No. 10-2122

UNITED STATES COURT of APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

WHITE OAK MANOR

Respondent

ON APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce the Board's Order issued against White Oak Manor ("the Company"). The Board found that the Company committed unfair labor practices when it interrogated and threatened two employees about their protest of the Company's inequitable enforcement of its dress code, and discharged one of those employees because of that protected concerted activity.

The Board had subject matter jurisdiction over this case under Section 10(a) of the Act,[1] which empowers the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order issued on September 30, 2010 and is reported at 355 NLRB No. 211. (JA 631.)[2] It is a final order with respect to all parties under Section 10(e) of the Act.[3] The Decision and Order incorporates by reference the Board's previous decision (JA 632) in this case, issued on January 30, 2009 and reported at 353 NLRB 795.

That prior decision was issued by a two-member quorum of the Board when there were no other sitting Board members. In 2009, the Company petitioned the United States Court of Appeals for the District of Columbia Circuit for review of that Order and the Board cross-applied for enforcement. Before the case was briefed, the D.C. Circuit placed it in abeyance pending final resolution of the validity of decisions issued by the two-member Board. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*,[4] holding that Board Chairman Liebman and Member Schaumber could not issue decisions

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[1] 29 U.S.C. § 160(a).

[2] "JA" references are to the Joint Appendix. "SA" refers to the Supplemental Appendix. "Br." refers to the Company's opening brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] 29 U.S.C. § 160(e).

[4] 130 S. Ct. 2635 (2010).

when there were no other sitting Board members, as they did in the prior decision here. The D.C. Circuit granted the Board's motion for remand based on *New Process*. The Board then issued its September 30, 2010 Decision and Order that incorporated by reference the January 30, 2009 decision. (JA 631-32.)

On October 5, the Board filed an application for enforcement of its Order. The application was timely filed, as the Act imposes no time limit for such filings. The Court has jurisdiction over the application pursuant to Section 10(e) of the Act[5] because the unfair labor practices occurred in Shelby, North Carolina.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its findings that the Company violated Section 8(a)(1) of the Act by threatening to discharge and interrogating employees Nichole Wright-Gore and Angela Hawkins.
2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging Wright-Gore because she engaged in protected concerted activity to initiate group action to compel the Company to equitably enforce its dress code.

STATEMENT OF THE CASE

Acting on a charge filed by employee Nichole Wright-Gore (JA 4), the Board's General Counsel issued a complaint alleging that the Company violated

[5] 29 U.S.C. § 160(e).

Section 8(a)(1) of the Act by threatening with discharge and interrogating two employees, and terminating Wright-Gore for engaging in protected concerted activity. (JA 6-12, 20-24.) Following a hearing, the administrative law judge issued a decision and recommended order finding violations of Section 8(a)(1) as alleged in the complaint. After considering the Company's exceptions to that decision, the Board affirmed the judge and found that the Company violated Section 8(a)(1) of the Act. (JA 631, 632.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

STATEMENT OF FACTS

I. The Board's Findings of Fact

A. Company Operations and Relevant Personnel Policies

The Company operates a long-term care facility in Shelby, North Carolina, and maintains its headquarters in Spartanburg, South Carolina. (JA 633.) The instant case involves the Shelby nursing home. The top company official there is Administrator Andy Nelson. Below him are eight directors who supervise employees in various departments of the facility. (JA 633; JA 92, 132, 275-76, 315, 397, 426, 448, 472.)

Nichole Wright-Gore ("Wright") was a Central Supply Clerk. She worked in a small office, preparing invoices on her computer, opening supply boxes, and distributing supplies to nurses' stations. Angela Hawkins is a Medical Records

Clerk. The employees at the facility are not represented by a union. (JA 636; JA 62-63, 209.)

The Employee Dress Code in effect in 2007 contained guidelines for professional appearance, general prohibitions, and uniform options for each job position, such as nursing assistants, ward clerks, and janitors. It prohibited visible body piercing and required that tattoos must be covered at all times. It did not prohibit items of clothing *not* listed in the Dress Code, including hats and head coverings. (JA 501-06.) Prior to Wright's discharge, many employees, including housekeeping and maintenance employees, customarily wore caps at the facility without any repercussions. (JA 276, 437.)

The 2004 and 2006 versions of the Company's Employee Handbook identify "Stealing or misappropriating (misusing) property belonging to the facility, residents or other employees" as "Conduct that May Warrant Termination Without Written Warnings." (JA 538, 626.) The 2006 Handbook added a section entitled "Misuse of Company Property and Internet Postings," which the Company describes as "a new policy prohibiting unauthorized use of the [Company's] name on any internet transmission or other medium." (JA 574.) This section also states, "Video footage and pictures of the facilities, its residents, visitors, and employees used without written authorization is a violation of Company policy and could result in . . . termination." (JA 600.) Employees Wright and Hawkins testified that

they never received a copy of this handbook. Typically, when the Company implemented new personnel policies, employees were asked to sign a form acknowledging their receipt of the policies, but they did not receive the actual policies at that time. Instead, Personnel Director Peggy Panther told them that "if [they] want a book to come to her office and get it." (JA 145-47, 254.)

Throughout Wright's employment, even after the 2006 Handbook took effect, employees photographed each other during special events and break times, on digital cameras and cell phones, without obtaining permission or being disciplined in any way. It was also a well-established practice for employees to show pictures to each other, whether the photos were shared electronically or printed and posted on bulletin boards in the facility. (JA 637; JA 120-21, 129, 173, 179, 200, 217-18, 446.)

B. Employee Wright Wears a Hat to Work as Her Coworkers Had Done; After First Ignoring It, the Company Tells Wright to Remove the Hat; Wright Protests that It Is Unfair To Require Removal of Her Hat When Other Employees Could Wear Hats

On October 23, 2007[6], Wright reported to work wearing a baseball cap to cover up a terrible haircut. She went to her immediate supervisor, Director of Nursing Terry Fowler, removed her hat and showed Fowler the haircut. Fowler responded that Wright's hair did not look bad and would grow back. Wright put her hat back on and returned to work. Administrator Andy Nelson, Business

[6] All dates are in 2007 unless otherwise indicated.

Office Manager Kathy Gunter, Personnel Director Panther, and Assistant Director of Nursing Tammy Whisnant saw Wright wearing a hat the week of October 23, but did not take any action. (JA 633; JA 66-73, 435, 456, 462.)

On October 30, during a fire drill, Panther told Wright that her hat was not part of the dress code. Wright did not respond or take off the hat. Shortly afterwards, Whisnant told Wright to remove the hat. Wright did not comply, explaining that the dress code did not prohibit the wearing of hats. Later that day, Director of Nursing Fowler called Wright into her office for a meeting with Panther and Whisnant. Fowler gave Wright a copy of the dress code in effect in 2007 and asked her to remove the hat. Again, Wright declined and said that it was unfair to require her to remove her hat when other employees were allowed to wear them. Fowler replied that Wright should not worry about other people and that if Wright did not remove her hat, she should clock out and leave through the back door of the facility. Wright did not remove her hat and left the facility. Concerned about the uneven application of the dress code, Wright went home and called Administrator Nelson, who told her to report to work the next day. In response to Wright's assertions that the dress code did not prohibit hats, that same day, Nelson distributed to employees a memorandum, which stated, "Only articles of clothing and jewelry that are listed are to be worn." (JA 633; JA 72-75, 79, 427-28, 434-35, 449-50, 507.)

The next day, on October 31, Wright dressed as a race car driver for Halloween. Her costume included a baseball cap, and other employees also wore hats as part of their costumes. Nelson approached Wright and said that it would be in her "best interest to take it off." Wright did so and never wore a hat at work after that day. (JA 633; JA 81-82). Later that day, Wright met with Nelson and Fowler in Nelson's office. Nelson asked why Wright did not take off her hat on October 30, and she again told Nelson that it was unfair that she was not permitted to wear a hat while other employees could wear hats. Nelson assured Wright that he "would look into it" and handed her a written warning for insubordination. Again, Wright asserted that it was unfair that the Company reprimanded her, but did not reprimand other employees who wore hats. (JA 633-34; JA 82-85.)

C. Wright Begins To Raise Awareness of and Document the Inequitable Enforcement of the Dress Code

Over the next two weeks, as Wright noticed that male employees were still wearing hats and showing tattoos, she spoke with at least ten female employees and three management officials about the Company's unfair enforcement of the dress code. Wright sought to enlist employee support and "hopefully get the upper management to enforce the dress code equally and fairly." (JA 131.) To do so, she engaged in many one-on-one and group conversations in the smoking and break areas. (JA 634; JA 65, 86-89, 96, 131, 193, 210-11, 247-49, 264-67.)

Specifically, Wright repeatedly discussed with coworker Angela Hawkins the Company's failure to uniformly enforce the dress code with regard to hats, tattoos, and jewelry. These conversations were overheard by Business Office Manager Gunter and her nonsupervisory assistant Christie Ingle. Also, other female employees who overheard Wright and Hawkins often joined in these discussions, agreeing with Wright's dissatisfaction and noting that some male employees did not cover their tattoos, as required by the dress code. On November 6, Wright also called the Company's headquarters and spoke to company consultant Debbie Sanders to discuss the warning she received and her conversations with employees and supervisors about the disparate application of the dress code. (JA 634; JA 92, 210-13.)

In addition to enlisting employee support and raising awareness among management, Wright and Hawkins began to document the uneven enforcement of the dress code. On November 12 and 13, Wright took pictures on her cell phone of four employees wearing hats and showing tattoos, with Hawkins' help. For example, on November 12, Wright and Hawkins approached employee Shay Roberts for a photograph; Wright informed Roberts that she received a warning for wearing a hat. Hawkins urged Roberts to let Wright photograph him wearing a hat and showing his tattoos. Wright took photographs of four employees: Roberts,

Harold Hopper, David Layell, and Deborah Mitchell. (JA 634; JA 98-100, 194, 512-13, 566.)

Between November 12 and November 14, Wright showed the pictures to two management officials, Staff Development Coordinator Veronica Walker and Business Office Manager Gunter, and at least five employees. On November 14, Hawkins joined Wright when Wright showed the photographs to Gunter and her assistant, Ingle, in Gunter's office. Wright stated that it was unfair that the Company allowed other employees to "break the dress code." Gunter never asked whether Wright had permission to photograph the other employees and never informed Wright that taking and showing pictures of other employees violated an employee rule. (JA 634; JA 104-10, 199-200, 214-15, 483, 491-92.)

On November 15, Administrator Nelson learned that Wright and Hawkins had documented the uneven dress code enforcement. That day, Hawkins showed Wright's cell phone pictures of Roberts to Receptionist Crystal Henson and said, "Look what we got." A few hours after viewing the pictures, Henson told Nelson she had seen a picture of Roberts "concerning the hat incident." Nelson told Henson "not to worry about it" and to "let him handle it." Also, Roberts told Nelson that Wright had taken his picture after Hawkins encouraged Roberts to let Wright do so, and Nelson asked Roberts to submit "something in writing" to him.

Finally, Gunter informed Nelson that Wright had shown her and Ingle pictures of other employees wearing hats and showing tattoos. (JA 634; JA 288-94, 475-83.)

D. Administrator Nelson Interrogates and Threatens To Discharge Wright Concerning Her Discussions with Coworkers and Documentation of the Uneven Dress Code Enforcement, and Lays the Groundwork for Terminating Her

On the afternoon of November 15, Nelson called Wright into his office, with Assistant Director of Nursing Whisnant present. During the meeting, Nelson questioned Wright about her efforts to enlist employee support and convince the Company to uniformly apply the dress code. Nelson asked Wright if she still had a problem with the hat. She replied that she did not have a problem with the hat but with being treated unfairly because of the Company's disparate enforcement of the dress code. Nelson told Wright that he thought their prior discussion on October 31 "was going to stay in [his] office and not leave." He asked why Wright did not "come back" to him if she still had a problem, and she responded that she did not see any results after that meeting. Nelson then said that Wright never told him she had a problem with the dress code. Wright reminded Nelson that she informed him that other employees wore hats, and that he assured her he would "look into it." He replied, "Oh yeah. I still haven't gotten around to that." (JA 634-35; JA 112-14, 440-41.)

Regarding Wright's efforts to garner support for consistent dress code enforcement, Nelson told Wright that he heard she had been talking to employees

and taking pictures of them without their permission. Wright said she had permission. Nelson called Wright a liar, which she denied, and informed her that "this is grounds for termination." Next, Nelson asked, "If you're so unhappy here, why are you still here?" She answered, "Andy, I have three children to take care of." He replied, "So you're going to let a hat come in between the food on your kids' table?" Nelson then told Wright she could resign at that time or think it over and discuss it later. The meeting concluded and Wright returned to work. (JA 635; JA 112-14, 442-44.)

The next day, on November 16, Nelson told Gunter that she and Ingle needed to give him written statements regarding Wright's photographs. They did so. Though both of their written statements included employee T.C. Brooks as one of the employees Wright photographed, Ingle testified that she was not sure she saw a picture of Brooks on Wright's cell phone. (JA 634; JA 205-06, 340, 475-76, 485, 582, SA 1.)

That afternoon, Nelson asked Brooks if he had any knowledge of his picture being taken at the facility. Brooks responded that he did not. Nelson encouraged Brooks to inform him or his supervisor if he heard anything. Around 2:00 p.m., Brooks submitted to Nelson a complaint form stating that he had "reasons to believe that someone in the facility ha[d] taken [his] picture without [his] knowledge and show[n] it to other staff . . ." and that he previously discussed this

complaint with Nelson. Prior to Nelson's inquiry, Brooks had no knowledge of or problems with an alleged picture of him. (JA 635-37; JA 341-42, 384, 630.)

E. The Company Discharges Wright For Photographing Employee Brooks; Nelson Interrogates and Threatens To Discharge Employee Hawkins Regarding Her Role in the Dress Code Controversy

Immediately after receiving Brooks' complaint, Nelson called Senior Administrator Amanda Pack in Charlotte, North Carolina, and decided to terminate Wright. The termination report stated that Wright was discharged for "[s]tealing or misappropriating (misusing) property belonging to the facility, residents or other employees. Employee took a picture of another employee without his/her permission and in turn, showed it to other employees." At 3:00 p.m., Nelson called Wright into his office. With Director of Nursing Fowler present, Nelson told Wright that he determined that she photographed an employee without his permission and that she was terminated. Upon termination, Nelson requested Wright's keys to the facility. (JA 635; JA 115, 342-45, 366-67, 515.)

According to Nelson, the sole reason for Wright's discharge was that she took a picture of employee Brooks without his permission. However, Wright denied doing so, and Nelson admitted that he never saw any such picture. The Company did not call Brooks to testify at the Board hearing.

Following Wright's discharge at 3:00 p.m., Nelson called employee Hawkins into his office around 3:30 p.m. He informed Hawkins that Wright "no

longer works here" and asked, "Do I need to take your keys?" Hawkins believed she would be discharged because "when you get fired they take your keys"—as the Company had done with Wright. Hawkins asked what Nelson was talking about. Nelson asked whether Hawkins knew anything about pictures. Hawkins told him she took pictures on Halloween. Nelson clarified his question and asked if Hawkins knew about the pictures Wright had taken. Hawkins told him about Wright's pictures of Roberts. Nelson then asked her if she had further information, to which Hawkins responded, "No, I don't. I just know she took the picture." (JA 635; JA 223-26.)

II. The Board's Conclusions and Order

On the foregoing facts, the Board (Chairman Liebman and Members Pearce and Hayes) found, agreeing with the judge, that the Company violated Section 8(a)(1) of the Act[7] by threatening to discharge and interrogating employees Wright and Hawkins, and by terminating Wright because she engaged in protected concerted activity. (JA 631; JA 635.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. The Order also requires the Company to rescind Wright's discharge and

[7] 29 U.S.C. § 158(a)(1).

to offer her reinstatement to her former job, or a substantially equivalent job if her former job no longer exists. The Board ordered the Company to make Wright whole for any loss of earnings and other benefits due to the discrimination against her. Additionally, the Board's Order requires the Company to remove from its files any reference to Wright's discharge, and notify her that it has done so and will not use the discharge against her. Lastly, the Company must post a remedial notice to employees advising them of their statutory rights and pledging not to violate the Act. (JA 631-32, 639.)

SUMMARY OF ARGUMENT

First, in its opening brief to the Court, the Company did not contest the Board's findings that it unlawfully threatened with discharge and interrogated Wright and Hawkins. It therefore waived the right to appellate review of those unfair labor practices. Accordingly, the Board is entitled to summary enforcement of these uncontested findings.

Second, substantial evidence supports the Board's finding that the Company unlawfully discharged Wright because of her protected concerted activities, and that her conduct was not sufficiently egregious to lose the Act's protection. Wright and her coworker, Hawkins, engaged in protected concerted activities by enlisting employee support for reforming the Company's unequal dress code enforcement and by documenting the inequity with photographs. Contrary to the Company's

assertions, Wright's actions were not based on a purely personal concern, but rather, on shared employee concerns about the disparate enforcement of the dress code that affected many employees.

It is undisputed that the Company discharged Wright solely because she allegedly photographed another employee and showed the picture to coworkers. The Board correctly found that Wright's photography—part and parcel of her protected concerted activity concerning the dress code—was not sufficiently egregious conduct to cause Wright to lose the Act's protection, for several reasons. Most importantly, the Board credited Wright's testimony that she never took the photograph for which she was terminated. Moreover, the Company did not disseminate its asserted rule requiring employees to get other employees' permission to photograph them, and did not enforce the rule against other employees; in fact, Wright was the only employee ever disciplined under this rule. Thus, given that the Company did not show that Wright even violated a known workplace rule by taking the specified employee's picture, the Board properly found her activity protected, notwithstanding the Company's claims to the contrary.

The Company incorrectly applies an analytical framework used to determine employer motive though motive is not in question here, as the Company's basis for Wright's termination is undisputed. The Company does not explain why its

analysis, and not the Board's, is correct, nor does it address the Board's finding that Wright's conduct was not sufficiently egregious to lose the Act's protection.

In sum, the Board's uncontested findings are entitled to summary enforcement, and substantial evidence supports its finding that Wright's discharge was unlawful. The Board's Order should be enforced in full.

STANDARD OF REVIEW

The scope of this Court's inquiry in reviewing a Board order is quite limited. This Court will enforce a Board order if the Board's factual findings are "supported by substantial evidence on the record considered as a whole"[8] and if "the Board's [legal] interpretations of the [Act] . . . are 'rational and consistent' with it."[9] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10] If such evidence exists, the Court must uphold the Board's decision "even though [it] might have reached a different result had [it] heard the evidence in the first instance."[11]

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[8] 29 U.S.C. § 160(e); *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 742 (4th Cir. 1998).

[9] *Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 352 (4th Cir. 2001).

[10] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 250 (4th Cir. 1997).

[11] *Alpo Petfoods, Inc.*, 126 F.3d at 250 (internal quotation marks omitted).

Specific to this case, whether an employee has engaged in protected concerted activity is a factual determination assessed under the "substantial evidence" standard, as are questions of whether an employer threatened to discharge, unlawfully interrogated, and terminated an employee for protected activity.[12] Finally, this Court accepts factual findings based on credibility determinations unless there are "exceptional circumstances," which only exist when a credibility determination "is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all."[13]

ARGUMENT

I. Section 8(a)(1) of the Act Prohibits an Employer From Restraining, Coercing, or Interfering with Employees in the Exercise of Their Section 7 Right to Engage in Concerted Activities

Section 7 of the Act guarantees to employees both the "right to self-organization, to form, join, or assist labor organizations" and the right "to engage in other concerted activities for the purpose of . . . mutual aid or protection."[14]

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[12] *See Medeco Sec. Locks*, 142 F.3d at 742; *NLRB v. Air Prods. & Chems., Inc.*, 717 F.2d 141, 145, 147 (4th Cir. 1983).

[13] *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 69 (4th Cir. 1996) (internal citations omitted), *amended on other grounds*, 95-2658, 153 LRRM 2617 (4th Cir. Nov. 26, 1996); *see NLRB v. CWI of Maryland, Inc.*, 127 F.3d 319, 326 (4th Cir. 1997) (accepting ALJ's credibility determinations because ALJ offered specific reasons, including that testimony was "credibly offered" and "uncontradicted").

[14] 29 U.S.C. § 157.

Section 8(a)(1) of the Act protects these rights by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."[15] To enjoy statutory protection against employer unfair labor practices in violation of Section 8(a)(1), an employee's conduct must be both concerted and for the purpose of mutual aid or protection.[16]

The well-settled test for a Section 8(a)(1) violation is whether, "under all of the circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees."[17] Under this objective test, it makes no difference "whether the language or acts were coercive in actual fact,"[18] or whether the employer intended to coerce.[19] Since whether particular conduct is coercive is a question "essentially for the [Board's] specialized experience," the Court grants "considerable deference" to the Board's determinations on such matters.[20]

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[15] 29 U.S.C. § 158(a)(1).

[16] *Holling Press, Inc.*, 343 NLRB 301, 302 (2004).

[17] *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997).

[18] *Equitable Gas Co. v. NLRB*, 966 F.2d 861, 866 (4th Cir. 1992).

[19] *Consol. Diesel Co.*, 263 F.3d at 352.

[20] *Id.* (citing *Grand Canyon Mining Co.*, 116 F.3d at 1044).

II. The Board Is Entitled to Summary Enforcement of Its Findings that the Company Violated Section 8(a)(1) of the Act by Unlawfully Threatening to Discharge and Interrogating Employees Wright and Hawkins

In its opening brief to the Court, the Company did not contest, or even mention, the Board's findings that the Company violated Section 8(a)(1) of the Act by unlawfully threatening to discharge and interrogating employees Wright and Hawkins. (JA 631, 635-36, 638.) The Federal Rules of Appellate Procedure, and the rules of this Court, require Company to present its "contentions and the reasons for them" in its opening brief.[21] A party's failure to raise an issue in the opening brief abandons it, and this Court need not consider the abandoned issue if that party later raises it in its reply brief.[22] Thus, by failing to challenge the Board's findings of unlawful threats of discharge and interrogation, the Company has waived its right to appellate review of those issues, and the Board is therefore entitled to summary enforcement of its uncontested findings.[23] Furthermore, the uncontested violations do not disappear, but remain relevant to a consideration of the contested

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[21] Fed. R. App. P. 28(a)(9)(A); 4th Cir. R. 34(b) (same).

[22] *See, e.g., Yousefi v. INS*, 260 F.3d 318, 326 (4th Cir. 2001) (declining to consider claim raised for the first time in reply brief); *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n. 6 (4th Cir. 1999) (failure to raise a specific issue in the opening brief constitutes abandonment of the issue under Fed. R. App. P. 28(a)(9)(A)).

[23] *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991) ("As to the parts of the order the company has not contested, the Board is entitled to summary enforcement.").

violations, "lending their aroma to the context in which the contested issues are considered."[24]

In any event, even if the Company had presented those issues for the Court's review, substantial evidence supports the Board's findings of unlawful threats of discharge and interrogations. The Company's top on-site official, Administrator Nelson, interrogated Wright about her efforts to end the inequitable enforcement of the Company's dress code, said those efforts could come between her job and the food on her children's table, suggested that she should leave since she was unhappy, and then asked for her resignation outright. Likewise, after telling employee Hawkins that he had just fired Wright, Nelson asked Hawkins whether he needed to take away her keys to the facility, questioned her about her role in protesting the Company's enforcement of the dress code, and implied that her continued engagement in protected activity would lead to her termination. Such

[24] *Id.* (quoting *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982)).

statements and questions constitute unlawful threats[25] and interrogations.[26]

III. Substantial Evidence Supports the Board's Finding That the Company Violated Section 8(a)(1) of the Act by Discharging Wright for Seeking to Induce Group Action To Compel the Company to Fairly Enforce Its Dress Code

The Company discharged Wright for allegedly taking a coworker's photograph without his permission. Wright's photography of other employees, however, was an integral part, or res gestae, of her protected concerted activity—attempting to initiate group action to end the Company's unfair enforcement of its dress code. She took the photographs solely to document the inequitable enforcement. Under the Board's established analytical framework for such circumstances, the relevant question is whether Wright's photography was conduct sufficiently egregious to lose the Act's protection. The Board correctly found that Wright's conduct in photographing her coworkers was not sufficiently egregious,

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[25] *E.g.*, *The Korea News, Inc.*, 297 NLRB 537, 540 (1990) (employer unlawfully asked employees why they did not quit if they had complaints), *enforced*, 916 F.2d 708 (2d Cir. 1990) (table); *Rogers Elec., Inc.*, 346 NLRB 508, 515 (2006) (employer unlawfully told employees, after concerted complaints, that those who were discontented "can just exit"). *See also Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1137 (4th Cir. 1982) (employer's warnings to employees that further engagement in protected activity would result in their dismissal constituted unlawful threats of discharge).

[26] *See Standard-Coosa-Thatcher*, 691 F.2d at 1138-39 (supervisor's efforts to elicit information from employee regarding his attitude toward protected activity and the fact that interrogation occurred in supervisor's office favored finding of coercion); *NLRB v. Nueva Eng'g Inc.*, 761 F.2d 961, 966 (4th Cir. 1985) (supervisor's threats of discharge during interrogation heightened the coercive, intimidating nature of the questioning).

most importantly because she never took the specific photograph for which the Company discharged her. Moreover, given that the record did not show that the Company disseminated a rule against employee photographs and the Company previously allowed other photographs of employees to be taken without their permission, the Board logically rejected any claim that Wright's photography was misbehavior at all, much less misbehavior severe enough to forfeit the Act's protection.

A. Section 7 of the Act Protects an Individual's Conduct If It Is "Concerted" and for the "Mutual Aid or Protection" of Employees

Section 7's safeguard of concerted activities undertaken for mutual aid and protection extends "even to activities that do not involve unions or collective bargaining."[27] Indeed, the "broad protection of Section 7 applies with particular force to unorganized employees" who have no designated bargaining representative to speak for them.[28] The term "concerted activity," though not expressly defined in the Act, "clearly enough embraces the activities of employees

[27] *Medeco Sec. Locks*, 142 F.3d at 746; *see NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

[28] *Washington Aluminum Co.*, 370 U.S. at 14.

who have joined together in order to achieve common goals."[29] However, individual action may also constitute protected concerted activity when it is "intended to enlist the support and assistance of other employees."[30] Even "a conversation involving only a speaker and a listener may constitute concerted activity" as long as 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."[31]

In addition to being "concerted," employee activity must also be for "mutual aid or protection" to be protected under Section 7 of the Act. The Supreme Court has stated that the "mutual aid or protection" clause protects employees who "seek to improve terms and conditions of employment,"[32] which, this Court recognized, include "sufficiently well identified" employee concerns such as dress codes.[33] It

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[29] *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991) (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984)) (internal quotation marks omitted).

[30] *E.g.*, *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

[31] *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 307 (4th Cir. 1980) (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

[32] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

[33] *New River Indus.*, 945 F.2d at 1294.

also protects employee complaints about disparate discipline,[34] as disciplinary measures are "reprimand[s] that can . . . have . . . future, tangible effects on the terms and conditions of employment."[35] Moreover, the Board has indicated that employees' use of photographs to demonstrate their positions concerning working conditions is protected activity.[36]

When an employee has engaged in protected concerted activity and is discharged because of that activity, the discharge violates Section 8(a)(1) of the Act.[37] Employees may lose protection of the Act, however, if the manner in which they carry out their Section 7 "conduct is so egregious as to take it outside the

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[34] *Indep. Stations Co.*, 284 NLRB 394, 394, 403-04, 407 (1987) (finding that employee's complaints about disparate discipline and favoritism were protected, as other coworkers shared employee's concerns).

[35] *NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 212 (4th Cir. 2005) (citing *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1240 (11th Cir. 2001)).

[36] *Ogihara America Corp.*, 347 NLRB 110, 112 n.8 (2006) (assuming arguendo that use of photographs to illustrate employees' positions concerning alleged poor work performed by supervisor was protected concerted activity).

[37] *Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am. v. NLRB,* 514 F.3d 574, 581 (6th Cir. 2008) (quoting *Guardian Indus. Corp.* 319 NLRB 542, 549 (1995)).

protection of the Act, or of such a character as to render the employee unfit for further service."[38]

B. Wright's Actions Constituted Concerted Activity for Mutual Aid or Protection

Substantial evidence supports the Board's finding that Wright was engaged in concerted activities for mutual aid and protection by "seeking to initiate or induce group action among the [Company's] employees in an effort to compel [the Company] to fairly enforce its dress code." (JA 632 n.2.) First, Wright did so "when she spoke with other employees concerning the disparate enforcement of the dress code" to enlist their support to convince management to fairly enforce the policy; second, Wright did so "when she took pictures, with the assistance of [] Angela Hawkins, of employees who were wearing head coverings and . . . showing tattoos," as a visual aid to demonstrate the uneven enforcement. (JA 636.) As demonstrated below, the Court should reject the Company's arguments to the contrary.

Wright engaged in concerted protected activity by discussing with her coworkers the Company's enforcement of the dress code. After receiving a written warning for wearing a hat and obtaining Nelson's assurances that he would "look into" the issue of other employees violating the dress code, Wright noticed that

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[38] *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 280 (4th Cir. 2003) (internal quotation marks omitted). *See also Hacienda Hotel, Inc.*, 348 NLRB 854, 854 n.1 (2006). *See generally Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

some male employees still wore hats and failed to cover their tattoos. Wright recognized that her complaint to Nelson was fruitless and, as Nelson admitted, Wright "chose to deal with [the issue] . . . by taking it and getting support from other employees." (JA 82-85, 395.) Wright testified that she sought to enlist employee support to "hopefully get the upper management to enforce the dress code equally and fairly." (JA 131.) She initiated one-on-one and group conversations with female employees and supervisors, during which many employees agreed with Wright that the dress code was unfairly enforced. Several of Wright's female coworkers testified accordingly and therefore corroborated Wright's description of her activities and intent. (JA 65, 88-89, 193, 210-13, 240, 247-49.) Wright also discussed this shared grievance with the Company's consultant on November 6 (JA 92), and on November 15, Wright reiterated to Nelson that the Company unfairly enforced its dress code. (JA 112-14.) When an individual like Wright brings a group complaint to management, that action is concerted activity even where she was not explicitly designated by the group as its spokesperson.[39] As the Board concluded, such discussions "constituted a joining together of the employees for their mutual aid and protection as the wearing of hats and other items outlined in the dress code would affect terms and conditions of

[39] *See Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198-99 (D.C. Cir. 2005).

employment" (JA 636), and discourse about terms and conditions of employment is protected.[40]

Wright was also engaged in concerted protected activity when she photographed employees using her cell phone, with Hawkins' assistance. (JA 632 n.2, 636.) As the Board found, Wright "enlisted Angela Hawkins to join together with her and assist in convincing employee Roberts to let Wright take pictures of him wearing a hat and showing a tattoo." (JA 631, 636.) Despite Nelson's assurance that he would look into the dress code enforcement, Wright noticed that employees continued to wear hats and show tattoos, and she began taking pictures to document the violations that the Company permitted. Hawkins assisted by urging Roberts to allow Wright to take pictures of him wearing a hat and showing his tattoo. (JA 98-100, 194.) Wright showed these pictures to supervisors and employees, complaining about the Company's failure to fairly implement its dress code (JA 104-110, 199-200, 214-15); also, when Hawkins showed Roberts' pictures to employee Henson, she remarked, "Look what we got," demonstrating that Wright did not act alone. (JA 288-89, 304.) With these pictures, Wright

[40] *See Consol. Diesel Co.*, 263 F.3d at 353 (discussion of white employees' opposition to Martin Luther King holiday was protected because "that issue is a term and condition of employment").

"intended to resolve or call attention to conditions of employment," and as such, was engaged in protected concerted activity.[41] (JA 636.)

Thus, the activities of Wright and Hawkins were intended to enlist the support of other employees to correct disparate working conditions and therefore constituted protected concerted activity for mutual aid or protection.[42]

C. The Company Unlawfully Discharged Wright For Engaging in Protected Concerted Activity; Her Conduct Was Not Sufficiently Egregious to Lose Protection of the Act

As shown in the previous section, Wright's photographic documentation of the uneven enforcement aimed to compel the Company to fairly enforce its dress code. The Board properly found that the Company unlawfully discharged Wright for engaging in protected concerted activity when it fired her for allegedly photographing another employee who violated the dress code. (JA 631, 635, 638.) Indeed, the Company's motivation for discharging Wright is undisputed: According to Administrator Nelson, the sole reason for Wright's discharge was that "she took a picture of T.C. Brooks and showed it to other employees."

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[41] *New River Indus.*, 945 F.2d at 1295. *See also id.* (distinguishing protected criticisms of working conditions from unprotected belittling attacks on employer).

[42] *Owens-Corning Fiberglas Corp.*, 407 F.2d at 1365 (individual action constitutes protected concerted activity when it is "intended to enlist the support and assistance of other employees"); *Indep. Stations*, 284 NLRB at 394, 407 (employee's support of coworker's complaint concerning disparate discipline is concerted activity). *See generally Eastex*, 437 U.S. at 565 (recognizing that "mutual aid or protection" clause protects employees seeking to improve terms and conditions of employment).

As discussed above,[43] where, as here, an employer discharges an employee for protected concerted activity, it may claim, as an affirmative defense, that the conduct in connection with that activity was sufficiently egregious to lose the Act's protection. Here, substantial evidence supports the Board's finding that Wright's conduct—purportedly photographing employee Brooks without his permission—was not sufficiently egregious to lose the Act's protection. (JA 632 n.2.) First, the Company did not establish that Wright actually took a photograph of Brooks without his permission—the sole basis for which it discharged Wright. Administrator Nelson conceded that he never saw a picture of Brooks on Wright's cell phone, and Wright consistently denied that she took his picture. Though Gunter and Ingle gave Nelson written statements claiming they saw a picture of Brooks on Wright's phone, Ingle testified that she was unsure if she saw his photograph and the judge credited Wright's testimony as "more reliable" than that of Gunter. (JA 634.) Moreover, neither Brooks' written complaint, nor the circumstances surrounding its submission to Nelson, suggest that he was actually photographed: Nelson asked Brooks if he heard about someone taking his picture, which he had not, and told Brooks to tell him or Brooks' supervisor if he heard anything. Only then did Brooks submit a form stating that he "had reasons to believe" his picture had been taken without his permission. One hour later, Nelson

[43] *See supra* at 23-26.

discharged Wright. Notably, the Company did not call Brooks as a witness in the Board hearing. (JA 635, 637; JA 97, 366-68, 379.)

Next, the Company failed to establish that it disseminated the rule that it claimed Wright violated—prohibiting employees from taking pictures of each other without first obtaining their permission. Neither Wright nor Hawkins ever received a copy of the 2006 Handbook, which contained that new rule. Although they signed a form acknowledging receipt of the Handbook revisions, they never received them. For while the Company required employees to sign receipts, it did not actually distribute copies of the handbooks to employees. Moreover, company managers never mentioned that rule when they saw Wright's photographs of her coworkers. For example, when Wright showed Business Office Manager Gunter the cell phone pictures, Gunter never asked Wright whether she had permission nor did she caution Wright that her actions may have violated an employee rule if the pictures were taken without permission. (JA 104-10, 145-46, 199-200, 254.)

Third, ample evidence supports the Board's finding that that Company did not enforce this rule against other employees. (JA 637.) It was common for employees to take, show, and post on bulletin boards pictures of each other without permission during special events, like holiday parties, and on break times when they were "goofing off," as long as no residents appeared in the pictures. (JA 119-20, 129, 173, 179, 200.) For example, Wright's former coworker, Patricia (Susie)

Hawkins, testified that she had taken pictures of employees at holiday parties, showed the pictures to coworkers and supervisors, and was never disciplined for doing so. (JA 269-73.) Moreover, Susie Hawkins and another employee both stated that they were unaware of any rule prohibiting employees from taking pictures of each other and sharing those pictures. Indeed, Assistant Director of Nursing Whisnant confirmed that no employee had ever been warned, let alone terminated, for this conduct, except Wright. (JA 446.)

The Board reasonably found unpersuasive the Company's attempt (Br. 31 n.7) to rationalize its previous inattention to the photography rule by distinguishing the permitted and unpermitted pictures "on the ground that they captured happy occasions." (JA 632 n.2.) In addition to its unfounded distinction, the Company contends that Nelson was justified in enforcing the rule against Wright because "it is covered by [HIPAA] and other privacy-protecting regulations." (Br. 30.) However, even accepting the Company's assertedly stringent desire to protect employee and resident privacy, there is no justification for why those privacy concerns would be implicated by Wright's photographs, but not others, including those capturing "happy occasions." The Company has not contended that Wright photographed any residents, so as to justify the purported HIPAA concerns.

Thus, substantial evidence supports the Board's findings that Wright was discharged because of her protected activity, and that her conduct was not

sufficiently egregious to cause her to lose the Act's protection. In its opening brief, the Company does not challenge the Board's finding that Wright's conduct was not "sufficiently egregious."[44] Instead, the Company analyzes the case under a *Wright Line* test, an analysis not applicable to this case, as shown below. (JA 632 n.2, 638.)

D. A *Wright Line* Inquiry Is Inapplicable, Contrary to the Company's Assertion, Because the Company's Motive Is Not in Question

Despite the overwhelming evidence demonstrating that Wright was discharged for engaging in protected concerted activity, the Company erroneously contends that the Board should have conducted an inquiry under the Board's seminal decision in *Wright Line*[45] without explaining why the Board erred in not doing so. (Br. 35-36.) In *Wright Line*, the Board set forth a burden-shifting test to determine an employer's motivation for discharging an employee.[46] The Board

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[44] *Cf. Yousefi*, 260 F.3d at 326 (declining to consider claim raised for the first time in reply brief); *Edwards*, 178 F.3d at 241 n. 6 (failure to raise specific issue in the opening brief constitutes abandonment of issue under Fed. R. App. P. 28(a)(9)(A)).

[45] *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

[46] *Id.* at 1089 ("[T]he General Counsel [must] make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. . . . [T]he burden [shifts] to the employer to demonstrate that the same action would have taken place even [absent] the protected conduct."). *See also NLRB v. Transp. Management Corp.*, 462 U.S. 393, 395-403 (1983) (approving *Wright Line* analysis).

has consistently held that its *Wright Line* analysis is inapplicable where employer motive is not at issue.[47]

Here, the Company's motive for discharging Wright is undisputed. Administrator Nelson testified that he discharged Wright for (allegedly) taking a picture of another employee without his permission. As shown, Wright's photographs were part of her protected concerted activity in trying to initiate group action to end the Company's inequitable enforcement of the dress code. (JA 637; JA 366-68.) Because the Company's motive is not in dispute, the *Wright Line* analysis used to determine motive for an employer's action is inapplicable.

In addition to applying the wrong analysis, the Company compounds its error by arguing that it did not know that Wright's activities were concerted, would have discharged her absent such activities, and had a good-faith belief that she committed the alleged offense. (Br. 13-33.) Such considerations are pertinent only

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[47] *See, e.g., Allied Aviation Fueling of Dallas*, 347 NLRB 248, 249 n.2 (2006) (employer motive is not at issue when employer admits employee was discharged for protected activity), *enforced*, 490 F.3d 374, 379 (5th Cir. 2007). *See also Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002) (*Wright Line* not applicable because employee was undisputedly discharged for protected activity), *enforced*, 63 F.App'x 524 (D.C. Cir. 2003); *Roadmaster Corp. v. NLRB*, 874 F.2d 448, 449-50, 454 (7th Cir. 1989) (declining to reach *Wright Line* analysis where it had affirmed the Board's finding that the employer discharged an employee for engaging in protected grievance-filing activity).

where it is disputed that an employee's protected activity was a motivating factor for the discharge.[48] Again, in the instant case, no such dispute about motive exists.

In any event, the record refutes the Company's claim that it did not know about Wright's protected concerted activities. Before discharging Wright, Administrator Nelson clearly knew that she was talking to other employees about the dress code enforcement and that her coworker, Hawkins, was involved. The day before terminating Wright, Nelson threatened to discharge and interrogated Wright about talking to employees and photographing employees who were violating the dress code—a finding the Company does not challenge. Pursuant to reports from employees Henson and Roberts and Business Office Manager Gunter,[49] Nelson knew about Wright's photographs and that Hawkins was also working with Wright on the dress code issue. Indeed, immediately after firing Wright, Nelson called Hawkins into his office to interrogate her about her role in the dress code controversy and to threaten her with discharge—another undisputed finding.

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[48] *See Wright Line*, 251 NLRB at 1087, 1096; *Accord TNT Logistics of North America, Inc. v. NLRB*, 413 F.3d 402, 406 (4th Cir. 2005); *McKesson Drug Co.*, 337 NLRB 935, 936 n.7 (2002).

[49] *See supra* at 10-11, 30.

In sum, since motive for Wright's discharge is not in issue, the Company errs in applying *Wright Line*. Accordingly, its assertions related to *Wright Line* are irrelevant and, in any event, are completely unsupported by the record.

E. The Company's Argument That Wright Was Not Engaged in Concerted Activity for Mutual Aid or Protection Is Without Merit

While the Company incorrectly examines this case under *Wright Line*, it does raise some arguments relevant to the analysis the Board applied—namely, that Wright and Hawkins were not engaged in protected concerted activities. (Br. 13-27.) First, it erroneously contends that Wright intended solely to advance her own interests, so her conduct was not concerted or for mutual aid or protection. (Br. 14-22.) The Board acknowledged that perhaps Wright's "initial refusal to remove the hat and her dissatisfaction with the warning . . . was an individual gripe," but correctly found that it "evolved into a joint action wherein, Wright was protesting the unfair enforcement of the dress code. . . ." (JA 631, 637.) The Company contests this finding, in part, because other employees did not "authorize" Wright to act on their behalf to change the dress code. (Br. 23-24.) However, it is not required that employees "authorize" a coworker to act on their behalf, or designate her as a spokesman for the group, for her actions to be

concerted.[50] As shown above,[51] the record affirms that Wright did not act exclusively on her own behalf. Wright discussed the issue with female employees and supervisors, enlisted Hawkins' help in documenting the unequal enforcement and showing those pictures to others, and confronted management about this inequity. Such actions aimed to persuade management to reform its uneven enforcement to the benefit of other female employees.

In support of its argument that Wright acted only for her own benefit, the Company attempts, and fails, to analogize *Hospital of St. Raphael*[52] and *Holling Press, Inc.*[53] to the instant case. (Br. 18-20.) First, the record does not support the Company's contention (Br. 19) that, like the employee in *Hospital of St. Raphael* who challenged a written warning she allegedly received because of her union activities and who was not engaged in protected concerted activity,[54] Wright's protest was a purely personal complaint regarding the discipline she received. Wright did not seek to challenge the write-up she received, but rather, the uneven

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[50] *See Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198-99 (D.C. Cir. 2005).

[51] *See supra* at 26-29.

[52] 273 NLRB 46 (1984).

[53] 343 NLRB 301 (2004).

[54] *Hospital of St. Raphael*, 273 NLRB at 46.

enforcement of the dress code. Also, here, other employees agreed with Wright and a coworker, Hawkins, helped Wright promote that cause.

Second, the record does not support the Company's view (Br. 19-20) that Wright's and Hawkins' actions were intended only to benefit one employee (Wright), like the employee in *Holling Press, Inc.* There, the Board found that an employee was not engaged in concerted activity when she asked a coworker to serve as a witness in her sexual harassment suit filed with a state agency.[55] Yet, here, the fact that Wright filed an EEOC claim stating that she was treated differently from other employees does not signify that Wright was solely concerned about herself, or in any way detract from the merits of her Board claim. Indeed, the record shows that Wright and Hawkins spoke to many other female coworkers to try to end the perceived gender disparity in the Company's dress code enforcement, an effort that clearly would benefit the overall workplace and female employees beyond Wright herself.

In a related argument, the Company also asserts that the Board erred in finding that Wright acted on behalf of other female employees because Wright did not specifically name any female employees in her EEOC Questionnaire and because she took "at least one" picture of a female employee. (Br. 21-22.) The first assertion is plainly inaccurate, since, in response to question seven, Wright

[55] *Holling Press, Inc.*, 343 NLRB at 301.

listed Nancy McKee, an employee who was not allowed to wear "capri's [*sic*] because she has a tattoo on her leg" (though a male employee, Roberts, had visible tattoos on his forearm). (JA 552.) As to the second contention, the fact that Wright photographed exactly *one* female employee, as well as *three* male employees, does not lead to the "inescapable conclusion" that Wright was acting only on her own behalf. (Br. 22.) While one female employee was photographed in violation of the dress code, the balance of the record shows that Wright focused on the gender-based disparity in the Company's dress-code enforcement in trying to encourage her female coworkers to protest and end that disparity.

F. The Company Has Not Met Its Heavy Burden in Convincing the Court To Reverse the Board's Credibility Findings

In support of its various substantive arguments, the Company generally contends that the judge erred by crediting Wright's testimony. It has not met its heavy burden of demonstrating that the Board's credibility determinations are unreasonable, contradict other findings of fact, or lack any basis.

First, the Company argues that Wright's testimony before the Board is inconsistent with her unemployment hearing testimony and EEOC Questionnaire that focused on her individual interests, not her collective action. (Br. 15-16, 20-22.) In doing so, the Company relies on summary judgment cases to argue that inconsistencies between Wright's testimony at the Board hearing and prior statements cannot create issues of material fact. (Br. 17-18.) However, since the

Board did not decide the instant case on summary judgment, but after a full hearing and the opportunity to evaluate Wright's candor in person, those cases are wholly inapposite.

It also contends (Br. 20) that "any testimony in conflict with these 'admissions' [that Wright acted on her own behalf] cannot be credited." (Br. 20.) The excerpted unemployment testimony (JA 163-64) does not indicate a time frame to which the questions and answers refer. As the Board found (JA 636), Wright *initially* had an individual complaint, but it evolved into a collective effort to seek equal enforcement of the dress code. Thus, it is not evident that her statements from the unemployment and EEOC cases, which obviously and understandably focused on Wright as an individual, are truly inconsistent with her testimony before the Board. Next, Wright's statements at the unemployment hearing that "[she] was the only one that wanted to wear a hat" (JA 149-50) and that she was "treated differently from other employees" in having to remove her hat (JA 554) do not contradict her Board testimony that she took photographs "because [she] wanted the dress code to be enforced equally and fairly with everyone." (JA 161.) Indeed, these concepts are not mutually exclusive. Wright wanted to wear her hat *and* she wanted the dress code enforced evenly.

More generally, the Company holds Wright, a lay person acting on her own behalf to vindicate her rights, to an unreasonably high standard in parsing her

responses to the EEOC and unemployment agency. It is hardly surprising that Wright did not mention her concerted activities in relation to specific questions that focused on her rights as an individual. She was not an attorney filing a pleading or coordinating litigation in multiple forums. Moreover, even if Wright's prior statements were contradictory, this Court, and others, have deferred to and affirmed the Board's credibility findings despite a witness' prior inconsistent statements.[56]

Second, the Company argues that the judge erred in crediting Wright's testimony because, while Nelson interrogated her, she incorrectly told him she had permission from each employee she photographed. (Br. 31, 35.) Understandably, Wright answered Nelson's questions cautiously as she did not want to be disciplined or terminated, and Nelson never assured her that she could answer truthfully without fearing reprisal. Wright's wary response only demonstrates that she felt coerced during Nelson's undisputed unlawful interrogation.[57] Thus,

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[56] *See, e.g, NLRB v. CWI of Maryland, Inc.*, 127 F.3d 319, 327 (4th Cir. 1997) ("Although a fact-finder could take this apparent inconsistency into account in weighing [the witness's] credibility, it is not sufficient for us to reject the determination that [his] testimony was truthful."); *NLRB v. Chem Fab Corp.*, 691 F.2d 1252, 1258-59 (8th Cir. 1982) (upholding Board's crediting of witness despite prior contradictory statement); *NLRB v. Florida Med. Ctr.*, 576 F.2d 666, 671 (5th Cir. 1978) (affirming credibility determinations despite witness's contrary pretrial affidavit).

[57] *See NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1313 (7th Cir. 1998) (employee's lie in response to interrogation illustrates coercion). *See also NLRB v.*

Wright's response, a result of Nelson's coercive interrogation, does not illustrate a lack of credibility. The Company's related argument (Br. 33) that Wright lost the protection of the Act by "lying" to Nelson is unavailing under the circumstances. Furthermore, the Company's outrage is unpersuasive, as it never justified Wright's discharge on her lying to Nelson.

Third, the Company contends that the judge erred in crediting Wright's "self-serving" testimony over that of Nelson and Gunter, as to whether Wright photographed Brooks. (Br. 31-32, 35.) The judge properly credited Wright's testimony over Nelson's testimony, considering that Nelson did not see Brooks' picture and Wright specifically denied ever taking his picture.[58] The judge, who observed the witnesses' testimony, concluded that "Gunter's testimony did not appear as sure as that of Wright." (JA 634.) Such findings are within the acceptable purview of the judge and the Board.[59] And, where the Company never

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Champion Labs., Inc., 99 F.3d 223, 227 (7th Cir. 1996) (considering whether questioned employee felt constrained to lie or to give noncommittal answers in finding coercive interrogation); *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 98 (2d. Cir. 1985) (finding of unlawful interrogation was "buttressed by the fact that neither employee considered the questions innocuous," as one worker lied about his knowledge of union activities).

[58] *See Standard-Coosa-Thatcher*, 691 F.2d at 1138 (employee's specific testimony was more credible than supervisor's silence on issue).

[59] *See NLRB v. Air Prods. & Chems., Inc.*, 717 F.2d 141, 145-46 (4th Cir. 1983). *See also Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 71 (4th Cir. 1996) ("The balancing of witnesses' testimony is at the heart of the factfinding process, and it is

called Brooks to testify, there is no evidence to support its claim (Br. 30) that Brooks was "upset" and "took it upon himself to complete" a complaint form.

Finally, the Company asserts that the judge incorrectly discredited Nelson's testimony about the October 31 meeting with Wright based on a "non-existent contradiction." (Br. 34.) As the Board clarified, Nelson did not recall Wright's claim on October 31 that the Company was allowing other employees to wear hats, but Whisnant testified that, during the November 15 meeting with Wright, Nelson asked if Wright *still* had an issue with the hat. (JA 631 n.1; JA 359-60, 440-41.) As Whisnant's testimony contradicts Nelson's "professed loss of memory," the judge reasonably discredited Nelson's testimony. (JA 631 n.1, 637-38.) Thus, the Board correctly upheld the judge's credibility findings.

G. The Company's Request That the Notice Be Revised is Premature

The Company's request to revise the Board-ordered notice to employees is premature. (Br. 36.) Issues concerning the implementation of the Board's remedy often result in additional litigation because the Board's established practice is to leave the particular details of its remedial orders to the compliance stage of the

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normally not the role of reviewing courts to second-guess a fact-finder's determinations about who appeared more 'truthful' or 'credible.'"), *amended on other grounds*, 95-2658, 153 LRRM 2617 (4th Cir. Nov. 26, 1996).

case.[60] Thus, issues regarding the exact wording of the notice to employees would be addressed in a compliance proceeding, if necessary.

In sum, the record supports the Board's findings that Nichole Wright-Gore experienced first-hand the Company's disparate enforcement of its dress code and sought to reform it. However, as Wright gained support for that cause among coworkers and documented the inequity, the Company learned of her campaign and confirmed its knowledge through now-undisputed unlawful threats of discharge and coercive interrogation. It consequently terminated Wright's employment based solely on her efforts to work with other employees to right a jointly perceived wrong. Under well-established precedent, the Company's discharge of Wright because of those efforts was unlawful.

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[60] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984); *see also NLRB v. Katz's Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996) (likening compliance proceedings to the damages phase of a civil proceeding).

CONCLUSION

Based on the foregoing, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

DECEMBER 2010

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-2122 **Caption:** National Labor Relations Board v. White Oak Manor

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Attorney for National Labor Relations Board

Dated: 12/17/2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	No. 10-2122
	*	
v.	*	
	*	Board Case No.
WHITE OAK MANOR	*	11-CA-21786
	*	
Respondent	*	
	*	

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Dated at Washington, DC
this 17th day of December 2010