

**Boese Hilburn Electric Service Company and
Stephanie L. Burke.** Case 17-CA-15678

November 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On March 25, 1992, Administrative Law Judge David G. Heilbrun issued the attached decision, and on March 16, 1993, the judge issued the attached supplemental decision.¹ The General Counsel has filed exceptions and supporting briefs to both the judge's original and supplemental decisions.

The National Labor Relations Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Respondent, Boese Hilburn Electric Service Company (BHE), is an electrical contractor in the building and construction industry. Boese Hilburn Systems, Inc. (BHS), a commonly owned enterprise with BHE, is engaged in the sale and servicing of computer products.² At all times material to this case, both companies' clerical needs were handled by head of accounting Joyce Reid and four employees: Charging Party Stephanie Burke, and employees Helen Fetters, Bertha Kovac, and Kathleen Walker. Working under Reid's supervision, Burke handled both companies' payroll and insurance administration. Burke's duties also included accounts payable data entry for BHS, job costing for BHE, and backup typing and switchboard for both companies. Fetters acted as both companies' receptionist and also did accounts payable data entry for BHE. Kovac worked primarily as a secretary for BHE, but also acted as Burke's backup on payroll. Finally, Walker provided technical support to BHS customers with respect to its computerized estimating system (that company's principal product), and handled shipping and other clerical duties for BHS.³

In the fall of 1990, Burke was additionally designated by the Respondent as the EEO officer for both the Respondent and BHS. Also in the fall of 1990, Burke learned that Walker was pregnant. The two women discussed whether Walker would receive ma-

ternity leave, particularly in light of their understanding that a former employee, Andrea Katz, had received paid maternity leave after her pregnancy. Walker subsequently raised the issue with David Zuck, the president of BHS and operations manager of BHE, who responded that he would have Burke look into the matter. Sometime in January 1991, Zuck and Burke discussed Walker's request. Burke advised Zuck that Walker should receive maternity leave, expressing her concern that EEO problems might result if the request were denied. Zuck responded that he could do what he wanted. At about this time, Zuck also told a group of employees, including Burke, that they would not have to worry about losing their jobs as there would always be paperwork for them to do.

On about February 25, 1991,⁴ Zuck asked Burke to review the Respondent's records to determine whether Katz had received paid maternity leave and, if so, whether she had been paid by BHS or BHE. Shortly thereafter, Burke complied with this request, and advised both Zuck and Walker that Katz had in fact received paid maternity leave.⁵

On about February 26, Burke overheard a conversation between Walker and Zuck, in which Zuck stated that Walker was trying to "take the company" through her request for maternity leave. The following day, Walker told Burke that she would meet with Zuck in an effort to get a final decision in this matter. Walker stated to Burke that Zuck's refusal to give her maternity leave was unfair. Although Burke responded that she agreed Zuck was being unfair, she also stated that she did not wish to get involved. The subsequent discussion between Walker and Zuck was inconclusive, as Zuck stated that Walker's request turned on whether Katz had been an employee of BHS or BHE, an issue which had not then been determined.⁶

Beginning in the last 2 months of 1990, the Respondent began experiencing substantial operating losses on its construction operations, which converted a net operating profit for the first 10 months of calendar year 1990 of \$175,000 into a net loss of \$20,000 for the year. Zuck testified without contradiction that the Respondent responded to these developments by sharply limiting its efforts to obtain new construction work, and by laying off BHE employees. Thus, two BHE estimators and a superintendent had either been laid off or left by the end of February.

Also in February, Zuck met with the Respondent's accountant to discuss its ongoing losses and to determine how to improve the Respondent's profitability

¹The supplemental decision was issued pursuant to the Board's October 13, 1992 unpublished order remanding this proceeding to the judge for further findings of fact, credibility resolutions, and conclusions of law.

²The judge found that BHE and BHS are a single employer. No party has excepted to this finding.

³Of the four employees working under Reid, Burke had the most seniority, having worked for the Respondent for approximately 10 years. Fetters had 8 years' seniority, Kovac had 3 years, and Walker had been employed by BHS for less than 3 years at the time of the hearing.

⁴Unless otherwise noted, all dates hereafter are in 1991.

⁵The judge did not credit Burke's testimony that Zuck requested that she advise Walker of the results of her research.

⁶Also on February 27, Zuck held a closed-door meeting with Reid. Although the judge found that such meetings were unusual, there is no evidence concerning what was said at this meeting.

prior to a planned effort to obtain refinancing of the Respondent's debt. Zuck decided that he needed to reduce expenses by laying off one office employee and determined that Burke should be the one to go. On March 1, Zuck met with Burke and advised her of his decision. When Burke asked Zuck whether the "maternity thing" had anything to do with Zuck's decision, he responded that it "aggravated" it. As Burke left his office, Zuck also told her that he did not want her going out there "stirring up a bunch of shit."

The Judge's Decision

The judge found that Burke's activities concerning Walker's maternity leave were not concerted activity within the meaning of Section 7 of the Act. Rather, the judge found that Walker's pursuit of paid maternity leave was strictly an individual matter, and that Burke's involvement was limited to "empathetic discussion between the women [Burke and Walker]" and an "innocuous inquiry" to Zuck in January. In this regard, the judge noted that Burke had told Walker that she did not want to get involved prior to Walker's confronting Zuck in late February. The judge also stated that Burke's "vague role" as an EEO officer "was practically a dead letter" with no significance to a determination of whether her actions were concerted.

The judge also found that, even if Burke's activities were found to be protected, concerted activity, they were not a motivating factor in her selection for discharge. Thus, the judge noted that the Respondent did not terminate Walker, who was "even more vocal than Burke" in seeking the maternity leave. The judge also found that the Respondent had substantiated its assertion that economic reasons alone motivated the "lay-off," in that the Respondent was experiencing substantial net operating losses on its construction business, and needed to reduce its overhead in order to obtain renewal of its line of credit with its bank. The judge also noted that the Respondent had laid off three other employees at the time of Burke's termination, that the choice of "well compensated Burke" was not startling, and that the Respondent returned to profitability in May 1991, after Burke's termination.

Finally, the judge found no merit to the allegations that Zuck's statements to Burke that the "maternity leave thing" had "aggravated" the decision to select her for layoff, and that she should not "go out there stirring up shit" independently violated Section 8(a)(1). In this regard, the judge found these statements to be ambiguous, when considered in context, and therefore not to have constituted an attempt to prohibit Burke from engaging in such activities.

The General Counsel's Exceptions

The General Counsel initially contends that the judge's finding that Burke did not engage in concerted

activity is erroneous as a matter of law, given his findings that she was championing Walker's "EEO rights" as well as her quest for maternity leave in her conversations with Zuck concerning this matter. The General Counsel further contends that the discussions between Walker and Burke concerning maternity leave were themselves concerted activity, and that Zuck was aware of those discussions.

The General Counsel also asserts that the judge erred in finding that Zuck's statements to Burke during the course of the termination meeting were too ambiguous to constitute violations of Section 8(a)(1). In this regard, the General Counsel asserts that the Board has found similar statements to be coercive, and hence unlawful.

Finally, the General Counsel takes issue with the judge's finding that Burke's termination did not violate Section 8(a)(1) under these circumstances.⁷ Initially, the General Counsel asserts that Zuck's statement that "the maternity leave thing" "aggravated" the decision to terminate Burke, alone, is sufficient to establish that the termination was unlawful. The General Counsel also asserts, however, that the Respondent has not established that it would have terminated Burke even in the absence of her protected, concerted activities. In this regard, the General Counsel notes: (1) Zuck's statement to employees in January that their jobs would always be safe; (2) that the Respondent gave all of the clericals, including Burke, a \$1500 bonus 2 weeks before Burke's termination, and gave its managers raises as well; (3) the Respondent's gross revenues increased in the month of February; (4) the timing of the discharge relative to Burke's protected, concerted activities and Zuck's closed door meeting with Reid; and (5) the fact that Burke was the most senior employee and could perform all the duties required of the office clericals.

Discussion

Contrary to the judge, we find that Burke's involvement with Walker's efforts to obtain maternity leave constituted concerted activity protected by Section 7 of the Act. The credited testimony establishes that Walker and Burke engaged in several discussions in which both employees complained about Zuck's asserted unfairness in failing to grant Walker the paid leave she requested, and that Zuck was aware of these discussions. In particular, the judge credited testimony that Burke and Walker agreed in one such conversation that Zuck was being unfair. The Board has found that the airing of complaints of this type constitutes concerted activity. *Salisbury Hotel*, 283 NLRB 685, 686 (1987). See also *Vought Corp.*, 273 NLRB 1290, 1294 (1984),

⁷In this regard, we note that the General Counsel correctly points out that the complaint alleges only that the termination violated Sec. 8(a)(1), not, as the judge inadvertently stated, Sec. 8(a)(3).

enfd. 788 F.2d 1378 (8th Cir. 1986) (employee told coworkers that another employee had been discriminatorily selected for promotion).

Likewise, the judge credited testimony that, subsequent to her initial discussions with Walker about maternity leave, Burke protested to Zuck that his refusal to grant maternity leave to Walker was unfair, and potentially in violation of Walker's EEO rights. These protests also constituted concerted activity. *Yellow Freight Systems*, 297 NLRB 322 (1989) (protesting to supervisor alleged harassment of coworker).

We also find that Zuck's statement to Burke that "the maternity thing" "aggravated" his decision to select her for termination violated Section 8(a)(1). Contrary to the judge, we perceive no ambiguity surrounding this remark. Rather, we find that a reasonable employee hearing the statement, during the course of a meeting at which the employee's termination was announced to them, would conclude that their involvement in protected, concerted activities played a role in their selection for termination. Such statements, of course, have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of Section 7 rights and, hence, violate Section 8(a)(1). *Sands Hotel & Casino*, 306 NLRB 172 (1992).

We also reverse the judge's dismissal of the complaint allegation that Zuck's statement to Burke that she should not go out there stirring up a "bunch of shit" was not unlawful. Particularly when viewed in light of Zuck's prior statement that Burke's involvement in concerted activities had played a role in her selection for layoff, we find that Burke could reasonably have viewed this statement as an order not to discuss her termination with her coworkers. Such instructions violate Section 8(a)(1). See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990). See also *Walker Die Casting*, 255 NLRB 212, 217 (1981), modified on other grounds and enfd. 682 F.2d 592 (6th Cir. 1982) (admonition to employee to mind her knitting found unlawful).

In light of Zuck's statement that the "maternity thing" aggravated the decision to terminate Burke, we find that the General Counsel has established a prima facie case that Burke's concerted activities were a motivating factor in her discharge. Once the General Counsel establishes a prima facie case, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of Burke's concerted activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 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). For the reasons which follow we agree with the judge that the Respondent has satisfied its burden in this case.

Initially, we agree with the judge that the Respondent has shown that its construction business was suffer-

ing substantial losses beginning in the last 2 months of 1990 and continuing until May 1991—well after the date of Burke's discharge.⁸ Moreover, the judge credited Zuck's uncontradicted testimony that in February he determined that a layoff was necessary to reduce overhead and improve the Respondent's balance sheet in order to improve its chances of obtaining needed re-financing from its bank. We note that its efforts in this regard were apparently successful, as the Respondent substantially reduced its overhead and the amount of its net loss within a few months after the discharges of Burke and the other BHE employees. We also note that Burke had not been replaced as of the date of the hearing. Rather, her duties have been apportioned among the remaining clerical employees with little if any increase in overtime after an initial adjustment period.

We further find that the General Counsel has not shown that these justifications for the discharge are pretextual. Although the General Counsel asserts that the bonuses and wage increases granted by the Respondent show that its financial condition was not so dire as to require a layoff, Zuck testified without contradiction that the wage increases were granted in October 1990, before the Respondent's financial condition deteriorated, and that the bonuses were in fact Christmas bonuses which the Respondent had delayed until February because its financial picture was so poor in December 1990. In our view, the delayed Christmas bonuses bolster, rather than undercut, the Respondent's assertion that its business had deteriorated substantially by the end of February 1991.

Likewise, we do not agree that the upturn in the Respondent's gross revenues in February establishes that the Respondent's explanations for the layoff are pretextual. Initially, we note that the General Counsel has not shown that the February figures had even been calculated on March 1, the date on which Burke was terminated.⁹ Moreover, Zuck testified that the decision to terminate Burke was made in the first 2 weeks of February; the General Counsel has not shown how the Respondent would have known its gross revenue figures for the month on that date. We further note that the Respondent's gross revenues fluctuated substantially from month to month, but nevertheless were on a general downward trend from October 1990 to October 1991, the last month for which figures are pro-

⁸Specifically, the Respondent's construction operations lost \$98,097.89 in November 1990, \$96,559.17 in December 1990, \$9,365.35 in January 1991, \$3,914.24 in February 1991, \$13,997.45 in March 1991, and \$9661 in April 1991. Although the Respondent's construction business returned to profitability in May 1991, this was associated with a significant reduction in overhead costs—the very reason given by the Respondent for Burke's discharge.

⁹On the contrary, the Respondent's accountant testified that monthly audits were not completed until the 10th to the 15th of the following month.

vided. Finally, despite the increase in gross revenues on which the General Counsel relies, it is undisputed that the Respondent was still operating at a net loss for the month of February.¹⁰

We also find that the Respondent has shown that it selected Burke, rather than one of the other clerical employees, for layoff for legitimate nondiscriminatory reasons. Initially, we find that the link between Burke's concerted activities and her termination is somewhat attenuated by the fact that Walker, who also engaged in protected, concerted activity which was both more active, more confrontational, and closer in time to the date of the termination decision, was not selected, and that the Respondent had previously terminated three other employees in the same area of its business.¹¹ Further, the Respondent has explained that it selected Burke because (1) she was the highest paid of the clerical employees other than Reid, her superior, meaning that her discharge would result in the greatest reduction in overhead; (2) Helen Fetters, who was the Respondent's receptionist, was not selected because she had cancer and could not afford to lose her health benefits; (3) Walker was not selected because she alone handled technical support for the computer estimating package, which was BHS's primary product; and (4) Burke's duties primarily related to BHE, which was suffering substantial losses as set forth above, had already laid off several of its construction employees, and thus had less need for clerical and payroll support.

We find no merit to the General Counsel's assertion that these explanations are pretextual. Although the General Counsel asserts that Burke was the most senior clerical employee apart from Reid, and could perform any clerical or office duty required, the Respondent has not asserted that Burke was not qualified but rather that she was selected because her discharge would effect the greatest reduction in its overhead. The General Counsel has not demonstrated that this assertion is false. To the contrary, the record discloses that the remaining employees were able to absorb her duties with only a temporary increase in overtime hours.

In sum, the evidence in this case establishes that the Respondent made a business decision to discharge a relatively highly paid, skilled employee, and to redistribute her duties among the remaining, less skilled but also lower paid employees, in order to reduce its significant operating losses and present an acceptable balance sheet to its bank in support of its impending bid

¹⁰ Under these circumstances, we find that Zuck's statement in January that the clerical employees did not have to worry about their jobs also does not establish that its claims of financial distress were pretextual.

¹¹ In this regard, we also note that the Respondent has explained the timing of its decision with respect to Burke by pointing to its impending presentation of its financial data to its bank in order to obtain refinancing of its revolving line of credit.

for refinancing. We therefore find, for all the foregoing reasons, that the Respondent has established that it would have taken the same action even in the absence of Burke's protected, concerted activities and accordingly dismiss the allegation that Burke was discharged in violation of Section 8(a)(1).

CONCLUSIONS OF LAW

1. By telling employee Stephanie Burke that her protected, concerted activities "aggravated" the decision to select her for discharge, and by subsequently instructing her not to "stir up any shit" following her discharge, the Respondent has interfered with, restrained, or coerced Burke in the exercise of the rights guaranteed by Section 7 of the Act.

2. The Respondent has not otherwise engaged in any unfair labor practices as alleged in the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Boese Hilburn Electric Service Company, Merriam, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees selected for discharge that their protected, concerted activities aggravated the decision to discharge them.

(b) Ordering discharged employees not to discuss their termination with other employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Post at its facility in Merriam, Kansas, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell our employees that their protected, concerted activities were a factor in their selection for discharge.

WE WILL NOT direct our employees not to discuss their discharge with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BOESE HILBURN ELECTRIC SERVICE
COMPANY

Richard C. Auslander Esq., for the General Counsel.
Thomas M. Moore (Moore & Bucher, P.C.), of Kansas City, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard at Mission, Kansas, on November 20, 1991. The charge and an amended charge were filed June 21 and July 29, 1991, respectively. A complaint was issued July 30, 1991, which was amended at the outset of trial. The primary issues that result are whether Boese Hilburn Electric Service Company (Respondent) laid off Stephanie L. Burke for engaging in protected, concerted activities, as well as verbally prohibiting such activities and informing her that layoff was due to so engaging, in violation of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of written, posthearing presentations by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Merriam, Kansas, where it has been engaged as

an electrical contractor in the building and construction industry, providing electrical service for commercial and industrial facilities. During the 12-month period ending March 31, 1991, Respondent, in the course and conduct of its business operations described above, performed services valued in excess of \$50,000 in States other than the State of Kansas. On these admitted facts, I find that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Case Summary

After an approximately 10-year office career with Respondent, Charging Party Stephanie L. Burke was suddenly laid off in March 1991 for claimed economic reasons. This followed shortly after her designation as the private employer's "EEO Officer," and her personal interest in assuring maternity benefits for another employee. Burke's layoff occurred about a month before the other employee left for maternity, and the benefits being sought were ultimately paid by Respondent.

B. Single-Employer Issue

General Counsel has concern for its theory of statutory engagement in concerted activity because Burke worked for one corporate entity, and the pregnant employee worked for a different one but at the same physical location. For this reason, General Counsel argues that a single-employer status should be found with regard to Respondent and the other corporate entity, or that at least the two be held as a joint employer.

The courts and the Board have repeatedly set forth the test for a single employer. *Radio Union v. Broadcast Services*, 380 U.S. 255 (1965); *Blumenfeld Theatres Circuit*, 240 NLRB 206 (1979), *enfd.* 626 F.2d 865 (9th Cir. 1980); *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136 (1990); *Hydrolines, Inc.*, 305 NLRB 416 (1991). There should exist an interrelation of operations, common management, centralized control of labor relations, and common ownership. Also relevant are such factors as the use of common office facilities, common equipment, and the interchange of key personnel. Not all of these factors must be found to establish the existence of a single-employer situation, and no one factor is controlling. Single-employer status ultimately depends on "all the circumstances of the case," and is characterized by an absence of the arm's-length relationship found among unintegrated companies. *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040 (D.C. Cir. 1975).

Here, the Respondent has been in existence tracing back to 1949. In 1986, the separate corporation called Boese Hilburn Systems, Inc. was established to soon engage in selling, shipping, and servicing computer hardware, computer software packages, and related products. Both Respondent and Boese Hilburn Systems, Inc. (Systems) are subsidiaries of the holding company Victory Investments, Inc. The current directors of Respondent are Grant Hilburn, Robert Lawrence, and David Zuck. Only Hilburn and Zuck constituted the directors of Systems during its recent existence. Hilburn identified himself as owner and president of Respondent, while Zuck testified that he was operations manager of both Respondent and Systems. Zuck was simultaneously the presi-

dent of Systems, and continues in that capacity with the corporate entity succeeding Systems in May 1991. Joyce Reid, a senior office employee and head of accounting, is corporate secretary-treasurer for Respondent and for Systems so long as it existed.

The two entities had used separate space within the same building, had one common telephone number, and provided each other crossover clerical services, accounting, space utilization, computer networks and products, financial credit, and utilities. Employees of both entities followed the same hours of work, accessed the same eating amenities inside the building, and assisted each other without regard to corporate name. In the course of happenings that this case concerns, Zuck made no distinctions in regard to the responsibilities Burke would have borne as EEO officer for the collective enterprise as between Respondent's employment policies and those of Systems.

I find that at all times material, Respondent and Systems have been affiliated business enterprises with one common officer, common ownership, a comparably controlling directorship, and the same managing supervision. They have formulated and administered a common labor policy affecting employees of the operations, have shared common premises and facilities, have provided services for and made sales to each other, and have shared personnel with each other. I hold Respondent and Systems to be a single employer. See *Goodman Investment Co.*, 292 NLRB 340 (1989).

C. Evidence

Burke's duties were to do payroll for both entities and administration of their insurance, plus job costing for Respondent and accounts payable for Systems. Prior to Burke's layoff, the other employees comprising Respondent's office staff were Reid who did overall bookkeeping, Helen Fetters, a receptionist also able to do accounts payable, and Bertha Kovacs, a general clerical who could back up the payroll functions if necessary. These various employees were crossed-trained in the office functions of public contact, payroll, and bookkeeping. Kathleen Walker was a clerical support employee working for Systems, having been hired in January 1989.

Andrea Katz was previously employed by Systems, and has been an acquaintance of Walker for several years. Katz had taken a maternity leave in 1989, and received 4 weeks of maternity leave pay while off work. Walker learned of this while socializing with Katz late in 1990.

In the fall of 1990, Burke and Walker had occasion, as colleagues in a common workplace, to discuss the fact that the latter had become pregnant. This occurred about the same time as Burke's casual designation as EEO officer, for which she was given a binder to be looked at and filed away. As time passed into early 1991, Burke had a brief conversation in Zuck's office, asking the official if he planned to pay maternity leave to Walker as had been done for Katz. Burke testified that he dismissed the inquiry, to which Burke intimated it could mean "trouble with EEOC." She recalled Zuck later asking her informally in mid-February 1991, what Katz had been paid. To this Burke stated a belief it had been 4 weeks. In late February, however, Zuck spoke to Burke asking that she ascertain from company records exactly what Katz had been paid at the time of her maternity, and whether sick leave and vacation had been included with such com-

pensation. Burke asserted that she was to let both Zuck and Walker know of the answer. Burke recalled looking this up and reporting back to Zuck that the records showed Katz being paid 4 weeks' maternity leave without a charge against sick leave or vacation. She added that this had happened after Katz had been with the Company for only about 6 months. She testified that Zuck expressed a refusal to extend such pay to Walker, and that she disputed the point with him. Burke had provided the same information to Walker earlier that day.

Burke testified further that on the following day, which she fixed as February 26, 1991, she was working jointly with Walker when Zuck appeared. The official said he opposed Walker having maternity benefits and that Katz had not been paid any. According to Burke this distortion of fact was discussed between the two women after Zuck left the area. Walker said she would try "pinning him down" on the matter. Burke recalled how later that day Walker returned from the direction of Zuck's office, looking dejected and saying Zuck offered only an unfair and inadequate benefit package for her absence on maternity.¹

Walker testified that the subject of a "maternity policy" originated when she inquired about it with Burke in late 1990. She next raised the subject with Zuck during a private conversation in his office occurring around late January or early February. Walker emphasized both her value and her deservingness as to such a benefit. However, at the time Zuck simply told her that he would have Burke check into the matter. A few days later, Walker approached Burke about an answer, and before that day was over Burke advised her that the check showed Katz had been given 4 weeks.

Subsequently, after the episode when Burke and Walker were working together and Zuck appeared briefly to mention the maternity leave subject, Walker determined to "get this settled" and proceeded into Zuck's office. This had followed a remark to her with Burke saying she did not "want to get involved in this." The discussion by Walker with Zuck was inconclusive, because he hinged any decision on the unknown factor of whether Katz had been an employee of Respondent or of Systems when paid maternity benefits. Walker did not thereafter obtain any answer until following her confinement in April, when it turned out that she was being given 4 weeks of paid maternity leave.

On the morning of March 1, Zuck called Burke into his office to say that she was being "let go." Burke testified that Zuck admitted how her activities regarding Walker's "maternity thing" had "aggravated" his decision to terminate her employment with his stated cutback on overhead. Zuck did offer 9 weeks of severance pay, and this was disbursed to her over the weeks following. Burke had also received a \$1500 bonus in February, deferred as it was for other clerical employees from late 1990. Burke's immediate action following this news was to protest her termination to Hilburn, but this was unavailing. She had done this notwithstanding, as she uncontradictedly testified, that Zuck had told her when the layoff meeting ended not to "go out there stirring up a bunch of shit."

Regarding business operations during calendar year 1990, Respondent had shown a net operating profit by the end of

¹ All dates and named months hereafter are in 1991, unless indicated otherwise.

October totaling \$175,000. The last 2 months of that year resulted in net operating losses of over \$90,000 for each period, with the result that the year end result was an approximate \$20,000 net loss on operations. This financial picture had been discussed between Zuck and his CPA, Ed Page, in consequence of which a decision was reached to reduce expenses by the layoff of one office employee. The person Zuck selected was Burke. This was assertedly on grounds that her job duties could be spread among the remaining office employees, and that in each of their cases a specific reason existed for retention.

D. Credibility

I generally discredit the testimony of Burke, whose demeanor did not satisfy me that she was fully accurate in the recollections given. She was contradicted in significant regards by Walker as to her commitment to the maternity benefit matter, and as to whether Zuck had once denied knowing about Katz' maternity leave after being so informed by Burke. In addition, she was further contradicted by the essentially credible Robert Baslock, regarding disclosure of confidential salary information to him concerning another person.

Implicit in this evaluation is my crediting with a high degree of confidence the testimony of Walker and, with only minimal certainty the testimony of Baslock. I also credit Zuck and Page, whose demeanor presentations were adequate to cause my belief in their testimony.

E. Discussion

I do not find that the facts of this case establish concerted activity on Burke's part. The maternity benefit issue involving Walker was strictly an individual matter, and does not under the law constitute an activity for the benefit of other employees generally.

The Board has exhaustively discussed its definition of concerted activities in the *Meyers I* and *Meyers II* decisions.² The plainest statement of this definition, as taken from *Meyers I* and later reaffirmed, states:

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. [Id. at 497.]

In *Burle Industries*, 300 NLRB 498 (1990), the Board found that an individual was unlawfully discharged after his effort "to induce group action." This holding was traced to an originating rationale in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), in which the court required concerted activities to appear at the very least as engaged in with the objective of inviting or inducing or preparing for group action, or that it have some relation to group action in the interests of employees. *Mushroom Transportation*, supra at 685. The Board took particular note of this case being cited with approval in *Meyers II*. See also *Whittaker Corp.*, 289 NLRB 933 (1988).

Here, the dynamics were highly individual in nature originating in little more than empathetic discussion between the

women and leading from this to Burke's innocuous inquiry to Zuck in January. Her vague role as an EEO officer provides no basis to convert such a passing inquiry into some component of potential group activity by employees. The EEO officer designation was totally formless, and carried no assigned responsibility or apparent commission to crusade for the betterment of employees at this informally, close-knit enterprise. Nor did the designation lead to any informative postings or activity involving even minimal documentation. As a factor in analyzing the issue of "concerted activity" relative to Section 7 of the National Labor Relations Act, Burke's appointment was practically a dead letter. The more significant fact is that Walker credibly testified how Burke had expressly disavowed involvement in the maternity leave subject.

This disavowal done during February also signaled a more important phase, which was Walker's own assertive venturing with Zuck. In this process she preempted the subject as her own personal effort, and expressed this most in her testimony of telling Zuck that he would hear the pugilistically referenced "round two" from her. The evidence fails to show any meaningful involvement by Burke following this preemption, and I believe the final configuration of facts is devoid of a showing that Burke's undertaking was done "with or on the authority of" Walker. *Meyers I*, supra at 497.

General Counsel's case authorities on the point are each distinguishable. In *Precision Tool & Die Mfg. Co.*, 205 NLRB 205, 208 (1973), a petition was "the combined effort of all the employees in the shop to improve their wages, hours, and working conditions." Again in *L & S Enterprises*, 245 NLRB 1123 (1979), the undertaking of a discharged employee was "for engaging in the formulation, circulation, and presentation of a petition concerning wages, hours, and working conditions." In *J. J. Security*, 252 NLRB 1290 (1980), the general context was that of an entire six-member employee complement at a detached worksite meeting "as a group with their employer, for the express purpose of achieving higher pay and shorter hours." Such objective was termed in this case as "their quest for improved wages, hours, and conditions of employment." *J. J. Security*, supra at 1291-1294. The collective nature of these authorities, coupled with the teachings of *Meyers I*, makes the Burke-Walker continuum of inquiry-type contacts with Zuck so highly distinguishable that an instance of statutory concerted activity is not shown.

Even if Burke's activities were held to be concerted, the further issue remains as to whether or not it motivated Zuck in his selection of her for layoff. Here, I do not believe the evidence is sufficient to establish that conclusion. Among other things of Walker herself being even more vocal than Burke in regard to seeking this benefit, I find that by approximately mid-February Respondent's reason for the layoff was purely economic. I am persuaded that its profit and loss statements are both highly authentic and relevant to the issue, and that they plainly show the significant business losses described. Furthermore, I am satisfied that a sincere concern for the losses was held by Respondent in terms of preparing its business plan for the renewal of major bank financing. The claim that construction activity trailed off in late 1990 and well into 1991 is fully in keeping with national awareness on the economy as a whole. By the time of Burke's layoff, two

²*Meyers Industries (Meyers)*, 268 NLRB 493 (1984), and *Meyers Industries (Meyers)*, 281 NLRB 882 (1986).

construction estimators and a superintendent had been terminated or left. New construction endeavors were limited by a business awareness, supported by the advisory role of CPA Page, that reduction of excessive overhead expenses was the only route back to profitability. In this regard, I specifically reject General Counsel's argument that the February (1991) revenues of \$270,000 represented a different picture. On the contrary, I find this nothing more than an instance of revenue surges in the construction business, and note too that the month in question still resulted in a net loss. It is also noteworthy that March (1991) also showed a large loss as the next to last month of such before profitability was restored. This reflected both the large severance pay granted Burke, and the transitional overtime worked by other employees after she was gone.

On the separate issues of claimed independent 8(a)(1) violation, I do not believe this is established from Zuck's two undenied verbalisms. In the full context here, use of the word "aggravate[d]" is not sufficiently free of ambiguity to hold that it proves how legally protected activities have been violated. As to the "stirring up shit" remark, this is even less directly a statement that such activities were attemptedly prohibited. Overall, the probative evidence does not support essential allegations of the complaint.

CONCLUSIONS OF LAW

1. Boese Hilburn Electric Service Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent did not commit unfair labor practices as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

Richard C. Auslander Esq., for the General Counsel.
Thomas M. Moore (Moore & Bucher, P.C.), of Kansas City, Missouri, for the Respondent.

SUPPLEMENTAL DECISION

DAVID G. HEILBRUN, Administrative Law Judge. This supplemental decision is issued in fulfillment of the Board's order remanding proceeding dated October 13, 1992. The sequence of matters set forth shall be (1) delineation of credibility resolutions, (2) specific findings of fact, and (3) a currently recommended case disposition.

I. CREDIBILITY RESOLUTIONS

The credibility resolutions of testimony by Stephanie Burke about her conversations with David Zuck and Kathleen Walker, as based on her demeanor, are as follows:

1. Burke is credited in saying that during early January 1991, Zuck remarked to a group at which she was present that clerical employees would not have to worry about losing their jobs.¹

2. Burke is credited in saying that during conversation with her in mid-January, Zuck stated he was able to do what he wanted, meaning he would not pay Walker anything for

¹ All dates and the named months hereafter are in 1991, unless indicated otherwise.

maternity leave and he was unconcerned about having EEOC trouble.

3. Burke is credited in saying that during conversation with her in mid-February, Zuck asked what, if anything, former employee Andrea Katz had been paid for maternity leave.

4. Burke is credited in saying that during conversation with her on (or about) February 25, Zuck asked her to check past records that would show whether, and in what manner, Katz had been paid as a maternity leave matter. Burke is discredited in recalling that on this occasion Zuck told her to inform Walker about results of the check.

5. Burke is credited in saying that while engaged in computer tasks in Walker's office during late afternoon on (or about) February 26, she overheard a brief remark by Zuck to Walker as he was passing by that she (Walker) was trying "to take the company" as to maternity leave benefits. Burke is discredited in recalling that on this occasion Zuck also then claimed Katz had not been paid anything of this nature.

6. Burke is credited in saying that during conversation in Zuck's office on March 1 where notice of her termination was made, Zuck stated the "maternity thing" had "aggravated" his decision. Burke is discredited to the extent that her testimony as to such a statement carried the intimation that Zuck expressed a retaliatory intention as to her personally. Comparably as to further passing of words between the two conversationalists while in Zuck's office on that date, Burke is credited in saying that Zuck stated he did not want her to go throughout the facility "stirring up a bunch of shit." Burke is discredited to the extent that her testimony as to such a statement carried the intimation that Zuck urged anything more than that she not emerge from their private conversation, and before leaving the premises behave openly and disruptingly like an angry, disgruntled person.

7. Burke is discredited in saying that during a conversation with Walker in late afternoon of February 26, Walker had stated that Zuck just falsely said to her that Katz had not been paid anything as a maternity leave benefit. This particular evaluation is influenced by the highly persuasive testimony given by Walker, a witness presenting with excellent demeanor, one not given to the indication of slanting her responses or having a particular bias, and one whose less detailed testimony as to dates, time lines, and seeming exactness of fact was nevertheless more convincing as a candid, natural matter of drawing from memory.

II. FINDINGS OF FACT

1. Before the year 1990 ended, a pregnant Walker came to believe from conversation with her friend Katz that the latter, while a past employee of this general business enterprise, had received 4 weeks' pay as a maternity leave-type of benefit.

2. By on or about February 1, Walker had initiated informal conversation with Zuck, inquiring about whether she would receive paid maternity leave benefits.

3. Zuck was initially unsympathetic toward the idea of Walker receiving paid maternity leave benefits, and his disinterest in her request left him uncertain as to whether former employee Katz had received compensation of this type, and if so what exact component of the general business enterprise had been her employing entity for purposes of such an outlay.

4. Burke and Walker, as persons working in the same general business enterprise and as frequent lunchtime companions during the first 2 months of 1991, talked conversationally and concernedly about Walker's imminent absence on maternity leave and the fairness, intrinsically and in comparison to Katz' earlier treatment, of Walker being granted some generous form of paid maternity leave.

5. The persistence of Walker's inquiries caused Zuck to request that Burke research the matter of Katz' compensation, and advise him on the facts (only as relating to payment).

6. Burke fulfilled this request soon after it was made, advised Zuck of the fact of past payment to Katz in the official sense she was expected to do, and further advised her companion coworker Walker of the same fact in ordinary causal conversation.

7. Burke knew from experiences on February 25, 26, and 27 that Zuck was gruffly unsympathetic to the principle of again extending a paid maternity leave benefit to Walker, and further knew over this approximately 48-hour timespan that the subject was probably evolving toward some decision.

8. By the close of business February 27, the request of Walker for paid maternity leave had stalled with Zuck's countering thoughts, that any money to be paid over at around the time of actual childbirth would likely be drawn from vacation and sick leave entitlements.

9. Burke had voiced EEO to Zuck as a subject matter and the EEOC as an enforcement agency as early as mid-January from her peripheral interest in Walker and growing dismay about Zuck's seeming unenlightenment on the subject, and the fact that he represented the chief official blocking compliance with Walker's reasonable seeming request.

10. Respondent's accounting advisor had engaged in a confidential review with Zuck of financial projections, and had legitimately resolved to advise the termination of Burke as the clerical employee whose absence would most effectively alleviate growing financial adversity.

11. The largely unprecedented, closed-door meeting on February 27 between Zuck and Joyce Reid, the latter being Respondent's long-service corporate officer and head of accounting, happening close in time to CPA Ed Page's recently completed series of meetings in mid-February, does not give rise to any inferences bearing on issues on the case.

12. The termination meeting between Burke and Zuck on March 1 revealed the latter to be gruff, vulgar, and rigid of manner, but did not reveal the episode as anything more than a pure notification, unhappy to all concerned, that a particular person had been necessarily chosen to lose employment in defense of larger business interests.

III. ISSUE ANALYSIS

The Board's remand directs an analysis of Burke's termination on the assumption that her activities were concerted in nature, and as to the alleged independently violative statements uttered by Zuck.

On the first point, the necessary analysis follows a framework of principles established in *Wright Line*, 250 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, General Counsel has the initial burden of establishing a prima facie case that an employee was discharged

or laid off by his employer because of unlawful animus. As part of the prima facie case, General Counsel must prove that the employee engaged in union or other protected activity, that the employer had knowledge of the employee's activity, and that the employee was discharged or laid off from employment because of union animus or other unlawful motive in violation of Section 8(a)(3). An inference of unlawful discrimination against an employee may be drawn from employer hostility, and any coincidence between the employee's activities and a closely following termination. Animus may be inferred from circumstantial evidence, while unlawful motivation may be inferred from the timing of an employer's action. Another factor from which unlawful motivation may be inferred is the pretextual nature of an employer's asserted reasons for his actions. See *Bardville Electric*, 309 NLRB 337 (1992). Once General Counsel has met the burden of establishing a prima facie case of discharge or other discrimination, the burden then shifts to the employer to show as an affirmative defense that the employee would have been discharged or laid off regardless of protected activity. See *In-Terminal Services*, 309 NLRB 23 (1992).

I continue to hold, for reasons originally given, that Burke's activities were not concertedly protected in nature. However, assuming them to be so, I do not believe they resulted in being a motivating factor in Respondent's choice of her for termination. The settled and commonly telling indicators of employer hostility, or pretext of reasons, given are not established by the evidence or fairly inferable. The most appropriate term for Zuck's treatment of the maternity leave subject would be insensitive; an essentially mean attitude, but one far short of hostile in this statutory sense. Uttering a petulant thought about "aggrava[ti]on]" need mean nothing more than Zuck's short-tempered irritation or annoyance with distraction, given all circumstances of this case. The Board has commended a reviewing of "the larger context" when provocative remarks touching on protected activity have been made. Cf. *Desert Construction*, 308 NLRB 923 (1992). As to pretext notions, the evidence sufficiently shows a careful and orderly look at business finances, a determination that cost cutting was essential and a not startling choice of well compensated Burke from among the clerical group as to which other poignant considerations pertained. As to the factor of timing, Burke's termination was chosen on the heels of Walker's increasingly persistent hopes, yet measurably more distant from when the subject had first arisen around first of the year. I thus hold that Burke's involvement, limited and fading as it was, did not constitute a "motivating factor" in her termination as administered by Zuck. Further, and assuming it did so motivate Zuck, I hold that the evidence advanced by Respondent is sufficient to meet the employer burden of the *Wright Line* framework that she would, even that event, have been the employee selected for layoff. The sufficiency I find here is also rooted in the fullness of CPA Page's involvement, the authenticity of financial trends as shown from fair depictions in revenue and costs, plus the imparting of expectable business judgment to counteract what was so relentlessly likely to occur as future operations continued in a new economic climate.

Accordingly, I hold as an overall matter under *Wright Line* that General Counsel's allegation of a violation under Section 8(a)(3) of the Act has not been supported by adequate proof in terms of controlling Board doctrine.

As to the allegedly independent violations of the Act, I have set forth in credibility evaluations and findings of fact above that neither of Zuck's vulgar utterances on March 1 constituted a prohibition against protected concerted activities, nor an informative telling that an unexpected termination from employment then being rendered was based on, or because of, any protected concerted activities. Whether

Zuck's behavior during the termination episode is labeled curt, gruff, offensive, or demeaning, the fundamental question is whether it was unlawful, which I find not to be the case.

[Recommended Order for dismissal omitted from publication.]