

Adelphi Institute, Inc. and Karen St. John Black.
Case 29-CA-11749¹

19 January 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND BABSON

On 5 February 1986 Administrative Law Judge Winifred D. Morio issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified and to adopt the recommended Order.

The judge found that the Respondent did not violate Section 8(a)(1) when it discharged employee Karen St. John Black for speaking to another employee about her probation. We agree, for the reasons set forth below.

The Respondent operates a business school where Black worked as an admissions representative from September 1984 until her discharge 5 March 1985. At approximately 5 p.m. that day, the Respondent's director, Philippe Doinel, told Black she was being placed on probation and gave her a probation letter.³ The letter explained that Black had not been at her desk all day, a new school period was starting in 3 days, and she had not yet enrolled a sufficient number of students to meet her admissions quota. After receiving the letter, Black approached fellow employee Sylvester Humbert in his office and asked him if he had ever been on probation. Humbert replied that he had not.

Immediately following this encounter, Humbert called Doinel and told him that Black had come to

Humbert's office and asked if he had ever been on probation. Doinel then called Black and told her she was terminated. Doinel stated at the hearing that, coupled with the other events of the day, Black's asking Humbert if he had ever been on probation was "the straw that broke the camel's back."

The judge found that Black's inquiry to Humbert was the motivating factor for her discharge but that it was not concerted activity because the inquiry was purely personal. We agree. Recently in *Meyers Industries (Meyers II)*⁴ we reiterated our definition of concerted activity as encompassing "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."⁵ We noted our approval of the Third Circuit's comments in *Mushroom Transportation Co. v. NLRB*⁶ that

[A] conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

We find that the above standards for determining the existence of concerted activity have not been met. Nothing in this case supports the conclusion that Black was initiating, inducing, or preparing for group action when she asked Humbert if he had ever been on probation. Absent from the record is any comment by Black or Humbert, which was credited by the judge, which would have suggested that Black's concern over her probation was directed toward group action.⁷ Nor is there any evidence that the Respondent suspected such motivation when it discharged her. To the contrary, the substantial record evidence points to the fact that Black was discharged for her individual action, which is beyond the scope of 8(a)(1) protections,⁸ and not for conduct that could be interpreted as "looking toward group action."⁹

Although we do not dispute our dissenting colleague's observation that concerted activity need

¹ The case number in the judge's decision is incorrect

² The General Counsel 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), enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found at sec. II, par. 1, of her decision, that Charging Party Karen St. John Black misled the Respondent on her application for employment in September 1984. The record shows that Black gave the misleading information on a New Employee Data Card, which she filled out sometime after she started working for the Respondent in September 1984.

Philippe Doinel, who was the director of the Respondent's Fulton St School when Black was discharged, was no longer employed by the Respondent at the time of the hearing.

³ The General Counsel did not allege that the probation was unlawful

⁴ 281 NLRB 882 (1986)

⁵ Id. at 887

⁶ 330 F.2d 683, 685 (3d Cir. 1964)

⁷ *Hospital of St. Raphael*, 273 NLRB 46 (1984) (no concertedness)

⁸ *NLRB v. Buddies Supermarkets*, 481 F.2d 714 (5th Cir. 1973)

⁹ In so concluding, we disavow the implication in the judge's analysis that a finding that an employer has a belief that an employee engaged in or intended to engage in protected concerted activity requires a showing of the existence of some concerted activity.

involve only a speaker and a listener, as the Board's decision in *Meyers II* reaffirmed,¹⁰ we disagree with his conclusion that Black was engaged in actual concerted activity when she spoke to Humbert. Our dissenting colleague finds actual concert based on two grounds. The first ground is that the subject matter discussed between Black and Humbert is a condition of employment. Subject matter alone, however, is not enough to find concert,¹¹ and such an analysis appears reminiscent of the approach taken in *Alleluia Cushion Co.*,¹² which the Board in *Meyers I*¹³ and *Meyers II* flatly rejected. The second ground on which the dissent relies is based on the unfounded assumption that there could be just one purpose for Black's inquiry and that it was to seek Humbert's aid in determining the impact of probation. Contrary to our dissenting colleague's view, there are other plausible reasons for Black's inquiry which do not indicate concert. Unlike the dissent, we simply will not supply a reason for Black's inquiry when the record does not support it or indicate any particular reason for her question. Because Humbert was the son-in-law of Doinel, Black might, for example, simply have wished to judge from his reaction to her question about probation whether he appeared to be aware of the action taken against her. Both as a son-in-law of the Respondent's director and as someone who had been annoyed to find Black in his office earlier in the day, Humbert is as likely to have appeared to Black to be one of those partly responsible for the disciplinary action as to have been someone she would wish to recruit for group protest. Without more, there is no way to determine whether such a question is preparatory to either group or individual action or whether it contemplates no action whatsoever. The dissent simply obliterates this point. Further, without anything on the part of Black or Humbert, or even Doinel, to justify such an assumption, the dissent also wrongly concludes that the Respondent suspected group rather than individual action. In this regard we note *Mushroom Transportation's* rule that

Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual

not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "gripping."¹⁴

We agree with the portion of that dissent's legal analysis which recognized the general principle of *Weingarten*¹⁵ that an employee may be engaged in concerted activity even though he alone may have an immediate stake in the outcome. Based on our factual analysis, however, we conclude that the further prerequisites for finding concert, as described supra, do not exist in the present case.

Moreover, our dissenting colleague's contention that Black's discharge had a "chilling effect" on the exercise of employees' Section 7 rights is without merit. In our view, Black's inquiry to Humbert did not rise to the level of a Section 7 discussion about terms and conditions of employment. As the Board observed in *Meyers II*, whatever remote incidental effect an otherwise lawful discharge may have on other employees does not render the discharge unlawful.¹⁶

The dissent also suggests that Doinel's statements to Black constitute an unwritten rule banning any employee discussion relating to terms and conditions of employment and that the Respondent failed to show any legitimate and substantial business justification for the rule as required by *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976). We initially note that this theory was not alleged nor argued by the parties nor passed on by the judge, and that this theory is based on the version of the events given by Black, who was generally discredited by the judge. Therefore, it appears that this theory was not fully litigated and cannot form the basis for finding a violation. Cf. *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1241 (9th Cir. 1980). In any event, we find *Jeannette* distinguishable in that, here, we are not faced with an unqualified, unwritten company rule or policy banning employee discussions. Unlike the dissent, we do not think that Doinel's purported statement to the effect that he had given her something personal and private about probation and that she went around asking other employees about it amounts to a "company rule or policy" in the sense used in *Jeannette*. Moreover, the court in *Jeannette* specifically reaffirmed the view that not every discussion of terms and conditions of employment constitutes protected concerted activity. Id. at 918 and fn. 2.

In conclusion, we agree with the judge that Black's only action was to question another employee about whether he was ever on probation

¹⁰ *Meyers II*, supra at 287-288

¹¹ See, e.g., *Mannington Mills*, 272 NLRB 176 (1984), *Allied Erecting Co.*, 270 NLRB 277 (1984), *Mushroom Transportation Co v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)

¹² 221 NLRB 999 (1975)

¹³ 268 NLRB 493 (1984)

¹⁴ Supra, 330 F.2d at 685

¹⁵ *NLRB v. J. Weingarten*, 420 U.S. 251, 260 (1975)

¹⁶ 281 NLRB 882 at 888-889

and the inquiry was not shown to be in pursuit of group action. We shall therefore dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER JOHANSEN, dissenting.

The Respondent, a business school, employed Charging Party Karen St. John Black to locate and enroll students. The Respondent's director, Philippe Doinel, placed Black on probation because she had not enrolled enough new students. Black then asked fellow employee Sylvester Humbert whether he was on probation. Humbert informed Doinel, who then fired Black. Doinel testified that the question to Humbert "was more or less the straw that broke the camel's back." The administrative law judge found that Black would not have been discharged "but for her inquiry to Humbert."¹ Nonetheless, the judge dismissed the complaint based on her finding that Black's inquiry was not protected.

The majority agrees with the judge that Black did not engage in protected concerted activity: "Nothing in Black's conduct suggested she was contemplating action with or on behalf of any other employee . . ." That misses the point. Whatever Black was contemplating at the time, she was engaged in actual concerted activity when she spoke to Humbert.

A conversation between employees is concerted activity within the meaning of the statute even though it involves only a speaker and a listener.² The adventitious circumstance that the listener is not responsive, or even is hostile, does not change the fact of communication.³ The subject, probation, is a condition of employment and it can scarcely be doubted that Black was seeking the aid of Humbert at least in determining the impact of probation. Employees are protected in their concerted activities for mutual aid or protection under Section 7 of the Act.

¹ The Respondent does not except to this finding, which is well supported

² As stated in *Root Carlin*, 92 NLRB 1313, 1314 (1951)

Manifestly the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indisputable preliminary step to employee self-organization [Footnote omitted]

³ The judge and the majority confuse the conversation between two "employees" here with situations immediately involving only one "employee" filing a "noncontractual grievance" with the employer, *Hospital of St. Raphael*, 273 NLRB 46 (1984), comments to management, *Mannington Mills*, 272 NLRB 176 (1984), and filing a claim with a state labor board, *Access Control Systems*, 270 NLRB 823 (1984)

The fact that Black was (from all appearances) acting from self-interest is not disqualifying: "[E]ven though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment."⁴

Moreover, the Respondent has failed to show any legitimate and substantial business justification for banning employee discussion of a term or condition of employment, an obvious focus and beginning point for employee organization. Employer discipline in this circumstance has a chilling effect on protected activities and must be justified to avoid the Act's prohibition.⁵

The Respondent, however, offers no justification for barring employee discussion of their employment conditions, resting instead on the argument that employees have no right to such discussion. Adopting that view "would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions."⁶

Accordingly, I would find the Respondent violated Section 8(a)(1).

⁴ *NLRB v J. Weingarten*, 420 U.S. 251, 260 (1975)

⁵ *Jeannette Corp v NLRB*, 532 F.2d 916 (3d Cir. 1976), enfg 217 NLRB 653 (1975)

⁶ *NLRB v Washington Aluminum Co.*, 370 U.S. 9, 14 (1962)

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DECISION

STATEMENT OF THE CASE

WINIFRED D MORIO, Administrative Law Judge This case, heard on 4-5 November 1985 at Brooklyn, New York, was based on a complaint that was issued on 3 July 1985 by the Regional Director for Region 29. The complaint alleges, in substance, that Adelphi Institute, Inc. (Respondent) discharged, and thereafter refused to reinstate, Karen Saint John Black because it believed that she had engaged in concerted activities for the purpose of mutual aid and protection. The Respondent, in its answer, denied that it had committed the unfair labor practice alleged in the complaint. Both parties filed briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times relevant, the Respondent, a corporation organized and existing by virtue of the laws of the State of Arizona, has maintained an office and place of busi-

ness at 1712 Kings Highway, Brooklyn, New York, where it is and has been engaged in providing educational and related services for business students. During the past year, which period is representative of its operations, Respondent in the course and conduct of its business operations derived gross revenues in excess of \$1 million and during the same period it purchased and caused to be delivered to its place of business school supplies and other goods and materials valued in excess of \$50,000 of which goods and supplies in excess of \$50,000 were transported and delivered to its place of business in interstate commerce directly from States of the United States other than the State in which it is located. The parties admit, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II THE ALLEGED UNFAIR LABOR PRACTICES

Karen Saint John Black filed an application for employment with Respondent in September 1984. On that application, Black stated that she had a bachelor of arts degree from Brooklyn College. During the hearing, Black admitted, on cross-examination, that although she attended the college for several years she had not graduated. Black claimed that she thought she had graduated and that it was only recently that she became aware that the college did not consider her to be a graduate.¹

It does not appear that the Respondent required a college degree for the position, as admissions representative, for which Black was hired in September 1984. As an admissions representative, it was Black's responsibility to locate and attempt to enroll students in the various business education programs offered by Respondent. Black was compensated for her duties through commissions, which were based on the number of students she enrolled if the students met certain attendance requirements. She was permitted a draw against the commissions she earned. Black worked until 5 March 1985 but on that day about 5 p.m. Black received a letter from Philippe Doinel, the Respondent's director, in which Doinel advised Black that she was being placed on probation. Both in his conversation with her when he gave her the letter and in the letter, Doinel advised Black that he had looked for her on that day on three occasions because he was concerned about her failure to enroll the expected number of students and because it was 3 days before the new school period was scheduled to begin. Doinel told Black that on one occasion he found her in the word processing room, on another occasion he found that she had gone to lunch, and on the third occasion he discovered her in another representative's office behind a closed door. During the hearing, Doinel indicated that he thought that Black was in the other representative's room to secure the names of students, who had been located by that representative, in order to fill her quota.²

¹ Black also admitted that at the time she applied for a position with her present employer she knew that she had not graduated. Notwithstanding that fact, Black again stated that she had a bachelor of arts degree on the application form that she filed with this employer.

² Doinel testified that names of students represented potential money to a representative and to attempt to take the names of students who had been secured by another representative was a very serious matter.

Although Black gave a somewhat different version of the events of 5 March, she basically did not disagree that on that day Doinel saw her on one occasion in the word processing room and on another occasion in another representative's room.

Counsel for the General Counsel does not contend that this probationary letter was discriminatory or unlawful in any respect. However, she does claim that it was Doinel's belief that Black engaged in protected concerted activities subsequent to the receipt of the probationary letter and he discharged her because of this belief.

According to Black's testimony, after she received the letter of probation she went to the office of another employee, Ann Rodriguez, and showed her the letter. Black testified that Rodriguez said "nothing too much other than she looked at me, like what was it for I told her I didn't know." Black claimed that she was in Rodriguez' office a few minutes and while there she did not see anyone but Rodriguez.³ Rodriguez was not called to testify. Black claimed that after she showed Rodriguez the letter she returned to her office where she remained for about 15 minutes until she went to the office of Sylvester Humbert, another admissions representative. Black testified that she asked Humbert whether he had ever received a probation letter and he replied that he had not received such a letter. Humbert then asked Black whether she had received one and she responded that she had and he then said, "Oh, that makes me nervous." Black claimed that she then asked Humbert why he was nervous and Humbert responded "because of all the things that are going on in Adelphi."⁴ Black claimed that she then told Humbert not to worry, to do his job, and there would be no problem. Black left Humbert's office and returned to her office where, within a few minutes, she received a call from Doinel who told her that she was terminated. She asked him why and Doinel replied "that he had given me something personal and private about probation and that I went around asking other representatives about it." Black did not have any further conversation with Doinel on that day but the following day she had a meeting with Doinel and during the meeting she asked him why she had been terminated and he told her that he could not tell her why she was terminated. She then requested a letter of termination and Doinel told her that he would give it to her the following day. Initially, Black agreed to wait for the letter but later that day she again requested a letter of termination. Doinel then gave her a letter which stated, "On 3-5-85 Ms. Karen Black is officially and formally terminated from Adelphi Institute, Inc."

Sylvester Humbert, who is Doinel's son-in-law, testified that on 5 March 1985 he saw Black on two occasions. On the first occasion, he left his office for a few minutes and when he returned he saw Black sitting in his seat behind the desk and he observed her hand on the

³ Black testified that the upper part of the partition in the office was glass and someone outside the office could see into the office.

⁴ In the affidavit secured from Black during the investigation of the case, Black stated that she asked whether Humbert had ever received a probation letter and he replied that he had not. She then left his office.

desk near the area of the drawers. He asked her what she was doing and she replied that she wanted to get away from the main office area because of the noise. Humbert came into the office and sat in the chair where students usually sat and he talked with Black for a few minutes. At some point, Doinel came into the office, observed the two, said hello, and left. However, when Black left Humbert, apparently concerned because Doinel had observed the two sitting and talking, called Doinel and told him what happened and expressed concern to Doinel about Black's presence in his office. Doinel replied that he would "handle the situation."⁵ Later that day, Black again came to Humbert's office and she asked Humbert whether he was on probation and he responded that he was not. Black then left. Humbert called Doinel and told him that Black had come to his office and asked him whether he was on probation. According to Humbert, Doinel did not ask any questions and that was the extent of the conversation.

Doinel testified that on 5 March 1985 he called Black to his office and gave her the letter of probation. During this meeting, he told her that they were approaching the start of the next school period, her productivity was not what he expected,⁶ and that throughout that day when he attempted to locate her, he found that she was either in the word processing room, out to lunch, or at some other representative's desk. He told Black that he was not satisfied with her work performance but he did not discharge her. Black left his office and within a few minutes he received a call from Humbert who told him that Black had asked him whether he had been on probation. Doinel testified that after he heard that, "coupled with the other items of the day," he told Black that she was terminated. According to Doinel, Black's question to Humbert,

was more or less the straw that broke the camel's back. I had felt that given the previous activity of the day—what I considered a very erratic [sic] work performance, that I just found it very, odd that after she had been at his desk, and trading—an incredible violation—that she should then go back down again and then to question him about a probation. Putting all these things together, I didn't—I terminated her employment.

When questioned about why Black's inquiry about probation triggered her discharge, Doinel responded that it did not trigger the discharge as much as her other activities of that day, including her being at Humbert's desk in his office when he was not there, not being at her work station, and his inability to locate Black when he looked for her. Doinel maintained that her inquiry alone would not have been the determining factor in his decision to discharge her. Thus, according to Doinel, it was all the

events which occurred on 5 March, including her question to Humbert which caused him to discharge Black. However, Doinel also testified that he was dissatisfied, in general, with Black's performance. Doinel claimed that Black was frequently late, took long lunch periods, frequently was not at her desk, her flirtatious conduct with him made him uncomfortable, and he thought that she smoked marijuana in the presence of students. Doinel admitted that notwithstanding this general dissatisfaction with Black's work performance, he did not decide to discharge her until 5 March. Black denied that she was late, engaged in flirtatious conduct⁷ with Doinel, or smoked marijuana.

Discussion

In the instant case, Black claimed that after she received the letter of probation she showed it to a fellow employee, Rodriguez, who made no comment and she then asked another employee, Humbert, whether he had received such a letter and he replied that he had not and that he was nervous about discussing the letter because of what was happening at Adelphi. I do not credit Black's testimony that she showed the letter to Rodriguez, nor do I credit that Humbert made any response to her inquiry except to deny that he was on probation. I base my credibility findings on my observation of Black while she testified, on the fact that she gave false and misleading information to her present and past employer about her college degree, and on the contradictions between her testimony and the statement contained in her affidavit about her conversation with Humbert. However, assuming that I did credit her testimony, I do not find that her conduct constituted concerted activity.

In *Meyers Industries*, 268 NLRB 493 (1984), an employee, Kenneth P. Prill, experienced difficulties with the brakes and steering mechanism on a particular truck, he complained to his employer on numerous occasions about the problem, without success, and eventually he filed complaints with state agencies about the condition of the truck, which complaints resulted in a citation being issued against the employer. Prill, who acted alone when he filed the complaints, was discharged for filing the complaints. Although, another employee had made similar complaints to the employer the Board concluded that Prill's discharge was not violative of the Act because Prill had acted alone when he filed the complaints and, therefore, he was not engaged in concerted activities. The Board, in reaching that conclusion, rejected the rationale previously stated in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), in which under similar circumstances a violation had been found. In *Alleluia*, a prior Board had found that an employee was engaged in concerted activities, although he had acted alone, when he filed complaints with the California Occupational Safety and Health Administration (OSHA) about safety problems at his workplace. In so finding, that Board had concluded that Congress and the States had passed laws or regulations because of their concern for industrial safety and,

⁵ It appears that Humbert was concerned about Black's presence in his office when he was not there because he thought that she might be trying to locate the names of students that he was attempting to enroll.

⁶ Black testified that her productivity was about the same as that of other representatives, but she did admit that as of 5 March, which was 2 or 3 days before a new term was to start, she had secured only 10 students who were scheduled to start school, although the quota was 25 students.

⁷ Black did admit that there had been rumors about an alleged affair between the two.

therefore, although an employee acted alone when he complained to a governmental agency about safety conditions in the workplace, such action was concerted activity because the "consent and concert of action emanates from the mere assertion of such statutory rights." In *Myers*, the Board not only overruled *Alleluia*, it also defined concerted activities as follows:

In general, to find an employee's activity to be "concerted," we will require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act and the adverse employment action at issue (e.g., discharge) was motivated by the employee's concerted activity

If that definition is applied to the facts of this case it is evident that Black was not engaged in concerted activities. Black's only action was to question another employee about whether he was on probation. Her inquiry was solely on her own behalf and was not on behalf of another employee or other employees. The *Myers* decision was remanded to the Board by the United States Court of Appeals for the District of Columbia (the case was appealed to the court under the name *Prill v. NLRB*, 755 F.2d 941 (1985)) because the court believed that the Board was in error when "it decided its new definition of concerted activities was mandated by the Act." However, even if the Board, on remand, decides to change its definition of what constitutes concerted activities, I do not consider that it will have an impact on this case. At issue in the *Myers* case was whether the Board could find concerted activities when an employee, acting alone, files complaints with a governmental agency charged with responsibility for investigating those complaints. In this case, Black's only action was to ask whether another employee was on probation. In these circumstances, absent other conduct, I conclude that Black's inquiry was purely personal and was not made in the interest of or on the authority of other employees and, therefore, it did not constitute concerted activity. *Hospital of St. Raphael*, 273 NLRB 46 (1984); *Mannington Mills*, 272 NLRB 176 (1984); *Access Control Systems*, 270 NLRB 823 (1984).

Counsel for the General Counsel argues, however, that it is not necessary to find that Black was engaged in concerted activities in order to find that her discharge was violative of the Act. Counsel contends that it is necessary only to find that the Employer believed that she was engaged in such activities and that she was discharged because of that belief. In support of that position, counsel has cited several cases. Although the cited cases contain language similar to the language used by counsel about an employer's belief, the facts in those cases are significantly different from those present in the instant case.

In *Monarch Water Systems*, 271 NLRB 558 (1984), the Board found that an employee was fired because the company president believed that the employee, Jones,

had acted in concert with a former employee, Ellis, to instigate an investigation with the Department of Labor about company business. The Board discussed the basis on which the president based his belief that the employee had acted in concert with the former employee. Thus, the president testified that he knew that Jones and Ellis were friends, he told Jones not to talk to Ellis, he was concerned about employees talking to Ellis, and he believed that Ellis had filed complaints with the Department of Labor. Moreover, the employer knew that the names of both individuals appeared on a charge filed with the Department of Labor. In these circumstances, the Board concluded that it was immaterial whether Jones, in fact, had acted in concert with Ellis because the employer, based on his knowledge, of their friendship and the appearance of their names on the charge, believed that they had acted together.

In *Windsor Industries*, 265 NLRB 1009 (1982), the Board stated that "a discharge because an employer suspects or believes that an employee engaged in union activities is violative of the Act." However, an examination of the facts in that case discloses that the two employees who were laid off were the two principal union adherents and they had attempted to organize other employees within the plant. Both employees had solicited other employees to sign authorization cards within the shop and they were observed by company officials speaking to union representatives. On one occasion, one of these two employees had presented the grievances of other employees to the employer at a meeting and the other, during that meeting, had requested that a list of holidays be posted. Moreover, the company president testified that when he received the union demand for recognition, he prepared a list of the employees he believed were prounion and the names of the two laid-off employees were on that list. Thus, it appears that the employees who were discharged, in fact, had engaged in union activities, within the plant and were observed by company representatives speaking to union officials.

In *Riverfront Restaurant*, 235 NLRB 319 (1978), the Board also concluded that it was immaterial whether the employees, in fact, had engaged in union activities, it was sufficient that the employer believed that he had and discharged him because of that belief. However, an examination of the facts in that case establishes that the employer knew that the discharged employee was a union sympathizer and the employer had exhibited his union animus in the week he discharged this employee by unlawfully interrogating another employee and discriminatorily discharging a third employee.

In *Crucible, Inc.*, 228 NLRB 723 (1977), the Board stated that if an employer's actions were based on fear or belief of an employee's union activity it is prohibited. In that case, however, the facts disclose that the employer discharged four employees who were engaged in union activity and then discharged a fifth employee, under similar circumstances, because he suspected that the employee also was a union supporter.

In all these cases, cited by counsel, there was evidence of concerted activities and evidence that the employer believed that the discharged employee had engaged

without others in that activity. In the instant case, there is no such evidence Black did not engage in concerted activities and Doinel had no reason to believe that she had engaged in such activities. The only testimony in this record concerning what Doinel knew about Black's activities came from Doinel and Humbert. Both individuals testified that Humbert had reported only that Black had asked him if he had ever been on probation. I credit that testimony, which is supported by Black's original statement to the Board agent during the investigation of the case. There is nothing in that inquiry by Black that could cause Doinel to believe that Black was acting in concert with Humbert or other employees, or that she was acting on their behalf. In fact, based on Humbert's earlier complaint to Doinel about Black, Doinel had every reason to believe that Humbert considered Black at best, an annoyance, and at worst, someone he considered untrustworthy. In these circumstances, it is difficult to conclude that Doinel discharged Black because of his belief that she had engaged in protected concerted activities.

Accordingly, because I do not find that Black was engaged in concerted activities that are protected by the Act and do not find that Doinel discharged her because

of his belief that she was engaged in such activity, I shall recommend that the complaint be dismissed.⁸

CONCLUSIONS OF LAW

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

2. The evidence is insufficient to establish that the Respondent violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation⁹

ORDER

The complaint is dismissed in its entirety.

⁸ Counsel for Respondent has argued that if I did find that Doinel believed that Black had engaged in protected concerted activities, I, nevertheless, should not find a violation because his belief was not a motivating factor in Black's discharge. I do not agree. It is evident, from Doinel's testimony, that despite his dissatisfaction with Black's work performance, he would not have discharged her but for her inquiry to Humbert. It was, to use Doinel's own statement, the straw that broke the camel's back, i.e., the motivating factor.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.