The Region submitted this case for advice as to whether the Board should assert jurisdiction over a political party, The Missouri Democratic Party (“MDP” or “the Employer”), and if so, whether the Employer violated Section 8(a)(1) and (3) by suspending and later discharging the Charging Party in retaliation for Union activity. We conclude the Missouri Democratic Party is an employer under the Act, and that its suspension and discharge of the Charging Party violated Section 8(a)(1) and (3) because the evidence demonstrates that the Employer acted with an unlawful motive.

FACTS

The MDP is the affiliate of the Democratic Party in the state of Missouri and is registered as a non-profit political party. During non-election years, the MDP employs a few individuals in managerial positions, such as the Executive Director who is responsible for the maintenance of the MDP headquarters. In addition to the Executive Director, the MDP’s “Board of Officers” is made up of a Chair, Vice Chair, Secretary, and a Treasurer, all of whom are elected by the members of the State Committee. The MDP regularly spends over a million dollars annually on out of state goods and services, in addition to raising annual revenues of around six million dollars, mostly from political contributions. On both its official website and Facebook page, the Employer advocates for Democratic candidates running for the United States Senate and House of Representatives, in addition to state elections.

Once the “run-up” to an election year begins, the MDP increases its staffing and most recently, in 2020, it employed around twenty employees in non-supervisory roles. Employees must sign a handbook acknowledging their receipt of the Employer’s
personnel policies, such as an outside employment policy and a neutrality policy. The most recent handbook was updated in May 2019. According to this version, Officers may approve certain outside employment requests; Officers, along with the Executive Director, are tasked with providing training programs for the staff on unlawful discrimination and harassment; and stakeholders may file complaints about employees with the Executive Director or any member of the Board of Officers.

In early 2019, the Charging Party was hired to speak at an MDP event in capacity as a member of 213 Group, LLC, a campaign consulting firm. In August of that same year, the MDP Executive Director reached out to the Charging Party about working for the Employer. There were discussions on whether 213 Group would be hired for certain projects or if the Charging Party would be hired directly. According to the Charging Party, the Executive Director specifically confirmed the Charging Party could continue to do 213 Group work, with no restrictions on what type of work could do once hired on by MDP, so long as it did not interfere with working time. Although the Employer admits to verbally agreeing to permit the Charging Party to continue to do work for 213 Group, it claims the Executive Director did in fact set restrictions on what type of work could do. Around , the Charging Party began working for the Employer as its Data & Technology Director, a non-supervisory position. In this role, the Charging Party managed a statewide electronic voter database contained in a software system called the Voter Activation Network, or VAN. Political campaigns donate to the MDP

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1 The policy states, in part: “Written approval from the Executive Director must be granted before the employee begins outside work... For employees working full-time at the MDP, the outside activity should be viewed as secondary to their primary job at the MDP, even if the MDP has approved it. All activities related to outside employment or work, such as telephone calls, must be conducted off-site and must not interrupt MDP job responsibilities.”

2 The neutrality policy states: “No employee shall endorse or support, or take any action that could be construed as endorsing or supporting, including online activity, any candidate in a contested Democratic primary, and shall not volunteer for any candidate in any contested Democratic primary, unless approved by the Chair or the Executive Director. No employee shall endorse or support any candidate in any election who is not a registered Democrat, when a registered Democrat is a candidate for such office.”

3 The Employer claims the Executive Director informed the Charging Party was required to limit work for 213 Group to assisting traditional non-profits and political entities outside of the State of Missouri. The Executive Director also allegedly told the Charging Party to seek approval before taking any work with 213 Group that could pose a conflict of interest.
and get access to the VAN database, where campaigns can create their own files within the system to assist them in voter outreach efforts.

In January 2020, the Charging Party initiated a union organizing campaign at the MDP. The Campaign Workers Guild (“CWG” or “Union”). An MDP Staff Union Twitter account was created, to which the Charging Party had administrative rights. On February 5, the Union issued a press release announcing the unionization of MDP staff employees. The Charging Party was quoted in the press release and identified as the employee leading the push for unionization. The following day, MDP signed a voluntary recognition agreement with the Union. Between April 10 and July 25, the parties held multiple bargaining sessions. Up until the July 14 bargaining session, the Charging Party attended each one and claims to have led the Union in negotiations.

Two days after the Union announced the organizing effort online and one day following the voluntary recognition by the Employer, the Executive Director, from personal account, tweeted that had a bad week of work because “others” made job harder than it needed to be. One week later, the Executive Director sent a message to all employees on Microsoft Teams addressing social media posts and press releases. Disclaiming at the beginning that was not telling employees to refrain from engaging with the press or posting on social media, the Executive Director stated that would get calls and/or texts every time someone posted about the Union. This post was framed as an “FYI” and the Executive Director explained that dealing with these texts and calls led to working from home more often and has taken up a lot of time.

On July 8, the Charging Party sent an email to unit employees regarding an investigation that management was conducting into whether an employee leaked information to a Union Representative that a Chairwoman of the Employer was on a leave of absence. In this email, the Charging Party advised everyone to not respond to inquiries from management until the unit could consult with Union counsel. The next day, the Charging Party emailed management on behalf of the bargaining unit and demanded the Employer cease attacks on members and return to the bargaining table.

A contentious bargaining session was held on July 14 where the parties discussed, among other things, financial issues and which job classifications would be included in the bargaining unit. The Union requested significant pay raises for all unit employees, and the Executive Director commented that employees whose positions were in dispute could have their pay docked or be terminated. One such employee whose position was in dispute was the Charging Party.

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4 All dates herein are 2020 unless otherwise specified.
One day after this bargaining session, the Union issued a press release via Twitter and Facebook, posting about the Union’s attempt to get a fair contract and noting several times about the salaries of staff employees being at 50% less than similar political parties in other states. In addition to this press release, the Union posted a petition for members of the public to sign and “Support MDP Workers Fighting for a Fair Contract.” Around 179 people signed the petition, many of whom were political candidates, elected officials, or held well-known public positions in Missouri.

An individual working for Tyler Merkel’s campaign, a Democratic candidate in a contested primary, emailed the Executive Director on July 16 about the Charging Party. This individual learned the Charging Party and 213 Group were working for Jo Doll’s campaign, the other candidate in this contested primary. As the Charging Party was employed by MDP, access to the VAN was greater than that of someone who was working for solely one campaign. With this greater access, the Charging Party could in theory access a “rival” campaign’s data. In the email, the individual asked that the Charging Party be removed from position with the MDP and threatened to take the situation to the media if the MDP did not act quickly.

The Charging Party was notified in an email dated that was being suspended with pay and investigated as a result of the Employer learning that 213 Group had received payments from a candidate in a contested primary, that this candidate’s campaign added to their VAN account on April 30, and that had logged into VAN through 213 Group account over 25 times since. In the email, the Executive Director cited the Employee Handbook’s outside employment policy. The email further states the Charging Party was explicitly told could not work in Democratic primaries and needed written consent before doing any political work in any capacity for 213 Group. The suspension email briefly noted the neutrality policy from the handbook as well.

Contrary to the Employer’s assertions in the initial suspension email, the Charging Party claims there were no restrictions placed on work for 213 Group pertaining to primaries or political work generally. In 2020, the Charging Party worked on a few different campaigns through 213 Group, two of which were contested primaries. Significantly, in June, the Secretary on the Board of Officers of the MDP was running for the State House, in a contested primary, and personally asked the Charging Party, while was employed with MDP, if 213 Group would work on campaign. Although the Charging Party worked around 10 hours on this campaign through 213 Group, did not charge for this service due to having a personal friendship with the Secretary.

On the Employer’s attorney conducted an interview with the Charging Party about work on Jo Doll’s primary campaign. This interview was recorded and
sent to what the Employer calls its “decision making group,” which was made up by the Executive Director, three members of the Board of Officers (Treasurer, Acting Party Chair, and one inactive Party Chair identified as an Officer), the Managing Communications Director, and the Managing Political Director. Together, this group decided to terminate the Charging Party. Two days later, the Charging Party was notified of termination via email. This notice mirrored the suspension letter in citing to the complaint received by Tyler Merkel’s campaign and violations of the neutrality and outside employment handbook policies.

**ACTION**

We conclude that the MDP is an employer under the Act. We also conclude that the Employer’s suspension and termination of the Charging Party violated Section 8(a)(1) and (3).

I. **It is proper for the Board to assert jurisdiction over the Employer.**

First, we note that the Supreme Court has “consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.”\(^5\) Throughout the life of the Act, neither Congress nor the Board have excluded political parties from the Board’s jurisdiction. However, the Employer argues that asserting jurisdiction over a political party would lead to unnecessary involvement in political decisions that are “essential to [their] First Amendment expressive interests.” In addition to this constitutional consideration, the Employer argues that it should not be subject to the Board’s jurisdiction because its activities are political and not economic in nature and therefore it does not impact interstate commerce. For reasons we will discuss below, these arguments are unpersuasive.

A. The Employer’s economic activity has a clear impact on interstate commerce.

We reject the Employer’s argument that because the nature of its activities are political rather than commercial in nature, and because its activities are focused exclusively in the state of Missouri, it does not have an impact on interstate commerce.

When the Board declined to assert jurisdiction over the nonprofit employer in *Ohio Public Interest Campaign*, it noted the nature of the respondent’s activity was not a basis for its decision.\(^6\) Instead, the Board reiterated that the only basis for

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6 284 NLRB 281, 281 (1987); see also *Kansas AFL-CIO*, 341 NLRB 1015, 1017–18 (2004) (exercising jurisdiction over the Kansas AFL-CIO despite its status as a
declining jurisdiction over a nonprofit organization would be if “its activities do not have a sufficient impact on interstate commerce to warrant the exercise of the Board’s jurisdiction.” In applying this standard, the Board found the operations of the respondent were almost exclusively limited to matters impacting Ohio residents and did not have a general impact on interstate commerce.

In Siemons Mailing Service, the Board announced it would assert jurisdiction over any nonretail employer with a total interstate inflow and outflow of goods and services that equaled or exceeded $50,000. Although the employer in Ohio Public Interest Campaign deriving a gross revenue in excess of one million dollars, it only received goods and services from outside the state of about $36,000. Due to this, in addition to the fact that the employer’s political concerns were entirely state-focused, the Board found that the employer had “not been shown to have such an impact on commerce as to warrant our assertion of jurisdiction in this particular case.” Later in 1987, the Board established a new jurisdictional standard of $250,000 in annual revenues “for all social service organizations other than those for which there exists a standard specifically applicable to the type of activity in which they are engaged.”

Here, despite the Employer’s claims, its operations clearly have a substantial impact on interstate commerce. It raises millions of dollars per year in political contributions and spends over one million dollars annually on out of state goods and services. Under either the normal nonretail standard of $50,000 of out-of-state inflow and outflow, or the “social services” standard of $250,000 annual revenue, the Employer has more than a sufficient impact on interstate commerce for the Board to assert jurisdiction. Unlike the respondent in Ohio Public Interest Campaign, the Employer’s involvement in interstate commerce is substantial. Further, the Employer’s website and Facebook pages reflect its advocacy for Democratic candidates

nonprofit political and lobbying organization); Ohio State Legal Services Assn., 239 NLRB 594 (1978) (asserting jurisdiction over an organization that, among other things, engaged in lobbying).

7 Ohio Public Interest Campaign, 284 NLRB at 281 (quoting St. Aloysius Home, 224 NLRB 1344, 1345 (1976)).

8 122 NLRB 81 (1958).

9 Ohio Public Interest Campaign, 284 NLRB at 281-82.

10 Id.

running for the US Senate and US House of Representatives, elections that have nationwide impacts.

B. Enforcing the Act will not interfere with a political party’s First Amendment rights.

The Employer argues that asserting jurisdiction over a political party presents difficult constitutional questions, and that doing so here specifically would require an inquiry into MDP’s political decisions that are essential to its First Amendment expressive interests. We disagree and find that enforcing the Act does not require an inquiry into the Employer’s protected political speech.

The First Amendment does not prevent the Board from asserting jurisdiction over political organizations. In Kansas AFL-CIO, the Board directly considered an employer’s argument that the First Amendment precluded the Board from exercising jurisdiction over a lobbying/political action organization.12 There, the Board affirmed the ALJ’s decision that NLRB v. Catholic Bishop of Chicago13 did not apply to political organizations.14

In Catholic Bishop, the Supreme Court noted that in the absence of a clear expression of congressional intent, the Court would interpret the National Labor Relations Act so as to avoid any serious constitutional questions.15 The Court there determined that the Board’s assertion of jurisdiction over religious teachers would create just such serious and unavoidable conflicts between the Act and the Religious Clauses of the First Amendment.16 Among other things, the Court noted that churches would assert that certain employment practices were mandated by their religion, necessitating the Board’s making a determination of whether the clergy were acting in good faith. Finding no clear congressional intent in either the law or the legislative history that the Act should cover teachers at religious schools, the Court determined that to avoid the serious constitutional issues, the Act should be interpreted as not extending to religious schools.

12 341 NLRB at 1017–18.
14 We note that the discussion of the First Amendment and Catholic Bishop in this memo does not suggest the General Counsel’s approval of Bethany College, 369 NLRB No. 98 (2020). Rather, the General Counsel is interested in revisiting the Board’s decision in Bethany College in a future, appropriate case.
15 Catholic Bishop, 440 U.S. at 500–01.
16 Id. at 503–04.
The Catholic Bishop analysis has not been applied outside the religious school context, i.e., to other kinds of potential conflicts between the assertion of Board jurisdiction and the First Amendment. For example, in Associated Press v. NLRB, the Supreme Court found that the Board’s assertion of jurisdiction over a newsgathering service did not infringe upon First Amendment guarantees of freedom of the press.¹⁷

In Kansas AFL-CIO, the Board similarly found that, just because an organization engages in First Amendment political activity, the Board’s assertion of jurisdiction over that organization would not infringe upon the First Amendment’s protection of political speech or association.¹⁸ That’s because the assertion of Board jurisdiction will not infringe on an employer’s control over its First Amendment protected speech, which is absolute and unaffected by its duties under the Act.¹⁹ While there may be organizational differences between a political action nonprofit like the Kansas AFL-CIO and a political party, there is little difference in the kind of speech undertaken by lobbyists and newspaper editorialists and the kind of speech undertaken by political party employees. Accordingly, we find that the First Amendment does not bar the assertion of jurisdiction over the Employer just because it is a political party.²⁰

C. The Board should not exercise its discretion to decline jurisdiction.

Finally, we conclude the Board should not decline to assert jurisdiction over the Employer. Section 14(c)(1) of the Act empowers the Board, by decision or rule making, to exercise discretion to decline jurisdiction where it determines that the effect of a labor dispute on commerce is “not sufficiently substantial to warrant the exercise of its jurisdiction.”²¹ Early in its history, the Board regularly declined to exercise

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¹⁷ 301 U.S. 103 (1937).

¹⁸ 341 NLRB at 1017–18.

¹⁹ Cf. Ampersand Publ’g, LLC v. NLRB, 702 F.3d 51, 56 (D.C. Cir. 2012) (holding inter alia that what is published and not published are not “legitimate employee concerns” for purposes of Section 7 protection) (quoting Passaic Daily News v. NLRB, 736 F.2d 1543, 1557–58 (D.C. Cir. 1984)).

²⁰ We take no position on whether it is proper for the Board to assert jurisdiction over an individual candidate’s campaign, therefore we will not address the 2019 cases Bernie 2020, Inc., Case 25-CA-245250, Advice Closing Email dated Oct. 25, 2019, and Warren for President, Inc., Case 01-CA-2465231, Advice Closing Email dated Oct. 25, 2019.

²¹ 29 U.S.C. § 164(c)(1). See also Hirsch v. McCulloch, 303 F.2d 208, 212 (D.C. Cir. 1962) (holding that the Board could not, on basis of advisory opinions, decline
jurisdiction over certain classes and categories of employers, including nonprofits, charities, small intrastate firms, hotels, and hospitals. The Board generally relied on findings that an employer was small, local, and did not significantly affect commerce, or that a state or foreign entity exerted significant control or regulation over an employer.

Almost all of the Board’s historical declinations have been either reversed by the Board or significantly narrowed. The Board no longer generally declines jurisdiction over a labor dispute involving a class of employers without first promulgating a rule or holding a hearing to establish a rule of decision).


23 See, e.g., Evans & Kunz, Ltd., 194 NLRB 1216, 1216 (1972) (declining to assert jurisdiction over a law firm composed of four to six attorneys where the firm confined most of its activities to the practice of law solely within Arizona).

24 See Horseracing & Dogracing Industries, Declination of Assertion of Jurisdiction, 38 Fed. Reg. 9537 (Apr. 17, 1973) (codified at 29 CFR 103.3) (declining Board jurisdiction over horseracing and dogracing industries, in part, because state laws set tracks’ racing dates and determined percentage share of the gross wagers that went to the state; the states licensed employees and retained the right to effect the discharge of employees whose conduct jeopardized the integrity of the industry; a “unique and special relationship” existed between the states and these industries because the industries constituted a substantial source of state revenue; and the sporadic nature of employment and lack of evidence of regular labor disputes suggested that these industries had insufficient impact on commerce to warrant the exercise of the Board’s jurisdiction).

25 See, e.g., St. Aloysius Home, 224 NLRB 1344, 1345 (1976) (“the only basis for declining jurisdiction over a charitable organization is a finding that its activities do not have a sufficient impact on interstate commerce to warrant the exercise of the Board's jurisdiction”); Lighthouse for the Blind of Houston, 244 NLRB 1144, 1145 (1979) (Board will no longer distinguish between profit and nonprofit organizations for jurisdictional purposes); Foley, Hoag & Eliot, 229 NLRB 456, 456–57 (1977) (overruling Board’s previous determination that it should decline to exercise jurisdiction over certain law firms); Kansas AFL-CIO, 341 NLRB 1015, 1018–19 (2004) (adopting ALJ decision rejecting respondent’s argument that because it was engaged primarily in state lobbying activities the Board should decline jurisdiction).

26 See, e.g., Delaware Park, 325 NLRB 156, 156 (1997) (finding that workers involved with a slot machine operation at a racetrack were not in the horseracing industry); Empire City at Yonkers Raceway, 355 NLRB 225, 227 (2010) (holding that combined
jurisdiction where a state or foreign entity exerts significant control. Thus, we conclude that it is within the Board's authority to assert jurisdiction over the Employer, and the Board should not decline to assert jurisdiction.

II. The Employer’s suspension and termination of the Charging Party violates Section 8(a)(1) and (3) of the Act.

To meet her initial Wright Line burden, the General Counsel must show the employee engaged in protected concerted activity, that the employer knew about this activity, and that the adverse action taken against the employee was motivated by animus towards the employee’s protected activity. Initially, we note that the evidence clearly shows that the Charging Party engaged in Union and protected concerted activities, and that the Employer knew about it. The Charging Party initiated the organizing campaign and began collecting signatures from other employees, which eventually led to the Employer’s voluntary recognition of the Union.

27 See, e.g., Hyde Leadership Charter School—Brooklyn, 364 NLRB No. 88, slip op. at 7–9 (2016) (rejecting argument that the Board should discretionarily decline jurisdiction over charter schools because of extensive state involvement where respondent received 99 percent public funding, teachers were treated as public employees under state law, and respondent was subject to a variety of state statutes); Management Training Corp., 317 NLRB 1355, 1357–58 (1995) (in determining whether the Board should assert jurisdiction over an employer with close ties to an exempt government entity, the Board will only consider whether the employer meets the definition of “employer” under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards); State Bank of India, 229 NLRB 838, 842 (1977) (holding that there is no public policy or policy of the Act which justifies the Board to continue to decline jurisdiction on the ground that the employer is an “agency” or “instrumentality” of a foreign state); Volusia Jai Alai, 221 NLRB 1280, 1280 (1975) (rejecting argument that the Board should use its discretion to decline jurisdiction over the Jai Alai industry where the state required that all employees be licensed and that 85% be state residents, retained power to approve all managerial employees and directly employed people on site in order to maintain the integrity of the game and the betting procedures, as well as to guarantee that the game was being played according to the rules); cf. Temple University, 194 NLRB 1160, 1161 (1972) (Board declining jurisdiction where direct state control of a non-profit university was so extensive as to make it a quasi-public institution).

in February. Once contract negotiations began, the Charging Party participated as a member of the Union's bargaining committee in every bargaining session up to termination, including the contentious session held on July 14. Throughout this process the Charging Party was quoted and identified in press releases issued by the Union. Engagement in Union and protected activity was no secret to the Employer.

If the General Counsel satisfies her initial showing, the burden shifts to the Employer to prove it would have taken the same action even in the absence of the Section 7 activity. Whether the employee's activity was a substantial or motivating factor in the employer's decision to take the adverse action may be demonstrated through direct evidence or inferred from circumstantial evidence based on the record as a whole. Some examples of circumstantial evidence include the timing of an adverse employment action in relation to the protected activity and if the proffered reason for the adverse action is pretextual. Disparate treatment by the employer or evidence that an employer's nondiscriminatory explanation is not true may also be used as circumstantial evidence that creates an inference of an unlawful motivation. Here, we find there is sufficient evidence to establish a causal relationship between the Charging Party's Union activity and suspension and termination in 2020.

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29 Manor Care Health Services–Easton, 356 NLRB 202, 204, 225 (2010), enforced, 661 F.3d 1139 (D.C. Cir. 2011) (citations omitted). See also Tschiggfrlie Properties, Ltd., 368 NLRB No. 120, slip op. at 8 (2019) (the General Counsel's burden is not automatically sustained because there is evidence of animus in addition to knowledge and protected activity, rather the evidence must support a causal relationship between the protected activity and the adverse action).

30 Tubular Corp. of America, 337 NLRB 99 (2001) (citations omitted).

31 See Corn Brothers, Inc., 262 NLRB 320, 325 (1982) (timing of discharges within one week of the first organizing meeting by employees in addition to union animus sufficient to find the General Counsel made a prima facie case); Pace Industries, Inc., 320 NLRB 661 (1996), enforced 118 F.3d 585 (8th Cir. 1997) (finding the respondent was motivated by anti-union animus when it implemented a new hiring procedure and its reasons for following these procedures were pretextual).

A. The Executive Director harbored hostility towards the organizing campaign and the Charging Party’s role with the Union.

Despite the Employer’s voluntary recognition of the Union, the Executive Director made various comments on Microsoft Teams and on Twitter that suggest harbored antiunion animus throughout the bargaining process. On February 7, two days after the Union announced the organizing effort online and one day after the voluntary recognition agreement, the Executive Director tweeted that had a bad week of work because “others” made job harder than it needed to be. One week later, the Executive Director sent a message to employees on Microsoft Teams addressing social media posts and press releases. Disclaiming at the beginning that was not telling employees to refrain from engaging with the press or posting on social media, the Executive Director stated received calls and/or texts every time someone posted about the Union. This post was framed as an “FYI” and ostensibly explained why had been working from home a lot and has been unable to dedicate time to other tasks. While these posts do not demonstrate direct animus towards the Charging Party’s role in organizing and posting on social media, the posts are strong circumstantial evidence of the Executive Director’s displeasure with Section 7 activity and the Employer’s discriminatory motivation in terminating the Charging Party’s employment.

See Holo-Krome Co., 293 NLRB 594, 595 n.6 (1989) (noting that statements demonstrating opposition to the union or protected activity can serve as a basis for finding animus even if the statements do not themselves violate the Act). We note that the Board recently held in United Site Services of California, Inc., 369 NLRB No. 137, slip op. at 14 n.68 (2020) that speech protected by Section 8(c) of the Act cannot serve as evidence of animus. To the extent that the statements relied upon herein would be considered protected by Section 8(c), the Region should urge the Board to overrule United Site Services and find that such speech can be used to establish discriminatory motive. See CARDS NEO, LLC, Case 14-CA-267122, Significant Advice Memorandum issued July 27, 2021, at 13-16.

Colonial Parking, 363 NLRB No. 90, slip op. at 1 n.3 (2016) (a showing of animus does not need to be specific towards an employee’s union or protected concerted activities, citing Libertyville Toyota, 360 NLRB 1298 (2014), enforced, 801 F.3d 767 (7th Cir. 2015)); cf. Tschiggfrie Properties, 368 NLRB No. 120, slip op. at 10, 11 (although the Board overruled the statement from Libertyville Toyota that proving protected activity was a motivating factor in the employment action does not require showing “particularized” animus towards the specific employee or any nexus to the specific protected activity, proof of discriminatory motivation can still be inferred from circumstantial evidence based on the record as a whole in establishing a causal connection).
We also find the Executive Director’s comment during the contentious July 14 bargaining session establishes additional animus toward the Charging Party.35 Here, in response to the Union’s proposal for a wage increase for the unit, the Executive Director stated employees in disputed positions, including the Charging Party, could have their pay docked in order to be included in the unit, or be terminated. Not only was the Charging Party’s position in the bargaining unit in dispute, but the total combined dollar amount the Union sought for the entire unit was about equal to the Charging Party’s salary. This comment, made just three days prior to the Charging Party’s suspension and eventual termination, establishes additional animus toward the Charging Party’s role in the Union’s campaign and bargaining. That this statement was not alleged as an independent 8(a)(1) violation “does not vitiate the force of the threats contained therein or diminish the weight of these implied threats of job loss as evidence of antiunion animus and motivation.”36

B. The timing of the Charging Party’s suspension and discharge suggest an inference of an unlawful motive.

We further conclude the timing of the Charging Party’s suspension and discharge, in relation to the contentious bargaining session and the petition released by the Union’s Twitter account, raises a serious question as to the Employer’s motivation. The Board has long held that “timing alone may suggest anti-union animus as a motivating factor in an employer’s action.”37 On [date], just three days prior to the Charging Party’s suspension, a contentious bargaining session was held between the Union and the Employer during which the Executive Director made a threat of termination and which itself is evidence of animus. That threat, together with the timing of the Charging Party’s suspension shortly after the bargaining session creates an inference of animus towards the Charging Party’s protected concerted and union activity. Additionally, the Union’s press release and online petition criticizing the Employer for its positions and behavior during bargaining, where members of the public could demonstrate their support for the Union, was

35 See Amglo Kemlite Laboratories, Inc., 360 NLRB 319, 325 n.16 (2014) (although unalleged, statements constituting implicit threats may be considered as evidence to establish an unlawful motivation or animus towards protected activity), enforced, 833 F.3d 824 (7th Cir. 2016).

36 Vico Products Co., 336 NLRB 583, 588 (2001), enforced, 333 F.3d 198 (D.C. Cir. 2003); see e.g., Bandag, Inc. v. NLRB, 583 F.2d 765, 767 (5th Cir. 1978) (acts displaying antiunion animus, although not alleged as independent violations, are “relevant in assessing the violations that were alleged”).

37 Masland Industries, 311 NLRB 184, 197 (1993), quoting NLRB v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984); see also Charter Communications, LLC, 366 NLRB No. 46, slip op. at 8 (2018).
posted (b)(6), (b)(7)(C) before the Charging Party’s suspension and resulted in around 179 separate emails of Union support being sent to the Employer. As the Executive Director had expressed displeasure with press releases and other social media posts by the Union, the timing of the Charging Party’s suspension (b)(6), (b)(7)(C) after the online petition also raises an inference of animus.

C. The Employer’s proffered reasons for discharging the Charging Party are pretextual, further suggesting the Employer had an unlawful motive in taking the adverse action.

The pretextual nature of an employer’s proffered reasons for the adverse employment action, along with other circumstantial evidence, is often sufficient to satisfy the General Counsel’s initial burden of showing the employer’s antithumor animus. Recently, in BS&B Safety Systems, LLC, the Board found animus based on the timing of an employee’s discharge and evidence of pretext. There, animus was inferred from the relatively close timing between the employee’s protected concerted activity and discipline, where the employee was engaged in protected activities right up until he was terminated, despite the employer’s assertions to the contrary. Animus was also found in BS&B based on pretext, where the employer had shifting explanations for the employee’s termination, it failed to conduct a meaningful investigation of the employee’s alleged production error, and it disparately treated the employee for committing the error. Here, in both the suspension letter and the termination letter, the Employer states the decision to terminate the Charging Party’s employment was due to violating the neutrality and outside employment policies contained in the Employee Handbook. We find these reasons to be pretextual and that the surrounding circumstances support an inference of unlawful motivation by the Employer.

38 370 NLRB No. 90, slip op. at 1–2 (2021).

39 Id., slip op. at 16.

40 Id., slip op. at 1–2.

41 (b)(5) The Region should contact Advice before submitting briefs to the Board.
i. The Employer’s verbal agreement regarding the Charging Party’s outside employment, along with evidence of disparate treatment, suggest the Employer’s reliance on the outside employment policy to be pretextual.

The Employer does not contest that it knew the Charging Party was going to work for 213 Group on its own time and admits to reaching a verbal agreement about that work. Despite the handbook rule requiring written approval from the Executive Director before an employee accepts outside employment, the Employer subverted its own rule and permitted the Charging Party to continue to work for 213 Group without any written agreement. Notably, there is disparate treatment evidence that multiple employees held outside (nonpolitical) employment without receiving written approval, none of whom were issued discipline by the Employer. The Employer contends that the Executive Director did not know the scope of work that 213 Group did and that it understood this work to be akin to fun between friends. However, in emails with the Charging Party prior to accepting the job, the Executive Director discussed the possibility of the Employer directly contracting with 213 Group for projects. That 213 Group worked in Missouri politics was no secret to the Employer and is demonstrated by the Employer’s express willingness to hire it. To the extent that the Employer and Charging Party disagree about the terms of their verbal agreement, that is a question of fact that should be resolved by an Administrative Law Judge.

ii. As the Employer had knowledge of the Charging Party working on the Secretary’s contested primary, its reliance on the neutrality policy is pretextual.

The Employer’s reliance on its neutrality policy as a reason for terminating the Charging Party for working in its capacity as a partner of 213 Group in a contested Democratic primary is pretextual. Importantly, only weeks before working for Jo Doll’s campaign, the Charging Party had worked with 213 Group on MDP’s Secretary’s campaign in [b] (b) (6), (b) (7)(C), at the Secretary’s request, in a contested primary. The Charging Party worked for nearly 10 hours on the Secretary’s campaign while held an [b] job with the Employer and without any written authorization beforehand. We reject the Employer’s claim it had no knowledge of the Charging Party working on the Secretary’s campaign and that it would have been disciplined if it did. At the time the Charging Party worked on the Secretary’s campaign, the

42 Lucky Cab Co., 360 NLRB 271, 274 (2014), enforced mem., 818 F. App’x 638 (9th Cir. 2020) (the fact that certain employees were not discharged for the same or similar infractions as the discriminates was persuasive evidence in finding the respondent’s reasons for discharges were pretextual and supported a finding of animus).
Secretary still held position on the Employer’s Board of Officers. As an appointed official of the Employer, the Secretary and other members of the Board of Officers are presumed agents of the Employer. In addition, the Employee Handbook would likely lead employees to perceive the Secretary, and other members of the Board of Officers, as agents of the Employer pursuant to the Board’s agency test, which is “whether, under all the circumstances, an employee would reasonably believe that the alleged agent was speaking for management and reflecting company policy.” Although the Secretary was neither a manager nor a supervisor of the Employer, knowledge about the Charging Party’s 213 Group work is properly attributable to the Employer because of the Secretary’s status as an agent. We find that because the Employer allowed the Charging Party to work on the Secretary’s contested campaign, it cannot rely on the neutrality policy to justify the Charging Party’s termination as that reliance is pretextual.

D. Regardless of the pretextual nature of the Employer’s rationale for its adverse action, it has failed to carry its Wright Line burden.

When an employer’s purported lawful reasons for an adverse action are pretextual, it fails, as a matter of law, to carry its burden under Wright Line. We note that the evidence of pretext discussed above obviates the need for any further analysis of the Employer’s rebuttal burden. Nevertheless, even if the Board

43 Nemacolin Country Club, 291 NLRB 456, 458 (1988) (noting that elected or appointed officials are “presumed to be agents clothed with apparent authority”), enforced, 879 F.2d 858 (3d Cir. 1989); see also IBEW, Local 453, 258 NLRB 1427, 1428 (1981) (“While the holding of elective office does not mandate a finding of agency per se, such status is persuasive and substantial evidence which will be decisive absent compelling contrary evidence”).


45 See Merrill Iron and Steel, Inc., 335 NLRB 171, 173 (2001) (attributing anti-union statements from a voting member of the respondent’s board of directors to the Respondent because of his status as an agent); State Plaza Hotel, 347 NLRB 755, 756 (2006) (“Since Aouli was an agent of the Respondent at the time, his knowledge may be imputed to the Respondent”).


47 See Golden State Foods Corp., 340 NLRB 382, 385 (2003) (where it is shown that the respondent’s reasons “are pretextual... the [r]espondent fails by definition to show
disagrees that the Employer’s reasons for terminating the Charging Party are pretextual, the Employer still has not met its burden. The Employer knew about the Charging Party’s work with 213 Group and verbally agreed that could continue to do such work, and there were multiple employees who held outside employment and were not disciplined. Despite competing claims by the Charging Party and the Employer about the terms of the verbal agreement on outside employment, that the Employer chose to ignore its own neutrality policy restricting what could do in capacity as a partner for a political consulting firm is instructive in why took on work for Democratic candidates in contested primaries. Further, the Employer’s acceptance of the Charging Party’s work with 213 Group on the Secretary’s campaign belies its reliance on the neutrality policy in deciding to terminate the Charging Party’s employment.

III. Conclusion

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) of the Act when it suspended and terminated the Charging Party.

/s/
R.A.B.

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