

From: (b) (6), (b) (7)(C)
To: [Murphy, Paul](#)
Cc: [Bock, Richard](#); [Szapiro, Miriam](#); [Dodds, Amy L.](#); [Shorter, LaDonna](#); [Compton, Kayce R.](#)
Subject: Hornell Gardens, LLC, 03-CA-258740 and 03-CA-258966 -- Case-closing e-mail
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Importance: High

The Region submitted these COVID-19-related cases for advice as to whether the Employer discharged Charging Parties (b) (6), (b) (7)(C) because of their protected concerted activity in violation of Section 8(a)(1) of the Act; whether Charging Party (b) (6) discharge also violated Section 8(a)(3); and whether the Employer threatened to blackball employees due to their Section 7 activity in a statement published in an online news site. We conclude the Charging Parties did not engage in protected concerted activity and/or union activity and their discharges were lawful. We also conclude the Employer's online statement was not a coercive threat. Therefore, the Region should dismiss the charge, absent withdrawal.

For employee conduct to be considered protected concerted activity, it must be both "concerted" and for the purpose of "mutual aid or protection." *See, e.g., Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 2 (January 11, 2019). Concerted activity includes when an individual employee brings "truly group complaints to the attention of management." *Id.*, slip op. at 3 & n.10 (quoting *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affirmed sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987)). To constitute a true group complaint, there must be evidence of "prior or contemporaneous discussion of the concern between or among members of the workforce." *Id.* Concerted activity also includes when an individual employee speaks with a coworker "with the object of initiating or inducing or preparing for group action . . . in the interest of employees." *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 3 & n.14 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). However, "when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to . . . it is more than likely to be mere 'gripping'" that does not constitute concerted activity. *Mushroom Transportation Co. v. NLRB*, 330 F.2d at 685, quoted in *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 3 and n.15.

We agree with the Region that neither Charging Party (b) (6) nor Charging Party (b) (6) were discharged in violation of Section 8(a)(1). Charging Party (b) (6) refusal to work with shared isolation gowns was neither concerted nor for the purpose of mutual aid and protection. Although Charging Party (b) (6) discussed the gown issue with Charging Party (b) (6) on March 30, 2020, prior to drafting (b) (6), (b) (7)(C) letter to the Employer, there is no evidence that the object of the conversation was initiating or inducing or preparing for group action in the interest of employees, as opposed to simply discussing that the nurses now had to share gowns. Further, Charging Party (b) (6), (b) (7)(C) letter is solely focused on (b) (6), (b) (7)(C) personal disgust at the notion of sharing gowns and fear for (b) (6), (b) (7)(C) own and (b) (6), (b) (7)(C) family's safety, which (b) (6), (b) (7)(C) believed to be at risk.

Charging Party (b) (6), (b) (7)(C) refusal to work (b) (6), (b) (7)(C) scheduled shift on April 11 was not concerted or for the purpose of mutual aid and protection. While Charging Party (b) (6) states (b) (6), (b) (7)(C) tried to educate (b) (6), (b) (7)(C) coworkers on the dangers of COVID-19 on March 30 after (b) (6), (b) (7)(C) was exposed to a patient who tested positive for the virus, there is no evidence that those conversations intended, referred to or even contemplated group action as a result. Indeed, Charging Party (b) (6), (b) (7)(C) refusal to work (b) (6), (b) (7)(C) April 11 shift

was based solely on the instructions of (b) (6), (b) full-time employer to quarantine (b) (6), (b) (7)(C) following (b) (6), (b) exposure at the Employer's facility.

Nor do we conclude that Charging Party (b) engaged in protected concerted activity on (b) (6), (b) (7)(C) as we do not find that Charging Party (b) reading of (b) (6), (b) statement to the Employer on that day was "a logical outgrowth of the concerns expressed by the group." *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992) (citing *Salisbury Hotel*, 283 NLRB 685, 687 (1987) and *Every Woman's Place*, 282 NLRB 413 (1986), *enfd. mem.* 833 F.2d 1012 (6th Cir. 1987)), supplemented by 310 NLRB 831 (1993). Unlike in *Mike Yurosek & Son* and *Every Woman's Place*, we cannot establish that (b) individual conduct was a logical outgrowth of a group concern or followed an earlier concerted protest. *See Mike Yurosek & Son, Inc.*, 306 NLRB at 1037, 1039 (individual employee's refusals to work overtime was outgrowth of employees' earlier concerted protest over working hours reduction); *Every Woman's Place*, 282 NLRB at 413 (individual's report to Department of Labor followed multiple efforts by employees as a group to change their employer's practices with regard to holiday pay by confronting their supervisor together); *see also JMC Transport, Inc.*, 272 NLRB 545, 550 (1984), *enfd.* 776 F.2d 612 (6th Cir. 1985) (discharged employee's individual paycheck dispute was preceded by protected concerted discussions with the employer about paychecks). No witnesses corroborate Charging Party (b) claim that (b) (6), (b) and (b) (6), (b) coworkers together agreed to not share gowns on the evening of March 30, 2020. Even if we credit Charging Party (b) that a group discussion and plan of action to not share gowns that evening occurred, there is no evidence that the plan went any further than that. Unlike in the cases cited above, the employees here never took their concerns to management as a group. And, although Charging Party (b) spoke to Charging Party (b) about (b) discharge on (b) (6), (b) (7)(C) which appears to have motivated Charging Party (b) to take a stand that evening during (b) (6), (b) shift, there is no evidence that Charging Parties (b) and (b) formed a plan of action together. Nor is there evidence the Employer considered Charging Party (b) solo speech and refusal to work on (b) (6), (b) (7)(C) to have been concerted.

Furthermore, although Charging Party (b) discussed the gown sharing issue with (b) (6), (b) coworkers on March 30, (b) (6), (b) alone confronted management regarding the issue on March 29 and 30 and did not claim on those dates to be speaking on behalf of anyone but (b) (6), (b) (7)(C) *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 2 & n.7 (acting in concert requires showing that "engaged in [conduct] with or on the authority of other employees, and not solely by and on behalf of the employee himself (b) (6), (b) (7)(C)."). While (b) (6), (b) invited two employees in the parking lot to join (b) (6), (b) protest that evening, Charging Party (b) informed them that it was (b) (6), (b) protest and (b) (6), (b) would move forward with or without them. Nor is there evidence that any other employee formed a plan with Charging Party (b) to refuse to work after hearing (b) (6), (b) read aloud (b) (6), (b) (b) (6), (b) (7)(C) statement. No employee requested Charging Party (b) to act on their behalf or authorized (b) (6), (b) to do so; (b) (6), (b) simply decided on (b) (6), (b) own that (b) (6), (b) represented (b) (6), (b) coworkers.

We agree with the Region's conclusion that Charging Party (b) passing reference to starting a union in the (b) (6), (b) (7)(C) statement that (b) (6), (b) read to (b) (6), (b) coworkers and, shortly thereafter, to the Employer, played no apparent role in (b) (6), (b) discharge. *See Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 (November 22, 2019) (evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee). In particular, the Employer's reaction to Charging Party (b) refusal to work

was the same as its reaction to Charging Parties (b) and (b) (6), (b) refusals to work.

Finally, we conclude the Employer's April 8 statement in the WSKG online news post was not an unlawful threat. On its face and in context in the article, the Employer threatened to report the Charging Parties to the State of New York licensing authority for quitting without notice, clearly referencing their roles of providing patient care at the facility. The Employer said the Charging Parties could not get unemployment because they quit—not that they could not get employment elsewhere. Compare *McGaw of Puerto Rico, Inc.*, 322 NLRB 438 (1998), *enfd.* 135 F.3d 1, 11 (1st Cir. 1997) and *Auto Nation, Inc.*, 360 NLRB 1298 (2014), *overruled on other grounds by Tschiggfrie, Properties, LTD*, 368 NLRB No. 120, slip op. at 7 (threats to prevent future employment due to union activity—not to keep the employees from receiving unemployment). It is too speculative to construe the Employer's licensing warning as a blackballing threat against future employment given the investigation process and the documented factors considered by the New York State Education Department licensing board in deciding whether to revoke a nursing license for patient

abandonment. [1] Finally, we also note the Employer's argument that its comments were taken out of context and are incomplete as reported. See *Walmart Stores, Inc.*, 368 NLRB No. 24, slip op. at 34 (July 25, 2019) (employer did not exercise any control over the television news stations editing decisions). Under the totality of the circumstances, we conclude the Employer's online statements do not have a reasonable tendency to coerce or threaten employees.

Because the allegations lack merit, the Region should dismiss the charges, absent withdrawal.

This email closes the case in Advice. Please contact us with any questions or concerns.

As of January 20, 2020, the NLRB requires electronic filing by parties. Please see www.nlr.gov for more information.

(b) (6), (b) (7)(C)

[1] <http://www.op.nysed.gov/prof/nurse/nurse-patientabandonment.htm> (last accessed July 24, 2020).