UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILLER PLASTIC PRODUCTS, INC.

and

RONALD VINCER, AN INDIVIDUAL.

Case 06-CA-266234

COUNSEL FOR THE GENERAL COUNSEL’S BRIEF
IN SUPPORT OF CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION

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I. INTRODUCTION

In a decision issued on May 27, 2022, Administrative Law Judge Michael A. Rosas (ALJ) found that Respondent Miller Plastic Products, Inc. (Respondent) discharged its employee Ronald Vincer (Vincer) because he engaged in protected concerted activities, including inherently concerted activities, by raising concerns about Respondent’s ongoing business operations and employee safety in the early days of the COVID-19 pandemic. Counsel for the General Counsel (General Counsel) respectfully excepts to the ALJ’s failure to address the General Counsel’s arguments regarding Alstate Maintenance, Electrolux Home Products, and Tschiggfrie Properties; and also to the ALJ’s failure to address the General Counsel’s properly pled requests for consequential economic damages and employee and management training conducted by a Board Agent during paid working time; and, finally, to the ALJ’s typographical errors at pages 9, 10, 18, 19, and 20 of his decision in this case.

II. STATEMENT OF THE CASE

On December 10, 2021, following the investigation of an unfair labor practice charge against Respondent, the Regional Director for Region 6 issued a Complaint and Notice of Hearing in this matter issued on December 10, 2021. On January 13, 2022, this case was transferred from Region 6 to Region 5 of the National Labor Relations Board. On March 15, 2022, the Regional Director for Region 5 issued an Amended Complaint and Notice of Hearing in this matter. The Complaint and Amended Complaint allege that Respondent, Miller Plastic Products, Inc. (Respondent) discharged its employee, Ronald Vincer (Vincer), because he engaged in protected concerted activities, in violation of Section 8(a)(1) of the Act. On May 27, 2022, the ALJ issued a decision and recommended Order finding that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by discharging its employee, Ronald Vincer, because he engaged in protected concerted activities, including inherently concerted activities. On June 24, 2022,
Respondent filed exceptions to the ALJ’s decision and recommended Order and a supporting brief, which were served on the General Counsel on the same date. The General Counsel is separately filing an answering brief to Respondent’s exceptions and cross-exceptions to the ALJ’s decision. The General Counsel hereby respectfully submits this brief in support of the General Counsel’s cross-exceptions.

III. SPECIFICATION OF THE QUESTIONS INVOLVED AND TO BE ARGUED

A. Whether the ALJ erred in failing to address the General Counsel’s arguments regarding Allstate Maintenance. [Cross Exception 1]

B. Whether the ALJ erred in failing to address the General Counsel’s arguments regarding Tschiggfrie Properties and Electrolux Home Products. [Cross Exceptions 2-3]

C. Whether the ALJ erred in failing to address the General Counsel’s properly pled request for consequential economic damages. [Cross Exception 4]

D. Whether the ALJ erred in failing to address the General Counsel’s properly pled request for employee and management training conducted by a Board Agent during paid working time. [Cross Exceptions 5-6]

E. Whether the ALJ erred in making a number of typographical errors in the ALJD. [Cross Exceptions 7-10]

IV. STATEMENT OF FACTS

A. Respondent’s Operations

Respondent operates a plastic products manufacturing plant in Burgettstown, Pennsylvania. ALDJ 1, Tr. 28:20-29:10. Respondent employs machinists, welders, and fabricators. ALJD 2:17-21. Those employees work on the plant’s workroom floor, which employees and management refer to as the plant. Tr. 29-30. Plant employees are assigned by management to regular workstations, which are comprised of long worktables, and accompanying cabinets where employees store their tools and personal effects. R Exh. 11, Tr. 56, Tr. 79:4-11. These tables are about eight feet long and are spread
throughout the plant. ALJD 2:19-20, R Exh. 11; Tr. 240:12-15. Most workstations are adjacent to at least one other station. ALJD 2:20, R Exh. 11.

The employees in the plant are supervised by a plant manager, chief operating officer, and Respondent’s owner. ALJD 2:11-15, Tr. 30:8-14. At all relevant times, Respondent’s Plant was supervised by Trenary, Zeliesko, and Owner Donnie Miller (Miller). ALJD 2:8-14, Tr. 30:8-14.

B. **Respondent’s Disciplinary Policies and Practices**

Respondent maintains an employee handbook, which lays out its workplace rules and expectations for employees. ALJD 3:10-4:5, GC Exh. 2; Tr. 36:10-13. This handbook is distributed to all employees. Tr. 36:14-16. Respondent’s employee handbook also articulates specific types of discipline that Respondent may utilize in the event of a breach of the policies articulated in the employee handbook. ALJD 3:10-4:5, GC Exh. 2 at 15. Respondent also maintains a separate list of company policies. ALJD 4:7-40, GC Exh. 4. Employees are required to sign this list of company policies, in addition to signing the employee handbook. GC Exh. 4. Neither Respondent’s employee handbook nor its list of company policies makes any reference to employees talking to each other, excessive or otherwise. ALJD 3-4, GC Exh. 2, GC Exh. 4.

Both Zeliesko and Trenary testified that employee discipline should be based on violations of Respondent’s policies, either in the handbook or the list of company policies, except in circumstances where the handbook and Respondent’s policies fail to anticipate a particular type of misconduct. Tr. 36:17-22. Any such policy violation is then documented on Respondent’s “Employee Warning Report” form, and placed in the employee’s file. ALJD 5:1-5, GC Exh. 3; Tr. 32-33. Respondent’s disciplinary protocol calls for the employee warning report to be completed by the front-line supervisor with as much detailed information about the infraction as possible, and then signed by the issuing supervisor. Tr. 34:9-16. That supervisor is usually the plant manager. Tr. 47:9-10.
C. Vincer's Employment History

Vincer began working for Respondent in 2015 and was already an experienced welder when he entered Respondent’s employ. ALJD 2:25-26, Tr. 140:7-9, Tr. 237:14-15, Tr. 140:19-22. Respondent’s managers and supervisors all viewed Vincer as highly skilled, and they were consistently satisfied with the quality of his work. ALJD 2:25-26, Tr. 140:19-22, Tr. 45:21-25.


Respondent claims to have issued Vincer three verbal warnings, first on June 28, 2019, and again on September 4, 2019, and January 15, 2020. GC Exh. 5, GC Exh. 6, GC Exh. 7. Trenary placed all three of these employee warning reports in Vincer’s personnel file, but neither Vincer nor Trenary signed any of these documents. GC Exh. 5, GC Exh. 6, GC Exh. 7; Tr. 142:3-4, Tr. 143:12-16, Tr. 144:14-16. Beyond these purported verbal warnings, Respondent never issued Vincer any written warnings or suspensions. Tr. 47. The ALJ correctly found that these warnings are dubious, and have the appearance of warnings placed in Vincer’s file after his discharge to paper the file and justify his termination. ALJD 2:3:n6, ALJD 17:8-9.

D. Vincer's Discussions of COVID-19 Safety Concerns

Beginning in late 2019 and early 2020, Vincer, like most Americans, became aware of the novel coronavirus which was first discovered in Wuhan, China. Tr. 239-240. As media coverage of the virus and the resulting disease we now refer to as COVID-19 (COVID) increased, Vincer began discussing it with his coworkers before work and during working hours most days. ALJD 7:3-15, Tr. 239:14-240:5, Tr. 241:5-11, Tr. 241:22-242:4. Vincer was concerned about what would happen when
COVID reached the United States, and if there was an outbreak in his community. Tr. 240:22-241:4, Tr. 242:5-15. He discussed these concerns with his coworkers every day. ALJD 7:3-15, Tr. 239:14-240:5, 241:5-11, Tr. 241:22-242:4, Tr. 240:22-241:4, Tr. 242:5-15. Most frequently, Vincer discussed these concerns with Boustead, a welder who was assigned to the workstation next to Vincer’s. ALJD 7:3-15, Tr. 239:242.

Throughout February and March of 2020, Vincer and Boustead had many conversations about COVID, in which both expressed their concerns about their own health and the health of their families in the event of a COVID outbreak in the workplace. Tr. 240:22-241:4, Tr. 242:5-15. Vincer and Boustead discussed COVID nearly every day in the early weeks of 2020. Tr. 239-242

Before long, COVID arrived in the United States, and on March 6, Governor Wolf declared a state of emergency in Pennsylvania. GC Exh. 19. Following the Governor’s declaration of a state of emergency, Vincer and Boustead continued to have regular discussions about COVID. Tr. 241:22-242:4. As Vincer and Boustead discussed how COVID might impact their safety in the workplace, Respondent also began updating employees regularly about COVID and relevant safety guidelines as more information became available. R Exh. 7, Tr. 48-49. During the course of their regular discussions of COVID, Boustead revealed to Vincer that he had lost his spleen in a workplace accident, and for that reason he considered himself at high risk for COVID, causing him concern about his safety at work around so many other people. ALJD 7:6-9, Tr. 2411-4; 246:1-7; Tr. 201:22-25.

Vincer promptly began to protest to any employees within earshot that it was not safe for them to be working in person. ALJD 7:3-15, Tr. 201:16-19, Tr. 205:12-206:11, Tr. 226:19-227:1. Vincer argued to Boustead, and any other employees within earshot, that the work that they were
doing was not essential, and that “we shouldn’t be working” or “we shouldn’t be here.” ALJD 7:3-15, Tr. 201:16-19, Tr. 205:12-206:11, Tr. 226:19-227:1, Tr. 150:19-25.

E. Vincer’s Statements at the March 16, 2020 All-Hands Meeting
On March 16, Governor Wolf’s office announced mandatory school closures and issued a stay-at-home order, closing restaurant dining rooms and certain types of retail establishments, in order to slow the spread of COVID. ALJD 5-6, GC Exh. 20. By this point it was clear to Respondent and its employees that Governor Wolf would be taking steps to close certain non-life-sustaining businesses, and that these closures related both to employee safety and employees’ continued ability to work and draw a paycheck. Tr. 79-86. To address these questions, Respondent called a meeting of all plant staff on March 16, 2020, where COO Zeliesko announced that Respondent believed itself to be a life-sustaining business, and would be remaining open for the time being.1 ALJD 7:19-26, Tr. 48:17-21, Tr. 79:19-22. After Zeliesko said this during the all-staff meeting, Vincer objected, “we shouldn’t be here.” ALJD 7:34-35, Tr. 149:10-150:25, Tr. 205:18-206:8. Both Trenary and Zeliesko responded to Vincer’s concerns by telling all the employees present that they were waiting to hear from the government and that they would stay open until they heard more from the government. ALJD 7:36-37, Tr. 151:1-8, Tr. 48:25-49:9.

F. Vincer’s Continued Discussions of Respondent’s Status as a Life-Sustaining or Essential Business
On March 19, Governor Wolf issued another public health order, closing all non-life-sustaining businesses in Pennsylvania. ALJD 8:24-25, GC Exh. 21. At that time, the Governor’s office had not issued a list of life-sustaining businesses. Tr. 49:2-9, GC Exh. 10. Respondent believed that it was likely to be classified as a life-sustaining business because it is a plastics manufacturer and deals with water purification systems and food service clients. GC Exh. 10; Tr. 87-

1 Respondent communicated separately with office staff about the effects of the Governor’s orders on its operational status.
88. Respondent communicated that belief to employees on the same date. ALJD 8:25-40, GC Exh. 10; Tr. 87-88. Respondent was ultimately classified as a life-sustaining business by Governor Wolf’s office. R Exh. 8.

Around this time, Vincer’s concerns about Respondent keeping the plant open began to dominate his daily conversations with Boustead. Tr. 209:11-19. During one such conversation, Vincer told Boustead that he thought Respondent was not a life-sustaining business, that they should not be open, and that someone should contact the authorities and tell them that Respondent was still open. Tr. 209:11-19. Boustead did not take any steps to contact the government about Respondent’s operational status. Tr. 209-210.

G. Vincer’s Questions about Employee Quarantine, Isolation, and Return to Work Protocols

In mid-March of 2020, employee Pierson was absent from work for several days. ALJD 9:25-29, Tr. 208:16-22. At the time, Vincer and other employees believed this was because Pierson’s wife had been exposed to COVID through her work in an assisted living facility. ALJD 9:25-29, Tr. 208:16-22, 245:8-22. When Pierson returned to the plant after only a few days, Vincer became concerned that Respondent might not have appropriate quarantine and return-to-work safety protocols in place. ALJD 9:28-32, Tr. 245:8-22. And so, on March 23, 2020, Vincer had two significant conversations at work. Tr. 244:16-245:7.

The first conversation was with Zeliesko. Tr. 244:16-245:7. Vincer stopped Zeliesko as he was walking through the plant and raised employee concerns by asking him what the requirements were for employees to return to work after having COVID or being exposed to COVID. ALJD 9:28-32, Tr. 244:16-245:7. Seemingly confirming Vincer’s and employees’ concerns that Respondent did not have a COVID quarantine policy, Zeliesko replied only that he would have to get back to
Vincer about that. ALJD 9:32-36, Tr. 244:16-245:7. The two never had another conversation about this subject.

The second conversation was with Boustead. Tr. 245:23-246:1. Vincer approached Boustead and urged him to speak with Trenary or Zeliesko about his own health vulnerabilities and what protocols Respondent was putting in place when people were sick or exposed to COVID. ALJD 10:1-3, Tr. 246:2-7. Boustead ultimately did go speak with Trenary about this issue and asked to be notified, because of his high-risk status, if anyone in the plant was ill. ALJD 10:3-8, Tr. 201:22-202:5, Tr. 207:8-11. Trenary expressed concern about Boustead’s high-risk status and assured Boustead that he would keep him informed about any active cases of COVID in the plant. ALJD 10:3-8, Tr. 228:1-10. Boustead did not make any reference to Respondent’s status as a life-sustaining business or needing to close its facility for employee safety during this conversation. Tr. 201:22-202:5.

H. **Respondent’s Investigation of Vincer’s Alleged Misconduct**

On March 24, 2020, and only one day after Vincer confronted him and objected to Respondent’s lack of return-to-work safety protocols, Zeliesko met with Trenary to discuss firing Vincer. ALJD 10:12, ALJD 10:34-37, Tr. 49:22-50:10, Tr. 153:9-18. This was not a scheduled meeting. Tr. 49:22-50:10, Tr. 153-154. Trenary and Zeliesko quickly agreed to discharge Vincer. Tr. 50:11-13. Neither Trenary nor Zeliesko reviewed Vincer’s personnel file prior to making the decision to discharge him. ALJD 10:32-37, Tr. 50:17-19, Tr. 157:1-5. Neither Trenary nor Zeliesko took steps to evaluate or quantify Vincer’s efficiency or production times. Tr. 50:20-24, Tr. 157:6-11. Neither Trenary nor Zeliesko attempted to quantify Vincer’s lost or wasted working time. Tr. 50:25-51:13, Tr. 157:6-11. Neither Trenary nor Zeliesko reviewed any specific jobs or tasks to evaluate Vincer’s production times. Tr. 117:19-118:1; Tr. 118:17-119:8, Tr. 157:6-11. In fact, they did not identify even one job where Vincer worked too slowly. Tr. 119:6-8, Tr. 157:6-11.

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Both Trenary and Zeliesko testified that there was no specific incident that caused them to discharge Vincer on this particular date. ALJD 10-11:n19, Tr. 50:6-13, Tr. 153-155. Trenary and Zeliesko agreed that they would terminate Vincer for cell phone use, poor performance, and not following company policy. Tr. 53:5-7. On this last point, they did not cite a particular policy. Tr. 53:8-18

After reaching their decision, Trenary and Zeliesko walked over to Miller’s office to inform him of their decision. Tr. 154:17-23. Miller asked no questions about Trenary and Zeliesko’s decision. Tr. 54. Miller, Zeliesko, and Trenary then went out to the plant floor and approached Vincer, to inform him of their decision. Tr. 57-58, Tr. 155:20-22, 156:3-10, Tr. 156:18-25.

I. **Respondent’s Discharge of Vincer**

On March 24, 2020, shortly after the lunch hour, Miller, Zeliesko, and Trenary approached Vincer at his work station, told him that his services were no longer needed, and that he was being fired for poor attitude, talking, and lack of profit. Tr. 247:8-9. They did not give him a termination letter or any other paperwork at that time. Tr. 248:6-8; GC Exh. 25, GC Exh. 26. Respondent did not issue Vincer a termination letter until June 4, 2020. GC Exh. 25, GC Exh. 26

J. **Respondent’s Shifting Defenses**

When Respondent discharged Vincer, Miller, Zeliesko, and Trenary informed him that he was being let go for poor attitude, talking, and lack of profit. Zeliesko also referenced failure to follow an unspecified company policy and disrespect for Trenary as reasons for Vincer’s discharge. Yet when Respondent received paperwork from the Pennsylvania Office of Unemployment Compensation in July 2020, seeking Respondent’s position with regard to Vincer’s unemployment insurance claim, Respondent listed the reason for Vincer’s discharge as “not meeting production time for efficiency.” GC Exh. 12
On or about October 29, Respondent filed a position statement with the Board’s Regional Director of Region 6 in response to Vincer’s charge in this matter. GC Exh. 40. In this position statement, Respondent claimed to have discharged Vincer because he talked too much, distracted other employees, used his cell phone in the plant, and because these behaviors could lead to a slowdown in plant efficiency. GC Exh. 40. By the time of the hearing, Zeliesko said that Vincer posed a safety hazard to his coworkers. Tr. 53:11-18. When pressed, Zeliesko failed to point to a single incident in which an employee had been injured or nearly injured as a result of Vincer’s conduct. Tr. 53:19-21. Trenary testified similarly, that the decision to discharge Vincer was based upon his excessive talking during working time, and that there was no particular inciting incident that prompted Respondent to discharge him on March 24, 2020. Tr. 50:6-13, Tr. 153-155.

Respondent also presented evidence that it decided to fire Vincer on March 24, 2020, because Respondent’s business was in financial trouble and facing further financial uncertainty resulting from the COVID pandemic. Tr. 105:25-111:16, R Exh. 14, R Exh. 15, Tr. 111:17-22. Respondent’s new defense, presented after Zeliesko had already testified that he had fired Vincer because of his excessive talking, lack of productivity, cell phone use, distracting other employees, and lack of respect for Trenary, was that the timing of Vincer’s discharge was a simple matter of financial pressure. Tr. 53:5-18, Tr. 105:25-111:16, R Exh. 14, R Exh. 15, Tr. 111:17-22.

K. Comparator Evidence
Respondent has chosen to discipline many other employees for conduct that relates to productivity, employee safety, and conduct that negatively affects its bottom line. During the period from January 1, 2018, to March 30, 2022, Respondent issued many such disciplines to Onuska, Cowger, Hedrick, Quinones, Peterson, and Boustead. ALJD 11-13

Respondent repeatedly disciplined Fabricator Onuska for attendance issues, which Respondent viewed as contributing to a problem with his productivity because his absences would
delay completion of ongoing jobs. GC Exh. 13, Tr. 68:3-11. This includes at least one week-long suspension, issued two months before Respondent discharged Onuska for his excessive absences and resulting productivity problem. GC Exh. 15, Tr. 68:3-11. Even after issuing this discipline, Respondent was reluctant to fire Onuska, and only did so after reviewing the extent of his absences, and thereby the number of hours during which Onuska’s workstation was not producing any work for Respondent, over the course of four years. GC Exh. 13.

Respondent discharged Fabricator Cowger on March 24, after issuing him numerous disciplines for producing poor quality work, work which had to be repaired at Respondent’s expense. ALJD 11:28-12:5, GC Exh. 27, GC Exh. 29, Tr. 100:21-101:10. This includes, on one occasion, an error which cost Respondent $3,000 in repair costs, which had to be completed by one of Respondent’s competitors, risking the permanent loss of a client. ALJD 11:28-12:5, Tr. 100:21-101:10. On each of these occasions, Respondent disciplined, but did not discharge, Cowger.

Similarly, Respondent chose not to discharge employee Jason Hedrick, despite his repeated and willful safety violations and delay of Respondent’s operations. Respondent issued Hedrick a final warning for intentionally hiding the keys to Respondent’s delivery truck, and then another written warning for failing to ship part of a customer’s order. Later, Respondent issued Hedrick a final warning for intentionally dropping a newly completed tank off of another employee’s workstation and damaging the tank, and then suspended him for climbing on trucks picking up orders at Respondent’s facilities, all before ultimately firing him. ALJD 13:5-13, GC Exh. 34, GC Exh. 35, GC Exh. 33, GC Exh. 32. Respondent issued all of these disciplines in writing, and all are signed by both Hedrick and his supervisor. GC Exh. 32, GC Exh. 33, GC Exh. 34, GC Exh. 35, GC Exh. 31. Respondent also provided Hedrick a termination letter on the date of his discharge. GC Exh. 31
Respondent disciplined Welder Quinones on four occasions before ultimately discharging him. ALJD 12:29-13:3. In December of 2018, Respondent discharged Quinones for improper use of a tool. GC Exh. 39. He received a written warning, and signed to acknowledge receipt of the discipline. GC Exh. 39. Respondent next disciplined Quinones on May 13, 2019, for excessive tardiness. GC Exh. 38. This discipline was also issued in writing and signed by both Quinones and Trenary. GC Exh. 38. In October of 2020, Respondent issued Quinones a final warning for purposefully damaging the tank he was welding by throwing a tool at the tank after being corrected by Respondent. GC Exh. 37. Finally, Respondent issued Quinones a discipline for building a tank that was so deformed that it was unusable and would have to be rebuilt from scratch. GC Exh. 36. Still, Respondent did not discharge Quinones until he had a fit of rage in response to receiving this fourth discipline. GC Exh. 36. The costly error alone was not sufficient to prompt Respondent to discharge Quinones, despite his pattern of costly mistakes and violent outbursts. GC Exh. 36. Each of Quinones’ disciplines was signed. GC Exh. 36, GC Exh. 37, GC Exh. 38, GC Exh. 39.

Most strikingly, Respondent did not issue corresponding disciplines to Boustead, with whom Vincer was conversing on each of the occasions on June 28, 2019, or September 4, 2019, when Respondent claims to have disciplined Vincer. R Exh. 13. Similarly, while Respondent claims to have moved Boustead as part of the January 15, disciplines issued to both Vincer and Boustead, this move is not reflected on Boustead’s January 15, 2020 discipline. GC Exh. 16. Furthermore, despite the lack of productivity resulting from all of his conversations with Vincer, Boustead was not discharged in March of 2020. R Exh. 13, Tr. 190:22-25. Indeed, Boustead was still employed by Respondent on March 31, 2022, when he testified in this matter, despite a subsequent disciplinary issue. Tr. 190:22-25. Although Respondent issued Boustead a written warning and a lengthy disciplinary meeting on January 11, 2022, for failing to record the time spent on jobs he completed, creating a billing problem on those jobs and interfering with Respondent’s ability to provide
accurate quotes for future jobs, Boustead remains in Respondent’s employ. ALJD 13:15-20, GC Exh. 30, R Exh. 21; Tr. 190:22-25, Tr. 171:5-180:5.

When faced with the possibility of discharging employees other than Vincer, Respondent took a measured and thorough approach to investigating other employees’ conduct. Since Zeliesko began his tenure as COO in 2019, Respondent has discharged two other employees, David Onuska and Shawn Peterson, for an alleged lack of productivity. In both cases, Zeliesko conducted a thorough and detail-oriented analysis of Onuska and Peterson’s productivity, including specific calculations of the estimated time that Onuska and Peterson had wasted. GC Exh. 13, GC Exh. 18.

In Onuska’s circumstance, Respondent analyzed all of his absences over a four-year period, on the basis that all hours when he was absent from work were hours in which he was unproductive and unnecessarily delaying production. GC Exh. 13, Tr. 68:3-11. In Peterson’s situation, Respondent still reviewed a data set, examining the number of jobs that Peterson’s machine could complete in a day and then comparing that with the number of jobs Peterson had personally completed in a day, and calculating the difference to establish the exact amount of time Peterson wasted. GC Exh. 18. Respondent did not limit its analysis of Peterson’s productivity to a single day. GC Exh. 18.

V. ANALYSIS

A. 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.

To be protected under Section 7 of the Act, employee conduct must be both “concerted” and “for the purpose of . . . mutual aid or protection.” See, e.g., Alstate Maintenance, LLC, 367 NLRB No. 68, slip op. at 2 (2019). 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. Meyers Industries (Meyers II), 281 NLRB 882, 884–85 (1986) (citing NLRB v. City Disposal Systems, 465 U.S. 822, 831 (1984)), aff’d sub nom., Prill v. NLRB, 835 F.2d
In 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 adequate rationale.” Prill v. NLRB, 755 F.2d at 942. In Meyers II, the Board explained that its Meyers I standard “fully embrac[ed]” the Third Circuit’s holding in Mushroom Transportation that individual employees also actconcertedly 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 (citing Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964)). See also Alstate, 367 NLRB No. 68, slip op. at 3. To be a shared concern, a “truly group complaint” need not be the outgrowth of a formal group discussion, plan, or action by employees. 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). 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.” Meyers II, 281 NLRB at 887. Thus, protected preliminary communications to coworkers include statements by an employee made to elicit support from fellow likeminded coworkers for a personally held view about a working condition. See, e.g., Morton International, 315 NLRB 564, 566 (1994) (finding that employee engaged in concerted activity by writing contradictory statements on memo that proposed smoke-free workplace, and posting memo in lunchroom, because the conduct induced support from fellow smokers); Whittaker Corp., 289 NLRB 933, 933 (1988) (“the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity”) (quoting Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969)). Fellow employees need not agree with the message or join the employee’s cause for there to be concert. See, e.g., Desert Cab, Inc., d/b/a ODS Chauffeured Transp., 367 NLRB No. 87, slip op. at 13 (2019).

In 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.” 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. See note 5. To the extent 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. 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. Alstate, 367 NLRB No. 68, slip op. at 7. Those factors include: whether the employer called the employee meeting to announce a decision about terms and conditions of employment; whether the decision affects multiple employees at the meeting; that the employee raised a complaint in response to the announcement at the meeting rather than ask how the decision would be implemented; that the employee complained about the decision’s effect on multiple employees; and whether the employee did not have an earlier opportunity to discuss the decision with coworkers because the employer first announced it at the meeting. 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).

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.2 Furthermore, the Alstate Board improperly narrowed the circumstances

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2 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
under which an employee’s conduct is considered to be for the purpose of mutual aid or protection. The Board should overrule *Alstate* to preclude interfering with the congressional policy the Act represents. Indeed, the Board should broadly interpret what constitutes concerted activity, as any activity that could objectively be a step in “initiat[ing], [] induc[ing], or [] prepar[ing] for group action.” *Meyers II*, 281 NLRB at 887 (quoting *Mushroom Transportation Co.*, 330 F.2d at 685). Such a test would ensure that employee rights under the Act are fully recognized and protected.

1. **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.**

“One 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.’” *Alstate*, 367 NLRB No. 68, slip op. at 14 (Member McFerran, dissenting) (quoting *Meyers II*, 281 NLRB at 883). “[T]he Act simply cannot do what Congress intended” unless the phrase “concerted activities” in Section 7 is interpreted broadly. *Id.*, slip op. at 14 (Member McFerran, dissenting). 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 protection because it concerned tips from a customer, which the employer did not control. *Id.*, slip op. at 8-9.
B. The General Counsel Respectfully Requests That the Board Use This Case as an Opportunity to Overrule Tschiggfrie Properties and Electrolux Home Products and Restore the Prior, Longstanding Wright Line Test

The General Counsel respectfully requests that the Board reconsider its recent decisions in Tschiggfrie Properties, Ltd., 368 NLRB No. 120 (2019), remanded by 896 F.3d 880 (8th Cir. 2018), and Electrolux Home Products, 368 NLRB No. 34 (2019), and restore how the Board, with extensive federal court approval, consistently had applied over a period of four decades the Wright Line test for determining when an employer's animus toward its employees' union or protected concerted activities caused an adverse employment action. See Wright Line, 251 NLRB 1083, 1089 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). In Tschiggfrie, the Board unnecessarily and inappropriately heightened the showing that the General Counsel must make to satisfy her initial burden under Wright Line. Specifically, the Board modified the Wright Line test to require that the evidence of animus necessary to satisfy the General Counsel’s initial burden be particular to demonstrate a causal relationship between an employee’s protected activity and the employer’s adverse action against that employee. Tschiggfrie Properties, Ltd., 368 NLRB No. 120, slip op. at 1, 8. In Electrolux, the Board for the first time minimized the significance of finding that an employer’s proffered reason for discharging a known union supporter constituted a pretext, evidence the Board previously had uniformly treated as a determinative indicium of an anti-union motive. The Board reasoned that evidence showing the employer complied with its legal obligations to bargain, or, in other words, the absence of other unfair labor practices by the employer, precluded relying on pretext alone to establish a discriminatory motive. Each case represents a significant and unjustified departure from well-established precedent interpreting and applying Wright Line, one of the Board’s most consequential decisions given its routine use in discerning motive for an adverse action. More important, these two cases frustrate the purposes of the Act by undermining the General Counsel’s
ability to protect employees who exercise their statutory right to improve their working conditions through collective bargaining from retaliation by their employers. Thus, the General Counsel respectfully requests that the Board overrule both cases.

1. Arguments Addressing Tschiggfrie Properties
   a. The Board’s Decision in Tschiggfrie Properties

   In Tschiggfrie Properties, the Board modified the General Counsel’s initial burden under Wright Line by expressly rejecting the statements in prior cases that no causal nexus or additional showing of particularized animus in relation to the employee activity is required.3 365 NLRB No. 34, slip op. at 1, n.1, 6-7 (2017), enforcement denied in relevant part and remanded, 896 F.3d 880 (8th Cir. 2018), on remand 368 NLRB No. 120 (2019). The Board specifically overruled the statement in Libertyville Toyota and similar cases that “proving that an employee’s protected activity was a motivating factor in the employer’s action does not require the General Counsel to make some additional showing of particularized motivating animus towards the employee’s own protected activity or to further demonstrate some additional, undefined ‘nexus’ between the employee’s protected activity and the

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3 The issue was whether the employer had violated Section 8(a)(3) and (1) by discharging an employee. In setting out the Wright Line test to determine the presence of anti-union motive, the administrative law judge stated the General Counsel must establish “union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer,” but added that “the General Counsel does not have to prove a connection between the antiunion animus and the specific adverse employment action.” 365 NLRB No. 34, slip op. at 8 & n.2. The Board majority adopted the ALJ’s statement of the Wright Line burden, explicitly rejecting the inclusion of a fourth “nexus” element to satisfy the initial burden. Id. The Eighth Circuit denied enforcement, concluding that the General Counsel must indeed prove a connection or nexus between the employer’s anti-union animus and the discharged employee’s union activities to establish that unlawful discrimination was a “substantial or motivating factor” for the discharge. Tschiggfrie, 896 F.3d at 886. In so concluding, the court adhered to its own precedent in Nichols Aluminum, where it stated that “[s]imple animus toward the union is not enough,” and while union hostility is a “proper and highly significant factor for the Board to consider . . . general hostility toward the union does not itself supply the element of unlawful motive.” Tschiggfrie, 896 F.3d at 886-87 (citing Nichols Aluminum LLC v. NLRB, 797 F.3d 548, 554-55 (2015)). On remand, the Board accepted the Eighth Circuit’s decision as the law of the case and applied its formulation of the Wright Line test, concluding that the evidence was indeed sufficient to show a causal nexus. 368 NLRB No. 120, slip op. at 3, 4.
adverse action.”4 Tsiggfrie, 368 NLRB No. 120, slip op. at 6 (quoting Libertyville Toyota, 360 NLRB 1298, 1301 n.10 (2014) (emphasis in original), enforced sub nom. AutoNation, Inc. v. NLRB, 801 F.3d 767 (7th Cir. 2015)).

The Board stopped short, however, of affirmatively requiring a separate showing of causation, or a nexus, as an additional element reasoning that such an element would be superfluous because “[t]he ultimate inquiry” is already whether there is a nexus between the employee’s protected activity and the challenged adverse employment action. Id., slip op. at 7 (citing Chevron Mining, Inc. v. NLRB, 684 F.3d 1318, 1327–28 (D.C. Cir. 2012). Thus, the Board settled on requiring evidence affirming the existence of a causal relationship between the employee’s protected activity and the employer’s adverse action. Id., slip op. at 7, 8. The Board added that the General Counsel “does not invariably sustain his burden by producing—in addition to evidence of the employee’s protected activity and the employer’s knowledge thereof—any evidence of the employer’s animus or hostility toward union or other protected activity.” Id., slip op. at 8. In other words, some degree of particularity vis-à-vis the employee’s protected activity must be shown to establish the requisite showing of animus. Id.

The Board offered two primary reasons for requiring this additional showing. First, it asserted that because the Libertyville Toyota formulation “can easily be interpreted as inconsistent with Wright Line,” it would create difficulties in securing circuit court enforcement of Board orders, as in Tsiggfrie itself. Id., slip op. at 7 & n.25, 8 n.26. Second, the Tsiggfrie Board repeated the Eight

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4 The Board referred to this articulation of the General Counsel’s initial burden, which rejected a nexus requirement, as the Libertyville Toyota formulation. In addition to Libertyville Toyota, the Tsiggfrie Board also discussed Mesker Door, where the Board stated that the ALJ “erred by ‘describing] the General Counsel’s initial burden as including a fourth ‘nexus’ element.” 368 NLRB No. 120, slip op. at 6 (quoting Mesker Door, 357 NLRB 591, 592 n.5 (2011)). The Tsiggfrie Board noted that ALJs were subsequently admonished if they included a fourth “nexus” element. Id., slip op. at 6 & n.16.
Circuit’s characterization that the Libertyville Toyota formulation made it seem that the General Counsel could satisfy the initial burden under Wright Line with any evidence of an anti-Section 7 motive. As to this concern, the Board opined that the Libertyville Toyota formulation did not simply confirm the absence of a fourth “nexus” element in the General Counsel’s initial burden, but rather affirmatively rejected the causality requirement that is the essence of the Wright Line test. Id., slip op. at 8, n.26.

b. The Board Should Overrule Tschiggfrie Properties

The General Counsel urges the Board to overrule Tschiggfrie because it unnecessarily modified the showing the General Counsel must make to satisfy her initial burden under Wright Line thereby unjustly denying the Act’s protections to employees who exercise their Section 7 rights in a wide range of cases. Tschiggfrie limits the relevant analysis to a specific discriminatee’s protected activities, improperly minimizing the import of the employer's response to various protected activities in discerning motive. Further, Tschiggfrie’s modifications are unnecessary given that the concerns raised with the Libertyville Toyota formulation, including the Eighth Circuit’s treatment of Board decisions mentioning that formulation, are unwarranted where, regardless of the language used to set out the Wright Line test, the Board’s analysis has consistently focused on whether there is sufficient evidence to conclude that the exercise of Section 7 rights caused the adverse employment action. At most, the Board need only explain, as recognized in Tschiggfrie, how the Libertyville Toyota formulation is consistent with Wright Line principles. Id. In light of the foregoing considerations, the concerns raised in Tschiggfrie for modifying the Wright Line test fail to justify the departure from well-established precedent.
The inquiry into causation under *Wright Line* should focus on the employer’s motive for an adverse employment action without requiring the General Counsel to prove a connection to a particular discriminatee’s union or other protected activities. Although an “employer’s awareness of a targeted employee’s union activity is the most common way of proving ‘actual discriminatory intent’ . . . such individualized knowledge is not always necessary for a violation to be found.” *Napleton 1050, Inc. v. NLRB*, 976 F.3d 30, 41 (D.C. Cir. 2020) (citation omitted), enforcing 367 NLRB No. 6, slip op. at 1 n.2, 14-17 (2018). “As long as the employer is taking adverse action against an employee or employees for the specific purpose of punishing or discouraging known union activity in the workplace, the employer ‘cannot cleanse an impure heart with ignorance of individual employee sentiments.’” *Id.* (quoting *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991)). Indeed, Section 8(a)(3) makes it unlawful for an employer to discourage union activity by discriminating with regard to terms and conditions of employment. The statutory language hinges the violation on the employer’s intent or motive, not the employee’s activity. *See id.* at 43. By requiring the General Counsel to establish a connection between an employee’s protected activity and the employer’s adverse action against that employee, the *Tschiggfreie* Board completely ignored the

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5 The analysis in this section focuses on the General Counsel’s initial *Wright Line* burden—i.e., the evidentiary showing required for a decisionmaker to make an initial finding of an unlawful motive—and, accordingly, does not disturb an employer’s opportunity to overcome the inference with its own evidence if and when the burden shifts. Nevertheless, evidence that an employer’s proffered justification for an adverse action constituted a pretext also may be used to satisfy the General Counsel’s initial burden. *See, e.g., Wright Line*, 251 NLRB at 1088 n.12 (“The absence of any legitimate basis for an action, of course, may inform part of the proof of the General Counsel’s case”). However, we do not address the relevance of pretext evidence here as that issue will be considered more fully below in connection with the discussion of *Electrolux Home Products*, 368 NLRB No. 34 (2019).
foregoing principles and tied requirements for establishing causation too closely to evidence about a particular employee’s activity, which allows an employer to evade liability for unlawfully retaliating against its workforce so long as its actions are not specifically linked to the targeted employee.

The shortcoming of Tschiggfrie’s modification of the Wright Line test becomes readily apparent when considering cases where the General Counsel established an employer’s unlawful motive for an adverse action despite the lack of a nexus to a particular discriminatee’s protected activity. For example, in situations where an employer discharges employees to discourage its workforce from engaging in protected activity, the employer may have done so at random, regardless of each individual employees’ engagement in Section 7 activity. See, e.g., Napleton 1050, Inc., 976 F.3d at 48 (noting the Act does not allow an employer “to fire a randomly chosen worker for the express and announced purpose of punishing its employees for unionizing—to ‘teach them a lesson’”). In such cases, despite the lack of evidence establishing a causal relationship between a particular discriminatee’s protected activity and the employer’s adverse action against that discriminatee, the employer’s unlawful motive may be evident based on, for example, general statements of animus, the proximity of the adverse action to the employer obtaining knowledge of any protected activity, the number of employees discharged together, or the lack of any legitimate justification for the action taken. This situation could be in the context of a mass discharge, disciplinary actions to punish employees as a group, or discharging one employee in retaliation for the protected activity of others, whether the employee is used as a scapegoat or as a coverup for other adverse actions. See, e.g., American Wire Products, 313 NLRB 989, 994 (1994) (in the context of a mass layoff, noting that “the Board and the courts have long held that, absent a reasonable explanation, the disproportion between the number of union and nonunion employees laid off or discharged may be persuasive evidence of discrimination’’); Link Mfg. Co., 281 NLRB 294, 299 n.8 (1986) (finding mass layoff “was thus in the nature of a ‘power display’ in response to the advent of the [u]nion and was unlawful

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without regard to specific knowledge of the pro-union activities of particular employees”), enforced 840 F.2d 17 (6th Cir. 1988); *Economy Foods*, 294 NLRB 660, 661, 668 (1989) (finding discharge of employee unlawful despite lack of evidence of specific animus aimed at the employee because it was in retaliation for the employees’ general organizing efforts), enforced *sub nom.* NLRB v. *Fridge Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991) (an employer’s retaliatory action is unlawful “even if the employer wields an undiscerning axe, and anti-union employees suffer along with the their pro-union counterparts”); *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 1 n.2, 14-17 (2018) (finding discharge and layoff of two employees unlawful following successful union organizing drive despite lack of targeted animus evidence), enforced 976 F.3d 30, 33-34 (D.C. Cir. 2020) (concluding Board properly focused on employer’s discriminatory intent to punish employees as a group for unionizing, rather than on employer’s knowledge of targeted employees’ individual pro- or anti-union position).

*Tschiggfrie’s* modification of the *Wright Line* test would also be problematic where an employer’s unlawful motive is established through a discernible pattern of unfair labor practices albeit removed to some degree from a discriminatee’s Section 7 activity. The unlawful motive behind an adverse action may be evident from evidence the employer committed the same type of violations in another case even though remote, the same managers or supervisors who carried out the adverse action committed other violations, the same methods of retaliation were involved, or the employer engaged in conspicuous recidivism or had a proclivity to violate the Act. See, e.g., *St. George Warehouse, Inc.*, 349 NLRB 870, 878 (2007) (relying in part on three-year-old unfair labor practices, particularly prior retaliation based on union activity, to find that subsequent discipline of employee was motivated by union animus).
Again, the approach set out in *Tschiggfrie* interferes with the proper analysis in cases presenting the situations discussed above, where the focus is properly on the motive behind an employer’s adverse action rather than whether it is retaliating against any particular discriminatee’s known Section 7 activity. *See, e.g.*, *Link Mfg. Co.*, 281 NLRB at 299 n.8 (finding mass layoff unlawful without regard to specific knowledge of the prounion activities of particular employees”); *Napleton 1050, Inc.* 976 F.3d at 43 (distinguishing the issue of whether an employer took an adverse action *because of* the employee’s activity from the proper inquiry into whether it did so with the intent of discouraging union activity, as mandated by the Act’s “plain statutory text, which focuses on the employer’s anti-union motive, not the views of the affected employees”). The heightened showing required under *Tschiggfrie* amounts to a technicality that allows employers to avoid liability for retaliating in response to one employee’s protected activity simply by taking action against a different employee. But where the evidence establishes an employer’s unlawful motive, the lack of “particularized” evidence should not preclude finding a violation. *See, e.g.*, *Howard’s Sheet Metal, Inc.*, 333 NLRB 361, 364 (2001) (unlawful discharge of one employee may taint contemporaneous discharge of another despite lack of targeted animus as to the other employee); *Marcus Management*, 292 NLRB 251, 262 (1989) (evidence revealed employer’s “latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will” where it waited six months to discharge union organizer to avoid a lawsuit). Indeed, it would undermine the purposes of the Act to do so. Accordingly, the Board should continue to prioritize using *Wright Line* to make the appropriate evidentiary inferences based on all the facts, rather than on refinements that tend to truncate the analysis or render the framework less effective at genuinely discerning motive and causation. The General Counsel respectfully requests that *Tschiggfrie* be reversed to effectuate these priorities.
ii. *Tschiggfrie*’s Modification Was Unnecessary Because Neither *Libertyville Toyota* nor *Mesker Door* Had Changed or Lowered the Initial *Wright Line* Burden

The *Tschiggfrie* Board’s primary objection to how *Mesker Door* and *Libertyville Toyota* set out the *Wright Line* test is that those decisions may be interpreted as allowing the General Counsel to satisfy the initial burden with “any” evidence of animus against Section 7 activity even if that evidence has little or no connection to the discriminatee’s protected activity. But regardless of how the test has been articulated, the Board has consistently applied *Wright Line* to find a violation only where substantial evidence established that an employer’s animus toward union or other protected activity caused an adverse action. For instance, although the *Tschiggfrie* Board emphasized that in *Mesker Door* the Board corrected the ALJ’s inclusion of a fourth nexus element when describing the General Counsel’s initial burden, the evidence in that case satisfied such an element. *Mesker Door, Inc.*, 357 NLRB at 592 n.4. Specifically, in addition to a backdrop of general animus, the Board relied on the fact that the discipline, which the employer asserted was for making threatening remarks, was issued just one day after the employee’s protected discussion, and the employer’s significantly more lenient treatment of an employee who engaged similar alleged misconduct of making a threat just a month later. *Id.* at 592. Adhering to the traditional three-element *Wright Line* test, the Board reversed the ALJ, who had failed to rely on either the compelling evidence of timing or disparate treatment to support finding an inference of unlawful motivation, despite having found several generalized independent Section 8(a)(1) violations. *Id.* at 591 n.1, 592. Consequently, the Board considered the entire record in concluding there was a causal relationship between the discriminatee’s union activity and the employer suspending him. *See Tschiggfrie*, 368 NLRB No. 120, slip op. at 12 (Member McFerran, concurring in the result) (listing the evidence the Board relied on in *Mesker Door* to find the employer had an anti-union motive).
Similarly, in *Libertyville Toyota*, in response to the ALJ including a fourth nexus element as part of the *Wright Line* test and the dissent of then-Member Miscimarra in support of that formulation of the test, the Board stated that this additional showing is not required. 360 NLRB at 1301, n.10. Nevertheless, the causal connection between the discriminatee’s protected activity and the employer’s adverse action in that case was clear. The same day the employer made several anti-union statements, including threats of futility, job loss, and blacklisting within the industry at a captive employee meeting the discriminatee attended, the employer for the first time departed from its past practice of addressing an alleged failure to meet a job requirement, in this case a valid driver’s license, directly with the employee, and instead ran a motor vehicle report on the discriminatee. *Libertyville*, 360 NLRB at 1329. In concluding that the employer unlawfully discharged the discriminatee three weeks later, the Board found an anti-union motive based on the employer committing contemporaneous unfair labor practices (i.e., the unlawful statements at the captive audience meeting) and proffering a pretextual defense (i.e., that the discriminatee had abandoned his job). *See Tschiggfrie*, 368 NLRB No. 120, slip op. at 12 (Member McFerran, concurring in the result) (listing the evidence the Board relied on in *Libertyville Toyota* to find the employer had an anti-union motive). In short, the Board determined that the General Counsel had established that the employer’s anti-union motive had caused the adverse employment action it took against the employee. Indeed, the Seventh Circuit enforced the Board’s finding of a violation. *See Tschiggfrie*, 368 NLRB No. 120, slip op. at 7, 12 & n.8 (both the majority and concurring opinions noting that the Seventh Circuit enforced the Board’s findings in *Libertyville Toyota*).

As the foregoing shows, neither *Mesker Door* nor *Libertyville Toyota* lowered the showing the General Counsel must make to satisfy the initial burden under *Wright Line*. Similarly, the cases the *Tschiggfrie* Board cited to support the position that the General Counsel does not invariably sustain her burden of proof under *Wright Line* based on any evidence of employer animus further reinforce
that the Board has never strayed from Wright Line’s basic causal inquiry. The Board cited two cases where evidence of the general animus was deemed insufficient to sustain the General Counsel’s initial burden. First, in Roadway Express, the issue was whether the union had violated Section 8(b)(2) by causing the employer to discipline an employee due to his status as a Beck objector. 347 NLRB 1419, 1419 & n.2 (2006). The Board found that the union pressing a prior complaint against the employee after the employer had determined it lacked merit and using an insult to refer to Beck objectors, which was remote in time, was insufficient evidence to establish that the union had an unlawful motive for bringing the employee’s driving-log violations to the attention of an employer. Id. at 1419 n.2. In reaching this conclusion, the Board noted that the union had an established history of bringing perceived driving-log violations to the employer’s attention. Id. Second, in Atlantic Veal & Lamb the issue was whether the employer had discriminatorily failed to recall a laid-off employee as part of its unlawful response to an organizing campaign. 342 NLRB 418, 418-19 (2004), enforced per curiam 156 Fed. Appx. 330 (D.C. Cir. 2005). The evidence showed only that the discriminatee was qualified for one of several new positions that became available, but it did not show the comparative skills levels or union sentiments of the employees who were hired, except for four recalled employees who had engaged in union activity. Thus, although it found the employer had committed other unfair labor practices in response to the organizing campaign, the Board reversed the ALJ and found the General Counsel had not satisfied the initial burden under Wright Line for this allegation. Id. at 419 & n.6. In both cases, consistent with its longstanding uniform application of Wright Line, the Board declined to find unlawful motivation where the record did not support such a finding. More important, even when finding no violation, the Board adhered to its causation analysis.

Each of the foregoing cases, whether criticized or relied on in Tschiggfrie, illustrate that the Board has faithfully adhered to the fundamental Wright Line principle of causation in determining
whether the General Counsel has met the initial burden of persuasion. Indeed, the Board itself declared that Tschiggfrie does not mark a radical shift in the interpretation or application of Wright Line. Tschiggfrie, 368 NLRB No. 120, slip op. at 8. Nevertheless, Tschiggfrie overreaches insofar as it modifies one of the Board’s most notable and oft-applied analytical frameworks without good reason to do so, and more importantly, overbroadly subsumes several categories of cases where there is a lack particularity as to animus but the evidence nevertheless supports the inference of unlawful motivation. As discussed, such an outcome contravenes statutory language holding the employer liable for discouraging Section 7 activity and fundamentally conflicts with the purposes and policies of the Act to protect the right of employees to organize and bargain collectively or engage in other protected activity.

c. The Tschiggfrie Board’s Reasoning for Overruling Precedent and Modifying the Wright Line Test is Unjustified Given How It Harms Statutory Rights

The Tschiggfrie Board plainly overstates the “difficulties” in securing enforcement of Board orders. Tschiggfrie, 368 NLRB No. 120, slip op. at 7. It concedes that while other appellate courts have questioned or expressed some level of criticism for the Libertyville Toyota formulation, namely the Fifth and Seventh Circuits, only the Eighth Circuit has denied enforcement on this ground. Id., slip op. at 7 n.24, 8-9 n.26. However, the Tschiggfrie Board recognized that it could have simply explained how the Libertyville Toyota formulation is consistent with Wright Line principles and served only to correct prior misinterpretations and respond to proposals in dicta to add a fourth element. Id., slip op. at 8 n.26. But rather than take that more limited approach, the Board dutifully accommodated the Eighth Circuit’s inaccurate statement of the law and added a new component to the Wright Line test that affects its future application. This modification has the potential to redefine decades of precedent without regard to how it may undermine the Act’s purpose of protecting employees who exercise their Section 7 rights. The Board’s response on remand focused too much
on perceived inconsistency and court criticism and not enough on the substantive task of protecting statutory employee rights. Given that Tschiggfrie permits the exclusion of several typical situations that would otherwise give rise to the inference of a violation, the public policy that the Act represents compels the Board to overrule it, especially where the employer’s opportunity to avoid liability by rebutting that inference remains undisturbed. Where, as here, the implications of the Board’s holding are so expansive, it must resist hewing to the misinterpretation of one court and ensure that the statutory rights embedded in the Act remain available to employees to exercise.

2. Arguments Addressing Electrolux Home Products  
a. The Board’s Decision in Electrolux Home Products
   In Electrolux Home Products, the Board for the first time held that the General Counsel had not established an employer’s unlawful motive for an adverse employment action despite finding the employer’s proffered justification for that adverse action to be a pretext.6 368 NLRB No. 34, slip op. at 3, 4-5 (2019). The Board set out the principle that when a respondent’s stated reasons for its decision are found to be pretextual—that is, either false or not in fact relied upon—discriminatory motive may be inferred “at least where . . . the surrounding facts tend to reinforce that inference” but such an inference is not compelled. Id., slip op. at 3 (emphasis added) (quoting Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966)). In doing so, the Board noted that precedent existed to

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6 As factual background, employee J’Vada Mason was an open and active union organizer during a campaign that resulted in the union’s certification as the 700-employee unit’s collective bargaining representative. Electrolux, slip op. at 1. Notably, Mason spoke up several times during the employer’s pre-election mandatory antiunion meeting and attempted to respond to managers’ antiunion statements for which she was told by two managers to “shut up.” Id. After the union’s certification, Mason was one of six employees on the union’s bargaining team and, during a bargaining session, raised her concern about a supervisor’s hostile response to her complaint about a bathroom sign-up policy. Id. The employer contends it discharged Mason for insubordination when, about two months later, she failed to deliver microwaves to her assembly line as directed. Id., slip op. at 1.
both support and undercut the proposition that the General Counsel may satisfy the initial burden under *Wright Line* based on a finding of pretext alone.7 *Id.*, slip op. at 3, n.10.

Reversing the ALJ, the Board discounted the employer’s hostility toward Mason’s persistent attempts to challenge the employer’s antiunion position at a mandatory meeting as too remote in time to support causation. *Id.*, slip op. at 4. However, the Board found, in agreement with the ALJ, that the employer’s proffered reason for the discharge was pretextual given that the evidence established the employer treated seven other employees more leniently, having only issued discipline for a similar offense rather than discharge. *Id.*, slip op. at 3. Nevertheless, the Board went on to find that the pretext alone was insufficient to meet the General Counsel’s initial *Wright Line* burden of proving Mason’s union activity was a motivating factor in her discharge. *Id.* In so finding, the Board held that it did not have to infer animus from pretext because the surrounding facts undermined that inference. *Id.* The Board then reasoned that when an employer offers a false or untrue explanation for an adverse employment action, “the real reason might be animus against union or protected concerted activities, but then again it might not.” *Id.*, slip op. at 3 & n.10, 6. The Board added “[i]t is possible that the true reason might be a characteristic protected under another statute (such as the employee’s race, gender, religion, or disability), or it could be some other factor unprotected by the Act or any other law, which would be a permissible basis for action under the at-

7 In asserting there is Board precedent for the proposition that the General Counsel cannot satisfy the initial *Wright Line* burden based on pretext alone, the Board relied solely on *College of the Holy Cross*, 297 NLRB 315, 316 (1989), wherein the Board adopted the ALJ’s decision. *Electrolux*, 368 NLRB No. 34, slip op. at 3 n.10. There, the ALJ stated, “the Board and the court require something more than a bare showing of a false reason, i.e., the support of surrounding circumstances” to find an employer’s motive unlawful. *College of the Holy Cross*, 297 NLRB at 316. The ALJ cited *Briarwood Hilton* in support, 222 NLRB 986, 991 (1976), where there was no actual finding that the employer’s explanation for discharge constituted a pretext. *Briarwood Hilton*, 222 NLRB at 990-91. Similarly, despite the ALJ’s statement about the value of pretext evidence alone, the ALJ expressly declined to find that the employer’s explanations for its adverse actions were pretextual. *Id.* at 320 (“The reasons proffered by [r]espondent to explain its conduct under scrutiny in this case have not been shown to be false. . . .”). Support for this position is therefore infirm.
will employment doctrine."  *Id.*, slip op. at 3. Applying these principles, the Board concluded that although the employer had proffered a pretextual reason for discharging the discriminatee, an open and active union supporter who was serving as a current member of the union’s bargaining team, that evidence alone did not warrant an inference the employer discharged the discriminatee because of anti-union animus.  *Id.*, slip op. at 4-5. The Board found that such an inference was undermined by the surrounding circumstances, including its finding that the employer bore no animus to its employees’ protected activities because it had bargained with the union regularly and in good faith, and the employer had not retaliated against any of the other employee-members of the union’s bargaining team.  *Id.*, slip op. at 4-5, 5 n.16, 6. The Board then distinguished two cases where the General Counsel had satisfied the initial burden under *Wright Line* based on evidence of pretext alone, specifically, *Whitesville Mill Service Co.*, 307 NLRB 937 (1992), and *El Paso Electric Co.*, 355 NLRB 428, 428 n.3 (2010), enforced 681 F.3d 651 (5th Cir. 2012), reasoning that in each case, surrounding circumstances supported the inference of unlawful motivation and there was no countervailing evidence to undermine the inference. 8  *Id.*, slip op. at 6.

8 The Board distinguished *Whitesville Mill Service Co.* by emphasizing that the Board there did not disclaim the ALJ’s reliance on timing in addition to evidence of pretext.  *See* 307 NLRB 937, 944-45 (1992). But in finding the violation, the *Whitesville* Board stated that it inferred unlawful motivation from the pretextual nature of the employer’s proffered reasons for the discharge, which was supported by evidence that the employer fabricated equipment damage reports after learning the discriminatee was involved with the union, and nothing more.  *Id.* at 937. The Board distinguished *El Paso Electric Co.* by emphasizing that in addition to evidence of pretext there was other animus evidence showing the employer had taken adverse actions based on the employee’s protected refusals to make what she perceived to be unsafe drives.  *See Electrolux*, 368 NLRB No. 34, slip op. at 6. But the *El Paso* Board explicitly stated it relied only on the pretext finding to conclude the employer had a discriminatory motive. 355 NLRB at 428, n.3. Thus, the Board’s rationale here artificially limits the meaning of each of these cases.
b. The Board Should Overrule Electrolux Because Its Approach to Pretext Denies Employees the Protections Of the Act

The General Counsel respectfully requests that the Board reconsider its decision in *Electrolux* and restore its previous reliance on evidence of pretext in *Wright Line* cases to find that adverse employment actions had been motivated by animus toward union or other protected activity. Without any controlling precedential support, *Electrolux* incorrectly set aside the discriminatory motive established by a bona fide finding of pretext simply because the employer otherwise complied with its statutory obligations to bargain in good faith and not discriminate against additional union supporters. This approach marked the first time, contrary to decades of precedent, that the Board found the General Counsel had not established the employer’s unlawful motive despite having found the employer’s proffered legitimate reason for the discharge was a pretext. By reducing the significance of a finding of pretext in this manner, the Board created a standard that undermines the purposes of the Act by permitting employers who proffer sham explanations for their discriminatory employment actions to avoid liability under the Act.

For decades it has been a bedrock principle of federal labor law that “if [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal – an unlawful motive – at least where, as in this case, the surrounding facts tend to reinforce that inference.” *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966), quoted in *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3. “Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party’s dishonesty about a material fact as ‘affirmative evidence of guilt’ . . . especially since the employer is in the best position to put forth the actual reason for its decision.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000) (Title VII case), quoted in *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 8, n.4 (Member McFerran, dissenting in part). These principles are especially true in Board
proceedings and practice, where the Board has never before discounted a finding of pretext as insufficient to prove animus. While it is theoretically possible that a respondent would lie or supply a false explanation to avoid disclosing a true but legal reason, in a Board proceeding the respondent is on notice of the adverse inference that will be properly drawn from doing so. In light of this significant disincentive, where a respondent seeks to justify its adverse action by providing a reason determined to be false or not actually relied on, it defies logic to speculate that the respondent might have had a motive that did not run afoul of the Act rather than draw an adverse inference. The Board should abandon the approach it announced in Electrolux because that decision undermines the foregoing well-established evidentiary principles.

Indeed, the shortcoming of the approach announced in Electrolux is further demonstrated by the fact that under the Wright Line framework, “where ‘the evidence establishes that the reasons given for the [respondent’s] action are pretextual . . . the [respondent] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the Wright Line analysis.’” Con-Way Freight, 366 NLRB No. 183, slip op. at 2-3 & nn.8, 9 (2018); see also Golden State Foods Corp., 340 NLRB 382, 385 (2003), cited in Electrolux Home Products, 368 NLRB No. 34, slip op. at 8 (Member McFerran, dissenting in part).

Alarming, the Electrolux Board abandoned this principle for the first time and stated that when an employer lies about the reason for disciplining or discharging an employee, it might have done so to conceal an anti-Section 7 motive, “but then again it might not.” Electrolux, 368 NLRB No. 34, slip

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9 The Board’s comment in Electrolux that it was not addressing an employer’s rebuttal burden, i.e., the second part of the Wright Line analysis, because it found that the General Counsel had not satisfied the initial burden solely with evidence of pretext did nothing to validate the new analytical approach it set forth. See 368 NLRB No. 34, slip op. at 3-4, n.11. An employer’s “failure to present any credible reason at all for [an adverse action] both ‘raises an inference of discriminatory motive’ and precludes any lawful rebuttal” by the employer. Id., slip op. at 8 (Member McFerran, dissenting in part) (quoting El Paso Electric Co., 355 NLRB 428, 428 n.3 (2010), enforced 681 F.3d 651 (5th Cir. 2012)).
op. at 3. It took the position that an employer's actual reason might have been one that is illegal under some other statute but nevertheless fails to violate the Act. *Id.* But justifying an employer's adverse action based on such speculation requires the Board to ignore the record evidence that the discriminatee engaged in protected activity, the employer had knowledge of that activity, and the employer relied on a false reason for its adverse action. After such a showing is made, the legal test for determining whether an employer acted unlawfully should not include considering whether potential lawful reasons could exist for the adverse action, especially where those reasons are hypothetical because the employer did not raise them in defense. Doing so renders the protections of the Act meaningless.

For similar reasons, the Board should not discount the significant probative value of pretext evidence as it did in *Electrolux* by stressing that the absence of other unfair labor practices by the employer undermines a finding of unlawful motive. *Id.*, slip op. at 4-6. Specifically, the Board stated that an inference of unlawful motive may be based on pretext evidence where the surrounding facts tend to reinforce that inference. *Id.*, slip op. at 3. It concluded in *Electrolux* there was countervailing evidence where the employer had bargained in good faith with the union after certification by quickly reaching an interim agreement on discipline and bargaining regularly thereafter, and it had not retaliated against the other employee members of the union’s bargaining

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10 In support, the Board relied on *Wackenhut Corp.*, 290 NLRB 212 (1988), where it adopted the decision of the same ALJ who imprecisely decided *College of the Holy Cross*, to support its position that evidence of an employer’s good-faith bargaining and lack of retaliation against other pro-union employees may be used to offset the inference of unlawful motivation created by pretext evidence. *Electrolux*, 368 NLRB No. 34, slip op. at 5 n.16. However, a close reading of *Wackenhut* shows the ALJ never made an explicit finding of pretext, instead speculating that the employer’s proffered explanation was weak, and concluding no violation based on the lack of other probative evidence. *Wackenhut Corp.*, 290 NLRB at 215. Thus, the ALJ’s consideration of the lack of other unfair labor practices operated as contextual background rather than specifically to undermine a valid finding of pretext.
team, to which the discriminatee also belonged. *Id.*, slip op. at 4, 6. But that the employer did not unlawfully evade its statutory duty to bargain in good faith, or unlawfully discipline or discharge additional union supporters, is not germane to the causation inquiry as to the alleged discriminatee. See *Master Security Services*, 270 NLRB 543, 552 (1984) (finding employer’s failure to take action against all or some other union supporters does not disprove its discriminatory motive, otherwise established, for its adverse action against a particular supporter), cited in *Electrolux*, 368 NLRB No. 34, slip op. at 9 n.5 (Member McFerran, dissenting in part).

Such an approach improperly discounts relevant surrounding evidence and minimizes the significance of the sum of the General Counsel’s evidence. In *Electrolux*, the relevant surrounding facts supporting the inference of unlawful motive included those showing Mason’s prominence as both a union organizer and bargaining representative, and her ongoing refusal to retreat from the employer’s repeated attempts to stifle her from attempting to improve working conditions, from her outspoken challenge during the captive audience meeting to her more recent complaints about working conditions and supervisor hostility to her complaints. *Electrolux*, slip op. at 1-2. The Board also erroneously discounted direct evidence of animus, managers’ directions to Mason to shut up in response to her attempts to dispute the employer’s antiunion rhetoric during the captive audience meeting, as irrelevant because it was too remote. *Electrolux*, slip op. at 1. But it is this evidence, combined with the employer’s failure to provide a credible reason for discharging her when it had treated seven other employees more leniently by issuing each of them discipline short of discharge for similar misconduct, which supplies the relevant surrounding information for the initial evidentiary showing under *Wright Line*. *Id.*, slip op. at 2, 3. See also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d at 470 (noting the “surrounding facts” supporting an inference of unlawful motive based on pretext evidence included the discriminatee, who was an officer, shop steward, and grievance committee member for a newly elected union, actively filing grievances, including on his
own behalf against his supervisor). The policies of the Act are undermined by the Electrolux Board’s creation of an implicit presumption that an employer’s failure to retaliate against additional employees or commit additional violations of the Act disproves an unlawful motive established by evidence of pretext.

In sum, the preceding analysis demonstrates that, despite the statements by the Electrolux Board to the contrary, the approach it announced in that case marked a significant departure from precedent. The Board should overturn Electrolux to ensure that it does not generate confusion on the proper analysis in Wright Line cases and results that conflict with longstanding principles.

C. Damages Should be Ordered to Compensate the Charging Party for All Consequential Economic Harms Sustained as a Result of Respondent’s Unfair Labor Practices

The ALJ declined to address the General Counsel’s request for consequential economic damages. ALJD 18:15-ALJD 18:25. The General Counsel requests the Board order Respondent make Vincer whole for reasonable consequential damages incurred because of its unlawful conduct, with interest calculated in accordance with Board policy.

This remedy seeks to ensure that victims of unfair labor practices are provided full relief. The Board has held that “victims of unlawful conduct should be made whole for losses suffered as a result of an unfair labor practice,” and that “the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of [the] unlawful conduct.” Cascades Containerboard Packaging, 371 NLRB No. 25, slip op. at 3 (2021); Transmarine Navigation Corp., 170 NLRB 389, 389 (1968).

Under the Board’s present remedial approach, some economic harms flowing from a respondent’s unfair labor practices are not adequately remedied. See Catherine H. Helm, The Practicality of Increasing the Use of Section 10(j) Injunctions, 7 INDUS. REL. L.J. 599, 603 (1985)
(traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board’s standard, broadly worded make-whole order, considered independently of its context, could be read to include consequential economic harm.

However, in practice, consequential economic harm is often not included in traditional make-whole orders. E.g., *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), enforced as modified, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.*), 145 NLRB 554 (1963). Thus, the Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain as a result of the Respondent’s unfair labor practices.

The Board and the courts have long recognized that properly effectuating the policies of the Act “requires constant reevaluation of the Board’s remedial arsenal so that the ‘enlightenment gained from experience’ can be applied to the actualities of industrial relations.” *H.W. Elson Bottling Co.*, 155 NLRB 714, 715 & n.5 (1965) (quoting NLRB v. Seven-Up Bottling Co. of Miami, 344 U.S. 344, 346 (1953)), enforced as modified, 379 F.2d 223 (6th Cir. 1967); see, e.g., *Jackson Hosp. Corp.*, 356 NLRB 6, 6-7 (2010) (discussing the Board’s “judicially-approved, evolutionary approach to remedial issues”). The role of an administrative agency such as the Board is to maintain “flexibility and adaptability to changing needs,” and recognize, as the D.C. Circuit observed long ago, “[i]n the evolution of the law of remedies some things are bound to happen for the first time.” *Am. Trucking Ass’ns v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967). The broad powers granted to the Board in Section 10(c), which must be construed “in light of ‘the provisions of the whole law, and...[the law’s] object and policy,’” afford significant leeway to devise creative remedies to counteract the harms caused by unfair labor practices. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 177 (1973) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)); see *Phelps Dodge*, 313 U.S. 177 at 199-200 (1941) (discussing “freedom given [to the Board] by Congress to attain just
results in diverse, complicated situations”). When crafting remedies, the Supreme Court has cautioned the Board to not “underestimate its administrative resourcefulness.” Id. In practice, the Board has often “revised and updated its remedial policies” over the years to “ensure that victims of unlawful conduct are actually made whole.” *Don Chavas d/b/a Tortillas Don Chavas*, 361 NLRB 101, 102-03 & n.9 (2014) (citing cases).

To fulfill its statutory mandate under Section 10(c) to use its broad discretionary authority to fashion make-whole remedies that will best effectuate the policies of the Act, the Board should require a respondent to compensate employees for all consequential harms they sustain because of unfair labor practices. See, e.g., General Counsel’s Statement of Position to the Board on Remand from the Ninth Circuit Court of Appeals in *Preferred Building Services, Inc., d/b/a Ortiz Janitorial Services*, Case 20-CA-149353, filed December 7, 2021; see also, the General Counsel’s Brief to the Board in *Thryv, Inc.* 20-CA-250250; 20-CA-251105.

Employees should be entitled to recover for all direct and foreseeable harm, such as costs, expenses, or lost investment income, that they suffered as a result of an unfair labor practice. Thus, the Board should require reimbursement of every kind of direct and foreseeable cost that would not have been incurred absent the unfair labor practice—e.g., costs associated with job loss should include restoring a prior health insurance policy or purchasing a new policy providing comparable coverage; any out-of-pocket health expenditures that would have been covered; compensation for penalties assessed for being uninsured or for prematurely withdrawing money from a retirement account; compensation for damages caused to an employee’s credit rating; compensation for financial losses from having to liquidate a personal savings or investment account; fees and expenses for training or coursework required to renew or obtain a new security clearance, certification, or professional license; legal fees for defending against unpaid bills; expenses related to housing,
relocation, transportation, and/or childcare where appropriate; and costs related to providing relief for victims of labor exploitation or employees targeted for their immigration status – as well as other costs directly created by the unfair labor practice itself. See *Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 4 (2018), enforced 976 F.3d 30 (D.C. Cir. 2020) (awarding towing and damage-repair expenses incurred because of respondent’s unlawful removal of toolboxes); *The Voorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip op. at 4 n.14 (2021).

Furthermore, it is well documented that job loss, demotion, or a reduction in income sets off a cascade of damages, including distress of a mental or emotional nature. While such damages may be challenging to quantify, it is no less a real, direct, and foreseeable result. See Jennie E. Brand, *The Far-Reaching Impact of Job Loss and Unemployment*, 41 ANN. REV. SOCIOL. 359-375 (Aug. 2015), available at: https://pubmed.ncbi.nlm.nih.gov/26336327 (discussing direct correlation of job displacement to psychological decline and social stigma, as well as significant disruptive effect of job loss on children, family relationships, social and community involvement). Indeed, “[j]ob loss disrupts more than just income flow; it disrupts individuals’ status, time structure, demonstration of competence and skill, and structure of relations. It carries societal stigma, creating a sense of anxiety, insecurity, and shame. The loss of a job presents a source of acute stress associated with the immediate disruption to a major social role, as well as chronic stress resulting from continuing economic and social and psychological strain.” Id.

In particular, a discharge that is in retaliation for exercising a statutory right sharply exacerbates the mental toll of the event. Myrtle P. Bell et. al., *Introducing discriminatory job loss: antecedents, consequences, and complexities*, 28 J. MANAGERIAL PSYCH. 591 (2013), available at www.emeraldinsight.com/0268-3946.htm (psychological distress exacerbated by discriminatory
circumstances of job loss). Accordingly, damages to compensate for harm are appropriate and warranted if that harm flowed directly and foreseeably from retaliatory unfair labor practices.

An employee should be made whole for all losses suffered because of an unfair labor practice, including expenses, penalties, legal fees, late fees, or other costs flowing from the inability to make a payment due to job loss or other adverse action. General Counsel’s Brief to the Board in *Thryv, Inc,* above. Employees should also be entitled, as they are under other statutory schemes, to damages for harm such as emotional distress or injury to character, professional standing, or reputation; as well as remedies that are tailored to addressing the public harm and chilling effect, which are the result of the unfair labor practices.

The General Counsel therefore respectfully urges the Board to order that Respondent compensate Vincer for all consequential damages suffered because of Respondent’s unlawful termination of him. This remedy will ensure that Vincer is restored as nearly as possible to the status quo that he would have enjoyed but for Respondent’s unlawful conduct.

D. Respondent Should Be Ordered to Have Employees Undergo a Training Regarding Employees’ Rights Under the Act Conducted by a Board Agent During Paid Work Time, and Similarly, Should Be Ordered to Have Supervisors and Managers Undergo a Training on Compliance with the Act Conducted by a Board Agent on Paid Work Time

The ALJ failed to address the General Counsel’s request for employee and management training as a remedy in this matter. ALJD 18:15-ALJD 18:25. The General Counsel respectfully requests that Respondent be ordered to have employees, supervisors, and managers undergo trainings regarding employees’ rights and compliance with the Act, respectively, to remedy the unfair labor practices in this matter.

Training for employees on their rights under the Act, and for supervisors and managers on compliance under the Act, is necessary here as part of a complement of remedies to restore the
status quo and effectuate the purposes of the Act. The rationale for the training remedy is based on
the same rationale as the notice posting remedy, a remedy that has been ordered by the Board since
its earliest cases. Pennsylvania Greyhound Lines, Inc., 1 NLRB 1, 52 (1935) enf. denied in relevant part 91 F.
2d 178 (3d Cir. 1937) rev’d 303 U.S. 261 (1938). The Board has stated that the purpose of a remedial
notice is to “counteract the effect of unfair labor practices on employees by informing them of their
rights under the Act and the Board's role in protecting the free exercise of those rights.” J Picini
Flooring, 356 NLRB No. 9, slip op. at 2 (2010). It also serves to deter future violations. Id. (citing
Hoffman 535 U.S. at 152).

In circumstances where a notice posting was deemed insufficient to effectively counteract
the effect of unfair labor practices, the Board has devised other remedies that more effectively
achieve those purposes. In some cases, for example, the Board has ordered that notices be read to
the employees by supervisors, managers, or Board agents. The purpose of such a notice reading is
both to “ensure effective communication of the substance of the notice” and to effectively reassure
employees where an employer’s conduct has created a chilling atmosphere. Teamsters Local 115 v.
NLRB 640 F.2d 392, 401 (D.C. Cir. 1981); JP. Stevens & Co. v. NLRB, 417 F.2d 533,540 (5th Cir.
1969) (“reading requirement is an effective but moderate way to let in a warming wind of
information and, more important, reassurance”); United Dairy Farmers Cooperative Assn., 242 NLRB
1026, 1029 & n.14 (1979), enf. in rel. part, 633 F .2d 1054 (3d Cir. 1980). See also, Domsey Trading Corp.,
310 NLRB 777, 780 & n.13, 813 (1993) (requiring that manager read the remedial notice in English
and remain nearby for the readings in other languages so that employees will be assured that
promises are coming from that manager), enfld. 16 F.3d 517 (2d Cir. 1994). The Board has also
required that supervisors and managers attend such readings to expose them to information
concerning their own substantive obligations under the Act. Pacific Beach Hotel, 361 NLRB No. 65,
slip op. at 8 (2014). Further, the Board has on occasion required that an employer provide written
instructions to supervisors on compliance with the Act. See Id., slip op. at 7 (requiring that employer mail notice and explanation of rights to all current supervisors and managers); JP. Stevens & Co., 244 NLRB 407,408 (1979) (requiring employer to provide written instructions to supervisors on compliance with the Act); S. E. Nichols, Inc., 284 NLRB 556, 561 (1987) (ordering employer to give its supervisors the remedial notice and written instructions to comply with the provisions of the notice), enfd. in rel. part, 862 F.2d 952 (2d Cir. 1988). Moreover, while the Board has not previously ordered a training remedy, training has been included in a number of Board settlements. See, e.g., NLRB v. Howard University Hospital, No. 99-1465 (D.C. Cir. Feb. 24, 2015), para. 10 at p.5 (requiring that all managers and supervisor complete collective bargaining training on a variety of topics and that all newly hired or promoted managers and supervisors complete training within 30 days of employment or promotion).

A training remedy would be more effective than a notice posting or notice reading alone. Organizational behavior studies have shown that face-to-face communication is the most effective way to communicate and enact organizational change. See Thomas C. Barnes, Making the Bird Sing: Remedial Notice Reading Requirements and the Efficacy of NLRB Remedies, 36 Berkeley J. Emp. & Lab. L. 351, 362-63 (2015) and studies cited therein. In situations involving coercive conduct premised on an employee’s immigration status, a face-to-face communication that permits interaction is especially well tailored for remedying the harm, which, as stated by the Board, may be “indelibly etched” into the minds of those who have been coerced. Viracon, Inc., 256 NLRB 245 (1981).

Specifically, training by a Board agent for employees will directly and immediately communicate, and permit questions and discussion regarding the employees’ rights under the Act, the employer’s violations, and the remedies for those violations. It will do so in a way that provides reassurance to employees by the very entity responsible for the enforcement of those rights.
Likewise, training by a Board agent for supervisors and managers will ensure that they fully understand the employer’s violations and remedial obligations, their employees’ rights under the Act, and their obligations going forward.

Training is a common remedy for violations of other federal employment statutes. The Office of Special Counsel for Immigration-Related Unfair Employment Practices, which has specific statutory authorization to seek a remedy of educating an employer’s hiring personnel, commonly requires that employers who have violated the Immigration and Nationality Act’s anti-discrimination provisions receive training. 8 U.S.C. § 1324b(g)(2)(B)(vi). See, e.g., OSC Settlement Agreement, Real Time Staffing Services, LLC., d/b/a Select Staffing, para. 12 at pp. 6-8 (Aug. 12, 2014) (requiring human resources personnel to attend training session conducted by Office of Special Counsel regarding unfair immigration-related employment practices, among other things), available at http://www.justice.gov/crt/about/osc/pdf/publications/Settlements/SelectStaffing.pdf. The Equal Employment Opportunity Commission, which enforces a statute with a remedial provision modeled after Section 10(c) of the Act and which does not grant explicit authority to seek a training remedy, regularly seeks court orders requiring respondents to provide training as a remedy as well. 42 U.S.C. § 2000e-5. See Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 446 n.26 (1986) (stating that the remedial provision in Title VII of the Civil Rights Act was modeled after Section 10(c) of the Act). See EEOC v. Mid-Am. Specialties, Inc., 774 F. Supp. 2d 892, 898 (W.D. Tenn. 2011) (ordering employer to conduct two-hour training session for employees and managers regarding Title VII’s prohibitions against sexual harassment). See also EEOC v. Serv. Temps, 2010 WL 5108733, at *5 (N.D. Tex. Dec. 9, 2010) (ordering employer to provide one hour of training to managers regarding obligations under Americans with Disabilities Act), aff’d sub nom., EEOC v. Serv. Temps Inc., 679 F.3d 323 (5th Cir. 2012). It is worthy of note that the remedial provision under the Americans with Disabilities Act mirrors the remedial provisions under Title VII. 42 U.S.C. § 12117(a). The

In light of the foregoing, the General Counsel respectfully asserts this case is appropriate for the Board to order Respondent to have employees, supervisors, and managers undergo trainings regarding employees’ rights and compliance with the Act, respectively, to remedy the unfair labor practices in this matter.

E. The Board Should Issue A Correction to the ALJD With the Proposed Corrections at Pages 9, 10, 18, 19, and 20

1. Page 9 of the ALJD
On page 9 of the ALJD at line 8, the ALJ stated, “Vincer did contest the accuracy of that information or otherwise express any concerns at that time.” The language in the first half of the sentence is reflective of an affirmative, inclusive meaning, while the use of the word “or” in the second half of the sentence suggests that the sentence is excluding subjects from the conversation. That incongruity, and the record evidence on this point, shows that the ALJ omitted the word “not.” This omission renders the sentence’s meaning ambiguous. This modification would not alter any material findings of fact, conclusions of law, or legal reasoning in the ALJD. This change would merely clarify the meaning of this sentence, consistent with the undisputed testimony of witnesses.
for both the General Counsel and the Respondent. The General Counsel respectfully requests that this sentence be changed to read “Vincer did not contest the accuracy of that information or otherwise express any concerns at that time.”

On Page 9 at line 32, the ALJD states “Vincer also Zeliesko if he thought the company should be open and operating.” The ALJ did not include a word such as “asked,” stating the nature of Vincer’s communication to Zeliesko. While the reader can infer some things about the nature of the communication from the second half of the sentence, the sentence’s exact meaning remains ambiguous in the absence of this missing word. Making this modification would not alter any findings of fact, conclusions of law, or legal reasoning in the ALJD. This correction would conform the ALJD with the ALJ’s findings in this matter. The General Counsel respectfully requests that this sentence be changed to state, “Vincer also asked Zeliesko if he thought the company should be open and operating.”

2. **Page 10 of the ALJD**

On page 10 at line 6, the ALJD reads, “Boustead did reference the Respondent’s status as a life-sustaining business or needing to close its facility for employee safety during this conversation.” The ALJ appears to make the same mistake here as he did on page 9 of the ALJD. The use of exclusive language, via the word “or” in the second half of the sentence suggests that this sentence was intended to describe subjects that Boustead did not raise during his conversation with Trenary, whereas the use of “did” as opposed to “did not” suggests something inclusive of numerous subjects upon which Boustead spoke during his conversation with Trenary. This inconsistency places the first and second halves of the sentence in conflict. This conflict is easily resolved by the addition of the word “not” on page 10 at line 6, between the words “did” and “reference.” Modifying this sentence would not alter any findings of fact, conclusions of law, or legal reasoning in the ALJD. This change would merely conform the ALJD’s language to the ALJ’s existing findings.
of fact with respect to Boustead’s conversation with Trenary. The General Counsel respectfully requests that this sentence be modified to read “Boustead did not reference the Respondent’s status as a life sustaining business or needing to close its facility for employee safety during this conversation.”

3. Pages 18, 19, and 20 of the ALJD

Beginning on page 18 of the ALJD, there are multiple references to the Regional Director for Region 21. These references occur on page 18 at line 28, page 19 at line 29, and page 20 at line 9. The charge in this matter was initially filed in Region 6, and the Regional Director of Region 6 issued the complaint in this matter. On January 12, 2022, the Associate General Counsel, on behalf of the General Counsel, issued an order transferring this case to Region 5. GC Exh 1-F. Correcting this error would not alter any findings of fact, conclusions of law, or legal reasoning in the ALJD. This correction would merely render clear which Regional Director the Respondent should report to for the purposes of compliance in this matter. The General Counsel respectfully requests that all references to the Regional Director for Region 21 be changed to read “Regional Director for Region 5.”

VI. CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests that the Board clarify what constitutes concerted activity and overturn *Alstate Maintenance*, restore the *Wright Line* standard by overturning *Electrolux Home Products* and *Tschiggfrie Properties*, order Respondent to compensate the Charging Party for consequential economic harms incurred as a result of Respondent’s unfair labor practices, order Respondent to have employees undergo a training regarding employees’ rights under the Act, and order Respondent to have supervisors and managers undergo a training regarding employees’ rights and employers’ responsibilities under the Act.
Dated at Washington, District of Columbia, this 8th day of July, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing General Counsel’s Brief in Support of Cross Exceptions in Miller Plastic Products, Inc., Case 06-CA-266234, was e-filed and served by e-mail as indicated below on this 8th day of July, 2022:

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