and Liebman, Members Hurtgen and Brame dissenting), reversing the administrative law judge, found that the Foundation violated Section 8(a)(1) of the Act by discharging Borgs, and reprimanding and discharging Hasan, because of their protected activity. (JA 305-09.)

The Board's order requires the Foundation to cease and desist from the unlawful conduct found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's order requires the Foundation to rescind its policy prohibiting employees from discussing wages with other employees, to remove from its files any reference to the unlawful reprimands given to Borgs and Hasan, to offer Borgs and Hasan full

reinstatement, and to make them whole for any loss of earnings and other benefits they suffered as a result of the unlawful actions taken against them. In addition, the order requires that the Foundation post a remedial notice. (JA 311-12.)

SUMMARY OF ARGUMENT

The Foundation does not contest the Board's findings that it violated Section 8(a)(1) of the Act by interrogating, threatening, and reprimanding employee Borgs because of his protected activity, and by promulgating a rule prohibiting employees from discussing wage information with each other. Therefore, the Board is entitled to summary enforcement of that portion of its order.

The Board also found that the Foundation violated Section 8(a)(1) of the Act by discharging Borgs because he insisted on having Hasan present at an investigatory interview with Loehrke and Berger. In making this finding, the Board applied to a nonunion workplace the holding in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975), that under Section 7 of the Act, which protects employees' right to engage in "concerted activities for . . . mutual aid and protection," employees have the right to the presence of a representative at an investigatory interview. Because the Board's interpretation of Section 7, as according these rights to nonunion employees, is a permissible interpretation of the Act, it is entitled to enforcement, even where, as here, the Board overruled its own precedent.

Borgs' conduct easily falls within the Board's definition of "concerted activity" because it is activity looking toward group action--that is, he and Hasan together confronting management at the interview. Likewise, it is for "mutual aid and protection" because Hasan, by voluntarily representing Borgs, would have established a pattern of mutual assistance among coworkers. Moreover, the Board's interpretation furthers the Act's policy of eliminating inequality of bargaining power between employees and employers.

Further, because an employer is not required to bargain with a *Weingarten* representative, the Board's interpretation does not conflict with the Act's Section 9(a) exclusivity principle, which only applies to collective bargaining. Likewise, concerns that the exercise of this right will interfere with an employer's ability to conduct internal investigations do not require a different result. Rather, cases applying the right in the union context demonstrate that the Board carefully safeguards employer prerogatives in conducting investigations.

In addition, the Board properly applied its new interpretation retroactively. Indeed, doing so causes no manifest injustice because the Foundation's claim that it relied on the current state of Board law is belied by the record and by its commission of numerous uncontested violations.

Finally, ample evidence supports the Board's finding that the Foundation violated Section 8(a)(1) of the Act by reprimanding and discharging employee Hasan

because of his protected concerted activity. Hasan's and Borgs' writing of two memos criticizing their direct supervisor, and seeking his removal, is protected activity under settled Board and court precedent. The Foundation's claim that it fired Hasan because he refused to sign his performance evaluation and objectives is undermined by the record evidence, such as the termination letter, which makes no mention of that purported reason.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY AFFIRMANCE OF ITS UNCONTESTED FINDINGS THAT THE FOUNDATION VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING, THREATENING, AND REPRIMANDING EMPLOYEE BORGS BECAUSE OF HIS PROTECTED CONCERTED ACTIVITY, AND BY PROMULGATING A RULE PROHIBITING EMPLOYEES FROM DISCUSSING WAGE INFORMATION WITH OTHER EMPLOYEES

Neither in its exceptions to the administrative law judge's decision, nor its opening brief to this Court, does the Foundation contest the Board's findings that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by interrogating, threatening, and reprimanding employee Borgs because of his protected concerted activity--that being, discussing wage information with other employees--and by promulgating a rule prohibiting employees from discussing wage information with other employees. By not contesting those violations, the Foundation has waived its right to do so, thereby entitling the Board to summary enforcement of the portions of

its order remedying those violations. *See Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982) (under Section 10(e), "the Court of Appeals lacks jurisdiction to review objections that were not raised before the Board"); *International Union of Petroleum & Indust. Workers v. NLRB*, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990). Those violations, however, "do not disappear" by being uncontested; they remain in the case, "lending their aroma to the context in which the [contested] issues are considered." *United States Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir. 1991) (*en banc*) (quoting *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982)), *cert. denied*, 503 U.S. 936 (1992).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE FOUNDATION VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEE BORGS, AND REPRIMANDING AND DISCHARGING EMPLOYEE HASAN, BECAUSE THEY ENGAGED IN PROTECTED CONCERTED ACTIVITY

Section 7 of the Act (29 U.S.C. § 157) protects the right of individual employees "to engage in . . . concerted activities for . . . mutual aid and 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, 12-13, 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 [S]ection 7." Accordingly, an employer violates Section 8(a)(1) of the Act by taking adverse action against an employee for engaging in concerted activity protected by the Act. *Washington Aluminum*, 370 U.S. at 12-13, 17; *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 263-64 (D.C. Cir. 1993). As shown below, ample evidence supports the Board's finding that the Foundation violated Section 8(a)(1) by discharging employee Borgs, and reprimanding and discharging employee Hasan, because of their protected concerted activity.

A. The Foundation Violated Section 8(a)(1) of the Act by Discharging Borgs Because He Insisted On a Coworker's Presence at an Investigatory Interview

1. Introduction and standard of review

The Board found that the Foundation violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Borgs for insisting on the right to have Hasan present at an interview where he reasonably believed discipline might be imposed. The Board's finding is based on its interpretation of Section 7 of the Act (29 U.S.C. § 157) as protecting an employee's right to the presence of a representative at such employer interviews, whether or not the employee is represented by a union. The Foundation does not dispute that it discharged Borgs because of his insistence on

having Hasan at the interview. Therefore, if the Board's interpretation of Section 7 as protecting Borgs' right to have such a representative present is enforced, its finding of a Section 8(a)(1) violation by the Foundation for discharging Borgs is also entitled to enforcement.

The Board's interpretation of Section 7 of the Act is entitled to affirmance if it is a "permissible construction" of the Act. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) ("*Weingarten*"). *Accord Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("*Chevron*") (where Act is "silent or ambiguous" on the issue, the Board's interpretation of Act is entitled to affirmance if "based on a permissible construction of [Act]"). Consistent with "the principle of deference," a reviewing court must uphold the Board's reasonable construction of the Act even if that construction was not "the only one [the Board] permissibly could have adopted[,]" and even if it was not the one "the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11, 844.

Moreover, the Board is charged with the "special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Where, as here, in performing its function, the Board "engages in the 'difficult and delicate responsibility' of reconciling

conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'" *Weingarten*, 420 U.S. at 267 (citations omitted).

2. The *Weingarten* right and the Board's application of the right in the nonunion workplace

a. The *Weingarten* right

In *Weingarten*, the Supreme Court upheld the Board's interpretation of the Act as creating a statutory right in an employee to refuse to submit, without union representation, to an investigatory interview that might result in disciplinary action. 420 U.S. at 260-67. In upholding the Board, the Court noted five "contours and limits of the statutory right." *Id.* at 256-59. First, the right "inheres in [Section] 7's guarantee of the right of employees to act in concert for mutual aid and protection." *Id.* at 256 (relying on *Mobil Oil Corp.*, 196 NLRB 1052, 1052 (1972), *enforcement denied*, 482 F.2d 842 (7th Cir. 1973)). Second, the right "arises only in situations where the employee requests representation," and an employee may voluntarily participate in the interview unassisted. *Id.* at 257. Third, the right is limited to situations where the employee "reasonably believes the investigation will result in disciplinary action." *Id.* Fourth, "exercise of the right may not interfere with legitimate employer prerogatives." *Id.* at 258. Accordingly, an employer is free both to inform an employee that no interview will be held unless he appears unaccompanied, and to conduct an investigation without an interview and act on

whatever information is obtained. *Id.* at 258-59. Fifth, "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview." Thus, although the "representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them[,] [t]he employer is . . . free to insist that he is only interested . . . in hearing the employee's own account of the matter under investigation." *Id.* at 259-60.

Moreover, the Court made clear that the right as defined by the Board was a "permissible construction of 'concerted activities for . . . mutual aid and protection.'" *Id.* at 260. In addition, it explained that the action of the employee in seeking such assistance clearly falls within the literal wording of that statutory phrase "even though the employee alone may have an immediate stake in the outcome because 'he seeks aid or protection' against a perceived threat to his employment security." *Id.* at 260. Furthermore, the Court held that the Board's rule was appropriate because it furthers the Act's stated purpose of "eliminat[ing] the 'inequality of bargaining power between employees . . . and employers.'" *Id.* at 261-62 (quoting Section 1 of the Act). As the Court explained, "[r]equiring a lone employee to attend an investigatory interview . . . perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *Id.* at 262 (quoting *American Ship Building Co. v.*

NLRB, 380 U.S. 300, 316 (1965)). Finally, Justice Powell, joined by Justice Stewart, stated, without drawing any rebuttal from the Court's majority, that "it must be assumed that the Section 7 right today recognized . . . also exists in the absence of a recognized union." *Id.* at 270 n.1 (dissent) (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)).

b. The Board applies *Weingarten* to the nonunion workplace

The Board first directly addressed the applicability of the right upheld in *Weingarten* to the nonunion setting in *Materials Research Corp.*, 262 NLRB 1010 (1982).² There, the Board found that nonunion employees enjoy a similar right to have a representative present at an investigatory interview. Specifically, the Board explained that the rule applied to unorganized employees because the Supreme Court in *Weingarten* had "emphasized that the right to representation is derived from the Section 7 protection afforded to concerted activity for mutual aid and protection, not from a union's right pursuant to Section 9 to act as an employee's exclusive

² Prior to *Materials Research*, the Board and two appellate courts had found that the right applied where employees had voted for unionization, but the union was not yet certified or was certified but the employer had refused to bargain in good faith with it. See *Glomac Plastics, Inc.*, 234 NLRB 1309, 1311 (1978), *remanded on other grounds*, 592 F.2d 94 (2d Cir. 1978); *Anchortank, Inc.*, 239 NLRB 430, 430-31 (1978), *enforced in part*, 618 F.2d 153 (5th Cir. 1980); *NLRB v. Columbia Univ.*, 541 F.2d 922, 931 n.5 (2d Cir. 1976); *Good Samaritan Nursing Home, Inc.*, 250 NLRB 207, 209 (1980).

representative for the purpose of collective bargaining." *Id.* at 1012. The Board emphasized that an employee's request for the assistance of a coworker, like the request for the assistance of a union representative in *Weingarten*, is "concerted activity--in its most basic and obvious form--since employees are seeking to act together . . . for mutual aid and protection." *Id.* at 1015. Thus, the Board concluded that its interpretation was compelled by the Act. *Id.* at 1014.

c. The Board reverses *Materials Research*

Several years later, in *Sears, Roebuck & Co.*, the Board overruled *Materials Research*, and found that the *Weingarten* right applies only to unionized employees. 274 NLRB 230, 232-33 (1985). The Board rejected the reliance in *Materials Research* on *Weingarten* as being based solely on its interpretation of Section 7, and found instead that *Weingarten* was based also on Section 9 of the Act, which prevents employers from dealing with union-represented employees on an individual basis. *Id.* at 230-31. The Board found that, in a nonunion setting, the "converse" of Section 9 applies--that is, that a nonunion employer "is entirely free to deal with its employees on an individual . . . basis." *Id.* at 231. Thus, the Board found that the Act compelled the conclusion that nonunion employees have no *Weingarten* rights. *Id.*

d. The Board reverses *Sears* and finds that applying *Weingarten* in a nonunion setting is a permissible interpretation of the Act

In *E.I. DuPont De Nemours & Co.*, 289 NLRB 627 (1988) ("*DuPont*"), *enforced*, 876 F.2d 11 (3d Cir. 1989), the Board disavowed its holding in *Sears* that the Act *compels* the finding that *Weingarten* applies only in union settings. The *DuPont* Board acknowledged that the Board's interpretation of the Act in *Materials Research* "represent[s] a permissible construction of the Act, but not the only permissible construction." *DuPont*, 289 NLRB at 628. The Board, however, declined to return to the *Materials Research* rule, and instead found that limiting the *Weingarten* right to employees in unionized workplaces "best effectuate[s] the purpose of the Act." *Id.* at 630-31.

3. The Board's return here to the *Materials Research* rule is a permissible interpretation of the Act

The Board here (JA 307-08) overruled *DuPont* and "return[ed] to the rule set forth in *Materials Research*, i.e., that *Weingarten* rights are applicable in the nonunionized workplace" Specifically, the Board found that *Materials Research* correctly attached significance to the fact that the Supreme Court in *Weingarten* found that the right was "grounded in the language of [Section] 7 of the Act, specifically the right to engage in 'concerted activities for the purpose of mutual aid and protection.'" As we show below, the Board's finding here represents a permissible construction of

the Act and is, therefore, entitled to enforcement. *Chevron*, 467 U.S. at 843.

Specifically, the presence of a coworker representative at an investigatory interview in a nonunion workplace is both "concerted," and "for mutual aid and protection," and, therefore, is protected by Section 7 of the Act.³

a. Borgs' activity was "concerted" under the Act

Concerted activities are those activities that are "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus., Inc.*, 268 NLRB 498, 497 (1984) ("*Meyers I*"), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 971 (1985). It is well-settled, however, that, in some circumstances, "an individual employee may be engaged in concerted activity when he acts alone." *NLRB v. City Disposal Sys.*, 465 U.S. 822, 831 (1984). *Accord El Gran Combo v. NLRB*, 853 F.2d 996, 1002 (1st Cir. 1988) ("*El Gran Combo*") (noting that "various sorts of

³ There is no merit to the Foundation's claim (Br 14 n.7) that the Board's order should not be enforced because there was no finding that the meeting at which Borgs sought Hasan's presence was an investigatory interview. Because the Foundation failed to raise this issue to the Board, either in its answer to the General Counsel's exceptions, or in a motion for reconsideration, Section 10(e) of the Act bars this Court from considering it. *See* discussion below at pp. 43-44. In any event, the Foundation concedes (Br 14 n.7) that the stated purpose was to discuss the January memoranda. Moreover, Borgs had every reason to believe that the meeting would lead to discipline. Indeed, as shown above (p. 9), Hasan received a written reprimand and was placed on probation during the course of his meeting with Loehrke and Berger.

activities that can be engaged in by *single* employees nevertheless fall under the rubric of 'concerted action'" (emphasis in original). Therefore, as the Board made clear in *Meyers Indus., Inc.*, 281 NLRB 882 (1986) ("*Meyers II*"), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988), specifically in response to concerns raised by this Court in remanding *Meyers I*, its definition of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." 281 NLRB at 887 (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)). Likewise, concerted activity includes "individual activity 'looking toward group action.'" *Id.* (quoting *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844 (2d Cir. 1980)). *Accord Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969) ("to protect concerted activities in full bloom, protection must necessarily be extended to 'intended, contemplated or even referred to' group action"), *cert. denied*, 397 U.S. 935 (1970).

The activity of an employee having the assistance of a coworker at an investigatory interview falls comfortably within the Board's definition of concerted activity. For example, here, Borgs requested that Hasan be permitted to attend an investigatory meeting with him. In so doing, Borgs was seeking to initiate group action--that is, he and Hasan together confronting management's allegations of misconduct by Borgs. Similarly, Borgs' conduct was "looking toward group action,"

because Borgs was looking toward his and Hasan's attending the meeting together. Thus, the activity here plainly fits into the Board's settled definition of concerted activity. *Meyers II*, 281 NLRB at 887. See *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1161 n.10 (5th Cir. 1980) ("the employee's activity in *Weingarten* satisfied the *Mushroom [Transportation]* standard for concerted activity, for, by asking for union representation . . . , the employee was inducing group action").

Moreover, the Board's interpretation here is supported by *Weingarten*. Although the Supreme Court in *Weingarten* did not discuss directly the concerted activity issue, it observed that "[t]he action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of [Section] 7" 420 U.S. at 260. See *Ontario Knife Co.*, 637 F.2d at 844 ("[I]mplicit . . . in *Weingarten* is that the action of an individual in requesting the assistance of a union steward met [Section] 7's requirement of concertedness."). In addition, the Court in *Weingarten* cited with apparent approval the portion of *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 846-47 (1973), holding that "[i]n a literal sense, it may be true . . . that if a [u]nion representative attends an interview with an employee, the two are engaged in 'concerted activity'" 420 U.S. at 260. The citation of this passage suggests that, in considering the requirement of concertedness, the Court focused on the activity that would take place if the employee's request was implemented--that is, that a request for assistance would result

in two employees being present at the interview. *See E.I. DuPont De Nemours & Co. v. NLRB*, 724 F.2d 1061, 1066 (3d Cir. 1983) ("*DuPont De Nemours*") (*Weingarten* suggests that "proper focus in evaluating the requirement of concertedness in this context should be on the literal nature of the activity that would take place if the employee's request was granted"), *vacated and remanded*, 733 F.2d 296 (3d Cir. 1984).

As the above discussion demonstrates, there is no merit to the contentions of the Foundation (Br 19, 20, 27) and amici (ABr 16 n.7) that *Meyers I* and *Meyers II* require a different result here. Although a literal reading of the Board's definition of "concerted activity" set forth in *Meyers I* (see above p. 23) may not appear to encompass individual conduct, the Board made it abundantly clear in *Meyers II* that such a limited definition was not intended. To the contrary, as explained above (p. 24), the Board stated: "To clarify, we intend that *Meyers I* be read as fully embracing the view of concertedness exemplified by the *Mushroom Transportation* line of cases." *Meyers II*, 281 NLRB at 887. Accordingly, the Foundation's and amici's overly literal reading of *Meyers I* fails to support its claim that here the Board erred.

b. Borgs' activity was for "mutual aid and protection"

In addition to being "concerted," activity must be for "mutual aid and protection" to be protected by Section 7. The Supreme Court has interpreted this

clause broadly to afford protection to employees who "seek to improve their terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). *Accord El Gran Combo*, 853 F.2d at 1002 ("concerted action and mutual benefit [prongs] have not been construed in an overly literal fashion"); *East Chicago Rehab. Center., Inc. v. NLRB*, 710 F.2d 397, 402 (7th Cir. 1983) ("Section 7 is broadly worded -- deliberately so."), *cert. denied*, 465 U.S. 1065 (1984). As shown below, the Board here reasonably interpreted Section 7's mutual aid and protection clause as including the right of a nonunion employee to have a coworker representative at an investigatory interview.

To begin, as the Board in *Materials Research* explained, having a representative at an investigatory interview is for mutual aid and protection because, through such conduct, "all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances" 262 NLRB at 1015. More specifically, by assisting a coworker with an employment problem, the representative can both provide aid at the interview and feel free to seek assistance of the person he aided should he experience a problem in the future. Thus, the coworker representative's voluntary action establishes a pattern of mutual assistance that offers moral support to all workers who find themselves in similar circumstances. As the Court in *Weingarten* explained, the "solidarity so established is 'mutual aid' in the most literal sense." 420 U.S. at 261 (quoting *NLRB v. Peter Cailler Kohler Swiss*

Chocolates Co., 130 F.2d 503, 505-06 (2d Cir. 1967)). *Accord DuPont De Nemours*, 724 F.2d at 1066 ("voluntary action of one worker may stimulate others to follow the example, thereby establishing a matrix of mutual support and assistance").⁴

Similarly, as the Board here explained, this type of concerted activity is for mutual aid and protection because it "greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'" (JA 307 (quoting *Weingarten*, 420 U.S. at 260-61)).⁵ Therefore, as the Court in *Weingarten* stated, even though only one employee may have an "immediate stake in the outcome" of the interview, all of his coworkers have an interest in seeing that punishment is meted out fairly by the employer. 420 U.S. at 260. *Accord El Gran Combo*, 853 F.2d at 1004 (finding it "immaterial [to mutual aid analysis] that employee is seeking assistance only for

⁴ Numerous commentators have followed similar reasoning in concluding that the assistance of a coworker representative provides protection to all workers. See Kenneth I. Judd, *The Weingarten Right in a Nonunion Setting: A Permissible and Desirable Construction of the National Labor Relations Act*, 19 Mem. St. U. L. Rev. 207, 226 (1989); Steve Carlin, *Extending Weingarten Rights to Nonunion Employees*, 86 Colum. L. Rev. 618, 628 (1986); Matthew W. Finkin, *Labor Law by Boz -- A Theory of Meyers Industries, Inc., Sears, Roebuck & Co., and Bird Engineering*, 71 Iowa L. Rev. 155, 185 (1985).

⁵ The Foundation's claim (Br 21) that Section 7 does not protect "opportunities" to act in concert is an overly literal reading of Section 7. Indeed, that Section 7 encompasses "the right . . . to engage in other concerted activities . . .," not just "concerted activities," demonstrates the breadth of the protection. *Ontario Knife*, 637 F.2d 844-45. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)

himself"). Having a coworker representative present at an investigatory interview, who can attempt to ensure that the employer acts fairly, thereby aids both the particular employee and his coworkers.

The Foundation's assertion (Br 17-19) that the Board's reasoning is faulty, because it incorrectly assumes that nonunion employees have shared interests, is without merit. First, it is entirely reasonable to assume that all employees, regardless of union affiliation, share an interest in having their employer impose discipline in a consistent and just manner. Indeed, nothing in *Weingarten* suggests that employees' interest in fair punishment comes from their union representation. To the contrary, the Court's reliance on *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942), a case involving an unrepresented employee, in its discussion of employees' mutual concern over just punishment, suggests precisely the opposite. Moreover, the Board's finding that employees have such an interest has received additional court approval. *See El Gran Combo*, 853 F.2d at 1004 n.4 ("the rest of the employees have an interest in helping the solely aggrieved individual, because the next time it could be one of them that is the victim of the employer's arbitrary and unfair practices").

(having the "[o]ppportunity to organize" is an "essential element[] in a balanced society").

Moreover, the Foundation's argument is based on a misunderstanding of the basic policies on which the Act is grounded. As the Board explained in *Materials Research*, "the Act is designed to eliminate the 'inequality of bargaining power between employees . . . and employers.'" 262 NLRB at 1014 (quoting *Weingarten*, 420 U.S. at 261-62 (quoting § 1 of the Act)). Therefore, a particular group of employees need not overtly claim to have a common concern that their employer may act in an unjust manner towards them, or any other common concern, in order to have a shared interest. Rather, lack of power, whether specifically articulated or not, is shared by all employees. Thus, it is entirely appropriate for the Board to interpret Section 7 to best effectuate the Act's purpose of minimizing disparities of power in the workplace. *See Weingarten*, 420 U.S. at 262 (holding that Board's interpretation of Section 7 is permissible because it effectuates Act's purpose of eliminating inequality of bargaining power between employer and employee).⁶

⁶ Amici's claim (ABr 19) that "Congress has declared that the means by which employees are to address that imbalance is by . . . selecti[ng] an exclusive bargaining representative" is a patently incorrect interpretation of the Act. Clearly, the plain language of Section 7 encompasses various forms of collective action, short of selecting a bargaining representative, in which employees can engage in an effort to empower themselves. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-16 (1962) (Section 7 protects nonunionized employees' concerted effort to force employer to raise temperature in shop). *See also Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36, 45 (1st Cir. 1997) ("Section 7 shields employees from hostile employers when employees seek, through union membership *or otherwise*, to band together for the purpose of 'mutual aid and protection'") (emphasis added).

The Foundation's related argument (Br 21-32) that the Act does not recognize "a role for representatives of individual employees' interests" evidences a similar misunderstanding of the Act. As discussed above, and as the Board explained here (JA 311) and in *Materials Research*, the representative is not acting solely on the individual employee's behalf. For example, in the circumstances of this case, if Borgs had been permitted to have Hasan at the investigatory interview with Loehrke and Berger, Hasan could have assisted Borgs in demonstrating that the memoranda they wrote criticizing Berger did not warrant discipline. Borgs and Hasan, thereby, could have helped establish a workplace practice whereby employees facing similar problems regarding supervision could raise the issue to management, in writing, without facing discipline.

There is similarly no merit to the argument that Section 7 should not be interpreted to allow for a representative in the nonunion context because nonunion co-workers do not have the skills necessary to provide effective assistance. Although, as a general matter, union representatives may be better equipped to provide assistance, because they are likely to have knowledge regarding the disciplinary and grievance procedures under the collective-bargaining agreement, as well as experience acting on others' behalf, the right in *Weingarten* did not turn on the skills of the union steward. To be sure, the Court noted that a skilled union representative could be useful to both

the employee and employer, but nowhere did it restrict the right to situations in which the union representative is skilled.

Similarly, in the nonunion context, an employee facing an investigatory interview would be assisted most effectively by a coworker who is smart, well-spoken, and knowledgeable with respect to the employer's disciplinary system. Such a representative could be as helpful as a union representative. The choice, however, is the employee's to make, and his statutory rights should not turn on whether he made the best choice, just as a union employee's *Weingarten* rights do not turn on his representative's skills.

Indeed, even an unskilled representative can provide moral support to a fearful coworker. Thus, as the Court in *Weingarten* explained, a "single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating circumstances." 420 U.S. at 251. Obviously, union employees are not the only ones who can be fearful, ignorant, or inarticulate. In fact, here, Borgs requested Hasan's presence because, after having been unlawfully interrogated, threatened, and reprimanded by Loehrke and Berger at the December 28 meeting regarding his discussions with coworkers about wages, Borgs was afraid to attend another investigatory interview with those two managers. A representative need not be highly trained or have knowledge regarding disciplinary procedures to

assist a fearful coworker like Borgs to tell his side of the story. In any event, as the Board explained in *Materials Research*, because the "purpose underlying *Weingarten* is to prevent an employer from overpowering a lone employee, the presence of a coworker, even if that individual does nothing more than act as a witness, still effectuates that purpose." 262 NLRB at 1015.

In fact, the presence of a representative may be of even more assistance in a nonunion workplace than in a union workplace. As one court noted, the "perception by workers of an imbalance of power may be heightened in the absence of a union, and the risks of improper or even unintentional intimidation of employees by management may be accentuated." *DuPont De Nemours*, 724 F.2d 1066. Similarly, because many nonunion workplaces do not have grievance-arbitration procedures "to check unjust or arbitrary conduct," an unrepresented employee "may experience even greater apprehension than one in an organized plant and need the moral support of a sympathetic fellow employee." *Materials Research*, 262 NLRB at 1015.

Finally, this Court can readily dispense with the related claim that the Court in *Weingarten* could not have envisioned applying the right in the nonunion context because it specifically referred to the role played by the "union representative" and to safeguarding the interest of the "bargaining unit." As the Board explained here (JA 307 n. 9), and earlier in *Materials Research*, 262 NLRB at 1012, the use of those terms by the Court in *Weingarten* was necessary to accurately describe the

circumstances of that case. Nothing in *Weingarten*, however, specifically limits its application to the union context. Rather, the Court's holding that the right to a representative is grounded in Section 7 is consistent with application of that right to all, not just union, employees. Moreover, because the dissenting justices stated their assumption that the right would apply to nonunion employees (*Weingarten*, 420 U.S. at 270 n.1), the Court's majority was aware of the possibility of such an application. Finally, whether or not the Court in *Weingarten* contemplated the right applying in a nonunion context is not determinative. As the above statutory analysis shows, the Board's interpretation is permissible independent of *Weingarten*.⁷

c. The Board's interpretation of Section 7 does not conflict with the exclusivity principle contained in Section 9(a) of the Act

There is no merit to the claim of the amici (ABr 16-19) and dissenting Board Member Brame (JA 322-23) that, by granting *Weingarten* rights to nonunion employees, the Board is forcing the employer to "deal" collectively with the equivalent of a labor organization, in conflict with the exclusivity principle set forth in Section 9(a) of the Act. The premise of this argument, as noted above (p. 21), is that

⁷ Indeed, one commentator argues that it is unnecessary to focus on the text of *Weingarten* to determine whether such a right exists, because the right is so plainly consistent with Section 7 statutory jurisprudence. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. Pa. L. Rev. 1673, 1737-50 (1989).

because Section 9(a) requires that, where employees have selected union representation, their employer must bargain exclusively with their chosen representative, in the absence of a collective-bargaining relationship, an employer is free to deal with its employees on an individual basis. As the Board explained (JA 307), this “entire argument rests on a non sequitur[.]” (JA 307 (citing *Slaughter v. NLRB*, 794 F.2d 120, 127 (3d Cir. 1986))), because the exclusivity principle contained in Section 9(a) applies only to "collective bargaining," not to "dealing with."

The term "dealing with" comes from Section 2(5) of the Act (29 U.S.C. § 152(5)), which defines a labor organization as an organization "which exists for the purpose . . . of dealing with employers." Congress intentionally used the broad phrase "dealing with," instead of the more restrictive phrase "bargains with[.]" to give reach to the Act's prohibition of company unions. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210-14 (1959). As such, "dealing with" is a term of art used in determining whether a particular group is a "labor organization" under the Act.

The exclusivity principle set forth in Section 9(a) of the Act (29 U.S.C. § 159(a)) provides, in relevant part:

representatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . , shall be the exclusive representative of all the employees . . . for the purposes of collective bargaining[.]

This provision establishes that, where employees have a recognized or certified bargaining representative, the employer cannot bargain with another representative of the employees. *Slaughter*, 794 F.2d at 127 (Section 9(a) "simply defines the status and role of a union once recognized or certified as the collective bargaining representative . . ."). See *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 63 (1975).

The argument of the amici and Member Brame attempts to blur the distinction between dealing and bargaining. Yet, as the plain language of Section 9(a) makes clear, the "system of exclusive representation . . . is expressly one of collective bargaining, not of dealing" (JA 308 (quoting *Slaughter*, 794 F.2d at 128)). Therefore, because, as the Court held in *Weingarten*, an employer has no statutory duty to "bargain with" an employee's representative at an investigatory interview, "the function of that representative cannot be in derogation of the exclusivity principle." *Slaughter*, 794 F.2d at 128.⁸

Furthermore, as the Board explained (JA 308), if the employer does not wish to conduct an interview with the coworker representative present, it "is completely free

⁸ Numerous commentators addressing this question agree with the Board that granting nonunion employees *Weingarten* rights in no way conflicts with Section 9(a) of the Act. See Finkin, *supra*, at 180-81; Carlin, *supra*, at 628-29; Morris, *supra*, at 1733-34; Jill D. Flack, *Limiting the Weingarten Right in the Nonunion Setting: The Implications of Sears, Roebuck & Co.*, 35 Cath. U. L. Rev. 1033, 1054-55 (1986).

to forego the investigatory interview," and carry out its investigation in another manner. Therefore, it is under no obligation to have any interaction with a coworker representative.

d. The practical concerns raised by the Foundation and amici do not require a different result

The Foundation (Br 31-33) and amici (ABr 3-10) claim that the Board lacks appreciation for the impracticability of its decision and shows indifference to the effect that its decision will have on employers conducting internal investigations. For example, they claim that employers' ability to investigate employee wrongdoing, particularly when two employees engage in misconduct together or when allegations of harassment are involved, will be fatally undermined. Similarly, they claim that nonunion representatives will be less inclined to keep matters confidential and will, therefore, discourage victims of coworker misconduct from reporting that misconduct. None of these concerns requires a different result here.

To begin, most of the concerns raised by the Foundation and amici are issues faced by union and nonunion employers alike. For example, although they contend that union representatives have an obligation to keep matters confidential, it could just as easily be argued that, because union representatives have a duty to represent all unit members, they have an obligation to inform those members what occurred in investigatory interviews. Similarly, union employers could face a co-conspirator-type

situation, such as the one outlined by amici, if an employee and the union steward are subjects of the same investigation. Furthermore, the issues raised regarding investigating harassment allegations are no different than in the union context. Thus, the concerns raised by the Foundation and amici are nothing more than attacks on *Weingarten* itself.

Moreover, nothing in *Weingarten*, or the Board's decision here, would prevent employers from taking steps necessary to ensure that they are able to conduct effective investigations even in the circumstances described above. To the contrary, *Weingarten* specifically states that an employee's "exercise of the right may not interfere with legitimate employer prerogatives." 420 U.S. at 258. Therefore, where an employer is legitimately concerned that disclosure of a victim's name, or the details of a particular act of misconduct, will embarrass the victim or have a chilling effect on the reporting of such misconduct, nothing in the Board's decision prevents the employer from requiring that the representative keep sensitive matters confidential. Similarly, the Board's decision would not prevent an employer from taking reasonable steps to ensure that the "co-conspirator" problem does not undermine its investigation. For example, in an analogous situation, the Federal Labor Relations Authority held that, where the union representative is the subject of the same investigation as other employees, the union representative "could not serve as [a] representative[] of other

employees being investigated until [the representative's] own investigation[] ha[s] been completed." *Federal Prison Syst.*, 25 FLRA 210, 211 (1987).

Furthermore, the Board's application of *Weingarten* demonstrates that protecting employers' prerogatives in conducting investigations has been an overarching concern of the Board. Indeed, the Board has repeatedly made clear that its "interpretation of *Weingarten* must be tempered by a sense of industrial reality." *Pacific Gas & Elec. Co.*, 253 NLRB 1143, 1144 (1981). *Accord Roadway Express, Inc.*, 246 NLRB 1127, 1128 (1979). Accordingly, the Board, with court approval, has placed reasonable restrictions on employees' exercise of their *Weingarten* rights.

For example, the Board has found that an employee cannot cause an employer to unreasonably delay an investigation by demanding the presence of a particular representative who is on vacation or otherwise unavailable, when another representative is readily available. *Coca-Cola Bottling Co.*, 227 NLRB 1276, 1276 (1977) (nothing in *Weingarten* indicates that employer must postpone interview because particular union representative is unavailable); *Roadway Express, Inc.*, 246 NLRB at 1130. *See Newport News Shipbuilding & Dry Dock Co.*, 254 NLRB 375, 390-91 (1981) (in "balanc[ing employer's] right to conduct such interviews with minimal delay and confusion against the very important rights granted by *Weingarten*[,]" Board finds that employer is not required to locate particular requested representative where another is available), *enforced*, 673 F.2d 1314 (4th Cir. 1982).

Nor, where a duly designated union representative is available, can an employee insist on a different representative. *Pacific Gas & Elec. Co.*, 253 NLRB at 1144 ("[w]e do not advance the effectuation of employee rights, or contribute to the stability of industrial relations . . . by introducing the notion that an employee may request this union representative instead of that one").

Moreover, an employer need not tolerate insubordinate or disruptive behavior from either the employee under investigation or the employee's representative. For example, in *Roadway Express, Inc.*, an employee, who had requested a *Weingarten* representative, refused to follow his supervisor's order to leave a work area, claiming that he would not do so until his steward was present. In those circumstances, the Board held that, while the employee was entitled to refuse to participate in the investigatory interview without his steward, "he was not privileged to ignore [the employer's] order to leave the [work] area." 246 NLRB at 1128. Rather, employees can be sanctioned for actions "that clearly undermine[] [the employer's] right to maintain discipline and order," despite their invocation of *Weingarten* rights. *Id.*

Similarly, in *New Jersey Bell Tel. Co.*, during an investigatory interview, the *Weingarten* representative repeatedly objected to the employer's asking the employee the same question more than once, and instructed the employee under investigation to answer only once. 308 NLRB 277, 279-80 (1992). The Board there, explaining that it was required by *Weingarten* to "strike a careful balance between the right of an

employer to investigate . . . , and the role to be played by the union representative[.]" found that to permit the representative's conduct "would severely circumscribe an employer's legitimate prerogatives to investigate employee misconduct." *Id.* at 279. Accordingly, the Board found that the employer acted lawfully in ejecting the representative from the interview. 308 NLRB at 280.

In sum, the language and holdings of these decisions demonstrate that the Board fully understands the complexities of the workplace and the need for employers to fully investigate employee misconduct. Moreover, they show that the Board, in applying the rule set forth here, will diligently balance the competing interests to ensure that employers are not unduly hampered in their ability to conduct such investigations. Therefore, the Board here was fully justified in finding (JA 307 n.11) that mere speculation that an employee representative would impair that ability "does not warrant depriving employees of the opportunity to act for mutual aid and protection."

e. There is no merit to the claim that the Board failed to adequately explain its decision

The Foundation (Br 27-33) and amici (ABr 20-22) contend that the Board failed to provide an adequate explanation for its decision to overrule *DuPont* and return to the *Materials Research* interpretation of Section 7. There is no merit to this claim.

To begin, it is well settled that the Board is not "disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision." *NLRB v. Local 103, Iron Workers*, 434 U.S. 335, 351 (1978). *Accord Chevron*, 467 U.S. at 863-64 (stating that "[a]n initial agency interpretation is not instantly carved in stone," and that an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis"); *Weingarten*, 420 U.S. at 265-66 ("to hold that the Board's earlier interpretation froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking"). To be sure, the Board is required to explicate the basis for its new position, *Weingarten*, 420 U.S. at 267, but here it did precisely as required.

Given that, since *DuPont* was decided in 1988, it has been the settled position of the Board that the interpretation of Section 7 applied here is permissible, it was unnecessary for the Board to engage in a lengthy statutory analysis. *DuPont*, 289 NLRB at 627-28. Rather, the Board needed to address the points of disagreement--those being the policy reasons relied on in *DuPont* for not extending *Weingarten* rights to nonunion workers. *Id.* at 628-30. Here, the Board did this, and explained (JA 307-08) point by point why it disagreed with the conclusion reached in *DuPont*. Moreover, it endorsed the reasoning of *Materials Research*, which fully articulated both the statutory and policy reasons for extending the right.

f. The Foundation's contention that the Board's interpretation of the Act unconstitutionally restricts employer speech should be rejected

In its Brief (Br 23-27), the Foundation, for the first time in this proceeding, mounts a constitutional challenge to the Board's interpretation of the Act.

Specifically, the Foundation claims that the Board's interpretation of the Act places a content-based restriction on employers' free speech rights. Because the Foundation failed to raise this argument before the Board, Section 10(e) of the Act (29 U.S.C. § 10(e)) precludes its consideration by this Court. In any event, it is meritless.

Section 10(e) provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (Section 10(e) bar on judicial consideration of issues not raised before the Board is jurisdictional). The fact that the Foundation prevailed before the administrative law judge on certain issues does not constitute an "extraordinary circumstance" excusing its failure to raise other relevant issues before the Board. *NLRB v. R.J. Smith Constr. Co.*, 545 F.2d 187, 192 (D.C. Cir. 1976); *NLRB v. L&B Cooling, Inc.*, 757 F.2d 236, 240 (10th Cir. 1985) (collecting cases). Particularly here, where counsel for the General Counsel argued in his exceptions to the administrative law judge's decision that the Board should reverse its position on the *Weingarten* issue, the Foundation should have filed cross-

exceptions to the General Counsel's exceptions, asserting its constitutional argument, or raised the argument in the lengthy Brief in Answer to Exceptions of the General Counsel that it filed with the Board. Having failed to do so, it cannot now assert the argument. Board Rules & Regulations 102.46(g) (29 C.F.R. § 102.46(g)) ("[n]o matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding"). See *L&B Cooling*, 757 F.2d at 240; *NLRB v. Cast-A-Stone Products Co.*, 479 F.2d 396, 397-98 (4th Cir. 1973).

Further, the Foundation waived the right to present its constitutional challenge to the Court by failing to file a motion for reconsideration, as provided in the Board's Rules and Regulations. 29 C.F.R. § 102.48(d)(1), Series 8 as amended. It is well settled that the failure to file such a motion precludes this Court's review of the issue raised now for the first time. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. at 665-66 (failure to "object[] to the Board's decision in a petition for reconsideration or rehearing . . . prevents consideration of the questions by the courts"); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998) (same).

In any event, the Foundation's constitutional claim is without merit. To be sure, employers have free speech rights. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). At the same time, however, Section 8(a)(1) prohibits interference with, restraint, or coercion of employees in the exercise of their Section 7 rights.

Recognizing these conflicting rights, the Supreme Court made clear in *Gissel Packing Co.* that:

[a]ny assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those are embodied in § 7 and protected by § 8(a)(1).

Id. The Court further explained that "any balancing of those rights must take into account the economic dependence of the employees on their employer." *Id.*

Accordingly, the Court concluded that the Board does not violate the First Amendment by restricting certain employer speech.

Similarly, this Court, following the guidance of *Gissel*, explained that "the force of the First Amendment has been held to vary with *context*." *USAirways, Inc. v. National Mediation Board*, 177 F.3d 985, 991 (D.C. Cir. 1999) (emphasis in original). Thus, when balancing employers' rights to make certain utterances to economically dependent employees, "lesser-than-usual First Amendment protection of employers' expression" is permissible. *Id.*

Here, where the Board carefully balanced the competing rights of employers to investigate employee misconduct, and employees to engage in Section 7 activity, it acted in accordance with the constitutional framework set forth in *Gissel*. Indeed, the Board's rule here takes into account the economic dependence of employees on their

employer, by preventing an employee, whose job security is threatened, from being required to face his employer alone.

4. The Board Acted Within its Discretion in Applying its Interpretation of Section 7 Retroactively

There is no merit to the Foundation's argument (Br 34-35) that, even if this Court upholds the Board's interpretation of Section 7, it should not be applied retroactively. An administrative agency is entitled to apply newly adopted interpretations retroactively if "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles" outweighs the adverse effects of such application. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). *Accord Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989) ("new rules announced in agency adjudications may be applied retroactively absent any 'manifest injustice'"), *cert. denied*, 498 U.S. 817 (1990). Among the factors courts consider in evaluating this balance are (1) whether the case is one of first impression; (2) whether the new rule represents an abrupt departure from well-established practice, or merely attempts to fill a void in an unsettled area of law; (3) the extent to which the party against whom the new rule is applied acted in reliance on the former rule; (4) the statutory interest in applying a new rule despite the reliance of a party on the old standard; and (5) the degree of burden that a retroactive order imposes on a party. *Local 900, Int'l Union of Elec. Workers v. NLRB*, 727 F.2d 1184, 1194 (D.C. Cir.

1984). *Accord NLRB v. Bufco Corp.*, 899 F.2d 608, 611-12 (7th Cir. 1990). As shown below, the Board carefully weighed the appropriate factors and acted within its discretion in applying its new interpretation of Section 7 to the Foundation.

First, contrary to the Foundation's contentions (Br 34-35), retroactive application is appropriate even though, in returning to the interpretation first announced in *Materials Research*, the Board overruled *DuPont*. To begin, as this Court has recognized, the Supreme Court has identified a number of reasons for applying a new rule in the case in which it is announced. *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). For example, "to deny the benefits of a change in the law to the very parties whose efforts were largely responsible for bringing it about might have adverse effects on the incentive of litigants to advance new theories or to challenge outworn doctrines." *Id.* Failure to apply the Board's new interpretation here plainly would discourage litigants such as Borgs from pursuing their rights before the Board.

Further, as the Board aptly observed (JA 309), "there is no evidence in the record even remotely suggesting that the [Foundation] was relying on the state of Board law when it decided to take action against Borgs." To the contrary, its actions suggest that it was either ignorant of, or indifferent to, its employees' rights under the Act. Indeed, as shown above (pp. 14-15), the Foundation admits that it unlawfully interrogated Borgs about his protected discussions with coworkers about wages,

threatened and disciplined him because of that protected concerted activity, and promulgated an unlawful rule prohibiting employees from discussing wage information with other employees. For the Foundation to suggest, in the face of these admitted, flagrant violations of the Act, that it was aware of, and attempted to act in accordance with, the Board's decision in *DuPont*, is simply incredible.

In addition, retroactive application furthers the statutory interest. As the Board explained, correcting the effects of the Foundation's unlawful discharge of Borgs furthers the purpose of protecting the rights of employees to engage in concerted activity for mutual aid and protection. In contrast, failing to make Borgs whole for the losses he has suffered as a result of his unlawful discharge, would be counter to the Act's purposes.

Finally, as the Board found (JA 309), the Foundation will suffer "no great injustice" if the interpretation is applied retroactively. Rather, where, as here, an employer has shown an overall disregard for employees' statutory rights, and there is no evidence that it attempted to follow the law, the equities weigh in favor of retroactive application.

B. The Foundation Violated Section 8(a)(1) of the Act by Reprimanding and Discharging Employee Hasan

As discussed above (p. 9), shortly after Borgs refused to attend the investigatory interview with Loehrke and Berger, those same managers met with Hasan. At that

meeting, Loehrke and Berger issued Hasan a written reprimand for insubordination for his part in writing and submitting the January 17 memorandum, and placed him on probation. Several weeks later, the Foundation discharged Hasan. As shown below, substantial evidence supports the Board's finding that the reprimand and discharge were because of Hasan's protected activity and, therefore, unlawful.

1. Applicable principles and standard of review

As discussed above (pp. 15-16), an employer violates Section 8(a)(1) of the Act by taking adverse action against an employee because the employee engaged in activity protected by Section 7 of the Act. Whether the adverse action 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, 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), *cert. denied*, 455 U.S. 989 (1982), for determining unlawful motivation. 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 it would have taken the same

action even absent the protected conduct. *Transportation Management*, 462 U.S. at 397, 401-03; *Southwire Co. v. NLRB*, 820 F.2d 453, 459 (D.C. Cir. 1987).⁹

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), *cert. denied*, 502 U.S. 1048 (1992). 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)). That standard "is not modified in any way" when the Board disagrees with the administrative law judge as to legal issues or derivative inferences made from the testimony. *Id.*

⁹ The motivation analysis was unnecessary with respect to the discharge of Borgs because the Foundation admitted that it discharged him solely because he insisted on Hasan's presence at the meeting.

Moreover, as discussed above (p. 17-18), determining whether an 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 Sys.*, 465 U.S. 822, 829 (1984). Thus, the Board's finding that an employee has engaged in protected concerted activity is entitled to considerable deference. *Id.* at 829.

2. The Foundation unlawfully reprimanded and discharged Hasan because of his protected concerted activity

a. Hasan engaged in concerted protected activity

The Foundation does not dispute the Board's finding (JA 311, 331-32) that Hasan engaged in certain protected concerted activity in the months leading up to his discharge. For example, as shown (p. 5), Hasan wrote a memorandum to Berger challenging the placement of warnings in his and Borgs' personnel files regarding the interpreter incident.¹⁰

The Board also reasonably found (JA 310) that Hasan's part in drafting and submitting the January 17 and January 29 memoranda regarding his supervisor, Director of Vocational Services Berger, constituted protected concerted activity. As shown below, this finding is entitled to enforcement.

¹⁰ Neither before the Board, nor in its opening brief to this Court, does the Foundation contest the Board's finding that Hasan's writing of this memorandum is protected concerted activity. The Foundation, thereby, waived its right to do so. *See* cases cited at p. 14-15 above.

Because Borgs and Hasan drafted the memoranda together, there can be no dispute that the drafting and distributing of the memoranda is concerted activity. The Foundation, however, argues (Br 38-39) that, despite the concerted nature of the activity, writing and distributing the January 17 memorandum is not protected under Section 7 because it does not concern working conditions or seek to enlist the assistance of others for mutual aid and protection. The Board reasonably rejected this argument.

First, the Board found (JA 311) that the January 17 memorandum, standing alone, constituted protected concerted activity. In making this finding, the Board reversed the judge's conclusion (JA 333) that it was unprotected because "the clear import of the memo is . . . dismissing [Berger] as their supervisor" on the NIDRR project. As the Board explained, even assuming that was the purpose of the memorandum, Hasan's activity is fully protected by the Act.

Indeed, under both Board and court precedent it is settled that concerted attempts to seek the dismissal of a supervisor who has an impact on employee working conditions is protected activity. *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84 (2d Cir. 1990); *Caterpillar, Inc.*, 321 NLRB 1178, 1178-79 (1996);¹¹ *Hoytuck Corp.*,

¹¹ Although *Caterpillar, Inc.*, 321 NLRB 1178 (1996), was vacated by the Board as moot on March 19, 1998, in a subsequent decision, the Board explained that "it [wa]s vacated only insofar as there is no longer a court-enforceable order in the case and the decision has no preclusive effect on the parties." *Caterpillar, Inc.*, 332

285 NLRB 904, 904 & n.3 (1987). *Cf Atlantic-Pacific Constr. Co. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995) (letter protesting promotion of coworker to supervisor protected). Under the test set out in *Oakes Machine*, 897 F.2d at 89, such concerted employee activity is protected where the identity of the supervisor is directly related to the terms and conditions of employment. This determination is based on the totality of the circumstances, including whether (1) the protest originated with employees rather than supervisors; (2) the supervisor at issue dealt directly with employees; (3) the identity of the supervisor is directly related to the terms and conditions of employment; and (4) the reasonableness of the means of protest. *Oakes Machine*, 897 F.2d at 89.

Under this test, Hasan's writing of the January 17 memorandum is protected. The first prong of the test is clearly met because the protest concerning Berger's supervision of the NIDRR project began with Hasan and Borgs. Likewise, there can be no dispute that Berger, as Hasan's and Borgs' supervisor on the project, had direct contact with them and direct impact on their working conditions. Indeed, as shown, Hasan and Borgs were evaluated by him and subject to discipline imposed by him. In these circumstances, the protest reasonably related to working conditions. *Hoytuck*

NLRB No. 101, slip op. p. 1, 2000 WL 1663431, at *1 (October 31, 2000). The Board explained, however, that "[t]here will remain a published decision in the case, and that may be cited as controlling precedent with respect to the legal analysis therein." *Id.*

Corp., 285 NLRB at 907 (1987) (concerted attempt to effectuate discharge of supervisor "reasonably related to working conditions" where supervisor that was the subject of protest closely supervised protesting employees on a daily basis). Finally, the means of their protest--letter writing--is an eminently reasonable form of protest. *Atlantic-Pacific Constr.*, 52 F.3d at 263; *Oakes Mach.*, 897 F.2d at 89.

There is no merit to the suggestion by the Foundation (Br 38-39) that the letter itself must discuss working conditions to be protected. Rather, the above cases make clear that where, as here, the target of the protest is a supervisor whose actions directly impact the protesting employees' working conditions, the connection to terms and conditions of employment is shown. *See Atlantic-Pacific Constr.*, 52 F.3d at 263 ("nexus between the activity and working conditions must be gleaned from the totality of the circumstances, as even wholly inarticulate activity. . . may be protected"). Therefore, here, because Berger had a direct impact on Hasan's and Borgs' working conditions, the letter seeking his removal as their supervisor on the project is protected.

Furthermore, the Board reasonably found (JA 310) that the January 17 memorandum was "inextricably intertwined" with the January 29 memorandum, also written by Hasan and Borgs. Indeed, the January 29 memorandum explained that its purpose was "to elaborate upon the reasons underlying the . . . January 17" memorandum. (JA 209-18.) It then went on to discuss, in detail, problems

concerning Berger's supervision. (JA 209-18.) Therefore, as the Board found (JA 310 & n.17), to the extent that the Foundation "could have initially harbored some doubt as to whether the [January 17] memo was related to Berger's impact on Hasan[']s . . . terms and conditions of employment, any such doubt was laid to rest" by the January 29 memorandum. Indeed, that the Foundation took no action with respect to the memos until February 1, just two days after receiving the second memo, amply supports the Board's finding that, at the time of that meeting, Loehrke and Berger "fully understood that the issues raised in the January 17 memo were not separate from the concerns . . . set forth in the subsequent memo."¹²

b. The Foundation reprimanded and discharged Hasan because of his protected concerted activity

The Foundation does not dispute that it issued a written reprimand to Hasan for his participation in writing the January 17 memorandum.¹³ Indeed, as shown above (p. 9), on February 1, Loehrke and Berger met with Hasan at which time they

¹² There is no merit to the Foundation's assertion (Br 43-45) that Hasan's conduct is not protected because it was disruptive. There is no evidence in the record showing that the memoranda caused any disruption in the workplace. Moreover, as shown above (p. 54), letter writing is an entirely reasonable form of protest.

¹³ The record is not clear as to whether the reprimand that the Foundation issued to Hasan on February 1 was in response to both the January 17 and 29 memos, or just the January 17 memo. The Board found (JA 311 n.19) that, because the two memos are inextricably intertwined, it was unnecessary to resolve the factual discrepancy.

reprimanded him, verbally and in writing, for insubordination for writing the memos. In addition, they placed him on probation, informing him that any further acts of insubordination would result in discharge. Because, as shown above, his conduct is protected activity under the Act, the Board's finding that the reprimand violated Section 8(a)(1) should be enforced.

The Board also found that the General Counsel satisfied the burden of showing that the Foundation discharged Hasan because of his protected activity, particularly writing the January 17 and 29 memoranda. The Board's finding is supported by ample evidence of the Foundation's animus toward Hasan's protected activity. For example, as the Board noted (JA 311), several months before his termination, Hasan angered Berger and Loehrke by challenging written warnings placed in his and Borgs' personnel files concerning the interpreter incident. In addition, as shown above, the Foundation placed Hasan on probation--thereby on the verge of discharge--because he wrote the memoranda outlining problems with Berger's supervision and seeking his removal as supervisor of the NIDRR project. Moreover, the Foundation's admitted violations of the Act--including threats against, and the interrogation and reprimand of, Borgs because of his protected activity, and the promulgation of the rule prohibiting employees from discussing wage information with each other--are additional evidence of its hostility to employees' protected activity. *Power Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

c. The Foundation failed to show that it would have discharged Hasan absent his protected activity

The Board reasonably rejected the Foundation's claim (Br 44) that it discharged Hasan because "he repeatedly refused to sign his formal performance evaluation and objectives." To begin, as the Board noted (JA 311), the termination letter given to Hasan did not even mention his refusal to sign the evaluation and objectives as a reason for his dismissal. Rather, it referred to Hasan's conduct "over the course of the last nine (9) months," which included his protected protest over the reprimands placed by Berger in his and Borgs' personnel files. In addition, the termination letter specifically referred to Hasan's "refusal to accept Agency supervision of [his] work on the NIDRR project," as the reason for his dismissal. (JA 311; 228.) Similarly, Executive Director Loehrke's testimony that Hasan's refusal to sign the evaluation and objectives was the "final straw" clearly signals that earlier conduct played a part in the Foundation's decision to terminate him. Finally, evidence that the Foundation placed Hasan on probation because of the memos, and instructed him that "one more act of misconduct or insubordination would result in . . . immediate termination" (JA 223-25), strongly suggests that the memos played a role in the Foundation's decision to discharge Hasan. Based on this evidence, the Board was fully justified in finding that the Foundation would not have discharged Hasan, had it not been for his protected activity, and therefore that his termination violated Section 8(a)(1) of the Act.

CONCLUSION

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

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