

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
ATLANTA BRANCH OFFICE

5

ALTON H. PIESTER, LLC

10

and

CASE 11–CA–21531

DARRELL CHAPMAN, an Individual

15

*Jasper C. Brown, Jr., Esq.*, for the General Counsel  
*Charles Thompson, Esq. (Malone, Thompson,*  
20 *Summers & Ott)*, of Columbia, SC,  
for the Respondent

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**BENCH DECISION AND CERTIFICATION**

**Statement of the Case**

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**KELTNER W. LOCKE, Administrative Law Judge:** I heard this case on September 17 and 18, 2007 in Newberry, South Carolina. After the parties rested, I heard oral argument, and on September 19, 2007, issued a bench decision pursuant to Section 102.35(a)(10) of the Board’s Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as “Appendix A,” the portion of the transcript containing this decision. The Conclusions of Law and Order appear below.

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**Additional Discussion**

**Credibility of Charging Party Chapman**

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The bench decision explained why I credited the testimony of certain witnesses, but did not discuss my conclusion that Charging Party Chapman’s testimony should not be credited. For the following reasons, I do not consider it reliable.

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During cross-examination, Chapman initially testified that he had only one speeding ticket on his driving record. When asked if he had three speeding tickets, Chapman answered, “Not of my knowledge.” However, when confronted with documentary evidence, he admitted he had three

speeding tickets. It seems unlikely that Chapman, a commercial truck driver, would lack knowledge of his own driving record.

5 Additionally, Chapman’s interest in the outcome of this proceeding – he stood to regain his job with backpay – may have affected his recollection. For example, Chapman described a conversation he had with another driver on April 2, 2007 just after Respondent’s owner, Alton Piester, discharged him. Chapman testified that he told this driver that Piester fired him “because I was talking about our money.” However, according to the other driver, James Seibert, Jr., Chapman said he had been fired because “he got loud in the office. . .” Witnesses 10 Marntin, Derrick and Piester uniformly testified that Chapman had, in fact, become loud before Piester discharged him. Crediting Seibert’s testimony, I find that when Chapman spoke with Seibert on April 2, 2007, Chapman did attribute his discharge to getting loud in the office rather than, as Chapman testified at the hearing, that he was “talking about our money. . .”

15 This difference, between how Chapman testified at the hearing and what he told Seibert on the day of his discharge, suggests an inclination to embellish his testimony in a way favorable to his case. This tendency may explain some rather improbable words which Chapman attributed to Renee Derrick.

20 Complaint paragraph 6 alleges that Renee Derrick, a secretary, was Respondent’s agent. Complaint paragraph 7 alleges that Respondent, through Derrick, made an unlawful implied threat of discharge. The General Counsel thus had the burden of proving both Derrick’s status as Respondent’s agent and that she made the alleged threat.

25 Chapman quoted Derrick as saying, right before the alleged threat, “I can speak for me and Hollywood. . .” (“Hollywood” referred to Owner Piester.) Obviously, if Derrick had said those words, it would support the General Counsel’s claim that Derrick possessed apparent authority to act as the owner’s agent. However, I do not credit Chapman’s testimony.

30 For the reasons discussed in the bench decision, I have concluded that Derrick was a very reliable witness and credit all of her testimony concerning her interaction with Chapman on April 2, 2007. That testimony does not suggest that she said “I can speak for me and Hollywood.”

35 Moreover, she would have no reason to make such a statement. Although it is possible to imagine circumstances in which Derrick might have a reason to say that she could speak for the owner, such circumstances were not present here. For example, if she had been trying to prevent Chapman from talking to Piester, she might have said that she had authority to speak for Piester. However, she was not trying to shield Piester from Chapman. To the contrary, Derrick credibly testified that she told Chapman that he “needed to go talk to Alton” and Chapman did.

40 Additionally, when Derrick told Chapman that if he didn’t like the way things were done, “then maybe he should clean his truck out,” Piester was present. It would seem odd for Derrick to say “I can speak for me and Hollywood” when “Hollywood” was right there.

45 Indeed, Chapman’s testimony that Derrick referred to Piester as “Hollywood,” and did so *in Piester’s presence*, strains credulity. More than once in her testimony, Derrick referred to Owner Piester by his first name, Alton, but she never called him “Hollywood.” Neither did the

5 other secretary, Sherry Marntin. Rather, “Hollywood” appears to have been the irreverent nickname which some of the drivers applied to Piester, perhaps a bit pejoratively. Although it would not have been out of character for Chapman himself or some other driver to have used this epithet, it is difficult to believe that Piester’s secretary would do so even if Piester were not there to hear it.

In sum, Chapman’s testimony does not ring true and I do not credit it.

10 **Derrick’s Status as Respondent’s Agent**

As noted above, the Complaint alleged that Derrick was Respondent’s agent. Citing *Dentech Corp.*, 294 NLRB 924 (1989), the General Counsel argues that Derrick possessed the apparent authority to act for Respondent.

15 The *Dentech Corp.* decision notes that “The Board has held that apparent authority may be inferred when an employee acts with the cooperation of or in the presence of supervisors.” 294 NLRB at 926, citing *Advanced Mining Group*, 260 NLRB 486, 503504 (1982), *Wm. Chalson & Co.*, 252 NLRB 25 (1980), and *Hit ‘N Run Food Stores*, 231 NLRB 660, 668669 (1977).  
 20 Additionally, as the Board observed in *Dentech Corp.*, an employer’s failure to disavow an employee’s conduct may warrant an inference that the employee possessed apparent authority. *Haynes Industries*, 232 NLRB 1092, 10991100 (1977).

25 In the present case, Owner Piester was present when Derrick told Chapman that if he did not like the way his pay was calculated, he should clean out his truck. Piester did not contradict this comment or otherwise indicate that he disagreed with it. Piester’s silence amounted to acquiescence. See *Dentech Corp.*, 294 NLRB at 927. Accordingly, I agree with the General Counsel that Derrick’s “clean your truck” remark may be imputed to Respondent.

30 However, for reasons discussed in the bench decision, I have concluded that the remarks about Chapman cleaning out his truck did not, considered in context, communicate an implied threat or otherwise interfere with, restrain or coerce employees in the exercise of Section 7 rights. Accordingly, even if Derrick’s “clean your truck” comment is imputed to Respondent, it does not constitute a violation of the Act.

35 **The Protected Activity Issue**

In substantial part, this case turns on whether Chapman was engaged in protected activity at the time of his discharge. This issue appears to be a close one and it has significant ramifications.

40 If I erred in concluding that Chapman’s activity on April 2, 2007 was not protected, then it also was inappropriate to analyze the facts under the framework which the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Rather, when an employer discharges an employee for protected activity, the appropriate inquiry focuses on whether the employee had committed any misconduct sufficient  
 45 to remove him from the protection of the Act. *Beverly Health & Rehabilitation Services*, 346 NLRB No. 111 (May 8, 2006). Because the issue concerning Chapman’s protected activity is both close and consequential, the additional discussion below may assist the Board in reviewing

the correctness of my conclusion that the cases cited by the General Counsel can be, and should be, distinguished.

5 The General Counsel has cited several cases to support the government’s argument that on April 2, 2007, Chapman was continuing the protected concerted activity of January 13, 2007, when the drivers complained about Respondent’s new method of computing their earnings. For example, in *Salisbury Hotel*, 283 NLRB 685 (1987), the Board found that the alleged discriminatee, Resnick, had engaged in protected, concerted activity when she complained to management about the respondent’s new lunch hour policy. Even though the record did not establish that the  
 10 “employees explicitly agreed to act together” to change the policy, most of them complained to management. Accordingly, the Board concluded, “the employees were engaged in a concerted effort to convince the Respondent to change its lunch hour policy. Resnick’s complaints to other employees, as well as her individual complaint to the Respondent, were part of the concerted effort.” *Salisbury Hotel*, 283 NLRB at 687.

15 In *Salisbury Hotel*, the record did not establish that employees authorized Resnick to speak on their behalf or even knew in advance that she was going to complain to management. Nonetheless, the Board found that her protest fell within the definition of concerted activity set forth in *Meyers Industries*, 268 NLRB 493 (1984) and *Meyers Industries*, 281 NLRB 882 (1984).

20 The present facts are similar in several ways. When Respondent announced the new pay computation, a great many employees objected. They continued to talk about it among themselves, and, individually, complained to management. Chapman, like Resnick in *Salisbury Hotel*, was among the most vocal. Were these the only facts, I would conclude that *Salisbury Hotel* is apposite here.  
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30 However, in *Salisbury Hotel*, the respondent announced the lunch hour policy in December, and management decided to discharge Resnick in December, not long after she complained. (The respondent waited to effectuate the discharge decision until after the Christmas holidays because it expected difficulty in finding a replacement.)

35 In the present case, Respondent announced the pay computation change on January 13, 2007, but did not decide to discharge Chapman until April 2, 2007. In the meantime, employee objections to the new pay computation method had faded. The General Counsel did present evidence that the change remained a subject of discussion among employees even at the time of Chapman’s discharge in April, but the evidence suggests that, at the time of his discharge, Chapman was the only driver who still was voicing objections.

40 Chapman’s protest, of course, would still be protected even if he were the lone holdout trying to rally other employees to support this cause. Indeed, an individual employee’s complaints aimed at instigating group action is quintessential concerted activity.

45 However, the credible evidence does not establish that Chapman was trying to enlist the support of other employees or that, on April 2, 2007, he intended to speak for anyone but himself. On that date, Chapman sought, in effect, that Respondent treat the reduction in pay as a deduction

from pay and list it on the paycheck stub. The record does not establish that any other employees wanted, or had asked for, such a change. Therefore, I conclude that Chapman was acting by himself, and not continuing the employees' January 13, 2007 concerted activity.

5 Credible evidence does not establish that, on April 2, 2007, Respondent regarded Chapman as speaking or attempting to speak for anyone other than himself. Accordingly, it is difficult to find a nexus between Chapman's discharge on that date and his protected activity several months earlier.

10 Based on this absence of a link between the protected activity and the adverse employment action, I concluded that the General Counsel had failed to prove the fourth *Wright Line* requirement. However, should the Board conclude that Chapman was, in fact, engaged in protected activity when Respondent discharged him on April 2, 2007, use of the *Wright Line* framework is not appropriate. As noted above, the proper inquiry in such circumstances would  
15 be whether Chapman had engaged in any misconduct sufficient to deprive him of the protection of the Act.

Were I to reach this issue, I would conclude that Chapman did not engage in such egregious misconduct and, accordingly, that he did not lose the Act's protection. Therefore, had I  
20 concluded that Chapman had been engaged in protected activity at the time of his discharge, I would have concluded further that the discharge was unlawful. However, in view of my conclusion that Chapman was not engaged in protected activity, I recommend that the Board dismiss the Complaint.

25 **Conclusions of Law**

1. The Respondent, Alton H. Piester, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

30 2. The Respondent did not violate the Act in any manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended

35 **ORDER**

The Complaint is dismissed.

40 Dated Washington, D.C., October 24, 2007.

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**Keltner W. Locke**  
**Administrative Law Judge**



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labor organization. Indeed, the Complaint does not allege a violation of Section 8(a)(3) of the Act, which makes unlawful employment discrimination to encourage or discourage membership in any labor organization.

Rather, the Complaint alleges that Respondent discharged employee Chapman because he “engaged in concerted activities with other employees for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such concerted activities for the purpose of collective bargaining or other mutual aid or protection.” For clarity, it may be noted that no evidence suggests that any employee or group of employees had requested that Respondent engage in collective bargaining and the General Counsel has not argued that any employees had formed any committee or organization to negotiate with their employer. Thus, notwithstanding the allegation that Chapman had “engaged in concerted activities. . .for the purpose of collective bargaining,” the record does not support such a finding.

Instead, the General Counsel argues that Chapman engaged in concerted activities with other employees for their “mutual aid or protection.” More specifically, the government asserts that a number of employees, including Chapman, protested a change Respondent made in the procedure for calculating their compensation, resulting in less pay. The employees began voicing these protests when Respondent’s owner announced the change during a January 13, 2007 meeting. The employees’ objections at the meeting constituted protected, concerted activity and, the government argues, Chapman was continuing that protected activity about two–and–a–half months later, on April 2, 2007, when, acting alone, Chapman complained about the change to one of Respondent’s office workers and to Respondent’s president.

The General Counsel contends that Respondent discharged Chapman in retaliation for protesting, in concert with other employees, the changed method for calculating compensation. Although such an alleged retaliatory discharge for protected activity resembles a discharge motivated by antiunion animus, the absence of a labor organization takes it outside the ambit of Section 8(a)(3) of the Act, which prohibits an employer from encouraging or discouraging union membership by engaging in employment discrimination.

Instead, the Complaint alleges that Chapman’s discharge violated Section 8(a)(1) of the Act, 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” of the Act. 29 U.S.C. § 158(a)(1). Section 7 of the Act grants employees the “right to self–organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and also “the right to refrain from any or all of such activities. . .” 29 U.S.C. § 157.

The Complaint also alleges that Respondent made two threats which violated Section 8(a)(1) of the Act. Specifically, Complaint paragraph 7 alleges that on January 13, 2007, Respondent, by Owner Piester, impliedly threatened employees with discharge if they engaged in protected concerted activity. The same paragraph further alleges that on April 2, 2007,

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Respondent, by Renee Derrick, impliedly threatened employees with discharge if they engaged in protected activity.

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Derrick works in Respondent’s office. The Complaint alleges, and Respondent denies, that Derrick is Respondent’s agent

**The January 13, 2007 Meeting**

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Respondent has not contested that its truck drivers (apart from the few owner–operators not relevant here), are “employees,” and therefore within the protection of the Act. Although their legal “employee” status isn’t disputed, it may be noted that the drivers receive compensation under a system different from that common in other industries. The productivity of the truck in generating revenue determines the compensation of its driver. However, as already noted, in January 2007, Respondent announced a change in billing and bookkeeping practices which negatively affected the amount of compensation a driver would receive. The change, which concerned the handling of fuel surcharges, made each truck appear to be less profitable than previously, and that, in turn, decreased the driver’s paycheck.

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When Owner Piester described the change at a January 13, 2007 meeting with the drivers, many protested vigorously. Piester told them, in effect, that he had made up his mind and that the change would take place notwithstanding their objections. During his testimony, Piester admitted he told the drivers that if they didn’t like it or it didn’t work for them, they could “clean out their truck and move to another job.”

25

The record establishes that the phrase “clean out your truck” carries a special meaning for truck drivers, or at least for Respondent’s drivers. Typically, a driver assigned to a truck will leave some personal possessions in it because he expects to be returning to operate it again. Should a supervisor tell a driver to “clean out your truck,” it would convey that the driver no longer would be operating that vehicle, or, in other words, that he was fired.

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Accordingly, the General Counsel argues that Piester’s remark to the drivers that if they didn’t like the change they could “clean out their trucks,” constitutes a veiled or implied threat of discharge. The record, however, does not persuade me that every reference to cleaning out a truck relates to the discharge of an employee. Rather, cleaning the personal possessions out of a truck reasonably would appear simply to signify that the driver’s previous relationship with that vehicle has ended, for whatever reason. The driver might have been reassigned to another vehicle, or he might have been discharged, or he might have quit voluntarily.

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Therefore, I do not understand Piester’s comment, that the drivers could clean out their trucks, to imply that they could be discharged for not liking the new system. Rather, I conclude that a typical driver reasonably would understand Piester’s words to mean, “if you don’t like the new system you can leave.” Stated another way, Piester’s words would be equivalent to saying, “If you don’t like the new system, you can pack your bags.”

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5 Would such a statement to employees upset about a change in working conditions – that  
 if they didn’t like it they could pack their bags and leave – constitute an implied threat? In  
*Jupiter Medical Center Pavilion*, 346 NLRB No. 61 (March 13, 2006), the respondent conducted  
 a number of employee meetings in response to a union organizing campaign. At one such  
 meeting, an employee criticized the way management treated its workers. A supervisor replied  
 “Maybe this isn’t the place for you . . . there are a lot of jobs out there.”

10 Reversing the administrative law judge, the Board held that the statement, suggesting that  
 the employee seek work elsewhere, violated Section 8(a)(1) of the Act:

15 The Board has long found that comparable statements made either to union advocates  
 or in the context of discussions about the union violate Section 8(a)(1) because they  
 imply that support for the union is incompatible with continued employment. *Rolligon  
 Corp.*, 254 NLRB 22 (1981). Suggestions that employees who are dissatisfied with  
 working conditions should leave rather than engage in union activity in the hope of  
 20 rectifying matters coercively imply that employees who engage in such activity risk  
 being discharged.

25 However, a significant fact distinguishes the present case from *Jupiter Medical Center*.  
 Employees were not discussing unionization during the January 13, 2007 meeting at which  
 Piester made the “clean out your truck” comment. Piester did not schedule the meeting in  
 response to a union organizing campaign. Indeed, nothing in the record suggests the existence of  
 such a campaign.

30 In the absence of any evidence establishing even that the word “union” came up during  
 the January 13, 2007 meeting, employees would have no reason to believe that Piester was  
 saying that support for a union was incompatible with continued employment. Certainly,  
 Piester’s “clean out your truck” comment communicated that employees dissatisfied with  
 working conditions or at least this particular working condition should leave. But that  
 suggestion isn’t the same as the veiled message which the Board found to be unlawful in *Jupiter  
 Medical Center*. In that case, the suggestion was unlawful not because it merely communicated  
 35 that an unhappy employee should leave but rather because the remark suggested the unhappy  
 employee should leave “rather than engage in union activity in the hope of rectifying matters. . .”

40 In *Jupiter Medical Center* the context of the remark a meeting called in response to a  
 union organizing drive provided the unspoken words which made the remark violative. When  
 an employer’s management calls a meeting to discuss a union campaign, employees attending  
 the meeting quite reasonably would try to relate the remark to the overall purpose of the meeting.  
 Respondent’s January 13, 2007 meeting did not take place in the context of such a union  
 organizing campaign.

45 Even if Piester’s “clean out your truck” remark did not convey to employees that working  
 for Respondent was incompatible with union activity, could it communicate that working for  
 Respondent was incompatible with engaging in other concerted activities for the employees’

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5 mutual aid and protection? It seems unlikely. Respondent did not call the January 13, 2007 meeting to discuss employees' protected activities.

10 Taking into account the total context, I conclude that employees attending the January 13, 2007 meeting reasonably would understand Piester's words not as the statement of a threat but as the announcement of a *fait accompli*. The words signified that Piester had made up his mind and the new plan would be going into effect despite their protests.

15 In this instance, announcing a *fait accompli* was not unlawful. Respondent's employees had not selected a union to represent them and Respondent had no obligation to bargain before making changes. Because I conclude that Piester's comment, in context, did not constitute an implied threat, I recommend that the Board dismiss this allegation.

**Events of April 2, 2007**

20 The record suggests that over time, employee discontent with the new practice abated. Chapman, however, continued to complain about the change. On April 2, 2007, he spoke with Renee Derrick, a secretary whose responsibilities include various accounting functions.

25 Witnesses differ somewhat concerning the details, so I must determine which gave the most reliable testimony. Based on my observations of the witnesses, I conclude that Derrick's testimony merits the greatest confidence. In addition to Derrick's demeanor, I also note that her answers were responsive to the questions and well organized. Additionally, based upon my observations of the witnesses, I credit the testimony of Sherry Marntin, who also works in Respondent's office.

30 Alton Piester appeared to have greater difficulty providing responsive answers. Although I believe him to be a sincere witness, his testimony sometimes seemed confusing and sometimes conclusory. In general, however, I credit his testimony.

35 The credited testimony establishes that when Chapman spoke with Derrick on April 2, he was concerned that the fuel surcharge amount did not appear on his pay stub. Derrick offered an explanation. Chapman remained unsatisfied and ultimately spoke with Piester. During the discussion, Chapman began to raise his voice.

40 Piester asked Derrick to come into his office. During his testimony, Piester explained that he summoned Derrick because he believed it would be good for someone to witness his conversation with Chapman.

45 At some point during the conversation, when Chapman still appeared to be unsatisfied, Derrick commented to him that if he was unhappy working there, he should clean his truck. Chapman protested that Derrick did not have authority to tell him to clean his truck, that is, she did not have authority to discharge him.

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5 Derrick stressed during her testimony, which I credit, that she did not instruct Chapman to “clean his truck,” which would be tantamount to discharging him, and noted that she did not have that authority. Rather, she told Chapman that if he were unhappy working there, he should clean his truck. That is, he should find work elsewhere.

10 The Complaint alleges that Derrick’s statement to Chapman about cleaning his truck constituted a veiled threat which violated Section 8(a)(1) of the Act. That issue will be discussed later in this decision.

15 Chapman became louder and got up out of his chair. Based on Derrick’s credited testimony, I find that he took a step towards Derrick. Piester told Derrick to clean out his truck, that he was fired.

My finding that Chapman spoke in a loud voice is based on the credited testimony of Derrick and Piester. However, I also note that on the witness stand, Chapman spoke in a noticeably louder voice than other witnesses.

20 In this instance, Chapman was concerned that information about the fuel surcharge did not appear on his paycheck stub. Derrick offered an explanation which did not satisfy Chapman. Derrick then referred Chapman to Piester.

25 Based on the credited testimony, most notably that of Marntin and Derrick, I find that Chapman spoke only about his own pay and pay documents and not those of any other employee. Additionally, the record fails to establish that Chapman indicated in any way that he intended to speak on behalf of any other employees or that any other employees had asked him to act on their behalf.

30 **Discussion**

35 For the reasons discussed with respect to Piester’s “clean your truck” comment at the January 13, 2007 meeting, I conclude that Derrick’s remark did not constitute a veiled or implied threat. That is particularly true because employees were engaged in concerted activity on January 13 when they protested the change in pay computation, but Chapman was acting by himself on April 2, 2007.

40 The General Counsel argues that Chapman’s April 2 conduct was a continuation of the employee protests at the January 13 meeting, and therefore protected. The credited evidence does not establish that Chapman said anything which would lead Piester to conclude that he was continuing the earlier protest. Considering the amount of time which had elapsed, it would not be self-evident that Chapman’s complaints, focused solely on his own pay and his own pay documentation, actually constituted activity on behalf of other employees. I conclude that Respondent had no reasonable basis to believe that Chapman was acting on behalf of anyone but  
45 himself.

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5 Concluding that Chapman’s conduct was unprotected, Derrick’s remark in response to that conduct does not constitute an implied threat of discharge or other retaliation for engaging in protected activity. Therefore, I recommend that the Board dismiss this 8(a)(1) allegation.

10 In determining whether Piester’s discharge of Chapman violated the Act, I will follow the framework which the Board set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees’ protected activity and the adverse employment action. More specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., *North Hills Office Services, Inc*, 346 NLRB No. 96 (April 28, 2006).

20 In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089; *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

30 It is true that the Board adopted the *Wright Line* framework to evaluate Section 8(a)(3) allegations, and that in certain Section 8(a)(1) discharge cases, following the *Wright Line* mode is not appropriate. However, the present discharge issue clearly turns on motive, and the Board has held that *Wright Line* provides an appropriate framework for analysis “in cases that turn on the employer’s motive.” *Phoenix Transit System*, 337 NLRB 510 (2002). Therefore, I will apply it here.

35 At the first step, I must determine whether Chapman engaged in protected concerted activity. Along with other employees, Chapman protested the change in pay computation at the January 13, 2007 meeting. Although I do not conclude that his actions on April 2, 2007 were protected, Chapman did engage in protected activity on January 13. Therefore, I conclude that the General Counsel has established the first *Wright Line* element.

40 The record certainly establishes that Respondent knew about Chapman’s protests on January 13. Respondent’s owner was present at the meeting. The General Counsel has proven both the second *Wright Line* element and the third. A discharge certainly is an adverse employment action.

45 However, I conclude that the government has not carried the burden of showing a link between the protected activity and the adverse employment action. Considering that two and

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5 one-half months had elapsed, and considering also the absence of evidence showing that the Respondent was hostile to the employees' protests, I do not find that such hostility existed. Indeed, I credit Piester's testimony that he did not mind talking with Chapman about the pay issue.

10 The credited evidence clearly establishes that Piester became upset when Chapman not only spoke loudly at Derrick but also stood up and took a step in her direction. The General Counsel elicited testimony that Chapman did not make any threat, in words or gestures. However, yelling at another employee, or even speaking loudly to an employee in an upset tone of voice, can impart discomfort as well.

15 Respondent pointed to Chapman's driving problems and driving record. I do not view this effort as an indication of a shifting defense. When Piester testified that Chapman's shouting was "the last straw," he seemed very sincere. Crediting that testimony, I conclude that Chapman's work problems had been a source of frustration to Piester which Piester might have tolerated longer. However, when Chapman started shouting at Piester's secretary, that was too  
20 much.

In sum, the credited evidence does not establish that Respondent discharged Chapman because of any protected, concerted activities. Accordingly, I recommend that the Board dismiss the Complaint in its entirety.

25 When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an  
30 appeal will begin to run.

Throughout the proceeding, counsel displayed consistently high standards of professionalism and civility, which I truly appreciate. The hearing is closed.