

**Nos. 16-4300, 17-1054**

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

**MID-ATLANTIC RESTAURANT GROUP LLC  
d/b/a KELLY'S TAPROOM**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**TABLE OF CONTENTS**

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction.....	1
Statement of the issue .....	2
Statement of the case.....	3
I. The Board’s findings of fact .....	3
A. Background: Kelly’s operations.....	3
B. Robin Helms and other employees raise concerns about scheduling; managers warn them that they would lose shifts if they presented their concerns to the Mitchells.....	4
C. Helms trains new bartender Chelsea Heyward .....	7
D. Kelly’s discharges Helms for complaining about working conditions with co-workers, but never mentions the tipping incident .....	8
II. The Board’s Conclusions and Order.....	9
Statement of related cases and proceedings.....	10
Summary of argument.....	10
Argument.....	12
Substantial evidence supports the Board’s findings that Helms engaged in protected, concerted activity by raising scheduling concerns to management and that Kelly’s violated Section 8(a)(1) of the Act by discharging her for it.....	12
A. Standard of review .....	12
B. Employees engage in protected, concerted activity where, as here, they complain to management about working conditions and discuss those matters among themselves.....	13

**TABLE OF CONTENTS**

<b>Headings-Cont'd</b>	<b>Page(s)</b>
C. An employer violates the Act by discharging an employee for engaging in protected, concerted activity .....	17
1. Helms’s protected conduct was concerted.....	19
2. Kelly’s knew about Helms’s protected, concerted activity .....	22
3. Kelly’s exhibited animus toward Helms’s protected, concerted activity.....	23
4. The timing of Helms’s discharge supports the Board’s finding that it was unlawfully motivated.....	25
5. Kelly’s stated reasons for Helms’s discharge were pretextual ....	26
6. Kelly’s failed to show that the administrative law judge’s credibility resolutions are “inherently incredible or patently unreasonable” .....	28
D. Kelly’s remaining contentions lack merit .....	33
1. The complaint was sufficient to put Kelly’s on notice of the allegation against it .....	34
2. Kelly’s failed to show that the administrative law judge abused his discretion .....	38
Conclusion .....	42

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>1621 Route 22 West Operating Co., LLC v. NLRB</i> , 825 F.3d 128 (3rd Cir. 2016) .....	18, 26, 27
<i>Allied Aviation Fueling of Dallas LP</i> , 347 NLRB 248 (2006), enforced, 490 F.3d 374 (5th Cir. 2007) .....	18
<i>Alton H. Piester, LLC v. NLRB</i> , 591 F.3d 332 (4th Cir. 2010) .....	17
<i>Atlantic Limousine, Inc. v. NLRB</i> , 243 F.3d 711 (3d Cir. 2001) .....	13, 29, 33
<i>Bakery Wagon Drivers &amp; Salesmen, Local 484 v. NLRB</i> , 321 F.2d 353 (D.C. Cir. 1963) .....	37
<i>Buncher v. NLRB</i> , 405 F.2d 787 (3d Cir. 1969) .....	31
<i>Citizens Inv. Servs. Corp. v. NLRB</i> , 430 F.3d 1195 (D.C. Cir. 2005) .....	17, 27
<i>Citizens Publ’g &amp; Printing Co. v. NLRB</i> , 263 F.3d 224 (3d Cir. 2001) .....	13
<i>Curtiss-Wright Corp. v. NLRB</i> , 347 F.2d 61 (3d Cir. 1965) .....	35
<i>D &amp; D Distr. Co. v. NLRB</i> , 801 F.2d 636 (3d Cir. 1986) .....	15, 21
<i>D &amp; F Indus.</i> , 339 NLRB 618 (2003) .....	27
<i>Dayton Typographic Serv. v. NLRB</i> , 778 F.2d 1188 (6th Cir. 1985) .....	28

**TABLE OF AUTHORITIES**

<b>Cases -Cont'd</b>	<b>Page(s)</b>
<i>Dreis &amp; Krump Mfg. Co. v. NLRB</i> , 544 F.2d 320 (7th Cir. 1976) .....	21
<i>Drukker Commc'ns, Inc. v. NLRB</i> , 700 F.2d 727 (D.C. Cir. 1983).....	36, 40-41
<i>E&amp;L Transport Co. v. NLRB</i> , 85 F.3d 1258 (7th Cir. 1996) .....	26
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	14
<i>Ewing v. NLRB</i> , 861 F.2d 353 (2d Cir. 1988) .....	20
<i>Frank Briscoe, Inc. v. NLRB</i> , 637 F.2d 946 (3d Cir. 1981).....	13
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	13
<i>Grane Health Care v. NLRB</i> , 712 F.3d 145 (3d Cir. 2013) .....	18
<i>Greater Omaha Packing Co., Inc.</i> , 360 NLRB 493 (2014), <i>enf'd in relevant part</i> , 790 F.3d 816 (8th Cir. 2015) .....	21
<i>Herman Bros, Inc. v. NLRB</i> , 658 F.2d 201 (3d Cir. 1981) .....	26, 28
<i>Hugh H. Wilson Corp. v. NLRB</i> , 414 F.2d 1345 (3d Cir. 1969) .....	14, 16, 21, 24
<i>Hunter Douglas, Inc. v. NLRB</i> , 804 F.2d 808 (3d Cir. 1986) .....	18

**TABLE OF AUTHORITIES**

<b>Cases -Cont'd</b>	<b>Page(s)</b>
<i>Kenrich Petrochemicals, Inc. v. NLRB</i> , 893 F.2d 1468 (3d Cir. 1990), <i>aff'd</i> , 907 F.2d 400 (3d Cir. 1990) (en banc) .....	34-35, 36, 38
<i>Local 363, affiliated with the Int’l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers &amp; Helpers of Am., AFL-CIO</i> , 123 NLRB 1877 (1959).....	35
<i>Louton, Inc., v. NLRB</i> , 822 F.2d 412 (3d Cir. 1987) .....	33
<i>L’Eggs Prods., Inc. v. NLRB</i> , 619 F.2d 1337 (9th Cir. 1980) .....	18, 24, 32
<i>MCPc, Inc. v. NLRB</i> , 813 F.3d 475 (3d Cir. 2016) .....	14, 16, 19, 20
<i>Meyers Indus., Inc.</i> , 281 NLRB 882 (1986), <i>enforced sub nom.</i> <i>Prill v. NLRB</i> , 835 F.2d 1481 (D.C. Cir. 1987).....	15, 16
<i>Mushroom Transp. Co. v. NLRB</i> , 330 F.2d 683 (3d Cir. 1964) .....	15, 16
<i>NLRB v. A. Lasaponara &amp; Sons, Inc.</i> , 541 F.2d 992 (2d Cir. 1976) .....	15
<i>NLRB v. City Disposal Sys., Inc.</i> , 465 U.S. 822 (1984).....	12
<i>NLRB v. Ferguson</i> , 257 F.2d 88 (5th Cir. 1958) .....	18
<i>NLRB v. Hale Container Line, Inc.</i> , 943 F.2d 394 (4th Cir. 1991) .....	24

**TABLE OF AUTHORITIES**

<b>Cases -Cont'd</b>	<b>Page(s)</b>
<i>NLRB v. Hotel Employees &amp; Rest. Employees Int’l Union, Local 26, AFL-CIO</i> , 446 F.3d 200 (1st Cir. 2006).....	15
<i>NLRB v. Mackay Radio &amp; Telegraph Co.</i> , 304 U.S. 333 (1938).....	36, 37, 40
<i>NLRB v. Mike Yurosek &amp; Son, Inc.</i> , 53 F.3d 261 (9th Cir. 1995) .....	15, 20
<i>NLRB v. Omnitest Inspection Servs.</i> , 937 F.2d 112 (3d Cir. 1991) .....	17, 19
<i>NLRB v. Phoenix Mut. Life Ins. Co.</i> , 167 F.2d 983 (7th Cir. 1948) .....	24
<i>NLRB v. S.W. Evans &amp; Son</i> , 181 F.2d 427 (3d Cir. 1950) .....	34, 38
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983).....	17
<i>NLRB v. Washington Aluminum Co.</i> , 370 U.S. 9 (1962).....	14
<i>Ozburn–Hessey Logistics, LLC v. NLRB</i> , 833 F.3d 210 (D.C. Cir. 2016).....	18, 32
<i>Phoenix Transit Sys.</i> , 337 NLRB 510 (2002), <i>enforced</i> , 63 F. App’x 524 (D.C. Cir. 2003) .....	18
<i>Quick v. NLRB</i> , 245 F.3d 231 (3d Cir. 2001) .....	13
<i>Roadmaster Corp. v. NLRB</i> , 874 F.2d 448 (7th Cir. 1989) .....	18

**TABLE OF AUTHORITIES**

<b>Cases -Cont'd</b>	<b>Page(s)</b>
<i>Roger J. Au &amp; Son, Inc. v. NLRB</i> , 538 F.2d 80 (3d Cir. 1976) .....	36
<i>Sam's Club v. NLRB</i> , 141 F.3d 653 (6th Cir. 1998) .....	33
<i>St. Margaret Mem'l Hosp. v. NLRB</i> , 991 F.2d 1146 (3d Cir. 1993) .....	12
<i>Title Guarantee Co. v. NLRB</i> , 534 F.2d 484 (2d Cir. 1976) .....	36
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	12, 13
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981).....	17, 18
<i>Yellow Freight Sys., Inc. v. DOL</i> , 954 F.2d 353 (6th Cir. 1992) .....	37-38

**TABLE OF AUTHORITIES**

**Statutes:** **Page(s)**

National Labor Relations Act, as amended  
(29 U.S.C. § 151 et seq.)

Section 7 (29 U.S.C. § 157) .....	10, 12, 13, 14, 16
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 10, 12, 13, 14, 17
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)).....	2, 12
Section 10(f) (29 U.S.C. § 160(f)).....	2

**Regulations:**

29 C.F.R. § 102.118(a)-(b).....	36
29 C.F.R. § 102.15 .....	35
29 C.F.R. § 102.30 .....	36

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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This unfair-labor-practice case is before the Court on the petition of Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom ("Kelly's") to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Kelly's. The Board found that Kelly's violated the National

Labor Relations Act by discharging an employee for engaging in concerted activity protected by the Act.

The Board's Decision and Order issued on November 30, 2016, and is reported at 364 NLRB No. 153. (JA 4-19.)<sup>1</sup> 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), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties.

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 Bryn Mawr, Pennsylvania. Kelly'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 Kelly's violated the Act by discharging employee Robin Helms for discussing scheduling concerns with co-workers and raising them with management.

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<sup>1</sup> "JA" references are to joint appendix, and "Br." refers to Kelly's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## **STATEMENT OF THE CASE**

Upon an unfair-labor-practice charge filed by Helms, a complaint was issued alleging that Kelly's violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by discharging Helms for her 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 Kelly's had violated the Act as alleged. (JA 6-19.) On review, the Board found no merit to Kelly's exceptions and adopted the judge's findings and recommended order as modified. (JA 4-5.) The following subsections summarize the Board's fact findings and its Conclusions and Order.

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. Background: Kelly's Operations**

Kelly's is a restaurant and bar in Bryn Mawr, Pennsylvania, that mainly serves a college crowd. (JA 6; JA 151.) Eugene Mitchell is the majority owner and managing partner; his wife Angelia serves as operations manager. (JA 6-7; JA 292, 309.) An on-site manager oversees day-to-day operations. Kristin Lang occupied that position until December 2014, when she was succeeded by Ryan Henry. (JA 7; JA 160-61, 518-19.) Kelly's also employs 7 to 10 bartenders, as well as cooks, servers, and bouncers. (JA 7; JA 493.)

Kelly's operates seven days a week. The most lucrative shifts for bartenders, who work primarily for tips, are Thursday, Friday, and Saturday, beginning at 5 p.m. (JA 7; JA 193, 389.) As many as five bartenders work those shifts. (JA 493, 584-614.)

**B. Robin Helms and Other Employees Raise Concerns about Scheduling; Managers Warn Them that They Would Lose Shifts If They Presented Their Concerns to the Mitchells**

Robin Helms worked as a bartender at Kelly's from March 2014 until she was discharged on April 30, 2015. (JA 7; JA 151.) Described by Angelia Mitchell as a "good bartender" who "did a good job," Helms never received any written discipline and had a perfect attendance record. (JA 7; JA 151, 391, 437, 475.)

Beginning in October 2014, Helms and several co-workers began discussing their concerns about scheduling. That month, Helms, bartender Joe Fairley, and server Chris Healy met with manager Lang to present their concerns. Helms complained that because she worked on Sundays, which was not a lucrative shift, she should also receive some of the early evening start times on other shifts. Fairley added that day-shift employees like himself should also be scheduled for early evening start times. Healy, who had worked as a server for some time, sought work on bar shifts. (JA 7; JA 177-79.) Lang told the employees that raising their concerns with the Mitchells would not get them anywhere, and

Eugene Mitchell would “lose his shit” if they addressed scheduling issues directly with him. (JA 16; JA 179.)

Several weeks later, Helms spoke to Lang again about scheduling. Lang said that complaining to the Mitchells would get Lang in trouble. Lang added that she could not handle that stress, and the Mitchells would only tell her to take shifts away from Helms. (JA 7; JA 161.)

In April 2015, Angelia Mitchell hired three new employees to replace two bartenders who were about to resign. (JA 7; JA 395.) Helms, who had previously lost shifts to new hires without explanation, talked about her concerns with bartenders Kris Flood and Sarah Clark. The three bartenders discussed their frustrations with scheduling and the possible effect of the new hires on their schedules. (JA 7; JA 192.) They were particularly concerned that management would schedule the new hires for the most lucrative shifts on Thursday, Friday, and Saturday, instead of giving those shifts to employees with more seniority. (JA 7, 8 n.10; JA 192-93.)

In mid-April, Helms and Flood took these concerns to the new manager, Ryan Henry. (JA 7; JA 189-90.) They told Henry they wanted to make sure that when the new hires came on board, the more senior bartenders, including themselves, would be scheduled for the lucrative weekend shifts. Henry, while

sympathetic, warned Helms and Flood that raising these issues with the Mitchells would cause them to lose hours and shifts. (JA 7; JA 189-91.)

Around the same time, Helms and Healy met with Henry. (JA 8; JA 194, 269.) Healy told Henry that he wanted to make sure he received bartending shifts before the new hires did. (JA 8; JA 194-95.) Helms explained that the more senior bartenders were generally frustrated and concerned that they would lose the prime shifts to the new hires. (JA 8; JA 195, 269-70.) She showed Henry an email she had drafted in which she planned to tell Eugene Mitchell that she deserved better shifts because of her performance and consistent work. (JA 8; JA 195.) Henry cautioned that sending the email would only anger Mitchell. He also told her that he followed the Mitchells' instructions, which included previous directives to take Helms off the schedule and put a new hire in her place. Based on Henry's advice, Helms did not send the email. (JA 8; JA 195-96.)

Helms spoke with Henry four more times. (JA 8; JA 269.) She explained that she was not the only bartender concerned about scheduling, and the uncertainty over the issue was "causing anxiety" among the senior bartenders. (JA 8; JA 269-70.) Helms told Henry she wanted to speak directly to Eugene Mitchell and explain their concerns that the more senior bartenders not lose shifts. As he had previously, Henry warned her not to complain to Mitchell about the schedule, and this time he gave her an example: when a dishwasher requested several

Saturdays off, Mitchell instructed Henry to remove him from the cleaning schedule in retaliation. (JA 8; JA 160.) While Henry warned Helms not to complain directly to the Mitchells, he sent an email to Angelia Mitchell informing her that Flood and Helms had raised concerns about their shifts. (JA 8; JA 395-96.)

**C. Helms Trains New Bartender Chelsea Heyward**

Chelsea Heyward was one of the three new bartenders hired by Angelia Mitchell in April 2015. On her first night, Heyward was trained by bartender Sarah Clark and on her second night by Helms. During that training shift, Heyward told Helms that Clark had said shifts were not assigned well and staff had been complaining. Helms agreed with Clark. (JA 10; JA 220-21.)

That night, Helms pointed out a pair of African-American customers and told Heyward that one of them was known not to tip the bartenders. After Heyward served them, Helms said, “Let me guess, they didn’t tip you.” Heyward said that, on the contrary, they tipped very well. In response, Helms averred that they must have done so “because you’re black, too.” (JA 10; JA 263, 327.)

About April 28, Heyward informed Angelia Mitchell that she had found another job. When Mitchell asked why she was leaving, Heyward said that Flood and Helms did not treat her well, and she felt “negative energy” from Helms who had nothing positive to say about Kelly’s. Heyward also recounted Helms’s

comments about the tipping incident, but asked Mitchell not to tell Helms what she had said. (JA 10-11; JA 330-32, 371.)

**D. Kelly's Discharges Helms for Complaining about Working Conditions with Co-Workers, and Never Mentions the Tipping Incident**

When Helms reported to work on April 30, Henry asked her to come to his office. Angelia Mitchell was there, and Eugene Mitchell arrived a few minutes later. (JA 11; JA 196-99, 405.) Before the meeting, Eugene and Angelia had collaborated to create a fictitious story about installing listening devices in the restaurant to record employee conversations. (JA 12; JA 404-05.) Drawing on that fiction, at the meeting Eugene told Helms that he had listened to hours of tape and had heard what Helms said about them, which hurt their feelings. (JA 11; JA 199.) Both he and Angelia told Helms that they knew she had been complaining about the work environment and her job to everyone "except the two of them." (JA 11; JA 313.) They would not take it, Eugene said, and fired her. Eugene then left the office. He never accused Helms of refusing to serve a customer because of her race or telling a co-worker that she must have received a good tip because of her race. (JA 13; JA 199, 436-37.)

After Eugene left, Angelia told Helms that they had installed listening devices and had recorded Helms's complaints. (JA 11; JA 200.) They were aware, she said, that the entire staff was complaining about working conditions. Angelia

added that Eugene wanted to “clean house” and fire them all, but that she was able to talk him out of it. She explained that she expected friends to come to Kelly’s that night and would be “mortified” if her friends overheard the bartenders complaining about working conditions. (JA 11; JA 201.)

Helms assured Angelia that she had not complained about working conditions around customers. When she asked why she was being fired despite consistently showing up for work, always treating customers courteously, and doing a good job, Angelia replied that none of that mattered. What mattered, she said, was that Helms hurt their feelings. (JA 13; JA 202-03.) She never mentioned the tipping incident. (JA 13; JA 486-87.)

## **II. THE BOARD’S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (then-Chairman Pearce and Members Miscimarra and McFerran) found, in agreement with the judge, that Helms engaged in protected, concerted activity when she discussed scheduling complaints with co-workers and presented those complaints to managers, and that Kelly’s unlawfully discharged her for that activity. (JA 4.) To remedy her unlawful discharge, the Board’s Order requires Kelly’s to cease and desist from the unfair labor practice found and from, 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. Affirmatively, the Order directs Kelly's to reinstate Helms to her former job and make her whole for any loss of earnings and benefits. (JA 4.)

### **STATEMENT OF RELATED CASES AND PROCEEDINGS**

There are no related cases or proceedings.

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that Kelly's violated Section 8(a)(1) of the Act by discharging Helms for her protected and concerted conduct in discussing with other employees, then raising to management, bartenders' concerns about losing prime shifts to new hires. Given the undisputed fact that co-workers joined Helms in meetings with management and raised the same concerns, there is no doubt that this protected activity was concerted, and that Kelly's could not lawfully discharge her for it. Moreover, the record amply demonstrates Kelly's animus toward employees raising scheduling complaints: two managers warned Helms not to raise her scheduling concerns directly to the Mitchells, and Angelia Mitchell told her that Eugene wanted to fire all the staff because they complained about working conditions. In addition, immediately after telling Helms they knew she had been complaining about the work environment and her job to everyone except them, the Mitchells said they would not take it, and discharged her. In light of this overwhelming evidence of knowledge and animus

towards Helms's protected, concerted activity, her discharge was unlawful unless Kelly's can show that it fired her for a lawful reason. This Kelly's has failed to do.

Although Kelly's claims, based on discredited testimony, that it fired Helms because she refused to serve an African-American customer, the Board found that explanation to be false and therefore a pretext that masked the true motive, which was to get rid of an employee who dared to complain about working conditions. The credited evidence establishes that Helms did not refuse to serve the customer, and Kelly's has not met its burden of showing the administrative law judge's credibility ruling on that point was patently unreasonable. Kelly's gains no more ground in asserting that it discharged her for making comments to a co-worker about that customer's tipping habits. As the Board found, the credited evidence establishes that Kelly's never even mentioned the incident as a reason for her discharge. Nor did Kelly's bother to investigate the incident or give Helms an opportunity to explain, as it had done with other employees in similar circumstances.

Finally, there is no merit to Kelly's claim that the complaint was insufficient and the administrative law judge erred in considering evidence not specifically alleged there. Under the Board's rules, the complaint is not required to list every iota of evidence to be elicited at trial. Instead, the complaint need only give notice of the allegation, as it did here. Moreover, Kelly's had ample opportunity to

litigate the issue. Accordingly, Kelly's cannot establish that the complaint was flawed or that the administrative law judge abused his discretion by considering evidence not specifically listed in the complaint.

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT HELMS ENGAGED IN PROTECTED, CONCERTED ACTIVITY BY RAISING SCHEDULING CONCERNS TO MANAGEMENT AND THAT KELLY'S VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING HER FOR IT**

#### **A. Standard of Review**

The scope of the Court's inquiry in reviewing a Board order is quite limited. The Board's findings of fact—such as its finding that Helms engaged in protected, concerted activity—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). 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).

Moreover, the Board's factual findings, and the reasonable inferences drawn 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*. *Universal Camera*, 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)).

**B. Employees Engage in Protected, Concerted Activity Where, as Here, They Complain to Management about Working Conditions and Discuss Those Matters Among Themselves**

Section 7 of the Act guarantees 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 . . . ." 29 U.S.C. § 157. Section 8(a)(1) of the Act 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.” 29 U.S.C. § 158(a)(1). 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. *MCPc, Inc. v. NLRB*, 813 F.3d 475, 482 (3d Cir. 2016).

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. *Id.* (quoting 29 U.S.C. § 157). Thus, concerted employee activity may be protected by the Act even if it is unconnected with union activity or collective bargaining. *Id.*; *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969). 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, 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, schedules, wages, or other terms and conditions of employment. See *NLRB v. Hotel Employees & Rest. Employees Int'l Union, Local 26, AFL-CIO*, 446 F.3d 200, 207 (1st Cir. 2006) (employee complaints about shifts and scheduling protected); *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265-66 (9th Cir. 1995) (complaints about schedule changes protected); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1976) (walkout in protest of Palm Sunday schedule protected).

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. As the 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., Inc.*, 281 NLRB 882, 887 (1986) (adopting the analysis of concerted activity set forth in *Mushroom Transp.*), enforced *sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *D & D Distr. Co. v. NLRB*, 801 F.2d 636, 640 (3d Cir. 1986). Thus, an individual employee engages in concerted activity when she brings "a group complaint to the attention of management," even though

she is “not a designated spokesman.” *MCPc*, 813 F.3d at 485 (citing *Meyers*, 281 NLRB at 886). *See also Hugh H. Wilson Corp.*, 414 F.2d at 1355.

As the 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). Further, “any doubt” about an employee’s concerted activity is erased when other employees raise the same concerns about working conditions to management. *MCPc*, 813

F.3d at 485. *Accord Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1199 (D.C. Cir. 2005); *Alton H. Piester, LLC v. NLRB*, 591 F.3d 332, 340 (4th Cir. 2010).

**C. An Employer Violates the Act by Discharging an Employee for Engaging in Protected, Concerted Activity**

Typically, in assessing whether an employer has violated Section 8(a)(1) by discharging an employee for engaging in protected, concerted activity, the Board will focus on the critical inquiry of the employer's motivation for the discharge, using a test approved by the Supreme Court. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983) (approving a test first articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)). Under that test, if substantial evidence supports the Board's finding that protected, concerted activity was "a motivating factor" in the employer's decision, the Board's conclusion must be affirmed unless the employer proves, as an affirmative defense, that it would have taken the same action even absent the employee's protected activities. *Transp. Mgmt.*, 462 U.S. at 397-98; *NLRB v. Omnitest Inspection Servs.*, 937 F.2d 112, 122 (3d Cir. 1991).

If, however, the explanations advanced by an employer for its conduct are pretextual—that is, they did not exist or were not in fact relied upon—then the employer has not met its burden, and the inquiry is logically at an end. *Wright Line*, 251 NLRB at 1083-84. Thus, when the Board finds that an "employer's

purported justifications for adverse action against an employee are pretextual, then the employer fails as a matter of law to carry its burden” under *Wright Line*.

*Ozburn–Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016). See also *1621 Route 22 West Operating Co., LLC v. NLRB*, 825 F.3d 128, 146 (3d Cir. 2016); *Grane Health Care v. NLRB*, 712 F.3d 145, 154 (3d Cir. 2013).

Where, as here, the employer’s reason for discharging an employee is established on its admissions that protected activity played a part in the decision, no further analysis of motive is necessary. See, e.g., *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002), *enforced*, 63 F. App’x 524 (D.C. Cir. 2003); *Allied Aviation Fueling of Dallas LP*, 347 NLRB 248, 249 n.2 (2006), *enforced*, 490 F.3d 374, 379 (5th Cir. 2007); *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). As the courts have explained, such an established admission 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.2d at 1343 (quoting *NLRB v. Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958)).

Further, as the Court has recognized, “because there often is no direct evidence of antiunion motivation, the Board may rely on circumstantial evidence to prove such intent.” *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 815 (3d Cir. 1986). Among the factors supporting an inference of unlawful motivation are the

employer's knowledge of the employee's protected, concerted activity; the timing of the adverse action in relation to the activity; the employer's hostility to that activity; the employer's inconsistent employment practices; and the employer's reliance on pretextual justifications for the adverse action. *Omnitest Inspection*, 937 F.2d at 122.

Applying these principles here, the Board found that Helms, by raising concerns about shift scheduling in concert with other employees, engaged in protected, concerted activity, and that Kelly's acted unlawfully by discharging her for that conduct. Kelly's does not contest the Board's finding, under settled law, that Helms's protests about scheduling were protected under the Act. *See* cases cited at p. 15 above. Rather, it challenges the Board's findings that Helms's protests were concerted and that it discharged her for that activity. The Court should affirm those findings because, as we now show, they are well-supported by the credited record evidence.

### **1. Helms's protected conduct was concerted**

As noted (pp. 15-16), concerted activity can arise out of employees discussing common concerns among themselves, a single employee raising common concerns to management, or employees joining together to present concerns to management. *See MCPc*, 813 F.3d at 484-84. Ample evidence supports the Board's finding that Helms engaged in each of these. She and other

employees presented scheduling concerns to manager Lang. Then, after two bartenders gave notice of their intent to quit in March 2015 and Kelly's began interviewing replacements, Helms had multiple conversations with employees Flood, Healy, and Clark about inconsistencies in scheduling and the effect of the new hires on the more senior bartenders' schedules. In April, Helms and Flood met with manager Henry and raised their concerns that the more senior bartenders would lose shifts, particularly the more lucrative shifts, to the new bartenders. Helms and Healy then met with Henry about the same issue. (JA 14.)

Helms also met independently with Henry approximately four other times, explaining to him that the scheduling concerns were not hers alone but that other bartenders were "unsure of their positions," and it was "causing anxiety" among them. (JA 15; JA 269-70.) Those discussions plainly constituted a continuation of the concerted activity, as they involved concerns that Helms and her co-workers had discussed among themselves and previously raised to management. As the Ninth Circuit has explained, even "[t]he lone act of a single employee is concerted if it "stems from" or "logically grew" out of prior concerted activity." *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995) (citing *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988)). In addition, individual complaints that "further a common interest or by their terms seek to induce group action in the common interest" are also concerted. *MCPc*, 813 F.3d at 485. Here, Helms's individual

discussions with manager Henry and her co-workers clearly furthered a common interest, evidenced by the group presenting its common scheduling concerns directly to management.

Kelly's repeated claims (Br. 31, 33, 36) that Helms acted only in her own self-interest fail to account for the overwhelming record evidence that she acted in concert with other employees. Not only did Helms discuss scheduling concerns with her co-workers, she joined them in presenting their complaints to managers together. Employees who discuss issues that they raise concertedly to management engage in "quintessential[ly] protected concerted activity." *Greater Omaha Packing Co., Inc.*, 360 NLRB 493, 493 n.3, *enf'd in relevant part*, 790 F.3d 816, 821-22 (8th Cir. 2015). *Accord Hugh H. Wilson Corp.*, 414 F.2d at 1348-49 (group of employees who raised Christmas bonus issue to employer engaged in concerted activity).

In any event, Helms's subjective motive for raising concerns about scheduling—her belief that she and other more senior bartenders should get the more lucrative shifts—is irrelevant. Because Helms raised these concerns on behalf of, and in concert with, other employees, her complaints "were not merely self-interested," and were, therefore, concerted. *D & D Distr. Co. v. NLRB*, 801 F.2d 636, 640 (3d Cir. 1986). *See also Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 n.10 (7th Cir. 1976) (in determining whether employees engaged in

protected, concerted activity, “what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of ‘mutual aid or protection’ of employees”).

## **2. Kelly’s knew about Helms’s protected, concerted activity**

Kelly’s was fully aware of Helms’s protected, concerted activity. The administrative law judge credited Helms’s testimony that she, along with other employees, presented scheduling complaints to admitted supervisors and agents Lang and Henry. (JA 7, 15; JA 145-46, 188-89.) Kelly’s, however, asserts (Br. 33, 43) that its owners had no idea Helms had any concerns other than her own narrow interests. Contrary to Kelly’s claim, the Board found that both Eugene and Angelia Mitchell admitted knowing that Helms complained about shift scheduling. Specifically, Eugene Mitchell testified that in April 2015, manager Henry informed him Helms had complained about shift scheduling to other employees and to Henry. (JA 15-16; JA 294.) And Angelia Mitchell admitted that in mid-April 2015, she knew Helms and Flood had raised concerns about the shifts they would be assigned after the new bartenders were hired. She further admitted that Henry sent her an email informing her of Helms and Flood’s concerns. (JA 16; JA 311-12, 395-96.) In addition, the Board found that, in the April 30 meeting where the Mitchells discharged Helms, Angelia Mitchell stated that both Mitchells knew “the entire staff was complaining about working conditions.” (JA 16; JA 201.)

The record, therefore, fully supports the Board's finding that the Mitchells admitted knowing Helms "undertook her activities regarding complaints about the schedule with other employees." (JA 16.) Thus, Kelly's cannot seriously claim that there is "no evidence of any kind presented that the decisionmaker, *i.e.* Mr. Mitchell, had any knowledge of Ms. Helms' complaints, much less that they potentially coalesced into group action." (Br. 43-44.) The Mitchells' admissions provide ample evidence that Kelly's had direct knowledge of Helms's concerted activity.

**3. Kelly's exhibited animus toward Helms's protected, concerted activity**

Not only did Kelly's know about Helms's protected, concerted activity, it plainly demonstrated animus toward that activity. Thus, in October 2014, manager Lang told Helms and two other employees that complaining about scheduling "wasn't going to get [them] anywhere," and that Eugene Mitchell "would lose his shit" if they complained to him about scheduling. (JA 16; JA 179.) Further, in December 2014, Lang told Helms that if Helms complained to the Mitchells about the schedule, Lang would be instructed to take shifts away from her. In April 2015, Helms and Flood received similar warnings from manager Henry: he cautioned that raising concerns about the schedule to the Mitchells would result in the loss of hours and shifts altogether. (JA 7; JA 191.) In a separate meeting with Helms and Healy, Henry told Helms that sending an email to Eugene Mitchell

about the schedule would just anger him. (JA 8; JA 195-96.) And in a private meeting with Helms, Henry told her that Eugene Mitchell had instructed him to take a dishwasher off the schedule altogether after that employee requested several days off. (JA 8; JA 160.)

Finally, the administrative law judge found that, in the April 30 meeting, the Mitchells effectively told Helms they were discharging her for an unlawful reason. Thus, immediately after telling Helms they knew she had been complaining about the work environment and her job to everyone except them, Eugene said they would not take it, and discharged her. Any ambiguity in their message was dispelled by Angelia Mitchell's further statement that Eugene wanted to "clean house" and fire all the employees because they were complaining about working conditions. (JA 16; JA 201.) *See L'EGGS Prods.*, 619 F.2d at 1343 (credited testimony of employee that supervisor told her he had been instructed "to find out who had been talking about the union and to get rid of her" constituted "an outright confession of unlawful discrimination"). *Accord NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 401 (4th Cir. 1991). As the Court has acknowledged, "the law recognizes that employees have a legitimate interest in 'acting concertedly to make their views known to management without being discharged for that interest.'" *Hugh H. Wilson Corp.*, 414 F.2d at 1350 (quoting *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948)).

Overlooking these findings of unlawful motive, Kelly's professes (Br. 48-49) that it could not have harbored animus against Helms because it did not take action against other employees who contacted the Mitchells about discrete scheduling matters. The Board, however, found that the occasions cited by Kelly's concerned "routine requests for days off" or "routine notifications such as being late for work or covering the shift of another employee." (JA 16; JA 617-743.) Indeed, Kelly's does not dispute the Board's finding that none of those requests "involved concerted protected complaints by employees regarding perceived problems" in scheduling. (JA 16.) Far from demonstrating that the Mitchells "are approachable and have an open door," as Kelly's argues (Br. 48), the emails and text messages cited by Kelly's simply reflect Angelia Mitchell's testimony that employees were required to email her, Eugene, and the manager when seeking a discrete change to the schedule. (JA 7, 16; JA 384-85.) Those routine communications are "insufficient to rebut the evidence" establishing that Kelly's harbored animus toward Helms for complaining about scheduling. (JA 16.)

**4. The timing of Helms's discharge supports the Board's finding that it was unlawfully motivated**

In addition to the direct evidence establishing Kelly's animus, the Board relied upon the timing of Helms's discharge. Helms's "precipitous discharge" on April 30 occurred shortly after her series of protected, concerted complaints to Henry about scheduling in March and April. (JA 16.) Such circumstantial

evidence supports the inference that Helms's discharge was unlawfully motivated. *See 1621 Route 22 West Operating Co., LLC v. NLRB*, 825 F.3d 128, 146 (3d Cir. 2016) (timing of discharge supports finding of unlawful motivation).

Kelly's claims (Br. 42), incorrectly, that its asserted reason for discharging Helms—namely, the April tipping incident—was more proximate in time to her discharge. In fact, Helms voiced complaints about scheduling until the end of April, when she was discharged. (JA 8; JA 269.) Moreover, as shown below, the Board reasonably rejected as pretextual Kelly's claim that it discharged Helms for an alleged "racist incident." (Br. 42.)

#### **5. Kelly's stated reasons for Helms's discharge were pretextual**

Substantial evidence supports the Board's finding that Kelly's stated reasons for discharging Helms were pretextual. (JA 17.) Kelly's contends that it discharged Helms "as a result of an incident of blatant racism" (Br. 39) and because of her "negative attitude" (Br. 44-45, 54). But Kelly's cannot meet its burden simply by articulating a nondiscriminatory reason for firing Helms.

*Herman Bros, Inc. v. NLRB*, 658 F.2d 201, 208-09 (3d Cir. 1981); *E&L Transport Co. v. NLRB*, 85 F.3d 1258, 1271 (7th Cir. 1996). Rather, as discussed (pp. 17-18), once the evidence supports an inference of antiunion discrimination, Kelly's bears the burden of *demonstrating* that it would have taken the same action regardless of

the employee's protected activity. *1621 Route 22 West*, 825 F.3d at 146. Kelly's failed to meet this burden.

As an initial matter, the Board found that Kelly's never notified Helms that racist comments were the basis for her discharge. Indeed, both Angelia Mitchell and Eugene Mitchell, the "ultimate decision-maker," according to Kelly's (Br. 43), admitted that they never even mentioned race in the April 30 meeting with Helms, much less told her that it was the reason for her discharge. (JA 12 n.21, 17; JA 427-28, 436, 486-87.) Further, Eugene's testimony that race was the "paramount" reason for discharging Helms cannot be squared with his admission that he never mentioned race at the meeting. (JA 426, 436.) Thus, Kelly's claim that the meeting "focused on the racist conduct" is belied by the testimony of its own witnesses. (Br. 40.)

Further, the Board found "no credible evidence" to support Kelly's claim that it discharged Helms for a purportedly negative attitude. Kelly's never advised Helms that other employees had complained about working with her or that her attitude was the reason for her discharge. (JA 17.) Kelly's failure to inform Helms of this asserted basis for her discharge likewise supports the Board's finding of pretext. *D & F Indus.*, 339 NLRB 618, 622 (2003). *See also Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1203 (D.C. Cir. 2005) (employer's claim that it discharged an employee for negativity and attitudinal issues was "simply another

way of indicating that he was terminated because he engaged in protected, concerted activity”). *Accord Dayton Typographic Serv. v. NLRB*, 778 F.2d 1188, 1193 (6th Cir. 1985).

In addition, Kelly’s failure to conduct an investigation or give Helms an opportunity to explain her actions in connection with the April tipping incident supports the Board’s finding of pretext. By contrast, when a customer accused bartender Sarah Clark of not providing service and saying “I work for tips, fuck you,” Eugene Mitchell spoke with Clark to get her side of the story. (JA 9; JA 299, 569-70.) Moreover, far from disciplining Clark, much less firing her, Mitchell simply told Clark her behavior was inappropriate.<sup>2</sup> (JA 9; JA 301.) Kelly’s peremptory treatment of Helms was much harsher. Rather than investigate the incident that purportedly prompted her discharge, Kelly’s “abruptly terminated Helms and never raised this incident” when it fired her. (JA 17.) This disparate treatment supports the Board’s finding of pretext. *See Herman Bros.*, 658 F.2d at 210 (inconsistency in applying rules “justifies the Board’s inference that the Company’s proffered excuse [for discharging an employee] was not legitimate”).

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<sup>2</sup> The treatment of Clark also shows that Kelly’s was well aware of the bartenders’ practice of not serving quickly those customers known not to tip. (JA 9, 17; JA 208-10.) Eugene Mitchell acknowledged that this policy was “quite common in the restaurant industry.” (JA 9; JA 300.)

**6. Kelly's failed to show that the administrative law judge's credibility resolutions are "inherently incredible or patently unreasonable"**

Kelly's primarily attacks the Board's findings by faulting the administrative law judge's credibility rulings, which it incorrectly views as based on "bald assertions of 'inconsistencies' and statements that the testimony was not 'corroborated.'" (Br. 40.) Kelly's also argues (Br. 39-51) that the judge should have credited more of its witnesses' testimony. To overcome the judge's credibility determinations, however, Kelly would have to show that they are "inherently incredible or patently unreasonable." *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001). Kelly's utterly fails to make that showing.

Contrary to Kelly's claims (Br. 46), the judge fully delineated his credibility rulings. Thus, the judge explained that he credited Helms's account of the April 30 meeting based on her demeanor and his finding that the testimony of Kelly's witnesses was "not mutually corroborative and [was] replete with other impairments that establish it as unreliable." (JA 12.) Moreover, the judge found that the "elaborate fiction" about listening devices that the Mitchells presented at the April 30 meeting and tried in vain to explain at trial was "indicative of their untrustworthiness as witnesses." (JA 12.) Indeed, Angelia Mitchell admitted that their claim they had recorded Helms's conversations was a ruse. (JA 11; JA 405.)

Moreover, despite Eugene Mitchell's claim that racial discrimination was the "paramount" reason for the April 30 meeting, both Mitchells admitted at the hearing that they did not even raise the issue at that meeting. (JA 12 & n.21, 17; JA 426-28, 436, 486-87.) In addition, Kelly's witnesses contradicted each other regarding the ultimate result of the meeting: Eugene and Angelia Mitchell characterized Helms's discharge as a "mutual separation," but Henry testified that Eugene discharged Helms because of "discriminatory acts regarding race." (JA 13; JA 409, 428, 520.)

Further, the judge found Angelia Mitchell's testimony to contain "such a fundamental internal inconsistency [that it was] not a reliable basis on which to make factual findings." (JA 13.) Specifically, the judge noted that in testifying on direct examination about the April 30 meeting with Helms, Mitchell first claimed that she discussed the April tipping incident but could not remember mentioning the customer's race. Mitchell then contradicted herself, testifying that in the meeting she noted that both the customer and the co-worker were black. On cross-examination, Mitchell reversed course again and testified that at the meeting she did not say anything to Helms about race.<sup>3</sup> (JA 13; JA 407, 486-87.) Given these

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<sup>3</sup> The judge further found that Angelia "Mitchell's testimony is not corroborated by Heyward in important respects and appears designed to buttress [Kelly's] defense." (JA 11 n.16.) Accordingly, and for the reasons noted above, he "specifically discredited Mitchell's testimony that Heyward told her that Helms refused to serve the customer because she was black and that Helms was a racist." (JA 11 n.16.)

differing versions, the judge reasonably declined to credit her testimony. *See Buncher v. NLRB*, 405 F.2d 787, 789 (3d Cir. 1969) (affirming Board’s credibility determination that company’s witness testimony was “fraught with inconsistencies, internal contradictions, exaggerations and implausibilities”).

The administrative law judge also properly declined to credit Henry’s testimony because it “was devoid of any details” and conflicted with that of the Mitchells. (JA 13.) For example, Henry testified vaguely that Helms’s discharge was “tied to the discriminatory act,” without identifying the alleged act. (JA 516.) He also repeatedly testified that he did not recall events and stated that he did not “recall a whole lot more than the reason for the termination itself.” (JA 524-25.) In discrediting Henry’s testimony, the judge further relied on his demeanor, which “reflected substantial uncertainty.” (JA 13.)

Kelly’s gains no more ground in arguing that “Heyward offered testimony that Ms. Helms made racist statements and refused to serve African-American customers.” (Br. 39.) Despite Heyward’s claim about Helms refusing service, the judge reasonably found Heyward not to be a credible witness because her “testimony was often disjointed and not cohesive,” and reflected her “interpretation” instead of focusing on factual events. (JA 10; JA 322, 324.)<sup>4</sup>

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<sup>4</sup> To be sure, the judge partially credited Heyward’s testimony, uncontroverted by Helms, that after Heyward received a good tip from an African-American customer Helms had identified as a bad tipper, Helms said, “it must be because you’re black,

Given the substantial conflicts in its witnesses' testimony, Kelly's claim that "[e]very witness" at the April 30 meeting except Helms "testified that the meeting was in regard to the incident of racism involving Chelsea Heyward" (Br. 39), is simply incorrect. In any event, having multiple discredited witnesses testify is not enough to overcome the deference afforded to well-reasoned credibility determinations. *See Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 220-21 (D.C. Cir. 2016) (declining to overturn credibility resolutions where judge rejected testimony of two witnesses).<sup>5</sup>

Unlike Kelly's witnesses, Helms proved credible because, as the judge found, her testimony "was detailed and consistent on both direct and cross-examination and was inherently plausible." (JA 12.) In addition, her demeanor "reflected a sincere desire to testify truthfully and her testimony had sufficient detail to render it reliable." (JA 6, 12.) Contrary to Kelly's claims (Br. 39, 40, 47), the absence of corroborating witnesses does not defeat the judge's decision to

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too." (JA 10; JA 327.) But neither this testimony nor Heyward's discredited claims help Kelly's because, as shown at pp. 27 and 30, the Mitchells never even raised the tipping incident at the April 30 meeting when they discharged Helms.

<sup>5</sup> Even if, as Kelly's claims, all of its witnesses had testified to the same thing, it would not have overcome its burden to show that the judge's credibility resolutions were unreasonable. *See L'Eggs Prods.*, 619 F.2d at 1343 ("If the number of witnesses making an assertion were the test, L'Eggs would win, hands down. But neither the [Administrative Law] Judge nor the Board nor this court is required to accept the self-serving declarations of L'Eggs' management personnel").

credit her testimony. It is settled that “uncorroborated and self-serving statements . . . may, standing alone, constitute substantial evidence where such testimony is reasonably deemed to be credible and trustworthy, and where it is not undermined by evidence to the contrary.” *Sam’s Club v. NLRB*, 141 F.3d 653, 658 (6th Cir. 1998). Kelly’s has not provided any credible evidence that undermines Helms’s testimony. Therefore, the judge’s demeanor-based credibility resolutions, which he fully explained, are entitled to “great deference” by the Court and should be upheld. *Louton, Inc., v. NLRB*, 822 F.2d 412, 414 (3d Cir. 1987).

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In sum, the Board’s finding that Kelly’s unlawfully discharged Helms for engaging in protected, concerted activity is amply supported by the credited record evidence. Importantly, Kelly’s has not shown that the Board’s detailed credibility determinations are “inherently incredible,” as required for the Court to overturn them. *Atlantic Limousine*, 243 F.3d at 718-19. Because Kelly’s failed to establish that it would have discharged Helms in the absence of her protected, concerted activity, the Court should uphold the Board’s finding that Kelly’s violated the Act by discharging her.

**D. Kelly’s Remaining Contentions Lack Merit**

Kelly’s argues (Br. 25-30) that Board’s decision should be overturned because it was denied due process. Specifically, it asserts that the complaint was

insufficient and the administrative law judge erred by considering certain evidence not specifically mentioned in the complaint. Kelly's, however, fails to show that the Board, affirming the judge's decision, abused its discretion in rejecting those claims.

**1. The complaint was sufficient to put Kelly's on notice of the allegation against it**

Kelly's contends that it was denied due process because the complaint did not detail all the facts relied upon by the General Counsel at trial. Specifically, Kelly's complains (Br. 26-27) that the General Counsel elicited testimony showing that Helms and other employees raised scheduling concerns to manager Kristin Lang (who was not named in the complaint) in October and December of 2014, and that employees Clark and Flood (also not named in the complaint) discussed scheduling concerns with Helms and with managers.

Kelly's also appears to assert (Br. 25-26, 29) that the deputy chief administrative law judge erred in denying its motion for a bill of particulars, which sought "the actions taken or considered taken for the interest of anyone other than Ms. Helms and the facts to support that notion." (JA 30.) As shown below, however, the judge did not abuse his discretion in denying the motion. (JA 37-38.) *See NLRB v. S.W. Evans & Son*, 181 F.2d 427, 431 (3d Cir. 1950) (trial examiner did not abuse his discretion by denying, in part, employer's motion for a bill of particulars); *Kenrich Petrochemicals, Inc. v. NLRB*, 893 F.2d 1468, 1484 (3d Cir.

1990) (administrative law judge did not abuse his discretion by denying discovery request), *aff'd*, 907 F.2d 400 (3d Cir. 1990) (en banc).

Kelly's misapprehends the nature of administrative complaints. As the deputy chief administrative law judge explained in his Order denying Kelly's motion, under the Board's rules, a complaint need only contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices." (JA 37, quoting 29 C.F.R. § 102.15.) It has long been the Board's practice that "matters of evidence need not be stated in the complaint." *Local 363, affiliated with the Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of Am., AFL-CIO*, 123 NLRB 1877, 1913 (1959). The Board, with the Court's approval, "allow[s] the General Counsel considerable leeway in amplifying or expanding certain details not specifically set forth in the complaint if they accord with the general substance of the complaint." *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 73 (3d Cir. 1965). Accordingly, the deputy chief administrative law judge properly concluded that the complaint was "sufficient to acquaint [Kelly's] with the issues to be considered at trial and to defend against the allegations made in the complaint," and he did not abuse his discretion by denying Kelly's motion. (JA 37.)

There is no more merit to Kelly's related claim (Br. 25, 29-30) that the deputy chief administrative law judge should have allowed prehearing discovery

by granting the motion for a bill of particulars. As the Court has noted, “neither the constitution nor the Administrative Procedure Act confer a right to discovery in federal administrative proceedings.” *Kenrich Petrochemicals*, 893 F.2d at 1484. Moreover, “the extent of discovery in enforcement proceedings has been left to the rule-making power of the NLRB.” *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976) (citing *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 487 (2d Cir. 1976)). Under the Board’s rules, for example, depositions are generally not allowed, and documents in the possession of the Board or General Counsel generally will not be produced without written consent. 29 C.F.R. § 102.30, 29 C.F.R. § 102.118(a)-(b). The Board’s limits on pretrial discovery recognize “the peculiar character of labor litigation [where] witnesses are especially likely to be inhibited by fear of the employer’s or in some cases the union’s capacity for reprisal and harassment.”<sup>6</sup> *Roger J. Au & Son*, 538 F.2d at 83.

To be sure, Kelly’s “was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint.” *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938). But Kelly’s was not entitled to old-fashioned, common-law pleading, to which “[n]ot even the courts any longer require adherence.” *Drukker Commc’ns, Inc. v. NLRB*, 700 F.2d 727,

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<sup>6</sup> Thus, Kelly’s misses the mark entirely by suggesting (Br. 30) that because discovery is required in criminal proceedings, administrative complaints should name every fact to be elicited at the hearing.

734 (D.C. Cir. 1983). Instead, “it is sufficient that the respondent ‘understood the issue and was afforded full opportunity to justify its actions.’” *Id.* (quoting *Bakery Wagon Drivers & Salesmen, Local 484 v. NLRB*, 321 F.2d 353, 356 (D.C. Cir. 1963)). *Accord Mackay Radio*, 304 U.S. at 350.

The complaint in this case fully satisfied this standard. It alleged that Helms “openly complained about shift schedules” in March and April 2015, that her complaints constituted protected, concerted activity under the Act, and that Kelly’s discharged her for engaging in that activity.<sup>7</sup> (JA 20-21.) The only issue before the administrative law judge was the one alleged in the complaint: whether Helms’s discharge violated the Act. (JA 6 n.3.)

Moreover, the administrative law judge afforded Kelly’s ample opportunity to fully litigate the General Counsel’s claim that it unlawfully discharged Helms because of her protected, concerted activity. Thus, Kelly’s called witnesses and presented documentary evidence on that issue. They also cross-examined the General Counsel’s witnesses. When an issue is fully litigated, as it was here, parties “obviously have notice of the issue and have been given an opportunity to respond. This satisfies the requirement of administrative due process.” *Yellow*

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<sup>7</sup> The complaint also alleged that Helms’s protected, concerted activity included raising concerns regarding “the loss of pay resulting from the malfunctioning of [Kelly’s] computer system.” (JA 20.) At the hearing, the General Counsel amended the complaint to eliminate that allegation. (JA 146.)

*Freight Sys., Inc. v. DOL*, 954 F.2d 353, 358 (6th Cir. 1992). *See also S.W. Evans*, 181 F.2d at 431 (rejecting employer’s claim that it was “necessary for adequate preparation and prosecution of its defense” to know the times each violation occurred). Simply put, Kelly’s was on notice of the conduct in question and had the opportunity to present its defense. Administrative due process requires no more.

**2. Kelly’s failed to show that the administrative law judge abused his discretion**

Next, Kelly’s argues (Br. 28) that the administrative law judge erred by “considering, and relying upon” evidence involving Kristin Lang, a stipulated supervisor and agent of Kelly’s. (JA 7; JA 188-89.) The Court reviews procedural challenges to Board orders, including decisions of an administrative law judge regarding admission of evidence, for abuse of discretion. *Kenrich Petrochemicals*, 893 F.2d at 1484. As we now show, Kelly’s failed to establish that the judge abused his discretion.

The administrative law judge clearly stated in his decision, and at the hearing, that he “would not consider anything to be an unfair labor practice unless it had been alleged as such in the complaint.” (JA 6 n.3; JA 187-88.) Moreover, the judge went on to state that while he would not consider new allegations of unfair labor practices, he would “consider that evidence with regard to the questions that are presented in the complaint, i.e., the alleged unlawful discharge of

Ms. Helms.” (JA 187-88.) Consistent with his ruling, the judge did not consider—or make any findings regarding—any unfair labor practice except the one alleged in the complaint, namely, whether Kelly’s violated the Act by discharging Helms for engaging in protected, concerted activity. (JA 6 n.3, 17.) But he did, also consistent with his ruling, consider evidence not specifically pled in the complaint that related to Helms’s discharge.

In its brief, Kelly’s acknowledges the administrative law judge’s ruling that he would not consider additional allegations of unfair labor practices, but then chides him for “considering, and relying upon, those very things.” (Br. 28.) Here Kelly’s incorrectly equates the presentation of evidence with the presentation of additional unfair-labor-practice allegations. The judge was very clear that he would consider evidence regarding the alleged unlawful conduct. By considering evidence that Helms and other employees raised their concerns regarding shift scheduling with admitted supervisor Kristin Lang, the administrative law judge acted in accord with his ruling. The General Counsel did not argue at the hearing—and the judge made no finding—that Lang engaged in any unfair labor practice.<sup>8</sup>

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<sup>8</sup> Furthermore, as shown (pp. 22-23), the unfair-labor-practice finding is not based solely on evidence that Helms and others complained about scheduling to Lang. Rather, the administrative law judge based his decision on the owners’ admissions that Helms and other employees complained about scheduling, and on Angelia

For this reason, Kelly's errs in asserting that it was denied due process when the General Counsel purportedly "quadrupled the timeframe of the complaint" by presenting evidence that Helms and others raised scheduling concerns to a manager in October and December 2014. (Br. 22, 26-27.) The judge did not expand the complaint allegation beyond Helms's discharge. Although he permitted additional evidence regarding protected, concerted activity that was a basis for her discharge, he did not abuse his discretion in doing so.

Finally, as Kelly's acknowledges (Br. 29), the administrative law judge offered it additional time—which it did not take—to prepare its case after the General Counsel presented evidence regarding Lang and other employees. Nevertheless, it argues that the offer of additional time "does not remedy the Government willfully hiding witnesses and evidence." (Br. 29.) As explained above, "the Government" is not required to name every witness or fact in the complaint and did not willfully hide witnesses or evidence. Rather, the complaint should, as it did, apprise Kelly's of the unfair-labor-practice allegation against it. By giving Kelly's additional time to prepare its case, the judge afforded Kelly's a "full opportunity to justify the action of its officers as innocent rather than discriminatory." *Mackay Radio*, 304 U.S. at 350. *Accord Drukker Commc'ns*, 700

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Mitchell's admission that another manager, Henry, told her Helms and Flood had raised issues regarding scheduling.

F.2d at 734 (respondent “was allowed a substantial adjournment in which to gather and supply any different or ameliorating evidence, which it did not do”). Kelly’s has failed to show that the administrative law judge abused his discretion in any way.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Kelly's petition for review and enforce the Board's Order in full.

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October 2017

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

MID-ATLANTIC RESTAURANT GROUP	)	
LLC d/b/a KELLY'S TAPROOM	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-4300, 17-1054
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	04-CA-162385
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Kellie Isbell certifies that she is a member in good standing of the State Bar of Maryland. She is not required to be a member of this Court's bar, as she is representing the federal government in this case.

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 9,436 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 5th day of October, 2017

**UNITED STATES COURT OF APPEALS  
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**CERTIFICATE OF SERVICE**

I hereby certify that October 5, 2017, I electronically filed the foregoing document 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 further 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 addresses listed below:

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Dated at Washington, DC  
this 5th day of October, 2017