The Region submitted this case for advice pursuant to GC Memorandum 21-04\(^1\) regarding whether the Charging Party engaged in protected concerted activity as defined in *Alstate Maintenance, LLC*,\(^2\) and if so, whether the Employer unlawfully terminated the Charging Party for engaging in that conduct. First, we conclude that the Charging Party engaged in protected concerted activity as defined in *Alstate* when he made comments and posed questions about merit raises during a budget meeting. However, the Region should use this case as a vehicle to urge the Board to overrule *Alstate* because that decision undermines the purposes of the Act by inappropriately restricting what may reasonably be considered protected concerted activity. Second, we conclude that the Employer violated Section 8(a)(1) because it terminated the Charging Party for making protected concerted comments about merit raises at the budget meeting. In finding the Charging Party’s termination unlawful under *General Motors, LLC*,\(^3\) the Region should urge the Board to overrule its decisions in *Tschiggfrie Properties*\(^4\) and *Electrolux Home Products*,\(^5\) both of which improperly altered the General Counsel’s burden for

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\(^1\) GC Memorandum 21-04, “Mandatory Submissions to Advice,” at 3 (Mar. 31, 2021).

\(^2\) *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019).

\(^3\) 369 NLRB No. 127 (2020).

\(^4\) 368 NLRB No. 120 (2019).

\(^5\) 368 NLRB No. 34 (2019).
showing animus when conducting a *Wright Line* analysis. Finally, the current case is an appropriate vehicle for urging the Board to overrule *General Motors* and reinstate the loss-of-protection standards from cases such as *Atlantic Steel Co.*

**FACTS**

Starfish Family Services, Inc. ("the Employer") is a nonprofit social services agency located in Dearborn, Michigan that employs about 400 employees who are not represented by a union. In [b]6, [b]7[c], the Employer hired the Charging Party as an [b]6, [b]7[c] In 2016 began working as a title retained until [c] termination in 2021.

During employment, the Charging Party neither received any discipline nor a performance review rating below “Satisfactory or Meets Expectations.” However, starting in mid-to-late 2019 and occasionally until [c] termination, the Charging Party had several discussions with [c] supervisor about being perceived as “angry” and needing to “advocate in a better way” when raising workplace concerns. Those discussions took place during regularly-scheduled meetings with [c] supervisor and were not disciplinary in nature. While it is not clear what conduct prompted those discussions, internal emails from December 2020 and January 2021 show that [c] supervisor was aware the Charging Party viewed management’s feedback as tone policing and that [c] did not want to change who [c] was.

In late 2020, the Employer announced that it would not grant employees merit raises at that time, which represented a change from the Employer’s usual practice of granting merit raises at the start of each year. The Employer stated that it would reconsider the decision later in 2021 as its financial prospects resulting from the pandemic became clearer. The Charging Party was upset about this decision, and in January 2021 [c] discussed the issue with at least 11 coworkers who similarly expressed their disappointment about the lack of merit raises and other Employer financial decisions.

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7 245 NLRB 814, 816 (1979).

8 All subsequent dates are in 2021 unless otherwise indicated.
On January 26, the Employer’s Chief Executive Officer (“CEO”) announced via email that the Employer would be adding a new position to the Executive Leadership Team (“ELT”). Several employees, including the Charging Party, were upset by this announcement given the Employer’s recent decision to not grant employees merit raises. That same day, the Charging Party texted a manager about the addition of the ELT position, stating “I’m just so surprised with all the layoffs . . . that we would add to our ELT team. It really feels top heavy when no one is getting a merit raise either.” Around the same time, Employee A, a coworker with whom the Charging Party had been discussing concerns about the budget, responded by email directly to the CEO and expressed surprise at the Employer’s financial decisions since it had suspended retirement fund contributions and merit raises. Employee A asked the CEO if the Employer had plans to help employees recover these financial losses. In the CEO’s reply in which attempted to explain the Employer’s budgetary decisions, included a postscript stating that the Employer’s Chief Financial Officer (“CFO”) had invited all employees to a first quarter financial review meeting and that Employee A “can get details from .” The Employer does not typically invite employees to attend budget meetings.

The first quarter financial review meeting (“the budget meeting”) took place via Zoom and was led by the CFO. Several other managers attended, including the Director (“the Director”) and over 50 employees. At the start of the meeting the CFO stated, “I won’t mute everybody . . . because I would like you guys to ask questions as we go along.” The Vice President (“the VP”) also encouraged employees to ask questions in the chat if they preferred. The CFO then proceeded to share a spreadsheet, which showed the Employer’s financial situation using dollar amounts, and to use the spreadsheet to explain various aspects of the Employer’s budget.

Soon after the meeting began, Employee A asked via the meeting’s chat function, “I recall at one point that the ELT had taken a pay cut to help with expenses. Is that still in effect?” The CFO responded that it was no longer in effect. A few minutes later, Employee B, another employee with whom the Charging Party had discussed pay concerns, asked in the chat if there was a way to look up the Employer’s tax returns. Employee B then privately texted the Charging Party and asked to post a question in the chat about why teachers in different programs were not paid the same. After the Charging Party did so, Employee A followed up in the chat writing, “To piggy back on [the Charging Party’s] question, there are differences in Merit Raises and COLA. Can you tell us more about what leads to those differences in pay, merit raises, and cost of living pay?” In the thirty minutes that followed, eight different employees, including the Charging Party and Employees A and B, posted various questions and comments, several per minute, about pay equity and budgetary decisions. The CFO and other Employer representatives attempted to answer these questions periodically.
After that exchange, the Charging Party wrote, “[CFO] – when do ou [sic] think we could get merit raise[s] for 2020? we all have been working so hard :).” Around that time an Employer official interjected to state that if there are individual questions about pay, employees should direct them to their supervisors or HR rather than to the CFO. Employee A then wrote in the chat, “I’m surprised to hear that it sounds like we are still in a bit of a precarious financial situation. We qualified for the PPE [sic]. We didn’t do merit raises this year. I’m surprised that we had the funds for a new ELT position. Can you elaborate?” In response, the CFO stated, in part, “the worst thing you can do is not invest in the strategic priorities of the [Employer].” Following that statement, the Charging Party wrote in the chat, “it feels like you quit investing in us first line staff since we didn’t get merit raises.” The CFO responded by saying that the situation remained precarious, and that it was not clear how the year would play out for the organization financially, which is why they had made the decision to not give merit raises.

Several minutes later the Charging Party asked in the chat, “how much [are] merit raises a year usually for employees?” After the CFO did not respond to this question, and during a pause in the meeting, the Charging Party unmuted microphone and asked the question aloud. was asked to speak at the meeting besides members of the finance and ELT teams. The Charging Party first asked the CFO how much merit raises usually cost per year, and when the CFO replied that it was usually two percent of the budget, the Charging Party followed up asking how much that would translate to in a dollar amount. The CFO stated that it would depend on the number of staff, and the Charging Party again followed up, asking for a number amount from the previous year, adding “I know you’ve had a hard year and I want to recognize that, but I think that in transparency there was a decision and I’m just wondering how much money that was.” Without providing a number the CFO stated, in short, that the years were not comparable because in fiscal year 2020 there was no pandemic. added that “nobody likes not getting a raise, but I think others like to keep their jobs and I think that is probably a higher value than a personal increase in pay in one year.”

At this point the Charging Party muted microphone because believed the CFO would not answer question about the approximate cost of merit raises to the Employer, information felt the employees needed to assess the validity of the CFO’s statements that the Employer could not afford the raises given the financial data presented at the meeting.

The recording of this exchange, which lasted approximately one minute, shows that the Charging Party never raised voice or used an angry tone. The Employer contends that came off as angry because shrugged shoulders and rolled eyes during the exchange, but this conduct is not visible from the Zoom recording, ostensibly because the conduct occurred while the CFO was speaking and only the current speaker was recorded. The Charging Party and
Employee A both contend that the Charging Party did not roll eyes, though both state it is possible that, during the CFO’s statement at the end of the exchange when it became clear that would not be providing them with a dollar amount for the cost of merit raises, may have shrugged shoulders.

Following this exchange, the Charging Party received messages from several coworkers who thanked for advocacy. The Director also privately messaged the Charging Party, stating that was concerned that the Charging Party still did not understand the financials. The two agreed to meet for a conversation.

During their meeting, the Charging Party asked the Director why dollar amounts for merit raises had not been included in the presentation, and why staff had not been informed ahead of time about the plan to hire a new ELT position. The Director talked to the Charging Party about the importance of having “trust in the management team to . . . know what needs to be done with the [Employer’s] budget and strategic planning.”

Following their initial exchange, the Director stated that did not like the Charging Party’s delivery at the budget meeting because had been “argumentative, aggressive, shoulder shrugging, shaking head, smirking and eye rolling.” The Director acknowledged that the Charging Party “was likely trying to advocate for people but was not doing it in a way that could be heard.” The Director also mentioned the Charging Party’s feedback over the previous year about the way in which makes comments in meetings. The Director told the Charging Party that this behavior needed to stop, and that it was “ok to ask questions and speak up on issues, but it is the delivery of that so that messages are heard that [the Charging Party] needs to work on.” In response, the Charging Party stated that had many people reach out who appreciated what said and how said it. The Director again stated that the behaviors needed to change because “supporting” the Charging Party was no longer worth it if was not willing to change. At this point the Charging Party stated that did not want to change behavior because did not feel that had done anything wrong, had not rolled eyes or been aggressive. felt the Director was “threatening” and if the Director did not like behavior, should write up. The Director replied that had concerns about the Charging Party’s work with clients if was unwilling to be reflective about behavior. At this point the Charging Party began laughing uncomfortably, threw up hands and again said that if behavior was really such a problem then the Director should write up. The Director responded that the next time they spoke it would be with HR, and the meeting ended.

Later that day, the Charging Party received a call from a Human Resources representative stating that was being terminated “due to behavior in
meetings.” Shortly thereafter, received a termination letter indicating that was being terminated “as a result of your behavior and conduct during the 2021 1st Quarter Review of Financials and subsequent discussion of that conduct with . . . the Director . . . as follows: creating or contributing to a disruptive work environment; unprofessional conduct; intentional refusal to carry out reasonable instructions.” The termination letter also states, “further, the actions of 2021 demonstrated a furtherance of a pattern of continued deficiencies in communication skills and a lack of demonstrated professionalism in the workplace which have been noted and discussed in performance reviews, supervisions, and in meetings with supervisors, manager, and your director since at least 2019.”

In late June, the Charging Party filed the current charge. The Employer asserts it did not intend to discipline or terminate the Charging Party based on conduct at the budget meeting but made the decision to terminate based on conduct during the follow-up meeting with the Director. The Employer also promised to provide examples of other employees who were terminated because of “unprofessional” conduct but has failed to date to do so.

**ACTION**

We conclude initially that the Charging Party engaged in concerted activity for the purpose of mutual aid or protection when made comments and posed questions during the budget meeting about the Employer not granting merit raises. Specifically, we find there exists sufficient evidence of “prior and contemporaneous discussions” with coworkers concerning pay issues to demonstrate that actions at the budget meeting constitute traditional concerted activity. We also conclude that, even absent the evidence of prior and contemporaneous conversations with coworkers, the nature of the conduct at issue here is concerted under Alstate. However, the Region should use this case as a vehicle to urge the Board to overrule its decision in Alstate because it undermines the purposes of the Act by improperly limiting what would reasonably be considered protected concerted activity.

We further conclude that the Employer violated Section 8(a)(1) when it terminated the Charging Party after the budget meeting. Insofar as the Employer claims that it terminated the Charging Party due to misconduct during the budget meeting and follow-up meeting with the Director, we conclude that a General Motors/Wright Line analysis establishes the Employer unlawfully retaliated against protected activity. In applying the Wright Line analysis, the Region should urge the Board to overrule its decisions in Tschoggfrie Properties and Electrolux Home Products because they inappropriately altered the General Counsel’s burden. Finally, the Region should also use this case as a vehicle to urge the Board to overrule its decision in General Motors and restore the loss-of-protection standards set forth in cases such as Atlantic Steel Co. Applying Atlantic
Steel here, we conclude that the Employer unlawfully terminated the Charging Party because he did not lose the Act’s protection while engaging in Section 7 activity during the budget or follow-up meetings.

I. The Charging Party’s Conduct During the Budget Meeting
Constituted Protected Concerted Activity under Alstate Maintenance

To be protected under Section 7 of the Act, employee conduct must be both “concerted” and “for the purpose of . . . mutual aid or protection.”9 The manner in which an employee’s actions are linked to those of coworkers determines whether the employee’s activity is concerted, with no particular combination necessary to find the conduct protected.10 In Meyers I, the Board held that, “[i]n general, to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”11 In Meyers II, the Board immediately expanded on that standard by “fully embracing” the Third Circuit’s holding in Mushroom Transportation that individual employees also act concertedly where they “seek to initiate or to induce or to prepare for group action, as well as . . . bring[] truly group complaints to the attention of management.”12 The Board further noted that activity may be concerted that “in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.”13 Thus, protected preliminary communications to coworkers include statements by an

9 See, e.g., Alstate Maintenance, LLC, 367 NLRB No. 68, slip op. at 2. The analysis here focuses on whether the Charging Party’s conduct during the budget meeting constituted concerted activity. conduct satisfied the mutual aid or protection requirement because sought to have the Employer address merit raises for and coworkers. Id. slip op. at 8-9 (stating that employee activity is for mutual aid or protection if the employee seeks “to improve terms and conditions of employment” or otherwise improve the lot of employees).


12 Meyers II, 281 NLRB at 887 (citing Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964)). See also Alstate, 367 NLRB No. 68, slip op. at 3.

13 Meyers II, 281 NLRB at 887.
employee made to elicit support from fellow likeminded coworkers for a personally held view about a working condition. Fellow employees need not agree with the message or join the employee’s cause for there to be concert.

In *Alstate Maintenance*, the Board construed the foregoing principles as providing that “an individual employee who raises a workplace concern with management is engaged in concerted activity if there is evidence of ‘group activities’ – e.g., prior or contemporaneous discussion of the concern between or among members of the workforce – warranting a finding that the employee was indeed bringing to management’s attention a ‘truly group complaint,’ as opposed to a purely personal grievance.” Concerted activity may sometimes be found in the absence of evidence of “group activities,” but the Board made clear that “[t]he fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity.” Instead, the Board provided a limited list of certain factors which, in those circumstances, will support the inference that the employee sought to induce, initiate, or prepare for group action. Those factors include: whether the employer called the employee meeting to announce a decision about terms and conditions of employment; whether the decision affects multiple employees at the meeting; that the employee raised a complaint in response to the announcement at the meeting rather than ask how the decision would be implemented; that the employee complained about the decision’s effect on multiple employees; and whether the employee did not have an earlier opportunity to discuss the decision with coworkers because the employer first announced it at the meeting.

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14 See, e.g., *Morton International*, 315 NLRB 564, 566 (1994) (finding that employee engaged in concerted activity by writing contradictory statements on memo that proposed smoke-free workplace, and posting memo in lunchroom, because the conduct induced support from fellow smokers); *Whittaker Corp.*, 289 NLRB 933, 933 (1988) (“the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity”) (quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)).

15 See, e.g., *Desert Cab, Inc., d/b/a ODS Chauffeured Transp.*, 367 NLRB No. 87, slip op. at 13 (2019).

16 *Alstate*, 367 NLRB No. 68, slip op at 3.

17 Id. slip op. at 7.

18 Id. slip op. at 7 & n.43 (also noting that all the factors need not be satisfied to support finding an inference that an employee sought to induce group action).
Applying the foregoing principles, the facts here establish that the Charging Party engaged in concerted activity by prior or contemporaneous discussions with co-workers about the very subject subsequently raised at the group meeting. However, even absent such discussions, conduct at the group meeting, too, would constitute concerted activity under the five-factor analysis set out in Alstate.

Initially, there is significant evidence of the Charging Party having both prior and contemporaneous conversations with fellow employees about the Employer's budgetary decisions. In January, before the budget meeting, the Charging Party exchanged complaints about the lack of merit raises and the Employer's other budgetary decisions with at least 11 coworkers. In late January, both the Charging Party and Employee A each complained to management officials that the Employer had hired a new Executive Leadership Team ("ELT") member – a high-paid position – at a time when the employees did not receive a merit raise. Finally, the active participation by eight employees who asked questions and made comments about pay equity and the Employer's other financial decisions in the Zoom chat during the budget meeting, including Employees A and B who did so in coordination with the Charging Party, represents contemporaneous employee discussion of wage concerns. In light of this extensive background of the Charging Party having prior and contemporaneous discussions with coworkers about the Employer's pay practices, the comments the Charging Party made by text and orally during the Zoom budget meeting represented bringing a truly group complaint, i.e., the lack of merit raises for the prior year, to the attention of management. It similarly constituted the "logical outgrowth" of these ongoing group activities, which the Board continues to recognize as concerted activity. Thus, conduct constituted traditional concerted activity under Meyers I and Alstate for the purpose of mutual aid or protection.

However, even assuming the Charging Party had not engaged in these prior and contemporaneous discussions with coworkers over the lack of merit raises, questions and statements during the Zoom budget meeting were nonetheless

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19 See, e.g., Maine Coast Memorial Hospital, 369 NLRB No. 51, slip op. at 1, 13 (2020), enforced, 999 F.3d 1, 10-11 (1st Cir. 2021); Mike Yurosek & Son, Inc., 306 NLRB 1037, 1038–39 (1992) (finding individuals' uncoordinated refusals to work overtime were logical outgrowth of earlier concerted protest over hour reductions), enforced, 53 F.3d 261 (9th Cir. 1995); Needell & McGlone, P.C., 311 NLRB 455, 456 (1993) (finding employee engaged in concerted activity where she complained about preferential treatment given a fellow secretary because her complaint was the logical outgrowth of concerns she had discussed with coworkers and raised at a staff meeting), enforced mem., 22 F.3d 303 (3d Cir. 1994).
concerted activity because they were presented in a group setting and related to a matter of common concern. Each of the limited factors the Board listed in *Alstate* as supporting an inference that an employee’s statement during a group meeting sought to initiate, induce, or prepare for group action are present here. To start, although the Employer did not call the budget meeting to announce its decision to not give merit raises for the prior year, that issue remained open because the Employer had stated it would consider revisiting the issue after obtaining a better understanding of its finances. Thus, the Charging Party’s statements and questions drew coworkers’ attention to the fact that the Employer’s budget presentation showed it continued to prioritize other matters like hiring and fully compensating officials in high-paid ELT positions but had “quit investing in us first line staff since we didn’t get merit raises.” The language the Charging Party used made clear that was protesting how the Employer’s decision to not grant merit raises affected the workforce, including the other employees attending the meeting, and not just . Finally, although the Employer previously had announced it would not currently pay merit raises, it is clear that the Employer made the atypical decision to invite employees to the budget meeting in order to explain its reasons for making certain budgetary decisions. Thus, the budget meeting provided an opportune environment for the Charging Party to highlight the Employer’s choice to not financially reward its employees’ efforts during a difficult year and challenge its claimed inability to afford merit raises. In short, all these circumstances support the inference under *Alstate* that the Charging Party used comments during the budget meeting to induce coworkers into joining protest over the lack of merit raises.20

II. The Board Should Clarify What Constitutes Concerted Activity and Overrule *Alstate Maintenance* Because It Is Inconsistent with *Meyers II* and the Purposes of the Act

By construing the principle of concerted activity in Section 7 so narrowly, the *Alstate* Board limited the Act’s reach, acted inconsistently with *Meyers II* and the *Mushroom Transportation* line of cases, and as a result undermined the Act’s purpose of protecting employees who seek to improve their working conditions.21

20 See *Alstate*, 367 NLRB No. 68, slip op. at 4, 6, 7 (citing *Chromalloy Gas Turbine*, 331 NLRB 858, 863 (2000) (finding employee engaged in concerted activity by protesting change in break policy at group meeting), *enforced sub nom.*, *NLRB v. Caval Tool Div.*, 262 F.3d 184 (2d Cir. 2001), and *Whittaker Corp.*, 289 NLRB at 934 (finding employee engaged in concerted activity by complaining about lack of annual wage increase at employer-initiated group meeting)).

21 In *Alstate*, the Board held that an airport skycap did not engage in concerted activity when, in response to an assignment to unload a soccer team’s equipment, he
Furthermore, the *Alstate* Board improperly narrowed the circumstances under which an employee’s conduct is considered to be for the purpose of mutual aid or protection. The Board should overrule *Alstate* to preclude interfering with the congressional policy the Act represents. Indeed, the Board should broadly interpret what constitutes concerted activity, as any activity that could objectively be a step in “initiat[ing], [] induc[ing], or [] prepar[ing] for group action.” Such a test would ensure that employee rights under the Act are fully recognized and protected.

A. The Board’s *Alstate Maintenance* Decision Undermined the Purposes of the Act by Deviating from *Meyers II* and Narrowly Construing and Thereby Limiting Concerted Activity

“[O]ne of the fundamental purposes of Congress’s decision to protect ‘concerted’ activities by employees was to ‘reduce the industrial unrest produced by the lack of appropriate channels for the collective efforts of employees to improve working conditions.’” “[T]he Act simply cannot do what Congress intended” unless the phrase “concerted activities” in Section 7 is interpreted broadly. However, rather than adhere to this congressional policy embedded in the Act, *Alstate* narrowed what constitutes “concerted activities,” thereby inappropriately limiting the settings where individual employees who seek to induce coworkers to support their efforts to change disfavored working conditions are protected by the Act. The Board should overrule *Alstate* to prevent producing such unjustifiable results.

In *Alstate*, the Board improperly deviated from *Meyers II* and narrowed the circumstances under which an individual employee’s complaint about working conditions to their employer in the presence of their coworkers will be considered stated in front of three coworkers that “[w]e did a similar job a year prior and we didn’t receive a tip for it.” 367 NLRB No. 68, slip op. at 4, 5. Although the skycaps initially walked away when a van containing the soccer team’s equipment arrived, they later helped baggage handlers who had been summoned from inside the terminal to complete the job. The soccer team gave the four skycaps a total tip of $83. *Id.* slip op. at 2. The Board also held that the skycap’s statement was not for the purpose of mutual aid or protection because it concerned tips from a customer, which the employer did not control. *Id.* slip op. at 8-9.

22 *Meyers II*, 281 NLRB at 887 (quoting *Mushroom Transportation Co.*, 330 F.2d at 685).

23 *Alstate*, 367 NLRB No. 68, slip op. at 14 (Member McFerran, dissenting) (quoting *Meyers II*, 281 NLRB at 883).

24 *Id.* slip op. at 14 (Member McFerran, dissenting).
concerted activity. Despite stating otherwise, the Board departed from longstanding precedent that provided that an individual employee’s concerted objective could be inferred in a group-setting from the totality of the circumstances. In place of that approach, the Board created a non-exhaustive list of five factors, discussed above, to consider in determining whether an individual employee’s statement in the group context could lead to a finding of concerted activity.\(^25\) In so doing, the Board “effectively establish[ed] a minimum threshold for finding that an employee’s activity is concerted” by creating a test “that assesses concerted activity in terms of isolated points of conduct rather than the totality of the circumstances.”\(^26\) Although the Board states that not all five factors need be present to find concerted activity, its approach implies that at least one or more must be satisfied and that the absence of one will weigh against a finding of concerted activity. As a result, “situations not encompassed by these factors will not support an inference of concerted action” despite the presence of other circumstances that do.\(^27\) The artificial barrier created by the Alstate approach thwarts the purposes of the Act by excluding from its protection many types of employee conduct for mutual aid or protection that would reasonably be considered concerted activity under *Meyers II*.

For example, two of the factors listed in Alstate make a finding of concerted activity in a group context dependent on an employee voicing a complaint during a formal workplace meeting called by the employer. However, where a group discussion is at issue, “the Board [had] never held that asserting an objection during a formal meeting was either necessary or sufficient. Rather, in each case the Board conducted a thorough review of all the facts in finding concerted activity.”\(^28\) But the approach set out in Alstate would seemingly preclude finding, for example, that employee advocacy to a supervisor at an impromptu gathering was concerted activity. Relatedly, it is not at all clear why an employer’s purpose in calling a meeting should be relevant to a determination that the employee’s actions were taken for the purpose of inducing group action. Because Alstate unnecessarily excludes from Section 7’s protective reach employee conduct that would be traditionally and reasonably considered concerted activity, i.e., a complaint made in front of coworkers, the Board should overrule that decision.

\(^{25}\) *Id.* slip op. at 7.

\(^{26}\) *Id.* slip op. at 14 (Member McFerran, dissenting) (quoting *MCPc, Inc. v. NLRB*, 813 F.3d 475, 486 (3d Cir. 2016)).

\(^{27}\) *Id.* slip op. at 14, n.23 (Member McFerran, dissenting).

\(^{28}\) *Id.* slip op. at 14 (Member McFerran, dissenting).
B. The Alstate Board Further Narrowed the Act’s Protection by Inappropriately Limiting the Reach of the Mutual Aid or Protection Clause

The Board in Alstate also narrowed the definition of the “mutual aid or protection” prong of Section 7 beyond what Congress intended. The Board reasoned that where workers’ complaints relate to an issue not directly controlled by the employer, such as customer tips, the complaints usually will not be for mutual aid because, e.g. tipping, is a matter between the employee and the customer from which the employer is “essentially detached.”29 This holding, too, undermines the purposes of the Act because the meaning of mutual aid and protection “encompasses a wide swath of employee activity that has the potential to ‘improve their lot as employees.’”30 As the dissent in Alstate notes, “[t]his necessarily includes employees’ shared ‘interests as employees,’ even if they do not relate to a specific dispute between employees and their own employer over an issue which the employer has the right or power to affect.”31 Indeed, “[t]he concept of ‘mutual aid or protection’ focuses on the goal of concerted activity.”32 The majority’s decision in Alstate improperly restricted this concept in contravention of congressional intent “to protect concerted activities for the somewhat broader purpose of ‘mutual aid or protection’” that necessarily includes “much legitimate activity that could improve [employees’] lot ... [and] better their working conditions.”33 The General Counsel urges the Board to overrule this holding of Alstate as it is inconsistent with the basic premise of Section 7.

C. The Board Should Draw from Meyers II and Clarify What Constitutes “Concerted Activity” to Appropriately Effectuate the Purposes of the Act

In Meyers I, discussed above, the Board narrowed the circumstances under which individual employees acting for employees’ mutual aid or protection will be

29 Id. slip op. at 8.

30 Id. slip op. at 16 (Member McFerran, dissenting) (quoting Eastex Inc. v. NLRB, 437 U.S. 556, 565 (1978)).

31 Id. (quoting Eastex, 437 U.S. at 563, 566-67).

32 Id. (emphasis in original) (quoting Fresh & easy Neighborhood Market, 361 NLRB 151, 153 (2014)).

33 Eastex, 437 U.S. at 565, 566 (quoting in part NLRB v. Washington Aluminum, 370 U.S. 9, 14 (1962)).
considered to have engaged in concerted activity.\(^{34}\) Previously, in *Alleluia Cushion Co.*,\(^{35}\) and its progeny, the Board had consistently held that “activity will be deemed concerted in nature if it relates to a matter of common concern”\(^{36}\) in the workplace such as safety, \(^{37}\) gender discrimination, \(^{36}\) and wages. \(^{36}\) That standard was based on the logical notion that “an individual’s actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all the affected employees.”\(^{40}\) However, in *Meyers I* the Board significantly increased the burden on the General Counsel by overruling the *Alleluia Cushion* line of cases and holding that, “[i]t will no longer be sufficient for the General Counsel to set out the subject matter that is of alleged concern to a theoretical group and expect to establish concert of action thereby.”\(^{41}\) Nevertheless, after the D.C. Circuit remanded *Meyers I*, the Board explained that the General Counsel’s burden would be met where an individual employee advocated for their rights under a collective-bargaining agreement, as in cases applying the *Interboro-City Disposal* doctrine,\(^{42}\) or where “individual employees seek to initiate or to induce or to prepare for group action,”\(^{43}\) as in the *Mushroom Transportation* line of cases. Subsequently, the Board continued expanding the narrow definition of concerted activity in *Meyers I* through the *Whittaker* line of cases, a development that, as discussed above, evolved until it was recently curtailed by the Board’s holding in *Alstate*.

\(^{34}\) *Meyers I*, 268 NLRB at 497; *Meyers II*, 281 NLRB at 886-87.

\(^{35}\) 221 NLRB 999 (1975).

\(^{36}\) *Diagnostic Center Hosp. Corp.*, 228 NLRB 1215, 1217 (1977).

\(^{37}\) *Alleluia Cushion Co.*, 221 NLRB at 1000.

\(^{38}\) *Country Club of Little Rock*, 260 NLRB 1112, 1114 (1982).

\(^{39}\) *Steere Dairy*, 237 NLRB 1350, 1351 (1978).

\(^{40}\) *Air Surrey Corp.*, 229 NLRB 1064, 1064 (1977).

\(^{41}\) 268 NLRB at 497.


\(^{43}\) *Meyers II*, 281 NLRB at 887 (quoting *Mushroom Transportation Co.*, 330 F.2d at 685).
An additional way the Board has cabined the holding in *Meyers I* is through the development of the “inherently concerted” doctrine. Under that doctrine, where employees engage in discussions among themselves about certain conditions of employment, “evidence of contemplation of group action is not required” for a finding of concerted activity to attach.44 That is because discussions of issues such as wages, job security, and work schedules are “often preliminary to organizing or other action for mutual aid or protection.”45

By acknowledging that the “concerted” prong of Section 7 includes any step in the process of developing group action, including preliminary steps, the Board in *Meyers II* correctly articulated a standard that effectuates the purposes of the Act. The “to initiate, to induce or to prepare” test for concerted activity necessarily includes group discussions about working conditions, group complaints, advocacy around a collective bargaining agreement, and most complaints to an employer or government agency. Further, such a test clearly encompasses the development, discussed above, of the *Whittaker* line of cases and the inherently concerted doctrine. However, Board interpretation of other aspects of the *Meyers* cases are inconsistent with this standard because they impose additional requirements, such as requiring the evidence to “demonstrate group activities, whether ‘specifically


45 *Id.* (job security). *See also Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (work schedules), *enforcement denied*, 81 F.3d 209 (D.C. Cir. 1996); *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992) (wages), *enforced mem.*, 977 F.2d 582 (6th Cir. 1992); *Trayco of S.C., Inc.*, 297 NLRB 630, 634-35 (1990) (wages), *enforcement denied mem.*, 927 F.2d 594 (4th Cir. 1991); *Triana Industries*, 245 NLRB 1258, 1258 (1979) (wages). The General Counsel also takes the position that workplace discussions concerning health, safety and racial discrimination are inherently concerted, see MEMORANDUM GC 21-03, “EFFECTUATION OF THE NATIONAL LABOR RELATIONS ACT THROUGH VIGOROUS ENFORCEMENT OF THE MUTUAL AID OR PROTECTION AND INHERENTLY CONCERTED DOCTRINES,” at 5-6 (Mar. 31, 2021), and that inherently concerted conduct should extend to wearing slogans, whether on a button, facemask or other garment, as such represents the genesis of a discussion and may well lead to further conversation in the more traditional sense, see Press Release, NLRB, Region 18 complaint alleges Home Depot fired employee who refused remove Black Lives Matter slogan from apron (Aug. 16, 2021),

authorized’ in a formal agency sense, or otherwise” to find a true group complaint. These requirements exclude from the definition of concerted activity some individual employee conduct that is for the purpose of mutual aid or protection and is often preliminary to group workplace advocacy or organizing. Since Meyers I the Board has often excluded such conduct from the definition of concerted activity merely because the appeals are directed at an employer or a government agency rather than a fellow employee. Furthermore, as the D.C. Circuit explained, and the Board recognized in Meyers II, the definition of concerted activity espoused in Meyers I is not mandated by the Act. Thus, the Board should overrule any aspect of the Meyers cases that is inconsistent with this test.

Indeed, often an individual employee’s appeal to their employer or to a state or federal agency is a critical step in initiating or preparing for group action. Regardless with whom an employee first raises a complaint for the mutual aid or protection of their co-workers or the manner in which they raise it, these actions will in most circumstances constitute concerted activity under the Act because

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46 Meyers II, 281 NLRB at 886.

47 Id.

48 See, e.g., Myth, Inc. d/b/a Pikes Peak Pain Program, 326 NLRB 136, 148-49 (1998) (no concerted activity where employee filed wage claim for improperly docked hours); Moyer Trucking Service, 269 NLRB 958, 958 (1984) (Board reversed ALJ’s finding that charging party’s conduct was concerted when he refused employer’s demands to drive an unsafe truck in violation of state and federal safety regulations); Mazer Chemicals, 270 NLRB 241, 241 (1984) (employee who was terminated for complaining to employer about unsafe working conditions at the plant which impacted all workers unprotected). In Pikes Peak Pain Program, the dissent strongly advocated for a return to the Alleluia Cushion standard because the Board should protect employees who “assert[] work-related statutory rights designed to improve working conditions. This role is particularly critical now when so large a percentage of the employees covered by the Act do not have a collective-bargaining representative or the protections of a collective-bargaining agreement.” 326 NLRB at 140 (Chairman Gould, dissenting).

49 281 NLRB at 882 (“Having accepted the remand, the Board must observe the court’s opinion as the law of the case and, necessarily, its judgment that the Meyers I definition [of concerted activity] is not mandated by the Act.”).

50 As these cases are fact sensitive, providing a list of circumstances or factors which should be used to determine when an individual employee’s conduct for the mutual aid of their coworkers is a step towards group action, in much the manner the Alstate Board did, is not necessary. All the surrounding circumstances should be
they are a step in initiating, inducing, or preparing for group action.51 This is because when an employer’s response to an employee’s concerns is inadequate or government agencies fail to swiftly protect employee rights, in many cases an employee’s next steps will be to strategize with their coworkers on how to effectuate change. Permitting employers to discipline individual employees for these common steps in initiating, inducing, or preparing for group action to improve working conditions does not protect workers as required by the Act, because it allows employers to cut off inchoate activities that lead to further collective action and workplace organizing.52

In addition, the definition of concerted activity espoused by the Meyers cases creates a significant inequity of protection between workplaces with collective-bargaining agreements and those without. Under the Interboro line of cases, discussed in Meyers II and approved of by the Supreme Court,53 an employee who acts alone in defending their rights under a collective-bargaining agreement is engaging in concerted activity protected by Section 7, even when the employee does not refer to the agreement directly. However, an employee who acts alone in defending workplace rights under state or federal law is not protected by Section 7 considered, and in most cases where an employee brings a concern to their employer or a government agency, the circumstances will often suggest that this was just such a step. As much as “[making] common cause with a fellow workman over his separate grievance’ is a hallmark of...solidarity,” Fresh and Easy Neighborhood Market, Inc., 361 NLRB 151, 155-56 (2014) (quoting NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (2d Cir. 1942)), so too is trying to make change that will benefit one’s coworkers by appealing directly to management. Employees who take such risks are often early leaders of movements for change within their workplaces, and the “solidarity principle” enshrined in the mutual aid or protection clause of the Act must protect them as well.

51 See Meyers II, 281 NLRB at 887.

52 Of course, where an employer rejects an individual employee’s workplace complaint and then terminates that employee for raising the complaint, it may be that the employer recognizes the complaint will lead to further concerted activities among its employees and is attempting to thwart any future collective action among them. Cf. Parexel International, 356 NLRB 516, 518 (2011) (finding employer violated Section 8(a)(1) by discharging employee as a “pre-emptive strike” to prevent her from discussing wages and employment discrimination with coworkers in the future). Thus, employers themselves are aware of the concerted nature of the employee’s conduct in such circumstances, yet extant Board doctrine arguably does not protect it.

under Meyers. Such an inequitable outcome is not mandated by the Act, and the General Counsel asks the Board to remedy it. Thus, to give full effect to the policies embedded in Section 7, in most circumstances individual advocacy directed to an employer or a government agency—as with individual advocacy to one or more coworkers—that is for employees’ mutual aid or protection should also be considered concerted and, thus, protected by the Act.

III. Although the Employer Unlawfully Terminated the Charging Party Under Current Board Law, This Case Presents a Good Vehicle for Urging the Board to Reconsider Tschiggfrie, Electrolux Home Products, and General Motors

In General Motors the Board held that “the Wright Line burden-shifting framework is the appropriate standard for cases where the General Counsel alleges that discipline was motivated by Section 7 activity, and the employer asserts that it was motivated by [the employee’s] abusive conduct.”54 Because the Employer asserts that it terminated the Charging Party for engaging in misconduct during the budget and follow-up meetings, the Region should first argue that, under General Motors and Wright Line, the Employer violated Section 8(a)(1) by terminating the Charging Party. In addition, although the General Counsel met her burden under Tschiggfrie Properties, the Region should urge the Board to overrule that case as it improperly requires a showing of particularized animus against the discriminatee’s protected concerted activity as part of the General Counsel’s Wright Line burden. Further, in light of the fact that pretext evidence helps establish the Employer’s unlawful motive, the Region should urge the Board to reconsider its decision in Electrolux Home Products,55 which improperly diminished the significance of such evidence in a Wright Line analysis. The Region should also

54 General Motors, LLC, 369 NLRB No. 127, slip op. at 9. Although the Board in General Motors stated that a Wright Line analysis would apply in cases involving employees discharged because of alleged “abusive conduct,” such as profane ad hominem attacks, racial slurs, and threats of violence, it subsequently has applied the same analysis to cases involving less severe forms of alleged misconduct. See, e.g., Wismettac Asian Foods, 371 NLRB No. 9, slip op. at 1 n.6, 6, 7 (2021) (applying General Motors where employer alleged it had discharged an employee for using angry hostile tones and making only negative comments while complaining in a safety meeting about being required to drive overweight trucks).

55 368 NLRB No. 34, slip op. at 3 (stating for the first time that “[w]hen an employer has offered a pretextual reason for discharging or disciplining an alleged discriminatee, the real reason might be animus against union or protected concerted activities, but then again it might not”).
request that the Board overrule General Motors and reinstate the loss-of-protection standards from cases such as Atlantic Steel because those standards better effectuate the purposes of the Act. Finally, applying Atlantic Steel to the instant case, the Charging Party did not lose the Act’s protection, and the Employer violated Section 8(a)(1) by discharging

A. Under General Motors/Wright Line the Employer violated Section 8(a)(1) By Terminating the Charging Party for Engaging in Protected Concerted Activity

Under General Motors and Wright Line, to establish that an employer unlawfully disciplined or discharged an employee, the General Counsel bears the burden of proving that the employee’s union or protected concerted activity was a motivating factor in the employer’s decision. To do so, the General Counsel “must initially show that “(1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity.” Circumstantial factors from which an anti-Section 7 motive may be inferred include the employer asserting that the employee’s protected concerted activities constituted misconduct, implementing an adverse action soon after the employee’s protected activity, and asserting reasons for the adverse action that are a pretext, i.e., false or not in fact relied on. Evidence of pretext may support an inference of unlawful motivation,

56 245 NLRB at 816.

57 See General Motors, 369 NLRB No. 127, slip op. at 8-9; Wright Line, 251 NLRB at 1089.

58 General Motors, 369 NLRB No. 127, slip op. at 10 (citing Tschiggfrie Properties, Ltd., 368 NLRB No. 120, slip op. at 6, 8 (2019)). The General Counsel can meet her initial burden under Wright Line as interpreted in Tschiggfrie but disagrees with the Board’s decision in Tschiggfrie. As noted below, the Region should thus urge the Board to revisit that decision.

59 See, e.g., Wismettac Asian Foods, 371 NLRB No. 9, slip op. at 7 (noting that employer disciplining employee for the protected activity he engaged in was “more than sufficient to show animus toward” that activity); Lucky Cab Co., 360 NLRB 271, 274 (2014) (noting that timing, contemporaneous unfair labor practices, and evidence of pretext are factors from which an employer’s unlawful motive for an adverse employment action may be inferred), enforced, 621 Fed. Appx. 9 (D.C. Cir. 2015) (unpublished decision). Although the close timing of an adverse action to an employee’s protected activity is typically a strong indicator of an employer’s unlawful motive in a Wright Line case, the Board noted in General Motors that
but it does not compel such a finding and may not be sufficient depending on the surrounding circumstances. 60 Finally, where an employer relies on pretextual reasons for an adverse employment action, it cannot satisfy its rebuttal burden under \textit{Wright Line} that it would have taken the same action even absent the employee’s protected activity. 61

Applying these principles here results in finding that the Employer violated Section 8(a)(1) by terminating the Charging Party based on the ample evidence of the Employer’s animus toward Section 7 activity. 62 To start, the Employer’s animus can be inferred from its assertion that the Charging Party’s protected concerted activity constituted misconduct. Specifically, during the follow-up meeting on the Director acknowledged the Charging Party had engaged in Section 7 activity during the budget meeting by stating “was likely trying to advocate for people” when asking about merit raises. Although the Director claimed the Charging Party’s delivery rather than the substance of the message was inappropriate because had been argumentative, aggressive, and cynical, the Zoom recording fails to corroborate assertions. Moreover, the termination letter primarily referred to the Charging Party’s Section 7 conduct during the budget meeting and follow-up meeting with the Director as the basis for termination. By doing so, the Employer showed that Section 7 activity was a motivating factor in its decision to discharge.

Second, the timing of the adverse action supports finding the Employer harbored an unlawful motive. The Employer terminated the Charging Party after complained about the lack of merit raises during the budget meeting it had called in an apparent attempt to quell employee frustration about its financial decisions. Indeed, the reaction of one Employer official that employees should raise questions about their pay with their supervisors or HR rather than to the CFO, and the CFO’s statement that employees should be grateful they still have jobs, both reveal the Employer’s immediate frustration with protected comments and attempt to minimize their effect on coworkers. Thus, while the Employer previously had not disciplined the Charging Party for perceived “anger” and “suspicious timing” is not necessarily probative where the protected activity and abusive conduct occur during the same event. See 369 NLRB No. 127, slip op. at 10, n.23. However, the Board in \textit{General Motors} added that timing may be probative when the surrounding circumstances, such as the employee being subject to disparate treatment, make it so. \textit{Id.}

60 \textit{See Electrolux Home Products}, 368 NLRB No. 34, slip op. at 3, 5.


62 \textit{See Tschiggfrie}, 368 NLRB No. 120, slip op. at 7.
failure to “advocate in a better way” when raising workplace concerns, the Employer terminated, this time almost immediately after complaining about the lack of annual merit raises in front of a large group of coworkers.63

Finally, the evidence establishes that the Employer’s proffered reasons for terminating the Charging Party constituted a pretext, which further supports finding an unlawful motive. Where, as here, an employer’s stated reasons for a discharge are false, or not in fact relied on, the Board may infer that it was attempting to conceal its true, discriminatory motive where the surrounding circumstances tend to reinforce that inference.64 Evidence of pretext includes the employer providing shifting explanations for the adverse action, subjecting the employee to disparate treatment, and abruptly implementing an adverse action.65

Each of the foregoing types of pretext evidence are present here. Initially, the Employer provided shifting explanations because the termination letter states that it terminated the Charging Party, at least in part, because of conduct at the budget meeting, and the HR representative also told the Charging Party was being terminated “due to behavior in meetings.” However, the Employer subsequently claimed it did not intend to discipline or terminate the Charging Party based on conduct at the budget meeting but based that decision only on conduct in the follow-up meeting with the Director.66 Moreover, the Employer’s failure to provide any evidence that it disciplined other employees for engaging in similar misconduct establishes that it subjected the Charging Party to disparate treatment.67 The Employer’s abrupt termination of the Charging Party, especially

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63 See, e.g., Schaeff, Inc., 321 NLRB 202, 217 (1996) (noting that timing alone may suggest animus as a motivating factor), enforced, 113 F.3d 264 (D.C. Cir. 1997). Although as noted above the Board in General Motors suggested that, in cases where an employer claims that it was the employee’s misconduct during Section 7 activity that led to discipline or discharge, timing will generally not be probative of animus, the presence of other indicia of unlawful motive provide the requisite surrounding circumstances that make it probative here. See 369 NLRB No. 127, slip op. at 10, n.23.

64 See Electrolux Home Products, 368 NLRB No. 34, slip op. at 3 (quoting Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966)).

65 See, e.g., Lucky Cab Co., 360 NLRB at 274.

66 Inter-Disciplinary Advantage, Inc., 349 NLRB 480, 509 (2007) (finding that “an employer's shifting explanation for a discharge, or . . . its post hoc attempt to rationalize such a decision, are suggestive of a pretext”).
considering the complete lack of any previous disciplinary action taken against also supports finding an unlawful motive. The foregoing evidence, which shows that the Employer’s reasons for terminating the Charging Party are a pretext concealing its true, unlawful motive, both supports finding that the General Counsel satisfied her initial burden under Wright Line and that the Employer cannot prove it would have terminated the Charging Party absent Section 7 activity.

B. The Board Should Overrule Tschiggfrie and Electrolux Home Products Because Its Approach to Animus and Pretext Evidence Denies Employees the Protections of the Act

In Tschiggfrie Properties, the Board heightened the General Counsel’s initial burden under Wright Line by holding that the evidence of animus must demonstrate a causal relationship between an employee’s protected activity and the employer’s adverse action against that employee. This holding undermines the Act’s protection by limiting the relevant analysis to a particular discriminatee’s protected activities rather than permitting the General Counsel to show that animus toward Section 7 rights generally was the cause of the adverse employment action.

In Electrolux Home Products, the Board similarly shifted the General Counsel’s burden in cases applying the Wright Line test by holding that when a respondent’s stated reasons for an adverse action are found to be pretextual a discriminatory motive may be inferred “at least where . . . the surrounding facts tend to reinforce that inference” but such an inference is not compelled and may be undermined by countervailing evidence. However, as noted by the dissent in Electrolux, how that decision minimized the significance of pretext evidence “seems to open the door for employers to lie to the Board and get away with it.”

67 See, e.g., Pro-Spec Painting, Inc., 339 NLRB 946, 949-50 (2003) (noting that a finding of “disparate treatment supports the inference that the reasons advanced by [the employee’s] termination were pretexts and his termination was in fact” caused by his protected activity).

68 See, e.g., La Gloria Oil and Gas Co., 337 NLRB 1120, 1124 (2002) (evidence of pretext may be found in the abruptness of an employer’s decision to discharge following alleged misconduct), enforced mem., 71 Fed. Appx. 441 (5th Cir. 2003).

69 See, e.g., Pro-Spec Painting, Inc., 339 NLRB at 949; Con-Way Freight, 366 NLRB No. 183, slip op. at 3-4.

70 368 NLRB No. 34, slip op. at 3, 4.

71 Id., slip op. at 9 (Member McFerran, dissenting in part).
Consequently, the Region should urge the Board to revisit Tschiggfrie and Electrolux consistent with the model brief insert from Strategic Technology, Case 15-CA-249872, Advice Case-closing Email dated Oct. 21, 2021.

C. The Board Should Overrule General Motors and Apply Atlantic Steel Here to Find that the Employer Unlawfully Terminated the Charging Party

The current case provides a good example of the problems with applying the Wright Line test to situations previously analyzed under the loss-of-protection standards set out in cases such as Atlantic Steel. Because the Employer here retaliated against the Charging Party’s protected concerted activity, there should be no need to show external evidence of animus to establish that termination violated the Act. Thus, the Region should rely on the arguments set out in the General Counsel’s Statement of Position in Lion Elastomers, LLC, 369 NLRB No. 88, Cases 16-CA-190861, et al., to urge the Board to overrule its decision in General Motors and return to the loss-of-protection standards.

Applying Atlantic Steel to the current case results in finding that the Employer violated Section 8(a)(1) by terminating the Charging Party for conduct during the budget and follow-up meetings because that conduct remained protected by the Act. Under the Atlantic Steel test the question is whether “an employee who was engaged in otherwise protected activity lost the protection of the Act due to opprobrious conduct.”\(^\text{72}\) To answer that question the Board considers four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s statements; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.\(^\text{73}\) Here, each factor weighs in favor of finding that the Charging Party retained the Act’s protection.

In analyzing the first factor, the place of the discussion, the Board generally finds that an employee retains the Act’s protection when the employee’s outburst occurs in a location unlikely to disrupt ongoing work.\(^\text{74}\) Here, the Charging Party raised concerns and questions about the lack of annual merit raises for employees at the budget meeting, which occurred virtually over a Zoom call during

\(^{72}\) Id.

\(^{73}\) Id.

\(^{74}\) See Datwyler Rubber & Plastics, 350 NLRB 669, 670 (2007) (outburst during monthly employee meeting held to facilitate discussion of work-related issues did not lose Act’s protection where “employees were free to raise workplace issues”).
which the Employer’s CFO and VP encouraged employees to participate via the chat and to unmute themselves to ask questions. Furthermore, the follow-up meeting with the Director occurred one-on-one over Zoom, which eliminated any potential that the Charging Party’s conduct would impair the Director’s ability to maintain discipline in the workplace. Based on the foregoing considerations, this factor strongly weighs in favor of protection.

The second factor also strongly favors protection as the subject matter discussed at the budget and follow-up meetings was the Charging Party’s advocacy for employee wages – a topic that is “the grist on which concerted activity feeds.”

The third factor, the nature of the conduct, also weighs strongly in favor of protection because at no time did the Charging Party cross the line into abusive, ad hominem, or discriminatory attacks; indeed, comments never involved the use of any threatening or vulgar language. Despite the absence of any such language or physical intimidation, the Employer suggests that it was the Charging Party’s body language, including shrugging shoulders and rolling eyes, that was inappropriate. It further argues, as noted above, that laughter during the follow-up meeting was inappropriate given the nature of the workplace, emphasizing that conduct must be viewed within a social work setting in which strong communication skills and professional behavior are required. Initially, the Zoom recording of the budget meeting fails to substantiate the Employer’s claim that the Charging Party engaged in the alleged mannerisms. But assuming it did occur, even in a social work setting, the very mild nature of the Charging Party’s alleged conduct weighs in favor of finding that retained the Act’s protection. If not, employees in such workplaces would automatically forfeit the Act’s protection by showing any frustration when expressing dissatisfaction with their working

75 See, e.g., Stanford Hotel, 344 NLRB 558, 558 (2005).

76 Aroostook County Regional Ophthalmology Center, 317 NLRB at 220 (quoting Scientific-Atlanta, Inc., 278 NLRB 622, 625 (1986)).

77 The nature of the workplace is relevant to the analysis of the third Atlantic Steel factor. See, e.g., Aluminum Co. of America, 338 NLRB 20, 22 (2002) (profanity at issue far exceeded that which was common and tolerated in his workplace).

78 See, e.g., Roseburg Forest Products Co., 368 NLRB No. 124, slip op. at 1 n.2, 9 (2019) (finding “mild nature” of employee’s conduct, which included speaking with an elevated voice, calling management stupid, and being told to calm down, favored finding the employee retained the Act’s protection, especially given the lack of any threats or vulgar language).
conditions even though “disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.”

Finally, while the Charging Party’s conduct during the budget meeting was not provoked by an unfair labor practice, it was in response to the failure of the CFO and other Employer officials present to, at first, respond to questions about merit raises. That provoked the Charging Party’s persistence in seeking information about merit raises. Although the Employer’s actions at the budget and follow-up meetings are not alleged to be unfair labor practices, the Employer’s refusal to discuss merit raises and subsequent insistence that the Charging Party change the manner of advocacy provoked the Charging Party’s comments. In light of these facts, this factor also weighs in favor of a finding that the Charging Party did not lose the Act’s protection.

Because all four Atlantic Steel factors favor finding that the Charging Party’s conduct did not lose the Act’s protection, we conclude that the Employer violated Section 8(a)(1) by terminating for engaging in that conduct.

Accordingly, the Region should issue complaint, absent settlement, consistent with the above analysis.

/s/
R.A.B.


80 See Overnite Transportation Co., 343 NLRB 1431, 1435, 1437-38 (2004) (fourth factor favored protection where supervisor’s refusal to discuss the circumstances of the discharges of eight employees, unalleged as an unfair labor practice, provoked the employee’s outburst, which occurred while the employee was investigating the matter as union steward).

81 See, e.g., Beverly Health & Rehabilitation Servs., 346 NLRB 1319, 1323 (2006), overruled on other grounds (subsequent history omitted).