

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PURITAN-BENNETT CORPORATION
A DIVISION OF TYCO HEALTHCARE

and

Case 25-CA-28562

COBI S. COBIAN, An Individual

Derek A. Johnson, Esq., for the General Counsel.
Jonathan J. Spitz and Amity H. Farrar, Esqs., of Atlanta, GA, for the Respondent.
Allen E. Grotke, Esq., of Greenwood, IN, for the Charging Party.

Decision

Statement of the Case

David L. Evans, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Indianapolis, Indiana, on July 10-11, 2003. On February 4, 2003, Cobi S. Cobian, an individual, filed the charge in Case 25-CA-28562 alleging that Puritan-Bennett Corporation, a Division of Tyco Healthcare (the Respondent) was engaging in unfair labor practices as set forth in the Act. After administrative investigation, the General Counsel of the National Labor Relations Board (the Board) issued a complaint which alleges that the Respondent had violated Section 8(a)(1) of the Act by suspending and discharging Cobian in August 2002¹ because that employee had engaged in concerted activities that are protected by Section 7 of the Act (protected concerted activities).² As amended at the hearing, the complaint also alleges that in February 2003 the Respondent violated Section 8(a)(1) by telling an employee that Cobian had been discharged because of his protected concerted activities. The Respondent filed an answer admitting that this matter is properly before the Board³ but denying the commission of any unfair labor practices.

¹ Unless otherwise indicated, all dates mentioned are in 2002.

² Section 7 provides that employees “shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 8(a)(1) provides that it is unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”

³ The Respondent admits that it has an office and place of business in Plainfield, Indiana, where it is engaged in the manufacture and non-retail sale of respiratory products for the healthcare industry and that, during the year preceding the alleged unfair labor practices, it purchased and caused to be delivered to its Plainfield facility, directly from suppliers located at points outside Indiana, goods and materials valued in excess of \$50,000. Therefore, at all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Upon the testimony and exhibits entered at trial,⁴ and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

A. Facts

Brad Hart is the Respondent's plant manager; Norman Roberts is its human resources manager; Jeff Earnest is its portable-products team manager; and Joe Abbott is that team's immediate supervisor. Kevin Ogle is a leadman (non-supervisory) under Abbott. Richard Haydon is the Respondent's stationary-products team manager, and he is the senior production supervisor subordinate to Hart. During the first week in August, Hart was absent, and Haydon then acted as plant manager. Tyco Healthcare has divisions in the country other than the Respondent. Personnel matters for Tyco's divisions are ultimately determined by Paul Ulatowski, Tyco's chief of human resources. Ulatowski's office is located at Tyco's headquarters in California. None of the Respondent's employees at the Plainfield plant are represented by a union.

Before the events of this case, employees did not clock in and out using time cards. (As one employee-witness testified, "You just showed up.") During July, the Respondent, after a series of meetings with the employees, instituted the Kronos time-keeping system. Under that system, employees were issued identification badges which were used both for security-access and time-keeping. (When a badge is swiped through a time-clock, an employee's time is recorded for a computer that generates the payroll.)

The General Counsel's evidence

Cobian was a production employee who, until his suspension on August 1 and discharge on August 7, reported to Abbott on the portable-products line. Marti Pena, John Cripe and Tom Nolan were other employees who worked under Abbott during August. On August 1, Pena, Cripe and Nolan appeared at work without their Kronos badges.

Daily production meetings are conducted for the approximately 30 employees on the portable-products line. Usually, Ogle starts the meetings about one hour after starting time, and Abbott comes in near the end. Usually, the meetings do not last more than 15 minutes. On August 1, starting time was 7:00 a.m. A work break was scheduled for 8:30 a.m. Before the daily production meeting started on August 1, Abbott saw that Pena did not have her Kronos badge with her. Abbott told Pena to go home and get it. Pena left the plant to do so. When Abbott joined the production meeting, he told his subordinates that he had sent Pena home and asked if anyone else had come to work without his or her badge. Cripe and Nolan acknowledged that they also had left their badges at home, and Abbott told them to leave also. Cripe and Nolan left the production floor, but, instead of leaving the premises, they went to the Respondent's personnel office to complain to Roberts. (Their complaint was successful; Pena, Cripe and Nolan were returned to work with no loss in pay. Charging Party Cobian was not involved in the discussions among Roberts, Cripe and Nolan.)

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Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who re-starts an answer, *and that re-starting is meaningless*, I sometimes eliminate, without ellipses, words that have become extraneous; e.g., "Doe said, I mean, he asked ..." becomes "Doe asked ...". I also omit some extraneous expressions such as "you know" and "O.K.?" The transcript is replete with errors. Most errors are obvious, and no party has filed a motion to correct the record. I am constrained, however, to point out that, at p. 105, L. 21, I said, "I adhere to my ruling," not "I'll hear it in my room."

5 Cobian testified that, at the August 1 production meeting, when Cripe and Nolan left pursuant to Abbott's instruction, "Pretty much the whole group was asking why and for what reason. ... I asked for what reasons the Company wanted to send [them] home." Abbott, according to Cobian, "just said they just had to leave the building immediately." Cobian testified that there were "between 20 and 30" employees at the August 1 production meeting, but on direct examination he did not name any employees, in addition to himself, who questioned Abbott's sending Pena, Cripe and Nolan home. On cross-examination, Cobian admitted that he could not remember who else questioned Abbott's actions.

10 As the August 1 production meeting was breaking up, Cobian told employee Tamara Sue Wright that he was, according to Wright, "gonna go up front and check out the policy." Wright replied, "O.K.". There is no evidence that Cobian told any other employee that he was going "up front" for any reason. Cobian then went to the Respondent's Human Resources Department.⁵ The first person that Cobian met at that department was employee Brooke Lawrence, Roberts' assistant. 15 Cobian asked Lawrence if the Respondent had any written policy that would permit Abbott's suspension of employees for not having their badges when they came to work. As Cobian and Lawrence were talking in the office, Abbott appeared. According to Cobian, Cobian told Abbott that Lawrence had just said that he could not suspend employees for not having their badges; Abbott told Cobian "to get my fucking ass back to work" in an "angry, loud, mad" tone and demeanor. Cobian 20 then left the office. Cobian testified that he left the office because: "I was mad, embarrassed, that he said that to me in front of people in the HR department." After walking a few feet toward his work area, Cobian turned-heel and returned to confront Abbott who, at that point, was in the conference room of the human resources department talking to Cripe and Nolan (who were in the conference room at that time because Lawrence had told them to go there to wait for Roberts.) Cobian testified that he told Abbott "that I wasn't his wife, his kid, his dog, [and] he shouldn't talk to me like that. We 25 should have respect for each other." Cobian then went back to his work area.

30 Cobian further testified that after working about an hour, Earnest came and escorted him to the human resources department's conference room. There, Earnest and Roberts asked Cobian what had happened. Cobian gave his version. Roberts and Earnest, further according to Cobian, told him that "I was a troublemaker, and if I wouldn't have been bringing up issues and wouldn't have been up in the HR none of this would've happened. I had no right to be up in HR asking about company policies." Further according to Cobian:

35 After Norm said that I had no right being up there asking about company policies, I looked at him, I said, "You know, if you guys don't take care of this, I will outside the company with my attorney."

Jeff Earnest looked at me says, "Well, I'll take that as a threat."

40 I said, "Well, I can't tell you how to take things; if that's how you feel, so be it."

45 Roberts and Earnest thereupon sent Cobian back to work. Cobian testified that he remained at work for about an hour and one-half when Abbott came and escorted him back to the conference room. Present with himself and Abbott in the room were Roberts, Earnest and Haydon. Earnest told Cobian that he was suspended because the supervisors "feel like you threatened Joe Abbot." Cobian responded by asking that the reason for the suspension be put in writing. Earnest refused that request and took Cobian's time-security badge. Earnest and Haydon then escorted Cobian from the plant.

50 On August 7, Cobian returned to the plant pursuant to a call that he had received from Roberts. He was met by Roberts who told Cobian that he was terminated under the Respondent's "zero-tolerance policy." Cobian then left the plant. On cross-examination, Cobian testified that during

⁵ Cobian testified that when he left the production floor, "it was break time." Cobian was contradicted on this point by the General Counsel's witness as well as the credible testimony of the Respondent's witness. Break time did not begin until 8:30 a.m., and it was still at least a few minutes short of that point.

Abbott's production meeting of August 1 "everybody," including himself, asked Abbott why he was sending employees home for failing to have their badges, but he acknowledged that no other employee asked or encouraged him to go to the office.

5 The General Counsel called current employee Michael Sanders to corroborate Cobian's testimony. When asked if any employees spoke up at the August 1 production meeting, however, Sanders replied, "Not that I know of." Sanders further testified that in February 2003 he had a confrontation with Ogle (again, the leadman under Abbott). Sanders told Ogle that some employees were doing only the work that they wanted to do and that he (Sanders) was thinking of mentioning that fact to a corporate-level manager who was visiting the Plainfield plant that day. Sanders admitted that during the confrontation with Ogle he got "hot," raised his voice and may have used profanity. Shortly thereafter, Abbott called him to the conference room. The General Counsel asked Sanders, and Sanders testified:

15 Q. So tell me about the, the meeting then with Joe Abbott in the conference room then. How did that meeting start?

A. I can't really recall how, I mean, we, we got into discussion of Cobi, you know, people look up to me and they, you know -- I, I try to stand up for people, too. I mean, it's because nobody else'll do it. They get walked on over there. And --

20 Q. What did you, what did you say to Mr. Abbott, if you recall?

A. What'd I say to Mr. Abbott? I can't really recall what I was saying to him, but I know I was, I was told that, you know, I'm not Cobi Cobian. This is how I, you know, it's been a while. I'm not Cobi Cobian, you know, I should not, I shouldn't stick up for people is how I understood, I shouldn't be doing that type of thing because you see what it got Cobi.

25 Sanders prides himself in speaking up for other employees, and he could not, or would not, distinguish between what Abbott may have said and what Abbott may have meant about Cobian's speaking up for other employees. I tried to clarify the matter:

30 JUDGE EVANS: Well, wait -- you said you "understood" that. Tell us what, what Abbott said out loud so, if I'd have been there, I would've heard it.

THE WITNESS: He said I'm not Cobi Cobian, you know, I shouldn't, I shouldn't be like Cobi Cobian because you, you know, you shouldn't do, be like him because you see where it got him -- stick, sticking up for people.

35 Based on this testimony by Sanders, the complaint, as amended at trial, alleges that the Respondent, by Abbott, in violation of Section 8(a)(1), "informed employees that [other] employees had been discharged for engaging in protected concerted activity." The General Counsel further contends that Abbott's statement to Sanders constitutes a binding admission that the Respondent discharged Cobian because he had engaged in the protected concerted activity of complaining to management on behalf of other employees. On cross-examination, Sanders admitted that, shortly after Abbott spoke to him in February, he, Abbott and Roberts discussed what Abbott had said about him (Sanders) being like Cobian. Sanders first denied, then admitted, that Roberts stated that his situation and Cobian's were different because Cobian had made a threat.

45 The General Counsel also called Nolan who testified that several employees at the August 1 production meeting muttered "bullshit" when Abbott told him (Nolan) and Cripe to leave the plant because they did not have their badges. Nolan, however, did not testify that Abbott did anything to indicate that he had heard the muttering. On cross-examination, Nolan admitted that neither he nor Cripe asked Cobian to complain to management on their behalf about being suspended (sent home) on August 1.

The Respondent's evidence

Abbott testified that, when he went to the human resources department on August 1 and found Cobian (who was talking to Lawrence), Cobian told him that he had no right to send Pena, Cripe and Nolan home. Abbott asked Cobian to go back to work (as it was still before break time). Abbott testified that Cobian replied by cursing, and then "I told Cobi to get his ass back to work." Cobian left the department. Abbott then went into the conference room where Cripe and Nolan were waiting to talk to Roberts. Cobian re-appeared and, further according to Abbott, "He told me I was not gonna fucking talk to him that way." Abbott left the conference room to find Roberts and Earnest and report what had happened. After the report, Abbott went to the production floor, and Roberts and Earnest went to the conference room to talk to Cripe and Nolan.

Roberts, who hired as the Respondent's Human Resources manager on May 27, testified that when Abbott reported to him and Earnest what had transpired, he and Earnest "counseled" Abbott that he should not have sent Pena, Cripe and Nolan home for not having their badges and that he should not have ordered Cobian back to work using the term "ass." Roberts and Earnest sent for Cobian about 9:30 a.m. Roberts testified on direct examination that the only purpose in sending for Cobian was to get his side of the confrontation with Abbott, but on cross-examination he acknowledged that he told the EEOC, in a statement that he had submitted to that agency in response to a charge that Cobian had filed, that there were 2 reasons for sending for Cobian; *to wit*: getting Cobian's side of the confrontation and finding out "what his concern was with other people."

Roberts further testified that he and Earnest asked for Cobian's account of what had happened earlier. Cobian told Roberts and Earnest that, "[h]e felt that it was unfair that the people should be asked to go home to pick up their time badges. And that he had come to see Brooke [Lawrence] to see if there was a written policy on the matter." Roberts replied that there is an "open door policy," but employees should not come to the office during work time, without permission of their supervisors, to present problems. When asked what Cobian then replied, Roberts testified:

He wanted to know what we were gonna do about Joe [Abbott]. ...
He was advised that, that this meeting was between Jeff [Earnest], myself, [and] Cobi [Cobian], and that we would deal with individuals on an individual basis and on a confidential basis. That our meeting that morning did not concern Joe. At this point we wanted to talk to him, about him and what took place in his eyes with respect to the confrontation, that Joe would be dealt with separately. ...

At that point he said, "If you're not gonna deal with Joe, then I'll deal with him myself outside of here; I don't care whether I lose my job." ...

Jeff responded first. He said, "Cobi, we are now entering a whole new issue. You've just threatened a supervisor."

Before Cobi got a chance to speak then I spoke up and said, "Cobi, there's no reason to go there."

At that point he repeated, "If you're not gonna deal with Joe, I'll deal with him myself outside of here; I don't care whether it costs me my job." ...

(During the General Counsel's presentation of evidence, Cobian denied that he ever told the supervisors that he did not care if they fired him for what he was saying.) Roberts further testified that he and Earnest told Cobian to take a break in the cafeteria; then they reported the matter to Haydon who was acting as plant manager in the absence of Hart. Roberts and Earnest recommended to Haydon "[t]hat we would suspend Cobi that afternoon indefinitely and that we would recommend termination. The suspension was to give us time to review it." Haydon agreed. Roberts then contacted Abbott and told him to bring Cobian to the office. Abbott did so, and, in the presence of Abbott and Roberts, Earnest told Cobian that he was suspended pending further notice and that management would let him know as soon as possible what the outcome of the suspension was.

On August 2, Roberts sent an e-mail to Ulatowski (again, the chief of human resources for Tyco whose office is in California). In the e-mail, Roberts described the situation and recommended the discharge of Cobian. On August 5, Roberts also participated in a telephone conference with Ulatowski and one Dan Gautier who is another official with Tyco's corporate management. After going over his investigation, Roberts again recommended discharge of Cobian for threatening Abbott. Ulatowski and Gautier agreed.

On cross-examination, Roberts was shown a copy of his August 2 e-mail to Ulatowski. In the e-mail, Roberts gives an approximately 500-word account of what had happened on August 1.⁶ Roberts begins the e-mail by stating that he had suspended Cobian "for making a threat of violence against a supervisor," and he concludes by recommending the discharge of Cobian. One sentence of Roberts' statement to Ulatowski is:

[Cobian] was unaffected by all of this [the suspensions of Pena, Cripe and Nolan], but Jeff Earnest, Department Manager, says he has a habit of always sticking his nose in everything and was probably a driving force in the previous organizing attempt.

(The last organizing attempt was in 2000.) On redirect examination, when asked why he put this sentence into the e-mail, Roberts testified:

Because I've always been trained to sit there and put all of the information together. The people that I report to indirectly are generally quite often in another state, in this case 2,000 miles away. If ... there's other issues to consider with respect to what should happen in the event of litigation or, or could it prompt litigation, they need to have those facts before, not after.

Roberts denied that Cobian mentioned going to an attorney during his August 1 meeting with himself and Earnest.

Earnest testified that on August 1, after he and Roberts told Cobian that his problems with the suspensions of Pena, Cripe and Nolan should have been handled differently:

Mr. Cobian went on and he said, "What are you guys gonna do about Joe Abbott?"
And I explained to him that we were not here to talk about Joe, I wanted to get his side of the story.

And he said, "I don't care what you guys do, I will take care of this in the parking lot." ...
I stopped Mr. Cobian at that point and I informed Mr. Cobian that now we are dealing with another issue because of his -- the statement that he just made.

And he said, "I don't care. This is fucking bullshit. I will handle it in the parking lot. ... I don't care if you fire me. I will handle this in the parking lot."

Earnest had been present when Roberts testified. Further on direct examination, Earnest acknowledged remembering that Roberts had testified that Cobian had said that he would deal with Abbott "outside of here." When asked to explain the difference, Earnest replied, "I am going with what I heard, that I did hear Mr. Cobian say he would handle it in the parking lot." Earnest also denied that Cobian mentioned going to an attorney during his meeting with himself and Roberts.

Abbott acknowledged that he spoke to Sanders in February 2003 and that Cobian was then mentioned. Abbott testified that Ogle had reported to him that Sanders had been disruptive on the production floor. When Abbott met Sanders in the human resources department to discuss the disruption:

⁶ Roberts also included a short statement by Lawrence about the part of Cobian's conduct that she had witnessed.

Mr. Sanders at the time was talking about another employee out there and he mentioned that management might not be scared of him but he wasn't. So I took that as a, not a threat, but it could lead to a, a potential threat. ...

I said he needs to watch what he says so that could not be interpreted as a threat, and be in a situation like with what happened with Cobi.

On cross-examination, Abbott named the employee to whom Sanders had referred as Norm Nelson. Abbott further acknowledged that Sanders was not given any formal discipline over the matter; Abbott explained, "It'd be like counseling This was a conversation where I was calming the individual down."

B. Credibility Resolutions and Conclusions

On brief, the Respondent argues that Cobian's protest to Roberts and Earnest about the discipline of Pena, Cripe and Nolan was unprotected because it was not the product of any discussions or agreements among employees before it was undertaken. I agree that Cobian did not have the support, encouragement or even consent of any other employees when he went to the human resources department,⁷ but I nevertheless disagree with the Respondent's conclusion. An employee's confronting management about its actions that have adversely affected the terms or conditions of employment of other employees is the essence of "concerted activities for the purpose of ... mutual aid or protection" under Section 7. As stated most recently in *Phillips Petroleum Company*, 339 NLRB No. 111 (July 31, 2003), the law is that:

Section 7 of the Act protects the right of employees to engage in concerted activity for their mutual aid and protection. It is well settled that the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." ^{10/} Such individual action is concerted as long as it is "engaged in with the object of initiating or inducing ... group action." ^{11/} The Board has also found concerted conduct when an individual attempts to bring a group complaint to the attention of management. ^{12/}

^{10/} *Cibao Meat Products*, 338 NLRB No. 134, slip op. at 1 (2003) (quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)).

^{11/} *Id.* (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). Accord: *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), *enfd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

^{12/} See *Meyers II*, 281 NLRB at 885, 887.

In analyzing the case before it, the Board in *Phillips Petroleum* found a violation where an employee spoke up to management about denials of leave to himself and other employees. In so doing, the Board also cited cases involving employees speaking up at group meetings where prior consent and agreement of other employees was not possible, much less a requirement; *to wit: NLRB v. Caval Tool Division*, 262 F.3d 184, 190 (2d Cir. 2001), and *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987).⁸ And that is the case here. As Roberts phrased it in his statement to the EEOC, which statement I credit,⁹ he and Earnest brought Cobian to the office in the first place, not only to get his side of the confrontation with Abbott, but to find out "what his concern was with other people." Roberts also admitted that, when Cobian got to the office, he told Roberts and Earnest that, "[h]e felt that it was unfair that *the people* should be asked to go home to pick up their time badges." (Cobian himself, of course, was not one of those "people.") And Abbott testified that, when he reached the human resources department on August 1, the first thing that Cobian said to him was that

⁷ Cobian informed Wright that he was leaving the production area to go to the office to "check out" the policy, but he did not seek her consent before he did so.

⁸ See also, *Neff-Perkins Co.*, 315 NLRB 1229 (1994).

⁹ See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

he did not have a right to suspend Pena, Cripe and Nolan. That is, Cobian was speaking for other employees on August 1, and the Respondent's supervisors knew it. Accordingly, I find and conclude that Cobian was engaged in a course of protected concerted activity when he approached management about the suspensions of Pena, Cripe and Nolan.

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The statutory protection that is afforded to employees who are engaging in protected concerted activities, however, is not boundless. As stated by the Board in *Bettcher Mfg. Corp.*, 76 NLRB 526, 527 (1948):

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A line exists beyond which an employee may not with impunity go, but that line must be drawn "between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in 'a moment of animal exuberance' (*Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service." [Quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815 (7th Cir. 1946).]

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That is, although the Act generally protected Cobian in his approach to management about the suspensions that had been imposed on Pena, Cripe and Nolan, that protection was lost if Cobian engaged in other

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conduct that rendered him unfit for further employment by the Respondent. The next question, of course, is one of fact: In what other conduct did Cobian actually engage?

5 Cobian testified that when Roberts and Earnest summonsed him to the office and told him that he should not question company policies, he replied that, “You know, if you guys don’t take care of this, I will outside the company with my attorney.” Cobian’s assertion that he told Roberts and Earnest that he was going to take up the matter “with my attorney” was awkwardly added after a distinct, and to this finder-of-fact telling, catch in his voice. It was as if Cobian was mentally stumbling over his own words because he knew that they were not true. Roberts and Earnest, however, were credible in their denials that Cobian ever referred to an attorney. But even before that, I also do not believe Cobian’s testimony that he challenged Roberts and Earnest to take care “of this,” supposedly referring to Abbott’s suspensions of Pena, Cripe and Nolan. I believe, and credit, the testimonies of Roberts and Earnest that Cobian asked them what they were going to “do about Joe,” and when they replied, in effect, that that was none of Cobian’s business, Cobian threatened to take matters into his own hands (again, without referring to an attorney). Cobian had been humiliated in front of fellow-employee Lawrence, and he was clearly angered by that humiliation, as was made clear by his testimony that, “I was mad, embarrassed that he said that to me in front of people in the HR department.” Cobian’s humiliation by Abbott was also made clear by Cobian’s testimony that he returned to tell Abbott “that I wasn’t his wife, his kid, his dog, and he shouldn’t talk to me like that.” That is, Cobian’s threat to take the matter further, to an attorney or elsewhere, was aimed at the conduct of Abbott’s humiliating him, not Abbott’s suspensions of Pena, Cripe and Nolan. Therefore, although Cobian had initiated a course of protected concerted activity when he came to the office to question Abbott’s right to impose the suspensions, he abandoned that course to engage in the self-satisfying demand that Abbott be punished because of what had happened only to him. That is, Cobian’s threat to take the matter further, to an attorney or otherwise, was not protected because it was not concerted, even if he did refer to an attorney.

30 And I do believe that Cobian threatened to do violence to Abbott. The General Counsel attempts to make much of the difference between the testimonies of Roberts and Earnest about what precisely Cobian threatened to do about Abbott. Roberts did testify that Cobian stated that he would “deal with him myself outside of here,” and Earnest did testify that Cobian stated “I will take care of this in the parking lot.” I believe, however, that if Roberts and Earnest wanted to collude in a proffer of false testimony they presumably would have gotten their stories straight about whether Cobian specifically referred to the parking lot. I therefore believe that the discrepancies in the testimonies of Roberts and Earnest are only natural, and minor, differences in honest recollections.

40 Whether Cobian threatened to even his score with Abbott “in the parking lot” or only “outside,” it was an obvious threat to do what Cobian knew that he could not do in the plant; *to wit*, physical violence. I am confident that Cobian had physical violence toward Abbott in mind because I believe, and specifically credit, the testimonies of Roberts and Earnest that Cobian added that he did not care if his statement about Abbott cost him his job. Moreover, even according to Cobian’s own account, when Roberts and Earnest told him that he was making threats, he did not deny it; instead he responded: “I can’t tell you how to take things; if that’s how you feel, so be it.” And when Earnest told Cobian later in the day that he was being suspended because the supervisors believed that he had made a threat to Abbott, Cobian responded by asking for that reason in writing, not by denying that he had intended to threaten Abbott.

50 On brief, the General Counsel contends that Cobian’s threat of violence was not strong enough to remove the protection of the Act. I have found that the threat was made in reference to Abbott’s humiliation of Cobian in the presence of Lawrence, and Cobian’s threat was therefore individual and not protected. But, assuming on some *res gestae* type of theory (or otherwise) that Cobian was still within the general protection of the Act when he threatened to take the matter further, I cannot agree with the General Counsel. On brief, the General Counsel states (twice) that Cobian’s threat was not “an imminent threat of physical violence.” The General Counsel

5 cites no case for the proposition that a threat of physical violence must be “imminent” before it constitutes good cause for discharge.¹⁰ Moreover, a delayed threat is just as perilous to the supervisor, and to the workforce, as an imminent one, and it is something that no employer should be forced to tolerate. That is, the employee who utters a delayed threat of violence is just as unfit for further employment as one who utters a threat that is imminent.¹¹

10 Nor do I believe the testimony of Sanders that, in February 2003, Abbott admitted that the Respondent had discharged Cobian because he had complained to management about the suspensions of Pena, Cripe and Nolan. Sanders was a most unimpressive witness. When asked how his meeting with Abbott began, Sanders, rather than answer the question, replied that people look up to him because “I try to stand up for people too. ... They get walked on over there.” When asked what he had said to Abbott, Sanders testified that he could not remember but, whatever it was, he “understood” Abbott’s reply to mean that he should not “stick up for people ... because you see what it got Cobi.” Then Sanders testified that what he “understood” was exactly what Abbott had said. It was clear to me that Sanders was there to supply missing evidence for Cobian, not to tell the truth. I believe, and credit, Abbott’s denials of Sanders’ testimony.

20 I shall therefore recommend dismissal of the Section 8(a)(1) allegation that Abbott admitted to an employee that Cobian had been unlawfully discharged. For the all of these reasons, and upon the record as a whole, I shall also recommend dismissal of the allegations that Cobian was suspended and discharged in violation of Section 8(a)(1).¹² Accordingly, I issue the following recommended¹³

25 ORDER

The complaint is dismissed in its entirety.

30 Dated at Washington, D.C.,

35 _____
David L. Evans
Administrative Law Judge

¹⁰ Certainly, the 2 cases cited by the General Counsel on brief do not rest on a lack of imminence for their findings that alleged employee threats did not cause the termination of the Act’s protection. *Caterpillar, Inc.*, 322 NLRB 674 (1996), turned on the fact that the threat to meet the supervisor “outside” was provoked by a blatant unfair labor practice. And *Leasco, Inc.*, 289 NLRB 549 (1988), held that the employee’s use of the phrase “kick your ass” was more of a common vulgarism than a threat, and that it was also provoked by an unfair labor practice.

¹¹ To be contrasted is *Felix Industries, Inc.*, 331 NLRB 144 (2000), as also cited by the General Counsel, where the discipline for an employee’s cursing during a course of protected concerted activity was found invalid, in part, because it was “unaccompanied by any threat.”

¹² I credit Roberts’ explanation of the reference in his August 2 e-mail to Ulatowski about Cobian’s suspected prior organizing activities. Moreover, even if those suspected activities could be considered to be a motivating factor in the Respondent’s suspending and discharging Cobian, the Respondent has shown that it nevertheless would have taken the actions that it did. See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

¹³ 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 adopted by the Board and all objections to them shall be deemed waived for all purposes.