**Sam's Club, Division of Walmart Corporation *and* Robin Zaas.** Case 7–CA–36934

August 27, 1996

BY MEMBERS BROWNING, COHEN, AND FOX

DECISION AND ORDER

On January 30, 1996, Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and cross-exceptions and a supporting brief. The Respondent filed a response and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found, and we agree, that the Respondent denied employee Robin Zaas a raise because of her protected concerted activities. The judge rejected the Respondent's *Wright Line* defense[3] that it had denied Zaas a raise because of a series of incidents with her coworkers, which incidents assertedly impaired her "teamwork." The judge rejected the Respondent's explanation. In his view, if the incidents had impaired her "teamwork," Respondent would have mentioned the incidents to Zaas and would have counseled her accordingly. The judge also implicitly rejected the defense that the raise was denied because Zaas' wages were already above the club guidelines.

As the judge found, the Respondent's explanations for denying Zaas a raise, i.e., that she was intimidating fellow employees, and that her wages were already above wage club guidelines, fail to demonstrate that a raise would have been denied in the absence of protected activity. Specifically, the credited testimony indicates that when Zaas requested and was denied a raise, that denial was frequently linked to her protected activity. Typical of the Respondent's answer to Zaas' requests are the following. In late October, District Manager James Moffat told Zaas, "to quit circulating petitions, quit stirring up trouble and quit talking to employees about pay and everything else and to mind my own business and just go to work . . . to keep my mouth shut I wasn't getting no raises." In January 1995 Store Manager David Smith told her, "You're not getting your raise and you're putting pamphlets in the break room. You're circulating a petition. You're causing a lot of trouble in the club." Again, in February 1995, Smith told her she was, "intimidating fellow employees . . . quit stirring up trouble, quit putting pamphlets in the break room and quit circulating petitions . . . quit causing trouble and go back to work and . . . quit circulating petition."

Nor does the evidence support the Respondent's defense that Zaas did not receive a wage increase because her wages were above the wage club guidelines. Zaas was never advised that she was being denied a raise because her wages met or exceeded wage club guidelines. Even had she been so advised, the Respondent nevertheless failed to show that meeting wage club guidelines was a basis for being denied a raise.

The Respondent's explanation for its failure to give Zaas a raise fails to demonstrate that it would have denied her a raise in the absence of protected activity. Although Zaas may have been informally criticized by a supervisor for her behavior, there is no evidence that she was ever advised that her behavior might jeopardize her raise. Thus, the Respondent's failure to address the specific incidents with Zaas, combined with the repeated references to her circulation of the petition, support a finding that she was discriminatorily denied a raise.

2. The complaint alleged, inter alia, that the Respondent violated Section 8(a)(1) and (3)[4] when, in response to Robin Zaas' protected concerted activities, it issued a written disciplinary form to Zaas on October 17, 1994, refused to remove it from her personnel file, and considered it when evaluating and denying her subsequent request for a raise. The Respondent argued that it had issued the disciplinary form in response to signed employee statements. These statements asserted that on September 13, 1994, Zaas had intimidated coworkers by complaining to them about how she was treated by her supervisors, and by threatening to have friends, who were state troopers, stop the supervisors whenever they saw them.

The judge found that Zaas had engaged in protected concerted activities, including discussing and circulating a petition concerning wages and terms and conditions of employment, and placing NLRB pamphlets in the employees' breakroom, and that those activities were known to the Respondent at the time it issued the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[4] Although the complaint alleged an 8(a)(1) and (3) violation, we do not pass on the 8(a)(3) allegation, because it would not materially affect the remedy.

disciplinary form. The Respondent subsequently directed Store Manager David Smith to remove the form from Zaas' file after she had filed an unfair labor practice charge. The judge found, however, that the Respondent, despite having removed the disciplinary form from Zaas' file, continued to refer to Zaas' protected activities as a source of trouble and intimidation at the club and as the reason for denying her a raise. The judge nonetheless concluded that the issue concerning the disciplinary form was moot, and he dismissed this allegation of the complaint. The General Counsel excepts. We find merit in the General Counsel's exception.

Preliminarily, we address the issue of mootness. In our view, the Respondent's withdrawal of the form after Zaas filed an unfair labor practice charge did not moot the issue. The Respondent did not remedy its unlawful conduct in accordance with Board requirements. In order to escape liability, a respondent's disavowal of unlawful conduct must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. Further, there must be adequate publication of the repudiation to the affected employees, no proscribed conduct by the employer after publication, and assurances given to the employees that their employer will not thereafter interfere with the exercise of Section 7 rights. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). The Respondent's removal of the form from Zaas' personnel file fails to satisfy any of these standards. In this regard, we note that the Respondent never disavowed the conduct. We also note that the Respondent relied on the form as a proffered reason for the subsequent unlawful denial of the wage increase.

Further, even if the withdrawal of the form was a quid pro quo for the withdrawal of the NLRB charge, it is clear that any "settlement" implicit in this exchange was vitiated by the Respondent's subsequent unlawful conduct. In sum, the disciplinary form allegation is neither moot nor settled.

Turning to the merits, the General Counsel argues that the timing of the issuance of the disciplinary form belies the Respondent's contention that it disciplined Zaas on October 17 solely for comments she allegedly had made to coworkers complaining about how she was treated by her supervisors and threatening to retaliate against supervisors. The disciplinary form was issued nearly 1 month after the alleged comments had been communicated to the Respondent and only 11 days after Zaas gave management copies of the petition she was circulating. The petition complained about working conditions at the club and wage differentials with other clubs. The General Counsel contends that the Respondent disciplined Zaas in response to the circulation of the petition.

We agree with the General Counsel that the evidence supports a finding that the Respondent violated Section 8(a)(1) by its issuance of the October 17 disciplinary form. Thus, the timing of the issuance of the disciplinary form evidences an unlawful motivation to coerce Zaas to stop circulating the petition.[5] That same motivation was found by the judge when he rejected the Respondent's *Wright Line* defense and found that Zaas would have been given a raise but for her protected concerted activities, including circulation of the petition. In fact, the judge found that the Respondent's agents made numerous unlawful statements to Zaas referring to her protected activities when they denied her repeated requests for a raise. In short, there is a prima facie case that the disciplinary form was motivated by the same reasons that motivated the denial of the wage increase. The Respondent's explanations for both are pretextual.

In sum, we agree with the General Counsel that the evidence supports a finding that this complaint allegation is neither moot nor settled. We find that the Respondent violated Section 8(a)(1) when it issued Zaas a disciplinary form because of her protected concerted activity, i.e., circulating the petition, encouraging employees to sign it, and putting NLRB pamphlets in the employee breakroom, and that the unlawful conduct was never adequately remedied.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Sam's Club, Division of Walmart Corporation, Farmington Hills, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) Issuing written disciplinary forms and refusing to remove them from employees' personnel files because they engaged in protected concerted activities.

(b) Telling employees who are engaged in protected concerted activity to quit causing trouble, to quit cir-

[5] We reject the Respondent's argument that Zaas was disciplined on October 17 for conduct occurring days before in which she allegedly threatened Supervisor Ernie Reed and Lisa Phillips, because they allegedly treated her unfairly. The Respondent argued that Store Manager Smith had been made aware of the two incidents only days before, on October 14 by employee Cheryl Cook. First, the judge credited Zaas' denial with respect to the second statement. Additionally, we note that Smith arrived at the facility on September 20, a week after the initial incident. At that time, Acting Store Manager Jim Hugerheid had already conducted an investigation which apparently did not result in any discipline. In the intervening time, Zaas had sent copies of the petition to management and Smith received a copy from Regional Manager Sean Jackson on October 6. We conclude that the "second incident" and an allegedly incomplete investigation which the Respondent argues were the precipitating factors in Zaas' discipline on October 17 were merely pretexts. Rather, we find that Zaas was disciplined on that date because of her protected activities.

culating petitions, to quit talking to employees about pay, to mind their own business, and that employees could be fired by circulating a petition referring to labor conditions.

(c) Denying employees a raise because they engaged in protected concerted activities.

(d) 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) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary notice issued on October 17, 1994, to Robin Marie Zaas, and within 3 days thereafter notify the employee in writing that this has been done and that the disciplinary notice will not be used against her in any way.

(b) Give Robin Marie Zaas the wage raise she would have received had she not been discriminatorily denied the raise and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Farmington Hills, Michigan, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 6, 1995.

[6] 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."

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

## 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 issue written disciplinary forms to employees because they have engaged in protected concerted activities and refuse to remove them from employees' personnel or other files.

WE WILL NOT tell employees who are engaged in protected concerted activity to quit causing trouble, to quit circulating petitions, to quit talking to employees about pay, to mind their own business, and that employees could be fired for circulating a petition referring to labor conditions.

WE WILL NOT deny employees a raise because they engaged in protected concerted activity.

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.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discipline of Robin Marie Zaas, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discipline will not be used against her in any way.

WE WILL give Robin Marie Zaas the wage raise we denied her and WE WILL pay her the amount of wages she lost with interest.

SAM'S CLUB, DIVISION OF WALMART CORPORATION

*Andre F. Mays, Esq.*, for the General Counsel.
*Carey Dewitt, Esq.*, of Detroit, Michigan, for the Respondent.
*Robin Zaas*, of Northville, Michigan, in propia persona.

## DECISION

### STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The original charge filed in this proceeding on March 6, 1995, by Robin M. Zaas, an individual, was served on Sam's Club, Division of Walmart Corporation (the Respondent) on the same date. The amended charge filed on April 17, 1995, was served on the Respondent on the same date. A complaint and notice of hearing was issued on April 20, 1995. In the complaint, among other things, it is alleged that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The complaint came on for hearing in Detroit, Michigan, on September 7, 1995. Each party was afforded a full opportunity to be heard, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

### FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

#### I. THE BUSINESS OF THE RESPONDENT

At all material times, Respondent, a corporation, has maintained its principal office and place of business in Bentonville, Arkansas (Respondent's headquarters facility). Respondent maintains various stores within the State of Michigan, including a store located at 24800 Haggerty Road in Farmington Hills, Michigan (Respondent's Farmington Hills store). Respondent is, and has been at all material times, engaged in the retail sale of bulk food and other grocery items. Respondent's Farmington Hills store is the only facility involved in this proceeding.

During the calendar year ending December 31, 1994, which period is representative of its operations during all material times, Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000.

During the calendar year ending December 31, 1994, which period is representative of its operations during all material times, Respondent, in conducting its business operations described above, purchased and received at its Farmington Hills store goods valued in excess of $50,000 directly from points outside the State of Michigan.

At all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE UNFAIR PRACTICES

##### Facts

First: The Respondent calls customers members; managers coaches; supervisors, team leaders; employees, partners or associates; and disciplinary action, coaching. The Respondent took over the operation of Pace's store in January 1994. At that time the Charging Party, Robin Marie Zaas, was working for Pace. She continued to work for the Respondent when it continued the Pace operation. She was deemed a productive employee. Zaas was called as the sole witness for the General Counsel. Zaas worked in the clothing department. Her job was "to keep the clothes straightened, keep my area fairly clean and stock the clothes out that need to be stocked and wait on customers and help them[,] like selling things to them."

During September and October 1994, Zaas circulated a petition among the partners. The petition was worded as follows:

> We the partners of Sam's Club #6657 expect fair and equal treatment as well as compensation levels equivalent to other Sam's Club stores and other competing retail positions in the area. This petition shall serve to communicate our attitudes and concerns to Wal-Mart and Sam's Club management.

Forty partners signed the petition dated September 21, 1994.

Second: On October 17, 1994, Zaas was called into the office of General Manager David William Smith (head coach). According to Zaas:

> David Smith said he was writing me up because some fellow employees came to him and said I was going to get state cops and everything after my boss Ernie, and that I was intimidating fellow employees that he's got signed witnesses of nine or ten employees saying I intimidate them in the work force.

Zaas said the charges were not true and refused to sign the writeup (performance coaching form) and started to walk out. Smith slammed his hands on the desk and said "damn it, Robin, get your ass back in here or you're terminated right now."[1] With tears in her eyes Zaas walked back into the office and said, "fire me if you think I care, because I'm not signing it." Smith replied that if "you don't sign it it goes to another write up" and that "with one more writeup, you are fired." Smith prepared another writeup. Zaas refused to sign this second writeup. The writeup charged "on 10-13 Robin was observed as saying that Ernie and Lisa were picking at her and being unfair."

On cross-examination, Zaas testified that Smith had deleted from the first writeup that part which referred to Zaas getting her trooper friends to harass Ernie Reed and Lisa Philips.

Smith admitted that he had heard about the distribution of the petition prior to October 17, 1994 meeting with Zaas and that he heard from "some one" that Zaas was distributing the petition. Smith testified that he had received a copy of the petition around October 6, 1994, from Sean Jackson, regional manager. He was concerned that "so many associates had expressed a concern." Some time after the disciplinary writeup in early November Zaas was supposed to have said to Smith there was a petition circulating but that she was not responsible for it.

[1] Smith denied this testimony.

Smith described the disciplinary incident. He testified that he disciplined Zaas on October 17, 1994, "for making threatening comments about Ernie Reed, Lisa Philips, and Barb Wozniak." He told her that he had statements that she had made threatening remarks about her coach, which he had placed on the original coaching form. Smith "ripped" this form up, and wrote another disciplinary writeup. Zaas refused to sign either form. After refusing to sign the first writeup Zaas started to leave. Smith "let her know at that time that failure to sign the coaching, according to company policy, could result in termination." Zaas returned and after a discussion she was given a second level writeup. Later, at Zaas' request, Smith refused to remove the coaching form from her file. After an unfair labor practice was filed it was removed.

Julie Anne Cape also attended the October 17, 1994 incident. She was a team leader in the freezer cooler section at the time. According to Cape the state trooper incident was referred to as unacceptable behavior. While Cape said the petition was not mentioned at the meeting she had heard about it. She said she had not heard Smith swear or say that Zaas could be terminated. Nor did she see Smith tear up a coaching writeup.

*The Trooper Incident.* Partner Cheryl Cook gave a statement on September 13, 1994, that on September 13, 1994, Zaas said that Ernie Reed is a "bad" manager and that she would get even with him and Barb Woziak, her team leader "by getting her trooper friends" to watch and harass them by stopping them after work or whenever they see them on the road. Partner Laura Hartlep also gave a statement to the Respondent dated September 13, 1994, in which Zaas' remarks about the trooper were described. Partner Justina Proctor also rendered a statement about the trooper.

Zaas denied that she had made the trooper statement.

Smith testified that Cook had related the trooper incident to him.

Third: In late October Zaas conversed with District Manager James Moffat in Smith's office at his request. Zaas quoted Moffat as saying "that Zaas was causing trouble in the club, to quit circulating petitions, quit stirring up trouble and quit talking to employees about pay and everything else and to mind my own business and just go to work." Moffat further said "for me to keep my mouth shut. I wasn't getting no raises." Zaas asked Moffat whether he would take the writeup out of her file. Moffat refused and said he was going to teach her a lesson. He said that the writeup would remain in Zaas' file for a year.

Moffat admitted that he had refused to remove the disciplinary writeup from her file because there were three witnesses' statements to support it. Moffat denied that he had made the remarks attributed to him by Zaas. He acknowledged that he knew about the NLRB pamphlets and the petition. Moffat agreed that he had had "an awful lot of conversations with Robin." Zaas had told him of the petition.

Fourth: In late October 1994 Zaas engaged in a telephone conversation with Gary Nebinger, regional vice president. Zaas related what was going on in the club and how people were being treated. Nebinger replied that he had already talked to Smith. "You're causing trouble in the club circulating petitions . . . could be fired." Zaas responded, "then fire me" and added, "I want my raise." Nebinger replied, "You're not getting no raise, because you're causing trouble. Just go to your area, do your work, mind your own business and not to talk to anybody." On cross-examination Zaas testified that Nebinger said that the Respondent had statements from employees.

Nebinger explained the open door policy "if any partner[s] . . . have anything on their mind . . . that they go to their immediate supervisor and they can't get satisfaction, they can go to their suprvisor's supervisor and so on all the way up to the chairman of the board." This policy Zaas had followed in calling Nebinger.

Nebinger agreed that he had had a telephone conversation about the coaching Zaas had received for harassing partners. Nebinger advised her that he agreed with the general manager's coaching "primarily due to the fact that I had read the statements." Nebinger denied the statements attributed to him by Zaas. Nebinger was aware of the petition on October 6, 1994. Nebinger testified that Zaas had asked him to remove the writeup from her files.

Fifth: In January 1995 Zaas participated in a discussion with Smith and Brown in Smith's office. According to Zaas she went to Assistant Manager Smith and Matthew W. Brown "Because I got in trouble over the petition, so I went and ask them again . . . if I'm going to get my raises that were promised to me. . . . And they said, no." They said that they had signed statements indicating that Zaas intimidated employees. Zaas replied that it was not true. Smith said, "You're not getting your raise and you're putting pamphlets in the breakroom. You're circulating a petition. You're causing a lot of trouble in the club." Brown agreed.

In February 1995 Zaas again put pamphlets from the NLRB entitled "Representation Cases," "our services and standards" in the breakroom because employees had asked her about their rights. The pamphlets ended up in the garbage. In February Zaas went again to Smith's office where she asked Smith and Brown "again about my raise and treating me equally, like other employees." Zaas was told she was "intimidating fellow employees . . . quit stirring up trouble, quit putting pamphlets in the breakroom and quit circulating petitions." "I wasn't getting no raises, to try to straighten up, they're going to teach me a lesson. . . . To keep my mouth shut and quit causing trouble and go back to work and quit putting pamphlets—quit circulating petition. Smith tried to ask me whether employees wanted the pamphlets."

The next day Zaas asked Brown "about treating me equally and giving me a fair raise." Brown shook his head and said, "I wasn't getting my raise and that I put more pamphlets in the breakroom, which I did."[2] Smith had told Jeffrey Lee Ervin to throw away the pamphlets. "I did not do it, I just forgot it."

At the February meeting between Smith, Brown, and Zaas, according to Brown, Zaas asked Smith why the pamphlets had been thrown away. Smith replied that "each day the breakroom was cleaned 100 percent. It was standard procedure for them to be thrown away." At the same meeting Zass wanted to know why she had not received a merit raise. Brown quoted Smith as saying to Zaas "your performance is good, it's the team work aspect that we need to work on." Brown remarked that "we needed to stay focused on creating a positive teamwork atmosphere." Brown testified in making

[2] Those pamphlets also disappeared.

this remark, he had in mind the walkie-talkie incident, the slushie incident, and the Laura Hartlep incident. (See infra.) Brown further testified that Smith said, "We need to look at a 30 to 60 day time frame in which we can take a look at, maybe, giving you a merit raise after we see an improvement in your team work aspect."

Smith testified that Zaas had approached him more than 10 times for a raise. At the meeting above in mid-February 1995, Smith testified that he told Zaas that she was "making more than what wage club guidelines." (Zaas' wage club guideline was $6.90, she was making $7 an hour.) When Zaas asked for a raise according to Smith, he told her "I'll let her know at that time her productivity was good, but it was offset by her teamwork, or lack of teamwork with fellow associates and that I had . . . statements[3] at that time stating that she had harassed them and they did not feel comfortable working with Robin." Two or three merit increases are given each month.

Before the meeting Smith testified he had received the following information and had it in mind when he refused Zaas a raise. The Laura Hartlep "punch her out" incident,[4] the Buzzelli "grabbing" incident, the "slushie" incident with Earlene Dobbs, the November incident at the register (Reed), the walkie-talkie incident, and the "Brian Pack" incident.

The essence of the above-mentioned statements is set out below:

*Laura Hartlep*

Reed reported to Smith that early in February Hartlep said to Zaas, "Leave me alone, you're not my boss, get away from me." Hartlep reported to Smith that Zaas had said to her that "she would punch her out." Hartlip was not concerned for her personal safety.

*Angela Buzzelli*

On February 9, 1995, Buzzelli submitted a statement describing an encounter with Zaas. Among other things, the statement related that Zaas mentioned she was going to the Labor Board, and that she insisted that Buzzelli write them (apparently the Respondent had made Buzzelli switch departments) and "tell them everything from day one." She explained that she needed to have more than just her complaint before they would file charges. "I asked her, if she didn't like them that much, why she didn't quit, she told me she wanted to get Wal-Mart into trouble before she leaves because she couldn't do it if she quit. She said the only reason why no one complained before to the Goverment is because everyone else is too scared."

According to Buzzelli, she tried to get away but she kept harrassing her, "grabbing my shirt sleeve so I couldn't walk away, grabbing my cart so I couldn't leave, pinning me by the office supplies aisle so she could convince me to write a letter."

> She explained that she had given a pamphlet to Gary and that she was going to put pamphlets in the breakroom then she asked me to go in on putting the pamphlets in the breakroom with her. I told her she could do whatever *she* wanted to do, it was *her* decision not mine. After 20 minutes of this constant grabbing, I told her I would write a letter, just so she would let me go from that point on, I got from the office supplies aisle to the juice aisle before she let go of the cart.
>
> The next day, Friday, February 10, 1995, Robin dropped off her pamphlets and gave me one, along with one of her lawyers' cards (by the way, the card went into the garbage.) She kept saying "I need to talk to you," but I kept avoiding her. I went out to do my reshop a couple of hours later and she grabbed me and was telling me how Rodney had grabbed a pamphlet and said he could use it. She kept telling me it was important to write.

Buzzelli advised Zaas she was not writing a letter. That evening Assistant Manager Matthew W. Brown asked her to prepare the above statement as did Smith on February 12, 1995.[5]

*The "Slushy" Incident.* This incident which occurred on February 11, 1995, concerned Zaas' demand for a slushie for her daughter after the hotdog stand was closed. Zaas' insistance upset a partner, Earlene Dobbs, who "stormed off." Zaas was given the slushie. Partner Angela Buzzelli who witnessed the incident was asked to write up the incident, which she did.

*The Register Incident.* Ernie Reed gave a statement to the Respondent dated November 13, 1994 in which Zaas was described as being asked to open a register. She opened the register but closed it to go on break with her daughter. Reed told Zaas to reopen the register. "She went back to her register and stood until I came back over by her register. She told me she better not get written up for running this register because she didn't like running it."

*The Walkie-Talkie Incident.* According to Assistant Manager Brown's statement, Zaas said over the walkie-talkie "my area looks like trash just like the rest of the place." According to Brown's testimony, this incident was prior to February and was discussed when a raise for Zaas was considered. Brown explained that when the store is closed "its important that the floor was nice and clean." Brown asked how the floor looked. According to Brown, Zaas responded as above stated. Brown went to Zaas and among other things said, "Let's focus on being more positive." He also said, "It's important that the members do not hear that."

*Brian Pack*

According to a statement (December 15, 1994) submitted by Shane Dickerson to the Respondent, Dickerson stated that Brian Pack was unable to lift merchandise due to a prior accident. Zaas replied, "Well what in the hell is he doing working here. He is no good to us." "I then said he helps us with scanning and member service." She then said, "Well

[3] On February 9, 1994, Smith had received a statement from partner Angela Buzzelli in which Zaas was accused of stating that she was going to the Labor Board, that she encouraged Buzzelli to go to the Labor Board, that Zaas was going to put more pamphlets in the breakroom, and that she gave Buzzelli a pamphlet and a lawyer's card. (See infra.)

[4] Hartlep was not concerned.

[5] I have quoted extensively from Buzzelli's statement since it reveals what the Respondent had learned of the activities of Zaas at the time it refused her a raise.

[what] do you think I do" and turned around and went to the register.

In October around half the employees who signed the petition received merit wage raises because they were below wage club guidelines.

Some time in the mid-October Coach Ernest Reed told Smith about the petition. One of the partners had shown it to Reed. "I expressed my concerns to David that basically I felt the partners had a valid concern. We needed to answer it. The concern in the petition was the hiring rate between the Southfield club and our own club in Farmington." Smith said that "we needed to take care of it." As noted above, within a week Smith held a meeting of the partners. Smith explained why Southfield's pay was higher, and told them "they would have the option if they wanted to, to transfer to that club so they could get the higher rate of pay."

Smith testified that the matters which were considered in the October 17, coaching were not considered when Zaas' request for a raise was evaluated. "At that time, sir, this had been thrown out."

Conclusions and Reasons Therefor

First: The record supports a finding that Zaas was engaged in protected concerted activity. Whether an employee engaged in protected concerted activity depends upon whether the activity is wholly personal or whether it embraces a group or group action. See *Myers Industries*, 268 NLRB 493 (1964) (*Meyers I*); *Herbert F. Darling, Inc.*, 287 NLRB 1356 (1988). Zaas circulated a petition protesting certain labor conditions; she solicited signatures to the petition, discussed working conditions with employees and encouraged them to sign the petition. She signed the petition along with other employees. She placed NLRB pamphlets in the breakroom and on request gave pamphlets to other employees. All had a common interest in the matters recited in the petition. All these were activities protected by Section 7 of the Act. Thus, Zaas was insulated against any reprisals for participating in such activity. See *Whittaker Corp.*, 289 NLRB 933 (1988).

Second: The General Counsel charges an unfair labor practice, because the Respondent issued a "written disciplinary form" to Zaas on October 17, 1994, and refused to remove it from her personnel file. While I am convinced that the Respondent knew by that date Zaas had circulated the petition I agree with the Respondent that the issue is moot.

The October 17, 1994 coaching was removed after Zaas filed an unfair labor practice charge, Smith testified that the October 17 coaching was not considered when Zaas' request for a raise was evaluated. "At that time, sir, this had been thrown out." Allegations of the complaint based on this incident are dismissed.

Third: This case for the most part hangs on the credibility of Zaas. As noted Zaas was the sole witness for the General Counsel.

As stated by the Board in *Roadway Express, Inc.*, 108 NLRB 874, 875 (1954), "[C]redibility findings may rest entirely upon evidence through observation which words do not, and could not, either preserve or describe."

In respect to demeanor, the Supreme Court has said in *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962):

> For the demeanor of a witness . . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

It has also been held that the testimony of an employee who testifies adversely to the employer should be given added weight if the employee still remains in the employment of the employer because the employee has in a sense booked the employer's disfavor and risked reprisal. *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962); *Wirtz v. B.A.C. Steel Products*, 312 F.2d 14, 16 (4th Cir. 1962).

In the case of *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 430, 431 (2d Cir. 1951), Judge Learned Hand writes

> [Findings] based on that part of the evidence which the printed words do not preserve. Often that is the most telling part, for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors, when the words alone leave any rational choice. . . . Nothing is more difficult than to disentangle the motives of another's conduct—motives frequently unknown even to the actor himself. But for that very reason those parts of the evidence which are lost in print become especially pregnant.

I have found Zaas to be generally an honest and truthful witness and after an examination of the record as a whole[6] I have credited her as to all findings based on her testimony.[7]

As the court of appeals said in *NLRB v. International Mineral & Chemical Corp.*, 391 F.2d 829, 833 (2d Cir. 1968). "The company's evidence was of the very sort warranting a trier of facts in believing the truth to be opposite what was asserted."

In this light, I considered the Respondent's testimony which was contrary to the facts I have found in this decision.

Fourth: Having credited Zaas I find that the Respondent committed the following violation of Section 8(a)(1) of the Act.

1. Moffat's statement to Zaas that she "was causing trouble in the club, to quit circulating petitions, quit stirring up trouble and quit talking to employees about pay and anything else and to mind my own business."

2. Moffat's statement in the context used that he was going to teach Zaas a lesson.

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[6] The testimony of all witnesses has been considered. In evaluating the testimony of each witness, demeanor was relied on. In addition, inconsistencies and conflicting evidence were considered. The absence of a statement of resolution of a conflict in specific testimony, or of an analysis of such testimony, does not mean that such was not considered. See *Walker's*, 159 NLRB 1159, 1161 (1966). Further, to the extent that a witness is credited only in part, it is done on the evidentiary rule that it is not uncommon "to believe some and not all of a witness' testimony." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

[7] "Differentiating between credibility based on demeanor and credibility based on analysis of the evidence could well be a semantical exercise in conceptualism of gossamer calibre." *Indiana Metal Products v. NLRB*, 442 F.2d 46 (7th Cir. 1971).

3. Nebinger's statement to Zaas, "You're causing trouble in the club circulating petitions. . . . I could be fired."

4. Nebinger's remarks to Zaas, "You're not getting no raise, becausing trouble. Just go to your own area, do your work, mind your own business and not talk to anybody."

5. Smith's statement in the presence of Brown "you're not getting your raise and you're putting pamphlets in the breakroom. You're circulating a petition, you're causing a lot of trouble in the Club."

6. Smith's statement to Zaas when he asked for a raise "quit stirring up trouble, quit putting pamphlets in the breakroom and quit circulating petition. . . . I wasn't getting no raises, to try to straighten up, they're going to teach me a lesson. . . . and quit passing pamphlets."

7. Brown's statement to Zaas that she wasn't getting a raise, she "put more pamphlets in the breakroom."

The Board has said in *Cox Fire Protection*, 308 NLRB 793 (1992), "the test is not one of intent. . . . but whether the threatened conduct has the tendency to interfere with, restrain, or coerce the employees in the exercise of the Section 7 rights." The foregoing findings satisfy this test.

Fifth: The General Counsel also alleges that the Respondent "about January 1995 and about early February 1995, by its agents David W. Smith and Matthew W. Brown at the Farmington Hills store refused to give the charging party a pay raise. . . . because the charging party engaged in protected concerted activities." From the testimony which I have credited, it would appear that the General Counsel has established a prima facie case. The Respondent raises a *Wright Line* defense.[8] It asserts that it has proved that Zaas would have been denied a raise even though she was engaging in protected concerted activities. The Respondent cites the incidents[9] set out above on which Smith testified he based his evaluation of Zaas.

According to Brown, Smith told Zaas "your performance is good, its the team work aspect that we need to work on." Brown remarked, "We needed to stay focused on creating a positive, teamwork atmosphere." According to Brown, Smith said, "Maybe, giving you a merit raise after we see an improvement in your team work aspect." According to Smith, when Zaas asked for a raise "I let her know that at that time her productivity was good, but it was offset by her teamwork or lack of teamwork with fellow associates."

From the testimony of Smith and Brown, assuming it is credible, Zaas' problem was lack of "team work." "Teamwork" is defined as "cooperated effort by the members of a team to achieve a common goal." Zaas' efforts in gathering employees to protest the Respondent's labor practices and in circulating NLRB pamphlets obviously does not fit the Respondent's concept of that definition.

The Respondent points to the statements submitted to it (some of which were solicited) to support its action. If those statements had been so important in the working life of Zaas it seems incongruous that they would not have been reviewed in depth with her by the Respondent. Smith testified that the specific incidents above referred to in the statements were never mentioned to Zaas[10] "These were never a coaching issue." Indeed had the incidents impaired her "teamwork," it seems reasonable that the Respondent would have coached her on the specific subjects. Moreover, the Respondent showed a swift reaction to the charges made in the petition by calling its employees (partners) together and rationalizing its position. It was no doubt a blow to the "coaches" for a partner to rock the boat, so to speak, by engaging in concerted activity and was an affront to its "partnership" like labor policy. Thus it appears that the Respondent was moved to discipline Zaas by denying a wage increase for her concerted activities rather than for the incidents described in the statements. Moreover, Zaas was the principal mover and the spearhead of employee protest and by denying her a wage increase the Respondent sent an unmistakable message to the other partners.

The Respondent's attempted *Wright Line* defense is a pretext.

In *Limestone Apparel Corp.*, 255 NLRB 722 (1981), it was noted that "a finding of pretext necessarily means that the reasons of the employer either did not exist or were in fact not relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel."

The real motive[11] of the Respondent in denying Zaas a raise was to discipline her for her concerted activities and hold her out as an example. I am convinced that Zaas would not have been denied her raise had she not engaged in concerted activity. Cf. *Wright Line*, supra.

The credible evidence in this case sustains the General Counsel's complaint as to Zaas' denial of a raise by a preponderance of the credible evidence. The Respondent offered a false explanation for the denial of Zaas' raise.

## CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction.

2. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. By denying Robin Marie Zaas a raise because she engaged in protected concerted activities for mutual aid and protection, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] I have drawn no credibility resolution as to the statements which were submitted to the Respondent, because it would be immaterial whether they were true or false as long as the Respondent relied on them.

[10] If the Court observed in *U.S. Rubber Co. v. NLRB*, 384 F.2d 660, 662–663 (5th Cir. 1969), "Perhaps the most damming is the fact that both [employees] were summarily discharged. . . . without being given any opportunity to explain or give their version of the incident." See also *Metal Cutting Tools*, 181 NLRB 536, 542–543 (1971).

[11] Cf. *NLRB v. Brown Food Store*, 380 U.S. 278, 287 (1965); *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961), and *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965).

therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having unlawfully denied Zaas a pay raise, I recommend that she be immediately granted the pay she would have received had the Respondent not unlawfully denied her a pay raise and make her whole for any loss of earning she may have suffered by reason of the Respondent's unlawful acts detailed, by payment to her of a sum of money equal to the amount she would have received had she been granted the raise with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]