

p. 11: 33-36; ALJD p. 12: 39-43; ALJD p. 13: 30- p. 15: 38). Judge Goldman determined that the September 6 layoff “did not constitute action by the employer that can be ascribed to Pelfrey’s protected activity. Indeed, the evidence suggests it was an anticipated not an adverse employment action.” (ALJD p. 13:50 – p. 14:2). It is clear from the Decision that Judge Goldman did not, as the General Counsel suggested, lose focus on September 6. He clearly, methodically, and thoroughly analyzed all the evidence surrounding that date. The ALJ’s conclusion after this thorough analysis was that no causal connection existed between any Protected Activity and any adverse employment action.

General Counsel further takes issue with the Judge’s decision determining no causality between the July 2 admonishment concerning wage discussion and the termination/layoff of Pelfrey more than eight (8) weeks later. As stated above, the judge indicated that September 6 cannot be ascribed to Pelfrey’s protected activity. General Counsel asserts that the ALJ misconstrued the employer’s intent surrounding the September 6 termination/layoff, which is simply not the case.

General Counsel’s case alleged that the termination/layoff on September 6 was a permanent termination, for unlawful motive, with intent not to rehire Pelfrey for future work. (ALJD p. 14:21-23). Judge Goldman held that the evidence does not support this theory of the case. (*Id.*). The evidence demonstrated that (1) Respondent granted three discretionary merit raises to Pelfrey *after* knowledge of his Protected Activity (ALJD p. 14: 7-9; ALJD p. 14: 13-19) and (2) Respondent’s foreman, Kyle Leeth, communicated to Pelfrey, *after* knowledge of his Protected Activity, that there was likely future work for Pelfrey (ALJD p. 14: 42-45).

General Counsel asserted that because Pelfrey’s employment was not continuous upon completion of the University of Toledo (“UT”) project, and that ongoing jobs were being performed by Respondent immediately following September 6, that Respondent’s failure to hire him indicated Respondent’s intent of permanency concerning Pelfrey’s termination/layoff. Judge Goldman clearly

analyzed these contentions and found that no evidence existed to indicate any such intent. (ALJD p. 14: 41). Pelfrey and General Counsel's own witness, Brett Lacourse, testified that there was no expectation of work immediately following the UT job. (ALJD p. 14:36-37; ALJD p. 10: 48- p. 11:2). The evidence indicated that no work was available for which Pelfrey could have been called back for prior to Respondent's knowledge of Pelfrey's allegations to UT of shoddy workmanship performed by Edifice. (ALJD p. 6: 25-33; p. 10:45- p. 11: 2; ALJD p. 11:4-23).

Judge Goldman, spent a large majority of his Decision discussing the September 6 termination/layoff of Pelfrey. The evidence simply does not support the General Counsel's claim to the contrary, and as such, the Board should dismiss the Exceptions as to such claim.

JUDGE GOLDMAN APPLIED THE PROPER LEGAL ANALYSIS

General Counsel, in its brief, contends that Judge Goldman's alleged failure to properly focus on September 6 resulted in an improper legal analysis and standard being applied to the case. General Counsel contends that Judge Goldman's *Wright Line* analysis was error, and that failure to apply the *Meyers II* analysis resulted in an "unsustainable conclusion."

The allegation in the Complaint was that the employer violated Section 8(a)(1) of the Act. (Complaint ¶ 7). Judge Goldman correctly applied a *Wright Line* analysis to the 8(a)(1) allegations. (ALJD p. 13: 4-28). The Board, and courts, have consistently held that *Wright Line* applies to all 8(a)(1) and 8(a)(3) cases. (271 NLRB 1302 (1984); *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1993)). Regarding the September 6 termination/layoff, the analysis demonstrated that the General Counsel did not establish its *prima facie* case because it failed to present evidence of a causal connection between Protected Activity and the September 6 employment action. (ALJD p. 13: 30-35; ALJD p. 15: 33-34; ALJD 17: 24-27). The primary reasons articulated by Judge Goldman for his finding are the

timing of the termination as it related to Pelfrey's Protected Activity, the Respondent's reward of multiple merit increases to Pelfrey subsequent to its knowledge of his Protected Activity, and the lack of either direct or circumstantial evidence to support the claim that on September 6 the Respondent had decided to terminate Pelfrey permanently. (ALJD p. 14: 6-19; ALJD p. 14: 25-39; ALJD p. 14: 41-50).

Under *Wright Line* the General Counsel carries the burden of persuasion that protected activity was a motivating factor for the adverse employment action. (*Wright Line*, 251 NLRB 1083 (1980)). Once this *prima facie* case is established the employer is entitled to proffer the defense that the same action would have been taken absent the protected activity. (*Transportation Mgmt. Corp.*, 462 U.S. at 401). Then, and only then, does the burden shift back to the General Counsel to demonstrate the proffered reason was pretextual. (*Id.*). Judge Goldman, having determined General Counsel failed to meet its *prima facie* burden by a preponderance of the evidence, did not need to reach a pretextual analysis of the case.

Having stated such, however, Judge Goldman did thoroughly assess the employer's proffered reason for the September 6 termination/layoff, despite the fact that the law did not require such assessment. Judge Goldman observed, "by all evidence, it is a normal part of these construction jobs that people are let go as the work declines," and that "it was entirely routine and expected that certain employees who were not 'core' employees of Edifice would be let go before longer term employees." (ALJD p. 13:38-40). The judge based his conclusions on the testimony of the witnesses of both parties. (ALJD p. 6: 25-33). Even the Charged Party himself anticipated the September 6 layoff. (ALJD p. 13: 4-50). While it is true that the ALJ did not expressly find the winding down of the job was not pretext, the record clearly indicates that it was not. Judge Goldman held first, that the September 6 termination/layoff was not unlawful, and secondly that the proffered employer reason was "normal," "routine," and "expected." (ALJD p. 13: 50- p. 14:1; ALJD p. 13: 38-39).

Finally, the General Counsel's suggestion that *Meyers II* is the proper standard in lieu of *Wright Line* has no merit. However, an examination of the facts as determined by Judge Goldman, under the *Meyers* analysis does not change the outcome. Under *Meyers Industries*, 268 NLRB 493 (1983) and its progeny the Board analyzes whether (1) the activity engaged in by the employee was "concerted" within the meaning of Section 7 of the Act; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the Act; and (4) the discipline or discharge was motivated by the employee's protected, concerted activity. *Meyers II* clarified that to receive the Act's protection an employee must "be engaged in with, or on the authority of, other employees, and not solely by and on behalf of the employee himself." (*Meyers II*, 281 NLRB 882 (1986)).

The evidence supports a finding of the first three requirements of the *Meyers* test, but just as in the *Wright Line* analysis, the causation element cannot be met with credible direct or circumstantial evidence. The record demonstrated that Pelfrey's wage complaints were discussed with other employees, and were thus concerted. (ALJD p. 5: 25-27). The record demonstrated that Edifice knew of the complaints, as evidenced by its admonition to keep his pay rate to himself. (ALJD p. 5: 34-40). Judge Goldman ruled the complaints were protected by the Act when he found Respondent in violation of the admonitions. (ALJD p. 12: 34-35). However, element (4) is where the General Counsel's case falls short. Judge Goldman found unequivocally that "the termination on September 6 did not constitute an action by the employer that can be ascribed to Pelfrey's protected activity." (ALJD p. 13: 50- p. 14:1).

Judge Goldman applied the correct legal standard. Even if General Counsel's assertion that *Meyers* was the proper test, its case suffers from the same paucity of facts to establish the September 6 termination/layoff was motivated by activity protected by the Act. The Board should dismiss the Exceptions as to the claim of improper legal analysis or standard.

JUDGE GOLDMAN CONSIDERED ALL EVIDENCE PRESENTED

Judge Goldman considered all of the evidence presented at trial, and furthermore discussed all evidence presented in his Decision. At issue, the three admonitions by Edifice to Pelfrey concerning his discussion of his wage rate with other employees.

Judge Goldman found that the allegations concerning the admonitions were essentially admitted. (ALJD p. 12: 12-14). The ALJ expressly found the admonition written on Pelfrey's pay stub to be a violation of Section 8(a)(1) of the Act. (ALJD p. 12: 34-35). Judge Goldman declined to reach the two additional allegations that Kyle Leeth verbally admonished Pelfrey on or about June 17 and July 2, because doing so would be "cumulative and would not materially affect the remedy." (ALJD p. 12 fn. 8). The judge was correct in this analysis.

The remedy prescribed by the judge for the violation was the standard Board remedy for such action, a cease and desist order with a notice posting. (ALJD p. 18: 38- p. 19:26). The inclusion of Leeth's admonitions would not alter the remedy prescribed.

General Counsel in its Brief in Support of Exceptions appears to allude that the cumulative effect was the missing link in establishing its *prima facie* case for the September 6 termination/layoff. For the judge or the Board to reach such a conclusion would require a complete disregard of the evidence and findings on record. Viewing the alleged failure to consider facts or independent violations in the light most favorable, the General Counsel still cannot establish a *prima facie* case under *Wright Line* or, as improperly suggested, *Meyers*.

The record established that the last of these three violations occurred on or about July 2. (ALJD p. 5: 31-37; ALJD p. 12 fn. 8). The record also established that Pelfrey received discretionary merit increases in pay on three separate occasions. (Tr. 135). The last of these increases was awarded to

Pelfrey on July 28, 2013, well after the last of the admonitions. (*Id.*). In fact, Pelfrey was the highest paid, non-supervisory worker on the UT job. (ALJD p. 14: 6-9; Tr. 137).

The evidence further breaks the causality of the admonitions in demonstrating Edifice fully intended to use Pelfrey on future jobs. (ALJD p. 14: 42-45). General Counsel makes much of Pelfrey's phone call to John Hall as establishing the employer's intent based on unlawful motive because of the wage complaints. Judge Goldman addressed this, crediting Hall's version of the phone call, and even holding that if Pelfrey's version was credited instead, no intent was evident. (ALJD p. 14: 26-39).

Judge Goldman considered all evidence presented at hearing. In a valid exercise of judicial economy, he chose to not reach two cumulative allegations that did not materially affect the remedy. This decision cannot bridge the gap in causation in the General Counsel's *prima facie* burden. The Board should dismiss the Exceptions as to the claim of failure to consider evidence and draw appropriate conclusions of law for the independent violations of 8(a)(1).

CONCLUSION

General Counsel failed to support its Exceptions to the Administrative Law Judge's Decision with reliable evidence. The evidence and record demonstrate that Judge Goldman considered all the evidence and facts, including a proper focus on the September 6 termination/layoff. He did not err when he utilized the well-settled *Wright Line* framework to analyze the facts. Even assuming, arguendo, that the General Counsel's assertion that *Meyers II* was the proper framework, the record and evidence support the same finding of no causation and therefore no violation. General Counsel cannot overcome this lack of causation even if, as it excepts, the judge ruled on the two additional admonition violations.

General Counsel has failed to support its exceptions with evidence from the record, and in fact, the evidence on record established clearly that the exceptions are not well-founded. The Board should

dismiss the General Counsel's exceptions. The Respondent respectfully requests the Board uphold Judge Goldman's Decision in its entirety.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been made with the Board via the Agency's e-filing portal, and courtesy copies have been electronically served on July 31, 2013 to the following parties:

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