

Nos. 14-1379, 14-1731

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

MCPc, Inc.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of MCPc, Inc. (“MCPc”) to review, and the cross-application of the National Labor Relations Board to enforce, a final Board Decision and Order (360 NLRB No. 39) issued against MCPc on

February 6, 2014. (A. 3-14.)¹ The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”).

The Board’s Order is final, and the Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices occurred in Pittsburgh, Pennsylvania. MCPc’s petition for review and the Board’s cross-application for enforcement were timely filed because the Act places no time limit on such filings.

STATEMENT OF THE ISSUE

Whether substantial evidence on the record as a whole supports the Board’s finding that MCPc violated Section 8(a)(1) of the Act by discharging employee Jason Galanter for his protected, concerted activity in complaining to MCPc’s management, during a team-building meeting, that it could ease employee workloads by hiring more engineers with the salary it was paying to a recently hired executive.

STATEMENT OF THE CASE

Upon unfair-labor-practice charges filed by Galanter, a complaint was issued alleging that MCPc violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by

¹ “A.” references are to the joint appendix that MCPc filed with its opening brief (“Br.”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

maintaining an overly broad confidentiality rule, and by discharging Galanter for his protected, concerted activity. After a hearing, the administrative law judge found—based on the record evidence and the credibility determinations that he made to resolve the conflicting testimony—that MCPc had violated the Act as alleged. (A. 6-13.) On review, the Board found no merit to MCPc’s exceptions and adopted the judge’s findings and recommended order as modified. (A. 3-4.)

I. THE BOARD’S FINDINGS OF FACT

A. Background; MCPc’s Operations and Its Confidentiality Policy

MCPc, a technology company, is an Ohio corporation with its headquarters in the Cleveland, Ohio area, and field offices in Pittsburgh, Pennsylvania and Buffalo, New York. This case primarily involves the Pittsburgh office, which has about 30 employees, including sales representatives, computer solutions architects, and computer network engineers. (A. 6; 88.)

MCPc maintains a confidentiality policy, applicable to all employees, generally prohibiting the disclosure of its business processes. In particular, the policy warns that “idle gossip or dissemination of confidential information within [MCPc], such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination.” (A. 3, 6-7; 203.)

B. During a “Team Building” Lunch Meeting With Employees and an MCPc Manager, Galanter Comments on Executive Compensation and Its Effect on Employee Workloads

From 2007 through his discharge on March 4, 2011, Jason Galanter was a solutions architect in MCPc’s Pittsburgh office. On or about February 24, 2011, Dominic Del Balso, MCPc’s Director of Engineering, who was based in the Cleveland office, visited the Pittsburgh office. Del Balso invited Galanter and several coworkers there to a “team-building” lunch, as was his custom during his regular visits to that office. Del Balso’s invitations generally included anyone who was in the office during his visit. This time, four employees attended: two solutions architects, Galanter and Jeremy Farmer; and two engineers, Dan Tamburino and Brian Sawyers. (A. 3-4, 7; 87-89.)

During the lunch meeting, the group discussed the employees’ heavy workloads—a shared concern and common topic of discussion among the employees. Galanter expressed the concern that the group was working particularly long hours and urged MCPc to hire additional engineers to alleviate employee workloads. Del Balso acknowledged the shortage of engineers. (A. 3-4, 7-8; 88-89, 94, 96, 101-02, 104-05.) In support of his point, Galanter explained that for the \$400,000 salary that MCPc was paying a recently hired executive, it could have hired additional engineers, and thereby eased the groups’ workloads. Two coworkers, Sawyers and Tamburino, indicated their agreement with Galanter

at that time. (A. 3-4, 7-8; 88-89, 104-05.) Del Balso again acknowledged the point, but did not ask Galanter where he acquired that information. (A. 3-4, 8 & n. 17; 89, 96, 101-02, 105.)

Galanter's statement about executive salary and its impact on employee workloads was based on a combination of employee rumors and an estimate derived from publicly available information discovered during internet research into executive salaries that he had conducted a couple weeks earlier, and after learning of the new executive's hiring. In that research, Galanter focused on the newly hired executive's previous company and learned that a comparable salary for a similar position in 2008 was \$362,500, which he rounded up to \$400,000 to estimate what a comparable salary would be in 2011. (A. 3-4, 8 & n.18; 88-89, 95-96, 99, 188.)

C. Within Eight Days, MCPc Discharges Galanter for His Comments at the Group Meeting, and Falsely Accuses Him of Improperly Accessing Its Computer Files To Discover (then Disclose) the Executive's Salary

Shortly after the team-building lunch on February 24, Del Balso informed MCPc's CEO, Mike Trebilcock, of Galanter's comments regarding executive compensation. Trebilcock directed MCPc's Vice President of Human Resources, Beth Stec, to review Galanter's access to MCPc's computer network. Stec then had Information Technology Manager Jeff Kaiser report on Galanter's access. Kaiser informed Stec that Galanter had full access (administrator rights) to all

MCPc network systems and email due to his work on a project designing MCPc's call center. (A. 3-4, 8 & nn. 19-20; 112, 116.) In connection with that project, MCPc had granted Galanter access to certain files which would allow him to make changes to MCPc's computer network. While he also had access to human resource files, he did not attempt to access those records. (A. 7 & n.13; 88, 90, 98, 100, 125-27, 253.)

Within a week of the February 24 lunch meeting, Supervisor Dale Phillips instructed Galanter to travel from Pittsburgh to attend a meeting in the Cleveland office on March 4. When Galanter—who had not been told the purpose of the meeting or who would be there—arrived, he was surprised to be met by CEO Trebilcock and Vice President Stec. Trebilcock began by asking Galanter to tell him about the group lunch meeting. Galanter explained that he and other employees expressed their concerns to Del Balso about the high salary being paid to a newly hired executive at a time when they needed more engineers to ease the group's heavy workloads. Trebilcock then asked Galanter where he had obtained the executive's salary information that he had mentioned at the meeting. Galanter explained that he had estimated the salary based on information that was publicly available on the Internet, and that executive compensation was a topic of "water cooler talk" among employees. (A. 3-4, 8; 89-90, 188, 195.)

After leaving the room, apparently to make a phone call to check on Galanter's claims, Trebilcock returned and presented Galanter with a printout purportedly showing Galanter's unusual access to MCPc's computer system. Trebilcock accused Galanter of disclosing the actual amount of the executive's compensation. Galanter acknowledged that he had mentioned a salary in the \$400,000 range, but insisted that all of his access to MCPc's computer system was authorized and in accordance with his assigned work on the call center project. Trebilcock responded that he had a "gut feeling" that Galanter "didn't do anything wrong here, but the damage is done." Trebilcock concluded with a remark that he was "very embarrassed" about the executive's salary information "getting out," said that MCPc and Galanter needed to "divorce," and left the room. (A. 8-9; 90, 98.)

After Information Technology Manager Kaiser had completed an audit of Galanter's personal computer, which did not reveal any improperly accessed files, Galanter was promptly escorted from the facility. While Galanter was not provided a written explanation for his discharge, MCPc subsequently stated in writing that it had terminated him for purportedly accessing, then disclosing, an MCPc executive's salary information during the group meeting, in violation of its confidentiality policy. (A. 7-9 & nn.13, 26; 90, 98, 100, 115-16, 126-27, 183-85, 255.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Miscimarra, Hirozawa, and Schiffer) adopted the administrative law judge's recommended findings that MCPc violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule, and by discharging Galanter for his protected, concerted activity in complaining to MCPc's management, during a team-building meeting, that it could ease employee workloads by hiring more engineers with the salary it was paying to a recently hired executive. (A. 3-4.)

The Board's Order requires MCPc to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with its employees' rights under the Act. Affirmatively, the Board's Order requires MCPc to, among other things: (1) rescind the unlawful confidentiality rule, and provide employees with an insert to the employee handbook that either advises them that the rule has been rescinded, or provides a lawfully worded provision to replace the unlawful one²; (2) offer Galanter reinstatement to his former job, or if that job no

² Before the Court, the Board is not currently seeking enforcement of the portions of its Order requiring MCPc to rescind and replace the unlawful rule, because MCPc is in the process of complying with those requirements. However, the Board reserves the right to seek enforcement of those portions of its Order in the event that MCPc ceases complying with them. *See NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950) ("the Board is entitled to have [any] resumption of the unfair practice barred by an enforcement decree"); *accord NLRB v. Raytheon Co.*, 398 U.S. 25, 27-28 (1970).

longer exists, a substantially equivalent position, without prejudice to his seniority or other previous rights; (3) make Galanter whole for any loss of earnings and other benefits resulting from his unlawful discharge, and compensate him for any adverse tax consequences of receiving a lump-sum backpay award; (4) remove from its files any reference to Galanter's unlawful discharge; and (5) post a remedial notice. (A. 4-5.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

STANDARD OF REVIEW

The scope of this Court's inquiry in reviewing a Board order is quite limited. The Board's findings of fact—such as its finding that Galanter engaged in protected, concerted activity during the lunch meeting—are conclusive if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1151-52 (3d Cir. 1993). Moreover, the Board's factual findings, and reasonable inferences from those findings, are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it *de novo*. *See Universal Camera Corp.*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). Further, the Board's credibility determinations are

entitled to “great deference” and must be affirmed unless they are shown to be “inherently incredible or patently unreasonable.” *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (citations and internal quotation marks omitted). Finally, the Board’s legal conclusions must be upheld if based on a “reasonably defensible” construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board’s finding that MCPc violated Section 8(a)(1) of the Act by discharging Galanter for his protected and concerted conduct in complaining to management, during a team-building lunch, about high executive pay and its effect on employee workloads. Given the group-meeting context, and the fact that coworkers joined in the discussion and indicated their agreement with Galanter, there is no doubt that this protected activity was concerted such that MCPc could not lawfully discharge him for it. As MCPc admitted discharging Galanter for that conduct, the discharge was unlawful unless MCPc can show that substantial evidence does not support the Board’s finding that his conduct was protected and concerted. This MCPc has failed to do.

Substantial evidence also supports the Board’s rejection of MCPc’s other arguments. For example, the Board reasonably rejected MCPc’s claim that it

instead discharged Galanter for improperly accessing an executive's confidential salary information and disclosing it during the meeting. The Board found that the alleged misconduct did not, in fact, occur, as Galanter had based his comments about executive salary on publicly available information derived from internet research and employee rumors. Also to no avail are MCPc's attacks the administrative law judge's decision to credit Galanter's testimony that the Internet, not confidential MCPc files, was the source of his information about executive salary. MCPc fails to meet its heavy burden of showing that the judge's credibility ruling was "patently unreasonable." Further, MCPc's claim that it discharged Galanter for lying about the source of his information when subsequently questioned by the CEO fails because the claim is part and parcel of its discredited assertion that Galanter had accessed and disseminated confidential salary information. The claim is also undermined by the CEO's admission, at the time of the discharge, that he was "very embarrassed" about the disclosure, so MCPc needed to "divorce" Galanter. The CEO never mentioned dishonesty as a basis for the discharge.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT MCPC VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING GALANTER FOR HIS PROTECTED, CONCERTED ACTIVITY IN SUGGESTING, DURING A TEAM-BUILDING MEETING, THAT MCPC COULD EASE EMPLOYEE WORKLOADS BY HIRING ADDITIONAL ENGINEERS WITH THE SALARY IT WAS PAYING A RECENTLY HIRED EXECUTIVE

A. MCPc Admits Discharging Galanter for His Comments at the Team-Building Meeting

Section 7 of the Act (29 U.S.C. § 157) guarantees to employees not only the “right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively,” but also the right to “engage in other concerted activities for the purpose of . . . mutual aid or protection” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements these guarantees by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” Thus, an employer violates Section 8(a)(1) when it discharges an employee for engaging in conduct that is protected and concerted under the Act. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969); *accord Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 263-64 (D.C. Cir. 1993); *Stanford Hotel*, 344 NLRB 558, 558-59 (2005).

Where the employer admits that it discharged an employee for activity that the Board has found to be protected and concerted, no further analysis of motive is necessary and the discharge is unlawful. *See, e.g., Allied Aviation Fueling of*

Dallas LP, 347 NLRB 248, 249 n.2 (2006), *enforced*, 490 F.3d 374, 379 (5th Cir. 2007) (employer motive is not at issue when employer admits employee was discharged for activity the Board found was protected); *accord Roadmaster Corp. v. NLRB*, 874 F.2d 448, 454 (7th Cir. 1989); *L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980); *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002), *enforced*, 63 F. App'x 524 (D.C. Cir. 2003).

Here, MCPc admitted—at the time of the discharge and before the Board—that it needed to “divorce” Galanter for his statements regarding executive compensation during the group meeting, which he made as part of a protected and concerted discussion of employee workloads. Specifically, CEO Trebilcock told Galanter, when discharging him, that while his “gut feeling” was that Galanter had done nothing wrong, the “damage is done,” and Galanter and MCPc needed to “divorce” because Trebilcock was “very embarrassed” about salary information “getting out” at the group meeting. (A. 8; 90, 98.) MCPc confirmed its CEO’s admission in its Position Statement to the Board, where it acknowledged that “Galanter was discharged for . . . disseminating . . . salary information” during the team-building meeting. (A. 8-9 & n.26; 183-85.) As the courts have explained, such an “an outright confession” serves to “eliminate any question” concerning the reason for discharge or “other causes suggested as the basis for the discharge.” *L'Eggs Prods.*, 619 F.3d at 1343 (quoting *NLRB v. Ferguson*, 257 F.2d 88, 92 (5th

Cir. 1958)). Accordingly, the Board reasonably found (A. 4, 8-9 & n.26), consistent with MCPc's admissions, that it discharged Galanter for discussing the salary information at the meeting. Indeed, in its brief to this Court, MCPc again acknowledges (Br. 33, 48-49) discharging Galanter for discussing salary information, consistent with the Board's finding.

Despite these acknowledgements, MCPc attempts to undermine the value of its own position statement (A. 183) by erroneously claiming (Br. 47-48) that the Board should not have considered it. As the administrative law judge explained (A. 128), and as MCPc essentially concedes (Br. 47), such statements—filed before the Board by MCPc's counsel—are admissible as admissions of a party opponent under Board precedent and Federal Rule of Evidence 801(d)(2). *See Massillon Comm. Hosp.*, 282 NLRB 675, 675 n.5 (1987) (admitting position statement as admission of party opponent); *accord United Scrap Metal, Inc.*, 344 NLRB 467, 467-68 & n.5 (2005).³

³ There is no support for MCPc's novel—and mistaken—view (Br. 48) that such documents should only be considered if they contain a party's full admission to the alleged violations. Rather, MCPc's admissions in its position statement regarding the reason for Galanter's discharge were properly considered because, as shown, they are clearly material to the legality of the discharge. *See Massillon*, 282 NLRB at 675 n.5 (admitting letter from employer's attorney to Board containing admissions "material" to the allegations being litigated).

As shown below, the Board also reasonably found that Galanter's activity was protected and concerted. Consequently, MCPc violated the Act by admittedly discharging Galanter for that activity.

B. The Board Reasonably Found that Galanter's Conduct During the Team-Building Meeting Constituted Protected, Concerted Activity

1. An employee engages in protected, concerted activity where, as here, he complains to management about employee workloads in a group setting

An individual employee's conduct is statutorily protected where it is "concerted" in nature and has as its purpose the "mutual aid or protection of employees." *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005) (quoting 29 U.S.C. § 157). Thus, concerted employee activity may be protected by the Act even if unconnected with union activity or collective bargaining. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969); *accord Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745-46 (4th Cir. 1998). Indeed, the broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must "speak for themselves as best they [can]." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Applying Section 7 of the Act (29 U.S.C. § 157), the Supreme Court has indicated that "mutual aid or protection" should be liberally construed to protect

concerted activities directed at a broad range of employee concerns. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68 & n.17 (1978) (the “mutual aid or protection” clause broadly protects employees who “seek to improve terms and conditions of employment”). It is axiomatic that protected activity includes employee complaints to their employer regarding their hours, workloads, wages and other terms and conditions of employment. *See Citizens Inv. Servs. Corp.*, 430 F.3d at 1199, 1203; *see also W. Mass. Elec. Co. v. NLRB*, 589 F.2d 42, 46-47 (1st Cir. 1978) (employee workloads are terms and conditions of employment subject to the Act’s protections) (citing *Irvington Motors, Inc.*, 147 NLRB 565, 565 (1964), *enforced*, 343 F.2d 759, 760 (3d Cir. 1965)).

An individual employee’s action is “concerted” if it bears some relationship to initiating or preparing for group action or bringing truly group complaints to management. *See Meyers Indus., Inc.*, 281 NLRB 882, 887 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). As this Court has explained:

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 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 Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964). *Accord Meyers Indus.*, 281 NLRB at 887 (adopting the analysis of concerted activity set forth in *Mushroom Transp.*); *D & D Distr. Co. v. NLRB*, 801 F.2d 636, 640 (3d

Cir. 1986). Thus, an individual employee engages in concerted activity when he “brings a group complaint to the attention of management . . . even though he was not designated or authorized to be a spokesman by the group.” *Citizens Inv. Servs. Corp.*, 430 F.3d at 1198-99 (citations omitted). *Accord Hugh H. Wilson Corp.*, 414 F.2d at 1355.

As this Court has emphasized, the test for determining concerted activity is broadly applied, and “preliminary discussions” are not disqualified as concerted activity “merely because they have not resulted in organized action or in positive steps towards presenting demands.” *Mushroom Transp.*, 330 F.3d at 685. Rather, “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] guaranteed by Section 7 of the Act if such communications are denied protection because of the lack of fruition.” *Id.*; *accord Meyers Indus.*, 281 NLRB at 887 (noting the Act’s protections must extend to “concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization”) (citation omitted). Thus, to “protect concerted activities in full bloom, protection must necessarily be extended to ‘intended, contemplated or even referred to’ group action, . . . lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions.” *Hugh H. Wilson Corp.*, 414 F.2d

at 1347 (quoting *Mushroom Transp.*, 330 F.2d at 685).

Consistent with these principles, the Board, with court approval, has consistently found activity concerted when, in front of their coworkers, single employees protest employment terms common to all employees. *See Cibao Meat Prods.*, 338 NLRB 934, 934 (2003), *enforced*, 84 F. App'x 155 (2d Cir. 2004); *accord Hugh H. Wilson Corp.*, 414 F.2d at 1348; *Worldmark by Wyndham*, 356 NLRB No. 104, 2011 WL 757874 at *3 (2011). A finding that such a protest involves concerted activity is particularly well-supported where, as here, it is made at a group meeting, and coworkers indicate their agreement with the employee's statements. *See Worldmark by Wyndham*, 2011 WL 757874, at *3 (finding that any doubt about the concerted nature of one employee's statements at a group meeting was removed when a second employee joined in those statements); *Cibao Meat Prods.*, 338 NLRB at 934 (holding employee engaged in Section 7 activity when he protested newly announced employer policy in front of other employees during a meeting called by the employer); *accord Neff-Perkins Co.*, 315 NLRB 1229, 1229 n.1 (1994); *Whittaker Corp.*, 289 NLRB 933, 934 (1988).

The Supreme Court has held that the task of defining the scope of Section 7 activity "is for the Board to perform in the first instance as it considers the wide variety of cases that have come before it." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (citation omitted). As the task of separating concerted from

unconcerted activity is “basically a factual inquiry,” the Board’s finding will be affirmed so long as it is supported by substantial evidence. *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946, 949 (3d Cir. 1981) (citation omitted); *see* cases cited at p. 9.

2. Galanter’s conduct was protected and concerted

Applying these principles here, the Board found that Jason Galanter’s statements, during a team-building meeting, about executive compensation and its impact on employee workloads, constituted protected, concerted activity and, thus, MCPc acted unlawfully by admittedly (*see* pp. 13-14) discharging him for that conduct. The Court should affirm the Board’s findings because they are well-supported by the credited testimony and other record evidence.

As shown at pp. 4-8, on February 24, 2011, Dominic Del Balso, MCPc’s director of engineering, held a team-building lunch meeting with Galanter and several other employees. During the meeting, the group discussed the employees’ heavy workloads—a well-known employee complaint—and Galanter urged MCPc to hire additional engineers to alleviate the problem. In support of his point, Galanter referred to the recent hiring of a company executive and stated that, for the \$400,000 salary MCPc was paying him, it could have hired additional engineers to alleviate employee workloads. Two other employees present at the meeting indicated their agreement with Galanter. (A. 3-4, 7-8; 88-89, 96, 101-02, 104-05.) Eight days later, MCPc discharged Galanter based on his comments at

the meeting, while falsely accusing him of improperly accessing confidential company computer files to discover the executive's salary.

Under settled law, that credited evidence amply supports the Board's finding that Galanter engaged in protected, concerted activity by discussing, at a team-building meeting with other employees and a manager, the employees' terms and conditions of employment, namely, staffing shortages resulting in heavy workloads. As shown at pp. 15-16, it is settled that such discussion of wages affecting employee workloads is protected under the Act. Further, as the Board noted (A. 3), such protected discussions clearly constitute concerted activity under settled precedent, including this Court's precedent. *See Meyers Indus., Inc.*, 281 NLRB 882, 885-87 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). *See Worldmark by Wyndham*, 356 NLRB No. 104, 2011 WL 757874, *3 (2011) (“[T]he Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees.”) *Accord Mushroom Transp.*, 330 F.2d at 685 (employee's statement concerted if made with the object of inducing group action or if it had “some relation to action in the interest of the employees”); *Hugh H. Wilson Corp.*, 414 F.2d at 1347 (under *Mushroom Transp.*, the Act's protections must extend to “intended, contemplated, or even referred to” group action).

As the Board explained (A. 4), the concerted nature of Galanter's conduct is also shown by the fact that the discussion of employee workloads occurred at a group meeting characterized by Del Balso as involving "team building." As the Board further noted, "in a group-meeting context, a concerted objective may be inferred" from such circumstances. (A. 4 n.5, quoting *Whittaker Corp.*, 289 NLRB 933, 934 (1988)); accord *Cibao Meat Prods.*, 338 NLRB 934, 934 (2003); *United Enviro Sys., Inc.*, 301 NLRB 942, 944 (1991), *enforced mem.* 958 F.2d 364 (3d Cir. 1992). See *Neff-Perkins Co.*, 315 NLRB 1229, 1229 n.1 (1994) (finding that two employees were engaged in concerted activity when they raised questions concerning working conditions at a group meeting called by the employer).

In any event, as the Board aptly observed (A. 3-4 & n.5), no such inference is necessary here because Galanter's colleagues joined in the discussion by expressing agreement with his comments about their working conditions. They specifically discussed with Del Balso how busy they were, how many hours they were working, and the need for MCPc to hire more engineers. (A. 3-4, 7-8; 88-89, 94, 96, 101-02, 104-05.) In addition, two coworkers indicated agreement with Galanter's follow-up comment about executive compensation and its impact on employee workloads. See *Worldmark by Wyndham*, supra, 2011 WL 757874 at *3 (finding that any doubt about the concerted nature of one employee's statements at a group meeting was removed when a second employee joined in those

statements). Accordingly, the record amply establishes that when Galanter raised these issues for discussion, he was acting “with . . . other employees, and not solely by and on behalf of . . . himself.” *Meyers Indus.*, 268 NLRB 493, 497 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

In sum, substantial evidence supports the Board’s finding that Galanter engaged in protected, concerted activity when he spoke about executive compensation and employee workloads during the meeting. As MCPc effectively admitted that it discharged Galanter for that conduct, the discharge was unlawful.

3. MCPc fails to present any argument or authority that would mandate a different result

MCPc fails to provide any basis for setting aside the Board’s well-supported finding that Galanter’s statements during the team-building meeting were protected and concerted. For instance, it founds its attack on the concerted nature of Galanter’s conduct on the twin false premises that Galanter’s activity cannot be concerted if (1) he did not organize the lunch—or get his coworkers’ authorization—in advance specifically to “concertedly complain” about employee working conditions (Br. 15-17, 22); or (2) no future group action was planned after the meeting (Br. 17-18, 22). This Court’s analysis in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, which MCPc misreads (Br. 26), disposes of both claims.

As discussed (pp. 16-17), in *Mushroom Transportation*, this Court explained that “preliminary discussions,” including those which were not planned in advance, are not disqualified as concerted activities “merely because they have not resulted in organized action or in positive steps towards presenting demands.” 330 F.2d at 685. Rather, because “concerted activity for mutual aid and protection has to start with some kind of communication between individuals,” it would effectively nullify employees’ statutory rights “if such communications are denied protection because of the lack of fruition.” *Id.*; accord *Hugh H. Wilson Corp.*, 414 F.2d at 1347; see *Meyers Indus.*, 281 NLRB at 887 (noting the Act protects concerted activity “in its inception”).

It follows that Galanter’s conduct was concerted even if it was not specifically planned in advance, or did not lead to further organizing activity. Indeed, as this Court has explained, a contrary finding would potentially allow “employer retaliation [to] destroy the bud of employee initiative aimed at bettering terms of employment and working conditions.” *Hugh H. Wilson Corp.*, 414 F.2d at 1347. This case exemplifies the Court’s concerns. By discharging Galanter within eight days of his protected statements during the meeting, MCPc may have effectively nipped in the bud any nascent employee action. In these circumstances, MCPc is in no position to rely on the lack of subsequent concerted action to claim that Galanter’s conduct was not concerted.

In any event, the Board properly followed this Court's teachings in *Mushroom Transportation* and explained (A. 10) that employees need not meticulously organize their conduct beforehand for a specific purpose, but may act "concertedly by raising impromptu complaints."⁴ See *Worldmark by Wyndham*, 356 NLRB No. 104, 2011 WL 757874, *3 (2011) (finding it irrelevant to the "concerted" inquiry that employees did "not agree in advance to protest together" and refusing to require "evidence of a previous plan to act in concert"). In other words, the Board observed, consistent with this Court's teachings, that conduct may be concerted without any actual or planned future group action if, as was the case with Galanter's conduct here, it was "the type of preliminary groundwork necessary to initiate group activity." (A. 10, quoting *Salon/Spa at Boro*, 356 NLRB No. 69, 2010 WL 5462286 at *19 (2010)); accord *Mushroom Transp.*, 330 F.2d. at 685; *Meyers Indus.*, 281 NLRB at 887.

Contrary to MCPc's further suggestion (Br. 17-18 & n.6), it was not necessary for employees to ask Galanter to speak on their behalf regarding their workloads. Rather, Galanter's discussion of working conditions in a group context is concerted even absent explicit authorization from other employees. See *Worldmark by Wyndham*, 356 NLRB No. 104, 2011 WL 757874 at *3 (2011)

⁴ Moreover, MCPc gets it wrong as a factual matter in asserting that there was no prior concerted activity. As shown at p. 4, Galanter and his coworkers regularly discussed their heavy workloads before the February 24 meeting.

(holding that “an employee who protests publicly in a group meeting is engaged in initiating group action . . . even when the employee had not solicited coworkers’ views before-hand”); accord *Hugh H. Wilson Corp.*, 414 F.2d at 1355 (noting that there is no need for a formal selection of a spokesperson).

Moreover, the Supreme Court has rejected MCPc’s further suggestion (Br. 19-21) that a complaint must concern a matter of which the employer is unaware, or “present a specific demand upon their employer to remedy a[n] objectionable condition” in order to be protected, concerted activity under the Act. *NLRB v. Washington Aluminum*, 370 U.S. 9, 14, 16 (1962) (also rejecting the relevance of “[t]he fact that the company was already making every effort to repair” the conditions at issue). Thus, it is immaterial whether, as MCPc claims (Br. 19-21), the lack of engineers was a commonly known problem, or that MCPc was already trying to hire additional engineers. Rather, the relevant point is that Galanter and his coworkers acted concertedly during the team-building meeting to urge MCPc to fix that problem.

Next, having failed to show that Galanter’s statements were not concerted, MCPc attempts, but also fails, to show that they were not *protected* under the Act. For example, it erroneously claims (Br. 19-21) that Galanter’s complaints are unprotected because, in its view, the amount of an executive’s salary has nothing to do with MCPc’s ability to hire additional engineers. MCPc, however, ignores the

facts in claiming (Br. 19-21) that Galanter's comments were not really about employees' hours and workloads, and that executive compensation was an "entirely separate" issue. As shown, Galanter explicitly linked both issues by arguing that for the amount MCPc was paying a recently hired executive, it could have hired more engineers to ease their workloads.

Nor can MCPc show (Br. 29-30, 32) that Galanter's complaints were unprotected based on its discredited and disproven assertion (A. 4, 7-8) that he had accessed and disclosed an executive's confidential salary information. As the Board found (A. 4, 7-8, 13), the credited evidence shows that Galanter did no such thing. Specifically, Galanter credibly testified (A. 7-8 nn.13, 18) that he estimated the executive's salary based on publicly available information that he obtained from the Internet, and from "water-cooler" talk with employees, but had not accessed any confidential MCPc files in so doing. Galanter then utilized that non-confidential information when he referred, during the team-building meeting, to executive salary as part of his protected, concerted complaint about employee workloads. (A. 3-4, 7-8 nn.13, 18; 88-89, 93, 95, 97-98, 188.) Thus, as Galanter neither accessed nor disclosed any confidential salary information, MCPc fails to show that his conduct was unprotected.

MCPc gains no ground in attacking (Br. 28-31) the judge's decision to credit Galanter's unrebutted testimony (A. 7-8 nn.13, 18) that the Internet, not

confidential files, was the source of his information about executive salary. MCPc cannot show, as it must, that the judge's decision was "inherently incredible or patently unreasonable." (*See* cases cited at p. 10.) After all, Galanter's testimony was unrebutted and corroborated (A. 8 n.18; 188) by documentary evidence. Indeed, MCPc concedes (Br. 38) that its own audit failed to show that Galanter had accessed any confidential files, which corroborates his credited denial of having done so. (A. 7-8 & n.13; 255.)

In any event, in crediting Galanter on the relevant point about the source of his information, the judge considered all relevant testimony and record evidence, including that which detracted from Galanter's testimony, and reached balanced conclusions. He credited (A. 8 n.16), for example, another employee's testimony that Galanter, in discussing executive salaries during the group meeting, had referred to MCPc executive Peter DeMarco as making a \$400,000 salary, rather than an executive named "Andy," as Galanter had stated. This does not, however, disprove Galanter's unrebutted testimony that he based his salary estimate on publicly available information he found on the Internet.⁵

⁵ The same is true of the other purported testimonial inconsistencies cited by MCPc (Br. 30-31). There is nothing "inherently incredible" in Galanter's testimony that he found a salary of \$362,500 on the Internet for an executive working at another company in 2008, then estimated that an MCPc executive working a similar job would be making "about \$400,000" a couple years later. Nor was the judge required to discredit Galanter's testimony that he initially viewed this information on the Internet a few weeks before the February 2011 group lunch meeting merely

Contrary to MCPc's contention (Br. 37), it is not also dispositive whether Galanter responded evasively when CEO Trebilcock questioned him about his protected conduct shortly before discharging him. In fact, Galanter answered truthfully when Trebilcock first questioned him about the source of his information, telling him it was from the Internet.⁶ (A. 3-4, 8 & n.18; 89-90, 188.) Trebilcock, however, refused to accept that answer, and he became agitated, pressing Galanter for more information. It was only then that Galanter, understandably flustered, incorrectly suggested that, while he was not sure, the salary information had "perhaps" also come from two coworkers in Buffalo. (A. 90.) Given that context, MCPc errs in asserting that the judge was required to discredit Galanter's unrebutted testimony that the Internet was the actual source of his salary information.⁷

because (*see* Br. 31) a printout of his search bears a "2012" date. As Galanter credibly explained, the website automatically included a "2012" date when he *reprinted* the page in preparation for the 2012 hearing, even though he originally viewed that information prior to the 2011 group meeting. (A. 89-90, 95, 99-100.)

⁶ It is also not dispositive that Trebilcock either denied, or could not recall, this part of the conversation. Rather, the judge's decision to believe Galanter over Trebilcock is entitled to deference because he examined "the conflicting versions" and made a reasoned analysis, and there is nothing showing that his findings are "inherently incredible or patently unreasonable." *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001).

⁷ MCPc also fails to undermine (Br. 28 n.11) the judge's decision to discredit Trebilcock's testimony that he heard about Galanter's statements during the lunch from MCPc engineer Doug Campbell. Rather, the judge cogently explained (A. 8

C. The Court Should Reject MCPc's Additional Claims

The Board (A. 4) properly rejected MCPc's defense (Br. 33-48) that its discharge of Galanter was lawful under *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), because it was assertedly based on a good-faith belief that Galanter had obtained confidential information about executive pay at MCPc by improperly accessing its computer records. Under *Burnup & Sims*, an employer does not violate Section 8(a)(1) when it discharges an employee based on a good-faith belief that the employee engaged in misconduct "in the course of" otherwise protected activity, unless the General Counsel shows that the employer's belief was mistaken. *Id.* at 23. As the Board explained, *Burnup & Sims* does not apply here because it was not alleged that Galanter engaged in misconduct "in the course of" his protected activity during the team-building meeting on February 24. (A. 4.)

Moreover, as the Board noted, even assuming the applicability of *Burnup & Sims*, and further assuming that MCPc honestly believed Galanter had improperly accessed computer records, its *Burnup & Sims* defense would fail because, as just shown (*see* p. 26), the purported misconduct did not, in fact, occur. (A. 4.) *See Accurate Wire Harness*, 335 NLRB 1096, 1097 (2001) (rejecting employer's *Burnup & Sims* defense where General Counsel established that the employee's

n.19) why he found it more likely that it was Del Balso who had relayed this information to Trebilcock. MCPc fails to show that this inference was somehow patently unreasonable. In any event, that specific issue has no bearing on the legality of Galanter's discharge for engaging in protected, concerted activity.

alleged misconduct did not occur), *enforced*, 86 F. App'x 815 (6th Cir. 2003). It follows that MCPc also cannot make a defense under *Burnup & Sims* to the effect that it lawfully discharged Galanter for improperly *disclosing* confidential salary information. Simply put, Galanter cannot be said to have disclosed what he never accessed nor possessed.

MCPc fares no better in claiming (Br. 33, 37-46) that it lawfully discharged Galanter for “lying” about the source of his information regarding executive salaries. After all, before the Board and on review, MCPc has portrayed its claim that Galanter accessed and disclosed confidential information, then lied about the source of it, as a singular, interrelated rationale for his discharge (*see* Br. 33, 45-48). But as the Board found, he did not improperly access company records, and his discussion of salary information was protected under the Act. These findings cast in a suspicious light MCPc’s further claim that it really discharged him for lying about the source of the information. Indeed, when he discharged Galanter, CEO Trebilcock never claimed that it was for dishonesty. Instead, Trebilcock said he was “very embarrassed” about the salary information “getting out,” so MCPc needed a “divorce” from Galanter. (A. 8-9; 90, 98.)

Further, MCPc’s claim that Galanter lied is an exaggeration that ignores the context of his statements and Trebilcock’s role in provoking them. As shown, Galanter truthfully told Trebilcock that he obtained publicly available information

from Internet searches and “water cooler” talk with employees. It was only when Trebilcock became agitated, refused to accept that answer, and pressed for additional information that Galanter, understandably flustered, merely stated that, while he was not sure, he had “perhaps” received information from two employees in Buffalo. (A. 90.) While that turned out not to be accurate, Galanter’s qualified assertion, under the heat of the CEO’s repeated questioning, is a far cry from the blatant dishonesty that MCPc misleadingly portrays it to be.

In any event, MCPc’s claim would fail even assuming *arguendo* both that Galanter had lied during questioning into the scope of his protected, concerted activities, and that this was the actual reason for discharging him. This is so because settled law bars an employer from discharging an employee for lying about his involvement in protected activity. *See, e.g., Tradewaste Incineration*, 336 NLRB 902, 907 (2001) (employee did not lose the Act’s protection by lying when employer questioned him about his involvement in protected, concerted activity, where employee’s untruth did not relate to the performance of his job or the employer’s business, but to a protected right guaranteed by the Act, which he was not obligated to disclose.)

In sum, the Board reasonably found that Galanter’s conduct during the group meeting was protected and concerted, and that MCPc admittedly discharged him for that conduct. Accordingly, because MCPc’s attempted defenses fail, the Court

should affirm the Board's finding that MCPc violated Section 8(a)(1) of the Act by discharging Galanter.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order.

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National Labor Relations Board
September 2014

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

MCPC, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

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**COMBINED CERTIFICATIONS REGARDING
BAR MEMBERSHIP, WORD COUNT, IDENTICAL
COMPLIANCE OF BRIEFS AND VIRUS CHECK**

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Greg Lauro certifies that he is a member in good standing of the bar of the District of Columbia Court of Appeals. He is not required to be a member of this Court's bar, as he is representing the federal government in this case.

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,308 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007. Further, the Board certifies that the hard copies of the brief submitted to the Court and counsel are identical to the electronically filed copy of the brief.

Finally, the Board certifies that the electronic copy of the brief submitted in Portable Document format (PDF) has been scanned for viruses using the Check Point Endpoint Security version: E80.30(8.0.986), and no virus has been detected.

/s/ Linda Dreeben

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Dated at Washington, DC

This 2nd day of September, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
this 2nd day of September, 2014