

**Myth, Inc. d/b/a Pikes Peak Pain Program and Kim M. McKeon.** Case 27–CA–14384

August 20, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN,  
HURTGEN, AND BRAME

On June 16, 1997, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a brief in reply.<sup>1</sup>

The National Labor Relations 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,<sup>2</sup> and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CHAIRMAN GOULD, dissenting.

The General Counsel expressly provided an opportunity for the Board to abandon the restrictive interpretation of concerted activity adopted by the Board in *Meyers Industries*<sup>1</sup> by alleging in the complaint and arguing before the judge that Charging Party McKeon's filing of a wage claim with the Colorado State Department of Labor constitutes concerted activity. In so doing, the General Counsel urges a return to the theory of concerted activity set forth in *Alleluia Cushion Co.*, 221 NLRB 999 (1975). My colleagues rebuff the General Counsel's offer to revisit this most important area of law. I accept it.

The warring interpretations of concerted activity set forth in *Alleluia* and *Meyers II* reflect two very different views of the Act and the Board's role in the statutory scheme of labor laws. The concept of implied concerted activity in *Alleluia* expands the reach of Section 7 of the Act to individual action that asserts a collective right and

<sup>1</sup> Kenneth P. Prill, charging party in *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied sub nom. *Meyers Industries v. NLRB*, 487 U.S. 1207 (1988), participated in this case as amicus curiae and filed an amicus brief.

<sup>2</sup> The General Counsel 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB (Prill I)*, 755 F.2d 941 (D.C. Cir. 1985); *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB (Prill II)*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied mem. *Meyers Industries*, 487 U.S. 1205 (1988).

requires the Board to accommodate other labor laws by protecting individual employees who assert rights created for all employees by workplace-related statutes. It protects unsophisticated, unorganized employees and presents a clear analytical approach that reduces the number of issues to be litigated.

The *Meyers II* theory of concerted action restricts the reach of Section 7 to employee action which has a direct link to actual group action and confines the Board's role to that of a highly technical arbiter of the statute it administers. It creates a division between the protection afforded organized and unorganized employees and presents a complex analysis which generates litigation. The acceptance or rejection of precedent on the theory of concerted activity indicates, perhaps more clearly than in any other area of the statute we administer, where a Board member stands on such critical matters as statutory construction and the scope of the Board's role in administering the Act.

I am of the view that *Alleluia's* construction of Section 7 and its understanding of the Board's responsibility to accommodate other labor laws is the better view. It is with disappointment, therefore, that I find that I stand alone.

A review of the rationales of *Alleluia* and *Meyers II* and court response to *Meyers II* illuminates the policy considerations underlying each view. It also provides the basis for concluding that policy considerations weigh far more heavily toward the *Alleluia* understanding of concerted activity.

The rationale of *Alleluia Cushion*

In *Alleluia*, employee Henley was discharged for notifying the California Occupational Safety and Health Administration (OSHA) of unsafe conditions at the workplace. There was no evidence that Henley purported to represent other employees or sought their aid in pursuing safety complaints. There was also no evidence that he acted in conjunction with other employees, that his action was an outgrowth of previous employee discussions, or that other employees shared his concern for safety. The Board concluded, however, that this absence of evidence was not sufficient to establish that other employees did not share his interest in safety or support his safety complaints.

Asserting that safe working conditions were "matters of great and continuing concern for all within the work force,"<sup>2</sup> the Board observed that Congress had recognized this concern through enactment of the Occupational Safety and Health Act,<sup>3</sup> as had state and local governments through the passage of similar legislation. The Board found that Henley's filing of the OSHA complaint was in furtherance of employee rights under the California Occupational Safety and Health Act. The Board held:

<sup>2</sup> *Alleluia Cushion Co.*, supra at 1000.

<sup>3</sup> 29 U.S.C. §§ 651–678.

It would be incongruous with the public policy enunciated in such occupational safety legislation (i.e., to provide safe and healthful working conditions and to preserve the nation's human resources) to presume that, absent an outward manifestation of support, Henley's fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on Respondent for their benefit. Rather, since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted. [Id. at 1000, footnote omitted.]

In essence, the Board found that the assertion of a work-related statutory right created the rebuttable presumption that other employees joined or consented in the assertion of the right. It further found that the Act cannot be administered in a vacuum. Instead, the Board must recognize the purposes and polices of other employment legislation, and construe the Act in a manner which supports the overall scheme of labor laws. By so doing, the *Alleluia* Board followed the teaching of the Supreme Court in *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942), that :

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

The overruling of *Alleluia Cushion* and the new theory of concerted activity set forth in *Meyers I* and *II*

In 1984, a newly constituted Board halted the trend of expanding the protections of Section 7 with the overruling of *Alleluia* and the adoption of an expressively narrow construction of Section 7 in *Meyers I*. Asserting that the legislative history of Section 7 shows that Congress considered the concept of "concerted activities" in terms of individuals united in pursuit of a common goal, the Board concluded that concerted activity must involve actual collective activity in some form. In rejecting the approach of *Alleluia*, the Board stated:

[W]e are persuaded that the per se standard of concerted activity, by which the Board determines what *ought to be* of group concern and then artificially presumes that it *is* of group concern, is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7. [268 NLRB at 496.]

In support of this approach, the Board emphasized that the courts of appeals that had reviewed the post-*Alleluia* cases had rejected the per se standard of concerted activity.<sup>4</sup> The Board then went on to define concerted activity as, in general, requiring an employee's activity to be engaged in with or on the authority of other employees. It referred to this as the "objective" standard of concerted activity.

#### Courts of Appeals' response to *Meyers I*

1. **The D.C. Circuit.** On February 26, 1985, the D.C. Circuit remanded *Meyers I* on the ground, inter alia, that the Board had erroneously assumed that its construction of "concerted activities" was required by the Act.<sup>5</sup> In finding that the Act did not mandate the *Meyers I* interpretation of concerted activity, the court stated that it read Supreme Court decisions interpreting Section 7 as indicating that the statute gives the Board substantial responsibility to determine the scope of Section 7.<sup>6</sup>

The court made special reference to *NLRB v. City Disposal Systems*,<sup>7</sup> a Supreme Court decision issuing after *Meyers I*, addressing the question of whether an individual employee's assertion of a right covered by a collective-bargaining agreement constituted concerted activity. In *City Disposal*, the Supreme Court was presented with the Board's doctrine in *Interboro Contractors*,<sup>8</sup> which provides that an individual employee making a complaint under a collective-bargaining agreement is engaged in concerted activity within the meaning of Section 7 of the Act. The Court of Appeals for the Sixth Circuit had rejected the *Interboro* doctrine on the ground that the term "concerted" in Section 7 must be read literally. The Supreme Court reversed the Sixth Circuit, finding that Section 7 does not compel such a narrow and literal interpre-

<sup>4</sup> The Board specifically referred to *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980); and *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977).

<sup>5</sup> *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

<sup>6</sup> The court cited *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *NLRB v. J. Weingarten*, 420 U.S. 251 (1975); and *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), as upholding a broad construction of Sec. 7 in different contexts.

<sup>7</sup> 465 U.S. 822 (1984).

<sup>8</sup> 157 NLRB 1295 (1966), *enfd.* 388 F.2d 495 (2d Cir. 1967).

tation of its language. The Court found that “[w]hat is not self-evident from the language of the Act . . . is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity.”<sup>9</sup> Finding that Section 7 was subject to varying interpretations, the Court upheld the Board’s *Interboro* doctrine as a reasonable interpretation of the Act. The Court concluded that “[t]he invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process . . . is a single, collective activity.”<sup>10</sup>

Relying on the Supreme Court’s broad construction of Section 7 in *City Disposal*, the D.C. Circuit found that the Board erred in *Meyers I* in finding that its restrictive interpretation of concerted activity was mandated by the Act. The court also questioned the Board’s reliance on judicial decisions rejecting *Alleluia*. It noted that many of these cases relied on reasoning that disapproved all forms of constructive concerted activity, including the *Interboro* doctrine, and thus did not survive *City Disposal*.<sup>11</sup> The court further noted that other judicial decisions rejecting *Alleluia* involved individual complaints about job conditions that were not based on occupational safety or other statutory rights.<sup>12</sup> Concluding that neither the language or legislative history of Section 7 nor Supreme Court or other judicial decisions compelled the *Meyers I* definition of concerted activity, the court remanded the case to the Board for reconsideration of its position.

**2. The Second Circuit.** In *Ewing v. NLRB*,<sup>13</sup> the Second Circuit was also presented with the *Meyers I* theory of concerted activity. There, the Board dismissed a complaint alleging that the employer refused to rehire an employee after a layoff in the mistaken belief that he had filed a complaint with the Occupational Safety and Health Administration. The Board relied on *Meyers I* to find that the individual assertion of a statutory employment right did not constitute concerted activity.

Citing the D.C. Circuit’s decision in *Prill I*, the Second Circuit found that the *Meyers I* interpretation of concerted activity was not mandated by the Act. The court also gave further rationale for finding that the *Meyers I* approach was not compelled by the Act. It suggested that the *Alleluia* presumption that other employees support the individual assertion of a statutory employment right was reasonable. Said the court:

<sup>9</sup> 465 U.S. at 831.

<sup>10</sup> *Id.*

<sup>11</sup> The court pointed to *Jim Causley Pontiac v. NLRB*, 620 F.2d 122 (6th Cir. 1980); *NLRB v. Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977); and *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973).

<sup>12</sup> The court pointed to *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980); and *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23 (7th Cir. 1980).

<sup>13</sup> 768 F.2d 51 (2d Cir. 1985).

The validity of that presumption “depends upon the rationality between what is proved and what is inferred.” *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945). Group support may rationally be assumed, absent evidence to the contrary, because fellow employees presumably want to be free to assert such a right without fear of losing their jobs. [*Id.* at 55.]

#### The Rationale of *Meyers II*

The *Meyers II* Board adhered to the restrictive definition of concerted activity set out in *Meyers I*. No longer asserting that this definition was mandated by the Act, the Board found that it was the definition most responsive to the central purposes of the Act. The Board looked to Supreme Court decisions emphasizing the Act’s unique protection for joint employee action such as *NLRB v. Jones & Laughlin Steel Corp.*,<sup>14</sup> stressing the importance of unionization to enable employees to deal on an equal basis with their employer; and *Metropolitan Life Insurance Co. v. Massachusetts*,<sup>15</sup> emphasizing the difference between minimum-labor-standard laws which apply to all employees and the NLRA which protects collective bargaining. Given this emphasis on group action, the Board found it appropriate to require some linkage to group action in order for conduct to be deemed concerted under Section 7.

The Board also found that the *Meyers I* definition of concerted activity was consistent with *City Disposal*. The Board noted the Court’s emphasis on the assertion of rights under the collective-bargaining agreement as part of a single collective activity. The Board also stated that:

It was recognized that the actions of the individual employee engaged in concerted activity might be remote in time and place from group action but, at some point, there would be an outer limit to concerted activity in order to be faithful to the collective-action component of Section 7. [Citations omitted.]

Finally, the Board found that no linkages to concerted activity could be found in a single employee’s invocation of a statute enacted for the protection of employees generally. The Board concluded that the only concerted activity involved in the enactment of statutes was the activity of the legislators and the lobbying process. This activity, however, was not generated by employees and was too remotely related to the activities of employees in the workplace to come within the protection of Section 7. As to whether policy considerations should lead the Board nevertheless to protect such attenuated activity because it is aimed at securing compliance with other work-related statutes, the Board found that it “was not intended to be a forum in which to rectify all the injustices of the workplace.”<sup>16</sup>

<sup>14</sup> 301 U.S. 1 (1937).

<sup>15</sup> 106 S.Ct. 2380 (1985).

<sup>16</sup> *Meyers II*, supra at 888.

### Court Response to the *Meyers II* Decision

1. **The D.C. Circuit.** The court affirmed the Board's judgment, finding that the rationale given in *Meyers II* was a reasonable interpretation of Section 7 of the Act.<sup>17</sup> As the court had noted in its earlier decision remanding *Meyers I*, its scope of review of Board decisions is limited; it may not second-guess lawful judgments.<sup>18</sup> Despite its deferral to the Board's discretion and expertise, the court made clear that its approval of *Meyers II* was based solely on the finding that it was a reasonable interpretation of Section 7 that did not exclude the possibility of other reasonable interpretations. The court stated:

By requiring that workers actually band together, the NLRB has adopted a reasonable—but by no means the only reasonable—interpretation of Section 7. [Emphasis added.]<sup>19</sup>

Similarly, in concluding that the *Meyers II* rejection of *Alleluia* was not inconsistent with *City Disposal*, the court stated:

The Supreme Court simply recognized that a worker's actions are concerted when tied to the actions of his fellow employees, and in *City Disposal*, the collective bargaining agreement itself provided the bond between one worker and another. **City Disposal** neither required nor precluded treating workplace-related statutory rights as establishing without more the necessary bond among workers.<sup>20</sup> [Emphasis added.]

To be sure, the D.C. Circuit approved the *Meyers II* definition of concerted activity as a proper exercise of the Board's broad authority to interpret the Act. At the same time, however, it clearly indicated that the *Alleluia* doctrine of implied concerted activity was also a reasonable interpretation of Section 7. It cleared the way for a return to *Alleluia* by a future Board.

2. **The Second Circuit.** As noted earlier, the court in its remand affirmatively suggested that it would be reasonable to find that the individual assertion of a statutory employment right was protected under Section 7. The Board rejected that suggestion and adhered to its dismissal of the complaint, relying on the rationale of *Meyers II*. Again, going farther than the D.C. Circuit, the court stated:

The Board's conclusion that a single employee's invocation of a statutory employment right is not "concerted activit[y]" under Section 7 is not, in our view, preferable. Nevertheless, we reluctantly conclude that the Board has offered a reasonable interpretation of the Act.<sup>21</sup>

Agreeing with the D.C. Circuit's analysis that the Act "could be read to support either the *Alleluia* or *Meyers* interpretation of concerted activity," the court held the *Meyers* definition of concerted activity to be a reasonable construction of the Act.<sup>22</sup>

The court, however, was clearly uneasy with the *Meyers II* restrictive approach to Section 7. Agreeing with the D.C. Circuit, the court found that *City Disposal* did not require the *Meyers II* view of concerted activity. The court stated:

The conclusion that individual invocation of statutory rights bears little relation to the collective process at the core of the Act is not the only reading of the NLRA. Statutory rights form the fabric upon which employees weave the pattern of their collective-bargaining agreement. The NLRB, citing *City Disposal*, noted that this process begins when a union is formed and continues during negotiation. It might have also viewed the procedure more comprehensively. A labor-management agreement is not written on a tabula rasa; rather, it is created against the background of a panoply of statutory employment rights. Employees, conscious of the milieu in which they decide to organize and bargain, rely on the availability of the enacted rights they already possess.<sup>23</sup>

The *Meyers II* approach focused on the limiting aspects of *City Disposal*. The court found that it would have been equally plausible to find that *City Disposal* presents "a broad vision of the 'integral aspect[s] of . . . [the] collective process.'"<sup>24</sup>

The Second Circuit clearly indicated that it would have adopted the *Alleluia* approach, had it the authority to do so. The court stated:

Were we considering the question de novo, we might have considered the opposite view more in keeping with the spirit and purpose of the NLRA. . . . The vast majority of American employees are not unionized. They do not work under the protections a collective bargaining agreement affords. Statutory employment rights provide the only protection they have against the arbitrary power of their employer. As it stands, the NLRB's interpretation of Section 7 would allow management to discharge or otherwise discipline an indi-

<sup>17</sup> *Prill II*, supra at 1481.

<sup>18</sup> *Prill I*, supra at 942.

<sup>19</sup> *Prill II*, supra at 1484.

<sup>20</sup> Id. at 1484–1485.

<sup>21</sup> *Ewing v. NLRB*, 861 F.2d 353, 355 (2d Cir. 1988).

<sup>22</sup> Member Hurtgen notes that *Meyers* represents a permissible reading of the Act that no court has overturned in the past 14 years. It should be no surprise that a court has not overturned *Meyers*. The scope of court review is limited to whether the Board's interpretation of the Act is reasonable and therefore permissible. A permissible interpretation is quite different, however, from a preferable interpretation. The Second Circuit indicated that *Alleluia* was not only a reasonable interpretation of the Act but also the preferable interpretation. The court suggested that it would have overturned *Meyers* had its scope of review allowed it to decide the issue de novo.

<sup>23</sup> Id. at 360.

<sup>24</sup> Id., citing *City Disposal*, 465 U.S. at 835.

vidual worker for exercising statutory employment rights. [Id. at 359, footnote omitted.]

In affirming *Meyers II* as a reasonable interpretation of concerted activity, the court somewhat unhappily did its duty: “[I]f reasonable, we must take the Board’s views as we find them, not as we might like them to be.”<sup>25</sup>

#### Concluding Analysis

The review of the rationales of *Alleluia* and *Meyers II* and the courts’ response shows that neither the language or history of the Act nor Supreme Court decisions compel only one theory of concerted activity. In this regard, the Supreme Court teaches that the rights guaranteed in Section 7 are protected “not for their own sake but as instruments of national labor policy.”<sup>26</sup> In my view, the demands of national labor policy vastly favor the *Alleluia* theory of concerted activity.

First, I note that although the legislative history is silent as to the precise meaning of “concerted activities” in Section 7, the use of the term “concert” in the evolution of labor law in this country indicates that its use in the Act was intended to expand employee rights. The term first appeared in legislation designed to shield organized labor from the criminal conspiracy doctrine and the injunctive power of the courts.<sup>27</sup> In light of this history, it is proper and preferable to infer that the use of “concerted” in the Act was intended to assure that what was lawful activity by one employee, was not unlawful because other employees joined it:

The assumption of the Act was *not* that action which should be protected when engaged in by a group should be left unprotected when engaged in by an individual, but that lawful individual action should not become unlawful when engaged in collectively. [Footnote omitted.]<sup>28</sup>

This interpretation of Section 7 has been supported by other commentators<sup>29</sup> and is, in my judgment, the best view of the meaning of “concerted activity.”

Second, the *Alleluia* approach places the Board in its proper role of protecting employees who attempt to improve their working conditions and accommodating other labor laws in administering the Act. One of the great criticisms of *Alleluia* is that it arrogates too much responsibility to the Board. I do not subscribe to this view.

<sup>25</sup> Id. at 361.

<sup>26</sup> *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975).

<sup>27</sup> See Gorman & Finkin, *The Individual and the Requirement of “Concert” Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286 (1981).

<sup>28</sup> Id. at 336.

<sup>29</sup> See, e.g., Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of the Legislative History*, 50 Ind. L.J. 720, 726–734 (1975), and Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 Tex. L. Rev. 991, 1006–1008 (1980).

The *Meyers II* Board recognized that the Board had a duty to construe the labor laws so as to accommodate the purposes of other Federal laws, but held that such a duty was quite different from: “taking it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices of the workplace.”<sup>30</sup> This is an erroneous view of the purpose of *Alleluia*. Of course, the Board should not be in the business of enforcing other statutes, Federal or state. The *Alleluia* interpretation of concerted action, however, does not involve enforcing statutes. It merely assures that employees will not be discharged or disciplined by their employers for *their* individual attempts to secure enforcement of statutes governing the workplace.

While it may be true that some work-related statutes contain provisions against retaliation, not all do. One of the central purposes of the Act, which sets it apart from other legislation, is that it protects employees who attempt to improve their working conditions. It, therefore, is reasonable for the Board to fulfill its duty of accommodating other labor laws by protecting an employee who asserts work-related statutory rights designed to improve working conditions.

This role is particularly critical now when so large a percentage of the employees covered by the Act do not have a collective-bargaining representative or the protections of a collective-bargaining agreement. For such unorganized employees, the assertion of work-related statutory rights, as the Second Circuit emphasized, is one of the only means they have to oppose the economic power of their employers. See also Gould, Estes, Rudy, Wise, Hay & McClain, *To Strike a New Balance: A Report of the Ad hoc Committee on Termination at Will and Wrongful Discharge*, *Labor and Employment Law News*, State Bar of California (1984); Note, *Uniform Law Commissioners’ Model Employment Termination Act Drafted by the National Conference of Commissioners on Uniform State Laws* (1991); Bellace, *A Right to Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. Mich. J.L. Rev. 207 (1983); Dertouzos, Holland & Ebener, *The Legal and Economic Consequences of Wrongful Termination*, RAND Institute for Civil Justice (1988); Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 Boston College L. Rev. 457 (1979); W. B. Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 Brigham Young University L. Rev. 885; W. B. Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 Employee Relations L.J. 404 (1987–1988); W. B. Gould, *Protection From Wrongful Dismissal*, N.Y. Times (Oct. 22, 1984); P. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 Cornell L. Rev. 105 (1997);

<sup>30</sup> *Meyers II*, supra at 888.

Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C. Davis L. Rev. 65 (1982). Note, *Implied Contract Rights to Job Security*, 26 Stan. L. Rev. 335 (1974). To read Section 7 so narrowly as to exclude individual employees who assert such important collective rights when such a reading is purely a matter of policy, does a great disservice to vast numbers of employees who do not have collective-bargaining representatives and who must otherwise depend on the happenstance of whether a retaliatory provision is included in the statute they assert.

A narrow reading of Section 7 also creates an unnecessary gulf between represented and unrepresented employees. The D.C. Circuit warned against such a result in its remand to the Board upon review of *Meyers I*:

[T]he Board's decision in *Meyers* produces the anomaly that a unionized worker who complains about safety or other matters covered by a collective-bargaining agreement will be held protected under *In-terboro* and *City Disposal*, while an unorganized employee will be denied protection for engaging in identical conduct. We agree with the Board that its responsibility is to apply the National Labor Relations Act and not to enforce all state and federal law. This does not mean, however, that with respect to matters within its discretion, the Board should ignore the policy implications of its decisions. [*Prill v. NLRB*, 755 F.2d at 957.]

In my view, it is neither necessary nor desirable to allow the determination of whether an employee's action is protected by the Act to turn on whether the employee asserts a right covered by a collective-bargaining agreement or a right covered by a work-related statute. There is a strong parallel between the assertions of these rights. In both cases, the right asserted is not an individual right, but one that is created expressly for employees in the workplace. In both cases, there is reason to believe that the assertion of the right by an individual employee is at heart a concerted act, consented to by other employees.

True, the reasons for implying consent are different. In the case of the collective-bargaining agreement, the agreement itself is the result of concerted activity by employees in the workplace where the right is asserted. As the Supreme Court found in *City Disposal*, the assertion of the right covered by the collective-bargaining agreement is part of the process which gave rise to the agreement. In the case of the statutory work-related right, the right is created in the public interest for the benefit of employees in the workplace. It is reasonable to presume that other employees consent to the assertion of a right collectively benefiting them. Indeed, as the *Alleluia* Board found, it is inconsistent with the public policies establishing the statutory rights to presume that employees do not support the assertion of the right simply because there is no outward manifestation of group support. Further, I agree with the Second Circuit's view that statu-

tory employment rights form part of the fabric of workplace which provides the background against which any organizing and collective bargaining must occur. The same is true of the judicially fashioned common law employment rights in areas like wrongful discharge. All of these rights are, therefore, not isolated from the collective-bargaining process.

Finally, the simplicity of analysis in *Alleluia* and more efficient use of the Board's resources are major policy considerations favoring the abandonment of *Meyers II*. Under the *Alleluia* approach, the initial inquiry is confined to whether an individual employee asserted a work-related statutory right and suffered discharge or discipline in retaliation. In contrast, the *Meyers II* approach requires a complex, often convoluted analysis when collective rights are asserted by an individual employee. Thus, it must be determined whether the employee's action was authorized by other employees,<sup>31</sup> generally relied upon in some way by at least one employee,<sup>32</sup> or was engaged in with the object of initiating or inducing or preparing for group action or had some relation to group action.<sup>33</sup> An inquiry of such complexity necessarily increases the Board's expenditure of resources on wasteful litigation.<sup>34</sup> It also places an undue burden on unsophisticated, unorganized employees. Whether such an employee's individual assertion of a collective right is protected depends on how and to whom the employee asserts the right. Employees who do not have a representative and who, in an unorganized setting, may be hesitant to involve themselves in open calls for group action should not be required to engage in such sophisticated or formalistic maneuvers to be shielded from discharge for asserting a right granted by statute to all employees in the workplace.<sup>35</sup> Again, the attempt by employees to show that they have gone through the proper hoops and had the appropriate discussions and communications demonstrat-

<sup>31</sup> *Allied Erecting Co.*, 270 NLRB 277 (1984).

<sup>32</sup> *Walter Brucker & Co.*, 273 NLRB 1306 (1984).

<sup>33</sup> *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

<sup>34</sup> See my dissent in *Flint Iceland Arena*, 325 NLRB 318 (1998), where I also urge the diminishment of potentially wasteful litigation within the context of non-Board settlements. Illustrative of a decision which substantially diminished litigation through its broad and clear mechanical rule relating to jurisdiction was *Management Training*, 317 NLRB 1355 (1995). The doctrine in *Management Training* has been approved in *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997), and in *Pikeville United Methodist Hospital. v. NLRB*, 109 F.3d 1146 (6th Cir. 1997), where we asserted jurisdiction over private employers. Consistent with this view, I have also advocated that the promotion of voluntary recognition agreements in order to avoid unnecessary litigation. See *Smith's Food & Drug Centers*, 320 NLRB 844, 847-848 (1996) (Gould, W., concurring). The Board has concurred with this approach in its promotion of settlement agreements negotiated where a decertification petition has been filed and an incumbent union has an established relationship with the employer. *Douglas-Randall, Inc.*, 320 NLRB 431 (1995).

<sup>35</sup> See W. B. Gould, *Recent Developments Under the National Labor Relations Act: The Board and the Circuit Courts*, 14 U.C. Davis L. Rev. 497, 513-519 (1981).

ing that more than one employee is involved, unnecessarily produces burdensome and wasteful litigation where, when the subject matter in dispute clearly involves all employees, this elongated and torturous process is not necessary.

Viewed against the history of the term “concert,” the simplicity of analysis which avoids formalistic gamesmanship so detrimental to unorganized employees, the reduction of issues for litigation, the recognition of the collective nature of work-related statutes, and the accommodation of other labor laws through the protection of an employee’s right to assert those laws compel the finding that *Alleluia* is far more in keeping with the spirit and purpose of the Act.

MEMBER HURTGEN, concurring.

My dissenting colleague would overrule the extant law of *Meyers*, and would hold that an individual employee engages in concerted activity even if he acts alone in pursuing a personal claim before a state agency. I would adhere to *Meyers*, and I would hold that the aforementioned activity is not concerted.

The reasons for my view are set forth in *Meyers* itself, and there is no need to repeat them here. However, I do wish to make three additional observations.

First, my colleague concedes, as he must, that *Meyers* represents a permissible reading of the Act. Further, it has been on the books for 14 years, and no court has overturned it.<sup>1</sup> In the interests of stability and predictability, I see no warrant for upsetting precedent, absent a compelling need to do so. There is no such need here.

Second, to the extent that individual employees have been discharged in reprisal for their resort to state or Federal agencies, it would appear that *those agencies themselves* would have the primary responsibility for protecting access to their own processes. At least in the absence of a showing that significant numbers of agencies do not afford such protection, I see no need for Federal (NLRB) intrusion in this area.

Finally, I disagree that *Meyers* creates a situation in which unorganized employees are unprotected while organized employees are protected. Unorganized employees have a Section 7 right to engage in concerted activity, just as union organized employees do. In addition, nonunion employees have a Section 7 right to remain nonunion, and they will still enjoy their Section 7 right to engage in concerted activity. However, neither a unionized employee nor a nonunionized employee engages in concerted activity when that employee simply goes to a state agency. *City Disposal*<sup>2</sup> is not to the contrary. In that case, the employee invoked the collective-

<sup>1</sup> My colleague does not dispute this point. He simply refers to one court that suggested that it would have made a different policy choice. However, even that court was quick to add that the policy choice is for the Board to make.

<sup>2</sup> 465 U.S. 822.

bargaining agreement, i.e., the fruition of the Section 7 effort of unit employees to achieve a union contract. Such activity is concerted. By contrast, in the instant case, the employee went to a state agency. I am unwilling to say that this activity is the same as that in *City Disposal*.

*Michael Cooperman, Esq.*, for the General Counsel.  
*Barbara Weil Gall and Dawn Leporati, Esqs. (Sherman & Howard)*, of Denver, Colorado, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in Denver, Colorado, on February 6–8, 1997, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 27 of the National Labor Relations Board on April 30, 1996. The complaint is based on a charge in Case 27–CA–14384 filed on March 14, 1996, by Kim McKeon, an individual (the Charging Party), against Myth, Inc. d/b/a Pikes Peak Pain Program (the Respondent). Posthearing briefs were due on March 12, 1997.

The complaint alleges and the answer denies that McKeon was: (1) warned on February 2, 1996; (2) work hours were reduced in on February 21, 1996; and (3) discharged on March 7, 1996, all because of her protected concerted activities in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record here, including helpful briefs from the General Counsel and the Respondent and from my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT<sup>1</sup>

#### I. JURISDICTION

At all material times the Respondent, a Colorado corporation with a clinic and place of business in Colorado Springs, Colorado (the Clinic), has been engaged in the operation of a clinic devoted to the relief of chronic pain. At all relevant times, the Respondent has annually enjoyed revenues in excess of \$250,000 and during the same periods purchased and received at its Clinic goods valued in excess of \$10,000 directly from enterprises within the State of Colorado, which are engaged in interstate commerce.

The complaint alleges, the answer admits, and based on the commerce facts set forth above I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background

The Respondent was established in June 1994 as a clinic providing specialized care and training for patients with long-standing and chronic pain. The Clinic offers an interdisciplinary team approach and utilizes physical, occupational, and recreational therapists and others in a comprehensive program.

At relevant times, Susan Hayes has been the Respondent's chief executive officer, Dr. John Tyler, the Clinic's medical director, and Dr. Kevin Murphy, its psychologist. All are part owners of the Respondent. These individuals were involved in establishing the Clinic and in doing so drew from the staff of another health care institution in the area for its starting employees. One of the employees invited to join the Clinic at its inception was the Charging Party who had worked with Hayes at the other institution. At relevant times McKeon was an exercise physiologist at the Clinic. Lee Carman was hired in June 1995 as a physical therapist and was promoted to manager of therapeutic services in October 1995. As manager of therapeutic services, Carman became responsible for the direct supervision of the Clinic's physical therapists, massage therapists, and exercise physiologists, including the Charging Party.

At relevant times, the Respondent has provided wages or salaries and certain fringe benefits to its employees. A portion of the employees' fringe benefits were paid for, in whole or in part, by the employees in the form of payroll deductions from their earned wages or salary. One aspect of the Respondent's employee compensation system was the issuing of "benefit dollars" to employees. These "benefit dollars" were a fixed number of dollars above and beyond the normal employee wage or salary issued to each employee each month, which could be allocated by the receiving employee to pay the employee's portion of fringe benefit costs or, in the alternative, to be paid directly to the employee.

### B. Evidence

#### 1. The Charging Party's telephone call to the Respondent's insurance carrier

In September 1995, during the period preceding the expiration of its then-existing employee insurance plan, the Clinic added to its employee benefits a new short-term/long-term employee disability benefits plan (the Plan). The Plan was in addition to the Clinic's other employee insurance coverage. Using its insurance agent, Daniel Nowels, the Respondent entered into an agreement with an insurance underwriter, UNUM Life Insurance (UNUM), to provide the Plan to eligible employees.

In November 1995, Hayes and Nowels explained to employees how the Plan was to operate. The premium for the Plan was to be employer paid, but the covered employees would have their "benefit dollars" reduced by the amount of the premiums paid by the Clinic for the coverage. The assertion that the Plan was to be paid for by the Employer coupled with the seemingly inconsistent fact that the employees would have their "benefit dollars" reduced in amount equal to the premium caused a certain confusion among employees respecting who was paying for the coverage which persisted over time despite the repeated explanations of the Respondent. The employee questions and confusion continued even after Plan pamphlets

were distributed in early January 1996<sup>2</sup> and a second employee meeting was held on January 9 to explain the Plan and how individual employee coverage was paid for.

Hayes testified that although virtually the entire staff had questions at the Tuesday, January 9 meeting, which were answered by management as best as possible, none of the employees raised further questions with her thereafter and she therefore assumed the matter had been resolved in all the employees' minds by Friday, January 12, her last day of work before commencing a vacation. Such was not in fact the case however.

McKeon testified that she remained confused by the seeming contradiction that the Plan was specifically designated as employer paid, yet employees were having their "benefit dollars" reduced by the cost of the Plan's coverage. She talked with her fellow employees and they too remained confused by the apparent contradiction. Employee Margaret Jane Andrews testified that in the Clinic employee room on January 18 either McKeon or Carman or both announced to the other employees that they were going to call the insurance carrier with their questions about the Plan.

Later that day, on January 18 during Hayes' absence on vacation, McKeon and Manager of Therapeutic Services Carman, after several attempts, placed a telephone call from the Clinic to UNUM and, using the speaker phone in the employee area of the Clinic, spoke to Kathy Bowles at UNUM about their questions and confusions.

The Charging Party described the conversation:

My questions to [Bowles were] that I had reviewed the policy, that it stated in the policy that the short-term and long-term disability was Employer-paid, and I called to ask her what that meant and if that was the case, then why was our paycheck being deducted for the amount to the short-term, long-term disability to pay for that?

Q. And what did she say to you?

A. She just explained that the policy was noncontributory, which meant that it was Employer-paid. No enrollment forms needed to be signed by employees because it was paid 100 percent by the Employer. And once again, I—you know, I questioned if that was the case, then why were our paychecks being reduced as in previous team meeting discussions to help pay for—to pay for short-term, long-term disability.

Q. And did she give you an answer?

A. No. She had no answer. I mean, this was new to her also.

Q. Okay. How did the conversation get left?

A. I know that Lee had asked questions that he had. I don't recall what they were, but it ended up that, Okay—thank you, and left it at that.

Immediately following the call, Carman, McKeon, and at least one other employee discussed the matter and determined it would be best simply to await Hayes' return from vacation and raise questions with her at that time. That same day other employees were informed of the conversation.

Thereafter, Bowles telephoned Nowels, reported her conversation with McKeon and Carman, and asked for information regarding the circumstances of the Clinic's insurance. Nowels attempted to reach Hayes but, learning she was on vacation,

<sup>2</sup> Unless otherwise noted all dates refer 1996.

called McKeon at the Clinic. Nowels reached Carman and McKeon by telephone, inquired as to what had transpired and reviewed the situation with them attempting to explain the terms of the policy and its payment.

Hayes returned to work from her vacation on Monday, January 22, and received telephone calls from both UNUM and Nowels respecting the above-described events. Nowels indicated to Hayes there was some seriousness in the matter because it was his belief that if UNUM concluded the policy was not in fact Clinic—as opposed to employee—paid, the Clinic’s disability insurance coverage would be canceled.

Hayes testified that, in speaking to UNUM and Nowels, she was able to clarify the matter to their satisfaction, so that the policy was not in jeopardy. She was not happy with her employees’ action in causing the difficulty however. She testified she was:

[P]retty devastated. I felt that the staff had almost like kind of gone behind my back to find out answers which, one, I tried to explain to them. Two, I felt this was something that I was trying to give to them just as an extra benefit and to say thank you very much for all of the hard work that they have done, and I felt like it just slapped me in the face.

Hayes added that she wanted to talk to McKeon and Carman together about the matter that day, but their schedules and her schedule did not allow such a meeting and before she could arrange for a meeting the day had passed and the following day’s regular weekly staff meeting was upon her.

Hayes conducted the January 23 staff meeting and at the conclusion of its structured portion, she described events:

[W]hen I open up the agendas, I ask if there’s any other items that need to be discussed, and at the bottom of the agendas you will normally see spaces to put that. [McKeon] asked to put in short-term/long-term disability. I stated I would like to talk with her and Lee [Carman] and Kevin [Murphy] after the meeting. She did not leave it at that, she came back to me in a very determined type of voice that said: “I want to know why we cannot talk about this at this meeting; this is an employee issue and I would like for us to talk about it here.” And I very sternly said at that point: “I will talk with you and Lee and Kevin after this meeting.”

She came back one more time in the stern voice of stating to me: “I would like to talk about it now.” And I looked at her very, very sternly—and I don’t do this normally in a team meeting—and I said, “Listen to what I say; I will talk with you and Lee and Kevin after this meeting regarding this.”

McKeon recalled that Hayes’ responses to her in the meeting were very atypical in being both angry and harsh. Andrews testified that Hayes’ reaction to McKeon’s request was sufficiently unusual to bring looks of surprise to the attending staff and caused whispering by the staff among themselves followed by Hayes’ comments to McKeon.

Hayes and Dr. Murphy<sup>3</sup> met with McKeon and Carman immediately after this meeting. Hayes explained to the two her desire not to discuss the matter at a staff meeting:

<sup>3</sup> Hayes testified she included Murphy in the meeting because McKeon had seemed upset when Hayes told her in the meeting that the matter would be discussed later and Murphy was both a skilled facilitator and her counterpart on the clinical side.

I needed to have both sides of a story before I was going to address that in front of a team. I informed them that I felt like I was being attacked in that meeting regarding these issues and that I was not going to discuss it at that point; now tell me what happened so that we can resolve it and I can tell you then what I was told too so you understand where I came from.

Hayes asked about the phone call by McKeon and Carman to UNUM and explained the Respondent’s views on the policy and the payment. McKeon continued to hold to her view that the fact employees’ “dollar benefits” were reduced to pay for the policy indicated to her that the coverage was not, in fact, employer paid, but the meeting ended without any discipline or other action against either McKeon or Carman.

## 2. The charge with the Colorado State Department of Labor

Consistent with normal procedure McKeon received her paycheck dated February 7, 1996, for the payroll period ending January 29. The check was not for the normal sum and the pay stub indicated that her hours worked were fewer than normal. McKeon sent a memo to Hayes concerning the check, the body of which asserted:

In reviewing my pay check, it appears there has been a mistake as the total hours shown for this is 82.67 hours as opposed to the usual salary pay period hours of 86.67.

Could you please explain this discrepancy. Thank-you.

McKeon visited the Colorado State Department of Labor on February 16 to inquire about the pay matter, but was unable to speak to an investigator.

In a memo dated February 19, Hayes responded to McKeon’s request for information as follows:

Enclosed is a copy of your time sheet which shows you were sick on January 18, 1996. You were absent for the entire day 8 hours and you do not have PTO available to cover. I did take into consideration that on Sunday you came into the office and worked four (4) hours. Therefore I only docked you four (4) hours for the January 18th day instead of eight (8) hours.

On February 20, McKeon met with Joe Herrera, a compliance investigator with the Colorado State Department of Labor, and filed a state wage claim against the Clinic respecting the 4 hours of “docked” pay.

Herrera testified he spoke to Hayes by telephone on the afternoon of February 21 about McKeon’s claim and the state regulations he believed applied to the matter. Hayes told him she would take up the matter with her personnel and human resources advisor. Hayes recalled that Herrera called at about 2 p.m. and told her of McKeon’s wage claim and further told her that the docking of McKeon’s hours was improper.<sup>4</sup> She remembers telling him that she would have HRC, a firm handling the Clinic’s human resources, deal with the matter. She testified she “couldn’t believe that [McKeon] . . . had called the Labor Board on this, on the issue of the hours when I felt that I had [given] her a nice explanation of the reason why I had done it.”

Later that day an agent of HRC, on the Respondent’s behalf, contacted Herrera and told him an error had been made and that

<sup>4</sup> The position of Herrera as conveyed to Hayes was that McKeon was a salaried employee whose salary could not be properly docked in the circumstances presented.

the claim would be paid. The claim was in fact paid, with the Colorado State Department of Labor noting the receipt of payment on February 26 and thereafter closing the file.

### 3. The reduction in the Charging Party's hours of work

Hayes testified that she always had a high opinion of McKeon's professional skills. She noted, however, that her own direction of employees had been quite informal and, with the assumption by Carman of the position of manager of therapeutic services in October 1995, he began to more formally structure work for the staff under his direction. The revamped and tightened schedules and arrangements initiated by Carman, in Hayes view, placed greater responsibility on staff, including McKeon, to manage and account for their time.

Hayes testified that McKeon had difficulty adjusting to these changes and that the previous friendly and informal relationship between the two of them came under strain commencing about October 1995. McKeon characterized the friendly relationship between the two as ending on, and as a result of, the January 23 staff meeting rather than on earlier events and circumstances.

Hayes testified that in the fall of 1995 she received reports from staff that McKeon was leaving the Clinic to go to appointments during the workday without providing adequate notice to staff and was neither reporting her departures from the Clinic nor her expected return times. Hayes testified that she discussed these matters with McKeon informally at the time she learned of the problem. McKeon testified that until the February 2 meeting, described below, Hayes had never criticized her work nor raised attendance or reporting problems or the complaints of staff.

Hayes testified that these problems reoccurred and on February 2 she called McKeon to a meeting with McKeon's immediate supervisor, Carman, and with Murphy—whom she intended to act as a facilitator—to discuss McKeon's leaving the facility without telling the receptionist where and for how long she would be gone. Carman testified that he participated in the meeting as McKeon's supervisor and because he felt her work was being affected by the absences.

At the meeting, these problems were raised with McKeon. Hayes recalled that McKeon became angry that her appointments were being used as a basis of criticism, inasmuch as she believed that Hayes well knew of them and thus had in effect consented to and approved of her conduct. Hayes testified she explained to McKeon that she had in fact known of McKeon's appointments, but not that they were becoming a problem for scheduling patients, nor that there was a failure to let the staff know where McKeon was or when she would return to the Clinic. McKeon answered that she always informed the front desk when she was leaving and when she would be back. Hayes countered that McKeon's assertions were not consistent with the reports she was receiving from the front desk.

Hayes also suggested to McKeon that with excessive appointments, long lunch hours, and early afternoon departure times, McKeon was not working a full week. Hayes also told McKeon that if "her behaviors" continued she would be changed from a salaried or full-time employee to an hourly or part-time employee. Hayes testified, "My intent was: 'You're paid for 40 hours a week, we'd like for you to work 40 hours a week; if you continue to work approximately 30 hours a week, then I'm going to pay you for 30 hours a week.'" McKeon recalled that she was threatened by Hayes at the meeting with both a reclassification from salaried to hourly employee and with a reduction from full- to half-time employment.

Hayes testified that in late 1995 and more specifically from January 27 on, she, Lee Carman, and Kevin Murphy had been discussing ways to reduce Clinic costs including the possible reduction of employee hours. She testified to meeting on February 20 with the two at which time they reviewed employees' schedules in consideration of possible reductions in employee hours. Hayes testified that at the meeting they determined to cut McKeon's hours from her current 8 to 3 hours per day. Carman testified, without particularizing the dates, that he was involved in evaluating employees' hours with Hayes and Murphy, and that he was aware McKeon's hours were to be cut before the February 21 meeting described below. Dr. Kevin Murphy was also unable to recall specific dates, but testified that he had spoken with Hayes and Carman in several meetings before the February 21 meeting "concerning Kim's hours and the amount of time she was actually working, and what we needed in the program in terms of her working, and whether that was an efficient use of our resources."

McKeon testified that shortly after 3 p.m. on February 21 she injured her shoulder while working. Soon thereafter and before she had reported her injury, she was summoned to a meeting in Hayes' office and there met with Hayes, Carman, and Murphy. She was given a letter addressed to her dated February 21, the text of which read in part:

In review of your schedule at Pikes Peak Pain Program the majority of your work is between the hours of 8:00 am to 10:30 am. Therefore, we are rearranging your work schedule to cover these sessions. Effective February 26, 1996 we would like for your hours to be Monday thru Friday 8:00 am to 11:00 am.

Hayes placed the meeting as occurring at 3:30 to 3:45 p.m. She recalled that McKeon did not mention having injured herself just before the meeting and learned of McKeon's report of an injury later that working day after the meeting.

McKeon reported her injury after the meeting and was thereafter referred to a regularly used physician by the Clinic, Dr. Robert Pero, for evaluation of her injury. Dr. Kevin Murphy telephoned Dr. Pero following the referral, but before McKeon's initial visit, and informed Pero that McKeon's injury was reported by her in the context of an adverse personnel action, implying at the very least that Dr. Pero should view the claim of injury by McKeon skeptically. In all events Dr. Pero evaluated McKeon, diagnosed a shoulder strain, prescribed physical therapy, and imposed temporary work restrictions limiting lifting and forceful flexion.

McKeon testified that from February 21 through the meeting on March 7, described below, she worked her new reduced schedule while complying with the work restrictions set by Dr. Pero. Carman, however, testified that he observed and/or received reports concerning various failings of McKeon in the days following February 21, namely; the undertaking of physical tasks prohibited by her work restrictions, reporting to work late, and the unauthorized canceling of a patient session purportedly because of her work limitations which, in Carman's view, were not in fact a limiting factor in the patient session.

Carman prepared an employee report of his perceived inadequacies in McKeon's performance coupled with a list of requirements that she must comply with to achieve satisfactory performance. The report, formatted so that McKeon was to sign it at the bottom in acknowledgment of its content with spaces for witness signatures, asserted in part:

I also acknowledge that failure to comply with any of the above written requirements will result in the immediate dismissal from my position with Pikes Peak Pain Program.

On March 7, McKeon was summoned to a meeting attended by Hayes, Murphy, and Carman. She brought a tape recorder to the meeting and obtained permission to record the meeting which she did. The recording of the meeting and a transcript of it were placed in evidence.

Carman took the initial active role on behalf of the Clinic at the meeting, telling McKeon that there had been “incidents” and giving her the employee report described above. McKeon and Carman engaged in a dialogue, with the other two generally silent, concerning the various incidents set forth on the report with McKeon disagreeing with the allegations or defending herself in each instance. McKeon also took issue with Dr. Murphy’s telephone call to Dr. Pero, described above, calling it unethical and unprofessional on Murphy’s part to question McKeon’s veracity in making the claim. McKeon’s defense in her exchange with Carman was vigorous and she viewed the criticisms of her as both incorrect and unjust. At one point McKeon accused the Clinic of simply attempting to rely on any little thing in its criticism of her, which characterization Hayes disputed.<sup>5</sup> The meeting ended when this exchange or debate between McKeon and Carman was interrupted by Hayes who told McKeon: “[T]his will be your last day today because we will not tolerate this type of thing any more.” Following a brief further exchange, the meeting ended. McKeon’s employment with the Clinic was thereafter ended.

McKeon’s discharge was never withdrawn and she has not been employed at the Clinic since. Following her discharge, McKeon sought state unemployment compensation which was granted following state consideration of the circumstances of her discharge.

### C. Analysis and Conclusions

#### 1. Arguments of the parties

The General Counsel argues that McKeon engaged in three separate actions, each of which were protected under the Act: (1) her telephone call to UNUM; (2) her requests to Hayes to discuss the insurance matter at the staff meeting and; and (3) her filing of her Colorado State Department of Labor salary claim. The General Counsel argues further that these protected activities were the cause of the Respondent’s warning of McKeon, the Clinic’s reduction in her work hours and its subsequent discharge of McKeon. Thus, the General Counsel argues that the Respondent in warning McKeon, reducing her hours, and in discharging her, all because of her protected activities, violated Section 8(a)(1) of the Act as alleged in the complaint.

The Respondent contests each of the General Counsel’s arguments. First, the Respondent argues that McKeon’s actions on each of the three occasions raised by the General Counsel were individual actions without the legal concert necessary under current law to cloak McKeon’s actions with protection under the Act. Second, the Respondent argues that, irrespective of whether McKeon’s activities were protected, she was not warned, work were not reduced, nor terminated for those activities. Rather, argues the Respondent, the warning, the

<sup>5</sup> Thus, for example, the following exchange: McKeon—“You guys are grasping.”; Hayes—“No, we’re not grasping.”

reduction in McKeon’s hours, and her subsequent discharge were each business decisions of the Clinic completely independent of any actions of McKeon respecting disability insurance or salary claims or her contacts with UNUM or the Colorado State Department of Labor. More specifically, the Respondent argues the initial warning in dispute arose from complaints from employees of the Charging Party’s conduct and the reduction in her hours was based on a determination that the Clinic did not need her for the full workday. Finally, the Respondent asserts the decision was taken to meet with McKeon on March 7 because of a developing pattern of insufficient conduct and her discharge occurred only upon the conclusion drawn from her behavior at the meeting that she was not going to change her belligerent attitude or conduct. Thus, the Respondent argues it did not violate the Act in any manner and the complaint should be dismissed.

It is appropriate to initially address the legal arguments respecting the issue of whether McKeon’s activities were protected under the Act. Thereafter, the analysis will turn to the question of whether McKeon’s protected activities resulted in her receiving the contested warning, reduction in hours, and/or discharge.

#### 2. Were McKeon’s activities protected under the Act

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce an employee in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 in turn asserts that employees have the right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Thus, a statutorily sufficient degree of “concerted activities” is necessary to invoke the protections of Section 8(a)(1) of the Act. The concept of “concertedness” has been one of evolution and controversy through the Board’s history and individual, setting specific, analyses of particular conduct are often highly context sensitive. Each of the three activities advanced as protected by the General Counsel will be discussed separately below.

##### a. *McKeon’s participation in the January 18, 1995 telephone call to the Clinic’s insurance carrier*

The telephone call and related circumstances are described, above, and are not in substantial dispute. McKeon’s telephone call presents the narrow<sup>6</sup> legal issue: Did her individual<sup>7</sup> action rise to the level of concerted activity by virtue of the context of events? The General Counsel seeks to invoke the Board’s “logical outgrowth” doctrine. In *Mike Yurosek & Son*, 306 NLRB 1037 (1992), enf. 53 F.3d 261 (9th Cir. 1995), the Board held at 1038:

<sup>6</sup> Much concerning McKeon’s telephone call is not in legal or factual dispute. McKeon telephoned UNUM Insurance about insurance coverage which she was to receive. The inquiry therefore concerned a term and condition of her employment. The Respondent specifically conceded that there was no impropriety in her telephone call which would justify punishment or adverse action against her. Employee telephone calls to their employer’s insurance agents regarding insurance coverages, current or possible, are clearly protected, if concerted. *Harvest Communications*, 321 NLRB 40 (1996).

<sup>7</sup> Although McKeon undertook her inquiry with fellow employee Carman, Carman was an admitted supervisor at all relevant times and the General Counsel does not assert that McKeon’s conduct was concerted by virtue of his participation in the activity.

We will find individual action is concerted where evidence supports a finding that the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group.

The Board applied this doctrine in *C & D Charter Power Systems*, 318 NLRB 798 (1995), to hold that an individual employee's complaints at a general employee meeting "constituted concerted activity because they were the logical outgrowth of the prior concerted complaints employees voiced."

The Respondent argues that by the time of the telephone call all other employee concerns had been answered and McKeon's actions were personal and isolated. Counsel for the Respondent argues on brief at 15:

Counsel for the General Counsel presented no evidence that any employee, other than Ms. McKeon, had additional concerns about the plan after the January 9th staff meeting. Rather, the evidence indicates Ms. McKeon's phone call to UNUM occurred after all questions concerning the ST/LT plan had been resolved. In short, Ms. McKeon placed the telephone call to UNUM merely to allay her own personal suspicions about how the ST/LT plan was paid. Thus, the UNUM phone call did not constitute concerted activity.

Contrary to the factual argument of the Respondent, however, I find that there were ongoing questions among employees respecting the way in which the coverage premiums were being paid.<sup>8</sup> I credit the uncontradicted testimony of Margaret Andrews that such questions and discussions continued among employees through the time the phone call was placed. I further credit her testimony that McKeon and Carman explicitly announced to employees that they were going to inquire about the matter and that at least some employees were present during some or all of the telephone call.

Given this factual finding, and in light of the cases cited, I find that the "logical outgrowth" doctrine applies to the McKeon telephone call on January 18, 1996, to UNUM insurance, and that the call was therefore protected concerted activity<sup>9</sup> within the meaning of Section 7 of the Act.

*b. McKeon's questions at the January 23, 1996 staff meeting*

Hayes' testimony may be used to describe the conduct at issue.

[McKeon] had stated—when I open up the agendas, I ask if there's any other items that need to be discussed, and at the bottom of the agendas you will normally see spaces to put that. [McKeon] asked to put in short-term/long-term disability. I stated I would like to talk with her and Lee [Carman] and Kevin [Murphy] after the meeting. She did not leave it at that, she came back to me in a very determined type of voice that said: "I want to know why we cannot talk about this at this meeting; this is an employee issue and I would like for us to talk about it

<sup>8</sup> It is unnecessary to make conclusions respecting the manner of premium payments, i.e., whether they were employee paid in the circumstances described above. It is enough to find, as I do, that the matter was ambiguous and confusing and that McKeon was not acting in bad faith in making her inquiry.

<sup>9</sup> The Respondent does not argue that the activities of McKeon, if concerted, were not known to be such by the Respondent. Nor would this argument be sustainable given that Carman her cohort in the call was a supervisor who clearly observed the other employees involvement in the matter. See also fn. 10, *infra*.

here." And I very sternly said at that point: "I will talk with you and Lee and Kevin after this meeting."

She came back one more time in the stern voice of stating to me: "I would like to talk about it now." And I looked at her very, very sternly—and I don't do this normally in a team meeting—and I said, "Listen to what I say; I will talk with you and Lee and Kevin after this meeting regarding this."

The General Counsel argues McKeon's attempt to raise the insurance matter at the meeting is concerted: (1) as a logical outgrowth of the employees' questions concerning the insurance, as argued in the preceding section; (2) as a simple continuation of that phone call and earlier concerted conduct; and (3) as threshold conduct designed to induce group action. The Respondent opposes each argument.

The first two arguments have been analyzed above and the issues decided in the General Counsel's favor. Regarding the "inducement to group action" question, the General Counsel argues on brief at 11:

McKeon's statement at the meeting that the disability plans were of concern to all the employees and, thus, should be discussed at the team meeting was clearly a call for group action on the subject of the disability plans. Hayes squelched any potential group discussion that could in turn have lead to group action by punishing McKeon for having the temerity to raise the subject over Hayes' objection. In *Meyers II*, [*Meyers Industries*, 281 NLRB 882 (1986)] and in subsequent cases, the Board reaffirmed the holding in *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951), that the protection of Section 7 extends to concerted activity which initially only involves a speaker and a listener, for such activity is an indispensable preliminary to group activity. In *Neff Perkins*, 315 NLRB 1229 fn. 1 (1994), the Board specifically stated, "We note that employees questions and comments concerning why conditions raised at a group meeting called by an employer clearly come within the definition of concerted activity under Board precedent"; see also *United Enviro Systems*, 301 NLRB 942 (1991); *Whitaker Corp.*, 289 NLRB 933 (1988). As Hayes was not required to permit a group discussion on the disability plans, retaliatory actions against McKeon for having attempted to initiate such a discussion violated the Act.

Counsel for the Respondent argues in opposition at 16–17 of her brief:

Likewise, Ms. McKeon's January 23rd request was not "calculated to induce, prepare for, or otherwise relate[d] to some kind of group action." *KNTV, Inc.*, 319 NLRB 447, 450 (1995) (employee's request that his employer consider improving employee wages was engaged in concerted activity because his request was "a continuation of his open and active engagement in, and leadership of, concerted activities involving employee pay issues"). Rather, McKeon's request occurred after the ST/LT plan was no longer an issue. Therefore, McKeon's request was not a logical outgrowth of concerns about the ST/LT plan. Moreover, McKeon testified at the hearing that she told Hayes she wanted to discuss the ST/LT plan at the January 23rd staff meeting because "I thought it was an issue that pertained to all the team members, and . . . I thought we

should discuss it.” Transcript 132:9–11 (emphasis added). No other team members expressed similar sentiments. Transcript 41:6–9; 84:9–12. Therefore, the evidence demonstrates that, at the January 23rd staff meeting, Ms. McKeon merely sought to express her own individual and personal confusion about the ST/LT plan.

The Board has held that “raising questions of common concern at meetings with company officials is usually a concerted act, particularly when the first person plural is used by the employee.” *Grimmway Enterprises, Inc.*, 315 NLRB 1276, 1279 (1995) (finding that employee who stated “we wanted to know” and “I and all of my co-workers want to know” was the designated spokesperson of an employee group and thus his actions were protected concerted activity). However, the Board further explained that “[t]he Board will usually regard that step as an essential preliminary to the inducement of group action.” *Id.* Because Ms. McKeon’s activity took place *after* the ST/LT plan payment issue had been resolved, her activity could not have been “an essential preliminary to the inducement of group action.”

In short, there is simply no evidence Ms. McKeon was engaged in protected concerted activity when she placed the phone call to UNUM or made the January 23rd request. Rather, Ms. McKeon was acting alone and for her sole personal benefit. [Emphasis in original.]

I reject the argument of the Respondent that, because the insurance coverage payment had been “resolved” as of the staff meeting on January 23, McKeon’s activity could not have been an essential preliminary to group action. If counsel means by her argument that no employee concerns remained at that time, I reject the argument on the facts. Counsel argument may mean, rather, that because the insurance coverage had been put in place and the means of payment implemented by January 23, the employees were in effect faced with a *fait accompli* respecting which no group action was now possible and therefore no action of McKeon at that time could be regarded as an essential preliminary to group action. I reject this argument as well. Even after the implementation, employees could seek to have the means or source of payment of the insurance premiums changed and, even if unsuccessful, could press their case to the employer, to the insurance carrier, to public authorities, to the public generally, or virtually to any forum at which they believed help would be availing. Group action in the sense used here is not necessarily successful or desirable action but rather and simply the action of more than one employee concerning the issue.

Based on my prior analysis, above, I agree with the General Counsel that the conduct of McKeon on January 23, like that of January 8, was concerted within the meaning of Section 7 of the Act.<sup>10</sup> Based on the cases cited and the record as a whole, I also agree with the General Counsel that the actions of McKeon on January 23 were concerted as conduct which was an essential preliminary to group action. I therefore find that the con-

<sup>10</sup> Hayes specifically attributed to McKeon the statement at the meeting: “[T]his is an employee issue and I would like for us to talk about it here.” There is no question that Hayes knew, either from McKeon’s remark itself or from previous conversations with Carman, or should have known of the more general interest employee interest in the insurance issue by this time.

duct was protected concerted activity within the meaning of Section 7 of the Act.

*c. McKeon’s filing of a wage claim with the Colorado State Department of Labor*

The General Counsel’s argument that McKeon’s contacts and charge with the Colorado State Department of Labor were protected concerted activity differs from the earlier arguments respecting her call to the insurance carrier and her statements at the staff meeting. On brief counsel for the General Counsel argues:

General Counsel concedes that McKeon’s wage claim with the Colorado State Department of Labor was not an outgrowth of any group concern. However, the issue raised by McKeon to the State Labor Board, namely whether an exempt, salaried employee could be docked pay for missing a day or several hours of work, was clearly a question that related to all of Respondent’s salaried employees, which included most of McKeon’s team. The significance of this issue was highlighted by Respondent’s invitation to Joseph Herrera to speak to Respondent’s management about the state regulations applicable to McKeon’s complaint. (Tr. 97–98.)

In *Alleluia Cushion*, 221 NLRB 999 (1975), and its progeny, the Board held that an individual action constituted concerted activity as long as the individual activity involved a group concern; see *Steere Dairy, Inc.*, 237 NLRB 1350 (1978); *P & L Cedar Products*, 224 NLRB 244 (1976). General Counsel takes the position herein that the *Alleluia Cushion* theory should be applied to McKeon’s wage complaint because, although McKeon had not discussed the matter with other employees and was not authorized to speak on behalf of others, the complaint involved an issue that could have general application to all salaried employees of Respondent, and, therefore, it was a matter of general concern and constituted concerted activity under *Alleluia Cushion*. Thus, any retaliation against McKeon due to her wage complaint was violative of the Act.<sup>4</sup>

<sup>4</sup> While General Counsel recognizes that *Meyers I* and *II* and their progeny currently set forth Board law defining concerted activity, the Board has signaled a willingness to reconsider whether it should return to the *Alleluia Cushion* line of cases for defining concerted activity. See *C & D Charter Power Systems*, [318 NLRB 798 fn. 2 (1995)]; *Liberty National Products*, 314 NLRB 630 fn. 4 (1994).

The Respondent emphasizes in its brief that “the General Counsel failed to present evidence that any other employee was aware of Ms. McKeon’s claim or that other employees had similar complaints” and therefore “Ms. McKeon filed the wage claim on her own behalf” and “the filing of the wage claim was not protected concerted activity.”

The Board in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), found constructive concert and hence protected activity when an individual acting on his own, but concerning a matter of workplace safety common to all employees, contacted a Federal workplace safety agency. That doctrine, were it current law, would clearly apply to the actions of McKeon’s in contacting the Colorado State Department of Labor respecting a claim based on an employer’s actions in docking a salaried employee’s wages. Many of the nonsupervisory employees at the Clinic are salaried. In a protracted litigation however, culminat-

ing in *Meyers Industries*, 281 NLRB 882 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), the Board exercised its discretion to specifically overrule *Alleluia* and abandon its constructive concert doctrine. As the counsel for the General Counsel notes, in the cases cited in his quoted argument above, various Board members since this abandonment of the constructive concert doctrine have questioned *Meyer's* rejection of *Alleluia*. The *Meyer* decision, even if questioned from time to time by individual members of the Board, has not been reversed by the Board and, as the General Counsel concedes, remains good law.

The General Counsel urges that I, in effect, overrule *Meyers* and return to the *Alleluia* standard. This is surely a proper argument for the General Counsel to make to the Board and therefore is properly made to me to preserve the matter for later argument to the Board, but reversing current Board law is simply beyond my reach as an administrative law judge. Administrative law judges are required from time to time to apply the Act and the Board's holdings to new areas or to determine the most appropriate Board cases or doctrines to follow where precedent is in conflict. Thus, interpolation and in some cases extrapolation of current doctrines are properly undertaken by a judge seeking to apply the law to a given case. The doctrine of *stare decisis*, i.e., the principal of judicial adherence to decided cases, however, generally requires lower courts to apply the settled law of prior decisions wherever applicable without modification or change. The Board has long specifically required its administrative law judges to follow Board precedent unless and until such precedent is changed by the Board or the Supreme Court, even in circumstances where contrary current Court of Appeals law exists. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). As the General Counsel concedes and as I find, the constructive concert doctrine and the *Meyers* decision is squarely involved here.

I view the requirement that judges follow precedent as extending to areas where the law is under challenge and individual Board members have expressed reservations about current law. Indeed, even were it seemingly apparent that a current Board majority would soon change current law, unless and until that law has been changed by Board or Supreme Court decision or other means such as the issuance of a new rule or regulation, the current law will continue to bind me. This being so, I decline to reevaluate *Meyers* or return to the *Alleluia* constructive concert doctrine. *Meyers* is current law which binds me. It squarely holds that individual actions such as those of McKeon in dealing with the Colorado State Department of Labor are not concerted activities and therefore are not protected under the Act. I so find.

Given this finding, I shall not further consider whether McKeon suffered adverse actions as a result of her contacts and charge with the Colorado State Department of Labor. The General Counsel must take its argument that the doctrine of constructed concert should be resurrected by the Board.

### 3. Was McKeon discriminated against because of her protected concerted activities

The complaint at paragraph 4 alleges three separate acts of discrimination against McKeon: the warning given her on February 2—complaint subparagraph 4(a), the reduction in her work hours announced on February 21—complaint subparagraph 4(b), and her discharge on March 7, 1996—complaint subparagraph 4(c). These acts are alleged to have been under-

taken by the Clinic because of McKeon's protected activities in violation of Section 8(a)(1) of the Act.

As the parties ably discussed on brief, the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching discrimination allegations which was recently restated in *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996):

Under [the *Wright Line*] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, [114 S.Ct. 2551, 2557–2558 (1994)].

That test shall be applied here.

*a. Was McKeon warned on February 2 because of her protected concerted activities of calling UNUM insurance on January 12 and her remarks at a staff meeting on January 23*<sup>11</sup>

The General Counsel contends that McKeon was warned on February 2 because of her January 12 telephone call to the insurance company and her attempts to raise the subject of disability coverage at the January 23 staff meeting. Thus, the General Counsel argues the reasons given McKeon were simply pretext designed to cloak the true, but improper motive of Hayes—animosity against McKeon because of her protected concerted activity. The General Counsel also notes the timing of the warning as occurring very shortly after the occurrence of McKeon's protected conduct.

I have found McKeon's call and staff comments to be concerted and protected activity. There is no dispute that Hayes was upset by McKeon's call to the insurance carrier which had potentially adverse consequences for the Clinic and was angered by the attempt of McKeon to raise the insurance matter at the staff meeting. Since Hayes was on vacation until Monday, January 22, she learned of each of the protected acts of McKeon during the week before the Friday, February 2, 1996 meeting with McKeon at which she was warned. Thus, there is a close temporal relationship between the protected activity and the warning. Further, the session with McKeon on February 2 was—other than contested informal discussions between Hayes and McKeon some months earlier—the first time at which management had informed McKeon of its perceived inadequacies in her work or of employee complaints about her availability.

The Respondent concedes the timing of events is not propitious from the Respondent's perspective. Counsel for the Respondent argues, however, that Hayes' passions or animosity generated by McKeon's two actions at issue were short-lived and quickly passed without consequence to McKeon's employment. Further, the Respondent notes that the meeting on February 2, originally scheduled for February 1, was not intended to be a formal matter, but rather more of an informal, mediated session to let McKeon know that there was recurring

<sup>11</sup> The two events were known to Hayes and Carman at the time the warning was issued and therefore it is unnecessary to separate the two protected activities in determining if McKeon was improperly discriminated against.

problems not in the quality of her work but rather in her being at the Clinic available to work. The Respondent emphasizes the denial of the Respondent's agents that improper motive underlay any of the actions taken respecting McKeon.

Versions of the February 2 meeting are not in substantial dispute. There is no doubt Hayes raised the matter of McKeon's making appointments and being gone from the Clinic during working hours and that McKeon was angry because she had earlier discussed at least certain of these matters with Hayes. There is no doubt that Hayes suggested that McKeon was not working full time, that McKeon challenged the assertion she was not checking out properly, and that Hayes labeled McKeon's denial as inconsistent with the reports she had received from other Clinic employees. Finally, there was no question that a series of procedures were put in place following the meeting to monitor McKeon's activities. While Hayes testified that the meeting was intended to be less acrimonious, in her view McKeon became very angry and challenging and it seems clear in Hayes' version of events that her own conduct took a sterner aspect in response to McKeon's reaction. In all events, it is clear that Hayes told McKeon that, if her unsatisfactory behavior continued, she could be changed from a salaried to an hourly employee or changed from a full-time to a half-time employee.

The issue is not so much as what was said at the February 2 meeting, but rather whether the matters asserted by Hayes were the true reason for the meeting and warning given to McKeon. On the motive question, Carman corroborates Hayes. Carman testified that the February 2 meeting came about in consequence of a joint decision of Murphy, Hayes, and himself to raise employee complaints with McKeon. Carman testified he had received various complaints from other employees respecting McKeon's "frequent phone calls, not notifying of when she was leaving, the excessive time spent out of work for other appointments" and concluded McKeon's job performance was involved and needed to be addressed.

Evaluating this allegation of the complaint under *Wright Line*, it may well be that the General Counsel's evidence concerning timing, animus, and the lack of any prior warning of similar kind sustains the General Counsel's prima facie case shifting the burden of persuasion to the Respondent. On this record, however, I find, even in that situation with the burden explicitly on the Respondent, that the Clinic would have taken the action it did on February 2 even had McKeon not engaged in any prior protected concerted activity.

In large measure, this finding is based on the weakness of the General Counsel's argument that the animosity of the Clinic and Hayes for McKeon's call to the insurance company and comments at the staff meeting would have caused Hayes to discriminate against McKeon, and that in order to do so, Hayes and Carman would, in affect, fabricate, or enhance employee complaints in order to create a pretext to justify taking action against McKeon on February 2 and to lie about the entire matter at the trial. Hayes admitted unhappiness about the fact that her employees had contacted the insurance carrier and supplied it with information that had the potential to adversely effect the Clinic, and that unhappiness would logically have been directed against both McKeon and Carman. There is no evidence that one had a greater role than the other nor that the Clinic or Hayes in particular thought that this was so. Yet, there is no suggestion that Carman—who as a supervisor was not protected under the Act for his conduct in contacting the insurance

carrier—was warned nor treated adversely by Hayes. Nor do I find the staff comments of McKeon, while clearly of immediate significance to Hayes, was the type of conduct which would have or did produce a lingering hostility of sufficient size and duration to cause adverse action to be taken against McKeon. Finally, I am simply unable on this record, given my favorable evaluation of the demeanor and credibility of Carman, to reject his testimony that the warning meeting was caused by employee complaints respecting McKeon, or to hold that such was not the case and rather that Hayes and Carman were engaged in a conspiracy respecting the matter. Rather, I specifically find there were precipitating employee complaints to Carman about McKeon which caused the February 2 meeting.

All of this being so, and on the basis of the record as a whole, including my evaluation of the relative demeanor of the witnesses on the matters in dispute, I simply find the General Counsel's evidence is insufficient to prevail over the testimony of Carman and Hayes respecting the events and motivations underlying the February 2 meeting and the warning that arose out of it. Accordingly, I shall dismiss the allegations of subparagraph 4(a) of the complaint.

*b. Were McKeon's hours reduced on February 21 because of her protected concerted activities*

There is no doubt that McKeon was told in a meeting with Hayes, Carman, and Murphy on Wednesday, February 21, that her hours were to be cut from 8 to 3 hours per day and that her hours were in fact cut constant with the announcement effective Monday, February 26.

The General Counsel argues the reduction in McKeon's hours on February 21 was but a continuation of the Respondent's campaign against her commencing with her earlier warning. Counsel notes the reduction in hours made McKeon ineligible for the disability insurance program which had been the source of difficulty between McKeon and the Clinic heretofore. Counsel notes that the Respondent's proffered business defense that a reduction in hours had been planned by Murphy, Carman, and Hayes over a course of weeks preceding its implementation is not clearly supported by specific testimony nor documentary evidence. Counsel also states that the argument that McKeon's hours were cut in response to business necessity had not been advanced to the regional office during the meetings held with Hayes and Carman during the investigation of the charge and should be regarded as simply a recent fabrication.

Murphy and Carman each testified that hours of employees and McKeon's hours in particular had been under discussion for a period of weeks, but only Hayes testified specifically that the decision to reduce McKeon's hours had been made before February 21, and was specifically designed to match McKeon's morning work schedule. In this sense the Respondent's defense is weaker than that offered respecting the February 2 warning for in that earlier situation Carman's testimony was more corroborative of Hayes than that presented respecting the reduction in hours.

If the Respondent's defense concerning the cut in hours is weaker than that offered respecting the warning, so, too, the General Counsel's theory of animus and other indirect evidence of a violation of the Act is more attenuated. Thus, the significance of the protected conduct—the call to the insurance company and the staff meeting comments—was further in the background and was less significant both in consequence of the passage of time and, as a result of the fact, that the insurance

carrier had indicated the questions and problems concerning the policy had been resolved and the coverage would be continued.

Most importantly, however, having found that the February 2 warning was not based on improper grounds, there is little basis for finding that the subsequent adverse action against McKeon was undertaken based on McKeon's protected activities occurring in January. For all of these reasons and based on the record as a whole, I find that there is insufficient evidence to establish the General Counsel's prima facie case that the Respondent reduced McKeon's hours because of her telephone call to UNUM Insurance and/or because she spoke up at the staff meeting on January 23. I shall therefore dismiss complaint subparagraph 4(b).

*c. Was McKeon's termination on March 7 because of her protected concerted activities*

The Respondent's witnesses, Hayes, Murphy, and Carman, testified that they did not initially intend to terminate McKeon at the meeting of March 7. Rather, they asserted that the meeting was to discuss the perceived inadequacies in McKeon's performance noted above and to attempt to induce her to improve her conduct and performance. Hayes testified that observing the obduracy and defensiveness of McKeon as Carman attempted to discuss her deficiencies, Hayes simply determined the situation was unsatisfactory and discharged McKeon.

The primary issues as to this count of the complaint are two-fold.<sup>12</sup> First is the issue of Hayes subjective motivation in firing McKeon. The second is the timing of the decision to fire her. The Respondent's three meeting participant witnesses testified that Hayes decision to fire McKeon was taken during the course of the March 7 meeting. Hayes testified that her determination arose from observing the hostility and defensiveness of McKeon during Carman's discussion with her concerning her failings at the meeting.

The General Counsel argues that there is evidence to suggest that the Respondent—or at least Hayes—had decided to discharge McKeon at least by March 4 because by that time Hayes had solicited and received from insurance agent Nowels a “recap” of events surrounding the phone calls to UNUM in January. Hayes had also transmitted to her human resources consultants before the March 7 meeting Carman's list, described above, which was given to McKeon at the meeting and was the basis for the discussions held.

I agree with the General Counsel that the noted evidence tends to support his theory that the discharge was preplanned and, for that reason, was arguably because the Respondent, or at least Hayes, was hostile to McKeon because of her earlier activities. Such an argument would have far greater force in supporting a finding of a violation of the Act, however, if McKeon's charge with the State Department of Labor were protected concerted activity.<sup>13</sup> That charge and McKeon's injury reported as occurring on February 21 just before the meeting of Hayes, Murphy, and Carman with McKeon that day,

<sup>12</sup> The General Counsel argues that the discharge was but the culmination of the course of wrongful discrimination earlier occurring on February 3 and 23. Further, the General Counsel argues that McKeon's conduct at the meeting was, at least in part, a response to that earlier illegal course of conduct and therefore was entitled to “more latitude” that the Respondent gave it. These arguments are defeated by my earlier findings that the warning and reduction in McKeon's hours were not improper.

<sup>13</sup> See discussion, sec. 3,d, the Department of Labor Claim, *infra*.

and clearly suspected by the Clinic's agents as being concocted, could also well be argued as a basis for a motivation to discharge McKeon given the closer time of their occurrence to the discharge.

On this record, however, I am unable to sustain the General Counsel's argument on the evidence offered. Having found that the earlier two actions of the Clinic against McKeon alleged as violations of the Act were not undertaken because of McKeon's call to the insurance company nor because of her conduct at the staff meeting, the General Counsel's case as to the discharge allegation is rendered especially difficult. There is simply insufficient evidence of other than very short term essentially impulsive hostility by Hayes to McKeon's protected concerted activity and sufficient, if not overwhelming, evidence that the Respondent's agents took the actions they did based on McKeon's perceived inadequacies independent of her protected acts.

All this being so, and based on the record as a whole and the same evaluative process set forth in resolving the two earlier allegations, I find the General Counsel's evidence simply does not meet the General Counsel's burden even to establishing a prima facie case that McKeon's March 7 discharge was based on her January activities found protected, above. Accordingly, I find complaint subparagraph 4(c) is without provable merit and will be dismissed.

*d. The Department of Labor claim*

The General Counsel also alleged that the Respondent reduced McKeon's hours and thereafter discharged her because of her conduct in filing a charge with the Colorado State Department of Labor. These theories of a violations of the Act were clearly part of the complaint allegations in subparagraphs 4(b) and (c), but have not been evaluated above save as discussed as a basis for finding the Respondent did not discriminate against McKeon for other protected concerted activities. Further, these allegations raise significant questions of fact which are not resolved by my findings, above, i.e., that McKeon's insurance inquiry and staff meeting conduct did not precipitate the adverse actions against McKeon by the Clinic as alleged in the complaint.

I need not resolve these factual questions concerning whether Hayes or the Clinic's animus against McKeon because of her salary claim with the Department of Labor caused the Respondent's reduction in her hours or her discharge, however, because I have determined, above, that McKeon's actions respecting the Department of Labor claim were not concerted and therefore are not protected conduct under current Board law. That being so, no violation could be sustained whatever factual resolution occurred respecting the Respondent's animus based on such unprotected employee conduct. Thus, in addition to the analysis under taken above, under the General Counsel's theory that McKeon's actions with the State Department of Labor were constructively concerted and hence protected, I find that complaint paragraphs 4(b) and (c) are also without merit under this theory and should be dismissed.

On the basis of the above findings of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

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<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The complaint shall be dismissed in its entirety.

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adopted by the Board and all objections to them shall be waived for all purposes.