UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

PIZZA PIAZZA, INC. D/B/A BADO’S
PIZZERIA & DELICATESSEN AND D/B/A
BADO’S PIZZA GRILL AND ALE HOUSE,

Respondent

and

ANDREW YOHO,

Charging Party

Case 06-CA-279445

COUNSEL FOR THE GENERAL COUNSEL’S BRIEF TO ADMINISTRATIVE
LAW JUDGE IRA SANDRON

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NATIONAL LABOR RELATIONS
BOARD
Region Six
William S. Moorhead Federal Building
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Dated at Pittsburgh, Pennsylvania,
This 31st day of May 2022.
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COUNSEL FOR THE GENERAL COUNSEL’S POST-HEARING BRIEF TO
ADMINISTRATIVE LAW JUDGE IRA SANDRON

I. STATEMENT OF THE CASE

On July 1, 2021, Pizza Piazza, Inc. d/b/a Bado’s Pizzeria & Delicatessen and d/b/a Bado’s Pizza Grill And Ale House (“Respondent”) discharged Charging Party Andrew Yoho (“Yoho”) after he raised concerns with Respondent about conditions he and his co-workers were experiencing at work. The record shows that Respondent violated Section 8(a)(1) of the Act by: 1) threatening employees with discharge; 2) telling employees they do not have the right to complain about wages, hours, and working conditions; and 3) discharging Yoho. The facts and the law establish that Respondent violated the Act as alleged.
II. STATEMENT OF FACTS AND CREDIBILITY

A. Statement of Facts

Respondent operates a restaurant that specializes in serving pizza and Italian cuisine. (36) There is a dining area - “front of the house” - and a kitchen - “back of the house”. (36-37) Employees working in the front of the house include bartenders and servers who work with customers in the dining room, while those working in the back of the house, or the kitchen, are cooks, and are primarily responsible for food preparation. (37, 171)

Yoho worked as a cook in the kitchen from February 2021 until he was discharged on July 1. (36) Yoho was never disciplined during his tenure, nor was he ever warned that he would be disciplined. (91) Respondent’s owner Frank Badolato described Yoho as a “very good employee”. (177)

Work schedules are posted weekly. The schedules are prepared by Badolato and Office Manager Marianna Logsdon. (38) The other employees who generally worked in the kitchen with Yoho were Randy Bishop, Aiden Smith, Scott Whitacre and George Pikras. (39, 46)

While Pikras worked alongside the others in the kitchen, both Yoho and Smith understood Pikras to be the manager in the kitchen (40, 136, 137), and Respondent’s payroll

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1 Numbers in parentheses refer to pages of the official trial transcript; GCX designates General Counsel’s Exhibits; RX designates Respondent’s Exhibits; JX designates Joint Exhibits.

2 All dates are 2021 unless stated otherwise.

3 Yoho misspelled Whitacre’s name at the hearing (39), and, as a result, the name is misspelled throughout the hearing transcript. The correct spelling of his name appears on Respondent’s payroll records (GCX-2, p. 7), and will be used in this brief.
records refer to Pikras as “manager”. Pikras gave instructions to the kitchen staff during their workday. In fact, when Yoho had to leave work early due to a physical issue, he informed Pikras before leaving. Badolato testified that he learned from Pikras that Yoho left work early on that occasion. Badolato also occasionally worked in the kitchen when preparing Respondent’s food truck or bringing in supplies.

During the last month or two of his employment, Yoho often spoke with his coworkers Smith and Whitacre about issues they were facing at work. These issues included the lack of plastic gloves for handling raw meat, water that leaked onto the grill from the ceiling, issues with the temperature of the cooler, and a shortage of kitchen staff. The employees raised these issues on multiple occasions with Pikras, who told the employees that he would raise their concerns with Badolato. Pikras told the kitchen employees that there would be a meeting to address their concerns, but the meeting was never held.

On June 29, Yoho, Smith, and Whitacre were working in the kitchen. Their shift started at 11:00 AM. Yoho testified that, during his previous shift on June 27, the kitchen staff ran out of plastic gloves. When he returned for his next scheduled shift, on June 29, there still were no plastic gloves for the kitchen staff. Yoho had discussed this issue with Smith and Whitacre; it was a safety concern because they handled raw meat in the kitchen.

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4 Respondent denied the allegation that Pikras is an agent of Respondent within the meaning of Section 2(13) of the Act. As described more fully below, the record evidence supports the complaint allegation that Pikras is an agent of Respondent within the meaning of the Act.
Badolato was in the kitchen when Yoho began working on June 29. (57) Yoho raised with Badolato the concern about the lack of plastic gloves. This was confirmed by both Smith and Badolato. (142, 177) Badolato and Yoho had two exchanges that day. (59) Initially, Yoho told Badolato that they were out of gloves, and Badolato asked why gloves were necessary. (59) Yoho explained to Badolato that the kitchen staff had to handle raw meat, and he felt it would be more sanitary to do so while wearing plastic gloves. (59) Badolato responded that he had not been told that he was required to provide gloves, and suggested to Yoho that he work with his bare hands. (59) Yoho protested, and, as he described at the hearing, Badolato became “irate”. (59)

Shortly thereafter, as Badolato was on his way out of the kitchen, Yoho raised the issue again. (60) Smith was close by. (142) Badolato instructed Yoho to put the raw chicken away without gloves, but Yoho refused. As he left, Badolato yelled at Yoho that he did not need to provide gloves, and suggested that Yoho use a plastic bag to cover his hands. (61) Badolato also suggested that he was going to make employees supply their own gloves. (95)

After Badolato left, Yoho spoke to Smith and Whitacre about the lack of gloves. (61-62, 99) After some discussion, Yoho decided that he would handle the chicken without gloves, but that he would be extremely careful, and frequently wash his hands. (62) Eventually, at Whitacre’s suggestion, Yoho obtained gloves from a restaurant next door. (63)

As it got closer to the dinner hour on June 29, business began to increase. (138, 139) Yoho, Smith, and Whitacre discussed the need for additional staff so that they could keep up with orders. (64, 139, 151)
Carlie Cain, a bartender, was in charge of the dining room. Although the restaurant usually stayed open until about 9:00 PM, Yoho told Cain at about 7:00 PM that they needed to close the kitchen because the kitchen staff could not keep up with the orders. Cain told Yoho that they were not closing, and Yoho responded that if they did not close, the kitchen staff would walk out at 8:00 PM. Yoho informed Cain that he had consulted with Smith and Whitacre, and that they agreed that they would walk out if the kitchen was not closed. This was not the first time that they had considered walking out, but they found the flow of work on June 29 to be particularly difficult.

As it got closer to 8:00 PM, Yoho again told Cain that the kitchen staff would walk out if the kitchen was not closed. In anticipation of their deadline, Yoho said that the kitchen staff began to warn the servers of their intention to walk out. Because Cain continued to refuse to close the kitchen, Yoho, Smith, and Whitacre left the kitchen. Yoho clocked out at 7:56 PM (GCX-2, p. 8) and Smith clocked out at 7:58 PM. While Whitacre walked out with Yoho and Smith, he did not clock out of work. He took a smoking break, then returned to the kitchen and finished his scheduled shift. Yoho and Smith left earlier than if they had completed their shift that day. Whitacre did not clock out until 9:47 PM. (GCX-2, pp. 7-8)

Cain called Badolato’s daughter Leah, who, in turn, informed Badolato that Yoho and Smith had walked out. Badolato then came to the restaurant. Badolato said that he arrived shortly after 8:00 PM, accompanied by his son-in-law, Christopher Smith.

Respondent denied that Cain is an agent of Respondent within the meaning of Section 2(13) of the Act. [GCX-1(i)]. Cain’s agency status is discussed in more detail below; the evidence supports the complaint allegation.
Whitacre was working in the kitchen when they arrived; they did what was necessary to complete the orders from the restaurant. (179-180) Badolato testified that they caught up on orders in about 15-20 minutes, and closed the kitchen around 8:30 PM. (181) Despite Badolato’s assertion that the kitchen always closed about an hour before the bar (181), as noted above, Whitacre did not clock out that night until 9:47 PM. (GCX-2, pp. 7-8) As discussed more fully below regarding credibility, Badolato’s time estimates do not appear to be accurate and should not be credited.

Smith returned to work for his next scheduled shift on June 30. (154) He did not discuss with management the issues that caused the kitchen staff to walk out the previous night; he apologized for walking out. (156) Smith was not disciplined in connection with the walk out, and remains employed by Respondent. (135, 155)

Yoho was next scheduled to work on July 1. (GCX-3, p. 1) While he was scheduled to begin work at 11:00 AM on July 1, Yoho intentionally went to the restaurant about an hour early in hopes of having an opportunity to speak with Badolato before his shift began. (80)

When he arrived, Yoho found Badolato in the kitchen. No one else was present. (81) Yoho made some notes for himself in preparation for this discussion, and he used those notes for reference when he spoke with Badolato. (81, 87, 115) He made clear to Badolato that he was not making demands; rather, he was conveying requests on behalf of the kitchen staff. (81, 116) Yoho also told Badolato that he was not recording the conversation. (83-84, 114)

Yoho began by pointing out to Badolato that Section 7 of the NLRA protects employees who make a concerted effort to raise issues regarding their working conditions. (82) Yoho went on to describe several issues that he and the others in the kitchen hoped Badolato would address. He started by telling Badolato that they felt that there were not enough people working in the
kitchen to handle the workload. (82) Badolato’s response was to ask Yoho if he was telling him how to run his business. (82) Yoho said that he was not, but that he was telling Badolato about conditions in the kitchen, pointing out that the staff felt the kitchen needed an additional chef and a full-time dishwasher. (82-83)

Again, Badolato told Yoho not to tell him how to run his business. (83) Yoho attempted to raise other issues, including sanitation. Yoho pointed out that there had been rain coming in over the grill, and that it took Badolato three weeks to fix the problem. (83) Yoho wanted to raise additional issues, but Badolato became gruff and told Yoho that he did not work there anymore. (84)

Yoho protested that he did still work for Respondent, and that he cared about what happened at the restaurant. (84-85) Badolato insisted that Yoho had walked out and quit. (85) Yoho again tried to tell Badolato that he had not quit, that he had come to the restaurant that day to work his scheduled shift, and that he wanted to talk to Badolato about issues faced by the kitchen staff. (85)

Badolato repeatedly told Yoho that he had quit and that he should get out of the kitchen. Yoho told Badolato that he would leave if he had been fired; otherwise he was there to work as scheduled. Yoho asked Badolato if he’d been fired, pointing out to Badolato that he had legal protection and that Badolato shouldn’t fire him. (85, 116) Badolato’s response was to get close to Yoho, and to ask if Yoho was “fucking threatening” him. (85, 117) Yoho again told Badolato that he had not quit, and that he was willing to work.

Badolato was insistent that Yoho leave the premises. Yoho offered to come back later, but Badolato told Yoho he should not come back; that he shouldn’t come into the business again. (86) Yoho told Badolato not to scream at him, but Badolato continued insisting that Yoho was
not coming back, and again told Yoho to “get the fuck out of my kitchen”. (86) Yoho tried again to offer to work, suggesting that he could come back the following day to give Badolato an opportunity to calm down. Badolato continued to insist, however, that Yoho had quit his job. (86)

Badolato became increasingly upset as the conversation progressed. (117) Yoho told Badolato that he would leave if he was fired, and asked Badolato again if he’d been fired. (86-87) Badolato then said that yes, Yoho had been fired, and again told Yoho to “get the fuck out of my kitchen”. (87, 117) Yoho left the restaurant on July 1 only after Badolato told him he was fired. (87, 187) Yoho went to his car, where he sat for a short time to calm down, then he left the area. (89, 129-130)

Yoho described Badolato as being about a head taller than Yoho. (88) Yoho said that he did not raise his voice during the July 1 exchange, but that Badolato raised his voice during this meeting. (88) Yoho tried to keep some distance from Badolato, but Badolato was moving throughout the kitchen during the interchange. At points during the exchange, Badolato took enough steps to be very close to Yoho. (87)

Despite Respondent’s suggestions to the contrary, the credible evidence demonstrates that Yoho and his co-workers in the kitchen frequently discussed concerns regarding their working conditions among themselves, and raised those issues with their manager, Pikras. In doing so, the kitchen staff was engaged in protected concerted activity.

**B. Andrew Yoho and Aiden Smith were credible witnesses**

As the Administrative Law Judge noted during the hearing, a finding on the merits of the complaint allegations rests primarily upon a determination of the credibility of Yoho’s and Badolato’s conflicting testimony regarding their July 1 exchange. As discussed in more detail
below, Yoho was the more credible witness, and his description of events should be credited. Yoho’s testimony throughout both direct and cross examination remained consistent. He demonstrated a clear recollection of the events and testified in a forthright, unembellished manner. Yoho testified with complete candor, and his demeanor was calm and respectful. Similarly, Aiden Smith provided details and confident descriptions of the events about which he was asked. Both Yoho and Smith should be credited.

Badolato’s description of the July 1 exchange with Yoho, however, is not credible. It is undisputed that Badolato is a head taller than Yoho, yet Badolato insisted that he found Yoho to be intimidating. (185) Badolato testified generally that Yoho “had all these demands” (185), but failed to provide any details of those demands during his testimony.

Badolato went on to say that Yoho was “right in my face” (186), even suggesting that he was reminded of Robert DeNiro’s character in the movie “Taxi Driver”. Yoho explained that he keeps his head shaved most of the time, which was also the case during his employment with Respondent. (90) Yoho wore a hat when he was working, but he was not wearing one when he went to speak to Badolato on July 1. (90-91) Yoho’s hatless appearance may have been surprising to Badolato, but that, on its own, should not have caused Badolato to feel threatened, particularly by an individual significantly shorter, and smaller in stature.

Based on his demeanor at trial, the July 1 exchange with Badolato (81, 84, 86) was clearly disturbing to Yoho, even though almost a year has passed since he was discharged. Badolato’s loud, expletive-filled response to Yoho’s thoughtful attempts to raise with Badolato the concerns of the kitchen staff was obviously distressing to Yoho. The weight of the evidence shows Yoho approached Badolato in good faith with the intention of calmly discussing issues that the kitchen staff were experiencing in their working conditions. Yoho intentionally went to
the restaurant before his scheduled work time, and did not clock in, so as not to interfere with his work duties. (88) He clearly described in his testimony the specific issues that he raised with Badolato, while Badolato testified in generalities. See Royal Laundry, 277 NLRB 820, 828 (1985) (Board affirming administrative law judge’s finding that respondent’s witness was not credible by testifying in generalities; only providing a general description of meetings and failing to describe specific topics or what was said).

In addition, Badolato’s credibility should be called into question because his description of the events of the evening of June 29 was vague. Badolato described varying times of his arrival at the restaurant after learning of the walkout, and of the time that the kitchen was closed that evening. (179, 181, 194) For instance, Badolato testified that the kitchen “always” closes an hour before the bar (181, 195). At one point he stated that the kitchen was closed at 8:30 or 8:40 that evening, but then said he was not sure what time they closed. (194) When confronted with the payroll record showing that Whitacre did not clock out that night until 9:47 PM, Badolato suggested that kitchen staff stays after the kitchen closes for cleaning purposes. None of the servers, however, worked that late. The records show that the servers, including Cain, clocked out at various times between 8:58 PM and 9:30 PM. (GCX-2) In fact, a review of the payroll record for the week of June 29 reveals that Whitacre’s clock out time on June 29 was the latest that anyone working in the kitchen clocked out that week. (GCX-2)

Badolato’s vague testimony shows that he was not forthright at the hearing. Badolato presented a narrative in a demeanor that was flippant; he even boasted about how quickly he can produce pizzas. (183) See Harowe Servo Controls, Inc., 250 NLRB 958, 958 (1980) (explaining that the Board has “consistently stated that the demeanor of witnesses is a factor of consequence in resolving issues of credibility”).

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Badolato was similarly vague when he testified, in response to direct examination, about whether he’d been approached by employees about short staffing. Badolato’s response was “. . . no, not directly” (171), which suggests that he had been approached indirectly. When asked about this response during cross examination, however, Badolato merely repeated that he was aware that the restaurant was short-staffed, continually refusing to explain what he meant by “not directly”, despite being asked by both Counsel for the General Counsel and the Administrative Law Judge. (193) Badolato’s evasion suggests that he was not forthright in his testimony. See Maietta Contracting, 265 NLRB 1279, 1286 (1982) (Board affirming administrative law judge’s findings that respondent’s witnesses were not credible as their testimony was evasive, self-serving, inconsistent, and displayed a “very poor memory of critical events”).

The credibility of Yoho and Smith is further enhanced by Respondent’s failure, without any explanation, to present testimony from either Pikras or Cain.6 Their failure to testify leaves Yoho’s and Smith’s account of the events of June 29, as well as their description of Pikras’ role in the kitchen and Cain’s role in the dining area, unrebutted on the record.

It is appropriate for the Administrative Law Judge to draw an adverse inference from Respondent’s failure to call Pikras and Cain to testify at the hearing. International Automated Machines, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witnesses not called are the Respondent’s agents. Id. See also CSC Holdings, LLC, 365 NLRB No. 68, slip op. at 5, n. 15 (May 11, 2017); Martin Luther King, Sr., Nursing Center, 231 NLRB 15, n. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify).

6 Respondent initially indicated that it would present Cain to testify (178, 216), but then, without explanation, reversed course. (216)
Furthermore, not only did Respondent fail to challenge Smith’s descriptions of his conversations with Yoho regarding their working conditions in the kitchen, but Smith’s corroboration of Yoho’s testimony that he complained, in the presence of his coworkers, about many aspects of their work to Pikras and to Badolato directly, is particularly credible given Smith’s status as a current employee of Respondent. By testifying against the interest of his employer, Smith’s credibility is “likely to be particularly reliable.” *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003), citing *Flexsteel Industries*, 316 NLRB 745 (1995).

Yoho and Smith were the more credible witnesses, and their description of events should be credited. Not only was Badolato vague and inconsistent in his testimony, but Respondent failed, without explanation, to call either Pikras, to whom Yoho and the kitchen staff repeatedly raised their concerns, or Cain, who was present at the restaurant on the night Yoho and Smith walked off the job. It was Pikras who told the kitchen employees that there would be a meeting to address their concerns, although the meeting was never held. (109) Respondent’s failure to call Pikras to testify leaves Yoho’s testimony unrebutted. See *L.B. Foster Company*, 168 NLRB 83, 86 (1967) (Board adopts administrative law judge’s findings of credibility that because respondent did not call the only person who could rebut employees’ testimony and only presented a witness who testified in generalities, that gave rise to the inference that the person, if called, would not support respondent’s position). These circumstances merely enhance Yoho’s and Smith’s credibility, and their descriptions of events should be credited over Badolato’s.

**C. George Pikras and Carlie Cain are Agents of Respondent within the meaning of Section 2(13) of the Act.**

While the record evidence in the case clearly establishes that Respondent, through owner Badolato, had knowledge of and held animus towards Yoho’s protected concerted activities, the record also demonstrates that both Pikras and Cain had both actual and apparent authority as
Respondent’s agents, thus providing further support for the proposition that the employee walkout in protest of various working conditions was protected, concerted activity, and that Respondent knew that employees were engaged in such activity.

Common law agency principles apply in determining whether an individual acts as an agent of an employer pursuant to Section 2(13) of the Act. One Stop Kosher Supermarket, 355 NLRB 1237, 1240 (2010). According to these principles:

[A]ctual authority refers to the power of an agent to act on his principal’s behalf when that power is created by the principal’s manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or “should know” that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him. Restatement 2d, Agency, § 27.

Tyson Fresh Meats, Inc., 343 NLRB 1335, 1336 (2004), citing Communications Workers Local 9431 (Pacific Bell), 304 NLRB 446, n. 4 (1991).

Whether the employer actually authorized such acts is not controlling in this determination. Tyson, 343 NLRB at 1336. Even in the absence of actual or apparent authority, an employer may be bound by its agent’s actions where the employer subsequently ratifies those actions by silence or affirmative conduct. Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82, 83 (1988).

It is the asserting party’s burden to prove agency status by offering specific evidence in its support. Tyson, 343 NLRB at 1336. Actual authority can be proven by both direct and circumstantial evidence. One Stop, 355 NLRB at 1240. The test of apparent authority “is whether, under all the circumstances, ‘the employees would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.’” Waterbed World, 286 NLRB 425, 426-427 (1987) (citations omitted).
The record shows that Cain and Pikras, who were the “go-to” individuals for work matters, possessed agency authority. Both Yoho and Smith understood Pikras to be their supervisor. (40, 137) Yoho requested permission from Pikras for a schedule change. (43-44) Yoho also understood Pikras to be the “point person” who would communicate issues to Badolato. (50) As to Cain, Yoho testified and Smith corroborated that Cain was understood as being in charge of the “front of house” dining room. (63, 137) The night of the walkout, June 29, Cain was the one left in charge of the restaurant (74), and it was to her that they turned with their plans to walk out.

At trial, Respondent did not present any evidence rebutting the testimony of Yoho or Smith supporting that Pikras and Cain had actual and/or apparent authority, despite Respondent’s cursory denial in its Answer to the Complaint. The record also contains admissions by Respondent and documentary evidence that Cain and Pikras are agents with actual authority. Payroll records show Pikras’ job title as “manager.” (GCX-2, pg. 6) Badolato testified that if employees had any issues, they could tell Logsdon, Cain, Kelsey Hudak, or Leah Badolato that they need to talk to him (175), thus cloaking Cain with sufficient authority that other employees perceive her as a conduit to management.

The evidence supports the conclusion that both Pikras and Cain are agents of Respondent within the meaning of Section 2(13) of the Act.

III. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT

Respondent violated Section 8(a)(1) of the Act in two ways. First, by making various threats to employees complaining about work issues, including by threatening employees with discharge; and second, by discharging Yoho for complaining about terms and conditions of employment.
The evidence establishes the following: 1) Yoho engaged in protected concerted activity prior to June 29, on June 29 - the day of the walkout - and on July 1; 2) Respondent (both directly involving Badolato and indirectly through his agents) knew Yoho engaged in protected concerted activity; 3) Respondent’s animus toward Yoho’s protected activities motivated Respondent to fire Yoho; and 4) Respondent’s actions and statements to Yoho would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights.

Furthermore, while the evidence establishes a violation under extant Board law notwithstanding Alstate Maintenance, LLC, 367 NLRB No. 68 (Jan. 11, 2019), the theory announced in Alstate Maintenance which narrowed the circumstances in which employee protests can be considered a “truly group complaint”, Id., is inconsistent with Meyers Industries, 281 NLRB 882 (1986), aff’d sub nom., Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. den. 487 U.S. 1205 (1988) (Meyers II) and the purposes of the Act. Although Yoho’s complaints to Badolato involved issues that were discussed among kitchen staff and the kitchen manager prior to July 1, and some of which were the impetus of the walkout on June 29, the issues affected more than just Yoho himself. These actions were protected because they “were a continuation of earlier concerted activities.” Summit Regional Medical Center, 357 NLRB 1614, 1617 (2011).

A. Respondent discharged Charging Party Andrew Yoho in Violation of Section 8(a)(1) of the Act

Under Wright Line, A Div. of Wright Line, Inc., 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982), 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. Wismettac Asian Foods, Inc., 371 NLRB No. 9 (July 16, 2021); Lucky Cab Co., 360
NLRB 271, 273 (2014). 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.” Id. The evidence of animus or hostility must be sufficient to establish a causal relationship between the employee’s protected activity and the employer’s adverse action against the employee. See Lucky Cab Co., 360 NLRB at 274 (finding sufficient animus linking protected activity to adverse action with evidence of, inter alia, disparate treatment, shifting explanations, false reasons for discharge); accord, Tschiggfrie Properties, Ltd., 368 NLRB No. 120, slip op. at 1 (Nov. 22, 2019).

It is well established that unlawful motivation can be inferred from both direct and circumstantial evidence. Prideco, 337 NLRB 99 (2001). Circumstantial evidence of discriminatory motivation can include pretextual or shifting reasons for the adverse employment action, suspicious timing between an employee’s protected activities and the discharge, disparate treatment of employees, and failure to adequately investigate alleged misconduct. Temp Masters, Inc., 344 NLRB 1188, 1193 (2005). If the General Counsel meets the initial burden, the burden shifts to the employer to show that it would have taken the same adverse action even without the protected conduct. Wright Line, 251 NLRB at 1089. The General Counsel can offer proof that the articulated reasons are false or pretextual. The fact finder can infer that the employer tried to conceal unlawful motives when the facts support that inference. Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966).

A showing of pretext also supports the initial showing of discrimination. See Wright Line, 251 NLRB at 1088, n. 12, citing Shattuck Denn Mining Corp. v. NLRB, 362 F.2d at 470
(where a respondent’s reasons are false, it can be inferred “. . . that the [real] motive is one that the employer desires to conceal - an unlawful motive - at least where . . . the surrounding facts tend to reinforce that inference.”). In this respect, it is clear that “. . . a trier of fact may not only reject a witness’s testimony about his or her reasons for an adverse action, but also find that the truth is the opposite of that testimony.”  *Hard Hat Services, LLC*, 366 NLRB No. 106, slip op. at 7 (June 12, 2018), citing *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).  

The evidence shows that Yoho and his co-workers concertedly complained about their working conditions, and that Yoho was discharged as a result of those complaints. In addition, Respondent exhibited animus toward Yoho in retaliation for making those complaints.


Yoho engaged in protected concerted activity when he discussed work-related concerns with other employees, brought issues to the attention of Respondent’s agents Pikras, Cain, and Badolato, induced group action by organizing a walkout in protest of work conditions, and discussed a list of concerns with Badolato following the walkout.

The Board has long held that “. . . for an employee’s activities to be protected under Section 7 of the Act, the activity must bear some relation to ‘employees’ interests as employees.’” *Amcast Automotive of Indiana, Inc.*, 348 NLRB 836, 838 (2006), quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 557 (1978). Refusals to work based on health or safety concerns are clearly protected by the Act. See, e.g., *Matsu Corp. d/b/a Matsu Sushi Restaurant*, 368 NLRB No. 16 (June 28, 2019); and *Union Boiler Co.*, 213 NLRB 818 (1974), enfd. 530 F.2d 970 (4th Cir. 1975).

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.” *Meyers II*, 281 NLRB at 887. A “truly group complaint” does not need to arise from a formal discussion, plan, or action among employees, and includes preliminary communication made by an individual employee to elicit support from likeminded coworkers; there is no need for coworkers to agree with the message or to join the individual employee’s cause for there to exist “concerted” activity. *Meyers II*, 281 NLRB at 887. See, e.g., *Whittaker Corp.*, 289 NLRB 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)).

In *Parr Lance Ambulance Service*, 262 NLRB 1284 (1982), enfd. 723 F.2d 575 (7th Cir. 1983), the Board upheld the administrative law judge’s finding that an employee who had engaged in a work stoppage to protest insufficient equipment in his ambulance was engaged in protected concerted activity, notwithstanding that a second employee had previously announced support for the walkout before reneging. As the Board explained in *Summit Regional Medical Center, supra*, an employee who acts alone, and whose actions do not attempt to urge other employees to action, “…could nevertheless be deemed concerted if it were a continuation of earlier concerted activities.” 357 NLRB at 1617 (footnote omitted).

To warrant protection under Section 7, activity must be both concerted and undertaken for the purpose of mutual aid or protection. The focus of the “mutual aid or protection” inquiry is on the goal of the concerted activity, primarily, “…whether the employee or employees involved are seeking to ‘improve terms and conditions of employment or otherwise improve their lot as employees.’” *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014), citing *Eastex, Inc.*, 437 U.S. at 565.
The record is rife with testimony from Yoho, corroborated by Smith, that Yoho did, in fact, share and discuss complaints regarding staffing and sanitation with other members of the kitchen staff, and that a walkout was discussed in the days leading up to June 29. Smith also corroborates that Yoho had a discussion with Badolato on June 29 regarding the lack of gloves for handling raw meat, a fact that Badolato himself testified to as occurring the day of the walkout. Furthermore, Smith testified that he joined Yoho in walking out, and that Whitacre also joined, albeit briefly. There is no credible dispute that the walkout was a collective action.

Yoho, with Smith corroborating once again, testified that he and his coworkers discussed issues with staffing, heat, and sanitation prior to June 29, and that these issues were shared with and often made in the presence of Pikras, an agent of Respondent as the kitchen’s manager.

Finally, Yoho confronted Badolato with a list of complaints on July 1, the first day he was scheduled to return to work after the walkout. Badolato testified that Yoho mentioned “statutes from the NLRB” (184), and the confrontation escalated to Badolato’s expletive-filled order for Yoho to leave his kitchen. Yoho testified that the issues he attempted to raise with Badolato during this July 1 discussion arose from the complaints the kitchen staff previously had discussed, and were the issues that led to the walkout on June 29.

The record in this case leaves no question that Yoho was engaged in protected concerted activity.

2. To the extent that Respondent claims Yoho “acted alone” under *Alstate Maintenance*, that case is inapposite to the facts of this case.

The threshold issue in this case is whether Yoho was engaged in concerted activity. Respondent contends that: 1) Yoho quit when he walked out on June 29; and 2) Yoho would have still been employed with Respondent but for his “conduct” on July 1. Respondent further contends that Yoho was not engaged in concerted activity because he had not been specifically
authorized by his co-workers to convey their complaints to Respondent on their behalf. The evidence in the record shows that Yoho and his coworkers complained about working conditions together and discussed walking out in protest, and that on June 29, he and his coworkers did just that, as a group. When Yoho returned to work on July 1 to discuss these very same concerns shared by himself and his coworkers, Badolato fired him. Thus, Alstate Maintenance is inapplicable here.

Under Alstate Maintenance, two elements must be satisfied for Section 7 protection to apply. The activity employees engage in must be “concerted,” and the concerted activity must be engaged in “for the purpose of . . . mutual aid or protection.” Id., slip op. at 2. The Board in that decision looked to the standards in Meyers Industries (Meyers I), 268 NLRB 493 (1984), remanded sub nom., Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. den., 474 U.S. 948 (1985). and Meyers Industries (Meyers II), 281 NLRB at 882, aff’d sub nom., Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. den. 487 U.S. 1205 (1988). Meyers I, looking at the totality of circumstances, required that an employee’s activity “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” Meyers I, 268 NLRB at 497. Meyers I does not require an employee to be a designated spokesman when bringing a group complaint to management. Meyers II, 281 NLRB at 886. Meyers II further explained that “if there is evidence of “group activities” - e.g., prior or contemporaneous discussion of the concern between or among members of the workforce” - this warrants finding that it was a “truly group complaint,” as opposed to a purely personal grievance. Id.

The record demonstrates here that the kitchen staff engaged in group activities and that Yoho’s complaints on July 1 concerned issues from previous discussions and the walkout on June 29, so there is no need to apply Alstate Maintenance. In that case, the Board found the
employee’s statement that he and his coworkers did not receive tips for a previous similar job assignment was not protected concerted activity because there was no evidence that he and his coworkers had any discussion regarding soccer teams’ tipping habits prior to his statement and because “tips” were not connected to the employer’s terms and conditions of employment.

_Alstate Maintenance, supra_, slip op. at 4.

3. 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.

Specific authorization is not necessary for complaints to be concerted and protected under the Act. _Meyers II_, 281 NLRB at 886. Instead, to be protected under Section 7 of the Act, employee conduct must be both “concerted” and “for the purpose of . . . mutual aid or protection.”

The manner in which an employee’s actions are linked to those of their coworkers determines whether the employee’s activity is concerted, with no particular combination necessary to find the conduct protected. 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.”

Subsequently, the D.C. Circuit remanded the case, stating that “[b]ecause the Board misconstrued the bounds of the law, its opinion stands on a faulty legal premise and without

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7 See, e.g., _Alstate Maintenance, LLC_, 367 NLRB No. 68, slip op. p. 2.


adequate rationale.” In *Meyers II*, the Board explained that its *Meyers I* standard “fully embraced” 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.” To be a shared concern, a “truly group complaint” need not be the outgrowth of a formal group discussion, plan, or action by employees. 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.” Thus, protected preliminary communications to coworkers include statements by an employee made to elicit support from fellow likeminded

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10 *Prill v. NLRB*, 755 F.2d at 942.

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

12 See, e.g., *Salisbury Hotel*, 283 NLRB 685, 685–87 (1987) (employee’s complaints to employer and Labor Department about new work schedule concerted, where “everyone balked” at and were “up in arms” about new policy, complained amongst themselves, and “tacitly agree[d] to complain to employer even though they did not “explicitly agree to act together”). See also *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1037-38 (1992) (concert established where four employees individually brought complaints about mandatory overtime to employer even though employees did not engage in discussion or plan prior thereto but where individual complaints were logically related to employees’ protest concerning scheduling reduction weeks earlier), enforced 53 F.3d 261 (9th Cir. 1995); *Every Woman’s Place*, 282 NLRB 413, 414 (1986) (Chairman Dotson, dissenting) (criticizing majority’s decision finding employee’s call to Labor Department concerted where employees previously complained to employer about holiday overtime but evidence did not establish those complaints were themselves concerted), enfd. mem. 833 F.2d 1012 (6th Cir. 1987).

13 *Meyers II*, 281 NLRB at 887.
coworkers for a personally held view about a working condition.\textsuperscript{14} Fellow employees need not agree with the message or join the employee’s cause for there to be concert.\textsuperscript{15}

In \textit{Alstate Maintenance}, the Board misconstrued 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.”\textsuperscript{16} The Board acknowledged that concerted activity may sometimes be found in the absence of evidence of “group activities,” but noted 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 created 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.\textsuperscript{17} Those factors include: whether the

\textsuperscript{14} \textit{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); \textit{Whittaker Corp.}, 289 NLRB at 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 \textit{Owens-Corning Fiberglas Corp. v. NLRB}, 407 F.2d at 1365).

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

\textsuperscript{16} \textit{Alstate}, 367 NLRB No. 68, slip op at 3. As noted above, the Board has found concerted employee complaints first voiced at group meetings even absent evidence of prior employee discussions of the specific issue. \textit{See} note 5. To the extent \textit{Alstate} narrowed the circumstances under which a complaint is protected as a “truly group complaint” by requiring evidence of a prior or contemporaneous discussion of the specific issue, it should be overruled on that basis, as well as the other grounds discussed infra.

\textsuperscript{17} \textit{Alstate}, 367 NLRB No. 68, slip op. at 7.
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.18

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.19 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

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).

19 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 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.
“initiat[ing], [] induc[ing], or [] prepar[ing] for group action.”20 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.’”21 “[T]he Act simply cannot do what Congress intended” unless the phrase “concerted activities” in Section 7 is interpreted broadly.22 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 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

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

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

22 *Id.*, slip op. at 14 (Member McFerran, dissenting).
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.\textsuperscript{23} 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.”\textsuperscript{24} 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.\textsuperscript{25} The artificial barrier created by the \textit{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 \textit{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.”\textsuperscript{26} But the approach set out in \textit{Alstate} would seemingly preclude finding, for

\textsuperscript{23} \textit{Id.}, slip op. at 7.

\textsuperscript{24} \textit{Id.}, slip op. at 14 (Member McFerran, dissenting) (quoting \textit{MCPc, Inc. v. NLRB}, 813 F.3d 475, 486 (3rd Cir. 2016)).

\textsuperscript{25} \textit{Id.}, slip op. at 14, n. 23 (Member McFerran, dissenting).

\textsuperscript{26} \textit{Id.}, slip op. at 14 (Member McFerran, dissenting).
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.

(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.” 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.’” 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.”

27 Id., slip op. at 8.
28 Id., slip op. at 16 (Member McFerran, dissenting) (quoting Eastex Inc. v. NLRB, 437 U.S. 556, 565 (1978)).
29 Id. (quoting Eastex, 437 U.S. at 563, 566-67).
Indeed, “[t]he concept of ‘mutual aid or protection’ focuses on the goal of concerted activity.”\textsuperscript{30} The majority’s decision in \textit{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.”\textsuperscript{31} The General Counsel urges the Board to overrule this holding of \textit{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 considered to have engaged in concerted activity.\textsuperscript{32} Previously, in Alleluia Cushion Co.\textsuperscript{33} 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”\textsuperscript{34} in the workplace such as safety, \textsuperscript{35} gender discrimination,\textsuperscript{36} and wages.\textsuperscript{37} 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

\textsuperscript{30} \textit{Id.} (emphasis in original) (quoting \textit{Fresh & easy Neighborhood Market}, 361 NLRB at 153).

\textsuperscript{31} \textit{Eastex}, 437 U.S. at 565, 566 (quoting in part \textit{NLRB v. Washington Aluminum}, 370 U.S. 9, 14 (1962)).

\textsuperscript{32} \textit{Meyers I}, 268 NLRB at 497; \textit{Meyers II}, 281 NLRB at 886-87.

\textsuperscript{33} 221 NLRB 999 (1975).

\textsuperscript{34} \textit{Diagnostic Center Hosp. Corp.}, 228 NLRB 1215, 1217 (1977).

\textsuperscript{35} \textit{Alleluia Cushion Co.}, 221 NLRB at 1000.

\textsuperscript{36} \textit{Country Club of Little Rock}, 260 NLRB 1112, 1114 (1982).

concern to all the affected employees.” 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.”

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, or where “individual employees seek to initiate or to induce or to prepare for group action,” 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*.

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.

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38 *Air Surrey Corp.*, 229 NLRB 1064, 1064 (1977).

39 268 NLRB at 497.


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

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.”

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 authorized’ in a formal agency sense, or otherwise” to find a true group complaint. These requirements exclude from the definition of

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33 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), https://www.nlrb.gov/news-outreach/region-18-complaint-alleges-home-depot-fired-employee-who-refused-to-remove-black.

34 Meyers II, 281 NLRB at 886.
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.45 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.46 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.47 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

45 Meyers II, 281 NLRB at 886.

46 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).

47 281 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.”).

48 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 considered, and in most cases where an employee brings a concern to their employer or a government agency, the circumstances will often suggest
activity under the Act because they are a step in initiating, inducing, or preparing for group action.\textsuperscript{49} 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.\textsuperscript{50}

In addition, the definition of concerted activity espoused by the \textit{Meyers} cases creates a significant inequity of protection between workplaces with collective-bargaining agreements and those without. Under the \textit{Interboro} line of cases, discussed in \textit{Meyers II} and approved of by the Supreme Court,\textsuperscript{51} an employee who acts alone in defending their rights under a collective-

\textsuperscript{49} See \textit{Meyers II}, 281 NLRB at 887.

\textsuperscript{50} 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. \textit{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.

\textsuperscript{51} \textit{NLRB v. City Disposal Systems}, 465 U.S. at 831-32.
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 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.

Not only was Yoho’s conduct protected and concerted under well-established Board law notwithstanding Alstate Maintenance, the application of General Motors, which should be overruled, does not change this conclusion.

4. The Board Should Overrule General Motors and Return to its Well-Established Loss-of-Protection Standards

The Board should overrule General Motors because applying Wright Line, a burden-shifting test, to cases where the sole issue is whether discipline for Section 7 activity is justified because of how the discriminatee carried out that activity fails to adequately protect employee statutory rights. Moreover, the Board’s reasons for applying Wright Line to such cases fail to withstand scrutiny and do not justify overruling the established loss-of-protection standards. In light of these concerns, the Board should return to the well-established loss-of-protection standards that predated General Motors.

   (a) Applying Wright Line to loss-of-protection cases fails to adequately protect employee statutory rights

Expanding the application of Wright Line to all cases involving alleged employee misconduct during otherwise protected concerted activity imperils the Section 7 right of
employees to communicate concertedly in the workplace. *Wright Line* is a burden-shifting test that allows the employer “to make the proof” that the discipline or discharge would have occurred absent the employee’s protected activities, and thereby to overcome evidence supporting the inference of an unlawful motive. *See Wright Line*, 251 NLRB at 1088, 1089. If employers can control the disparate treatment analysis, they will avoid liability for otherwise discriminatory discipline and discharge actions and, thus, effectively eviscerate employees’ Section 7 rights.52 *Id.* In short, applying a burden-shifting test enables employers to hide behind a manufactured cloak of targeted discipline to silence employees from engaging in patently protected Section 7 activity.

The Board in *General Motors* did not consider this significant flaw with applying a *Wright Line* analysis to cases previously analyzed under one of the loss-of-protection standards, and how deleterious it would be to employees’ Section 7 rights. *General Motors*’ expansion of *Wright Line* potentially obliterates the Act’s core function of sheltering fundamental Section 7 rights. In light of that oversight, the Board should return to the loss-of-protection standards it applied before its decision in *General Motors*. A return to longstanding precedent in this area reliably enables the Board to assess protected conduct without the unreasonably destructive effect on employee rights, and the unnecessary analytical hurdles discussed below, that near-universal application of *Wright Line* presents.

(b) The Board’s reasons for applying *Wright Line* to loss-of-protection cases fail to withstand scrutiny and do not justify overruling the established loss-of-protection standards.

52 Evidence of disparate treatment may be one of the few indicators available to establish an employer’s discriminatory motive because the Board noted in *General Motors* that timing would typically not be probative. *See General Motors LLC*, 369 NLRB No. 127 (July 21, 2020), slip op. at 10, n. 23.
On closer review, each reason set out in *General Motors* for applying a *Wright Line* analysis to assess the lawfulness of discipline or discharge for Section 7 activity that involved alleged employee misconduct, and overruling the loss-of-protection standards, fails to establish that it would better effectuate the policies of the Act or ensure the consideration of employer obligations under other antidiscrimination statutes. To the contrary, the previous loss-of-protection standards implicitly permit the Board to consider whether the conduct at issue implicates other relevant laws. Following is an explanation of the shortcomings behind each reason.

First, the loss-of-protection standards do not create inconsistent and unpredictable results, but permit the Board to reach results appropriate for each case. In *General Motors*, the Board initially reasoned that the loss-of-protection standards were problematic because they yielded inconsistent and unpredictable results that failed to provide clear guidance for when an employer would violate the Act by disciplining or discharging an employee for abusive conduct. Contrary to the Board’s concern, the ability of the standards to yield findings responsive to the wide array of factual circumstances inherent in human conduct at the workplace illustrates their strength. Each standard allows the Board to consider the subtleties of each case. Permitting the Board’s analysis to be properly tailored to the setting and surrounding circumstances promotes equitability.

Second, the loss-of-protection standards are not “wholly indifferent” to employer obligations under other antidiscrimination statutes, but rather implicitly permit the Board to account for that concern. The loss-of-protection standards represented by cases such as *Atlantic Steel Co.*, 245 NLRB 814 (1979); *Pier Sixty, LLC*, 362 NLRB 505 (2015) enf’d. 855 F.3d 115 (2d Cir. 2017), overruled by *General Motors LLC, supra*; and *Clear Pine Mouldings* 268 NLRB
1044 (1984), overruled by General Motors LLC, supra; are structured to allow the Board to consider employer obligations under other antidiscrimination statutes when determining if an employee exercised Section 7 rights in a way that lost the Act’s protection. As is apparent, the presence of these factors permits the Board to consider, when determining if discipline or discharge violated the Act, whether the employee’s alleged misconduct while exercising Section 7 rights created a potential liability for the employer under other antidiscrimination statutes. Thus, current loss-of-protection standards permit the Board to account for these concerns with a greater degree of precision and better effectuate these goals.

Third, the loss-of-protection standards permit the Board to properly consider the amount of leeway employees should be given while exercising their Section 7 rights to ensure those rights remain meaningful. In General Motors, the Board overruled the loss-of-protection standards, in part, because it stated that they are based on the “misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful.” 369 NLRB No. 127, slip op. at 8. It added that “nothing in the text of Section 7 suggests that abusive conduct is an inherent part of the activities that Section 7 protects.” Id. Thus, the loss-of-protection standards that empowered the Board “to referee what abusive conduct is severe enough for an employer to lawfully discipline” failed to effectuate the Act’s policy of protecting only Section 7 activity by employees that is not abusive.

The initial flaw in the Board’s approach in General Motors is that it ignores workplace realities. It is well-established that employees may become heated and show their frustrations while seeking to safeguard or improve their working conditions or livelihoods in response to actual and perceived detrimental actions taken by their managers, supervisors, or coworkers. Section 7’s protections should not be contingent merely on an employee’s ability to remain
unemotional, speak artfully, or refrain from intemperance. See Consumers Power Co., 282 NLRB 130, 132 (1986) (“The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses”), criticized in General Motors, 369 NLRB No. 127, slip op. at 8. Despite the Board’s comment in General Motors about the text of Section 7, it is equally true that “[t]here is simply no requirement to use a pleasant, happy tone of voice when engaging in protected activity.” Wismettac Asian Foods, Inc., 371 NLRB No. 9 (July 16, 2021), slip op. at 6.

The Board’s rebuke, in General Motors, of loss-of-protection standards for being overly permissible of abusive conduct, by applying Wright Line, overbroadly subsumed cases where the foremost aspect of the conduct was that it was protected, not that there was an egregiousness to its execution. Indeed, in the underlying decision in General Motors itself, the administrative law judge applied Atlantic Steel and found two of the employee’s incidents lost the Act’s protection, one involving a racially charged comment and the other involving conduct that was cumulatively abusive (a threat, disruptively playing loud and offensive music for an extended period of time, and profanity upon leaving a meeting with management). 369 NLRB No. 127, slip op. at 22-23, 24. Thus, loss-of-protection standards do not presuppose toleration of abusive conduct as some necessary evil required to give meaning to Section 7 rights.

Finally, the loss-of-protection standards properly consider the alleged misconduct as part of the res gestae of the employee’s Section 7 activity. The General Motors Board erred in concluding that an employee’s Section 7 activity is analytically separable from misconduct committed in the course of Section 7 activity. 369 NLRB No. 127, slip op. at 9. The two are inextricably intertwined analytically, and yet the Board relied on this legal fallacy to justify
applying a *Wright Line* analysis rather than the established loss-of-protection standards. The Board concluded that the nature of an outburst and its protected content are analytically distinct, justifying application of the *Wright Line* standard, which necessarily presumes a dual motive for issuing discipline or discharge and seeks to determine which motive factually led to the discipline at issue. The Board’s adoption of *Wright Line* for cases in which an employee’s outburst led to his discipline thereby creates a false question of motive where that inquiry is irrelevant and unnecessary. As a result, this approach improperly demotes as less significant the determinative facts that the conduct at issue was protected and caused the employer action, rather than accepting that the cause-in-fact is not in dispute. Conversely, the loss-of-protection standards, like the *res gestae* principles that preceded them, more suitably approach the analysis with the basic assumption that a violation is established where protected conduct caused discipline, and the only relevant inquiry is whether some aspect of the protected activity cost the employee the Act’s protection.

Because the *Wright Line* standard simply does not resolve the essential inquiry in loss-of-protection cases, and *General Motors* minimizes the indisputable link between the protected conduct and adverse action and creates the significant potential of artificially denying employees core Section 7 rights, it should be overruled. The Board should return to the well-established loss-of-protection standards, which have been developed into a body of precedent that better acknowledges that a core function of the Act is to afford fundamental protection to employee communications in service of improving collective terms and conditions of employment. Those standards equally enable the Board to flexibly assess whether there is sufficiently egregious misconduct that justifies the disciplinary action despite it occurring during Section 7 activity. Importantly, they further enable the Board to assess the severity of an employee’s alleged
misconduct in relation to concerns under other antidiscrimination statutes, ensuring that
employers can maintain order and a workplace free from proscribed discrimination, while also
properly prioritizing the protected nature of the relevant conduct consistent with the Act’s
fundamental purpose.

(c) Applying Atlantic Steel to the instant case, Yoho’s conduct did not
lose the protection of the Act and Respondent violated Section 8(a)(1)
by discharging him.

Applying the four-factor Atlantic Steel test to the current case, the evidence shows that
Respondent unlawfully discharged Yoho on July 1 for raising issues of concern to the kitchen
staff with Badolato, in violation of Section 8(a)(1) of the Act.

The first factor, the place of the discussion, favors protection. Yoho raised issues with
Badolato occurred during non-work time. Yoho came to work early specifically so that his
discussion with Badolato would not occur while he was supposed to be working. The timing of
the discussion was thus appropriate and favors protection.

The second factor, the subject matter of the discussion, also favors protection. Yoho
attempted to raise issues that directly related to the working conditions of the kitchen staff. He
pointed out their concerns about the lack of sufficient staffing and sanitary issues, and would
have continued with additional issues had Badolato not become so agitated, insisted that Yoho
leave the premises, and then discharged Yoho. Accordingly, this factor favors protection.

The third factor, the nature of the employee’s outburst, favors protection. While
Respondent suggested that Yoho was loud and offensive, it was Badolato who became agitated
and yelled at Yoho to leave the premises in response to Yoho’s attempt to respectfully bring
these work-related issues to Badolato’s attention. As described in more detail above, it was
Badolato who acted inappropriately, unlawfully telling Yoho not to tell him how to run his
business, and firing Yoho in response to Yoho’s attempt to discuss the concerns of the kitchen
staff. Notably and undisputedly, Yoho did not resort to personal insults or foul language.

_Compare Beverly Health & Rehabilitation Servs., Inc.,_ 346 NLRB 1319, 1322-23 (2006) (nature
of outburst did not weigh against loss of protection where employee told another employee to
“mind your fucking business” during grievance discussion), _overruled on other grounds_ (subsequent
history omitted), _with Plaza Auto Center, Inc._, 360 NLRB 972, 977 (2014) (nature
of outburst weighed against protection where employee repeatedly directed obscene and ad
hominem profanities at supervisor). Consequently, there is nothing opprobrious about Yoho’s
conduct that would warrant forfeiture of the Act’s protection.

The fourth factor, provocation by an unfair labor practice, also favors protection. In the
instant case, Yoho’s comments to Badolato were clearly protected. Badolato’s hostile reaction to
Yoho’s attempt to discuss the working conditions in the kitchen was inappropriate and unlawful.
Badolato initially threatened to discharge Yoho, and also told Yoho not to tell him how to run his
business. If the administrative law judge finds that Yoho raised his voice to Badolato, the
evidence shows that Yoho was provoked by Badolato’s unlawful statements. See _Felix
Industries, Inc._, 331 NLRB 144, 145 (2000) (fourth factor favored protection where employee’s
outburst was triggered by supervisor’s hostile responses to employee’s protected remarks, which
were not alleged as unfair labor practices); _enf. den. and rem. on other grounds_, 251 F.3d 1051,
1055-56 (D.C. Cir. 2001), _supp. by_ 339 NLRB 195 (2003) (reaffirming employee did not lose the
Act’s protection). Therefore, the fourth factor further favors protection.

In sum, because all of the four factors favor finding that Yoho did not lose the Act’s
protection, the Administrative Law Judge should find that the evidence supports a finding that
Respondent violated Section 8(a)(1) by discharging Yoho for his protected concerted activity on
July 1, when he raised with Badolato the issues of concern to the kitchen staff. The record clearly establishes that Respondent had knowledge of Yoho’s protected concerted activity.

5. Respondent knew Yoho engaged in protected concerted activity. “Knowledge” of an employee’s protected concerted activity need “not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn.” *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995); *Greco & Haines, Inc.*, 306 NLRB 634 (1992); *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985); *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936, 944 (1978). “Indeed, the Board has inferred knowledge based on such circumstantial evidence as: (1) the timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment.” *Montgomery Ward*, supra; *Greco & Haines*, supra; *E. Mishan & Sons*, 242 NLRB 1344, 1345 (1979); *General Iron Corp.*, 218 NLRB 770, 778 (1975).

The Board also “has inferred knowledge where the reason given for the discipline is so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive.” *Montgomery Ward*, supra; *Whitesville Mill Service Co.*, 307 NLRB 937 (1992). “Even where the employe’s rationale is not patently contrived, the Board has held that the ‘weakness of an employer’s reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation.’” *Montgomery Ward*, supra (citation omitted).

Yoho’s testimony that he shared his complaints with Pikras and Cain, agents of Respondent, is unrebutted in the record. Furthermore, Badolato testified that Yoho complained to him on June 29 about the lack of gloves. Badolato also testified that Yoho confronted him with a list of “demands” and mentioned NLRB statutes on July 1. There is simply no dispute that Respondent was aware of Yoho engaging in protected concerted activity.
Likewise, the record clearly establishes that Respondent exhibited animus against Section 7 activity in this case. As soon as Yoho began discussing his concerns about working conditions and explaining his rights under Section 7, Badolato immediately turned confrontational, indicating that Yoho had “quit,” questioned whether Yoho was threatening him and telling him how to run his kitchen, and ordered him to “get out of my kitchen.” Smith faced no such backlash from Badolato when he returned, repentant, after the walkout.

6. Respondent exhibited animus against Section 7 activity.

The evidence as a whole establishes that Respondent’s reasons for discharging Yoho were pretextual, based on the fact that Badolato told Yoho he “quit” and to get out of his kitchen while Yoho engaged in protected activity, the disparate treatment of Smith, and the shifting reasons for discharge, thus making this case distinguishable from *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (Aug. 2, 2019) where the Board concluded that although the evidence in support of disparate treatment indicated pretext, the record was sparse and did not support an inference of animus.

When Yoho raised the issues of concern to the kitchen staff with Badolato, he was met with disdain from Badolato. The triggering action that motivated Respondent to fire Yoho was the “confrontation” on July 1, when Yoho attempted to discuss with Badolato his list of concerns. Smith returned to work after the walkout without reprimand, after apologizing to Cain and Badolato. The difference between Smith’s and Yoho’s return to work after the walkout is that Yoho wanted to engage Badolato in a discussion about the terms and conditions of employment of the kitchen staff, as was his right as an employee protected by Section 7 of the Act.
Badolato’s characterization of that discussion differs starkly from Yoho’s. As is discussed in this brief, supra, Badolato’s portrayal of the incident lacks all credibility. Badolato was unable to testify to anything other than Yoho’s baldness, but exhibited a flair for the dramatic by claiming that Yoho, who is at least a full head shorter than Badolato, yelled two inches from his face and physically intimidated him. Yoho’s demeanor and detailed accounting of the incident at the hearing dispels the fiction of Badolato’s sparse recollection.

Badolato testified that when Yoho approached him with “demands” on July 1, Badolato told him to “get out of the kitchen” and “get out of my face and just go.” (187) After Yoho left, Badolato called the police. (187) Badolato contradicted himself regarding Yoho’s separation from employment. Badolato testified that when Yoho asked whether he was fired, Badolato told Yoho, “You walked out.” (186) The record shows, however, that Badolato did not regard Smith, who also engaged in the walk out, as having quit. Further, it is undisputed that Smith was not subsequently fired, as Yoho was. The key difference between Yoho and Smith is that Yoho voiced his complaints about working conditions upon his return to the restaurant for his next scheduled shift. (191-192) Yoho testified that, prior to raising the employees’ concerns, things were “peaches and cream”. (117) When he mentioned his rights under the Section 7 of the Act, however, Badolato became “visibly upset” and “his face changed completely.” (82, 117)

In order to meet its burden to show that its actions were not unlawful, Respondent cannot simply “present a legitimate reason for its actions,” but must instead prove that the actions were “predicated solely on those grounds, and not by a desire to discourage [protected] activity.” Toll Mfg. Co., 341 NLRB 832, 847 (2004) (citation omitted); see, e.g., Key Food, 336 NLRB 111, 112 (2001) (finding that respondent’s limited evidence lacking detail regarding its past
practice of transferring employees to new stores was insufficient in light of the timing of an unlawful interrogation and threat regarding an employee’s union activity).

The timing of Yoho’s discharge, the content and tone of the discussion when Badolato told Yoho to “get out of my kitchen,” and the difference in treatment from Smith who did not approach Badolato with complaints, satisfy the General Counsel’s burden to demonstrate pretext and causation. The credible evidence supports a finding that Yoho engaged in protected concerted activity, that Respondent had knowledge of that activity, and that Respondent discharged Yoho in violation of Section 8(a)(1) of the Act, as alleged. Therefore, to the extent that Respondent contends it fired Yoho because of his alleged conduct on July 1, and thus calls for the General Motors standard to apply here, the record establishes that Yoho’s protected activity was the motivating factor in Respondent’s decision and Respondent failed to prove that it would have taken the same action in the absence of the Section 7 activity, as set forth in this brief. Id. at p. 10.

B. Respondent made coercive statements to employees in violation of Section 8(a)(1) of the Act.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7” of the Act. 29 U.S.C. §158(a)(1). Section 7 of the Act grants employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and also “the right to refrain from any or all of such activities…” 29 U.S.C. §157. A statement violates Section 8(a)(1) when “. . . Respondent’s conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights.” Fixtures Mfg. Corp., 332 NLRB 565 (2000). The motive behind the
statements is not relevant. *Yoshi’s Japanese Restaurant & Jazz House*, 330 NLRB 1339, n. 3 (2000).

Moreover, when an employer unlawfully discriminates against one employee based on his protected concerted activity, this animus often supports an inference that the same animus motivates actions against other employees who share the same complaints regarding working terms and conditions. See *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003) (finding that respondent’s “unlawful disciplinary action against one pro-union employee based on antiunion animus helps to support the inference that the same animus motivated its actions against other prounion employees”). Nowhere is this truer than where the employer’s obvious discrimination against a complaining employee establishes hostility to those complaints and employees’ Section 7 rights. See *Reeves Distribution Service*, 223 NLRB 995, 998 (1976) (affirming the administrative law judge’s finding that substantial evidence of the respondent’s hostility to unionization of its workforce warrants the inference that the change in the practice of letting employees take tractors home was attributable to the employees’ union activities).

1. Respondent threatened employees with discharge in violation of Section 8(a)(1) of the Act.

When Yoho presented Badolato with his list of concerns, Badolato told him, “get out of my kitchen,” “you quit,” and “you don’t even work here anymore.” (84) It is unlawful for an employer to threaten an employee with discharge because he engages in protected concerted activity. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, n. 2 (2007) (respondent unlawfully threatened an employee, who had engaged in the protected concerted activity of speaking on behalf of herself and fellow employees about their working conditions, by telling her that if she did not like the situation, she could go “flip burgers”).
The Board has found statements like, “if you are unhappy here, you can leave” and comparable statements in the context of employees complaining about working terms and conditions, to violate Section 8(a)(1) because these statements imply that complaints expressing dissatisfaction with working conditions are incompatible with continued employment. See *Tito Contractors, Inc.*, 366 NLRB No. 47, slip op. at 23 (March 29, 2018) (employer unlawfully equated employees’ protected activities with disloyalty towards the company in statements to an employee who refused to disavow the protected activities); *Hialeah Hospital*, 343 NLRB 391, 394 (2004) (employer violated the Act when its vice president implicitly threatened employees by suggesting that if the employees were “not happy” they should quit).

Respondent’s central defense is that Yoho quit when he walked out on June 29. [67, 85-86, 117, 168; GCX-1(i), par. 7(a)]. The evidence shows, however, that Smith was not discharged, disciplined, or considered a quit when he returned to work for his next scheduled shift on June 30. Respondent mistakenly believes that saying Yoho quit when he walked out does not violate the Act. Respondent is wrong; Yoho’s actions constituted protected activity under the Act. See, e.g., *Parr Lance Ambulance Service*, 262 NLRB 1284, n. 1 (upholding a finding that an employee’s work stoppage to protest insufficient equipment in his ambulance engaged in protected concerted activity).

The result of Respondent’s shifting reasons for Yoho’s discharge can be distilled to a clear message that, if employees initiate a walkout to protest working conditions, or if employees confront their boss with complaints about working conditions, those employees are considered to have voluntarily left their positions; that these protests and complaints are incompatible with continued employment with Respondent, *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, n. 2. In essence: if you are not happy here, you can leave. This type of language is a threat of
discharge and is a violation of Section 8(a)(1) of the Act. The evidence supports a finding that Respondent violated Section 8(a)(1) of the Act, as alleged, by threatening to discharge employees who engage in protected activity by complaining about working conditions.

2. Respondent told employees they do not have the right to complain about wages, hours, and working conditions in violation of Section 8(a)(1) of the Act.

Respondent repeatedly violated Section 8(a)(1) on July 1, when Yoho tried to discuss the reasons why employees engaged in a walk-out. Yoho testified that on July 1, when he told Badolato that Section 7 protected employees engaged in concerted efforts and that the biggest issue that the kitchen staff has was not enough staff, Badolato responded, “Are you telling me how to run my business?” (82) When Yoho went on to explain that they needed a full-time dishwasher, Badolato responded, “You don’t get to tell me how to run my business.” (83) After Yoho addressed sanitation concerns, Badolato stated, “You don’t even work here anymore. Why are we talking about this?” (84) See *Armstrong Machine Co.*, 343 NLRB 1149, 1151 (2004) (finding a violation of the Act when Respondent made statements threatening employees with suspension, complaining about their “bad attitudes,” stating that if they don’t want to work there, they can leave, and that he was “tired of this bullshit,” when employees were attempting to unionize). In this context, these statements constitute threats that protesting working conditions is not acceptable and ultimately resulted in the employees’ discharge. See *Tra-Mar Communications, Inc.*, 265 NLRB 664, n. 5 (1982) (finding that respondent violated Section 8(a)(1) with statements such as “I’ll never have a union telling me how to run my business or giving me orders as to what to do, before I do that I’ll sell the business and move to Florida” because such remarks are clearly designed to discourage any further protected concerted activity by conveying the message it would be futile).
When Yoho attempted to respond that he still worked there, Badolato said, “You quit. You walked out,” to which Yoho said, “I walked out. I didn’t quit. I am here to work today after we talk.” (85) Badolato again stated, “No, you’re not, because you quit.” (85) Yoho said, “I want to talk to you about all of this,” Badolato responded by telling Yoho, “Get out of my kitchen.” (85) Yoho asked if he was fired and reiterated that he had protection, Badolato then said, “Are you fucking threatening me?”, taking steps closer toward Yoho, repeating, “Are you coming in here and fucking threatening me?” (85-86) See Armstrong Machine Co., supra.

Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge because they raised complaints about their terms and conditions of employment, and by telling employees they do not have the right to complain about wages, hours, and working conditions, as alleged.

IV. CONCLUSION AND REQUESTED REMEDY

The record evidence as set forth and argued above amply supports all the allegations of the Complaint, as amended, and requires a finding that Respondent violated Section 8(a)(1) of the Act in the manner alleged. Respondent should be ordered to remedy the unfair labor practices alleged, and a recommended order53 should issue requiring that Respondent make the Charging Party whole, including, but not limited to, payment for consequential economic harm he incurred as a result of the Respondent’s unlawful conduct; and to submit the W-2 reflecting backpay paid to the Charging Party to the Regional Director within 14 days from the date that the backpay payment is made. Additionally, as part of the remedy for the alleged unfair labor practices, the General Counsel seeks an order requiring Respondent to provide training for its

53 A draft recommended Order is attached as Appendix A, and a draft recommended Notice to Employees is attached as Appendix B.
employees, supervisors and managers on the rights afforded to employees under the Act and compliance with the Act. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Dated at Pittsburgh, Pennsylvania, this 31st day of May, 2022.

Respectfully submitted,

/s/ Julie R. Stern
Julie R. Stern
Counsel for the General Counsel

/s/ Jessica B. Michael
Jessica B. Michael
Counsel for the General Counsel

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1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222
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APPENDIX A
PROPOSED RECOMMENDED ORDER

Respondent Pizza Piazza, Inc. d/b/a Bado’s Pizzeria & Delicatessen and d/b/a Bado’s Pizza Grill And Ale House, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

   (a) threatening employees with discharge because they engage in activity with other employees regarding their wages, hours, and working conditions;

   (b) telling employees that they do not have the right to complain about wages, hours, and working conditions;

   (c) firing employees because they exercise their right to protest their working conditions and bring complaints to us on behalf of themselves and other employees; and

   (d) in any like or related manner interfering with the rights employees have under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

   (a) offer Andrew Yoho immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed;

   (b) pay Andrew Yoho for the wages, consequential damages, and other benefits he lost because of his discharge;

   (c) remove from our files all references to the discharge of Andrew Yoho, and notify him in writing that this has been done and that the discharge will not be used against him in any way;

   (d) preserve, and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order;

   (e) post at Respondent’s Pittsburgh, Pennsylvania, facility, copies of the attached notice marked “Appendix”. 54  Copies of the notice, on forms provided by the Regional Director

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54 If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility
for Region Six, after being signed by Respondent’s authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 1, 2021;

(f) provide training for its employees, supervisors and managers on the rights afforded to employees under the Act and compliance with the Act; and

(g) within 21 days after service by the Region, file with the Regional Director for Region Six a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply with this Order.

Dated:

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Ira Sandron
Administrative Law Judge

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involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”
APPENDIX B
PROPOSED RECOMMENDED NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT threaten you with discharge because you engage in activity with other employees regarding your wages, hours, and working conditions.

WE WILL NOT tell you that you do not have the right to complain about wages, hours, and working conditions.

YOU HAVE THE RIGHT to freely bring workplace issues and complaints to us on behalf of yourself and other employees and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT fire you because you exercise your right to protest your working conditions and bring complaints to us on behalf of yourself and other employees.

WE WILL offer Andrew Yoho immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL pay Andrew Yoho for the wages, consequential damages, and other benefits he lost because we fired him.

WE WILL remove from our files all references to the discharge of Andrew Yoho, and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

Pizza Piazza, Inc. d/b/a Bado's Pizzeria & Delicatessen and d/b/a Bado’s Pizza Grill and Ale House

(Employer)
The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll-free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

1000 Liberty Ave Rm 904
Pittsburgh, PA 15222-4111

Telephone: (412) 395-4400
Hours of Operation: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Centralized Compliance Unit at complianceunit@nlrb.gov