Sabo, Inc., d/b/a Hoodview Vending Co. *and* Association of Western Pulp and Paper Workers Union, affiliated with United Brotherhood of Carpenters and Joiners of America. Case 36–CA–010615

December 14, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On November 30, 2010, Administrative Law Judge Lana H. Parke issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint in this case alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee LaDonna George: 8(a)(1), because the discharge was motivated in part by George's conversation with another employee about possible layoffs, and 8(a)(3), because the discharge was motivated in part by George's union activity. The judge dismissed both complaint allegations, finding that the conversation at issue did not constitute protected concerted activity, and that the Respondent demonstrated that it would have discharged George even in the absence of her union activity. As explained below, we reverse the judge and find merit in the 8(a)(1) allegation. In light of that determination, we find it unnecessary to address the 8(a)(3) allegation.

I. RELEVANT FACTS

The Respondent operates a vending machine service in Tualatin, Oregon. The Respondent's owners are Bob Hill, who serves as the Respondent's President, and his wife, Sally Hill, who serves as the Respondent's secretary. The Respondent employs route drivers who stock vending machines located at various client facilities throughout southwest Washington and northwest Oregon. The Respondent hired LaDonna George as a route driver in 2001, and she remained in that position through the events in question.

In early 2009, the Union launched an organizing campaign to represent the Respondent's employees; George served as a member of the employee organizing committee. In the lead-up to a March 10, 2009 election, the Respondent vigorously opposed the organizing campaign.[1] The Union lost the election and filed objections, after which the parties agreed to a second election, scheduled for January 7, 2010. The Union withdrew its petition on December 31, 2009, however, because of a loss of support among the Respondent's employees.

On Wednesday, January 6, 2010,[2] George's father unexpectedly passed away. After taking leave for the remainder of the week, George returned to work on Monday, January 11 and worked through Thursday, January 14. At the end of the day on Thursday, as she was leaving to attend a cremation placement ceremony for her father, George submitted a vacation request form requesting leave for the following Monday and Tuesday. Arriving at work on the morning of Friday, January 15, George learned that her vacation request form had been returned with a note from Sally Hill, explaining that her request was denied because the Respondent did not have anyone available to fill in for her. Upset that her leave request had been denied, George prepared for her assigned routes but became increasingly distraught. She wrote a note on the back of the returned vacation request form stating that, having buried her father the day before, she was "not in a condition or state of mind to be driving or working right now." George slipped the note under Bob Hill's office door and left work without notifying a supervisor.[3]

After Bob Hill found George's note later that morning, he called her cell phone and left a message asking her to call in, but George did not respond. Later that day, Sally Hill sent George an email with an attached memo—labeled "final warning"—stating that if she was not at work on time on Monday, January 18, she would be terminated.[4] Sally Hill subsequently sent George a text message on Sunday, January 17, asking if she would be at work the next day; George responded that she would.[5]

[1] The particulars of the organizing campaign are recounted in the judge's decision. The Respondent's actions during that period underlie the judge's finding that antiunion animus was a motivating factor in the Respondent's decision to discharge George, a finding to which there are no exceptions.

[2] All dates hereafter are 2010, unless otherwise noted.

[3] There is no dispute that George failed to follow required procedures in leaving work early.

[4] The judge found that the Respondent issued George another memo that day, admonishing her for failing to service a customer account on time. In fact, the record shows that this other memo was issued to George on January 5. The judge's error does not affect our analysis or conclusions.

[5] Although the judge's recitation of the facts omitted George's testimony concerning the January 17 text messages, that testimony was uncontroverted. We therefore credit George's account of the exchange.

When George arrived at work on Monday morning, she encountered fellow route drivers Keith Neary and Steve Boros in the warehouse area and thanked them for covering for her on Friday. George then asked Boros if he had seen a help wanted advertisement, posted over the weekend on the internet, in which a Tualatin vending company was seeking a route driver.[6] Boros replied that he had. George stated that she thought the ad must have been posted by the Respondent, because the only other vending company in Tualatin did not experience as much turnover as the Respondent. Boros expressed his agreement. George then stated her belief that the posting of the ad meant the Respondent was going to fire a route driver, and she asked Boros who he thought it would be. Boros responded that he did not know.[7]

Something about the conversation, however, led Boros to believe that George had "insinuated" that Boros was going to be fired.[8] Later that day, he approached Bob Hill and asked if he was going to be fired. Bob Hill said no and asked why Boros had asked the question. When Boros stated that George had told him that he was going to be fired, Bob Hill responded that it was George who was going to be fired, for leaving work without giving notice on January 15. Unsatisfied with Bob Hill's response, Boros sought out Sally Hill and asked her the same question. Sally Hill assured Boros that he was not going to be discharged, and, like her husband, asked him why he thought he would be. Boros referred to the internet ad and his conversation with George.

Later that day, Sally Hill met with George and asked why she was "stirring things up." George said she did not know what Sally Hill was talking about. Sally Hill then inquired why an employee had asked her (Sally Hill) if he was going to be fired; George said she had no idea. After this meeting, Sally Hill wrote a memo stating that "Steve Boros came into my office today to speak with me about La[D]onna George telling him he was going to be fired because she saw a job posting for a route driver on the internet."

That same afternoon, the Hills summoned George to Bob Hill's office. There, they informed her she was being discharged because she was "untrustworthy." The next day, Sally Hill convened an employee meeting and informed the assembled employees that George had been fired for gossiping and telling other employees they were going to be fired. After the meeting, Sally Hill approached Boros to ask if George had told him that he was going to be fired. Boros stated that George had not actually said so but that "it was implied," based on a "process of elimination and [his] own knowledge."[9]

Sometime thereafter, at a state proceeding over a claim George filed for unemployment compensation, Sally Hill testified that George was fired for leaving work on January 15 and for telling Boros that he was going to be fired. At the hearing in the present unfair labor practice case, Sally Hill testified that George was discharged for accumulated infractions culminating in George's conduct on January 15 and 18 (the day of George's conversation with Boros). On further questioning, Sally Hill stated that she did not know whether the Hills would have fired George absent the Boros conversation.

II. THE JUDGE'S DECISION

The judge first found that George's discharge did not violate Section 8(a)(3). Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that the Acting General Counsel sustained his initial burden of showing that George's union activity was a motivating factor in the Respondent's decision to discharge her. In support, the judge relied on record evidence showing that George had engaged in union activity, that the Respondent knew of it, and that the Respondent exhibited animus towards it. The judge further found, however, that the Respondent demonstrated that it would have discharged George even in the absence of her union activity, because she left work early on January 15 and because of her conversation with Boros on January 18.

Turning to the 8(a)(1) allegation that the Respondent discharged George because she had engaged in protected concerted activity—the conversation with Boros about the possibility of an employee being discharged—the judge found no violation here, either. Citing *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), and *Daly Park Nursing Home*, 287 NLRB 710 (1987), the judge found that the conversation did not constitute protected concerted activity because nothing was said that expressly or impliedly contemplated any future action for the mutual aid and protection of the Respondent's employees. Accordingly, the judge dismissed this allegation.

[6] Our colleague speculates that George asked the question to find out if Boros "had heard anything about her being fired because of an unexcused absence," but the record contains no evidence to support this statement.

[7] The record is unclear as to what, if any, role Neary played in this conversation.

[8] "Insinuated" is the word Boros used in his testimony. Although the judge found that George indicated to Boros that the ad meant *someone* was going to be fired, there is neither evidence nor a finding by the judge that George suggested to Boros that he was the one.

[9] Although the judge's recitation of the facts omitted Boros's testimony concerning Sally Hill's question, that testimony was uncontroverted. We therefore credit Boros's account of the exchange.

Contrary to the judge, and as explained below, we find that George's discharge violated Section 8(a)(1); accordingly, we find it unnecessary to address the 8(a)(3) allegation.

III. ANALYSIS

The touchstone issue in this case is whether George's conversation with Boros was protected concerted activity. The answer to that question essentially resolves the 8(a)(1) allegation.

The Acting General Counsel contends that the Boros conversation was protected concerted activity because it centered on the employees' job security, and, therefore, the Respondent violated Section 8(a)(1) by discharging George for having that conversation with a fellow employee. We agree.

Employee activity is protected under Section 7 of the Act when it is "concerted and engaged in for the purpose of 'mutual aid or protection.'" See *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). Generally speaking, a conversation constitutes concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). But contemplation of group action is not required in all circumstances. For example, it need not be part of the conversation to invoke the Act's protection when the discussion is about wages. See, e.g., *Trayco of S.C., Inc.,* 297 NLRB 630, 634–635 (1990), enf. denied mem. 927 F.2d 597 (4th Cir. 1991). Indeed, the Board has stated that wage discussions are "inherently concerted." See *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992).[10] This is because wages are a "vital term and condition of employment," and the "grist on which concerted activity feeds"; discussions of wages are often preliminary to organizing or other action for mutual aid or protection. *Aroostook County Regional Ophalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in part on other grounds 81 F.3d 209, 214 (D.C. Cir. 1996); see also *Triana Industries.*, 245 NLRB 1258, 1258 (1979) (discussion of wages "is clearly concerted activity").[11]

In dismissing the complaint allegation that the Respondent violated Section 8(a)(1) by discharging George based on her conversation with Boros, the judge relied on the lack of evidence that the Boros conversation contemplated future group action. Contrary to the judge, we find that the lack of such evidence is not determinative, because—like wage discussions—employee conversations about job security are inherently concerted.

The rationale for finding wage discussions inherently concerted applies with equal force to discussions concerning job security. Indeed, from the employee point of view, wages and job security are usually the most vital terms and conditions of employment. Job security—whether and under what circumstances employees will be discharged or laid off, and with what procedural protections—concerns the very existence of the employment relationship and, accordingly, any concerns about job security quickly ripple through, and resonate with, the work force. Cf. *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987) ("Laying off workers works a dramatic change in their working conditions (to say the least) . . . ."); *Falcon Wheel Division L.L.C.*, 338 NLRB 576, 576 (2002) (finding complaint sufficient because it is "inherent" that a layoff constitutes a "material, substantial, and significant change" in employees' working conditions"); see generally *Cecil I. Walker Machinery Co.*, 305 NLRB 172, 174 (1991) (employer's distribution of new manual, describing its at-will employment policy, sparked opinion among employees that a union was needed to insure job security); *Hankins Container Co.*, 145 NLRB 640, 647 (1963) (employee informant told employer that the union's strongest argument for unionizing was that it could provide more job security).[12] Discussion of job security is therefore concerted even if

[10] We note that in *Plumbers Local 412*, 328 NLRB 1079 (1999), the Board affirmed a judge's finding that a conversation about wages was not concerted, where the conversation was between one employee seeking a wage increase for herself and employees of another employer. The judge in that case found that the employee explicitly "negated" the object of group action, as reflected by her testimony that she was not attempting to enlist the aid of the other employer's employees. See id. at 1083.

[11] The Board has similarly determined that employee discussion of certain other topics is inherently concerted. Specifically, in *Aroostook County*, the Board found that discussions concerning employee work schedules were also inherently concerted, because scheduling implicated vital elements of employment—hours and working conditions—and was "as likely to spawn collective action as the discussion of wages." Id.

[12] See also *Crossing Rehabilitation Services*, 347 NLRB 228, 231 (2006) (when asked by employer why employees wanted union, employee answered union could negotiate about safety concerns, benefits, and job security); *Jakel Motors*, 288 NLRB 730, 735 fn. 9 (1988), enfd. 875 F.2d 644 (7th Cir. 1989) (when asked by employer why they want a union, employees expressed desire for job security and better wages); *L & J Equipment Co.*, 272 NLRB 652, 652, 657 (1984), enfd. mem. 772 F.2d 895 (3d Cir. 1985) (when employer asked employees why they wanted a union, employees answered that they wanted job security).

group action is nascent or not yet contemplated. To hold otherwise, and thereby find that the Act does not protect the ability of employees to discuss such a vital term and condition of employment without fear of reprisal, would effectively allow employers to chill employees in the exercise of their right to act concertedly to protect their mutual—and fundamental—interest in job security. In other words, the ability to act concertedly to address this vital term and condition of employment could be rendered meaningless if employers were free to retaliate against employees on the ground that the retaliatory action was directed only at a discussion.[13]

Here, the conversation between George and Boros clearly concerned job security, as they discussed whether the job posting meant that an employee was about to be discharged. The Respondent's reaction upon learning of the conversation (or at least Boros's understanding of it) illustrates why conversations about job security are inherently concerted. Upon hearing that George had suggested that someone would be fired, the Respondent took the most dramatic action possible: it discharged George and announced the discharge and the unlawful reason for it to the remaining employees.[14] Clearly, such action would inevitably shut down future discussions and any other concerted actions that might follow, because if anything would coerce employees in the right to act concertedly for mutual aid and protection, it would be discharging an employee for suggesting that another employee's job might be on the line.[15]

We respectfully disagree with our dissenting colleague's contention that finding George's conversation protected "extend[s] the protection of individual job complaints far beyond statutory limits." At the heart of our colleague's contention is his rejection of the doctrine of inherently concerted activity itself.[16] Indeed, he acknowledges the existence of this settled doctrine as the basis for our finding when he calls for overruling it.[17] To the extent our colleague contends that we are impermissibly extending the doctrine, he again fails to provide any meaningful basis for distinguishing between two of the most vital terms and conditions of employment: wages and job security. Indeed, as explained above, both are central employee concerns, and the failure to find such discussions protected could have a devastating effect on employees' freedom to otherwise act concertedly. Permitting retaliation against employees for discussing the security of their jobs would contravene a fundamental policy of the Act.[18]

Turning now to the role George's protected conversation with Boros played in her termination, it is clear to us that the conversation was a motivating factor in her dis-

[13] As our dissenting colleague notes, in partially denying enforcement of the Board's Order in *Aroostook County*, the D.C. Circuit criticized the Board's rationale for finding discussions of scheduling changes inherently concerted. The court's criticism, however, was reserved for the Board's suggestion "that any discussion of work conditions is automatically protected as concerted activity" and for the Board's emphasis that discussions of scheduling "could 'spawn collective action.'" See *Aroostook County*, 81 F.3d at 214. In finding that discussions of job security are inherently concerted, we need not and do not address whether discussions of other terms and conditions of employment might also be inherently concerted.

[14] It is beyond peradventure that other, less dramatic, actions by employers similarly chill the exercise of Sec. 7 rights and are therefore unlawful. Cf. *McClain & Co.*, 358 NLRB No. 118, slip op. at 1–2 (employer threat of adverse action if, in the future, employees engaged in protected concerted activity of complaining about schedules violated Sec. 8(a)(1) because threat tended to chill exercise of Sec. 7 rights); *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003) (warning to employee not to attempt to discuss work-related issues with coworkers violated Sec. 8(a)(1)).

[15] We further note, moreover, that the conduct at issue here occurred in the aftermath of an unsuccessful organizing drive among the Respondent's employees. Thus, although it is by no means a determinative fact in deciding this case, the potential connection between the discussion of one of the most vital terms and conditions of employment and further concerted conduct was not likely lost on the Respondent.

[16] The dissent erroneously contends that the inherently concerted activity doctrine is a "variant" of the (subsequently rejected) constructive or per se theory of individual activity articulated in *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975). Inherently concerted activity involves a conversation between two or more individuals. *Alleluia Cushion,* on the other hand, concerned the efforts of a single employee to enforce a statutory right and whether such individual efforts could nevertheless be deemed concerted. The crucial difference is, of course, between multi-employee and individual conduct.

[17] Although the dissent is correct that *Triana Industries* and *Automatic Screw Products* dealt with blanket prohibitions of wage discussions, it does not follow that *Aroostook County* mischaracterized these cases in finding wage discussions inherently concerted. In fact, *Automatic Screw Products* explicitly states that such a prohibition is unlawful precisely because discussing wages "is an inherently concerted activity clearly protected by Section 7 of the Act." See *Automatic Screw Products*, supra at 1072. Further, in denying enforcement in *Aroostook County*, the D.C. Circuit did not question that discussions of wages are inherently concerted. And since *Aroostook County*, the Board has continued to rule that wage discussions are inherently concerted. See, e.g., *Valley Slurry Seal Co.*, 343 NLRB 233, 245 (2004); *Belle of Sioux City, L.P.*, 333 NLRB 98, 101 (2001).

[18] Our colleague also contends that we should not extend the inherently concerted doctrine where the facts "so plainly belie any common objective" between George and Boros. Our colleague goes beyond what the record shows in making this statement, as there is no testimony as to George's motivation in bringing up the job posting. Moreover, the inherently concerted doctrine does not require showing that employees engaged in a conversation share a common objective. Nor, for that matter, does *Meyers II*. Quoting *Mushroom Transportation*, 330 F.2d at 685, *Meyers II* states that a conversation involving only a speaker and a listener may be concerted under certain circumstances, but it does not require that the speaker and listener share a common objective. See *Meyers II*, supra at 685.

charge.[19] The Respondent, however, advanced another reason for the discharge: George's abrupt departure from work on January 15, which was neither concerted nor protected conduct. Thus, the remaining question is whether the Respondent has shown by a preponderance of the evidence that the discharge would have taken place even in the absence of the protected conduct. See *Wright Line*, supra, 251 NLRB at 1089; accord: *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 3–4 (2011) (discharge violated Sec. 8(a)(1) where respondent could not meet *Wright Line* rebuttal burden). We find that the Respondent has failed to meet this burden.

In fact, the Respondent's actual conduct is inconsistent with its defense. After George left work on the morning of Friday, January 15, Sally Hill sent George a memo that afternoon that she termed a "final warning," and said that if George did not report to work on time on Monday, January 18, she would then be fired. On Sunday, Sally Hill sent George a follow-up text message asking if George would be at work the next day. Sally Hill's conduct plainly establishes that the Respondent had no plans to terminate George for her departure from work on Friday, so long as she reported to work on Monday, which she did. Moreover, neither Sally nor Bob Hill mentioned the Friday departure from work when they terminated George or when Sally Hill informed the other employees that George had been fired for gossiping and spreading rumors. Finally, Sally Hill expressly testified that she did not know whether the Respondent would have discharged George had it not been for George's conversation with Boros. We therefore find the Respondent has not established that it would have discharged George in the absence of her protected conduct. Accordingly, we find that the Respondent's discharge of George violated Section 8(a)(1) of the Act.[20]

AMENDED CONCLUSIONS OF LAW

1. The Respondent, SABO, Inc., d/b/a Hoodview Vending Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Association of Western Pulp and Paper Workers Union, affiliated with United Brotherhood of Carpenters and Joiners of America (the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about January 18, 2010, the Respondent violated Section 8(a)(1) of the Act by discharging employee LaDonna George for engaging in protected concerted activity.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) by discharging LaDonna George, we shall order the Respondent to offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to expunge from its files and records any and all references to the unlawful discharge, and to notify George in writing that this has been done and that the discharge will not be used against her in any way.[21]

ORDER

The National Labor Relations Board orders that the Respondent, SABO, Inc. d/b/a Hoodview Vending Co., Tualatin, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

[19] If the Boros conversation were the sole reason advanced for George's discharge, the analysis of the 8(a)(1) violation would be complete. See *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 5 (2011), and cases cited therein.

[20] Employee Boros testified that, on Monday morning, after he told Bob Hill that George was the impetus of his questions about whether he would be discharged, Hill told him that George was going to be fired for leaving work without permission on Friday. As the evidence shows that the Hills had no plans to discharge George, it seems clear that Bob Hill's statement cannot be taken literally. Rather, the statement appears to reflect his anger over George's conversation with Boros.

[21] We shall also provide for the electronic distribution of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

(b) In any like or related manner interfering with, restraining, or coercing 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 this Order, offer LaDonna George full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make LaDonna George whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

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

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

(e) Within 14 days after service by the Region, post at its Tualatin, Oregon facility copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 36, 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 means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 36 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.

Dated, Washington, D.C. December 14, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

The customary use of "inherent" in legal analysis connotes a self-evident matter. My colleagues, however, have given that word an altogether different meaning, i.e., something otherwise not provable. In this particular case, they contend that any employee's discussion of job security with another employee, even if out of a purely personal concern with no intent to induce group action, is inherently concerted and therefore protected by the Act. Of course, it is difficult to cabin that kind of reasoning, and I have no confidence that my colleagues aim to do so. On the contrary, this case stands as yet another effort to vitiate the *Meyers Industries*[1] test of concerted activity and to extend the protection of individual job complaints far beyond statutory limits.[2]

The facts here are quite simple. Route driver LaDonna George, having engaged in unexcused absenteeism for which she might well have anticipated discipline, saw an internet ad for a job opening. When she returned to work, she asked fellow driver Boros if he had seen the ad and speculated that it must have been posted by the Respondent. Boros agreed. George then speculated that the Respondent was going to fire someone and asked Boros who he thought that might be. He said that he did not know. Later, having concluded—rightly or wrongly, it does not matter—that George meant Boros was about to get the boot, he complained to owners Bob and Sally Hill, both of whom reassured Boros that his job was not

[22] 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."

[1] 281 NLRB 882 (1986)(*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) .

[2] See also e.g., *Parexel International, LLC*, 356 NLRB No. 82 (2011), and *Worldmark by Wyndham*, 356 NLRB No. 14 (2011).

in danger. The Hills then fired George for circulating gossip that someone was going to be fired.[3]

What really happened in the George-Boros conversation? *She*, channeling Shakespeare's Polonius, implicitly tried to find out if he had heard anything about her being fired because of an unexcused absence.[4] *He* thought that she was implying he would be fired for some unknown reason. There was nothing concerted about this discussion, nothing that suggested an "I've got your back if you've got mine" or a *common* concern about group job security.[5] George was certainly not asking Boros to help her, and he certainly had no basis for inferring that she was offering to help him. The discussion was the antithesis of concerted. Two employees harboring individual job security concerns spoke briefly at each other with only those concerns in mind.

These facts present a problem for the Acting General Counsel, who bears the burden of proving that George was discharged because she engaged in "concerted activities . . . for . . . mutual aid or protection," conduct protected by Section 7 of the Act. Further, "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence."[6] Correctly deciding that the Acting General Counsel failed to adduce evidence sufficient to meet this burden, the judge recommended dismissal of the unlawful discharge allegation.

Effectively conceding the absence of evidence that the brief George-Boros colloquy contemplated future group action, my colleagues nevertheless ride to the rescue of the Acting General Counsel. They relieve him of the burden of record proof with their doctrine of inherent concerted activity for employee-to-employee conversations about working conditions. It is enough, they say, that the Acting General Counsel proved two employees discussed a "vital" term and condition of employment, the kind of discussion which purportedly often leads to union or other concerted activity, even if this is neither intended nor the result in a particular case.

This reasoning cannot be reconciled with the *Meyers II* test of concerted activity or with the Third Circuit opinion in *Mushroom Transportation*[7] upon which that test is explicitly based. As summarized by one court of appeals, it is, of course, well established that "[a] conversation, even one involving one speaker and one listener, may be deemed 'concerted activity.'" See *Meyers II*, 281 NLRB at 889 (citing *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir.1964)). However, to qualify as such, 'it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.' *Mushroom Transportation Co.*, supra at 685.'"[8]

My colleagues believe that this principle implementing the language of Section 7 of the Act applies only "generally speaking" or "typically," and does not mean that in every instance the Acting General Counsel must prove that the alleged concerted activity contemplated future group action. In fact, the principle does not really apply at all for them. They rely instead upon a few Board cases that misinterpret and misapply precedent to obviate the need for affirmative proof of a nexus between individual action and common cause.

Chief among these cases is *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in relevant part 81 F.3d 209, 214 (D.C. Cir. 1996). In that case, four nurses griped about job scheduling issues in front of patients. Even though the administrative law judge found no evidence that they did so with the object of initiating group action, the Board found that the nurses were engaged in concerted activity and that the respondent violated Section 8(a)(1) by discharging them for this activity. The Board rationalized this result by analogizing the employee discussion of work schedules to employee discussions of wages in prior cases where such discussion was found to be concerted and protected, stating that "[c]hanges in work schedules involve when and where employees will work. They are directly linked to hours and conditions of work—both vital elements of employment—and are as likely to spawn collective action as the discussion of wages."

As one commentator accurately observed, the *Aroostook* Board mischaracterized cited precedent as holding that *any* employee discussion of wages is concerted without evidence of intent to engage in group ac-

[3] For purposes of this analysis, I will assume arguendo that my colleagues are correct that the George-Boros conversation was *the* factor motivating the Respondent to discharge George. Inasmuch as I would find George was engaged in unprotected activity, I conclude that the discharge did not violate either Sec. 8(a)(1), because the Acting General Counsel has failed even to meet his initial burden of proving unlawful motivation, or Sec. 8(a)(3), because the Respondent has proven that it would have discharged George for unprotected activity even in the absence of her prior union activity.

[4] "By indirections find directions out." *Hamlet*, Act 2, Scene 1.

[5] See, e.g., *Tracer Protection Services*, 328 NLRB 734, 741 (1999).

[6] *Meyers II*, 281 NLRB at 886.

[7] *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)

[8] *NLRB v. Portland Limousine Co.*, 163 F.3d 662, 666 (1st Cir. 1998), denying enforcement of 325 NLRB 305 (1998).

tion.[9] None of those cited cases support that broad proposition, and the cited Third Circuit opinion actually disclaims it. See *Jeannette Corp. v. NLRB*, 532 F.2d 916, at 918 (3d Cir.1976). In fact, *Jeannette* and the two cases cited by my colleagues—*Triana Industries*, 245 NLRB 1258 (1979), and *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992)—all stand for the unremarkable proposition that an employer's blanket prohibition of employee wage discussions is unlawfully overbroad because it necessarily encompasses some instances of actual concerted activity about mutual wage concerns. None of those cases support the proposition that all employee wage discussions are inherently concerted.

Today, my colleagues add job security to the list of subjects where employee discussion alone, even absent evidence of a group action object, is concerted and protected. They articulate the same two justifications for the inherent concerted activity theory and rely on the same precedent as in *Aroostook*. First, they say that job security, like wages and work schedules, are "vital terms and conditions of employment" which concern "the very existence of the employment relationship." Second, they posit that employee discussion of these matters "often presage organizational [or actual concerted] activity."

In the context of protected concerted activity, however, there is no statutory rank order of importance for wages, hours, and working conditions. The suggestion that matters such as wages, job security, and schedule changes are "vital" to the employment relationship and "grist" for concerted activity, while other unidentified issues are of more peripheral significance and have less potential to "spawn" group action, is pure artifice. Employee expressions of discontent with any aspect of their employment condition may lead to concerted or organizational activity, no matter how trivial the particular matter of discontent may seem to a neutral observer. Conversely, employee expressions of discontent may be individual and personal gripes, with no common concern, intent, or potential to lead to activity for mutual aid and protection, no matter how important the matter may objectively appear. That is precisely why a legal fiction of "inherently concerted" cannot substitute for affirmative proof. It is also why, on review of *Aroostook*, the D.C. Circuit ridiculed this rationale as "limitless and nonsensical . . . ; adoption of a per se rule that any discussion of work conditions is automatically protected as concerted activity finds no good support in the law."[10]

At bottom, the "inherently concerted" theory upon which my colleagues rely is nothing more than a variant of the *Alleluia Cushion*[11] per se or constructive theory of individual concerted activity that was rejected by the Board in *Meyers I*.[12] As described there, "[u]nder the *Alleluia* analytical framework, the Board questioned whether the purpose of the activity was one it wished to protect and . . . deemed the activity 'concerted,' without regard to its form."[13] It is no coincidence that two of the Board Members participating in *Aroostook* expressly disclaimed reliance on, and questioned the continuing vitality of *Meyers*.[14] My colleagues apparently share this view, regardless of whether they say so. I do not.

In my view, the test of individual concerted activity in *Meyers II* controls in this case and mandates dismissal of the complaint. The doctrine of inherent concerted activity is incompatible with this test and should be overruled. At the very least, however, it should not be extended to employee discussions of job security, particularly in a case where the facts so plainly belie any common objective between two employees.

Dated, Washington, D.C. December 14, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[9] Moss, Phillip J., *Aroostook County Regional Ophthalmology Center v. National Labor Relations Board*, 12 Me. B.J. 68, 70–71 (1997).

[10] 81 F.3d at 214. See also *NLRB v. Portland Limousine Co.*, supra, and *Trayco of South Carolina, Inc. v. NLRB* 927 F.2d 597 (4th Cir. 1991), denying enforcement of 297 NLRB 630 (1990).

[11] *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

[12] *Meyers Industries (Meyers I)*, 268 NLRB 493, 495 (1984).

[13] Id. at 495.

[14] 317 NLRB at 220 fn.12.

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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

WE WILL make LaDonna George whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

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

SABO, INC. D/B/A HOODVIEW VENDING CO.

Helena A. Fiorianti, Atty., for the General Counsel.
Thomas M. Triplett, Atty. (Schwabe, Williamson & Wyatt), of Portland, Oregon, for the Respondent.
Paul Cloer, Organizing Coordinator, of Portland, Oregon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by Association of Western Pulp and Paper Workers Union, affiliated with United Brotherhood of Carpenters and Joiners of America (the Union), the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued an amended complaint and notice of hearing (the complaint) on August 25, 2010. The complaint alleges that SABO, Inc., d/b/a Hoodview Vending Co. (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). This matter was tried in Portland, Oregon, on September 21–22, 2010.[1]

I. ISSUE

Did the Respondent violate Section 8(a)(3) and (1) of the Act by terminating employee LaDonna George because of her union or other concerted protected activities and/or to discourage employees from engaging in union or other concerted protected activities.

[1] All dates are 2010, unless otherwise specified.

II. JURISDICTION

At all relevant times, the Respondent, an Oregon corporation, has been engaged in the business of providing vending and coffee services with an office and place of business in Tualatin, Oregon. During the 12-month period preceding the complaint, which period is representative of all material times, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000 and purchased and received at its Tualatin facility goods valued in excess of $50,000, directly from points located outside Oregon. I find Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, the Union has at all relevant times been a labor organization within the meaning of Section 2(5) of the Act.

FINDINGS OF FACT

Unless otherwise explained, findings of fact are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings.

The Respondent stocked snacks and fresh food items in vending machines located at the premises of various business facilities throughout southwest Washington and northwest Oregon. At all material times the following individuals held the positions set forth and have been supervisors and/or agents of the Respondent within the meaning of the Act:

Robert Hill (Mr. Hill)	President
Sally Hill (Mrs. Hill)	Secretary

On March 10, 2009, Subregion 36 conducted an election in a unit of the Respondent's route drivers, technicians, and route supervisors. The tally of ballots showed that four employees had voted for the Union and four employees had voted against the Union with two challenged ballots. The Union filed timely objections to the election.

By letter dated June 11, 2009, addressed to Mr. and Mrs. Hill, the Union notified the Respondent that the following employees had agreed to serve on the Union's organizing committee:

Dwight Covington (Mr. Covington)	Keith Neary (Mr. Neary)
Gary Dalton	Mark Ritchie
LaDonna George (Ms. George)[2]	Kristopher Stover

On August 27, 2009, the Respondent and the Union entered into a stipulation to set aside the March 10, 2009 election and hold a new election. On the same date, the Respondent entered into a settlement agreement of unfair labor practices alleged in

[2] In November 2009, Ms. George ceased being a route supervisor and became a route driver. The parties stipulated that from November 2009 through the date of her discharge, Ms. George was not a supervisor within the meaning of the Act.

Cases 36–CA–10438, 36–CA–10470, and 36–CA–10481. On December 31, 2009, the Region approved the Union's request to withdraw the representation petition Case 36–RC–6454.[3]

On February 19, 2009, Ms. Hill conducted an employee meeting at the Respondent's facility. According to Mr. Covington who worked for the Respondent as a route driver until he resigned his employment in August 2009, Ms. Hill said, inter alia, that the Company would not bargain with the Union if the Union got in and that the Union would find the Respondent to be the hardest employer they ever dealt with. Mr. Covington could not recall anything else said at the meeting. Under cross-examination, Mr. Covington testified that Ms. Hill read to employees from a document, saying she was embarrassed to do so but that she needed to read everything on advice of counsel.[4] Mr. Covington also recalled that Ms. Hill said nobody could make the Respondent pay more than it could afford.

Ms. Hill testified that on February 19, 2009, she read to employees a document entitled "First Speech to Employees for Election 2–19–09," which included the following references to collective bargaining:

> If, by some unfortunate mistake, the Union wins this election, all we have do to is bargain in good faith—which of course we would do. But, legally, we do not have to agree to anything. The union would find us the toughest employer they have ever come up against. We would deal hard, and we would deal at arm's length.
>
> Nobody can get us to pay more than we can afford. Not with a negotiation—not with a picket sign—it will not happen.
>
> We believe that we do not have the moral right to force our people to join a union in order to work here. I guarantee you that if the Union wins this election and we bargain with them, this will very quickly become the number one issue. I don't know what the Union could offer us to get us to change our minds, but we would not be surprised to see them offer pay and benefits cuts to get us to agree to force you to pay them money to work here. If we do not agree to their proposal to force you to pay them money, they would probably strike.

Mr. Covington's testimony of what Ms. Hill allegedly said in the February 19 meeting lacks context, and it is impossible to determine whether his testimony was a specific recollection of what Ms. Hill said or whether it reflected inferences he perhaps unwarrantedly drew. Further, Mr. Covington corroborated Ms. Hill testimony that she read from a prepared document in addressing employees, as did Ms. George. I credit Ms. Hill's account of what she said at the meeting, and I find that the above excerpts from the document she read from accurately reflect the statements she made about future bargaining with the Union.[5]

On March 5, 2009, in Mr. Hill's office, Mr. and Ms. Hill met with Mr. Covington to discuss his paycheck. According to Mr. Covington, Ms. Hill told Mr. Covington that if employees selected the Union as their representative, the Company would no longer observe the past practices of permitting flextime, paying for benefits, or providing work between 6 p.m. and 6 a.m., and would institute a mandatory employee meeting every morning at 6 a.m. Mr. and Ms. Hill denied that Ms. Hill told Mr. Covington union representation would bring the stated changes. Rather, Ms. Hill testified that she reminded him that although a competitor had a fixed 6 a.m. starttime, the Respondent gave its drivers worktime flexibility.[6]

Mr. Covington testified that after Ms. Hill left the office, he asked Mr. Hill about a former incentive program called the "Ironman Award," to which Mr. Covington believed he was entitled. Mr. Hill told Mr. Covington the Ironman Award would be contingent on the upcoming March 10, 2009 union election.[7]

Following the March 10, 2009 unsuccessful union election, the Respondent posted a sign at its facility stating, "THANK YOU. Bob and I are grateful to our loyal employees." The sign included the handwritten words, "Thanks so much, Sally," and, "Thanks for your support, Bob." A week or so later, Ms. Hill told Mr. Covington that "no matter what [he] told [his] little friend at the Union, [the Respondent was] going to run the company how they wanted to through the down economy." She added that if employees "wanted to run to the Union like a bunch of rats," that was fine, but the Company was still going to do things the way they wanted.

On Wednesday, January 6, at 10:40 p.m., while off work, Ms. George was notified that her father had unexpectedly passed away. Ms. George attempted to inform Mr. and Ms. Hill by telephone, leaving at least one message on the company phone line. On Friday morning, January 7, Mr. Hill telephoned Ms. George, expressed sympathy for her loss, and asked when she expected to return to work. Ms. George said she would return to work the following Monday, January 11. Ms. George and her family arranged for a cremation "placement ceremony" to be held on Thursday, January 14, after Ms. George completed her workday.

On Monday, January 11, Ms. George returned to work and worked through Thursday, January 14. As she finished her route on January 14, Ms. George asked Ms. Hill if she could have off the following Monday and Tuesday, January 18 and 19. Ms. Hill told Ms. George to turn in a written request on a vacation form and she would look into it. Ms. George filled out the vacation request, as instructed. The following day, Friday, January 15, when Ms. George reported for work at about 5 a.m., she found that Ms. Hill had replied to her vacation request

[3] The Union withdrew its petition because it believed it had lost employee support.

[4] Ms. George also recalled that Ms. Hill read from a paper during the meeting but was vague about what she said.

[5] I find the statements were not unlawful and do not reflect union animus.

[6] I found Mr. Covington's testimony in this regard to be clear, specific, and truthful. I credit his account of what Ms. Hill said.

[7] Ms. Hill testified the Ironman Award was an incentive program that had been discontinued in 2006. The asserted nonexistence of the award does not, of course, resolve the question of whether Mr. Hill made the statement attributed to him by Mr. Covington. Although Mr. Hill denied making the statement, I found Mr. Covington's testimony of what Mr. Hill said in regard to the Ironman Award to be clear, specific, and truthful; I credit his account.

by returning the form with the following written on it: "Sorry—We do not have anyone to do your route. We have a driver in training but not ready yet. Sally."

Upset that her leave request had been denied, Ms. George balled up the vacation request form. As Ms. George prepared to work her route, she grew more agitated and emotional and determined that she was not able to work or drive. She wrote the following note on the vacation request form that Ms. Hill had returned to her and slipped the form under Mr. Hill's office door: "I just buried my father yesterday and I am not in a condition or state of mind to be driving or working right now. Sorry LaDonna." Ms. George then left work without notifying any supervisor.

That same morning Mr. Hill found Ms. George's vacation-request-form note on his office floor. At 7:15 a.m., Mr. Hill telephoned Ms. George's personal cell phone number and left the message, "LaDonna, please call the office. We want to know where you're at." Sometime that day, Ms. George noticed that Mr. Hill had attempted to telephone her, but she did not return the call. Later that day, Ms. George received an e-mail from Ms. Hill dated January 15 with an attached memorandum that stated, in pertinent part:

> Today you left work without notice and without informing anyone, leaving Hoodview Vending without anyone to service your accounts. When we tried to call you, you did not respond or make any attempt to call us back.
>
> You are expected to be at work and on time to do your job, Monday morning January 18, 2010, or you will be terminated.

On the same day, Ms. Hill issued a memorandum dated January 15 at 4:13 p.m. to Ms. George regarding a failure to service an account by the customer-specified time of 8:30 a.m. The memorandum stated, in pertinent part, "Your decision to service [the customer account] at noon on Monday upset [the customer] and he called to remind us, once again, that we must be there by 8:30 a.m."

On Monday, January 18, Ms. George reported to work. While preparing for her route, she had a conversation with two employees, Steve Boros (Mr. Boros) and Mr. Neary (the George/Boros conversation). After a brief inconsequential exchange with Mr. Boros and Mr. Neary, Ms. George asked Mr. Boros if he had noticed on an unemployment website that a job was posted for a vending route driver in Tualatin, Oregon. Knowing that only two vending companies, the Respondent and S&S Vending, were located in Tualatin, Ms. George said she did not believe the posting was for S&S Vending because they did not go through as many employees as the Respondent. Ms. George and Mr. Boros discussed their belief that the posting meant the Respondent was going to fire a route driver. According to Mr. Boros, Ms. George asked who Mr. Boros thought the employee would be. Although Mr. Boros could not recall specifically what Ms. George said, he believed she "insinuated" that he was going to be fired. Ms. George denied telling either Mr. Boros or Mr. Neary that the Respondent was going to replace either of them or fire any employee.

When he finished his route later that day, January 18, Mr. Boros asked Mr. Hill if the Respondent was going to fire him. Mr. Hill said no and asked what made him ask that. Mr. Boros told Mr. Hill that Ms. George had told him he was going to be fired. Mr. Hill assured Mr. Boros he would not be fired, adding that Ms. George would be fired because she had left work without notice. Immediately after his conversation with Mr. Hill, Mr. Boros spoke with Ms. Hill in her office. Mr. Boros asked if he were going to be fired. Ms. Hill said no and asked where he had gotten the idea. Mr. Boros said he had seen the internet job posting and Ms. George had told him he would be fired.

On January 18 at about 4:30 p.m., at Ms. Hill's request, Ms. George met with Ms. Hill in her office. According to Ms. George, Ms. Hill asked her why she was stirring things up. Ms. George said she did not know what Ms. Hill was talking about. Ms. Hill asked Ms. George why somebody had asked Ms. Hill if he was going to be fired. Ms. George said she had no clue.[8] Following her meeting with Ms. George, Mr. and Ms. Hill decided to terminate her. According to Ms. Hill, the decision was based on Ms. George's long history of violating company rules,[9] uncooperativeness, not responding to calls both as a supervisor and as a driver, failure to service accounts, walking off the job without communicating that she would not be there, which led the Hills to feel they could not rely on her, and telling Mr. Boros he was going to be fired.[10]

Later, after Ms. George finished her route, Ms. Hill called her into Mr. Hill's office. Ms. Hill handed Ms. George an envelope containing her paycheck and told her that it was her last day there because she was untrustworthy.

On the following day, Ms. Hill addressed an assembled group of route drivers, telling them that she was tired of the behind-the-back talk in the warehouse, with everybody talking behind everybody's back instead of talking to Mr. and Ms. Hill if they had a problem with somebody. She told the group that

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[8] Ms. Hill testified that Ms. George denied telling anyone that he was going to be fired but claimed that every employee was looking for a job. When Ms. Hill told her not to spread lies about things she knew nothing about, Ms. George became upset. Saying, "I can't deal with this," she walked out of Ms. Hill's office. It is unnecessary to resolve credibility between the two versions, as Ms. Hill and Ms. George's accounts do not differ in any material point.

[9] In May 2009, the Respondent issued two written warnings and a memorandum (considered an admonition and not discipline) to Ms. George, the last of which was dated May 28, 2009.

[10] Of the reasons given, it is clear that the paramount grounds were Ms. George's unanticipated and unexcused cessation of work on January 15 and her prediction of discharge to a coworker. In response to counsel for the General Counsel's question whether the sole reason for Ms. George's termination was her telling Mr. Boros that he was going to be fired, Ms. Hill testified, "No, it was for walking off the job and telling him he was going to be fired." In later testimony, Ms. Hill said that she did not know if the Respondent would have fired Ms. George if her conversation with Mr. Boros had not occurred.

the Respondent had fired Ms. George for gossiping and spreading rumors, telling people they were going to be fired.[11]

III. DISCUSSION

A. Legal Principles

Section 7 of the Act assures employees the right to engage in union activities and other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(3) of the Act provides that it shall be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

In termination cases turning on employer motivation, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing that union activity was a motivating or substantial factor in an adverse employment action. The elements required to support such a showing are union activity by the employee, employer knowledge of that activity, and employer animus toward the activity. If the General Counsel meets the initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Alton H. Piester, LLC,* 353 NLRB 369 (2008).

B. LaDonna George's Discharge as an Alleged Violation of Section 8(a)(3) of the Act

The General Counsel contends that the Respondent fired Ms. George because of her activities in support of the Union. The General Counsel argues that the reasons put forth by the Respondent—Ms. George's poor performance, unannounced and unauthorized departure from work on January 15, and assertion to a coworker that he would be fired—were mere pretexts for antiunion discrimination.

The Respondent does not dispute that the General Counsel has met the first two elements of the *Wright Line* burden as to the discharge of Ms. George. Uncontroverted evidence shows that Ms. George engaged in union activities of which the Respondent was aware. As to the third element—the existence of employer animus toward Ms. George's union activities—there is no direct evidence. However, both Mr. and Ms. Hill demonstrated animus toward employee union support generally when they, respectively, told Mr. Covington that continuation of the Ironman incentive award depended on the outcome of the union election and that if employees opted for union representation, the Respondent would adversely alter certain past practices, including flextime and benefit payment. Further animus was demonstrated by Ms. Hill's postelection pejorative statement to Mr. Covington that even if employees ran to the Union "like a bunch of rats," the company would conduct its business as it wanted. The General Counsel has established that the Respondent had the union animus required by the third element of the General Counsel's *Wright Line* burden. The evidentiary burden shifts, therefore, to the Respondent to prove, as an affirmative defense, that it would have discharged Ms. George even in the absence of employees' union activity, in which she had been predominantly involved.

The Respondent argues that even assuming the General Counsel carried the initial *Wright Line* burden, the Respondent has shown it would have discharged Ms. George notwithstanding her or other employees' union activity (1) because she engaged in the unprotected activity of leaving work without notice on January 15 and (2) because she unwarrantedly caused a coworker to believe he was about to be fired.[12]

As to the Respondent's first asserted reason for discharging Ms. George—her January 15 job-abandonment—the General Counsel does not contend that Ms. George's unauthorized departure from work was protected under the Act or that it did not constitute misconduct that reasonably justified discipline. Rather, the General Counsel argues that the Respondent implicitly excused Ms. George's January 15 misconduct and that its attempt to raise the misconduct as a defense shows pretext. Although Ms. George complied with Ms. Hill's order to return to work on January 18 or face termination, it does not inevitably follow, and there is no evidence, that the Respondent considered Ms. George's return-to-work to have corrected her misconduct. There is no evidence the Respondent did not intend to discipline Ms. George for her misconduct; in fact, Mr. Hill's January 18 statement to Mr. Covington that Ms. George would be fired because she had left work without notice, as well as Ms. Hill's January 15 memorandum to Ms. George admonishing her about her failure to service a customer account that day, suggest quite the contrary. I cannot, therefore, find that the Respondent's reliance on Ms. George's January 15 job-abandonment as a basis for her discharge was, as the General Counsel argues, pretextual.

The Respondent could reasonably view Ms. George's abandonment of her job as a serious offense, and it is not the role of the administrative law judge to second guess the degree of discipline an employer chooses to impose on an offending employee. Inasmuch as Ms. George engaged in serious misconduct on January 15 by leaving work without permission, and as there is no evidence the discipline meted to Ms. George was patently out of line with customary discipline or motivated by unlawful considerations, the Respondent has met its burden of proving that it would have discharged Ms. George even in the absence of employees' union activity.

The Respondent's second asserted reason for discharging Ms. George was its disapproval of her January 18 George/Boros conversation, which resulted in Mr. Boros telling Mr. and Ms. Hill that Ms. George had told him he was going to be fired. As to this reason, the General Counsel has not shown that Ms. George's January 18 conversation had anything to do with union activity, that antiunion animus in any way motivated

[11] The complaint did not allege that Ms. Hill's statements at this meeting violated the Act.

[12] I do not address Ms. George's prior work record. As noted earlier, I find her past discipline/admonitions did not form any material basis for her discharge.

the Respondent's reaction to the incident, or that the Respondent seized upon the incident to retaliate against Ms. George for her union adherence. Rather, the evidence demonstrates that the Respondent was genuinely displeased about Ms. George's reported statement to Mr. Boros and concerned that Mr. Boros had been upset by it. The Respondent's second reason for discharge is, therefore, appropriately considered under the General Counsel's alternate theory that the Respondent discharged Ms. George in violation of Section 8(a)(1) of the Act.

C. LaDonna George's Discharge as an Alleged Independent Violation of Section 8(a)(1) of the Act

As to the Respondent's second asserted reason for discharging Ms. George, the General Counsel's theory of violation rests on *NLRB v. Burnup & Sims,* 379 U.S. 21, 23 (1964).[13] In *Burnup & Sims*, the Supreme Court held:

> [Section 8(a)(1) of the Act] is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

The General Counsel argues that the George/Boros conversation constituted concerted protected activity, that the Respondent knew it was concerted protected activity, and that the Respondent disciplined Ms. George for alleged misconduct arising out of the activity. The General Counsel asks that the burdens allocated by *Burnup & Sims (U.S.)* be applied.

Burnup & Sims (U.S.) is not entirely apposite to this matter. *Burnup & Sims (U.S.)* dealt with a situation in which alleged employee misconduct, for which the employee was disciplined, occurred during the course of known concerted protected activity but was not itself protected activity. Here, the General Counsel argues that the George/Boros conversation was concerted and protected, while the Respondent contends the conversation was not only unconcerted and unprotected but that it constituted misconduct in and of itself. That is a different scenario from the *Burnup & Sims (U.S.)* facts. The more appropriate analysis is directed by Board cases that address situations where the conduct for which an employee is disciplined is itself concerted protected activity. See *CGLM, Inc.,* 350 NLRB 974 fn. 2 (2007), quoting *Meyer Industries*, 268 NLRB 493, 497 (1984) (an employer independently violates Sec. 8(a)(1) of the Act if, "having knowledge of an employee's activity, it takes adverse employment action that is motivated by the employee's protected concerted activity"); *Burnup & Sims,* 256 NLRB at 976 (an employee's discipline independently violates Sec. 8(a)(1) of the Act, without regard to the employer's motive, and without regard to a showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity"). However, under either approach, the existence or lack of animus is not relevant as the Respondent's adverse employment action against Ms. George was admittedly motivated, in major part, by the George/Boros conversation.

Since the Respondent's adverse employment action against Ms. George was based, in significant if not major part, on her role in the George/Boros conversation, the first step under either a *CGLM, Inc.* or a *Burnup & Sims (U.S.)* analysis is to determine whether the target activity—the George/Boros conversation—was concerted and protected. The General Counsel bears the burden of establishing that the George/Boros conversation constituted concerted protected activity.

Conversations between or among employees may constitute concerted activity under certain conditions. The conditions were stated by the court in *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964), and adopted by the Board in *Meyers II*, 281 NLRB 882, 887 (1986):

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

The court further distinguished unconcerted from concerted conversation,[14] which distinction the Board adopted in *Daly Park Nursing Home,* 287 NLRB 710, 710–711 (1987):

> If [the conversation's] only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representatives to protect or improve his own status or working position, it is an individual, not a concerted activity, and, if it looks forward to no action at all, it is more than likely to be mere griping.

Here there is no evidence that Ms. George, Mr. Boros, or Mr. Neary, in speculating about the origin and ramifications of an internet job posting, contemplated taking any action regarding the job posting or its theoretical consequences. There is also no suggestion that any of the three employees proposed giving mutual aid or protection to any employee supposedly targeted by the Respondent for discharge. Since the George/Boros conversation looked forward to no action whatsoever, under the Board's reasoning in *Daly Park,* supra, the George/Boros conversation was mere conjectural grousing and not concerted activity.

Cadbury Beverages,[15] and *Jhirmack Enterprises,*[16] cited by counsel for the General Counsel, are distinguishable, as the activity involved in each case contemplated future protected action. In *Cadbury Beverages,* an employee engaged in concerted protected activity on behalf of another employee by cautioning another employee against representation by an assertedly untrustworthy union representative, conduct that contemplated future protected action. In *Jhirmack,* an employee engaged in concerted protected activity when, motivated

[13] In order to avoid confusing the Supreme Court case with *Burnup & Sims,* 256 NLRB 965, 976 (1981), cited hereafter, I refer to the Supreme Court case as *Burnup & Sims (U.S.).*

[14] 330 F.2d at 685.

[15] 324 NLRB 1213 (1997), enfd. 333 U.S. App. D.C. 94 (D.C. Cir. 1998).

[16] 283 NLRB 609 fn. 2 (1987).

by a desire to protect a fellow employee's employment, she advised a coworker that other employees had complained to management about his slow job performance that affected general employment conditions. The warning contemplated future work-related action by the warned employee.

Since there is no evidence that the George/Boros conversation was anything more than an exchange of speculative employee opinions or that its purpose, explicit or implicit, was to initiate or to induce or to prepare for group action, I cannot find that it was concerted activity entitled to protection under Section 7 of the Act.

IV. CONCLUSION

Having found the Respondent did not unlawfully discharge Ms. George for leaving work without notice on January 15 and/or for engaging in unconcerted conduct on January 18, the complaint shall be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The complaint is dismissed.

Dated: Washington, D.C. November 30, 2010

[17] 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.