

Datwyler Rubber and Plastics, Inc. and Mononga Moore. Case 11–CA–21185

August 13, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On March 2, 2007, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,¹ findings,² and conclusions and to adopt the recommended order as modified and set forth in full below.³

The judge found, among other things, that the Respondent violated Section 8(a)(1) by discharging employee Mononga Moore for engaging in protected concerted activity. For the reasons set forth below, we agree with the judge that the Respondent's conduct was unlawful.

¹ We find no merit to the Respondent's contention that the judge erred by excluding evidence of employee Mononga Moore's charge of discrimination with the U.S. Equal Employment Opportunity Commission and evidence of Moore's previous performance problems and background. "[T]he Board affirms an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion." *Aladdin Gaming, LLC*, 345 NLRB 585, 587–588 (2005). Here, there was no abuse of discretion in excluding the above evidence. The judge excluded the charge of discrimination because it was related to a separate and ongoing administrative proceeding. In addition, he excluded evidence of Moore's previous performance problems and background because the Respondent conceded at the hearing that Moore's prior behavior was not a factor in its decision to discharge her.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's findings that the Respondent unlawfully threatened discharge in violation of Sec. 8(a)(1) by telling employee Moore: (1) that if she did not like working the required 7-day workweek, then she could turn in her badge and go "flip burgers"; and (2) that since she believed in God so much that she should pray to God to find her another job.

We also adopt the judge's finding that the credited testimony establishes that the Respondent violated Sec. 8(a)(1) by threatening its employees with plant closure in the event of unionization. In doing so, we find it unnecessary to pass on the judge's alternative finding that, even crediting Respondent witness Barbara Driggers, her testimony would establish an 8(a)(1) violation.

³ We shall modify the judge's recommended Order to include the Board's standard remedial language for the violations found.

Background

The facts, as set forth more fully in the judge's decision, are as follows. Owing to production demands, the Respondent implemented a 7-day workweek in fall 2005. Notwithstanding employee concerns about physical exhaustion and the inability to attend church on Sundays, the 7-day workweek continued into 2006. On January 5, 2006,⁴ the Respondent held one of its monthly employee meetings. The purpose of these meetings, which are held in the Respondent's employee break room, is to facilitate discussion of work-related issues. The January 5 meeting was attended by all of the Respondent's first-shift production employees.

The Respondent's general manager, Willie Ruefenacht, opened the meeting by telling the employees that they needed to continue working hard to meet its customers' tight production requirements. At some point thereafter, employees began raising complaints, mainly about the protracted workweek. Moore asked Ruefenacht when the Respondent was going to discontinue the 7-day workweek, and Ruefenacht responded that he did not see this in the future. Moore then stated that the employees were tired, that the situation was unfair, that "God created the world in six days and rested on the seventh day," and that the employees should also be permitted to rest on the seventh day. Ruefenacht responded that God had nothing to do with the situation. Employee Carla Samuel then stated that "God has everything to do with it, because if it weren't for God, none of us would be here." Ruefenacht then told Moore that if she did not like the situation, then she could turn in her badge and go "flip burgers." At this point, Moore called Ruefenacht a devil and said that Jesus Christ would punish him and the Respondent for continuing the 7-day schedule. Moore also asked whether she was being fired, and Ruefenacht did not immediately respond. When Moore repeated the question, Ruefenacht responded "no." At some point during this exchange, Moore also told Ruefenacht that others might be intimidated by him, but that she was not. Ruefenacht then ended the meeting, roughly 15–20 minutes earlier than scheduled. After the meeting, Ruefenacht told Production Manager Mike Rogers that Moore "has got to go."

Thereafter, on January 11, Moore was called into a meeting with Rogers and Human Resources Manager Richard Wysocki, where she was told that she was being discharged. When Moore asked why she was being discharged, Wysocki responded, "I don't have to have a reason to fire you."

⁴ All dates hereafter refer to 2006.

The judge found that the Respondent violated Section 8(a)(1) by discharging Moore for engaging in protected concerted activity, i.e., for speaking on behalf of herself and other employees about their terms and conditions of employment. The judge also found that Moore did not lose the protection of the Act by telling Ruefenacht that he was a devil, that Jesus Christ would punish him and the Respondent for requiring the 7-day workweek, and that she was not intimidated by him. In finding that Moore's outburst did not lose the protection of the Act, the judge cited the factors set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), but he did not analyze the outburst under them. As explained below, we find that application of the *Atlantic Steel* factors to the foregoing facts demonstrates that Moore's outburst did not lose the Act's protection. Accordingly, we find that her discharge violated Section 8(a)(1).

Analysis

Where, as here, it is clear that an employee was discharged for an outburst that occurred while engaging in Section 7 activity, the appropriate inquiry is whether the outburst was so opprobrious as to remove the employee from the protection of the Act. See, e.g., *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322 (2006). To determine whether an employee loses the protection of the Act due to the allegedly opprobrious conduct, the Board considers the following factors set forth in *Atlantic Steel*: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practices. *Atlantic Steel Co.*, supra at 816. We find that each of these factors weighs in favor of Moore not losing the protection of the Act.

With respect to the first factor, the place of the discussion weighs in favor of protection. Moore's outburst occurred during an employee meeting, where employees were free to raise workplace issues. Further, the meeting was held in the employees' breakroom, a location that would not disrupt the Respondent's work process. See, e.g., *Noble Metal Processing*, 346 NLRB 795, 800 (2006) (place of discussion weighs in favor of protection where outburst occurred during employee meeting held away from employees' work area, and thus did not disrupt the work process).

Addressing the second factor, we find that the subject matter of Moore's discussion with Ruefenacht also weighs in favor of protection. Moore's outburst occurred during a discussion of employee complaints about terms and conditions of employment, principally the 7-day workweek.

As to the third factor, we find that the nature of Moore's outburst weighs in favor of protection as well. Moore's outburst did not contain profane language, and it was spontaneous, brief, and unaccompanied by physical contact or threat of physical harm. See generally *Beverly Health & Rehabilitation Services*, supra, 1323 (nature of outburst—where employee told another employee to “mind [her] f--king business” during discussion of grievance—weighed in favor of protection) (internal citations omitted). While we recognize that Moore's statement could reasonably be viewed as offensive, we find that the nature of the outburst, when viewed in context of the protracted workweek and the employees' related concerns, does not weigh in favor of Moore losing the protection of the Act.

Finally, we find that the fourth factor, whether Moore's outburst was provoked by the Respondent's unfair labor practices, also weighs in favor of protection. As noted above, after Moore raised the employees' concerns about the continuation of the Respondent's 7-day workweek, Ruefenacht told her that if she did not like the situation, then she could turn in her badge and go “flip burgers.” The judge found, and we agree, that Ruefenacht's statement conveyed an unlawful threat of discharge for engaging in protected activities. Thus, Moore's outburst was an immediate response to the unlawful threat. Indeed, the facts show that Moore was well aware of Ruefenacht's threat when the outburst occurred, as she immediately thereafter asked Ruefenacht whether he was, in fact, discharging her. Accordingly, we find that her outburst was provoked by the Respondent's unfair labor practice, and we thus find that this factor weighs in favor of protection.

In sum, application of the *Atlantic Steel* factors to the instant facts establishes that Moore did not lose the protection of the Act by her statements at the employee meeting. Therefore, we find, in agreement with the judge, that the Respondent's discharge of Moore for engaging in that conduct was unlawful.⁵

ORDER

The National Labor Relations Board orders that the Respondent, Datwyler Rubber and Plastics, Inc., Marion, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁵ Chairman Battista joins his colleagues in finding that Moore's outburst was not so opprobrious as to lose the protection of the Act. He does so, however, based only on the factors of place of discussion, subject matter, and provocation. He finds that assuming arguendo the third factor (the nature of the outburst) weighs against protection, it is outweighed by the other three factors.

(a) Threatening its employees with termination for making statements concerning terms and conditions of employment at employee meetings.

(b) Threatening its employees with plant closure because of their engagement in protected concerted activities.

(c) Discharging its employees because of their engagement in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mononga Moore full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

(b) Make Mononga Moore whole for any loss of earnings and other benefits she may have sustained as a result of her discharge, with interest as set forth in the remedy section of this decision.

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

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Marion, South Carolina, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 2006.

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

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with termination for making statements concerning terms and conditions of employment at employee meetings.

WE WILL NOT threaten our employees with plant closure because of their engagement in protected concerted activities.

WE WILL NOT discharge our employees because of their engagement in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful discharge of Mononga Moore and offer her full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

WE WILL make Mononga Moore whole for any loss of earnings and other benefits as a result of her discharge, with interest.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

DATWYLER RUBBER AND PLASTICS, INC.

Jasper C. Brown, Esq., for the General Counsel.

Daniel M. Shea, Esq. and *Michelle W. Johnson, Esq.*, for the Respondent.

DECISION

STATEMENT OF CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on November 6 and 7, 2006, in Florence, South Carolina, pursuant to a complaint filed with the National Labor Relations Board (the Board). The complaint is based on an amended charge filed by Mononga Moore, an individual, with the Board against Datwyler Rubber and Plastics, Inc., (the Respondent or Datwyler). The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint is joined by the answer filed by Respondent wherein it denies the commission of any violations of the Act.

On due consideration of the testimony and evidence received in the case and the positions of the parties at the hearing and the briefs filed by the parties, I issue the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find, that at all times material the Respondent has been a South Carolina Corporation with a facility located at Marion, South Carolina, where it is engaged in the production of automobile parts, that during the past 12 months, a representative period, Respondent sold and shipped from its South Carolina facility products valued in excess of \$50,000 directly to points outside the State of South Carolina and that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges three areas of violations of the Act. Paragraph 6(a) of the complaint alleges that on January 5 and 6, 2006, Respondent's general manager, Willie Ruefenacht, threatened employees with termination for engaging in protected concerted activities. Paragraph 6(b) of the complaint alleges Respondent threatened employees with plant closure if they selected a labor organization as their collective-bargaining representative. Paragraph 7 of the complaint alleges that Respondent terminated employee Mononga Moore on January 11, 2006, because of her engagement in protected concerted activities.

The following includes a composite of the credited testimony of the events of January 5, 6, and 11, 2006. These events began with a regular monthly meeting of the first-shift employees on

January 5, 2006, which had been called by Respondent Datwyler to discuss various work-related items. Willie Ruefenacht is Datwyler's general manager and the highest ranking official at Respondent's Marion, South Carolina plant. Although Datwyler is a South Carolina corporation, it is headquartered in Switzerland and Ruefenacht reports directly to the Switzerland headquarters. Present at the meeting on behalf of Respondent's management were Ruefenacht, Production Manager Mike Rogers, Human Resource Manager Richard Wysocki, and Supervisor Tim Davis. The meeting was attended by all of the production employees on the first shift. The employees were on paid time and it was management's projection that the meeting would last about a half hour with another meeting scheduled for the second-shift employees shortly after the first meeting was conducted. It was also anticipated that management would meet with the third shift. The meeting was opened by Rogers with Ruefenacht speaking first. There were about 65 shift employees present at the meeting. Ruefenacht greeted the employees and thanked them for a special effort they had made in responding to a customers' shortage of materials that had to be remedied. Respondent is a second tier manufacturer and must meet very tight time constraints for certain of its customers who must meet strict time constraints to their automotive manufacturing customers. Of particular concern at this time was Continental Teves, a large customer of Respondent that had recently moved from Ashville, North Carolina, to Mexico and was experiencing substantial delays which could result in severe monetary penalties to Continental Teves and to Datwyler if they were unable to meet the automotive manufacturer's production schedule. Ruefenacht began to speak to the employees and said that they need to work very hard to meet the tight production requirements. At some point shortly after Ruefenacht began to speak, employee Carla Samuel spoke up and complained that she was being required to simultaneously operate two fast presses and one slow press at the same time making it difficult for her to meet her production requirements. She also complained that she had been told to follow the chain of command but said that nothing was being done by management to correct problems. At this point employee Mononga Moore spoke up and asked Ruefenacht when the Respondent was going to stop working 7 days a week. Ruefenacht said he did not see this in the future. Moore complained that she was tired and that it was unfair. She also said that God created the world in 6 days and rested on the seventh day and that the employees should also be permitted to rest on the seventh day. Ruefenacht told her that it did not matter as he was in charge at the plant. Samuel then spoke and said it did matter as, without God, none of them would be there. Ruefenacht also told Moore that he could not change this and that if she did not like it, she could turn in her badge to Rogers and could go flip burgers. Ruefenacht testified that at some point in this exchange, Moore called him a devil and said that Jesus Christ would punish him and the Company for working the 7-day schedule. Moore asked Ruefenacht if she was being fired and when he did not answer her she asked again and he then said, "No." Moore also told Ruefenacht at this meeting that others might be intimidated by him but that she was not afraid of him. Moore and employees Cheryl Wilson, and Beverly Eaddy testified that Moore did

not call Ruefenacht a devil. Rogers testified that Moore did call Ruefenacht a devil. It is undisputed that Moore did not use any profanity, or engage in any kind of threatening behavior. Rogers initially testified that Moore's tone of voice was loud and later on redirect examination testified she was screaming. Rogers acknowledged that the 7-day workweek was a matter of concern to employees who had initially enjoyed the extra money but became tired mentally and physically. The group meeting lasted only a total of about 15 minutes. Ruefenacht indicated to Rogers to end the meeting which he did. Ruefenacht testified that immediately after this meeting, he told Rogers that "the lady" (Moore) has got to go. Rogers agreed but suggested they cool down and speak to Human Resource Manager Wysocki first which they did.

Former employee Cheryl Wilson testified as follows:

The group meeting had started when Moore spoke and complained about being required to work seven days a week including Sundays. Wilson testified that Moore said that even the Lord took one day off to rest. Ruefenacht said that the Lord didn't have anything to do with this. Employee Carla Samuel then said that the Lord had everything to do with this. Moore spoke up again and told Ruefenacht that everyone else might be intimidated by him but she was not. He then told her if she didn't like what was going on, she could leave. She asked if she was being fired. He did not reply and she asked him again and he said "No." Moore did not scream at the meeting. Nor did she use profanity. Moore sounded like she was trying to get her point across. She was not disruptive. At that time they had been working seven days a week for several months. The seven day work week was a matter of concern for some employees but some liked the extra money.

Employee Beverly Eaddy testified as follows:

The meeting began with Rufenacht speaking. He talked about sales and productivity and said what he wanted to say and then Carla Samuel spoke and asked how long they would be working seven days because that was too much. I do not credit Eaddy with regard to Samuel having made this comment concerning the seven day week. Moore spoke up and asked how long they would be working seven days. Moore also told Ruefenacht he never talked to us. Ruefenacht then said that if she didn't want to work there, she could go somewhere else and "flip burgers." Moore then told him that God made heaven and earth in six days and rested on the seventh day. Rufenacht said God had nothing to do with it. He then said the meeting was over. Eaddy testified Moore never used profanity, did not scream at Ruefenacht and did not call him a devil. Moore's tone of voice was loud enough to hear but she was not screaming.

Employee Carla Samuel testified as follows:

Ruefenacht spoke first about production problems in the plant. When he stopped talking she asked about who to go to if they have questions. Then Moore said that even God rested a day. Ruefenacht told her, God had nothing to do with it. Samuel then said God's got everything to do with it because if

it weren't for God, none of us would be here. Then Moore said to Ruefenacht that she was not intimidated by him. Then Ruefenacht said that if she didn't like her job she could hand in her badge and also said something about flipping burgers. Moore then asked whether he was firing her. He said that he didn't say that. Moore's tone of voice was not loud and she did not scream or use any profanity.

Moore testified that at this regular monthly meeting, she asked Ruefenacht when they were going to stop the 7-day workweek and he said he didn't see it anytime in the future. She said God created the world in 6 days and needed a rest on the seventh day and we were tired. Ruefenacht said God didn't have anything to do with it and he (Ruefenacht) had the last say and if she didn't like it, she could flip burgers and turn in her badge to Rogers. She asked if she was fired and he did not reply so she asked again and he said, "No." Moore testified that in the monthly meeting her tone of voice was the same as Ruefenacht. It was normal. She did not scream. She did not call Ruefenacht a devil. She was speaking for the majority of the employees and herself about the 7-day workweek. On cross-examination, Moore acknowledged that she did raise her voice in the group meeting.

Moore testified that in October 2005, she had attended a meeting with Rogers and Supervisor Tim Davis and that she had told them that some of the employees wanted to go to church and were tired of the 7-day workweek and that Davis said he was tired also but there was nothing that could be done about it. I credit Moore's testimony concerning this meeting which is un rebutted as Davis did not testify and Rogers said a number of employees had complained to him about the 7-day workweek but that he could not recall whether or not he was at this meeting.

Respondent called another meeting on January 6 to which Moore and Samuel were summoned. Ruefenacht, Rogers, and Davis were also in attendance. Ruefenacht spoke first at the meeting and according to the testimony of Moore, said Samuel was a Judas Iscariot. Samuel did not testify to this. Ruefenacht said to Moore that since she believed in God so much, she should pray to God find her another job. Ruefenacht also said he had never been talked to in that manner before in his career at Datwyler as he had been in the group meeting. He then left the meeting. Moore and Samuel testified that he cut them off without giving them a chance to explain their position. Ruefenacht testified that Moore did not want to reason. Subsequently, on January 11, 2006, Moore was called into a meeting conducted by Wysocki with Rogers present. Wysocki told Moore she was being terminated. Wysocki indicated on the unemployment form that she was laid off. Ruefenacht testified her termination had been reported as a layoff to enable her to collect unemployment benefits.

Following her termination Moore began meeting with Respondent's employees at her home and generated petitions listing grievances and complaints of the employees which were submitted to both Datwyler in Marion County, South Carolina, and its headquarters in Switzerland. Datwyler received a petition in May. On about May 22, 2006, Ruefenacht directed Respondent's finance manager, Barbara Driggers, to meet with

the employees who signed the petition and to report back to him, which she did. Barbara Driggers also has human resource responsibilities which were given to her after Human Resource Manager Wysocki was laid off. Pursuant to this directive Driggers held five separate meetings with the employees who had signed the petitions to discuss their grievances and complaints. Barbara Driggers and Sharon Driggers (who is not related to Barbara Driggers) met with Samuel and employee Jackie Taylor on May 23, 2006. Sharon Driggers was there as a witness and took some notes. Samuel testified that at this meeting Driggers asked what is this about a union and then said you know if you brought in a union, Switzerland would shut the Marion plant down. Taylor testified she could not remember any details of the meeting except that Driggers told them where the rules were located in the plant. Barbara Driggers denied threatening the plant would be shut down if a union came in. Rather she testified that she had made a list of six items that were on the petition rather than bring the petition to the meeting. On item (6) she wrote "Raises & Union - Mexico?" She testified she wrote this because they were talking about raises and she told them that Respondent had not made any money since its inception in 1996 and that Switzerland did not have any ties with Marion County and if they did not show a profit that it may decide to close the Marion facility and move it to Mexico but that this had nothing to do with unions. Sharon Driggers is a human resource and payroll clerk. She attended two of the meetings of Barbara Driggers with the employees who had signed the petition. She was there as a witness. The first meeting was with Carla Samuel and Jackie Taylor. These employees brought up issues of raises, working 7 days and air-conditioning in the plant. When the issue of raises came up, Barbara Driggers said that Datwyler had no ties in Marion County and could move if they could not make a profit. She testified that this had nothing to do with a union. Sharon Driggers took notes at the meetings. The employees were brought into the conference room and Barbara Driggers told them Respondent had received the petition and wanted to talk about their concerns. Barbara Driggers testified that she did not say anything to the effect that if a union came in, this would cause the plant to move to Mexico. Barbara Driggers conceded that she had mentioned a union in the meeting with employees Carla Samuel and Jackie Taylor, because it was listed on their petition. She asked them if they wanted to discuss a union and they did not respond. Barbara Driggers testified she sent reports back to Ruefenacht as to what occurred in the meetings with the employees.

I credit Samuel's testimony that Barbara Driggers threatened plant closure that if a union were brought in, Switzerland would shut the plant down. I find that Barbara Driggers was an agent of Respondent under Section 2(13) of the Act, when she met with the employees at Ruefenacht's direction and when she conducted the meetings with the other employees who had signed the petitions prepared by Moore and reported the information received from the employees back to Ruefenacht. Driggers was vested with apparent authority and would have been perceived by the employees as an agent of Respondent by the threat issued by Driggers to employees Jackie Taylor and Carla Samuel that Switzerland would shut the Marion County

plant down if the employees brought a union in. *Restaurant Horikawa*, 260 NLRB 197, 203 (1982); Driggers issuance of the unlawful threat of plant closure was violative of Section 8(a)(1) of the Act. I find that even if Barbara Driggers' version were credited, her testimony that she threatened a shutdown of the plant by the Switzerland headquarters if issues of wages were brought up, establishes a violation of Section 8(a)(1) of the Act. I credit Samuel's testimony that Driggers did threaten plant closure if the employees brought a union in. I find it is unlikely that Samuel would have either intentionally or mistakenly made such a charge on her own as a current employee of Respondent.

III. CONTENTIONS OF THE PARTIES

In his brief the General Counsel contends as follows: Respondent threatened Moore with termination for engaging in protected concerted activities at the January monthly meeting and Respondent also threatened employees with plant closure if they selected a labor organization as their collective-bargaining representative in the meeting held by Barbara Driggers in response to the petition filed by its employees listing a number of concerns and requests. Moore's conduct at the January 5 monthly meeting was protected concerted activity. An employee's questions and comments in a group meeting called by the employer concerning common conditions of employment constitute concerted activity protected by the Act, citing *Enterprise Products*, 264 NLRB 946 (1982); *Whittaker Corp.*, 289 NLRB 933 (1988). Other employees at a group meeting need not accept an individuals' invitation to group action in order for the invitation to be concerted. *El Gran Combo*, 284 NLRB 1115 (1987); *Mushroom Transportation Co.*, 142 NLRB 1150 (1963). The object of inducing group action need not be express. *Jeannette Corp.*, 207 NLRB 653 (1975). It is undisputed that Moore was discharged because of her conduct in the group meeting. Moore's request for relief from the 7-day workweek was a matter of common concern for the employees and her comments were concerted activity. These comments were reinforced by Samuel who testified she told Ruefenacht that God had everything to do with it in reference to the 7-day workweek.

The General Counsel contends further that Moore acknowledged she raised her voice at the meeting but not to the level of a shout or scream. Nor did she use any profanity or engage in any other disruptive behavior at the meeting. Moore specifically denied calling Ruefenacht a devil or stating that Jesus Christ would punish Ruefenacht and the Company for requiring the 7-day workweek. Moore's testimony was corroborated by former employee Wilson and current employees Samuel and Eaddy. Each of these employees denied that Moore had screamed or engaged in any disruptive behavior in the January monthly meeting. Eaddy, a 6-year employee, testified that Moore did not call Ruefenacht a devil in the January monthly meeting.

Although Ruefenacht denied having threatened Moore with termination at the monthly meeting and in the followup meeting the next day, he did acknowledge however that he told employees at the January monthly meeting that "if you cannot stand the manufacturing pressure here you're always free to look for

another job and leave the company.” Samuel, Eaddy and Wilson testified that Ruefenacht threatened Moore with termination in the January monthly meeting. Samuel testified that at the meeting the next day, Ruefenacht threatened Moore by stating, “[I]f you believe in God so much, you can pray to God to find you another job.” Accordingly, the General Counsel contends that Ruefenacht unlawfully threatened Moore with termination in the January monthly meeting, and again in the meeting held the next day because of her engagement in protected concerted activities citing *Bill Scott Oldsmobile*, 282 NLRB 1073, 1073–1074 (1987).

The General Counsel argues that Respondent presented the testimony of Production Manager Rogers and employee Sherry Stover to bolster the credibility of Ruefenacht’s testimony concerning the monthly meeting. Stover testified that when Ruefenacht made his introductory remarks, he was immediately interrupted by Moore, and that Moore stated she did not want to work 7 days and that Moore tried to “over talk” Ruefenacht. However, Production Manager Rogers testified that it was Carla Samuel who first addressed Ruefenacht in that meeting rather than Moore. Stover could only recall that Moore said Jesus Christ would punish Ruefenacht for making the employees work 7 days a week and that Moore was not intimidated by him.

The General Counsel also points to conflicting testimony on the part of Rogers. Rogers testified that Moore asked Ruefenacht if she was fired but did not recall what had prompted Moore to ask this question and could not recall what Moore said before she allegedly called Ruefenacht a devil. Rogers also vacillated as to the statement that God would punish the Company and Ruefenacht. On direct examination and on cross-examination, Rogers said Moore used the term “God” but on redirect exam, said Moore used the term “Jesus Christ” in this threat. On direct examination, Rogers said Moore’s tone of voice at the January monthly meeting was loud. However, on redirect examination, he said she was screaming. The General Counsel also contends that Ruefenacht’s testimony was similarly inconsistent. He initially testified that Moore interrupted him at the beginning of the January monthly meeting. However, Rogers testified it was Carla Samuel who interrupted him at the beginning of the meeting. Most significantly, Ruefenacht stated at the hearing that Moore screamed at him, called him a devil and threatened that Jesus Christ would punish him and the Company for working 7 days. However, in a memo to Finance Manager Barbara Driggers dated June 23, he stated his account of the January monthly meeting and did not mention any of the statements allegedly made by Moore at the hearing. He did not say Moore screamed at him, nor did he state she called him a devil or that she threatened that Jesus Christ would punish him and the Company for working 7 days. His only comment concerning Moore in the June 23 memo was, “Then came the ladies monologue,” in reference to Moore and Samuel.

The General Counsel contends that Moore engaged in concerted activity with the other employees in the January monthly meeting and notes that the Board has found similar activity protected where two employees asked questions and made comments at a group meeting called by an employer, citing *Neff-Perkins Co.*, 315 NLRB 1229, 1233 (1994). The “Then

came the ladies monologue” comment in the June 23 memo shows that Respondent lumped Moore’s and Samuel’s actions together. Moore’s conduct thus clearly comes within the definition of concerted activity under Board law, citing *United Enviro Systems, Inc.*, 301 NLRB 942, (1991). The evidence refutes Respondent’s contentions that Moore was insubordinate. Moreover, the Board has permitted employees engaged in such concerted activity a wide latitude in how they are required to conduct themselves including expressing themselves in a loud and angry manner and the use of profanity, provided they do not engage in flagrant misconduct so violent or of such character as to render the employees unfit for further service. *Postal Service*, 250 NLRB 4 (1980). In *United Enviro Systems, Inc.*, supra and *Neff-Perkins Co.*, supra, employees who engaged in concerted activity were found not to have lost the protection of the Act even though their conduct was rude, argumentative, and profane. In the instant case Moore’s conduct did not exceed the bounds of permissible concerted activity. She did not engage in any threatening acts, nor did she threaten plant discipline. She did not use any profanity. In this case Moore’s conduct was spontaneous but was a matter of common concern for all employees in the plant.

The Respondent in brief contends as follows: It lawfully terminated Moore for insubordination because she verbally attacked its general manager, Ruefenacht, at a meeting of all first-shift employees. Moore’s outburst was neither protected nor concerted. Ruefenacht did not threaten any employees with termination on January 5 or 6. Ruefenacht’s comments on these dates related to the production pressures at the plant and that he could not immediately change the work schedule. These statements could not reasonably be interpreted as a threat. Barbara Driggers never threatened to shut down the Marion plant if a union came in.

Respondent contends that Moore was terminated for legitimate nondiscriminatory reasons and not because of any protected concerted activity. At the hearing, Moore denied she had called Ruefenacht a devil or stated that Jesus Christ would punish him and Datwyler for requiring the 7-day workweek. She admitted she was loud and told Ruefenacht that she was not afraid of him. On cross-examination, Moore was unresponsive to Datwyler’s attorney’s questions. See *Parc Fifty One Associates*, 306 NLRB 1002, 1007 (1992), rejecting testimony of an argumentative and evasive witness. Respondent also contends that other of the General Counsel’s witnesses were less than credible. Samuel admitted she was not sure about the order of various comments at the January 5 meeting. Wilson admitted she had been terminated from her job at Datwyler and told a supervisor that Ruefenacht had not seen the last of her as she was leaving the plant.

Respondent contends further that Moore shouted insults and religious slurs unrelated to any legitimate workplace concern. It is unlikely that Ruefenacht, Rogers and Stover would have all invented Moore’s comment that “Jesus Christ” was going to punish Ruefenacht and Datwyler for requiring her to work on Sundays. Moore’s “devil” comment was corroborated by Rogers. Respondent contends that Moore’s insults and religious slurs did not relate to any term or condition of her employment and are similar to those held unprotected in *Media*

General Operations, Inc. v. NLRB, 394 F.3d 207 (4th Cir. 2005), where one employee became agitated in a meeting of pressmen and called his supervisor a racist and stated that the newspaper was a racist place to work. The Respondent contends that Moore did not communicate legitimate workplace concerns when she called Ruefenacht a devil. The Respondent also cites *Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968) (conduct of employee who interrupted meeting and accused plant manager of being no different than Castro held unprotected). The Respondent contends further that Moore's personal attack on Ruefenacht was not concerted as she spoke only for herself citing *Meyers Industries*, 281 NLRB 882, 885 (1986). Moreover her subsequent conduct of religious slurs and insults was not concerted. *HCA Health Services of New Hampshire*, 316 NLRB 919, 929-930 (1995). The test for whether an employee's actions have lost the protection of the Act is set out in *Atlantic Steel Co.*, 245 NLRB 814 (1979). The four factors to be balanced are (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether it was provoked by an employer's unfair labor practice. Moore's tirade occurred in front of the entire first shift with dozens of people present and would reasonably tend to affect workplace discipline by undermining the authority of Ruefenacht. *Aluminum Co. of America*, 338 NLRB 20 (2002); *Waste Management of Arizona*, 345 NLRB 1339, 1341 (2005). Moore's offensive comments were unrelated to her desire to work fewer hours.

IV. ANALYSIS

The statement made by Ruefenacht in response to Moore's complaints about being required to work the 7-day workweek, that she could turn in her badge to Production Manager Rogers and she could go flip burgers, constituted a threat of discharge issued to Moore in response to her complaints about the 7-day workweek. I find that this threat was violative of Section 8(a)(1) of the Act. It is also clear that Moore's conduct at the regular monthly meeting was protected concerted activity concerning the employees' hours and terms and conditions of employment. I find that Moore was engaged in protected concerted activities on behalf of herself and her fellow employees when she spoke out at the meeting in opposition to the mandatory Sunday work. It is undisputed that the required Sunday work was a matter of concern to many of the employees. Production Manager Rogers testified that the employees were all tired from the mandatory Sunday work which had been required for a protracted period of time.

I also find that Ruefenacht's statement to Moore on the next day in the conference room was violative of Section 8(a)(1) of the Act. In this meeting Ruefenacht told Moore that since she believed in God so much, she should pray to God to find her another job. This was clearly a threat of discharge in response to Moore's engagement in protected concerted activity at the group meeting on the prior day.

Mononga Moore was discharged on January 11, 2006, for her conduct at the group meeting. It is undisputed that as Rogers testified, the sole reason for her discharge was her conduct at the meeting. Respondent defends its actions in discharging Moore as justified on the basis that she verbally at-

tacked Ruefenacht and was insubordinate and thereby lost the protection of the Act.

I find that Moore made the statement attributed to her by Ruefenacht and Rogers, that Ruefenacht was a devil and that God would punish him and the Company for making the employees work 7 days a week. In making this determination I have considered the testimony of the witnesses, their relationship to management as employees in the case of Eddy and Samuel and their respective interests in the outcome of this case particularly concerning Moore, Eddy, and Samuel, as well as the interest of the Respondent's management, Ruefenacht and Rogers, in responding to Moore's having spoken out. I am convinced that Moore did make the comment attributed to her. I found convincing Ruefenacht's open and steadfast testimony that Moore made the comment about the devil. However, I do not believe that it was so egregious as to warrant discipline against Moore. She basically spoke out at the Respondent's meeting concerning the work hours of the employees. However, she did not threaten or engage in any profanity or threatening or violent behavior. I do not find that Moore's spontaneous remarks constituted any serious threat sufficient to undermine discipline at the plant. I do not find that it was so egregious as to cause Moore the loss of the protection of the Act. Moore spoke out spontaneously at the meeting in protest on behalf of the employees, including herself, being required to work the 7-day week. She said she was tired. At the hearing she testified that she told Ruefenacht, "we" were tired. In either event I find that she was engaged in protected concerted activity about a matter of working conditions and hours of employment namely, being required to work a 7-day week. There is no doubt that the 7-day workweek was a matter of concern to many of the employees. Production Manager Rogers testified that the employees were tired. Moore testified that Shift Supervisor Davis told her that he was tired also but there was nothing he could do about it. Davis did not testify and Moore's testimony is un rebutted in this regard. When Moore spoke out at the meeting she did not engage in profanity or threaten any violent behavior which would have made her further employment untenable. It is clear that Moore was pursuing a complaint in opposition to maintenance of a seven day workweek. This complaint concerned her fellow employees and was a complaint about "hours" and "terms of employment." While her comments in pursuit of this complaint may have been unpleasant for Respondent to hear, they were not so egregious as to cause the loss of the protection of the Act. *Postal Service*, supra; *United Enviro Systems, Inc.*, 301 NLRB 942 (1991); *Neff-Perkins Co.*, supra.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening employees with termination for making statements at group meetings concerning terms and conditions of employment.

(b) Threatening its employees with plant closure because of their engagement in protected concerted activities.

(c) Its discharge of Mononga Moore.

3. The above-unfair labor practices in conjunction with Respondent's status as an employer affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

It is recommended that the Respondent offer immediate reinstatement to employee Mononga Moore to her former position or to a substantially equivalent one if her former position no longer exists. The above employee shall be made whole for all

loss of backpay and benefits sustained by her as a result of Respondent's discharge of her and its failure to reinstate her. Respondent shall also remove from its files all references to the unlawful actions taken against her and advise her in writing that it has done so.

All backpay and benefits shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal Rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S. Code Section 6621.

[Recommended Order omitted from publication.]