

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: March 18, 1996

TO : Rochelle Kentov, Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: FD Service 506-2001-5000
Case 12-CA-17399

This Section 8(a)(1) discharge case was submitted for advice on whether the employee was engaged in concerted activity under Meyers,¹ and if not whether complaint nevertheless should issue in order to allow the Board to reexamine Meyers which overruled Alleluia Cushion Co., 221 NLRB 999 (1975).

Charging Party Dubon, a janitorial employee, was assigned a storage closet for her cleaning fluids and other chemicals. The Employer required its janitorial employees to take their breaks and to eat their lunches in these closets. In mid-May 1995, Dubon's supervisor asked what smelled so bad in Dubon's closet. Dubon replied that she was going to file an OSHA complaint about the condition of her closet and also the fact that she was required to eat her lunch there.

On June 14, the Employer issued Dubon a written warning for "socializing" when she was taking her break in the security office because of the condition of her closet. Dubon denied socializing, refused to sign the warning, and invited the Employer to join her for lunch in her closet to see its condition. Immediately thereafter, Dubon and a fellow employee agreed that one of them should call a government agency about the condition of their closets. Eventually, both employees separately called OSHA.

Around two weeks later on June 28, the Employer's administrative assistant Winters received a call from an "OSHA lady" who told him that there had been a report of chemical storage problems. Winters asked who had

¹ Meyers Industries, Inc. (Meyers I), 268 NLRB 493 (1984) reaffirmed in Meyers II, 281 NLRB 882 (1986).

complained, but the OSHA official declined to identify anyone and instead stated that OSHA would supply the Employer with information by sending a fax. A few hours later, Winters received a second call from the same OSHA official. [FOIA Exemptions 6, 7(C) and 7(D)], the OSHA official stated that a cleaning person had complained that "they were required to eat their lunch in their janitorial closet...." A short time later that same day, the Employer received an OSHA fax enumerating the following five hazards:

- a. the room where cleaning supplies are kept and where employees take breaks is infested with mice and roaches;
- b. the supply room is not kept clean and orderly;
- c. No personal protective equipment is provided for the cleaning crews;
- d. Employees are required to eat in the supply room where the chemicals are stored;
- e. The fumes in the supply room overpowers employees & causes respiratory distress.

The following day, the Employer discharged Dubon allegedly for committing a third work rule infraction, viz., coming to work one-half hour late. The Region has found that this reason was pretextual and that the Employer discharged Dubon because it suspected that it was she who had reported it to OSHA. The Employer's Manager denied that allegation and denied knowing the identity of the OSHA complainant, [FOIA Exemptions 6, 7(C) and 7(D)]: I never asked anyone who the employees were who were complaining about their closets.

We conclude that the Region should issue complaint in order to provide the Board with an opportunity to reconsider whether it should return to the Alleluia Cushion² line of cases and find that the Charging Party's conduct was concerted under the doctrine of "implied concert" in that case. In addition, the Region should also allege that Dubon had been engaged in protected concerted activity within Meyers.

² Alleluia Cushion Co., 221 NLRB 999 (1975).

In a series of prior cases, we have authorized issuance of complaint under Alleluia Cushion where a single employee had been discriminated against because he or she, acting alone, had voiced a complaint about common employment terms, or filed a complaint with a government agency over a common employment term.³ Accordingly, the Region should proceed in the instant case under that same rationale, i.e., that Dubon was discharged for engaging in the protected concerted activity of filing an OSHA complaint over common employee terms. We conclude in addition, however, that the Region should also argue a violation under Meyers, i.e., that Dubon in fact had acted concertedly and the Employer discharged Dubon in the belief that she had been engaged in concerted activity.

It is clear that Dubon was acting concertedly with fellow employee Sequeira. However, the Board required in Meyers that the employee not only must have engaged in concerted activity, but the employer also must have knowledge of the concerted nature of that activity.⁴ We note the Region's finding that the Employer discharged Dubon in the belief that she had filed the OSHA complaint in large part because Dubon had earlier threatened to file such an OSHA complaint. We would argue that the Employer also believed that Dubon had acted concertedly in filing that OSHA complaint based upon the following evidence.

First, the Employer's manager [*FOIA Exemptions 6, 7(C) and 7(D)*] did not ask who the employees were who were complaining.... This statement arguably constitutes an admission that, although the Employer did not know the identity of the complainants, it certainly did assume that more than one complainant was involved. Second, the OSHA fax to the Employer not only denotes five separate "hazards", but also refers to their impact upon

³ See, e.g., Single Source Transportation, Case 30-CA-12822, Advice Memorandum dated October 3, 1995; Michigan Transport, Inc., Case 7-CA-36886, Advice Memorandum dated May 31, 1995; and Industrial Construction Services, Case 27-CA-13243, Advice Memorandum dated November 23, 1994.

⁴ See Amelio's, 301 NLRB 182 (1991); Talson Corp., 317 NLRB 290 (1995) (ALJD discussion of employee Denham, at p. 315).

"employees". The first, fourth and fifth hazards refer to cleaning room hazards affecting "employees", and the third hazard refers to the lack of protective equipment for "the cleaning crews." Given the multiplicity of complaints in the OSHA fax, and the description of these complaints as impacting more than one employee, the Employer could reasonably infer that the OSHA complaint had been the product of concerted activity.

Finally, administrative assistant Winters, who received both telephone calls from the OSHA official, states [*FOIA Exemptions 6, 7(C) and 7(D)*] that during the second call, the OSHA official told him that a cleaning person had complained that they were required to eat their lunch in their janitorial closet. (emphasis added) Thus, the Employer arguably had notice from that conversation that the second OSHA complainant purported to speak for more than one employee. Interestingly, this second OSHA complaint concerned the same storage closet issue over which Dubon had initially threatened to call OSHA.⁵

We therefore conclude that the Region should issue complaint in order to both provide the Board with an opportunity to reconsider whether it should return to the Alleluia Cushion line of cases, and also to argue that, in

⁵ Cf. Amelio's, supra, where the Board refused to find employer knowledge of the concerted nature of the conduct of an employee who had repeatedly complained alone about a common employee problem to management. The General Counsel argued an inference of employer knowledge of concert based upon the facts that (1) employees had actively discussed the same problem; (2) the employer was aware of an off-premises employee meeting; and (3) employees "may well have informed" the employer about that meeting. Based on these few facts, the Board declined to infer employer knowledge of the concerted nature of the employee's individual complaints about the problem. In contrast, as noted above, there is evidence on the instant case, together with an Employer admission, warranting the inference that the Employer knew or suspected that Dubon had acted concertedly.

any event, Dubon was unlawfully discharged for having engaged in protected concerted activity under Meyers.⁶

B.J.K.

⁶ [FOIA Exemption 5