The Region requested advice as to whether Drew’s Tire Pros (DTP) violated Section 8(a)(1) of the Act when it discharged an employee (Charging Party) for protesting the failure of to properly quarantine after apparent exposure to the COVID-19 virus. Applying Wright Line, we conclude DTP violated Section 8(a)(1) because the Charging Party’s protest was protected concerted activity, DTP knew of that activity, and the activity motivated DTP’s discharge of the Charging Party.

FACTS

DTP is an auto parts store and repair shop in Pahrump, Nevada, employing two salespeople and between 10 and 13 technicians and mechanics. The Charging Party became employed there as a technician in 2018. worked approximately 40 hours a week and reported to the Shop Manager and the Owner.

On Monday, November 9, 2020, the Charging Party arrived at DTP shortly before regular starting time and was walking toward the shop when was approached by a group of employees who included two of the shop’s mechanics and another technician (Mechanic 1, Mechanic 2, and Technician 1). They told the Charging Party of disclosure to them that members of family had tested positive for the COVID-19 virus and that would soon be going home.

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Although these employees had expressed to their discomfort about apparent COVID exposure, they seemingly never shared with any objection they may have had to presence at DTP’s workplace. Five minutes later, however, the Charging Party, Technician 1, and another employee (Technician 2) approached informed of their concerns about becoming infected with the virus, and objected to presence there. In response, did not deny being exposed to the virus but simply left shortly thereafter.

The Charging Party did not work on Tuesday, November 10, as that was regularly scheduled day off. When returned on November 11 worked the entire day because wasn’t there.

On Thursday morning, November 12, as the Charging Party was retrieving service tickets on the way to the shop, noticed sitting in office. asked why had returned to DTP’s workplace so soon after being exposed to the COVID-19 virus and why none of the other employees had objected to presence. responded that the others were afraid to say anything and derided them as “bitches.” Once again, though, never denied exposure to the COVID-19 virus. Upon arriving in the repair shop, the Charging Party told the Shop Manager that because of presence was fearful of becoming infected and therefore reluctant to work. The Shop Manager excused whereupon the Charging Party went home. later phoned the Charging Party at home and asked to return, but the Charging Party refused. restated fear of infection with the COVID-19 virus so long as was there and told that other employees felt the same. While at home, the Charging Party exchanged text messages with Technician 1, who had also abstained from going to DTP’s workplace that day. It was during this exchange that Technician 1 revealed disclosure to of testing positive for the COVID-19 virus the previous week. The two employees commiserated about their possible infection with the virus due to refusal to properly quarantine and about their reduced hours of work that week.

The Charging Party and Technician 1 reported for work and was there again. Within earshot of Technician 1 and Mechanics 1 and 2, the Charging Party repeated with reluctance to work at the shop so long as was present. replied that the Charging Party wouldn’t have to worry anymore about that dilemma because was fired. The two then began shouting at each other, the Charging Party declaring couldn’t rightfully terminate and calling the Charging Party a “little bitch.”

2 Technician 2, who had participated along with the Charging Party and Technician 1 in the group protest to on November 9, arrived at DTP’s workplace about 10 minutes after this last encounter between the Charging Party and
Later on, in a series of text exchanges between and the Charging Party, asserted that the Charging Party had been discharged because of poor performance, not because co-workers had complained about their risk of infection with the COVID-19 virus. According to the Charging Party had failed in three separate incidents during September and October 2020 to change a dirty air filter, replace a wheel-lock key after a brake inspection, and install the right-sized oil filter. Although the Charging Party at the time for any of those incidents, nonetheless claims that the incidents raised concerns in mind about the Charging Party’s job performance and veracity. In the last of those text messages, also characterized the Charging Party’s departure from DTP as a layoff.

For part, the Charging Party states that had no disciplinary history at DTP and that had first raised the three incidents of alleged poor performance in their text exchange of

**ACTION**

We conclude, applying a Wright Line analysis, that DTP’s discharge of the Charging Party was in retaliation for protected concerted protests regarding COVID-19 safety. Accordingly, the Region should issue a Section 8(a)(1) complaint, absent settlement.

To prove an unfair labor practice under Wright Line, the General Counsel must show that (1) an employee engaged in Section 7 activity, (2) his employer knew of the activity, and (3) the employer’s animus toward the activity motivated the adverse employment action. If such a showing is made, the burden shifts to the employer to show it would have taken the adverse action regardless of the Section 7 activity. If, however, the evidence establishes that the rationale proffered by the employer for the adverse action is a pretext, the employer necessarily fails to prove the action would have been taken even in the absence of the protected concerted activity.\(^3\)

**I. The Charging Party Engaged in Concerted Activity.**

The Board reaffirmed in Alstate Maintenance, LLC,\(^4\) that the governing standards for analyzing whether employees have engaged in concerted activity are

\(^3\) 251 NLRB at 1089.

\(^4\) 367 NLRB No. 68, slip op. at 3-4, 6-8 (2019).
embodied in *Meyers I* and *Meyers II*. First and foremost, an employee's activity is concerted when acting collectively with, or on the authority of, other employees and not solely on his or her own behalf. Secondly, concerted activity occurs when an employee undertakes to initiate, induce, or prepare for group action by other employees or behaves in some relation to group action that is intended to benefit other employees. Even in the absence of preparation for, or anticipation of, group action, some discussions amongst employees of certain vital elements of employment raise concerns pivotal to their collective interests, which may render the discussions inherently concerted. Individual acts of an employee may also be concerted depending on the circumstances. For example, the Board may conclude that the activities of a single employee addressing an employer's group meeting of employees are concerted. Additionally, the activities of a single employee can be part of a continuous course of concerted activity or a logical outgrowth of that activity. In general, whether an employee has engaged in concerted activity is a question of fact to be resolved on the evidence as a whole and depends on his or her actions being sufficiently linked to group activity.

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7 *Meyers I*, 268 NLRB at 497.

8 *Meyers II*, 281 NLRB at 887.


The facts of this case demonstrate that the Charging Party’s conduct during the week of November 8, 2020 formed a continuous course of concerted activity. First, on Monday, November 9, in a clear display of group activity, the Charging Party along with Technicians 1 and 2 approached about the presence at the shop after hearing that members of the family had tested positive for the COVID-19 virus. From the employees’ perspective, could have been contagious, and mere presence posed for everyone else the risk of becoming infected with the virus.

Next, when unexpectedly returned to the shop on Thursday, November 12, the employees’ concern over risking infection resurfaced. The Charging Party again voiced reluctance about being there to both and the Shop Manager, the latter excusing from work. Later that day, after phoned the Charging Party at home and asked to return, the Charging Party repeated unwillingness to do so based on potentially contagious condition and remarked that others felt likewise. Technician 1, for instance, had also decided to forego working at the shop on November 12 and got tested that day for the COVID-19 virus. All those events embodied the collective character of the employees’ concerns about self-quarantining adequately or, if did not, presence in the workplace when they were there.

Lastly, on persistent presence led the Charging Party to complain yet again about the risk posed to every employee in DTP’s workplace. complaint was overheard by other employees—particularly, Technician 1 and Mechanics 1 and 2—who on November 9 had learned of apparent exposure to the COVID-19 virus, had warned the Charging Party of that fact the same day, and had expressed to their discomfort about presence at DTP’s workplace.

The verbal protest made collectively by the Charging Party and Technicians 1 and 2 on November 9 about their health concerns over presence was clearly concerted action. Likewise, the Charging Party’s subsequent communications with and Shop Manager on November 12 and were a continuation of that initial instance of concerted activity. So too was the Charging Party’s refusal to work in DTP’s workplace as long as was there and could potentially infect and others with the COVID-19 virus.

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13 Consumers Power Co., 282 NLRB 130, 131 (1986) (two employees who had approached their supervisor about a safety issue were held to have engaged in concerted activity).
The foregoing events are similar to what transpired in *Alton H. Piester, LLC*, where the Board held that the individual acts of a discharged employee were a continuous course of concerted activity under Section 7 of the Act. At a meeting with the company’s truck drivers on January 13, 2007, the owner announced the drivers would no longer be paid for time spent unloading palletized goods from their trucks. The change sparked objections from several drivers at the meeting and thereafter, but only the charging party continued objecting after January 2007. During meetings with the owner and the company’s accountant in April 2007, the charging party again voiced the drivers’ objections to the change and asked that the unpaid time be reflected on their paystubs. Emotions boiled over at the last of those meetings, where the charging party complained loudly and persistently and was ultimately discharged. Notwithstanding the fact that more than two months had elapsed between the January 13th meeting and the last encounter on April 2, 2007, the Board found the charging party’s discharge unlawful because his individual complaints about the change in compensation were part of a continuous course of concerted activity beginning in January 2007.

Although we have resolved that the Charging Party’s verbal protests and abstention from DTP’s workplace began as traditional group action and progressed into individual acts that together formed a continuous course of concerted activity, the Region should argue alternatively that the same activity is concerted under the Board’s doctrine of “inherently” concerted activity. That doctrine emerged in *Trayco of South Carolina, Inc.*, where the Board held that an employee’s discussions with her co-workers about higher wages constituted concerted activity even though the discussions did not contemplate group action. In reaching that decision, the Board observed that the object of inducing group action need not be expressed but can instead be implied from the subject matter of discussion. Because higher wages are a “frequent objective of organizational activity,” the Board reasoned that the employee’s discussions about that subject impliedly were concerted. The doctrine

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14 353 NLRB 369, 372-73 (2008) (two-member board), *enforced*, 591 F.3d 332 (4th Cir. 2010). Although *Alton H. Piester, LLC*, was issued by a panel that under *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), was not properly constituted, it is the Acting General Counsel’s view that *Piester* was soundly reasoned. The Region should therefore urge the ALJ and Board to apply the principles set forth in that case. *See DHL Express, Inc. v. NLRB*, 813 F.3d 365, 377 n.2 (D.C. Cir. 2016) (noting that the rationale in a voided, two-member Board decision was “instructive”).


16 *Id.* at 634; accord *Automatic Screw Prods.*, 306 NLRB 1072, 1072 (1992), *enforced mem.*, 977 F.2d 582 (6th Cir. 1992).
was enlarged in *Aroostook County Regional Ophthalmology Center*,\(^ {17}\) where the Board decided that discussions about changes in work schedules were inherently concerted activity despite the absence of any talk about the initiation of group action. Like wages, the Board concluded that work schedules are a “vital term and condition of employment” that are “likely to spawn collective action.”\(^ {18}\) Lastly, in *Hoodview Vending Co.*,\(^ {19}\) the Board added the subject of “job security” to the list of vital terms and conditions of employment which, when discussed between two or more employees, will be regarded as inherently concerted activity. Such discussions concern “the very existence of the employment relationship and [will] quickly ripple through, and resonate with, the work force.”\(^ {20}\)

The inclusion of health and safety matters among the subjects of discussion deemed to be inherently concerted activity is a logical and necessary extension of the inherently concerted doctrine.\(^ {21}\) Few subjects are of more vital concern to an employment relationship than workplace health and safety issues.\(^ {22}\) Safe and healthy workplaces were woven into our social fabric through national legislation enacted over 50 years ago.\(^ {23}\) Moreover, the resolution of safety and health issues is a frequent objective of organizational activity likely to spawn collective action.\(^ {24}\)


\(^{18}\) *Id.* at 220.


\(^{20}\) *Id.* at 357.

\(^{21}\) See *Renewal by Andersen LLC KC*, Case 14-CA-262563, Advice Memorandum dated Apr. 9, 2021, at 7-8 (arguing that workplace safety and health issues are inherently concerted); *North West Rural Electric Cooperative*, Case 18-CA-150605, Advice Memorandum dated Sept. 21, 2015, at 9-12 (same).


\(^{23}\) Occupational Safety and Health Act of 1970, as amended (29 U.S.C. §651 et seq.).

\(^{24}\) E.g., *Systems with Reliability, Inc.*, 322 NLRB 757, 757-60 (1996) (employees discussed toxic effects of methyl ethyl ketone in their workplace before confronting employer and threatening to contact OSHA); *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995) (confirming relevancy of union’s request for audit report addressing health and safety matters).
which is particularly true under life-threatening conditions of the kind posed by the COVID-19 pandemic.25

Consequently, even if the Charging Party and Technicians 1 and 2 had not gone as a group on November 9, 2020 to voice their concerns about presence in the workplace as a source of COVID-19 infection, the discussions the Charging Party had with co-workers about the risk of such infection can and should be regarded as inherently concerted activity.

II. The Charging Party’s Concerted Activity Was Protected.

To warrant protection under Section 7 of the Act, concerted activity must have been undertaken “for the purpose of collective bargaining or other mutual aid or protection.”26 The Board observed in Fresh & Easy Neighborhood Market, Inc.,27 that “[t]he concept of mutual aid or protection focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees.”28

In NLRB v. Washington Aluminum Co.,29 the Supreme Court held that a group of 11 employees who had walked off their jobs to protest the bitter cold temperatures inside their employer’s foundry acted for their mutual aid or protection because reforming their uncomfortable surroundings fell squarely within the goal of improving the terms and conditions of their employment and therefore


26 29 U.S.C. 157 (West 2021); Alstate Maintenance, LLC, 367 NLRB No. 68, slip op. at 8.

27 361 NLRB at 153.

28 Id. (citing Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978) (emphasis in original and internal quotation marks omitted)).

was protected under Section 7 of the Act.\textsuperscript{30} Similarly, in \textit{Tamara Foods, Inc.},\textsuperscript{31} the Board found that employees participating in a work stoppage to avert any adverse consequences to their health from the ammonia escaping out of their employer's in-house refrigeration system had engaged in concerted activity for their mutual aid or protection.\textsuperscript{32}

The concerns of the Charging Party and her co-workers that satisfactorily quarantine away from DTP's workplace following apparent exposure to the COVID-19 virus naturally stemmed from a desire to protect their own health and safety by not becoming infected with the virus. A safe and healthy workplace is a statutorily mandated condition of employment throughout the United States.\textsuperscript{33} Because the goal of the Charging Party's concerted activity was to achieve and maintain such a workplace, that activity was protected under Section 7 of the Act.\textsuperscript{34}

\section*{III. DTP Knew of the Charging Party's Protected Concerted Activity.}

Under \textit{Wright Line}, the second required element for establishing a violation of Section 8(a)(1) of the Act is proof that an employer knew, or at least suspected, an employee's engagement in protected concerted activity.\textsuperscript{35} Although this element can be proven by either direct or circumstantial evidence,\textsuperscript{36} the employer's knowledge or suspicion must be actual, not constructive. In other words, the element will not have been satisfactorily proven if the evidence shows only that the employer could

\footnotesize{\textsuperscript{30} Id. at 17.}

\footnotesize{\textsuperscript{31} 258 NLRB 1307, 1308-09 (1981), enforced, 692 F.2d 1171 (8th Cir. 1982), cert. denied, 461 U.S. 928 (1983).}

\footnotesize{\textsuperscript{32} Accord Union Boiler Co., 213 NLRB 818, 818-19 (1974), enforced, 530 F.2d 970 (4th Cir. 1975).}


\footnotesize{\textsuperscript{34} Because the Charging Party's shouting match with apparently occurred only after said was discharged, we need not determine whether that conduct caused the Charging Party to lose the Act's protection.}

\footnotesize{\textsuperscript{35} \textit{Handicabs, Inc.}, 318 NLRB 890, 897 (1995), enforced, 95 F.3d 681 (8th Cir. 1996), cert. denied, 521 U.S. 1118 (1997).}

\footnotesize{\textsuperscript{36} \textit{Samsonite Corp.}, 206 NLRB 343, 349 (1973).}
be reasonably expected to know of the activity or that it would have acquired knowledge of the activity had it made a diligent inquiry.\textsuperscript{37}

Here, there is little doubt that DTP actually knew of the Charging Party’s protected concerted activity. DTP is a small, owner-operated business employing about 15 individuals and is principally managed by \textsuperscript{38} Moreover, the statements by the Charging Party and co-workers concerning failure to sufficiently quarantine after apparent exposure to the COVID-19 virus were made mostly to personally.

\textbf{IV. DTP’s Animus Toward the Charging Party’s Section 7 Activity Motivated Discharge, and Its Proffered Rationale for That Discharge Was Pretextual.}

The Board clarified in \textit{Tschiggfrie Properties, Ltd.},\textsuperscript{39} how the third element of the \textit{Wright Line} standard must be applied in analyzing whether an employer’s adverse action against an employee was motivated by its animus toward the employee’s protected concerted activity. Evidence of\textit{ any} animus toward activity of that kind is ineffectual. The element can be proven only through evidence of animus that supports a causal relationship between the employee’s protected activity and the employer’s adverse action.\textsuperscript{40} Evidence of such a relationship has been found in multiple scenarios. Adverse action that is contemporaneous with the protected concerted activity is strongly suggestive of animus toward the activity.\textsuperscript{41} Similarly indicative is an employer’s derisive characterizations of employees

\textsuperscript{37} \textit{Reynolds Elec.}, 342 NLRB 156, 156-57 (2004).

\textsuperscript{38} \textit{See Samsonite Corp.}, 206 NLRB at 349 (inference of actual knowledge was warranted in small plant where supervisors had close contact with employees and where protected concerted activity was carried out openly).

\textsuperscript{39} 368 NLRB No. 120 (2019).

\textsuperscript{40} \textit{Id.}, slip op. at 1. \textit{Accord General Motors LLC}, 369 NLRB No. 127, slip op. at 2 (2020).

\textsuperscript{41} \textit{Charter Communications, LLC}, 366 NLRB No. 46, slip op. at 8 (2018); \textit{Lucky Cab Co.}, 360 NLRB 271, 274 (2014), enforced mem., 818 F. App’x 638 (9th Cir. 2020); \textit{Electronic Data Sys.}, 305 NLRB 219, 220 (1991), enforced in rel. part, 985 F.2d 801 (5th Cir. 1993).
engaged in such activity.\textsuperscript{42} Animus has also been found to exist when an adverse action has been taken only after the occurrence of protected concerted activity.\textsuperscript{43}

The facts of this case point to a causal relationship between the Charging Party’s protected concerted activity and his discharge and thus support a finding that the discharge was motivated by DTP’s animus toward that activity. The protests voiced to \textsuperscript{44} initially by the Charging Party and his co-workers on November 9, 2020 and subsequently by the Charging Party alone on November 12 and \textsuperscript{44} were met by \textsuperscript{45} discharge of the Charging Party on the latter date—an adverse action which was contemporaneous with the protected concerted activity. \textsuperscript{44} And when confronted with those verbal protests and the resulting reluctance of certain employees to come to work, \textsuperscript{b} derided the Charging Party and the others as “bitches” in an obvious display of animosity toward them and their protected activity. Lastly, during \textsuperscript{45} discharge of the Charging Party on \textsuperscript{b} never mentioned the earlier incidents of the Charging Party’s allegedly poor performance. \textsuperscript{b} asserted those incidents as grounds for the discharge only after the protected concerted activity had occurred. Taken together, these events are probative of DTP’s animus toward the Charging Party’s protected concerted activity.\textsuperscript{45}

DTP will be unable to rebut the Region’s initial showing that the Charging Party was discharged for protected concerted activity because its proffered

\textsuperscript{42} Bates Paving & Sealing, Inc., 364 NLRB No. 46, slip op. at 3 (2016).

\textsuperscript{43} Approved Elec., 356 NLRB 238, 239 (2010).

\textsuperscript{44} Although other employees who engaged in protected concerted activity, e.g., Mechanic 1 and Technician 1, were not discharged, they had not persisted in continuing the concerted protest over workplace health and safety matters to the degree the Charging Party did.

\textsuperscript{45} When an employer proffers a rationale for its adverse action against an employee that is shown to be a pretext—\textit{i.e.}, false or not actually relied upon—the General Counsel may offer the pretextual nature of that rationale as additional evidence probative of the employer’s animus toward the employee’s protected concerted activity. Such an inference is certainly not compelled, however, and may be made only if the surrounding facts tend to reinforce that inference. \textit{Electrolux Home Prods.}, 368 NLRB No. 34, slip op. at 3-4 (2019). Here, DTP’s pretextual rationale for the Charging Party’s discharge is not the sole basis for satisfying the General Counsel’s \textit{Wright Line} burden. The Charging Party’s protected concerted activity and \textsuperscript{b} expressed animus toward that activity occurred close in time to the discharge which reinforces the conclusion that a causal relationship existed. \textit{See Mondelez Global, LLC}, 369 NLRB No. 46, slip op. at 4 (2020).
rationale for the discharge was a pretext. Evidence of a pretext includes, *inter alia*, unwarranted discipline for previously tolerated infractions and shifting explanations for adverse action. The three incidents of the Charging Party’s alleged poor performance cited by DTP as a basis for the discharge occurred in September and October 2020, weeks before the discharge in mid-November, and the Charging Party states never mentioned any of the incidents to until after discharge. Indeed, although states documented two of the three incidents, has produced no such documentation nor did take any remedial action to prevent the recurrence of similar incidents. The tolerated those incidents until weeks later, when the Charging Party engaged in protected concerted activity, suggests they were not the true basis for the discharge. Similar doubt arises from shifting characterizations of the Charging Party’s departure, as initially claimed that the Charging Party was discharged for poor performance but later re-characterized the departure as a seasonal layoff.

CONCLUSION

The Charging Party’s verbal protests of failure to properly self-quarantine and resulting reluctance to physically work in presence amounted to concerted activity. That activity was protected under Section 7 of the Act because its aim was to achieve safe and healthy working conditions for the Charging Party and co-workers. DTP actually knew of that protected concerted activity based on personal awareness of it. Finally, the Charging Party’s discharge was motivated by DTP’s animus toward the protected concerted activity in which had engaged, notwithstanding contention that it was founded on poor performance—a pretext. In sum, following *Wright Line*, we

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46 *Approved Elec.*, 356 NLRB at 240.

47 *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), enforced, 160 F.3d 353 (7th Cir. 1998).

48 As far as any layoff is concerned, the Charging Party’s seniority in relation to fellow technicians was somewhere in the middle, raising suspicion as to why would have been laid off before any of the others.

49 *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), is not applicable because did not have a mistaken belief about the occurrence of the incidents which claims led to assess the Charging Party’s job performance as poor. Nor is a *res gestae* analysis appropriate here since is not relying on any alleged loss of protection in the course of otherwise protected concerted activity as the basis for the discharge.
conclude that the charge has merit and, absent settlement, the Region should issue complaint against DTP for violating Section 8(a)(1) of the Act.

/s/
R.A.B.

ADV.19-CA-269254.Response.Drew's Tire Pros