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Salon/Spa At Boro, Inc. and Natalie Ann Lakes and Elizabeth A. Frith. Cases 9–CA–45349, 9–CA–45426, and 9–CA–45538

December 30, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On October 18, 2010, Administrative Law Judge Paul Buxbaum issued the attached decision. The General Counsel filed an exception and a supporting brief.

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

The Board has considered the decision and the record in light of the exception and brief and has decided to affirm the judge’s rulings, findings and conclusions, and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Salon/Spa at Boro, Inc., Springboro, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified by substituting the following for paragraphs 2(e) and (f), relettering the subsequent paragraphs accordingly.

“(e) Within 14 days after service by the Region, post at its Springboro, Ohio facility copies of the notice in the judge’s decision marked “Appendix.”⁴⁸ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

¹ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge’s recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

The judge’s recommended Order includes a provision directing the Respondent to post the notice electronically on its intranet system. The Board recently modified its standard notice-posting language to require a respondent that customarily communicates with its employees through electronic means to additionally distribute the Board’s remedial notice electronically in such a manner. *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall modify the recommended Order to provide for the distribution of the notice in accord with *J. Picini Flooring*. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 2009.”

Dated, Washington, D.C. December 30, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jamie L. Ireland, Esq., for the General Counsel.
Stephen A. Watring, Esq., of Dayton, Ohio, for the Respondent.
Natalie Ann Lakes, of Miamisburg, Ohio, and *Elizabeth A. Frith*, of Liberty Township, Ohio, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on June 28–30, 2010. The initial charge was filed December 18, 2009,¹ and additional charges were filed on February 2 and April 5, 2010. The consolidated complaint was issued May 7, 2010.

The complaint alleges that the Employer, Salon/Spa at Boro, Inc., engaged in a series of violations of the National Labor Relations Act (the Act) consisting of unlawful interrogations of employees, threats of reprisals directed toward employees, and the unlawful discharge of two members of its work force, Natalie Ann Lakes and Elizabeth A. Frith. Each of these actions is asserted to be in violation of Section 8(a)(1) of the Act. The Employer’s amended answer to the complaint denies all of the material allegations and raises certain defenses, including the contention that one of the charges alleging an unlawful threat of reprisal was filed outside the time limit specified in Section 10(b) of the Act.

For the reasons described in detail in this decision, I find that the Employer did engage in violations of the Act consisting of a series of unlawful interrogations, the utterance of a threat of reprisal against an employee, and most significantly, the unlawful discharge of its two employees, Lakes and Frith. I further conclude that the Employer has established that the allegation of an additional unlawful threat was untimely filed, lacks merit, and should be dismissed.

¹ All dates are in 2009, unless otherwise indicated.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation, operates a hair salon and day spa at its facility in Springboro, Ohio, where it annually purchases and receives at its Springboro, Ohio facility, goods valued in excess of \$10,000 directly from points outside the State of Ohio and derives gross revenues in excess of \$500,000. The Company admits³ and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Background

In 1992, Bobbie Hausfeld opened a hair salon and day spa at Springboro, Ohio. She had prior experience operating other hair salons and is also an owner of a second salon and spa in Beavercreek, Ohio. Each salon is a separate corporate entity. Hausfeld serves as the president of the Springboro salon involved in this case. It provides “guests” with hair styling, manicures, skin care, and massages.⁴ During the period at issue, three team leaders reported to Hausfeld: Michelle D’Amico, Genny Dill, and Patricia Wilson Cordell. It is undisputed that these team leaders were supervisors within the meaning of the Act.⁵ During the events in controversy, approximately 40 persons were employed by the salon, including more than a dozen so-called “hair designers.” The employees have not been represented by any labor organization.

Among the salon’s hair designers were two persons who figure prominently in this case. Natalie Lakes was hired by the salon in April 2005. She progressed from apprentice to hair designer in February 2006. In November 2007, she received a further promotion to a level-two designer. In 2009, Lakes took maternity leave from April until July 1. Lakes testified that, shortly after her return to work, she received yet another promotion. Hausfeld disputed this claim, contending that the event described by Lakes was merely an across-the-board rate increase for the hair designers. Hausfeld indicated that she did not recall whether Lakes received anything more than this general rate increase. On rebuttal, Lakes insisted that she was promoted and that Hausfeld announced her promotion at a staff meeting. I credit Lakes’ account, finding it noteworthy that Hausfeld did not deny Lakes’ contention but merely professed a lack of recollection. In addition, the Employer would certainly be ex-

² The General Counsel has filed an unopposed motion to correct errors in the transcript. Regarding the list of proposed corrections, I cannot find the errors reported to be located at Tr. 191, L. 25 and Tr. 343, L. 1. I grant the motion as to each of the remaining errors cited in the motion. In addition, at Tr. 149, L. 14, “through” should be “throw.” At Tr. 763, L. 20, “drop” should be “draw up.” Any remaining errors of transcription are not significant or material.

³ See amended answer to the consolidated complaint, at par. 2. (GC Exh. 1(l).)

⁴ Customers are referred to as “guests.”

⁵ See, amended answer to the consolidated complaint, at par. 3. (GC Exh. 1(l).)

pected to possess documentary evidence that could shed light on the matter. It did not choose to present such documentation.

Another key figure in this case is Elizabeth Frith. Hausfeld hired Frith as a hair designer in April 2007. She transferred to the Springboro salon in the following September. In June 2009, Frith took a medical leave. She returned to work in mid-August.

At this juncture, it is appropriate to note that Hausfeld manages her salon with a specific overall goal in mind. She testified that she had been involved in other salon operations that had failed to provide an acceptable degree of profitability. Before founding the Springboro salon, she made a study of the crucial issue of customer retention. Based on extensive interviews with customers, she concluded that a key factor in the loss of existing clientele was a perception among those customers that the atmosphere in the salon was negative. As she put it, her ultimate conclusion was that, “negativity was one of the major reasons that guests leave a salon.” (Tr. 610.) She resolved that the Springboro salon would be operated in a manner that would minimize the possibility of creating an atmosphere of negativity by requiring all employees to avoid statements and behaviors that could contribute to such an atmosphere or perception among the customers. She characterized this policy against negativity as her “philosophy” and “vision.” (Tr. 612.)

Numerous witnesses described the content of Hausfeld’s negativity policy.⁶ Generally speaking, there was broad agreement as to the parameters of the policy and the vigor with which it was enforced by supervisors. To begin with, Hausfeld defined the policy as follows:

Negativity is complaining. It is not being happy or grateful for the situation that you have. It could be complaining about your personal life. It could be complaining about having a guest. It could be complaining about being busy, complaining about not being busy. It could be complaining about another employee. Whether just in general pulling people down . . .

(Tr. 74.) Counsel for the General Counsel asked Hausfeld whether the definition included, “[c]omplaining about how the Company’s run,” and she replied, “that’s negativity.” (Tr. 74.)

Hausfeld also reported that an isolated instance of such negativity was not punishable because, “[e]verybody can have a bad day.” (Tr. 76.) However, she acknowledged that she has frequently imposed discipline on employees for statements and behavior that she perceived as constituting negativity. As she explained, “if it comes to a point where it affects the team and it affects morale, and it affects the salon overall which, in turn, affects the paying guest who comes in to have a wonderful experience [t]hat is where the zero tolerance negativity policy comes in.” (Tr. 77.) In such cases, employees face discipline, up to and including termination from employment.⁷

⁶ It should be noted that the Employer maintains an employee handbook. While that document does not contain a written description of the negativity policy, it does exhort employees to “have a positive mental attitude” and “[a]void gossip between guests and/or teammates.” (GC Exh. 2(a), pp. 2 & 3.) Hausfeld testified that, “throughout the manual, we do focus on positive attitude.” (Tr. 73.)

⁷ The Company’s disciplinary records confirm the accuracy of this testimony. For example, in the year prior to the terminations that are at the heart of this case, Tanisha Bates and Kaley Orth were issued warnings for negativity. (GC Exh. 20, p. 1 and GC Exh. 12, p. 1.) Tiffany Mason was sent home early and Christal Graham was placed on probation for violations of the negativity policy. (GC Exh. 5, p. 9 and GC Exh. 5, p. 7.) Most importantly, Tanisha Bates, Kokka Manson, Katie

Other witnesses provided enlightening testimony regarding the content and breadth of the negativity policy as applied at the salon. Jessica Eubank has been employed as a hair stylist at the salon for the past 7 years. Her description of the negativity policy was:

If I'm going to talk behind somebody's back, like a manager's back, and say bad stuff about them, that's negativity. And, you know, [the person] who I'm talking to is going to understand that, or maybe not understand it, but it's going to put that little bug in their head. And they're going to start talking to the next person about, you know, how management's doing something wrong, or Bobbie [Hausfeld's] doing something wrong, or something, besides going to the source and just taking care of it.

(Tr. 344.) In the same vein, Team Leader Dill reported that negativity is "talking about a coworker, talking about a member of management." (Tr. 591.)

Perhaps the ultimate illustration of the breath and scope of the policy was provided by Colleen Brewster, an assistant team leader at the salon. She recounted an incident when she reported to work during a snowstorm and fell in the parking lot. Upon entering the building, she went into the area between the employees' break room and the office and commented that, "I just hate the snow." (Tr. 773.) Upon hearing this remark, Hausfeld took her into the office and warned her that such a complaint could be seen as "[the] start of negativity." (Tr. 773.)

In sum, the uniform and consistent descriptions of the negativity policy as applied by this Employer confirm the accuracy of counsel for the Respondent's characterization of the policy in his opening statement. As he put it, "it's a broad policy saying we don't want negativity." (Tr. 489.) He went on to observe that, "we apply this policy to any kind of negativity, including negativity towards management." (Tr. 491.)

B. The Events in Controversy

The General Counsel contends that the Employer's efforts to enforce its negativity policy in the fall of 2009 included the commission of a number of unfair labor practices. Before evaluating this claim, it is necessary to describe the pertinent events.

There was widespread agreement among the witnesses that, as the autumn season began, there was increasing friction between management and employees at the salon. The first salient manifestation of this situation described by the parties occurred in late September or early October.⁸ On that day, Team Leader Cordell was scheduled to work, but her assigned apprentice was not on duty. Realizing this, Cordell directed the apprentice assigned to hair designer Jessica Bays Williams to work for her instead. Lakes reported that the manner in which Cordell made this reassignment was abrasive and "real short tempered." (Tr. 138.) Another designer, Laura Call, corroborated this description of Cordell's manner, testifying that it was, "very kind of blunt and short to the point." (Tr. 421.)

Hay, Christal Graham, and Jessica Frazier were all fired for such infractions. (R. Exh. 2, R. Exh. 8, R. Exh. 6, R. Exh. 5; GC Exh. 5, p. 2.) These records clearly confirm Hausfeld's observation that violations of the negativity policy were "probably one of our most common reasons for discipline." (Tr. 623.)

⁸ Lakes indicated that it took place on September 22. Frith reported that it happened on October 3. The precise date is immaterial.

Bays Williams testified that she learned about Cordell's appropriation of the apprentice that had been assigned to her from Lakes. Not surprisingly, the news aroused an angry reaction. As Bays Williams explained:

I was really mad, because she was a manager and I felt like I needed an assistant, too, and I was super busy, and she should have understood, you know, that I needed one, too.

(Tr. 381.) Frith testified that the incident provoked further discussion among the hair designers. She observed Lakes and Call complaining that Cordell had yelled at Call. Joining the conversation, Frith observed that it was not fair that Cordell was "allowed to treat us that way." (Tr. 190-191.) She told her coworkers that, "we needed to say something, because it wasn't fair." (Tr. 191.)

At approximately the same time, the Employer conducted one of its routine monthly staff meetings. The meeting was held at a local Doubletree Hotel. As I will discuss in the legal analysis portion of this decision, the precise date of this meeting is fraught with significance. Unfortunately, determination of that date requires that I grapple with the vagaries and frailties of human memory, particular the recollection of an event that appeared routine at the time it occurred but has assumed importance during the course of subsequent litigation.

In the presentation of her case, counsel for the General Counsel asked several witnesses about the date of this staff meeting. Responding to counsel's question as to whether she attended a staff meeting in October, Lakes indicated that she felt "pretty sure" that it was held in October. (Tr. 136.) Frith was asked if she attended, "a monthly meeting in October of 2009." (Tr. 188.) She responded affirmatively. When asked the same question, Hair Designer Carrie Aiello replied, "I think so. Yes." (Tr. 245.) However, moments later she informed counsel that she did not know the "specific date" of the meeting. (Tr. 245.) Similarly, responding to counsel's inquiry as to whether she attended a meeting in October, Hair Designer Eubank testified that she had done so. However, under examination by counsel for the Employer, Eubank readily conceded that she did not recall whether the meeting was held in September or October. The same situation was repeated in the account of Bays Williams. On direct, when asked if she was present at a staff meeting in October, she affirmed that she was. Not long afterwards, she reported her impression that the actual date of the meeting was "blurry" and that "I can't remember exactly when that meeting was held." (Tr. 375.) On examination by counsel for the Employer, Bays Williams added that she did not know the month of the meeting.⁹ It is easy to understand why the testimony of these witnesses developed in the confusing and unsatisfactory manner that it did. By asking each witness whether she attended a staff meeting held in October, counsel indulged in the use of leading questions. The vice in this practice is well summarized by McCormick, *Evidence* § 6 (6th ed. 2006), "A leading question is one that suggests to the witness the answer desired by the examiner." Having been offered the suggestion that the meeting was held during the month of October, the witnesses readily accepted the suggestion.¹⁰ Closer

⁹ In fact, she seemed to be under the impression that the meeting was held after the month of October.

¹⁰ I do not mean to imply any criticism of the witnesses. I doubt they were aware that the date held legal significance due to the Act's limitation period. Nor am I implying that counsel for the General Counsel did anything improper. Federal Rule of Evidence 611(c) permits the

examination of the totality of their accounts demonstrates that their assent to this date was not based on any specific recollection. When asked to consider the matter further, they readily backed away from any such attempt at precision. Indeed, it is both obvious and understandable that the witnesses did not actually know whether the meeting took place in September or October.

On the state of this record, how is one to determine the date of this staff meeting? As is so often true in litigation, the definitive answer is provided by reference to an otherwise routine and uninteresting piece of paper that was generated contemporaneously with the event. In this instance, the document is a receipt from the Doubletree Hotel for payment of \$261.08 for the rental of the Ohio Room by the Employer. The receipt shows that the room was rented for a meeting on September 24, 2009. (R. Exh. 10.) While I cannot have any confidence in the testimony about the date, I readily conclude that this routine business document provides the key piece of information. For that reason, I find that the staff meeting that I am about to describe took place on September 24. I will evaluate the significance of this finding later in this decision.

The witnesses all agree that at the September 24

staff meeting, Hausfeld addressed the immensely popular subject of social networking.¹¹ Hausfeld reported that she told the staff, that they needed to be kind and positive . . . there are a lot of other people reading their information, reading them that they may not even be aware that was reading what they were posting . . . So it's public.

(Tr. 56.) She suggested that they confine their remarks to "positive" comments.¹² (Tr. 56.)

Various employees also described Hausfeld's comments at this meeting. Lakes reported that Hausfeld warned the staff not to respond to former employees. She testified that Hausfeld told them, "to be careful what [we] say on that, that it could hurt our business." (Tr. 136.) Frith reported that Hausfeld's remarks on the subject were brief. According to her, the comments consisted of an admonition that:

if you put bad things on there, then there were people that could see that. And then if you put good things on there that, you know, that there were people that could also see that. So . . . it could make or break your career. Like it could make you look good or make you look bad, depending on what your wrote on your page.

(Tr. 189.) Interestingly, counsel for the General Counsel asked Frith if she thought Hausfeld was referring to work or to life in general. Frith replied that, "I assume just in general." (Tr. 189.)

Aiello testified that Hausfeld told the employees that, when using Facebook, "we need to, you know, like watch our lan-

use of leading questions when "necessary to develop the witness' testimony." The questions were not subjected to any objection and I do not doubt that counsel felt they were necessary. Nevertheless, the entire episode illustrates the pitfalls of reliance on leading questions.

¹¹ It is likely that social networking issues will become a feature of labor law cases. For instance, see General Counsel's Advice Memo in *Sears Holdings*, 18-CA-19081, 2009 WL 5593880 (Dec. 4, 2009).

¹² Hausfeld testified that she chose to address this subject because disgruntled former employees were posting negative comments about the salon and current employees were adding comments, "that said, yeah, or love you, or lots of love or laughs, or whatever." (Tr. 672.) She reported that Lakes and Frith were two of the employees involved in this behavior.

guage, and how we conduct ourselves." (Tr. 245.) She also noted that Hausfeld expressed puzzlement as to why current employees would want to be friendly to former employees who made negative comments about the salon. Eubank also reported that Hausfeld made reference to negative postings from former employees who were hoping that the salon would close and posed a rhetorical question to the staff: "But then how can they be our friends, if they would be happy if we were jobless?" (Tr. 308.)

In addition to holding general staff meetings, the Employer also had a regular practice of holding meetings of the management team. At one such meeting held on October 8, the subject of negativity in the workplace was addressed. Both Cordell and Hausfeld reported that employees had spoken to them regarding their concerns about the negative behaviors of others. Hausfeld testified that she told the assembled managers that she had some ideas and planned to address the issue after returning from her upcoming vacation.

Team Leader Dill testified in more detail. Under cross-examination, she reported that Frith, Lakes, and Aiello were named as the causes of the negativity under discussion. Dill also testified that:

We decided that at that time, because it had been such an issue before, that it would be best [to terminate Lakes]. But, Bobbie [Hausfeld] wanted to speak to all three of them first and then handle Natalie's termination herself. [Tr. 599.]

On October 12, a nail technician at the salon, Kaley Orth, had a private meeting with Hausfeld.¹³ Orth testified that she sought this meeting in order to inform Hausfeld that, "a lot of negativity was going around." (Tr. 226.) In particular, Orth reported that she told Hausfeld that, "the managers were just getting a little power hungry and crazy, and it was upsetting the employees." (Tr. 226.) Hausfeld asked for specific names and Orth declined to provide them but observed that, "all around, the managers were just bitches." (Tr. 226.) Hausfeld directed the conversation from managers to employees and brought up several specific names including Frith and Lakes. Albeit reluctantly, Orth did testify that she told Hausfeld that they had been "talking" and that she had heard "some negativity" from them. (Tr. 228.)

Hausfeld also described this private meeting with Orth. Indeed, she testified that it was what she heard in this meeting that eventually led to the discharges of Lakes and Frith. She reached this conclusion after Orth told her that, "she was thinking about leaving, quitting, because of all the negativity that was going on, especially in the break room." (Tr. 677.) Hausfeld testified that, when pressed, Orth named Lakes, Frith, and Aiello as the persons to whom she was referring. As to details, she informed Hausfeld that Frith had "called the front desk

¹³ Orth testified that this meeting occurred prior to the staff meeting held on October 16. As to the precise date, counsel for the General Counsel introduced a portion of the Employer's position statement representing that the date was October 12. (Tr. 745.) While I recognize that the position statement was not written by a person with direct knowledge, I deem it to be the best available indicator of the actual date. In relying on the information provided in the Respondent's position statement, I note that the Board places evidentiary weight on such admissions by a charged party. See *Roman, Inc.*, 338 NLRB 234 (2002), and the interesting discussion by the trial judge in *Evergreen America Corp.*, 348 NLRB 178, 187 (2006), enf. 531 F.3d 321 (4th Cir. 2008).

employees stupid,” and characterized the managers as “bitches.” (Tr. 122.)

I note the presence of some contradictions between the accounts of this meeting given by the two persons involved. To the extent that their versions differ, I credit that of Orth. It was clear to me that Orth intended to lodge a complaint about management’s behavior but found herself in the unfortunate position of being interrogated about the behavior of her coworkers. Based on her obvious discomfort and embarrassment about what transpired as reflected in her demeanor and presentation on the witness stand, I conclude that it was Hausfeld who redirected the conversation away from the behavior of management and into an investigation of negativity among the employees with specific emphasis on the conduct of Lakes and Frith.

Not long after Hausfeld’s meeting with Orth, she departed on her vacation.¹⁴ She testified that this was interrupted by “numerous” calls from her staff expressing concern about negative postings on Facebook authored by former employees. (Tr. 681.) She reported that the callers were particularly upset that current employees had responded to those comments. Hausfeld indicated that the callers told her that the employees who had posted comments were Lakes and Frith.

On October 16, while Hausfeld was out of town, events reached a crisis point. Matters began at approximately 11 a.m. in the employees’ break room. Lakes and Call were present in the room when Team Leader Dill entered. Lakes testified that, upon observing that there was soiled laundry in the break room, Dill demanded that the two employees wash the laundry and do the dishes.¹⁵ She proceeded to slam the dryer door and also slam some bowls into the sink. After this display of anger, she “stormed out.” (Tr. 139.)

Dill’s own account of this incident largely corroborates Lakes’ testimony. She stated that she came to work and saw that the salon was a “mess.” (Tr. 581.) In the break room, she encountered Lakes and Call and asked them to do the laundry. Dill conceded that:

I was upset. I was frustrated, just to what I had walked into with the salon being such a mess and nothing being done. And out of my frustration, when I shut the dryer door, it was loud.

(Tr. 581–582.) Dill’s angry demeanor on that day was also observed by another employee, Aiello. She testified that, upon arriving for work, she addressed Dill and Dill gave her “a short answer.” (Tr. 254.)

Dill’s behavior provoked discussion among the employees. Lakes testified that she told Call, “I can’t take this anymore. Management can’t keep treating me like this. I’ve got to tell somebody.”¹⁶ (Tr. 139.) Call replied that this was a good thing

¹⁴ Hausfeld testified that she left for her vacation on October 9. Counsel for the General Counsel introduced another portion of the Employer’s position statement representing that her vacation began on October 15. (Tr. 745.) I do not find the exact timing of the start of her trip to be of significance. Suffice it to say that she was away from the salon during the events about to be described.

¹⁵ Hair designers were required to perform such chores as part of their so-called “shop duties.”

¹⁶ It should be noted that Lakes’ sense of outrage at being ordered to perform the shop duties was based on her belief that she was one of the best performing employees when it came to these shop chores. Interestingly, Dill confirmed Lakes’ self-assessment in this regard, testifying that “I praised her, usually, for being one of the main ones that helped out.” (Tr. 603.)

since someone needed to do it. Lakes proceeded to send a text message to Frith seeking her advice as to which manager to approach with her complaint about Dill’s behavior. Frith responded by suggesting Darby Snider, Hausfeld’s executive assistant.¹⁷ Taking this suggestion, Lakes called Snider and requested a meeting. Shortly after scheduling this meeting, Lakes encountered Aiello who, coincidentally, complained to her about Dill’s behavior that morning.¹⁸ When Lakes told Aiello that she intended to lodge a complaint about Dill with Snider, Aiello told her that this was “[g]ood.” (Tr. 141.)

Approximately 20 minutes later, Lakes met with Snider to lodge her complaint regarding Dill’s conduct in the break room. She testified that Snider told her that she appreciated the information and that she would “take care of it.” (Tr. 142.) Although Snider did not testify, Cordell provided testimony that Snider went to Dill and herself to inform them of Lakes’ complaint. She described Lakes’ concern “that there was negativity in the salon about the managers and the staff was really upset with us.” (Tr. 533.) The three managers decided that they needed to have an immediate staff meeting to address the problem. As Cordell explained, they held a conference call with Hausfeld and told her that they wanted to hold the staff meeting “to nip it in the bud right away.” (Tr. 534.)

Hausfeld testified that during the conference call with her managers she was informed that Lakes had lodged a complaint with Snider, “[a]nd that the whole staff was upset about my managers.” (Tr. 682.) Hausfeld reported that she approved the request for an immediate staff meeting to be held in her absence and indicated that the goal of the meeting was to get the employees to air their concerns, “[b]ecause, according to Natalie [Lakes], they were all upset at my managers.” (Tr. 684.) Hausfeld instructed the managers to conduct the meeting and report the results to her as soon as it was concluded.

Management notified all staff members that there would be a meeting that evening. Employees who were not on duty that day were instructed to report to the salon for the meeting. No less than eight witnesses testified about what was said at this staff meeting. Fortunately, with one significant exception, there was a consensus as to what happened at the meeting.

Team Leader Cordell testified that she began the meeting by telling the assembled staff that the managers “heard you guys have concerns about there being negativity, and that you’re upset with management that we’re causing some of the negativity and we apologize to the staff.” (Tr. 534.) She then solicited the staff to “talk to us about it.” (Tr. 534.) Initially, nobody responded. Eventually, Lakes spoke up and this prompted others to participate. Call took the occasion to complain about Cordell’s behavior in appropriating another stylist’s apprentice. Cordell apologized for her conduct. In her account, Cordell also reported that Frith made “very positive” comments about the workplace. (Tr. 538.) As the meeting came to a conclusion, Cordell told the employees that Hausfeld “had a list of people

¹⁷ Lakes’ testimony regarding her contact with Frith was confirmed by Frith who testified that Lakes sent her a text message to tell her that “she wanted to go to management about the way that Genny [Dill] was acting this specific day, and she wanted my opinion if she should go to Darby [Snider] or if she should go to Trish [Cordell].” (Tr. 192.) Frith indicated that she recommended Snider.

¹⁸ Lakes’ testimony in this regard was fully corroborated by Aiello. She reported that she had asked Lakes, “[W]hat was wrong with Genny [Dill].” (Tr. 255.) Lakes replied that she did not know, but “she thought that her actions were inappropriate.” (Tr. 255.)

that she wanted to talk to when she got back into town.”¹⁹ (Tr. 538.)

Team Leader Dill testified that management began the meeting by asking the staff to air their concerns. She reported that she also took the occasion to apologize to the staff for the dryer door incident in the break room. Dill indicated that when employees failed to speak up, Lakes became upset and told them, “I can’t believe you guys aren’t saying anything . . . because you guys think it’s negative, too.” (Tr. 584.) Despite this encouragement, “everybody was just really silent.” (Tr. 586.) Frith did address the audience, stating that she liked working at the salon because “management is really nice and positive.” (Tr. 585.)

As I have indicated, these accounts from the managers are not markedly different from the numerous versions provided by the employee witnesses. To the extent that they added details, I will discuss those accounts. Lakes noted that Cordell began the meeting by indicating that the original plan had been to hold the meeting when Hausfeld could attend, but since “someone came to management today” it was decided to hold it immediately. (Tr. 145.) After Cordell’s call for discussion of the problems was met by silence, Lakes reported that she did speak up and complain that “management has been pretty snappy towards everybody.” (Tr. 145.) She ended her remarks by observing that “other people had noticed stuff, too, and I hope they stand up and speak.” (Tr. 145.) Thereafter, several employees did air some of their complaints, while others made positive comments. Lakes also noted that Cordell advised the staff that Hausfeld had a list of employees that she planned to speak with on her return.

Frith’s account added a detail regarding Snider. She reported that Snider advised the staff that an employee had spoken with her earlier in the day to report that the employees “just felt like they [the managers] were being really harsh, harassed everyone.” (Tr. 196.) Frith also noted that Cordell criticized Bays Williams for raising the apprentice assignment issue because she had not been present during the incident and must have learned about it through “gossip.” (Tr. 198.) Cordell asserted that “[y]ou should have went to management, rather than to each other.” (Tr. 198.)

Aiello’s account tracked the general consensus. She reported that, once Lakes chose to begin the discussion, she told the managers that they were not “treating us or her right.” (Tr. 261.) Call’s testimony included her own subjective acknowledgement that she was prompted to raise the apprentice assignment issue, “because Natalie [Lakes] had brought up that the management team had been kind of negative.” (Tr. 427.)

There was one area of significant divergence in the accounts of the managers and employees. Several employee witnesses remarked on the fact that managers made two assertions about the airing of employee complaints. In the first instance, they repeatedly confirmed their desire to hear such complaints at the meeting and assured the staff that there would be no adverse

consequences from such discussion. However, at the same time, the managers warned the staff that, once the meeting was over, continued discussion of employee complaints would not be tolerated. For example, Lakes testified that Cordell told the staff that they were free to discuss their concerns, “[b]ut if you mention anything after this meeting, you are going to get in trouble.” (Tr. 148.) Frith confirmed this account, noting that Cordell told the employees to “get everything off their chest” during the meeting and also warned that “if they were caught talking about it afterwards, then they would get in trouble.” (Tr. 195.)

While it is clear that Lakes and Frith are highly interested parties, their reports of Cordell’s predictions of the consequences of further discussion of complaints among the staff was corroborated by other testimony. Thus, Orth’s succinct version of Cordell’s statements was that she told them, “[S]ay something now, or forever hold your peace.” (Tr. 231.)

In response to this testimony that management ordered employees to cease discussing their grievances with each other after the meeting, Dill provided revealing confirmation. On direct examination, she reported that she could not recall managers ever telling employees not to discuss these issues later.²⁰ However, under examination by Charging Party Frith, Dill was asked whether managers told the staff at the meeting “to come to management instead of going to one another.” (Tr. 606.) Dill responded as follows, “I do remember that being said in the meeting . . .” (Tr. 606.) Dill then attempted to temper her admission by asserting that what the managers meant was that it was better to bring complaints to managers since they had the power to fix things.

In resolving this issue, I readily conclude that the accounts of the employees are credible. They are clear and consistent with each other. Orth’s summary is particularly compelling. Furthermore, Dill’s admission provides powerful corroboration. Finally, such an attitude on the part of the salon’s managers is entirely consistent with Hausfeld’s strongly held views regarding negativity in the workplace. For all these reasons, I find that the managers both encouraged the staff to raise grievances at the meeting and warned them in no uncertain terms that they would be subject to punishment if they chose to continue to discuss those grievances among themselves once the meeting had concluded.

Immediately after the meeting ended, the managers held another conference call with Hausfeld to report on the outcome. Cordell reported that they told Hausfeld that, “we didn’t think it accomplished much.” (Tr. 544.) Hausfeld confirmed that the managers had a negative impression of the value of the meeting, indicating that she was “very disappointed” to hear this. (Tr. 686.) Hausfeld also noted that, as part of their description, the managers had informed her that Lakes had been vocal during the meeting.

Sensing that her participation in the meeting had been prominent, Lakes chose to raise the matter with both Cordell and Dill on the following day. She told Cordell that, “I didn’t mean to throw you under the bus yesterday, but everything was just getting out of hand and I needed to come to management.” (Tr. 149.) Somewhat ominously, Cordell replied that she appre-

¹⁹ I asked Cordell what Hausfeld intended to discuss with the employees on this list. She advised me that it was, “[p]robably the negativity problems that we were having in the salon.” (Tr. 539.) Hausfeld testified that she did have an actual written list of employees that included the names of Lakes and Frith because, “I had pretty much already determined . . . that those two were the main sources of negativity.” (Tr. 688.) It should be noted that Orth testified that, unsurprisingly, the announcement about Hausfeld’s list “shocked everybody.” (Tr. 232.)

²⁰ Similarly, Cordell testified that she could not recall warning the employees not to engage in further discussions of their grievances. Of course, the professed inability to recollect such a statement is not the same as a denial that it was uttered.

ciated Lakes' choice to bring the issues to management since, "[w]e don't want everyone to talk about each other." (Tr. 149.) Thirty minutes later, Lakes made a similar apology to Dill, using the same colorful metaphor about the bus. Dill graciously observed that she knew that Lakes was conscientious about performing her shop duties. She also noted that management felt that the meeting had not accomplished much because, "not everyone stood up that should have." (Tr. 152.)

As promised during the staff meeting, over the next several days Hausfeld proceeded to hold individual conferences with each of the employees on her written list. Specifically, Hausfeld reported that she met with Aiello, Bays Williams, Call, and Eubank. She testified that the employees confirmed to her that Lakes and Frith "were the negativity problem." (Tr. 120.) The employees provided their own testimony regarding their individual meetings with Hausfeld.

As to Aiello, Hausfeld indicated that she told her employer that Lakes and Frith were being negative and that this behavior consisted of complaints in the break room regarding both coworkers and team leaders. Aiello testified that Hausfeld told her that she had been advised that several people were said to be spreading negativity around that salon and that her own name had been among those mentioned. Hausfeld then asked her if she knew of any others who had been negative and she named Lakes and Frith as being a source of negativity at Hausfeld's and that they were pulling everyone down through their behavior.

Hausfeld reported that, during her meeting with Bays Williams, she was informed that "there were a couple of coworkers that weren't happy at work, and because they weren't happy, they tended to want everybody else not to be happy either." (Tr. 695.) Hausfeld recalled that she named Lakes as one of those individuals. Bays Williams testified that Hausfeld told her that "she had some concerns about like with management and with us talking." (Tr. 387.) In response, Bays Williams recounted that, "then I spoke up and told her about the Laura and Natalie with Trish incident." (Tr. 387.) She was referring to the controversial occasion when Cordell had appropriated the apprentice assigned to another hair designer. She added that the episode had made her angry and that she "felt negativity" about it from both Lakes and Frith. (Tr. 405.)

Hausfeld testified that she met with Eubank, but was unable to recall whether Eubank provided the names of any negative coworkers. Eubank's own testimony was highly revealing. At the time of her testimony, she continued to be employed at the salon. Her demeanor and presentation on the witness stand were consistent with that of a person who was undergoing a conflict between the desire to provide truthful testimony under oath and the wish to please her employer who was listening to that testimony. Thus, at first, Eubank was very vague in her account of her meeting with Hausfeld. She confined herself to the concession that Hausfeld told her that, "we don't want negativity in our salon." (Tr. 313.) On being confronted with her earlier affidavit, she admitted that Hausfeld asked her who was being negative. She described her reply as, "I told Bobbie that Natalie was the one that was coming to me wanting to be off early [on Halloween] and it was bringing other people down, because they were—everybody wanted to be off early to take their kids off trick-or-treating." (Tr. 329–330.) Still later in her examination, Eubank revealed more critical information about her description to Hausfeld regarding Lakes' complaints about Halloween leave. She testified that Lakes' complaint to

her coworkers included the fact that she was upset because "managers were getting off first."²¹ (Tr. 357.)

Finally, it is important to describe Hausfeld's meeting with Call as that meeting is the subject of both the General Counsel's general claim of a pattern of unlawful interrogations and also a specific contention that Hausfeld violated the Act by making a threat of reprisal against Call. Call testified that Hausfeld made a direct reference to the fact that Call was in a special position within the salon because of her role as an educator of new employees.²² She went on to warn Call that, because she was in a "higher position" where other employees would "look at me as an example, that I was going to be watched closer for that." (Tr. 438.) Removing any doubt as to her intended message, Hausfeld went on to admonish Call that if she engaged in more negativity, "as an educator, you might have to take a leave, basically." (Tr. 439.)

Having delivered this somber message, Hausfeld then questioned Call regarding the conduct of her coworkers. Call described this exchange as follows:

She said that she knew that some people were being negative and she wanted to know if I knew of anyone. And I said I couldn't name anyone off the top of my head. And she's like, well, have you noticed Natalie and Liz being negative?

(Tr. 470.) In an effort to avoid harm to her coworkers, Call responded that, "you know, yeah, everyone has been negative, at some point in time." (Tr. 440.)

As just recounted, Call reported that Hausfeld warned her about the consequences of further negativity and questioned her regarding the attitudes of her coworkers. Hausfeld's own version of this meeting included her testimony that she was unable to remember whether Call had provided the names of any specific employees who had been negative. She did, however, clearly recall her warning to Call, describing her statements as follows:

I just reiterated to her that as a leader of—in her position she leads the young and teaching them for education and training, and not only does she teach them technically, but she also teaches them our philosophy and our vision and our culture. And by her being negative they would look to her for that. [A]nd they look to her even more so because she is in a training position, and that she needed to be cautious about the negativity issue with her, otherwise she wouldn't be able to remain in that because that is my expectation, especially with my leaders. [Tr. 720.]

After she concluded this series of investigatory interviews with employees, Hausfeld described her thought process. As she explained, she made an effort to "assess the situation and determined that, obviously, there was a really bad problem with morale and—and atmosphere in the salon, and there was dissension among team. And I truly believed that because of all the people that have come to me, and because I—I definitely felt

²¹ Because she had not been present at the staff meeting, Eubank was also called into an individual meeting with Team Leaders Cordell and Dill. She indicated that they told her that "people were starting to talk about management and how they were not going to management with their problems." (Tr. 310–311.) In this regard, the team leaders specifically mentioned Bays Williams, Lakes, and Frith.

²² It is undisputed that Call's additional assignment as an educator was prestigious. More significantly, this duty came with additional monetary compensation.

that Liz and Natalie were the main source of the problems.” (Tr. 697–698.)

After hearing this testimony, counsel for the Employer asked Hausfeld, “[s]o, what did you decide as a result?” (Tr. 698.) She replied, “I decided to terminate them.”²³ (Tr. 698.) She then delegated the task of firing Frith to Team Leader D’Amico while deciding to terminate Lakes herself. Lest there remain any ambiguity, counsel for the General Counsel asked Hausfeld why Frith was discharged. Her succinct response was, “[n]egativity.” (Tr. 118.)

Frith testified that she was at work on October 20. After finishing with a client, she asked D’Amico for permission to leave early due to her child’s illness. In response, D’Amico called her into the office and told her that, “I hate to do this, but Bobbie wants me to give you your termination papers.” (Tr. 203.) Frith pressed D’Amico to learn the details behind the decision to fire her. D’Amico directed her to the language on the form used to document the termination, merely adding that Frith had been “negative, and backbiting, and disrespectful to my team leaders.” (Tr. 204.) When asked to give more details, D’Amico failed to do so. Finally, Frith asked who had complained about her. D’Amico told her that, “we had meetings with several different employees and your name was mentioned every time.” (Tr. 205.) After the meeting, D’Amico escorted Frith so that she could collect her personal possessions. Frith requested a chance to speak with Hausfeld, but reported that she was never given this opportunity. She has not worked for the salon since that date.²⁴

On the day after Frith’s termination, Lakes reported to the salon, worked for an hour, and went home sick. On the next day, October 22, she returned to work and learned that she was scheduled to have a 1 p.m. meeting with Hausfeld. Hausfeld testified that she called Lakes into her office with the intent to fire her. Before she could do so, Lakes complained about her anger at the decision to fire Frith. According to Hausfeld, Lakes’ next comment provided an unexpected opening to address the actual purpose of the meeting. As she put it,

²³ I credit Hausfeld’s clear and logical response to her attorney’s question and find that it establishes that Hausfeld made the decision to discharge Lakes and Frith after she concluded her interviews with their coworkers. It follows that I reject Hausfeld’s earlier self-serving claim in her testimony that she decided to terminate the two employees after Orth had complained about their behavior prior to the staff meeting. I find this version of events to be an attempt to evade the clear and persuasive connection between Lakes’ prominent role at the staff meeting and her dismissal shortly thereafter. By the same token, I reject Dill’s similar claim that a decision to terminate Lakes was made at the time of the October 8 management meeting. This is simply another attempt to avoid the obvious inference that arises from the timing of Lakes’ discharge shortly after her very active participation in the October 16 staff meeting. See *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970) (timing of mass layoff mere days after organizing campaign began was “stunningly obvious”). Indeed, counsel for the Employer also placed no reliance on these claims, asserting in his brief that, “[b]efore making the final decision [to terminate Lakes and Frith], however, she decided to meet with other employees upon her return from vacation to confirm her observations.” (R. Br. at p. 9.)

²⁴ D’Amico did not testify in this trial. I credit Frith’s uncontroverted account and note that it is entirely consistent with the evidence demonstrating that she was being discharged for violation of the negativity policy based on the results of Hausfeld’s series of employee interviews.

[Lakes] said, so, I should be fired. If you’re going to fire anybody, I should be the one fired. And I said, well, you are. And I am going to let you go.

(Tr. 704.) Once again, counsel for the General Counsel asked Hausfeld to delineate the reason for this decision to fire Lakes. As was the case with her response to the same inquiry regarding Frith, Hausfeld’s concise answer was, “[f]or negativity.” (Tr. 104.)

Lakes described her own termination, providing considerably more detail than in Hausfeld’s version. She reported that Hausfeld began the meeting by asking her how she felt about Frith’s discharge. She replied that it had upset her, “but it is what it is.” (Tr. 153.) Hausfeld asked her whether she knew why all of her friends got fired, adding that, “[w]hy do you think all your friends get fired? Do you realize how that makes you look? It makes you look negative.” (Tr. 154.) Lakes responded that her friends, “have nothing to do with my work.” (Tr. 154.)

Hausfeld next complained that Lakes had refused to provide the names of other employees who were being negative. As Lakes put it, “[s]he said that I’m showing her that I care more about my friends than having a job, because I had three chances to give names and I didn’t.”²⁵ (Tr. 155.) Hausfeld repeated this assertion and asked if Lakes understood. When she replied in the negative, Hausfeld told her, “[w]ell, then Hausfeld’s isn’t for you anymore.” (Tr. 157.) With that, the meeting ended. Lakes has not been employed at the salon since that time.

In the months following their terminations, both Frith and Lakes filed charges alleging that the salon had violated the Act by discharging them for engaging in protected concerted activity. On May 7, 2010, the Regional Director filed the consolidated complaint adopting those claims and adding allegations of other misconduct by the Employer.

C. Legal Analysis

The consolidated complaint alleges that the Employer violated Section 8(a)(1) of the Act by uttering two threats, conducting a series of interrogations, and discharging Lakes and Frith. I will examine each of these contentions in chronological order. Before engaging in this analysis, however, I must address an essential preliminary consideration. The General Counsel’s theory as to most of the alleged unfair labor practices centers on his view that the employer was responding vigorously and unlawfully to protected concerted activities by its employees. Absent a conclusion that those employees had been engaged in such protected concerted activities, there would be no basis for the Board to regulate management’s conduct.

1. Protected concerted activity by employees

At the outset, it must be acknowledged that, typically, the issue of protected concerted activity arises in the context of employee efforts to organize or assist in the functioning of a un-

²⁵ I credit Lakes’ testimony regarding the termination meeting. Hausfeld’s reported emphasis on Lakes’ failure to give information regarding the negative behaviors of other employees is entirely consistent with the importance Hausfeld attached to receiving such reports from employees. Indeed, her attitude was underscored when, later on the same day, she suspended Hair Designer Michelle Wysong for 1 week without pay for violating the negativity policy by refusing to report on negative behavior among her coworkers. As Wysong’s suspension notice describes it, her discipline was for, “[n]egativity about apprentice in break room—not able to come to management about neg/concerns in salon. Feels that is telling on people.” (GC Exh. 5, p. 1.)

ion. There is no evidence that the employees of the salon ever engaged in activity related to a labor union. Despite this, it is well-established that the Act's protection extends beyond the context of labor unions.²⁶ This is evident in the language of Section 7 providing that employees shall possess "the right to self-organization . . . to engage in other concerted activities for the purpose of . . . mutual aid or protection." This right is enforceable by means of Section 8(a)(1) which prohibits employer interference, restraint, or coercion of employees who are exercising their Section 7 rights.

In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the Supreme Court endorsed the Board's action in ordering reinstatement of employees who were not organized in a union but who, nevertheless, engaged in a walkout to protest the conditions of their employment. The employer had argued that the employees' concerns were mere "gripes" and that their walkout violated a legitimate company rule against unauthorized departures from the workplace. 370 U.S. at 15. The unanimous Court observed that the employees "had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could." 370 U.S. at 15. In so doing, they were entitled to the protection of the Act. As the Court explained, "an employer is [not] at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects." 370 U.S. at 17.

In operating under the Supreme Court's mandate, the Board has taken care to draw a distinction between individual action and protected concerted activity. That the drawing of such distinctions required careful policy analysis is illustrated by the extensive citation necessary to describe the procedural history of the Board's leading precedents, *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Meyers II*, the Board held that the Act "requires some linkage to group action in order for conduct to be deemed 'concerted' within the meaning of Section 7."²⁷ 281 NLRB at 884.

In assessing the nature of such concerted activity, the Board has cautioned that a pragmatic approach is required in order to properly assess the "myriad of factual situations that . . . will continue to arise in this area of the law." *Meyers I*, 268 NLRB at 497. The key concept is that concerted action must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497.

²⁶ Interestingly, the Act's additional protections are often brought into play in the types of workplaces and occupations not ordinarily encountered in labor law. An obvious example is the salon and spa involved in this case. An equally unusual example was another case on my own docket, *Citizens Investment Services Corp.*, 342 NLRB 316 (2004), affd. 430 F.3d 1195 (D.C. Cir. 2005) (investment consultant employed by a large financial institution unlawfully discharged for protected concerted activity). See also *KNTV, Inc.*, 319 NLRB 447 (1995) (discharge of television news reporter for engaging in protected concerted activity was unlawful).

²⁷ This does not mean, however, that a finding of concertedness requires proof of some sort of express authorization by coworkers. See *Amelio's*, 301 NLRB 182 fn. 4 (1991), and the cases cited therein.

In this case, I have made a careful evaluation of this question with regard to the conduct of employees at the salon, particularly Lakes and Frith. Turning first to Lakes, the events of October 16 are highly significant. On that day, Dill made her angry remarks regarding the failure of the staff to perform the shop duties and slammed the bowls into the sink and the dryer door. After Dill left the room, Lakes told Call, "I can't take this anymore. Management can't keep treating me like this. I've got to tell somebody." (Tr. 139.) Call replied that this was a good idea, since "someone needs to." (Tr. 139.) Lakes sent a text message to Frith to ask her advice as to which manager she should see regarding her complaint about management's treatment of the employees. Frith suggested Snider. Shortly thereafter, Lakes encountered Aiello and told her about her intention to complain to Snider about Dill's behavior. Aiello responded that this was "[g]ood." (Tr. 141.) Lakes did meet with Snider to register her complaint. In response, the managers called a staff meeting for later that day. At the meeting, Lakes took the lead in airing the staff's grievances. She challenged her fellow employees to speak up "about the way that management had been treating everyone."²⁸ (Tr. 196.) Her challenge was accepted by Call and Bays Williams who reported their displeasure over the apprentice assignment controversy involving Cordell.

Aside from her prominent role on October 16, the evidence established that Lakes engaged in a variety of other conduct relevant to the issue of protected concerted activity. For example, Eubank testified that, during her individual meeting with Hausfeld, she responded to a query about negative behavior by other employees by informing Hausfeld that Lakes complained to her that everyone wanted to have time off on Halloween to take their children trick-or-treating and "that managers were getting off first." (Tr. 357.) Eubank also testified that Lakes complained about the quantity of customer bookings. By the same token, Bays Williams reported that Lakes would talk with her "about negativity in the salon and issues with managers." (Tr. 399.) On one particularly busy day, Lakes solicited Bays Williams to join her in complaining to a manager about scheduling.

Turning to Frith's role, I note that her conduct during the important October 16 meeting was markedly different from that of Lakes. Instead of airing grievances about her employer, Frith used the occasion to speak in a positive vein regarding her job. Despite this, there was much evidence showing that Frith did engage in efforts to promote actions by employees designed to attempt to persuade management to address concerns. For instance, Call testified that, "on occasion, [Frith] would complain about work, or you know, being slow and, you know, management, that kind of thing . . . how things were being run. She didn't like, you know, some of the policies that we had, management." (Tr. 465-466.) Indeed, Call observed that, "usually when I saw the two of them [Lakes and Frith] together, then they were complaining about work conditions." (Tr. 466.)

Frith's supervisors also testified that they had taken note of Frith's conduct in complaining to coworkers about conditions at the salon. Cordell reported that Frith did not like the scheduling practices on weekends and "voiced it to other employees." (Tr. 526.) Hausfeld testified that she was well aware of Frith's dissatisfaction with Cordell's weekend scheduling practices,

²⁸ As Aiello described it, Lakes told the managers that they were "not treating us or her right." (Tr. 261.)

noting that Frith's complaints on this topic were the subject of discussion at management meetings. Dill asserted that Frith "was always negative in the break room talking about coworkers and about management." (Tr. 578.)

The course of conduct of Lakes and Frith that I have just described falls into three broad categories. Lakes engaged in discussions of terms and conditions of employment with coworkers, initiated complaints to management, and spoke out at a staff meeting. Frith also discussed workplace problems with coworkers on an ongoing basis. I must now determine whether these activities constituted concerted protected activity within the meaning of the Act.

In examining this question, it is important to note that the Supreme Court has taken a realistic and flexible approach. Writing for the Court, Justice Brennan outlined the policy considerations that underlie any analysis:

[I]t is evident that, in enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process.

NLRB v. City Disposal Systems, 465 U.S. 822, 835 (1984).

Taking its lead from the Court, the Board observed in *Meyers II*, that concerted activity, "encompasses 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." 281 NLRB at p. 887.

With regard to Lakes, it is clear that her conduct constituted concerted protected activity. In particular, her behavior at the critical staff meeting goes to the essence of such conduct. The Second Circuit has noted that the Board and courts have on "myriad" occasions held that an employee who voices group grievances at a staff meeting is engaged in protected concerted activity. *NLRB v. Caval Tool Division*, 262 F.3d 184, 190 (2d Cir. 2001). Two examples will suffice to underscore the settled nature of this finding. In *Whittaker Corp.*, 289 NLRB 933 (1988), the president of the company called the employees to a meeting to announce a decision to suspend future wage increases. One employee, Johnston, voiced a spontaneous protest for which he was discharged. In ordering his reinstatement, the Board held:

We find that, in the presence of other employees, Johnston protested, at the earliest opportunity, a change in an employment term affecting all employees just announced by the Respondent at that meeting. This is clearly the initiation of group action as contemplated by the . . . line of cases which was specifically endorsed by *Meyers II*.

289 NLRB at 934. Interestingly, Lakes' behavior at her staff meeting makes a stronger case for a finding of concerted activity. When Johnston made his statement against the cancellation of wage increases, his coworkers remained silent. By contrast, when Lakes asked her coworkers to speak up about their condi-

tions of employment, Call and Bays Williams added their own voices to Lakes' complaint.

Another precedent presents an even more striking fact pattern where the Board found concerted protected activity. In *Media General Operations, Inc.*, 341 NLRB 124 (2004), a supervisor convened a staff meeting to chide the staff for their job performance. In response, an employee, Mankins, interrupted to assert that the supervisor failed to treat everyone equally, going so far as to call the supervisor a racist and accusing the company of being a racist place to work. For this conduct, Mankins was suspended. The Board did not hesitate to find that his conduct was concerted activity, observing that:

We find that Mankins' comments at that meeting constituted protected concerted activity. Indeed, it is well settled that an employee engages in protected activity by speaking up to management about the allegedly unfair treatment employees have received. [Footnote and citation omitted.]

341 NLRB at p. 125.²⁹ From this, it is clear that Lakes' statement at the staff meeting, made in a far milder and more temperate form than Mankins used, was a clear example of protected concerted activity.

I must now characterize the other forms of activity engaged in by Lakes and Frith, particularly their practice of raising complaints and criticisms of management's actions and policies with their coworkers. There is no doubt that this sort of conduct takes the concept of concertedness to its outer limit. However, a review of the pertinent authorities demonstrates that it does not go beyond that outer limit. It will be recalled that, in response to concerns raised by the D.C. Circuit in its review of *Meyers I*, supra, the Board emphasized that, "our definition of concerted activity in *Meyers I* encompasses 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." *Meyers II*, 281 NLRB at 887.

I conclude that the conduct of Lakes and Frith in repeatedly raising specific grievances with their coworkers and seeking their support and approval was the type of preliminary groundwork necessary to initiate group activity.³⁰ It was virtually identical to activity found to be concerted by the Board in *Champion Home Builders Co.*, 343 NLRB 671 fn. 3 (2004), enf. in pertinent part 209 Fed. Appx. 692 (9th Cir. 2006). In that case, the concerted activity consisted of an employee discussing his "concerns about bonuses with coworkers on several occasions" and his statements to management indicating that his coworkers agreed with his complaint.

²⁹ It is interesting to note that the Fourth Circuit declined to enforce the Board's order. In so doing, it did not take issue with the finding of concerted activity, but did conclude that the offensive nature of Mankins' statements rendered them unprotected. *Media General Operations, Inc. v. NLRB*, 394 F.3d 207 (4th Cir. 2005). Of course, there was nothing comparable in the content of Lakes' remarks at her meeting that would take them outside the protection of the Act.

³⁰ Indeed, during the Board's infancy and while using the gender specific language of that long ago era, Judge Learned Hand observed that when employees, "in a shop make common cause with a fellow workman over his separate grievance . . . they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome . . . [T]he solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts." *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503, 505 (2d Cir. 1942).

While it is true that Lakes and Frith's pattern of airing complaints to their colleagues did not produce much in the way of group protest to management, the relative absence of such activity is readily understandable in the circumstances of this case.³¹ The testimony revealed that the issues that led to disaffection within the Salon arose very shortly before the October staff meeting. Indeed, this point is underscored by Cordell's testimony that management chose to hold the staff meeting despite Hausfeld's absence on vacation because the managers wanted to "nip it in the bud right away." (Tr. 534.) In fact, management's subsequent actions clearly produced the desired effect. As I will address later in this decision, those actions consisted of conduct that interfered with, restrained, and coerced employees in the exercise of their Section 7 rights by warning them that they could not air their grievances once the staff meeting had concluded,³² interrogating them regarding the protected activities of their coworkers, threatening loss of benefits for participation in protected activity, and ultimately, discharging two employees for such participation. Not surprisingly, once these steps had been taken, no further group activity occurred. It had, indeed, been nipped in the bud.

The situation here is one that was anticipated by the Third Circuit in a venerable case that is often cited by the Board. In *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), the court was concerned that the definition of concerted activity not be stretched to include mere individual complaints or griping. Despite this concern, the court observed:

This is not to say that preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands. We recognize the validity of the argument that, inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.

330 F.2d at 685.

The record reveals that the salon's employees engaged in a pattern of preliminary conversations and discussions that formed the prelude to group activity in support of their concerns about the terms and conditions of their employment. Those discussions did lead to a measure of such group activity, particularly during the October 16 staff meeting. The absence of significant additional group activity does not undermine the concerted nature of the preliminary conversations because it was the direct result of management's pattern of coercion specifically designed to preclude further concerted activity by the employees. For these reasons, I conclude that the employees, including Lakes and Frith, engaged in conduct that falls within

³¹ To be clear, Lakes' incitement of her coworkers at the staff meeting did produce some group activity in that it caused other employees to voice support for her complaints.

³² I recognize that the General Counsel had not alleged that the warning to the staff against further discussion about management's conduct once the staff meeting ended was a violation of Sec. 8(a)(1). Despite this, it is appropriate to consider this behavior in evaluating other conduct subject to specific complaint allegations. See *American Packaging Corp.*, 311 NLRB 482 at fn. 1 (1993) (well-settled that conduct not independently charged may be used to show "the underlying character of other conduct that is alleged to violate the Act").

the ambit of concerted activity entitled to protection under the Act.

2. The allegedly unlawful threat regarding social networking activities

Turning now to the specific allegations of unlawful conduct, the complaint asserts that, "[a]bout September or October 2009, a more precise date being presently unknown to the General Counsel," Hausfeld threatened employees with unspecified reprisals if they engaged in protected concerted activities, including such activities conducted on "internet social sites." (GC Exh. 1(g), p. 3.) It is further alleged that this threat was made at a Doubletree Hotel near Springboro, Ohio.

The Employer mounts a two-pronged defense to this allegation of misconduct. First, it contends that the charge raising this allegation was untimely filed. Second, it asserts that the General Counsel has failed to meet his burden of proving that Hausfeld's statements violated the Act in the manner alleged. I conclude that the Employer is correct under both its procedural and substantive arguments.

As to the affirmative defense based on the untimeliness of the charge, one must begin by noting that Congress included a limitations period with regard to the filing of charges alleging unfair labor practices. Thus, Section 10(b) provides that, "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." The Board has noted that a significant function of this provision is to create a "statute of limitations" for the prosecution of unfair labor practices. *Carney Hospital*, 350 NLRB 627, 628 (2007).

In order to assess the Employer's statute of limitation defense, the procedural history must be examined. The initial charge in this case was timely filed on December 18 because it was confined to a single allegation of misconduct, the discharge of Lakes approximately 2 months earlier on October 22.³³ (GC Exh. 1(a).) The issue of timeliness arises because the first and only charge filed that alleges the utterance of unlawful threats was filed on April 5, 2010. (GC Exh. 1(e).) Although that charge and the complaint allegation that incorporates it assert that the threats were made in "about September and October 2009," for reasons fully discussed earlier in this decision, I have found that the evidence establishes that the statements constituting the alleged threat under examination here were made by Hausfeld at a meeting conducted at the Doubletree Hotel on September 24. In consequence, it is clear that the charge alleging this misconduct was filed more than 6 months subsequent to the event it addresses.

As is often true in the law, this arithmetic calculation does not end the inquiry since the Board holds that certain equities can trump the mathematics. In its leading case of *Redd-I, Inc.*, 290 NLRB 1115 (1988), the Board mitigated the rigor of the limitations period by authorizing the prosecution of otherwise untimely charges if those charges are closely related to other timely-filed charges. Relatively recently, the Board summarized the standards for application of this "closely related" doctrine as follows:

The Board considers (1) whether the otherwise untimely allegations of the amended charge involve the same legal theory

³³ A second charge was timely filed by Frith on February 2, 2010. That charge confined itself to the issue of her termination on October 20. (GC Exh. 1(c).)

as the allegations in the timely charge; (2) whether the otherwise untimely allegations of the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations.

WGE Federal Credit Union, 346 NLRB 982, 983 (2006).

In her brief, counsel for the General Counsel argues that each of the requirements of this analytical standard has been met. I agree that the third portion of the test, whether the Employer's defense would be the same as that which it offers in response to the timely charge, is met. The Employer's defense to all of the complaint's allegations is that its philosophy and vision that requires employees to avoid "negativity" does not violate the Act and has not resulted in any conduct against employees that violated the Act. Although less compelling, I also conclude that the General Counsel has shown that the first prong of the test is met. Thus, since all of the alleged violations in the complaint arise under Section 8(a)(1), they all involve the legal theory that requires proof that an employer has engaged in unlawful interference, restraint, and coercion directed against exercise of the rights of employees guaranteed in Section 7 of the Act. In my view, this conclusion stretches the "closely related" doctrine to what should be its farthest reach. Although both forms of misconduct involve unlawful interference, there is a world of difference between the utterance of an unspecified threat of reprisal to a general assembly of employees at a staff meeting and the highly specific act of discharging an employee because of her participation in protected activity. Fortunately, the remaining portion of the *Redd-I* standard appears to me to be designed to prevent an overbroad application of the exception to the Congressionally mandated limitation period.

Turning to that remaining analytical criterion, I must determine whether the allegedly unlawful threat made at the September 24 staff meeting has some meaningful nexus with the sequence of events contained in the timely filed charges. A careless application of this standard could easily prove to be so elastic as to entirely vitiate the Congressional objective of limiting the period in which a party's past conduct could subject it to unfair labor practice litigation. Thus, events which occur after other events can always be claimed to exist as part of a sequence or pattern. Indeed, generations of historians have made their living by attempting to discern a particular significance from such a string of incidents. Of course, those historians are not bound by a statute of limitations.

Fortunately, in recent years the Board has taken clear steps to limit application of the "closely related" doctrine to those circumstances where it can be demonstrated that the series of acts under examination were more than merely sequential in time. In particular, the holding in *Carney Hospital*, supra, is vital to the analysis in this case. In that case, the Board considered the application of the "closely related" doctrine to a series of charges that is highly analogous to the present case. The charging party had filed a timely charge alleging an unlawful disciplinary action against a union supporter.³⁴ This was followed

³⁴ The suspension of the union supporter was alleged to violate Sec. 8(a)(3). In the present case, the allegedly unlawful discipline is asserted to violate Sec. 8(a)(1). I do not see this as a material distinction for the purposes under discussion. Indeed, to the degree it does matter, I see it as cutting against the application of the "closely related" doctrine because the disciplinary action in *Carney Hospital* was specifically al-

by a series of untimely charges alleging violations of Section 8(a)(1), including interrogations and threats. Applying extant precedent, the judge concluded that the untimely charge was closely related to the timely charges because it was part of the employer's overall effort to oppose the union's organizing campaign.

The Board, adopting the views of two appellate courts, took the occasion to delineate limits in the application of the concept of sequence to excuse an untimely filing. It held:

[W]e will not find that the [*Redd-I*] second prong is satisfied merely because timely and untimely allegations pertain to events that occurred during or in response to the same union campaign. But where the two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity, we will find that the second prong of the *Redd-I* test has been satisfied. [Footnotes and internal quotation marks omitted.]

Carney Hospital, supra at 630. Holding that the mere fact that "the events occurred during the same organizational campaign and the same general time period" was insufficient to support a "finding of factual relatedness," the Board dismissed the untimely allegations. *Id.* at 631.

Applying the rationale of *Carney Hospital* to this case, it is apparent that there is even less proof of factual relatedness here. Thus, while recognizing that it was not the only way to meet the *Redd-I* standard, the Board clearly noted that the presence of a pattern of violations forming "part of an overall employer plan to undermine union activity," presented a particularly firm foundation for application of the "closely related" doctrine. *Id.* at p. 630. In the case under consideration, there was no union organizing campaign and certainly no overall plan by the Employer to thwart such a campaign. In fact, far from any overall plan of attack, the evidence demonstrates that the steps taken over time by the Employer to address what it viewed as negativity were ad hoc and individual responses to what it perceived to be discrete events.

In my opinion, the circumstances revealed in this record underscore the Board's wisdom in applying restraint to the application of the "closely related" doctrine. If mere sequence of events, standing alone, were sufficient to excuse an untimely filing there would be no practical constraints on the ability of a litigant to evade the Congressional intention of limiting the exposure of private parties to expensive and economically disruptive litigation. This is powerfully illustrated in this case by the recognition that the Employer's efforts to enforce its philosophy against negativity extended to periods far earlier than the month of September. For example, in February 2008, Genie Combs was discharged for "negativity with ex-employees." (GC Exh. 5, p. 5.) In November of that year, Tanisha Bates was discharged. Her termination form reports that the reason for her firing was "negativity in salon." (GC Exh. 5, p. 6.) In February of the following year, Kokka Manson was terminated for "continual negativity which is against company policy." (GC Exh. 5, p. 10.) A few months later, on May 27, 2009, Jessica

leged to be the product of unlawful animus while proof that the discharges of Frith and Lakes violated the Act does not necessarily require evidence of such animus. This is significant since animus could well represent the clear thread that serves to unite what would otherwise simply be a progression of potentially unconnected events.

Frazier was fired for “attitude & negativity.” (GC Exh. 5, p. 2.) How and where does one draw the line?

If one were to excuse an untimely filing simply because the alleged misconduct was part of a sequence of similar events to those timely raised, the intent underlying the statute of limitations would be completely compromised. There is no difference in principle between the Employer’s application of the negativity policy to Bates in November 2008 and its alleged threat based on that policy in September 2009. Without the vital limits articulated by the Board in *Carney Hospital*, nothing would stand in the way of a party’s attempt to employ the “closely related” doctrine to prosecute remote actions that possess only a mere sequential and topical relationship to a timely filed charge. For these reasons, I agree with the Employer that the allegation regarding an alleged threat on September 24 is untimely and must be dismissed.

While I have concluded that the complaint allegation regarding Hausfeld’s statements made during the September 24 staff meeting should be dismissed as beyond the applicable statute of limitations, in the interest of decisional completeness, I will examine the underlying merits. The General Counsel contends that, during this employee staff meeting, Hausfeld made certain statements that constituted unspecified threats of reprisal against employees who engaged in protected concerted activities. In *Empire State Weeklies, Inc.*, 354 NLRB No. 91, slip op. at p. 3 (2009), the Board recently summarized the nature of such an alleged violation:

An employer violates Section 8(a)(1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a totality of circumstances standard to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their [protected concerted] activities, and employer statements protected by Section 8(c). [Citations and certain internal punctuation omitted.]

In this connection, the Board has also observed that, “[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” *Double D Construction Group*, 339 NLRB 303 (2003). [Footnote omitted.] Finally, “in considering whether communications from an employer to its employees violate the Act, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect.” *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006). [Citation and internal quotation marks omitted.]

In applying this standard for assessment of the Employer’s statements at the September 24 meeting, I am mindful that the crucial component is the determination whether any of those remarks could reasonably be interpreted as intimidation, coercion, or interference with protected rights.³⁵ Examination of the

³⁵ Although it is far from clear that such is the case, I will assume that Hausfeld’s remarks at the meeting may be viewed as being directed, in part, against employees’ activity that could be both protected and concerted. Thus, if employees chose to engage in group communications designed to seek improvement in their conditions of employment by the means afforded through social networking sites, this could potentially constitute conduct shielded by Sec. 7 of the Act.

descriptions of Hausfeld’s statements contained in the testimony of the various individuals present at the meeting reveals that those statements contained two themes. First, Hausfeld impressed upon the employees that their postings on the social networking sites were perhaps more available for public viewing than they realized. Because of the possibility that customers or other interested persons may read such postings, she urged the staff to exercise judgment and restraint in making use of the sites.

In evaluating these comments, I am cognizant of the generational difference between Hausfeld and her staff members. Those staff members belong to a generation that takes the internet and other modern means of communication for granted and that, arguably, maintains a different expectation of personal privacy than those of us belonging to older age cohorts. In my view, much of Hausfeld’s objective in making her comments was educational and almost parental in nature. The evidence reveals that the audience took the remarks this way as well. For example, Frith, hardly a witness who desired to put a positive spin on Hausfeld’s behavior, testified that she assumed that the comments were not a specific reference to the work environment, but rather were directed toward life “in general.” (Tr. 189.)

It is clear to me that Hausfeld’s overall purpose in warning her employees to be careful in their use of social networking media was didactic, not coercive. Thus, her references to the potential negative effects of the exercise of poor judgment when using the sites did not represent a threat of reprisal from management but rather a warning that poorly chosen statements or photographs could have a negative impact on a young person’s reputation with resulting impact on her career. The point here is the same one underscored by the Board in *Baker Concrete Construction, Inc.*, 341 NLRB 598, 598 (2004). In that case, a supervisor named Kelly warned an employee to stay away from union proponents or, “you [could] have trouble.” In determining that this statement was not an unlawful threat of reprisal, the Board noted that, “it is far from clear that Kelly was saying that the Respondent would be the source of that trouble.” Id. at 598. By the same token, I conclude that there is no evidence that the bad consequences from misuse of social networking alluded to by Hausfeld were going to come from some action by management.

The second broad theme in Hausfeld’s remarks was her displeasure that certain current employees were choosing to post comments on social network sites belonging to disgruntled former employees. Thus, she posed a rather persuasive rhetorical question, asking the staff members why they would want to have friendly relations with persons who desired their employer to go out of business, thereby rendering them jobless. Nothing in these comments represented a threat of reprisal by management. As the Supreme Court has observed, Section 8(c) of the Act protects an employer’s freedom under the Bill of Rights to communicate her opinions to her employees without fear of “infringe[ment] by a union or the Board.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Because Hausfeld refrained from uttering any threats regarding consequences from management if staff continued to communicate with former employees, her criticism of this behavior was protected by both the Act and the Constitution. See, for example, *Children’s Center for Behavioral Development*, 347 NLRB 35, 35 (2006) (if unaccompanied by threats or promises of benefit, employer may “criticize, disparage, or denigrate a union”) and *Miller*

Towing Equipment, Inc., 342 NLRB 1074, 1076 (2004) (employer may offer his “perspective” against union so long as it is not accompanied by threats).

Having examined the content and tenor of Hausfeld’s statements made at the Doubletree meeting on September 24, I find that they cannot reasonably be construed as tending to interfere with, restrain, or coerce her employees in the exercise of their statutory rights. To the contrary, I conclude that her remarks were simply expressions of opinions of the type that are protected by Section 8(c) of the Act. As a result, for reasons both procedural and substantive, I will recommend that this allegation of the complaint be dismissed.

3. The alleged unlawful interrogations by Hausfeld

The General Counsel alleges that, during the third full week of October, Hausfeld engaged in coercive interrogations of employees in violation of Section 8(a)(1). The Board’s evaluative criteria in this regard are particularly clear. They derive from its leading case on the topic, *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985), and are summarized as follows:

Under Board law, it is [well established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of “whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act.” In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter. [Footnote omitted.]

Norton Audubon Hospital, 338 NLRB 320, 320–321 (2002). In addition, it is important to note that the Board has expressed particular concern regarding interrogations that appear designed to obtain “information upon which to take action against individual employees.” *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1224 (2002). See also *SALA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001) (interrogations that constitute “a pointed attempt to ascertain the extent of the employees’ union activities” are unlawful).

There is little, if any, material dispute regarding the facts involved in this allegation. Hausfeld testified that she compiled a written list of employees that she intended to interview on her return from vacation. She described her purpose as, “what I intended to do if they were negative is ‘what’s going on, you know, talk to me.’” (Tr. 687.) [Internal quotation marks supplied.] Similarly, Cordell testified that the probable purpose of the interviews was to investigate “the negativity problems that we were having in the salon.” (Tr. 539.)

Significantly, management used the occasion of the October 16 staff meeting to announce the upcoming interviews with Hausfeld. Whatever management’s intentions were, a reasonable employee hearing that the salon’s owner had a written list of people to interview would find this to be ominous and threatening. Thus, it is not surprising that Orth reported that this announcement did, in fact, shock the audience of employees.

Regarding the actual interrogations, Hausfeld testified that she met privately and individually with Aiello, Bays Williams, Eubank, Orth, and Call. She confirmed that she discussed the negativity problem with these employees and that she was told

that Lakes and Frith were engaged in negative behaviors. The employees who testified about the interviews provided additional details. Eubank, albeit reluctantly given her uncomfortable position as a current employee, admitted that Hausfeld asked her who was being negative in the salon. Call reported that Hausfeld, “did ask me if I knew of anyone else that was being negative.” (Tr. 439.) Indeed, she pressed the inquiry by raising the names of Frith and Lakes and asking whether “you noticed them being negative at any time.” (Tr. 440.) Aiello also confirmed that Hausfeld asked her for the names of other employees who had been negative.

Before applying the analytical criteria to this largely undisputed factual record, I must address an important preliminary consideration. There is no doubt that the subject of each interrogation was the compliance of the staff with the Employer’s negativity policies. It remains to be determined whether questioning regarding such compliance with the policy constituted interrogation about protected concerted activity. In this regard, two things are clear. First, the Employer’s negativity policies cover a wide range of topics that extends far beyond any protected activity. Indeed, it has already been noted that even a complaint about the weather resulted in a counseling session from Hausfeld. Second, it is equally clear that the negativity policies do include topics that directly concern protected concerted activity. Thus, Hausfeld readily agreed with counsel for the General Counsel’s assertion that the policies included, “[c]omplaining about how the Company’s run.” (Tr. 74.) Similarly, Team Leader Dill testified that “talking about a member of management” constitutes prohibited negativity. (Tr. 591.) Finally, counsel for the Employer conceded the point in his opening statement, observing that, “we apply this policy to any kind of negativity, including negativity towards management.” (Tr. 491.)

It is quite likely that the employees who were being interrogated about negativity in the salon would have found the line of questioning to be ambiguous and vague in its scope. In assessing the significance of the presence of such ambiguity, the proper analogy is to the Board’s line of cases addressing employers’ written work rules that are ambiguous in their wording.³⁶ In its leading case on this subject, the Board has held that “any ambiguity in the rule must be construed against the Respondent as the promulgator of the rule.” *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enf.* 203 F.3d 340 (D.C. Cir. 1999). [Footnote omitted.] See also *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281 (2004).

The Employer’s unwritten negativity policy that, in significant part, proscribes statements and conduct that consist of complaints about management’s conduct or other working conditions is overbroad and serves to chill the employees’ exercise of their Section 7 right to engage in protected concerted activity. This is made entirely clear in the Board’s holding in *KSL Claremont Resort*, 344 NLRB 832, 832 (2005), where the employer maintained a written rule against “negative conversations” about employees and managers. In evaluating that policy, the Board held:

We find that the rule’s prohibition of “negative conversations” about managers would reasonably be construed by em-

³⁶ Indeed, the ambiguity in an unwritten policy such as this one is even more patent than any vagueness in a written work rule. Whatever the defects contained in a written work rule, such a rule is at least presented in a concrete and immutable form.

ployees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful. [Citation and footnote omitted.]

I readily conclude that when Hausfeld questioned her employees regarding compliance with the negativity policies of the salon, those employees could (and did) reasonably conclude that the interrogation included an inquiry into the employees' participation in protected concerted activities.

With this background, it is now appropriate to apply the *Rossmore House* factors to the series of interviews conducted by Hausfeld. As to the background of the interrogations, I conclude that this factor supports a finding of coercion. The announcement that Hausfeld had compiled a written list of employees to be interviewed inevitably produced fear and anxiety in the work force. This would be particularly acute because that work force was certainly well aware that, as Hausfeld put it, violations of the negativity policy were one of the "most common reasons for discipline." (Tr. 623.)

I have already noted that the Board has expressed particular concern about interrogations that seek to learn about the specific involvement of employees in protected concerted activities. It is clear that Hausfeld's questions were entirely directed to learning about violations of the negativity policy by specific employees. Since that policy encompassed protected concerted activity by those employees, this factor is perhaps the strongest indicator of unlawful and coercive conduct by Hausfeld. Indeed, nothing illustrates the degree of intimidation involved in this questioning more clearly than the fact that the interviews were closely followed by the imposition of dramatic discipline on those employees who were named by the interviewees as having violated the negativity policy.

The next set of factors consists of the identity of the questioner and the location and method of interrogation. Each of these supports a finding of unlawful conduct. The questioner was the highest ranking official in the salon. The location was in her private office, a setting that was both out of the ordinary and quite formal. The method of questioning was pointedly designed to ask each employee privately to report on her colleagues' behavior. All of this served to heighten the coerciveness of the interviews.³⁷

The Employer conducted a series of interrogations that were designed, at least in significant part, to elicit information, including involvement in protected concerted activities, that would be used to determine individual employee's compliance with the negativity policies for the purpose of imposing sanctions on those coworkers who had violated the policies. Those interrogations were conducted in a manner that would reasonably be perceived as coercive by the interviewees. As a result, I find that Hausfeld's series of interrogations conducted during the week of October 19 were unlawful within the meaning of Section 8(a)(1) of the Act.

4. The alleged threat of reprisal against Laura Call

The General Counsel contends that, during the course of interviewing Call as described above, Hausfeld also uttered a

³⁷ The remaining factor, whether an employee was an open union supporter, is irrelevant under the facts of this case.

threat of reprisal against Call.³⁸ This is alleged to also violate Section 8(a)(1).

As with the interrogations, there is no dispute about the content of the conversation involved in this allegation of misconduct. Call testified that Hausfeld began her interview by warning her that her compliance with the negativity policy was going to be "watched closer" than that of rank and file employees because of her status as an educator. (Tr. 438.) Underscoring her point, Hausfeld cautioned Call that, if she violated the policy in the future, "as an educator, you might have to take a leave, basically."³⁹ (Tr. 439.)

If there was any trace of ambiguity about the nature of Hausfeld's threat of reprisal to Call contained in Call's account, it was dispelled by Hausfeld's own testimony about the discussion. As Hausfeld, explained, she told Call that, "she needed to be cautious about the negativity issue with her, otherwise she wouldn't be able to remain in that [educator's position] because that is my expectation, especially with my leaders." (Tr. 720.)

Earlier in this decision, I have outlined the Board's standards for determining whether an employer has made statements that violate Section 8(a)(1). If the statements reasonably tend to interfere with, coerce, or restrain an employee in the exercise of her Section 7 rights, they are unlawful. See *Empire State Weeklies, Inc.*, supra. Hausfeld's undisputed warning to Call was that she would lose the status and extra compensation associated with her role as an educator if she violated the Employer's negativity policies. As I have already discussed in detail, those policies prohibited a broad range of speech and behavior, including a variety of conduct that would constitute protected concerted activity. Beyond this, Hausfeld chose to deliver her warning to Call in the course of an otherwise unlawful interrogation. As the Board has observed, "[w]here an interrogation is accompanied by a threat of reprisal or other violations of Section 8(a)(1) of the Act, there is no question as to the coercive effect of the inquiry." *SALA Motor Freight, Inc.*, supra at 980. [Citations omitted.]

In a private meeting that included an unlawful interrogation, Hausfeld warned Call that she would lose her prestigious status and extra monetary compensation as an educator if she engaged in conduct, including protected concerted activity, which violated the negativity policies. In uttering this threat of reprisal against Call, Hausfeld violated Section 8(a)(1) of the Act by directly and powerfully interfering with Call's exercise of Section 7 rights.

³⁸ For reasons that have never been explained and which I cannot comprehend, the General Counsel characterized this as a threat of "unspecified" reprisal. As will shortly be discussed, the uncontroverted evidence demonstrates that the threat of reprisal was laser-like in its precision and specificity. There is no contention that this erroneous characterization of the threat caused any prejudice to the Respondent in presenting its defense. Furthermore, the issue was fully explored during the trial. As a result, no harm was caused by the General Counsel's error. See *Pergament United Sales*, 296 NLRB 333, 335 (1989), enf. 920 F.2d 130 (2d Cir. 1990) (no prejudice where issue was fully litigated) and *Dal-Tex Optical Co.*, 130 NLRB 1313 (1961) (complaint allegation was sufficient where it provided the name of the agent who committed the alleged offense, the date, and the nature of the activity).

³⁹ I found Call's testimony to be particularly compelling. She presented her account in a calm, poised, and confident manner that underscored her reliability.

5. The discharges of Natalie Lakes and Elizabeth Frith

The most serious set of allegations against this Employer is the General Counsel's contention that it unlawfully discharged Lakes and Frith due to their involvement in protected concerted activity. The Board's standard for assessment of this claim is well summarized as follows:

The discharge of an employee will violate Section 8(a)(1) of the Act if the employee was engaged in concerted activity (i.e., activity engaged in with or on the authority of other employees and not solely on her own behalf), the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity.

Triangle Electric Co., 335 NLRB 1037, 1038 (2001). I will now apply this standard to the circumstances of this case.⁴⁰

As to the first criterion, I have previously set forth in detail my finding that Lakes and Frith did participate in concerted activity within the meaning of the Act. The evidence clearly demonstrated that Lakes engaged in a series of discussions with her coworkers regarding their terms and conditions of employment, initiated complaints to management regarding those working conditions, and spoke out about those conditions at a staff meeting. Frith also engaged in discussions about working conditions with her coworkers on an ongoing basis. At the very least, the conduct of these two employees constituted precisely the type of preliminary activity that forms the prelude to the group activity that the Act is designed to foster and protect. As a result, I conclude that Lakes and Frith were engaged in a pattern of concerted activity within the meaning of the Act.

At the second step, it is necessary to determine whether the Employer was aware of the concerted activities of Lakes and Frith. Clearly, an employer who is ignorant of the nature of an employee's concerted activity cannot be found to have discharged that employee because of involvement in that activity. See *Reynolds Electric*, 342 NLRB 156 (2004). In this case, there is abundant evidence that management was acutely aware of the concerted activities engaged in by Lakes and Frith. As will become evident during the discussion of management's articulated reasoning for their discharges, it was precisely this concerted activity that aroused the ire of Hausfeld and her subordinates. In this regard, the situation is identical to that described by the administrative law judge in another very recent case involving the termination of employees due to their involvement in concerted activity. As the judge described in words that easily fit most of the facts of this case:

The many conversations that [the two employees] had with each other, with fellow employees, and with management, regarding their wages, hours, and working conditions, beyond question constituted protected concerted activity. Further, there is no doubt that management officials at the [workplace] were acutely aware of this activity, in many instances directly responding to it in a very negative way. [Citations omitted.]

⁴⁰ This analytical methodology is applied in cases where there is a single motive for the adverse employment actions. The Employer shares my view that this is such a case. As counsel put it, "Respondent believes that a single motive analysis is appropriate in this case to the extent that there was only one motive for discharge and that motive was legal." (R. Br. at p. 15.) The evidence clearly shows that the only motive was "negativity" and that a single motive analysis is required to resolve the issue of whether that motive was a lawful one.

Roomstores of Phoenix, LLC, 2010 WL 2180784, 28-CA-22404, slip op. at 20 (2010).

Having found that Lakes and Frith engaged in concerted activities and that management was aware of those activities, I must determine whether the nature of these actions brought them within the protection of the Act. Here, the concerted activity consisted of verbal discussions with coworkers regarding complaints about the conduct of managers and the work policies of management, discussion with managers about the same topics, and similar statements made during the course of a staff meeting.

The Act affords employees broad scope in airing their grievances in a concerted manner. Nevertheless, as the Board has described,

The protection that our Act provides employee verbal and written expressions during the course of protected activity is not without limitation. Otherwise protected activity may become unprotected if in the course of engaging in such activity, the employee uses sufficiently opprobrious, profane, defamatory, or malicious language. Nonetheless, the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. [Citations and internal punctuation omitted.]

Honda of America Mfg., Inc., 334 NLRB 751, 752 (2001), enf. 73 Fed. Appx. 810 (6th Cir. 2003). There is simply no allegation that Lakes or Frith engaged in any speech or conduct that falls outside the wide ambit of protection under the Act. Their statements regarding the terms and conditions of their employment constituted protected activity.

I must now address the issue of whether Lakes and Frith were discharged due to their participation in protected concerted activity. Unlike the typical case involving alleged unlawful terminations, there is no dispute as to the employer's rationale for the adverse actions. This was underscored when counsel for the General Counsel asked open-ended questions to Hausfeld seeking her explanation as to why the two women were fired. In response, Hausfeld gave the succinct answer that Lakes and Frith were fired due to "negativity." (Tr. 104, 118.) There is no claim that the decision to fire either employee was motivated by any other factor, such as other forms of misconduct or any performance issue. Indeed, as to performance, it is noteworthy that Hausfeld testified that Lakes is an "extremely talented [hair] designer." (Tr. 648.) Similarly, Frith's performance evaluations reflect the highest possible score in the area of "ability to provide quality Customer Service." (GC Exh. 16, pp. 9, 12.) [Capitalization in the original.] Dill also confirmed that she had never had any problem with the work performance of either Lakes or Frith.

There is no dispute that Lakes and Frith were fired because they were perceived to have violated the negativity policies of the salon.⁴¹ While there is no question that Lakes and Frith were

⁴¹ To a considerable degree, this justification by the Employer is, in itself, problematic. The Board has a long history of justifiable skepticism regarding employers' disciplinary actions that are based on negative characterizations of the employees' attitudes, particularly when such actions occur in the context of protected concerted activities by those employees. Thus, the Board has ordered reinstatement for employees discharged because they were a "disruptive force" (*Skyline Lodge*, 305 NLRB 1097 fn. 1 (1992), enf. 983 F.2d 1068 (6th Cir. 1992); or an "instigator" (*Boddy Construction Co.*, 338 NLRB 1083 (2003); or a "troublemaker" (*United Parcel Service*, 340 NLRB 776

fired for engaging in prohibited negativity, I clearly recognize that this does not automatically resolve the issue of whether they were fired for protected concerted activity. The Employer's negativity policies are both vague and extremely broad. They cover a wide variety of behavior that includes both protected concerted activity and "negative" conduct that does not involve the terms and conditions of employment. Such prohibited negativity may include comments about their own personal lives, the personalities of others, or even bad weather. Therefore, I must determine whether the forms of negativity that the Employer considered to be misconduct leading to the decision to terminate Lakes and Frith consisted of protected concerted activity.

In assessing whether the negativity that led to the firing of Lakes and Frith consisted of their protected concerted activities I have accorded great weight to the contemporaneous written justifications for the two discharges that were prepared by management in order to document the thinking behind the adverse actions. Of course, past experience teaches that it may sometimes be naïve to place great reliance on the contents of such termination reports. A large and sophisticated employer operating in a union context may well employ a phalanx of labor and employment lawyers and human resource specialists capable of crafting justifications designed to avoid liability for prohibited personnel actions. I am convinced that such is not the case here. This is a small employer who appeared to be entirely unfamiliar with the statutory framework governing protected activity. I conclude that the written termination reports constitute an accurate portrayal of management's actual rationale for discharging Lakes and Frith.⁴²

Turning to the key documentary evidence, it is noteworthy that the Employer maintains a form entitled, "Hausfeld's Termination of Employee By the Company." (GC Exhs. 11, 13.) The form explains that, "[i]t is the Supervisor's responsibility to record the grounds of termination of an employee by the company. Use the space below for the Supervisor's reason or reasons for termination." (GC Exhs. 11, 13.) This form was completed in order to document the terminations of both Frith and Lakes.

As to Frith, the form, dated October 20, states in full:

Liz is being let go do [sic] to violating Company's policy on zero tolerance with negativity. She is conversing with employees about other team members & team leaders negatively. In doing so, she has created an uncomfortable & negative work environment for fellow employees. She is not focused on her career here with Hausfeld's. She is ultimately not happy for she expresses her disapproval of many of Hausfeld's policies to other team members. [GC Exh. 11.]

(2003). As the Board explained, "[i]t is well settled that an employer's reference to an employee's 'attitude' can be a disguised reference to the employee's protected concerted activity." *Rock Valley Trucking Co.*, 350 NLRB 69 (2007).

⁴² Beyond this, I conclude that those reports are more trustworthy than subsequent attempts to explain and justify the discharges that have been provided during the course of this litigation. In so doing, I note that the Board has endorsed the view that documentary evidence prepared while events were fresh and before lawsuits were contemplated may properly be accorded greater probative value than subsequent testimony from interested parties. See *Domsey Trading Corp.*, 351 NLRB 824 fn. 56 (2007) (a finding that documentary evidence was "was entitled to greater weight than contradictory testimonial evidence" is consistent with Board law).

This explanation of the Employer's rationale for discharging Frith makes it abundantly clear that she was fired for engaging in protected concerted activities consisting of "conversing with employees about . . . team leaders negatively" and "express[ing] her disapproval of many of Hausfeld's policies to other team members."⁴³ (GC Exh. 11.) A fair reading of the entire explanation leads to the clear conclusion that the particular forms of negativity that resulted in the disciplinary action were precisely those forms that coincided with the Act's definition of protected concerted activity.

Turning now to the written explanation for Lakes' discharge, dated October 22, it provides in full:

Meetings with multiple Hausfeld's employees at the Springboro location resulted in the conclusion that Natalie Lakes is one of the main sources of negativity about team members and management.

Natalie is unable to keep the line of friendship and careers separated and allows and is involved in situations that causes [sic] dissention among team members. [GC Exh. 13.]

As with Frith, this explanation makes it crystal clear that the form of negativity that led to the decision to discharge Lakes was her involvement in protected concerted activity. Thus, Lakes was fired because she was "one of the main sources of negativity about . . . management" and a cause of "dissention among team members." (GC Exh. 13.)

An examination of the totality of the evidence, with particular reference to the Employer's written justifications, reveals that Lakes and Frith were not fired because they expressed negativity regarding their personal problems, the personal behavior of their coworkers, or the general circumstances of their lives. Instead, they were discharged specifically because their negativity consisted of a pattern of criticism of managers' behavior and the policies of their Employer as articulated to coworkers, and in the case of Lakes, to supervisors and the assembled work force at a staff meeting.

Having found that the discharged employees engaged in protected concerted activity and that the Employer fired them because they did so, I must consider one additional factor. The Board will uphold an employer's policy that restricts the exercise of protected rights if that employer establishes that there is a "legitimate and substantial justification" for its policy. *Phoenix Transit System*, 337 NLRB 510 (2002), enf. 63 Fed. Appx. 524 (D.C. Cir. 2003). In this case, the Employer asserts that it has such a justification.

⁴³ The Employer's written explanation also encapsulates the thought that Frith's employment should end because she was "not happy" working at Hausfeld's. This is consistent with Hausfeld's testimony that, "if [employees are] negative all the time, that tells me they're not happy with us. And if they're not happy with us, why do you want to stay with us[?]" (Tr. 622.) On many occasions, the Board has found such expressions to constitute violations of Sec. 8(a)(1). For example, see *Paper Mart*, 319 NLRB 9 (1995) (finding unlawful an employer's statement that if an employee was not happy, he could seek employment elsewhere); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (unlawful for employer to indicate that unhappy employees should find another job because the statement suggests that support for protected activities is "incompatible with continued employment"); and *Plaza Auto Center*, 355 NLRB No. 85, slip op. at 2 (2010) (owner's statement to employee that, if he did not like employer's policies, he did not need to work there was both "unlawful and provocative").

It will be recalled that Hausfeld testified that the salon's negativity policies were the product of her careful analysis of the conditions in her occupation and the reasons why some beauty salons were not successful. Based on her examination, she concluded that it was vital to maintain an atmosphere where the customers felt "a culture of love and happiness." (Tr. 124.) Because employee discussions with each other about problems in the workplace that affected their terms and conditions of employment, even when conducted out of the presence of customers, could create a negative feeling in the shop that could be sensed by customers, such conversations were prohibited by the negativity policies.

I have no doubt as to the sincerity of Hausfeld's testimony regarding the reasons for her broad negativity policies and her vigorous enforcement of those policies. I am also sympathetic to counsel for the Employer's argument that, "this Employer should not be punished simply because they have a unique take on how they want their workplace to be." (Tr. 494.) Indeed, it is clear to me that the Board strives to accord deference to an employer's vision and philosophy when such deference is consistent with the Board's statutory responsibilities. For example, in *W San Diego*, 348 NLRB 372 (2006), the employer emphasized that it had an operating philosophy designed to make the guests' experiences at its hotel a "Wonderland" where customers would feel able to fulfill their "fantasies and desires." 348 NLRB at 372. [Capitalization in the original.] In order to effectuate this vision, the hotel required employees to wear a uniform that included a small pin. It also maintained a work rule that prohibited all other adornments to the uniform. This rule was enforced against an employee who chose to wear a union pin in the public areas of the building. The Board concluded that the employer had demonstrated "a special circumstance . . . justifying its prohibition on wearing the pin in public areas of the hotel." 348 NLRB at 373. [Footnote omitted.]

Given the Board's attitude, I have made an effort to find an accommodation between this Employer's negativity policy and the Section 7 rights of its employees. Unfortunately, there is simply no way to harmonize the policy with the statutory rights of employees created by Congress. The Employer's demand that its staff refrain from all forms of criticism among themselves and toward members of management, whether in earshot of customers or not, is so broad as to effectively destroy the ability of the employees to engage in Section 7 activities. In explaining the reasons supporting enactment of the statute, Congress stated:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

(Sec. 1 of the Act.) The breadth of the Employer's negativity policies, coupled with the vigorous manner in which they are enforced, would render it impossible for employees to engage in even the most preliminary forms of discussion of the types that were given protection under the Act. Indeed, it is impossible to envision how any group of employees could assert their Section 7 rights in the face of such a set of policies. For these reasons, I conclude that the Employer has failed to demonstrate a lawful justification for its decision to discharge Lakes and

Frith because of their participation in protected concerted activities that it deemed to be in violation of its negativity policies.

Before concluding this discussion, it is necessary to address a procedural defense that forms a central feature of the arguments raised in counsel for the Employer's posttrial brief. Counsel argues that the allegations in the complaint are "extremely limited," and that the General Counsel failed to substantiate those tightly constrained claims. (R. Br. at p. 2.) In particular, he stresses that a close reading of the language of the complaint demonstrates that the General Counsel's theory regarding the discharges is strictly confined to proof that the employees were fired "due to protected concerted activity taking place on October 16." (See R. Br. at p. 3.) (See also R. Br. at pp. 10–11.) A literal reading of the complaint allegations would support this point of view. (See complaint, par. 5(a–d), GC Exh. 1(g), p. 3.)

As to Lakes, counsel's argument gains no traction at all. Even if one were to apply counsel's highly technical and constricted approach to the complaint allegations, the evidence demonstrates that Lakes was, indeed, terminated in large measure due to her conduct on October 16. On that day, she engaged in discussion with her coworkers regarding their grievances against the supervisors. With the support of those coworkers, she took the initiative to bring this matter to the attention of Snider. Management responded by convening a staff meeting that evening. At the meeting, Lakes clearly took the lead in articulating grievances and encouraging her coworkers to do the same. Upon her instigation, other employees did voice similar complaints. Thus, even under counsel's very narrow view of the issue, the evidence clearly shows that Lakes was discharged because she was "one of the main sources of negativity about team members and management" and was "involved in situations that causes [sic] dissention among team members," and that this rationale was directly related to management's appraisal of her conduct on October 16. (GC Exh. 13.)

Regarding Frith, the situation is different. Counsel for the Employer is accurate in observing that she was not on duty during October 16. Her only involvement in protected concerted activity on that date was the exchange of text messages with Lakes regarding Lakes' plan to complain to management about the conduct of the supervisors. While Frith attended the evening staff meeting, it is undisputed that her comments about the work environment made during the session were positive in tone and content. Thus, I agree with counsel that if the General Counsel were properly limited to proving that Frith was discharged due to her behavior on October 16, the evidence would be slight.

The difficulty with counsel's argument is that it fundamentally misperceives the role of the complaint in unfair labor practice proceedings. As long ago as 1940, the Sixth Circuit described that role as follows:

The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.

NLRB v. Piqua Munising Wood Products Co., 109 F.2d 552, 557 (6th Cir. 1940), quoted with approval by the Board in *Artesia Ready Mix Concrete*, 339 NLRB 1224, 1226 (2003).

It is noteworthy that the complaint, although inartfully drafted,⁴⁴ does comply with the standard contained in the Board's rules. Section 102.15 requires that the complaint allegations include "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." This the complaint certainly manages to do. It advises the Employer that the unfair labor practices committed consisted of the discharges of Frith and Lakes on October 20 and 22 respectively. Beyond this, the complaint clearly articulates a legal theory in support of this conclusion, to wit: that the discharges constituted interference, restraint, and coercion directed against those employees due to their protected concerted activities. (Complaint, pars. 5, 6, GC Exh. 1(g), p. 3.)

Although the wording of the complaint was unnecessarily narrow in appearing to confine the protected concerted activity to events on October 16, the key requirements of due process and fundamental fairness were achieved. In its leading case in this general area, the Board authorized an unfair labor practice finding under a completely different legal theory from the one articulated in the complaint. It did so because it concluded that "the complaint placed at issue the motivation" for the allegedly unlawful conduct and the matter had been subject to "full litigation" at trial. *Pergament United Sales*, 296 NLRB 333, 335 (1989), enf. 920 F.2d 130 (2d Cir. 1990). See also the Board's very recent application of this doctrine in *Stabilus, Inc.*, 355 NLRB No. 161, slip op. at 3 fn. 13 (2010) (unfair labor practice finding upheld where "theory was not advanced by the General Counsel," but the material facts were "fully litigated"). The same reasoning clearly applies here. The Employer was certainly on notice that the motivation underlying the discharges of Lakes and Frith was alleged to be an unlawful response to their protected concerted activities. Counsel for the Employer clearly grasped this and mounted a full defense to this challenge.⁴⁵

Ultimately, the absence of prejudice to the Employer from the unnecessarily restrictive language of the complaint is demonstrated by comparing what occurred here to a venerable case before the Supreme Court. In *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 349–350 (1938), the Court affirmed the Board in the face of the employer's contention that the Board had relied on a different legal theory than the one articu-

⁴⁴ As I have already observed, this is not the only example of the inartful wording in this complaint. See fn. 37, *infra*.

⁴⁵ One example will suffice. On direct examination by counsel for the Employer, Team Leader Dill was asked, "[W]hat's your observation with respect to Ms. Frith . . . being negative or positive?" Dill replied, in pertinent part, "it was reported to Bobby [Hausfeld] and Bobby reported to the managers that—that Liz was one of the main one's name[d] that was always negative in the break room talking about coworkers and about management." (Tr. 578.) It was clearly understood by all involved in the trial that the issue centered on the conduct of the employees during the entire period at issue and on management's response to that course of conduct. The parties never confined themselves to the events of October 16. In fact, the defense took pains to raise the matter of the employees' conduct prior to that date. As counsel asserted in his brief, "[p]roblems with Charging Parties' negative attitude surfaced long before October." (R. Br. at p. 13.)

lated in the complaint. Characterizing this defense as "highly technical," the Court held:

A review of the record shows that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint. The entire evidence, pro and con, was directed to the question whether . . . the respondent did in fact discriminate against the [employees] because of union activity. While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory.

I conclude that the same analysis here results in an identical conclusion. The complaint adequately put the Employer on notice as to the actions of its managers that were under scrutiny and as to the General Counsel's legal theory as to why those actions violated the Act. The Employer was given every opportunity to mount a full defense and, indeed, did just that.

Because Lakes and Frith engaged in protected concerted activity consisting of discussions aimed at inducing and preparing for group action and the Employer discharged them for this conduct, I find that the Employer has violated Section 8(a)(1) of the Act.⁴⁶

CONCLUSIONS OF LAW

1. The Employer coercively interrogated its employees regarding their protected concerted activities and the protected concerted activities of their coworkers in violation of Section 8(a)(1) of the Act.

2. The Employer threatened one of its employees with loss of status and monetary compensation if she chose to engage in protected concerted activities in violation of Section 8(a)(1) of the Act.

3. The Employer discharged its employees, Natalie Ann Lakes and Elizabeth A. Frith, because they had engaged in protected concerted activity in violation of Section 8(a)(1) of the Act.

4. The charge alleging that the Employer uttered an unlawful threat of reprisal concerning employees' participation in social networking was untimely filed. Additionally, the General Counsel did not meet his burden of proving that these state-

⁴⁶ Because I have found that the Employer's reason for discharging the employees was an unlawful one directed specifically toward their protected concerted activities, it would not be appropriate to examine the facts of this case using a dual motive methodology as outlined in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (judge erred in employing dual motive analysis where there is a "causal connection" between protected activity and resulting discipline). In any event, if I were to have looked at this as a dual motive case, I would have concluded that any alternative explanations for the discharges were simply pretexts. It is evident that the actual motivating reason for the disciplinary action consisted of the Employer's conclusion that Lakes and Frith violated the negativity policies by engaging in criticisms of their supervisors and their terms and conditions of employment during discussions with coworkers, and in the case of Lakes, in discussions with supervisors and during the course of a staff meeting. Where the Employer's asserted justifications are pretextual, the analysis mandates a finding of unlawful conduct. See *Rood Trucking Co.*, 342 NLRB 895, 898 (2004) (where pretext is found, "there is no need to perform the second part of the *Wright Line* analysis").

ments constituted an unlawful threat of reprisal within the meaning of Section 8(a)(1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Regarding Lakes and Frith, I will recommend that the Respondent be ordered to offer reinstatement and restitution for the loss of pay and benefits from the date of discharge until the date of such offer of reinstatement. I will also order that the Respondent post a notice in the usual manner.

In addition to these typical remedial measures, the General Counsel seeks two types of relief that have not previously been routinely awarded by the Board: compound interest for the unlawfully terminated employees and electronic notice posting on the Employer's intranet system. Interestingly, both of these matters are currently before the Board for full consideration. On May 14, 2010, the Board issued an invitation to the labor law community seeking amicus briefs as to both issues. While it would be instructive to wait until the Board has ruled on these issues, such a delay would be inappropriate in this case since it involves remedial action for unlawfully discharged employees. See *Kentucky River Medical Center*, 355 NLRB No. 129, slip op. 5 fn. 13 (2010).

As to compound interest, the General Counsel has made it a routine, albeit thus far unsuccessful, practice to seek this relief. In the past, I have expressed my concern about this litigation tactic of demanding unprecedented relief from administrative law judges who are clearly not authorized to grant it. For example, see my comments in *Frye Electric, Inc.*, 352 NLRB 345, 358 (2008). Until now, the Board has continued to decline to order compound interest. See, for example, *Quanta*, 355 NLRB No. 8, slip op. at 3 fn. 4 (2010), citing *Rogers Corp.*, 344 NLRB 504 (2005). Unless and until the Board changes its policy, I continue to lack the authority to grant the relief requested. Therefore, I shall order that the Respondent shall offer the discharged employees reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The situation is different regarding the request for electronic posting of the notice. In the past, the Board had expressed considerable reluctance to issue such an order, going so far as to delete a judge's electronic notice posting order despite the absence of any exception from the respondent. See *National Grid USA Service Co.*, 348 NLRB 1235 fn. 2 (2006). More recently, however, the Board's views have evolved. In *Windstream Corp.*, 352 NLRB 510 (2008), opinion adopted at 355 NLRB No. 119 (2010), the Board added an electronic notice provision to the judge's recommended notice. It took this action because it had evidence in the record that "the Respondent regularly communicates its employment policies to employees through electronic mail." 352 NLRB 510 at fn. 3.

Although the Board has not yet enunciated an overall policy, it appears to me that *Windstream* authorizes judges to make individual findings on this issue based on the record in each case. See also, *Naples Community Hospital*, 355 NLRB No.

171 at fn. 2 (2010). In this case, counsel for the General Counsel did develop the record regarding the issue. Hausfeld testified that the Employer maintains a so-called "in-house intercom system" which is similar to email. (Tr. 645.) Frith characterized this intercom system as, "like an email set up, but it's personalized through each stylist." (Tr. 188.) The Employer uses this intranet system to communicate to the staff about such matters as the scheduling of staff meetings.

Because the circumstances are similar to those in *Windstream* and the use of intranet posting will provide a modern, efficient, and effective means of facilitating the Board's communication to the employees, I will grant the General Counsel's request for intranet posting. In so doing, I will utilize the language drafted by the Board in *Windstream*. I recognize that there may be technical issues involved in accomplishing this electronic posting. Particularly, in light of the fact that this is a small employer, I expect that the Regional Office will furnish all appropriate technical assistance to the employer. I further intend that the Employer be authorized to raise any technical impediments to the effectuation of this portion of the order in the compliance process.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁷

ORDER

The Respondent, Salon/Spa at Boro, Inc., Springboro, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees regarding their participation in protected concerted activities and the participation of other employees in such activities.

(b) Threatening, coercing, or intimidating its employees due to their participation in protected concerted activities.

(c) Discharging or otherwise disciplining Natalie Ann Lakes, Elizabeth A. Frith, or any of its other employees due to their participation in protected concerted activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Natalie Ann Lakes and Elizabeth A. Frith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Natalie Ann Lakes and Elizabeth A. Frith whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Natalie Ann Lakes and Elizabeth A. Frith, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

⁴⁷ 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.

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

(e) Within 14 days after service by the Region, post at its facility in Springboro, Ohio, copies of the attached notice marked "Appendix."⁴⁸ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 2009.

(f) Within 14 days after service by the Region, post the attached notice marked "Appendix" electronically on the Respondent's intranet with a link sent by electronic mail to its employees.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges a violation of the Act not specifically found.

Dated, Washington, D.C. October 18, 2010

APPENDIX

NOTICE TO EMPLOYEES

⁴⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate our employees about their participation in protected concerted activities or about the participation of other employees in such activities.

WE WILL NOT threaten, coerce, or intimidate our employees due to their participation in protected concerted activities.

WE WILL NOT discharge or otherwise discipline Natalie Ann Lakes, Elizabeth A. Frith, or any of our other employees because of their participation in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Federal labor law.

WE WILL, within 14 days from the date of this Order, offer Natalie Ann Lakes and Elizabeth A. Frith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Natalie Ann Lakes and Elizabeth A. Frith whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Natalie Ann Lakes and Elizabeth A. Frith, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

SALON/SPA AT BORO, INC.