

Nos. 18-1600, 18-1964

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PARKVIEW LOUNGE, LLC d/b/a ASCENT LOUNGE

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

JULIE B. BROIDO
Supervisory Attorney

MILAKSHMI V. RAJAPAKSE
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2996
(202) 273-2914

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Assistant General Counsel

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Parkview Lounge, LLC d/b/a Ascent Lounge (“Parkview”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order against Parkview.

The Board's Decision and Order issued on April 26, 2018, and is reported at 366 NLRB No. 71. (JA 482-93.)¹

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)), and its Order is final with respect to all parties. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because the unfair labor practice occurred in New York, New York.

Parkview filed its petition for review on May 29, 2018. The Board filed its cross-application for enforcement on June 27, 2018. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that Parkview violated Section 8(a)(1) of the Act by discharging employee Susann Davis for her protected concerted activity in voicing group workplace concerns to Parkview managers during a staff meeting.

¹ Record references are to the Joint Appendix ("JA") filed with Parkview's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to the opening brief.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by Davis, the Board's General Counsel issued a complaint alleging that Parkview violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Davis for her protected concerted activity. After a hearing, the administrative law judge found, based on consideration of the entire record including witness credibility, that Parkview had violated the Act as alleged. On review, the Board found no merit to Parkview's exceptions and adopted the judge's findings and recommended order with minor modifications.

I. THE BOARD'S FINDINGS OF FACT

A. Background; Parkview Employs Susann Davis as a Cocktail Server

Parkview is a restaurant and lounge located in Manhattan. (JA 482, 484; 427, 435.) It is a subsidiary of City Nights Hospitality ("CNH"), an entity owned and operated by Chief Executive Officer Brian Packin. (JA 484; 42, 105, 325-26.) Packin and CNH Operations Manager Ray Quinones are personally involved in managing Parkview's employees—bartenders, cocktail servers, busboys, kitchen staff, and other on-site staff—but for much of the time period herein, they delegated day-to-day operation of Parkview's business to General Manager Geoffrey Daley, Assistant Manager Jonathan Torres, and Floor Manager Natlya Aksentyeva. (JA 484; 26, 42, 130-32, 148-52, 196, 328, 347.)

When Parkview opened its doors in June 2015, Susann Davis was among the first cocktail servers hired. (JA 482, 484; 24-25, 104-06, 148, 152, 176, 218.) She quickly proved an asset and won the good opinion of her managers. (JA 484-85 & n.4; 35-36, 153, 343-44.)

B. Davis and Other Cocktail Servers Begin Discussing Concerns About Their Working Conditions, Raising Some of Their Concerns with Management

Within a few months of Parkview's opening, the cocktail servers began discussing aspects of their working conditions, pay, and benefits. (JA 485; 27-31, 107-09, 119-20.) They complained to one another about the cold temperature of their indoor work areas, and the skimpy uniforms and high heels they were required to wear. (JA 485; 27-28, 107, 123-24, 128-29.) They also discussed issues related to their pay and benefits, such as the lack of any compensation for periods when servers were required to be on-call, and the lack of transit and health benefits offered by other employers. (JA 485; 28-30, 107-08.) In addition, they shared their frustrations with the heavy-handed management style of Assistant Manager Jonathan Torres. (JA 485; 29, 40, 66-67, 112-13, 136.)

At times, managers were in the vicinity when employees discussed these matters. (JA 485; 30, 62, 89-90, 109, 130.) At other times, employees proactively took their concerns directly to management. (JA 485; 31, 62-63, 90-91, 109, 296-97, 303.) For example, employees including Davis complained to General

Manager Daley about the cold temperatures and Torres's management style. (JA 485 & n.9; 31-33, 92, 136, 153-54, 199.)

C. Davis Has a Tense Exchange with Assistant Manager Torres, After Which Parkview Promptly Removes Him From the Facility; Davis Is Not Disciplined

On December 3, 2015, Davis disregarded an instruction from Torres because she believed that it contradicted an earlier instruction she had received from General Manager Daley. (JA 482, 485; 40-41.) In response, Torres removed Davis from the floor, which angered Davis. (JA 482, 485; 40-41.) She immediately emailed CEO Packin, asking to meet with him to discuss her concerns about Torres's "poor decisions" as a manager. (JA 482, 485-86; 41, 66, 452, 458-59.) Packin stated he was willing to meet but noted that he already understood the problem at hand and had a "game plan in place to improve all around." (JA 486; 458.)

In an email to Packin several hours later, Torres related his version of the events surrounding his decision to remove Davis from the floor. (JA 486; 475.) Torres alleged that Davis had angrily objected to his "micromanaging" her, and that she had "wished [him] death" as she clocked out. (JA 486; 475.)

Despite these allegations, Packin did not issue any discipline to Davis. (JA 482, 486 n.14; 41.) He praised her for her "concern and dedication" in bringing the problem to him. (JA 486; 458.) Meanwhile, he removed Torres from his

position at Parkview and placed him at another CNH-owned restaurant and lounge, where Packin felt he could gain some needed training as a manager. (JA 482, 486 n.14; 42, 136, 289.)

D. Davis Has a Tense Exchange with Floor Manager Aksentyeva; Packin Holds a Meeting To Smooth Things Over, Which Ends with Aksentyeva Praising Davis's Performance as a Server and Packin Assuring Her of Job Security

On January 15, 2016, Davis received permission from General Manager Daley to take a break during a party event. (JA 482, 486; 33-34, 460-61.) She went to a breakroom and used her phone. (JA 482, 486; 34.) At some point while she was there, Floor Manager Aksentyeva entered the breakroom and chastised her for using her phone rather than eating. (JA 482, 486; 34.) Davis responded that she could do as she wished during her break. (JA 482, 486; 34.)

About one week later, on January 22, Packin held a meeting with Daley, Aksentyeva, and Davis to discuss the "conflict" the previous week between Aksentyeva and Davis. (JA 482, 486-87; 34-36, 460-65.) He explained that he wanted to resolve such issues "internally" and directly, rather than letting things "bleed out" to "other staff members of the team." (JA 482, 486-87; 35, 460.) He then asked Davis if she had a problem "tak[ing] direction" or "constructive criticism" from managers. (JA 486-87; 461.) Davis said that she did not and explained that she had responded sharply to Aksentyeva because she felt

“attacked” and “spoken down to.” (JA 486-87; 461.) Packin ventured that it probably was not Aksentyeva’s intention to make her uncomfortable, and in this regard he noted that Aksentyeva, in fact, had a high opinion of Davis’s work. (JA 486-87; 461.) According to Packin, Aksentyeva had “always said” that she had “a great team” when Davis was on duty, and had even mentioned putting new servers with Davis for training purposes. (JA 486-87; 461.) Aksentyeva confirmed that she respected Davis as a person and a server, and that it had not been her intention to disrespect Davis “at all.” (JA 486-87; 465.)

Packin summed up the situation by stating, “I think Natalia [Aksentyeva] can grow from this experience and you [Davis] can grow from this experience.” (JA 486-87; 36, 462.) He added that no one’s job was at stake—“hers isn’t, yours isn’t.” (JA 482, 486-87; 36, 462.) At the end of the meeting, Aksentyeva apologized to Davis and assured her that she was doing “a great job on the floor.” (JA 482, 486-87; 36, 465.)

E. Davis Notices that She Is Assigned Fewer Hours than Usual and Asks To Discuss Her Schedule with Daley; He Agrees To Meet But Denies that Anything Out of the Ordinary Lay Behind the Schedule Change

Soon after the January 22 meeting, Davis received her schedule and noticed that she was assigned fewer hours than usual. (JA 487; 47, 453-54.) She wrote an email to General Manager Daley on January 25, asking “if there’s an issue that explains this sudden change.” (JA 487; 453-54.) Daley responded the following

day that he “need[ed] to see changes and improvement in [Davis’s] service,” but when Davis questioned this rationale, Daley said he had made the schedule as he did every week “to accommodate the needs of the business as well as adding additional staff into the schedule.” (JA 487; 47, 453.) He offered to discuss the issue in person. (JA 487; 453.)

F. Davis Raises Employee Concerns to Managers at a Staff Meeting

The following day, CNH Operations Manager Quinones and General Manager Daley held a meeting with all employees to discuss various workplace issues. (JA 482, 487; 42-43, 109, 139-40, 180-81.) After Quinones and Daley covered their planned material, they opened the floor to questions and concerns from the employees. (JA 43, 109.) Davis took the opportunity to raise several issues. (JA 482, 487-88; 43, 110, 227.) She asked if Parkview would consider paying employees for periods when they were required to be on call. (JA 482, 487-88; 44, 449.) She said that otherwise, “we pretty much waste our days.” (JA 488; 449.) Davis also asked if there was anything management could do “to make us more comfortable as servers being that it’s always so freezing cold” in the employees’ work areas. (JA 488; 449.) Davis suggested that if management was not willing to raise the temperature in those work areas, perhaps they might allow “us to wear a sweater” at work. (JA 488; 449.) She further advocated for employees to receive transit and medical benefits, stating that “we should be able

to get the benefits that [other] companies offer.” (JA 488; 44, 192, 199-200, 449.)

As Davis spoke, other employees in the room nodded their heads in agreement.

(JA 482, 488 n.19; 45, 110-11.)

Quinones later answered a few discrete questions from Davis about special-event pay. (JA 449-50.) As to the remaining issues she had raised, Quinones said he would report “everything” to Packin and get back to the employees. (JA 482-83, 488; 44, 449.)

G. After the Staff Meeting, Davis and Daley Meet To Discuss Davis’s Concerns About Her Schedule; Daley Raises Problems with Davis’s Performance; Davis Responds to His Allegations

Following the meeting, and after her shift ended on January 27, Davis met with Daley to discuss her work schedule. (JA 483, 488; 47-48, 455.) He alleged several problems with her conduct, claiming that she relied too much on the Servers’ Assistants; that because of her inattentiveness two weeks earlier, patrons at one of her tables had left without paying; that she was rude to two co-workers; and that she was difficult to speak to. (JA 488; 185-86, 455.)

The next morning, Davis emailed Daley a detailed response to his allegations. (JA 483, 488-89; 47-48, 455.) She defended her use of the Servers’ Assistants “to assist me at work,” saying that it was part of their duties to do so. (JA 488; 455.) With regard to the incident involving an unpaid bill, she said that she believed “the burden of responsibility is unfairly placed on me,” and noted that

she had immediately reported the issue to him when it happened. (JA 488; 455.) Turning to her alleged rudeness toward two co-workers, she explained the basis for her disagreements with them and noted that management had never expressed an interest in intervening or discussing such matters before. (JA 488; 455.) Similarly, responding to Daley's claim that she was hard to speak with, she noted that Daley had never mentioned any such problem, and emphasized that since starting at Parkview she had never experienced any issue communicating with or taking directions from him. (JA 488; 455.) She ended her email by stating that she was "disappointed" in the way Daley was treating her as an employee, and speculating that perhaps something had shifted since the January 22 meeting with Packin and Aksentyeva. (JA 488-89; 455.)

H. Daley Tells Packin that Davis Voiced Workplace Concerns at the Staff Meeting; Two Days Later, Parkview Discharges Davis, Citing One Reason at the Time and Adding Others After the Fact

Shortly after the events described above, Daley told Packin what had transpired at the January 27 staff meeting. (JA 483, 489 & n.22; 184, 203-04.) He specifically relayed Davis's comments regarding room temperature, employee uniforms, pay, and benefits. (JA 489 & n.22; 184, 199-200, 203-04.) He further told Packin that he and Quinones had "offered a direct response to all the staff that were there at the time." (JA 489; 200.) As a separate matter, Daley noted Davis's

complaint about her work schedule and forwarded the email in which she responded to Daley's claims about her conduct at work. (JA 483, 489; 397.)

On January 29, just two days after the staff meeting where Davis voiced group concerns about the workplace, pay, and benefits, Packin discharged her, saying that it was for not getting along with management. (JA 483, 489; 25, 46.) During their conversation, which lasted about two minutes, Packin did not suggest that there were any issues with Davis's service or performance. (JA 489 & n.24; 46.) However, in a form filed two weeks later with the New York Department of Labor, Parkview stated that Davis had been discharged for confrontational relationships with managers and co-workers, as well as issues with her floor service. (JA 483, 489; 466-67.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing credited facts, the Board (Members Pearce, McFerran, and Emanuel) found that Parkview violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Davis for her protected, concerted activity in voicing group workplace concerns to management during the January 27 staff meeting. (JA 483.) In finding this unfair labor practice, the Board relied on Parkview's clear knowledge of Davis's protected, concerted activity, the swiftness of the discharge that followed—just two days after that activity—and Parkview's shifting and inconsistent reasons for its sudden action. (JA 483.)

The Board's Order requires Parkview 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 their rights under Section 7 of the Act (29 U.S.C. § 157). (JA 484, 492.) Affirmatively, the Order requires Parkview to: offer Davis reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position; make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her; compensate her for the adverse tax consequences, if any, of a lump-sum backpay award; remove from its files any reference to the unlawful discharge; and post a remedial notice. (JA 484, 492-93.)

STANDARD OF REVIEW

This Court's review of Board orders is "quite limited," and thus a Board order "cannot be lightly overturned." *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 96 (2d Cir. 1985). The Court reviews the Board's legal conclusions only to ensure that they have a reasonable basis in law, and in doing so the Court affords the Board "a degree of legal leeway" because "decisions based upon the Board's expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference." *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001) (internal quotation marks and citations omitted).

Similarly, the Court reviews the Board’s findings of fact only to determine whether they are supported by substantial evidence. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), *cited in Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988) (emphasizing that the question is not “whether [the Court] might make a different choice between inferences were the matter before [it] de novo”). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 121 (2d Cir. 2017). Accordingly, “reversal based upon a factual question will only be warranted if, after looking at the record as a whole, [the Court is] left with the impression that no rational trier of fact could reach the conclusion drawn by the Board.” *NLRB v. Albany Steel, Inc.*, 17 F.3d 564, 568 (2d Cir.1994) (internal quotation marks and alterations omitted). The Court’s review is “even further constricted” where, as here, the Board’s factual findings depend on credibility determinations made by an administrative law judge and adopted by the Board, because those determinations “may not be disturbed unless incredible or flatly contradicted by undisputed documentary testimony.” *NLRB v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board’s finding that Parkview violated Section 8(a)(1) of the Act by discharging employee Susann Davis because she

raised concerns about employees' working conditions, pay, and benefits at an employer-held staff meeting on January 27, 2016. An individual employee engages in concerted activity when she seeks to initiate, induce, or prepare for group action, or brings truly group complaints to management's attention. And such activity is protected by the Act if it is undertaken for the mutual aid or protection of employees in regard to their terms or conditions of employment. Under settled law, the element of concert may be reasonably inferred where a lone employee speaks up about matters affecting employees' work lives in the context of a group meeting called by management for the purpose of discussing workplace issues.

Applying these well-established principles, the Board reasonably found—and Parkview does not dispute—that Davis engaged in protected concerted activity by speaking up at the January 27 staff meeting to ask whether Parkview would consider changes that included paying employees for periods when they were on call, warming their work areas or letting them wear sweaters, and granting them transit and health benefits. As a visible testament to the concerted nature of Davis's appeals, the employees in the room nodded their heads in agreement as she spoke. Thus, there is no question that substantial evidence supports the Board's finding that Davis engaged in protected concerted activity on January 27.

The record also amply supports the Board's findings that Parkview officials, including CEO Brian Packin, knew about Davis's comments at the January 27 meeting and swiftly discharged her because of that protected conduct, in plain violation of the Act. Packin's deputies, Quinones and Daley, were present at the meeting and committed to relay employees' concerns to Packin. True to this promise, Daley reported Davis's comments to Packin. Accordingly, there is no merit to Parkview's claim that Packin lacked knowledge of Davis's protected concerted activity.

Moreover, the Board reasonably found that Parkview discharged Davis because of that activity. In particular, the stunningly obvious timing of the discharge—just two days after the staff meeting—and the absence of a consistent or plausible justification for her discharge, strongly support the Board's finding of unlawful motive. In so finding, the Board specifically rejected, as pretextual, Parkview's shifting claims—first that Davis was discharged for failing to “get along” with management, and later that she was discharged for performance issues and not getting along with coworkers.

Although Parkview now attempts to present the Court with its own view of the facts, which the Board rejected, it fails to show, as it must under the standard of review before the Court, that the Board's finding of pretext is not supported by substantial evidence in the record. Also contrary to Parkview's contentions, given

the Board’s finding that its proffered justifications for the discharge were pretextual, those justifications cannot serve as the legitimate “cause” for Davis’s discharge within the meaning of Section 10(c) of the Act, and thus cannot relieve Parkview of its obligation to reinstate Davis with backpay.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT PARKVIEW VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEE DAVIS FOR HER PROTECTED CONCERTED ACTIVITY

A. Applicable Principles

Section 7 of the Act 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.” 29 U.S.C. § 157. In turn, 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. *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 825 (1984); *NLRB v. Chelsea Laboratories, Inc.*, 825 F.2d 680, 681 (2d Cir. 1987).

1. The Act Protects Individual Employees Raising Shared Employee Concerns with Their Employer

Under Section 7 of the Act, an individual employee's conduct is statutorily protected if it is "concerted" in nature and has as its purpose the "mutual aid or protection of employees." *City Disposal Sys.*, 465 U.S. at 829-31 (quoting 29 U.S.C. § 157). As the Supreme Court has recognized, moreover, 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). Thus, concerted activity by individual employees 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 *Chelsea Laboratories*, 825 F.2d at 683.

The Supreme Court has indicated that the "mutual aid or protection" clause set forth in Section 7 of the Act 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) (noting that the 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 work environment, hours, wages, and other terms and conditions of

employment. See *Washington Aluminum*, 370 U.S. at 14-15; *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1199, 1203 (D.C. Cir. 2005).

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); *accord Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). 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 (internal citations omitted). *Accord Hugh H. Wilson Corp.*, 414 F.2d at 1355.

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”; internal 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, this Court has found activity concerted when, in front of their coworkers, single employees protest employment terms common to all employees. See *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188-92 (2d Cir. 2001); accord *Cibao Meat Prods.*, 338 NLRB 934, 934 (2003), *enforced*, 84 F. App’x 155 (2d Cir. 2004). 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 *MCPc, Inc. v. NLRB*, 813 F.3d 475, 484 (3d Cir. 2016) (finding concertedness where a lone employee spoke out “about a matter of general employee interest in a group meeting context” and, in doing so, “successfully attract[ed] the impromptu support of at least one fellow employee”); *Worldmark by Wyndham*, 356 NLRB 765, 766 (2011) (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).

2. It Is Unlawful for an Employer To Retaliate Against an Employee for Engaging in Protected Concerted Activity

When an employer asserts a reason for taking an adverse action against an employee that is unconnected to the employee's protected concerted activity, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983). Courts will uphold the Board's finding of an unlawful discharge under *Wright Line* if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in the employer's decision to discharge the employee, unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the adverse action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 399-400, 404-405; *accord NLRB v. G & T Terminal Packaging*, 246 F.3d 103, 115-16 (2d Cir. 2001). But where, as here, the employer's proffered reasons for its action are

pretextual—that is, if they either did not exist or were not in fact relied upon—the employer has necessarily failed to meet its burden, and the inquiry is logically at an end. *Transp. Mgmt. Corp.*, 462 U.S. at 395, 398-403; *Abbey’s Transp. Servs.*, 837 F.2d at 579, 582; *Wright Line*, 251 NLRB at 1084, 1089. *Accord Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Because direct evidence of employer motivation is seldom available, it is “perfectly proper,” as this Court has put it, for the Board to establish motivation based on “circumstantial evidence and inferences of probability drawn from the totality of other facts.” *NLRB v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 295 (2d Cir. 1972) (internal quotation marks and citation omitted); *see also Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 139 (2d Cir. 1990) (“Intent is subjective and in many cases can be proved only by the use of circumstantial evidence.”). Such circumstantial evidence that the Board relies upon in finding unlawful motivation includes the employer’s knowledge of and hostility toward protected activity, the timing of its adverse action, and “the absence of any legitimate basis for an action’—i.e., the absence of a credible explanation from the employer,” or its shifting and inconsistent reasons. *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (quoting *Wright Line*, 251 NLRB 1083, 1088 n.12 (1980)). Ultimately, because

motive is a question of fact that implicates the Board's expertise, its finding of unlawful motivation is "entitled to substantial deference." *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013); *accord NLRB v. Bridgeport Ambulance Serv.*, 966 F.2d 725, 730 (2d Cir. 1992).

B. The Board Reasonably Found that Parkview Discharged Davis for Engaging in Protected Activity

Applying *Wright Line*, the Board found that Parkview had an unlawful motive for discharging Davis, given that: (1) she openly engaged in activity that was indisputably protected and concerted; (2) Parkview's highest-level managers were well aware of her activity, (3) Parkview summarily discharged her just two days later; and (4) Parkview proffered "reasons" for suddenly discharging her were plainly pretextual. As shown below, substantial evidence supports the Board's finding that, on this record, Parkview violated Section 8(a)(1) of the Act by discharging Davis.

1. Davis's protected concerted activity

As the Board found, and Parkview does not dispute, Davis "voiced a number of group workplace concerns during the January 27 staff meeting," after CNH Operations Manager Quinones and General Manager Daley invited the gathered employees to raise matters of interest to them. (JA 483.) In particular, the record establishes that Davis, referring to employees collectively, asked why "we're not getting paid" while on call, and whether there was anything that management could

do “to make us more comfortable as servers being that it’s always so freezing cold” in the employees’ work areas. (JA 487-88.) Davis suggested that if management was not willing to raise the temperature in those work areas, they might allow “us to wear a sweater” at work. (JA 488.) She further advocated for employees to receive transit and medical benefits, stating that “we should be able to get the benefits that [other] companies offer.” (JA 488.)

The terms that Davis used (“we” and “us”) plainly conveyed that she was not seeking redress of personal grievances, but raising possible improvements in terms and conditions of employment that employees shared in common. *See Worldmark by Wyndham*, 356 NLRB at 766 (concerted activity found where an employee used the terms “we” and “us” in complaining at a staff meeting about a new dress code applicable to all employees). Lest there was any doubt on this point, other employees at the meeting “nodded their heads in approval” as she spoke, underscoring that the matters she raised were, in fact, group concerns. (JA 488 n.19, 490.)

Applying settled law to these undisputed facts, the Board found that Davis’s comments were “concerted,” within the meaning of Section 7 of the Act, because she brought “truly group complaints to the attention of management.” (JA 489, citing *Meyers Indus.*, 281 NLRB 882, 887 (1986).) *See NLRB v. Caval Tool Div.*, 262 F.3d 184, 190 (2d Cir. 2001) (employee engaged in concerted activity when

she questioned employer's new break policy at staff meeting called by employer); *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (employee engaged in concerted activity by raising working conditions at staff meeting called by employer; concertedness inferred from the circumstances).

The Board further found that Davis's concerted activity qualified for protection under Section 7 because her comments were clearly directed towards "mutual aid or protection": they aimed at advancing "employees' interests as employees" in regard to wages, working conditions, and benefits. (JA 490, quoting *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 154 (2014).) Understandably, given the above undisputed facts and settled law, the Company did not question, before the Board, that "Davis was engaged in protected concerted activity when she voiced a number of group workplace concerns during the January 27 staff meeting." (JA 483.)

And although Parkview now suggests that it did not understand the import of Davis's remarks, because they appeared to involve matters that "concerned her individually," the record forecloses any such view of the situation, because Davis's comments themselves conveyed concert. (Br. 35.) Daley, moreover, admitted that he and Quinones treated them as group concerns and "offered a direct response to all the staff that were there at the time." (JA 203-04, 489.) Thus, any assertion that Daley viewed Davis's comments as personal to her is inconsistent not only

with the comments on their face, but also with his treatment of them at the meeting.

2. Parkview was well aware of Davis's protected concerted activity

Substantial evidence also supports the Board's finding that Parkview was fully aware of Davis's protected concerted activity at the January 27 meeting. It is undisputed that Quinones and Daley—both high-level managers who report directly to CEO Packin—were present when Davis spoke at the January 27 meeting. And because they were physically in the room, they would have also seen that her comments “were met by nods of approval from the assembled employees.” (JA 483.)

Notwithstanding this evidence, Parkview argues here, as it did before the Board, that the person who ultimately approved Davis's discharge—CEO Packin—was not present at the January 27 meeting and therefore the discharge could not have followed from anything that occurred there. (Br. 34-37.) To the contrary, Packin's absence from the meeting is immaterial. As the Board found, Packin's deputies (Quinones and Daley) were present for Davis's comments, and they not only “offered a direct response to all the staff,” they also assured the gathered employees that they would relay “everything” to Packin and “get back to” them later. (JA 488.) Consistent with this assurance, and as Daley admitted, he briefed Packin after the meeting, specifically telling Packin what Davis had said.

(JA 489 n.22; 199-200, 203-04.) In these circumstances, it was patently reasonable for the Board to infer that Packin himself, as well as his deputies, knew about Davis’s protected concerted activity at the January 27 meeting. *See Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988) (noting that employer “knowledge [of protected activity] may be shown by circumstantial evidence from which a reasonable inference may be drawn”); *accord NLRB v. Dorn’s Transp. Co.*, 405 F.2d 706, 713 (2d Cir. 1969).

In a vain effort to undercut this entirely logical inference, Parkview argues that Daley “never informed Packin that Davis was acting in a concerted manner when bringing up issues” at the January 27 meeting. (Br. 35.) But as the Board noted, in his testimony “Daley conceded that he told Packin what Davis said at the meeting.” (JA 489 n.22.) Parkview’s contrary assertion is undercut by its acknowledgement that Daley relayed to Packin that Davis had raised “workplace issues” such as the possibility of securing group health insurance for employees.² (Br. 35. *See also* JA 44, 199-200, 203-04, 351-52, 369-70, 378.)

² Contrary to Parkview’s suggestion (Br. 35-36), because Davis’s act of raising concerns at a group meeting qualifies as concerted activity under well-settled law, it is irrelevant whether Daley specifically told Packin that other employees nodded their heads in agreement as Davis spoke at the meeting. *See Caval Tool*, 825 F.3d at 187-90 (employee’s questions about new break policy in context of management-led staff meeting found concerted in the absence of overt endorsement or approval by other employees). Likewise, because an employee’s speaking up about working conditions at a staff meeting is plainly concerted

3. The highly suspicious timing of the discharge

The undisputed record evidence shows that soon after Daley briefed Packin about Davis's comments at the January 27 meeting, and within two days of the meeting itself, Packin summarily discharged Davis, purportedly for failing to get along with management. (Br. 37.) Consistent with settled law recognized by this Court, the Board reasonably inferred from the highly suspicious timing of this discharge that Parkview took the action to retaliate against Davis for her protected concerted activity. (JA 483.) As this Court has explained, the "abruptness of a discharge and its timing are persuasive evidence as to motivation," *NLRB v. Porta Sys. Corp.*, 625 F.2d 399, 404 (2d Cir.1980), and an inference of unlawful motive is particularly "proper" when—as in this case—"the timing of the employer's actions is stunningly obvious," *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir.1982) (internal quotation marks and citation omitted). *See also Mira-Pak, Inc.*, 147 NLRB 1075, 1081 (1964) (unlawful discharge found based in part on suspicious timing, two days after protected concerted activity), *enforced*, 354 F.2d 525 (5th Cir. 1965).

activity, there is no comparison between this case and *Ontario Knife Company v. NLRB*, 637 F.2d 840, 845-46 (2d Cir. 1980), cited by Parkview (Br. 36), which involved a lone employee's unilateral decision to walk off her job in protest of working conditions.

Although Parkview argues (Br. 38-42) that the timing of the discharge in relation to Davis’s protected activity is merely a coincidence, and that the discharge actually followed from a series of “confrontational occurrences” between Davis and various managers, the Board reasonably rejected that argument. (Br. 38, JA 483-84 & n.3.) As the Board found, and as further explained below, Parkview seized on the asserted “confrontations,” for which Davis was never issued any warning or otherwise disciplined, to generate a pretext for her discharge. Accordingly, the last of her alleged “confrontations”—her explanatory email to Daley that constitutes no confrontation at all—cannot qualify as a “legitimate intervening event” that could sever the temporal link between the protected concerted activity and the discharge here. (Br. 38, quoting *Feldman v. Law Enf’t Assocs. Corp.*, 752 F.3d 339 (4th Cir. 2014).)

4. Parkview’s shifting and inconsistent reasons for discharging Davis demonstrate pretext

The Board reasonably found that Parkview’s shifting and inconsistent reasons for its sudden discharge of Davis only strengthen the inference that it acted with a retaliatory motive. In this regard, Davis’s credited testimony establishes that on January 29, Packin told her that she was discharged for not “getting along” with management. (JA 489 & n.24.) He said nothing about any service or performance issues. Nevertheless, about two weeks later, in response to a state inquiry about “[w]hat specifically” Davis was “told about why []she was

discharged,” Parkview cited unspecified “issues with [her] floor service,” as well as “confrontational relationships with both management and other staff.” (JA 467.) As the Board found, “[t]hese inconsistent and shifting reasons” strongly suggest that the reason Parkview initially proffered for the discharge—Davis’s purported inability to “get along” with managers—was not the real reason for her discharge at all, but simply a pretext to conceal its true reason, which was an unlawful one. (JA 483, citing *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) (“Where . . . an employer provides inconsistent and shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.”), *enforced*, 165 F.3d 32 (7th Cir. 1998).)

In its brief, Parkview does not question the legal principle that inconsistent or shifting explanations for a discharge will support a finding of pretext. *See GATX Logistics*, 323 NLRB at 335.³ Instead, Parkview focuses on salvaging its factual position, claiming that it “always maintained that the primary reason for Davis’s termination was her inability to work with management,” while also maintaining that service issues were also a factor. (Br. 43.) This claim, however, is at odds with the credited record evidence. Davis’s credited testimony establishes

³ Parkview has accordingly waived any challenge to the Board’s reliance on those pretext principles in this case. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) (arguments “not made in an appellant’s opening brief” are waived).

that Packin did not tell her she was being discharged “primarily” for her inability to get along with management; he presented that as the *sole* reason for her discharge. Thus, Parkview is simply wrong that it has “always” or consistently maintained that inability to get along with management and service issues were both reasons for Davis’s discharge, with the former simply being the “primary” reason. (Br. 43, 50.)

Further, as the Board found, these proffered justifications for Davis’s discharge are highly implausible on the reading of the record as a whole, and accordingly the Board properly considered them pretextual for that reason as well. (JA 483, 491, citing *Lucky Cab Co.*, 360 NLRB 271, 274-75 (2014) (noting that “improbable” and “implausible” reasons offered by the employer, as well as shifting explanations, supported the finding that employer’s stated rationale for discharge was pretextual), *enforced mem.*, 621 F. App’x 9 (D.C. Cir. 2015).) Specifically, although Parkview takes great pains to detail (Br. 44-48) disputes between Davis and certain managers, the reality is that “Parkview tolerated Davis’s slights” towards Torres and Aksentyeva. (JA 491.) Indeed, Parkview never disciplined Davis for any aspect of her conduct towards them. (JA 36-37, 41, 203.) Moreover, far from issuing any sort of reprimand, CEO Packin praised Davis for her “concern and dedication” in bringing to his attention the December 3, 2015 incident involving Torres, and he followed up by removing Torres from the

facility. (JA486; 458.) Similarly, following the January 15, 2016 dispute with Aksentyeva, both Packin and Aksentyeva praised Davis's work as a server, Aksentyeva apologized for any disrespect she may have shown Davis, and Packin assured Davis that her job was not in jeopardy.

Given this record evidence, the Board correctly found that Davis's manner of interacting with managers only came under the microscope *after* she spoke up for all employees at the January 27 staff meeting. (JA 491.) Thus, within one day of that meeting, General Manager Daley reported to Packin an entirely minor and routine exchange with Davis about her work schedule, in which Davis wrote a detailed explanation as to why she disagreed with Daley's stated reasons for reducing her hours. But instead of engaging with Davis on this matter, consistent with its purported practice of open discussion and swift dispute resolution (*see* JA 460-65, Br. 41, 53-54), Parkview—incredibly—discharged Davis immediately, asserting it was doing so because she did not “get along” with management.⁴ As the Board found, this abrupt course of action raises natural questions about Parkview's true motivation. (JA 483, 491.) *See Abbey's Transp. Servs. v. NLRB*,

⁴ Contrary to Parkview's suggestion (Br. 41), neither the Board nor the administrative law judge embraced Parkview's claim that the bona fide reason for Davis's discharge was her January 28 email. As the Board's decision and the bulk of the judge's analysis make clear, the January 28 email merely provided Packin with a ready excuse for a discharge that was actually motivated by Davis's protected concerted activity the previous day. (JA 491.)

837 F.2d 575, 582 (2d Cir. 1988) (upholding Board finding of unlawful discharge where “the company had, in reality, seized upon an innocuous incident to discharge” an employee who had engaged in protected activity). At bottom, the record failed to show “that Davis’s relationship with management—so soon after the January 22 meeting where she was assured of job safety—[had] deteriorated to the extent that it merited discharge.” (JA 491.)

The record similarly failed to establish that Parkview’s asserted “issues with [Davis’s] service” on the work floor were a plausible basis for her discharge on January 29. (JA 467.) As the Board found and the record makes clear, Davis was a skilled and senior cocktail server—so skilled, in fact, that Parkview paired new servers with her to learn the job. (JA 482; 112.) Davis had only one instance of discipline on her record, and it long predated the events at issue. (JA 37, 39, 76, 451.) Specifically, on November 4, 2015, Daley gave her a written warning for paying insufficient attention to some of her tables. (JA 37, 451.) As Daley acknowledged in his testimony, however, Davis’s service improved after she received the warning. (JA 485 & n.10; 79, 200-02.)

Although Parkview now suggests that new issues with Davis’s work surfaced in late January, its suggestion is belied by the fact that, on January 22, Parkview managers praised her work, telling her that she was “doing a great job on the floor” and faced no question as to her job security. Parkview points to

absolutely no evidence in the record establishing that Davis’s work performance precipitously declined in the seven days between those January 22 statements and Davis’s January 29 discharge.⁵ Accordingly, any claim that Davis was discharged for poor work performance is contrary to the credited evidence. (Br. 48-50.)

Equally baseless was Parkview’s after-the-fact claim to state authorities that Davis was discharged for having “confrontational relationships” with non-management staff. (JA 466.) Tellingly, Parkview no longer attempts to defend this particular “justification” for Davis’s discharge. In any event, any effort to legitimize it would fail. As the Board found, Parkview did not produce credible evidence to support its assertion that Davis had an unusual problem “getting along” with other floor staff. (JA 485 n.11, 486 & n.15.) Indeed, “[t]he only coworker called to testify, [Elizabeth] Pinzon, certainly did not confirm that assertion.” (JA 485 n.11.)

Implicitly recognizing the strength of the Board’s pretext finding, Parkview plays up other evidence that it contends could have changed the result.

Specifically, it argues that the Board should have considered its inaction against

⁵ Parkview cites Daley’s purported concern, on January 27, that customers at one of Davis’s tables had walked out on their bill, but that incident occurred two weeks earlier, even before the January 22 meeting. (Br. 50.) Moreover, no one at the January 22 meeting—including Daley, who was present—raised that incident. On the contrary, as already noted, the managers in attendance praised Davis’s work and said she was “doing a great job.” (JA 482, 487.)

other employees who spoke out at the January 27 staff meeting. (Br. 52, 54-55.) It is settled, however, that an employer's failure to retaliate against some employees who engaged in protected activity does not disprove a conclusion that it retaliated against others. *See, e.g., McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 8 (1st Cir. 1997) (rejecting employer's claim that its motive for discharging union supporters was pure because it did not discharge all of them); *Union Tribune Publ'g Co. v. NLRB*, 1 F.3d 486, 492 n.3 (7th Cir. 1993) (same; discharge of a single union adherent); *Handicabs, Inc.*, 318 NLRB 890, 897-98 (1995) ("An employer's failure to discriminate against every union supporter does not disprove a conclusion that it discriminated against one of them."), *enforced*, 95 F.3d 681 (8th Cir. 1996).

More broadly, in repeatedly advancing its preferred view of the evidence, which the Board rejected, Parkview misunderstands the standard of review. The question on appeal from a Board decision is not whether the record contains evidence that could have supported a finding different from what the Board found. *See NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962) (reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo," quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488

(1951)). Instead, the question is whether substantial evidence in the record as a whole supports the Board's finding.

Here, as shown above, substantial evidence supports the Board's finding that Davis's protected concerted activity on January 27 was a motivating factor in Parkview's decision to discharge her just two days later, on January 29. Because the Board found Parkview's proffered reasons for the discharge pretextual, Parkview by definition was "unable to prove that it would have terminated Davis in the absence of her protected concerted activity." (JA 483.) Accordingly, the Board properly concluded that Parkview's discharge of Davis violated Section 8(a)(1) of the Act. (JA 483-84.)

C. The Board Properly Exercised Its Discretion in Ordering Parkview To Reinststate Davis with Backpay

Intent on avoiding liability for its conduct, Parkview argues that "even if" its discharge of Davis was unlawfully motivated, the Board should have deemed the discharge "for cause" under Section 10(c) of the Act, and withheld the standard remedies of reinstatement and backpay. (Br. 56-57.) This argument is meritless.

In Section 10(c) of the Act, Congress authorized the Board to order an employer "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). Consistent with that provision, the Supreme Court has explained that the basic purpose of a Board remedial order is "a restoration . . . , as nearly as possible,

to that which would have obtained but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). *Accord NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965). Accordingly, from the earliest days of the Act, “[r]einstatement [has been] the conventional correction for discriminatory discharges.” *Phelps Dodge Corp.*, 313 U.S. at 194. *See also NLRB v. Int’l Van Lines*, 409 U.S. 48, 54 (1972). Further, as this Court has explained, “[t]he finding of an unfair labor practice . . . is presumptive proof that some back pay is owed by the employer.” *NLRB v. Consolidated Bus Transit*, 577 F.3d 467, 477 (2d Cir. 2009) (quoting *Mastro Plastics*, 354 F.2d at 178). *See also NLRB v. Ferguson Elec. Co., Inc.*, 242 F.3d 426, 431 (2d Cir. 2001). Accordingly, the Board acted well within the range of its statutory discretion in ordering Parkview to remedy its unlawful discharge of Davis by reinstating her with backpay.

The Board’s Order is not undermined, as Parkview claims (Br. 56-57), by a further provision in Section 10(c) that states: “No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.” 29 U.S.C. § 160(c). Because the Act does not define the term “for cause,” the Board has exercised its authority to interpret the term’s meaning. *See Lechmere v. NLRB*, 502 U.S. 527, 536 (1992) (“[T]he NLRB is entitled to judicial deference when it interprets an ambiguous provision of a

statute that it administers.”). Exercising that authority, the Board has explained that, in the context of Section 10(c), “[for] cause . . . effectively means the absence of a prohibited reason.” *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007), *pet. for review denied sub nom. Brewers & Malsters, Local Union No. 6 v. NLRB*, 303 F. App’x 899 (D.C. Cir. 2008). As a result, “[i]t is important to distinguish between the term ‘cause’ as it appears in Sec[ti]on 10(c) and the term ‘just cause,’ [which] encompasses principles such as the law of the shop, fundamental fairness, and related arbitral decisions.” *Taracorp Indus.*, 273 NLRB 221, 222 n.8 (1984).

Furthermore, “[t]here is no indication . . . that [Section 10(c)] was designed to curtail the Board’s power in fashioning remedies when the loss of employment stems directly from an unfair labor practice.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964). Thus, the Board is authorized without doubt to order reinstatement and backpay as a remedy under Section 10(c) where an employer’s adverse action “is motivated by [an employee’s] protected activity,” and therefore the adverse action is “unlawful under Section 8(a)(1) and/or (3), and is not ‘for cause.’” *Anheuser-Busch, Inc.*, 351 NLRB at 648. *See NLRB v. Local Union No. 1229, Int’l B’hd. Of Elec. Workers*, 346 U.S. 464, 474 (1953) (for-cause discharge is discharge for reasons “other . . . than [unlawful] intimidation and coercion”); *Taracorp*, 273 NLRB at 222 n.8 (an employer may “discharge for good cause, bad cause, or no cause at all,” subject to “one specific, definite qualification;

it may not discharge when the real motivating purpose is to do that which [the Act] forbids”) (internal quotation and citations omitted).

Here, as shown above pp. 28-32, the Board specifically rejected, as pretextual, Parkview’s argument that it discharged Davis for her behavior toward managers. Accordingly, Parkview cannot resurrect that pretextual argument as a lawful “cause” for the discharge and thereby avoid its remedial obligation to Davis.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Parkview's petition for review and enforcing the Board's Order in full.

/s/ Julie B. Broido
JULIE B. BROIDO
Supervisory Attorney

/s/ Milakshmi V. Rajapakse
MILAKSHMI V. RAJAPAKSE
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2996
(202) 273-2914

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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**UNITED STATES COURT OF APPEALS
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)	
v.)	Board Case No.
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NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 8,844 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, D.C.
this 8th day of January 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, D.C.
this 8th day of January 2019