Miller Plastic Products, Inc. *and* Ronald Vincer. Case 06–CA–266234

August 25, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

In March 2020, during the early stages of the COVID-19 pandemic, the Respondent terminated employee Ronald Vincer for raising concerns about its COVID protocols and decision to remain open for business. The Region issued a complaint alleging that Vincer had been discharged for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act. On May 27, 2022, Administrative Law Judge Michael A. Rosas issued the attached decision.[1] In finding the violation, the judge concluded that Vincer's COVID-related complaints constituted concerted activity under the *Meyers Industries* cases.[2] The Respondent excepts, arguing, among other things, that Vincer's COVID-related complaints constituted mere individual "griping," not protected concerted activity, under the Board's decision in *Alstate Maintenance, LLC,* 367 NLRB No. 68 (2019). The General Counsel filed cross-exceptions contending that the judge reached the correct result, but that *Alstate Maintenance* should be overruled because it deviated from *Meyers II* by narrowly construing and thereby limiting concerted activity.

We affirm the judge's conclusion that the Respondent violated Section 8(a)(1) by discharging Vincer. As explained below, although we agree with the judge that, contrary to the contentions of the Respondent, the finding of a violation is warranted under extant law, including *Alstate Maintenance*, we further find, in general agreement with the General Counsel, that *Alstate Maintenance* invited unwarranted restrictions on what constitutes concerted activity under Section 7 of the Act and is at least in tension with, if not contrary to, *Meyers II*. Accordingly, we overrule *Alstate Maintenance* to better promote the policies of the Act, consistent with prior precedent.[3] Applying the standard articulated in *Meyers II*, we affirm the judge's conclusion that the Respondent violated Section 8(a)(1) by discharging Vincer.

I. BACKGROUND

The Respondent manufactures plastic storage products at a plant in Burgettstown, Pennsylvania. Approximately 26 to 33 employees work in the plant, which includes a machine shop, a fabricating department, and an office.

The Respondent hired Vincer as a fabricator in 2015. Managers considered him to be a highly skilled employee, but Vincer was also very social, and he would often talk with other employees at their workstations, especially James Boustead. Casual discussion among employees while they worked was commonplace and accepted by management.

The Respondent periodically counseled Vincer about performance deficiencies, including excessive talking, distracting coworkers, and using his cell phone. On March 5, 2020, Donnie Miller, the Respondent's owner,

[1] The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the judge's recommended Order as modified and set forth in full below.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In adopting the judge's credibility resolutions, however, we find it unnecessary to rely on his statement that former Plant Manager Blake Trenary lacked credibility because, although he was no longer employed by the Respondent, his roommate still worked for the company. We rely, instead, on the judge's overall assessment of the demeanor of the witnesses.

We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

In affirming the judge's findings, we find it unnecessary to rely on his statements that Vincer's conduct was "inherently concerted." We further clarify that the quoted language in fn. 9 of the judge's decision is not a direct quotation of Chief Operating Officer Timothy Zeliesko's testimony with respect to the Respondent's disciplinary policies but rather an accurate paraphrasing of that testimony (Tr. 31–33).

We grant the General Counsel's request to correct the judge's apparently inadvertent omissions of words in two places in his decision. These changes are supported by the record and do not alter any material fact or conclusion of law. We also correct the judge's decision to reflect the transfer of the case to Region 5 after the issuance of the complaint. We find it unnecessary to pass on the General Counsel's requested correction pertaining to the testimony of employee James Boustead.

The judge included a provision in his recommended Order requiring the Respondent to offer reinstatement to employee Ronald Vincer, but he failed to include a corresponding provision in the notice. The judge also included a provision in the notice requiring the Respondent to file a report with the Social Security Administration allocating backpay to the appropriate calendar years. But see *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016) (revising remedy to require employers to file report with the Regional Director rather than the Social Security Administration). We shall substitute a new notice to conform to the Order as modified and to correct these inadvertent errors.

[2] *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[3] As noted in his concurring opinion, Member Kaplan agrees that Vincer's COVID-related complaints constituted protected concerted activity under well-established *Meyers* precedent and the majority decision in *Alstate Maintenance*. He disagrees, however, with our decision to overrule *Alstate Maintenance*.

counseled Vincer and Boustead about excessive talking and production times. However, Vincer was not issued a written warning.[4]

On March 6, the Pennsylvania governor issued an order proclaiming a disaster emergency as a result of the COVID pandemic. On March 16, the governor announced statewide mitigation efforts, effective March 17, including a stay-at-home-order and the closure of non-life-sustaining businesses. The announcement, however, did not identify which businesses qualified as life-sustaining.

Around this time, the emerging pandemic was a frequent topic of conversation within the plant. Plant Manager Blake Trenary and Chief Operating Officer Timothy Zeliesko periodically updated employees about developments. Vincer and Boustead spoke to each other about the pandemic every day. Boustead mentioned that he was at high risk for serious illness because of past medical problems. Vincer told Boustead and other employees that he believed that the Respondent was not an essential or life-sustaining business and should close. He also suggested to Boustead that someone should contact the authorities and tell them that the Respondent was still open.

On March 16, the day that the governor announced the closure of nonessential businesses, Zeliesko convened an all-hands meeting in the middle of the plant. Plant Manager Trenary was also present. At the meeting Zeliesko stated his belief that the Respondent would be classified as an essential business and outlined the health and safety measures taken by the company. Vincer, clearly upset, asserted that the Respondent did not have the proper precautions in place and that the employees should not be working ("we shouldn't be working").[5] Several other employees also raised questions regarding whether Respondent qualified as an essential business.[6] Zeliesko replied that the employees needed to keep working until there was further clarification from the state government.

On March 18, employee Larry Pierson learned that his wife had been sent home from her job at a nursing home with flu-like symptoms. Pierson shared that information with Vincer, who suggested that Pierson inform Trenary. Pierson did so, and Trenary sent him home. On Monday, March 23, Boustead informed Vincer that Pierson had returned to work on March 20. (Vincer had been off that day.) Concerned about the Respondent's protocols, Vincer asked Zeliesko what the requirements were for employees to return to work after having or being exposed to COVID. Zeliesko replied that he would have to get back to him. Vincer also asked Zeliesko if he thought the company should be open and operating. Zeliesko replied that the Respondent believed that it was a life-sustaining business.

After his conversation with Zeliesko, Vincer spoke with Boustead. Vincer urged him to speak with Trenary or Zeliesko about his health vulnerabilities and the protocols the Respondent was putting in place when people were sick or exposed to COVID. Boustead did speak about his concerns with Trenary, who assured him that the Respondent would follow proper procedures, make anyone who came into contact with COVID stay home, and inform him if he should get tested.[7]

On March 24, Trenary observed Vincer text messaging on his cell phone and reported it to Zeliesko. Almost immediately, and without further investigation, they went to Miller and recommended that Vincer be terminated. Miller agreed. Shortly thereafter, Miller, Zeliesko, and Trenary informed Vincer that he was terminated for poor attitude, talking, and lack of profit.

The judge found that Vincer's conduct—raising concerns to the Respondent about its COVID protocols and its decision to remain open for business—was both concerted and for mutual aid or protection. He rejected the Respondent's contentions that Vincer's complaints constituted mere individual "griping." Applying *Wright Line*,[8] the judge found that the Respondent discharged Vincer for his protected concerted activity in violation of Section 8(a)(1), rejecting the Respondent's assertion that it terminated him for poor performance and violating its policies.

On exceptions, the Respondent argues that Vincer's conduct was not concerted under *Alstate Maintenance*.[9] The General Counsel cross-excepts, asserting that *Alstate Maintenance* misconstrued the *Meyers Industries* cases, improperly narrowed the definition of concerted activity

[4] Under the Respondent's disciplinary procedures, front-line supervisors are to document policy violations on an "Employee Warning Report" signed by the issuing supervisor and the employee and placed in the employee's file.

[5] At the hearing, Vincer was not asked about his comments at the March 16 meeting, and he did not address the meeting in his testimony. However, Trenary and Boustead both confirmed that, at the March 16 meeting, Vincer challenged the Respondent's decision to remain open for business. Thus, Boustead confirmed that his past recollection, as accurately recorded in his Board affidavit, was that Vincer "was upset" at the meeting, he asked "why we were still working when the employer was not an essential business," and he stated that "he didn't think we had the proper precautions in place for the pandemic." Trenary testified that Vincer said, "we shouldn't be working."

[6] In so finding, the judge relied on the testimony of employee James Boustead, whom the judge called "the most credible witness in this case," that "several people more than Mr. Vincer" stated, at the March 16 meeting, that the Respondent was not an essential business.

[7] Boustead testified that, at Vincer's suggestion, he expressed his concerns to both Trenary and Zeliesko, and they stated that the Respondent was "an essential business because of the food and water purification products that we . . . manufacture" and assured him that they would follow proper procedures. Although Zeliesko denied that Boustead approached him with any COVID-related concerns, Trenary confirmed that Boustead approached him and raised concerns about COVID and "his personal health issues" but testified that the conversation took place on March 16, after the all-hands meeting.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] The Respondent also argues that Vincer's conduct was not for mutual aid or protection, that the General Counsel failed to establish animus under *Wright Line,* and that the Respondent met its *Wright Line* rebuttal burden. For the reasons stated by the judge, we reject these arguments.

by imposing a limited list of factors that will support a finding of intent to induce group action, and thus undermined the Act's purpose of protecting employees who seek to improve their working conditions. Therefore, the General Counsel argues, *Alstate Maintenance* should be overruled. In response, the Respondent contends that *Alstate Maintenance* was correctly decided and is consistent with *Meyers II*.

II. DISCUSSION

Having examined *Alstate Maintenance* and the premises upon which it rests, we conclude that it should be overruled.[10] For the reasons explained below, we find that *Alstate Maintenance* established an unduly restrictive test that is at least in tension with *Meyers II,* unnecessarily overruled *WorldMark by Wyndham*, 356 NLRB 765 (2011), and failed to fully promote the policies of the Act.

Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." Section 7 establishes the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." "To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 152 (2014).

In *Meyers I*, the Board held that an employee's activity is concerted when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." 268 NLRB at 497. Subsequently, in *Meyers II*, the Board clarified that concerted activity under Section 7 "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." 281 NLRB at 887. However, in *Meyers I,* and again in *Meyers II*, the Board cautioned that this definition of concerted activity "is by no means exhaustive" and it acknowledged that a "myriad of factual situations . . . have arisen, and will continue to arise, in this area of the law." 268 NLRB at 496–497; 281 NLRB 887. The Board emphasized therefore that "the question of whether an employee engaged in concerted activity is, at its heart, a factual one" based on the totality of the record evidence. 268 NLRB at 497; 281 NLRB at 886.

The Board also reaffirmed that activity that at inception involves only a speaker and a listener can be concerted, "for such activity is an indispensable preliminary step to

[10] Our concurring colleague contends that because it is not necessary to overrule *Alstate Maintenance* to decide this case, our rationale for doing so is "nonprecedential dicta." However, as explained above, the parties have expressly raised the issue in their exceptions and cross-exceptions: the General Counsel argues that *Alstate Maintenance* should be overruled because it is inconsistent with *Meyers II* and the purposes of the Act, and the Respondent contends that *Alstate Maintenance* was correctly decided and is consistent with *Meyers II*. The Respondent additionally argues that Vincer's conduct was not concerted under *Alstate Maintenance*. Accordingly, the questions of whether *Alstate Maintenance* was correctly decided and whether Vincer's conduct was concerted under that case have been placed before us by the parties in this case, and, therefore, we appropriately decide them. The Board majority in *Alstate Maintenance* itself, which included our colleague, acknowledged that when a party relies on a decision in its exceptions brief, "assessment of [its] argument may properly include determining whether the precedent the argument relies on is sound." *Alstate Maintenance*, 367 NLRB No. 68, slip op. at 6 fn. 32.

We reject our colleague's assertion that our decision is "nonprecedential" because overruling *Alstate Maintenance* is not required in order to resolve this case. As the Supreme Court has long recognized, "'adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein,'" and "such cases 'generally provide a guide to action that the agency may be expected to take in future cases.'" *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (quoting *NLRB v. Wyman-Gordon,* 394 U.S. 759, 765–766 (1969)). Under our colleague's view, the Board would be powerless to announce a new standard in a case finding liability when application of the previous standard to the facts already rendered the respondent's actions unlawful. Historically, however, the Board has modified policies through adjudication, including in cases in which the change in standard has not changed the result for the respondent in the case, a practice that would not survive our colleague's novel theory. *Alstate Maintenance* itself was such a case. See *Alstate Maintenance*, 367 NLRB No. 68, slip op. at 1 (stating "although we believe *WorldMark by Wyndham*[, 356 NLRB 765 (2011)] is distinguishable, we conclude that *WorldMark* cannot be reconciled with *Meyers Industries* and must be overruled").

Moreover, our colleague misconceives the legal principle of obiter dicta. The cases our colleague purports to rely upon for his erroneous view of what separates dicta from holdings simply reiterate the uncontroversial precept that discussion of legal principles in a decision that are not a constituent part of a rationale relied upon by the decision are dicta. This well-understood concept does not suggest the entirely different (and erroneous) concept that a rationale relied upon by the tribunal in its decision is dictum if the tribunal could have adopted a different rationale. As the Supreme Court has long made clear, alternate holdings are not dicta. *Woods v. Interstate Realty Co.,* 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.") (citing *Massachusetts v. United States,* 333 U.S. 611, 623 (1948) and *United States v. Title Insurance Co*., 265 U.S. 472, 486 (1924)). See also *O'Gilvie v. United States*, 519 U.S. 79, 84 (1996) ("Although we gave other reasons for our holding in [a prior case] as well, we explicitly labeled this reason an "independent" ground in support of our decision. We cannot accept petitioners' claim that it was simply a dictum.") (citation omitted). The federal appellate courts follow this rule, and we choose to do so, as well. See *Assn. of Battery Recyclers v. EPA*, 716 F.3d 667, 673 (DC Cir. 2013) (quoting *Union Pacific Railroad Co. v. Mason City & Fort Dodge Railroad Co*., 199 U.S. 160, 166 (1905) for the principle that where "there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter [dictum], but each is the judgment of the court, and of equal validity with the other'"); *United States v. Shakir*, 616 F.3d 315, 319 fn.1 (3d Cir. 2010) (quoting *Kushner v. Winterthur Swiss Insurance. Co*., 620 F.2d 404, 408 fn. 4 (3d Cir. 1980)), cert denied 562 U.S. 1116 (2010).

Here, a three-member majority of the Board has explicitly rejected *Alstate Maintenance*'s articulation of concerted activity and overruled it, placing a reasonable construction on the statutory scheme that we believe more suitable for vindicating the policies of the Act and that we believe is consistent with longstanding precedent (but not with *Alstate Maintenance* itself). We have applied this correct standard to the facts of this case and found a violation of the Act. This overruling of *Alstate Maintenance* is Board precedent. Our alternative finding that application of the overruled *Alstate Maintenance* standard would lead to the same result does not make our decision any less binding.

employee self-organization." Id. at 887 (quoting *Meyers I*, 268 NLRB at 494; *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951)). Notably, the "object of inducing group action need not be express," and an employee's statement may, in certain contexts, "implicitly elicit[] support from his fellow employees." *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988). Thus, in the decades that followed *Meyers I* and *Meyers II*, the Board conducted a thorough review of all the record evidence in order to determine whether an individual employee's protest had "some linkage to group action." Id. at 884.

In *Alstate Maintenance*, however, the Board majority cast aside this holistic approach and, in its place, adopted a checklist of factors that imposed significant and unwarranted restrictions on what constitutes concerted activity. In doing so, the Board narrowed the circumstances in which statements made by individual employees in front of their coworkers will be found concerted. 367 NLRB No. 68, slip op at 7. The majority held that "an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of 'group activities'—e.g., prior or contemporaneous discussion of the concern between or among members of the workforce." Id., slip op at 3. The majority also held that "[t]he fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity." Id., slip op at 7. "Rather, to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action." Id. The majority decision then set forth a list of five "relevant factors that would tend to support drawing such an inference":

> (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely . . . to ask questions about how the decision has been or will be implemented; (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.

Id.[11]

The decision in *Alstate Maintenance* overruled *WorldMark by Wyndham*, supra. In *WorldMark*, the Board found that an employee engaged in concerted activity when he complained to a supervisor in front of other employees, one of whom then joined in the protest, about a change in dress code that would require employees to tuck in their shirts. The Board observed generally that the Board had consistently found activity concerted when, in front of their coworkers, single employees protest terms and conditions of employment common to all employees. Id. at 766. More specifically, the Board in *WorldMark* looked at all of the surrounding circumstances and found concerted activity based on the following facts: (1) the employee took the first opportunity to question the newly announced dress code change; (2) the dress code affected him and his coworkers as a group; (3) the employee presented his objection in group terms, using "we," not "I"; (4) the employee knew from past experience that his coworkers preferred to wear their shirts untucked, and thus the employee would reasonably expect this issue to be a matter of concern to his coworkers; and (5) in fact, a coworker did join his protest. Id.

The *Alstate Maintenance* majority, however, fundamentally misconstrued the *WorldMark* decision, insisting that it wrongly announced a per se rule that an employee's protest made in any group context is always a concerted inducement to group action. 367 NLRB No. 68, slip op at 7. *WorldMark* neither established nor applied a per se rule. Rather, as described above, the Board considered all the surrounding circumstances in finding that the employee's protest was an inducement to group action. The *WorldMark* decision merely reflected the Board's longstanding recognition that a complaint made in front of a group of coworkers is a relevant consideration that, in combination with other relevant facts, may support an inference that an employee is seeking to induce group action.[12]

The *Alstate Maintenance* majority also found it problematic that the employee in *WorldMark*—like the protesting employee in *Alstate Maintenance*—raised his objection in an impromptu gathering of employees, rather than in a formal employer-employee meeting. Id., slip op.

[11] Then-Member McFerran dissented, finding that *Alstate Maintenance*'s narrow definition of concerted activity is unwarranted, at odds with precedent, and inconsistent with the policies of the Act. Id., slip op. at 12–15. We find the dissent persuasive, and our analysis below echoes many of its points.

[12] Similar to the *Alstate Maintenance* majority's mischaracterization of *WorldMark*, our colleague mischaracterizes our decision here as "center[ed] on a false premise" that the Board has consistently found activity concerted when, in front of their coworkers, single employees protest terms and conditions of employment common to all employees. As explained above, while the Board often finds such activity concerted, it does so only when consideration of all the surrounding circumstances results in a finding either that the action of the single employee "was engaged in with the object of initiating or inducing or preparing for group action or . . . had some relation to group action in the interest of the employees," or that the employee was "bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 884, 887.

at 5. The majority cited decisions in which employee protests in formal group meetings were found to be concerted. In *Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000), the Board found that an individual employee's protest of a new break policy was concerted under all the circumstances. To be sure, the Board relied on the fact that the employee lodged her protest during a formal meeting called by the employer to discuss the policy, which often suggests an intent to induce group action. But the Board did not hold that concert may be found only in such formalized meetings.[13] Similarly, in *Whittaker Corp.*, supra, the Board found that an employee engaged in concerted activity when he objected, in a formal employer-employee meeting, to the employer's announcement that employees would not be receiving their regular annual wage increase. As in *Chromalloy*, the Board noted that, "[p]articularly in a group-meeting context, a concerted objective may be inferred from the circumstances." 289 NLRB at 934. But, again, the Board, quoting *Meyers I*, emphasized that "the question of whether an employee engaged in concerted activity is, at its heart, a factual one." Id. at 933. Likewise, in *Cibao Meat Products*, the Board found concerted activity where an employee voiced his protest during an employer-called meeting, but once again it did not hold that only such a setting could support the finding. 338 NLRB 934 (2003), enfd. mem. 84 Fed.Appx. 155 (2d Cir. 2004), cert. denied 543 U.S. 986 (2004). In sum, although in each of these cases the Board found that, "particularly in a group meeting," one might reasonably infer that a protest was intended to induce group action, the Board never held that asserting an objection during a formal meeting was either necessary or sufficient. Rather, in each case the Board conducted a thorough review of all the facts in finding concerted activity.

Contrary to the assertions of the *Alstate Maintenance* majority and our concurring colleague, *WorldMark* is in harmony with this approach, as the Third Circuit implicitly recognized in *MCPc, Inc.*, 813 F.3d 475, 485 (3d Cir. 2016). In *MCPc*, in affirming the Board's finding that an employee engaged in concerted activity when he communicated his dissatisfaction about shared working conditions to a manager during a lunch with his coworkers, the court acknowledged the "long line of decisions by the Board and courts" finding that an individual employee engaged in concerted activity by complaining during formal meetings called by the employer to address the issue. Id. at 484 (citing cases). But the court also observed that the Board and other courts of appeals have "extended this line of reasoning to the lone employee who complains to management in a less organized group context." Id. The court stated, "[a]lthough merely complaining in a group setting would surely not be sufficient in itself to transform an individual grievance into concerted activity, we rely on *WorldMark by Wyndham* for the narrow proposition that in such circumstances a lack of prior planning does not foreclose a finding of concerted activity, where the individual's statements further a common interest or by their terms seek to induce group action in the common interest." Id. at 484–485. Notably, the Third Circuit did not interpret *WorldMark* as establishing a per se rule that an employee's protest made in any group context is always a concerted inducement to group action. This understanding of *WorldMark* is fully consistent with the *Meyers* decisions, where (as noted earlier) the Board emphasized that under the non-exhaustive definition of "concerted" given in those cases, "a myriad of factual situations would arise calling for careful scrutiny of record evidence on a case-by-case basis." *Meyers II*, 281 NLRB at 887.

Our concurring colleague asserts that, in order to establish concertedness based on a "truly group complaint" under *Meyers II*, "the General Counsel must establish that the employee was bringing a complaint to management that had been derived from group action." He contends that the employee in *WorldMark* did not meet this standard because "[t]here is no evidence that the employee had been aware of, let alone part of, any group action with regard to the rumored rule change leading to a truly group complaint." Nor, he claims, is there evidence that the employee "asked the manager those questions with the intent of initiating group action." Our colleague's argument, however, is based on an overly circumscribed—and incorrect—interpretation of *Meyers II*.

As mentioned, in *Meyers II*, the Board reaffirmed that activity that at inception involves only a speaker and a listener can be concerted, "for such activity is an indispensable preliminary step to employee self-organization." 281 NLRB at 887. Contrary to our concurring colleague's argument, nothing in *Meyers II* requires that the General Counsel establish that the employee's complaint "had been *derived* from group action" (emphasis added). Rather, *Meyers II* broadly defines concerted conduct, explaining that, "to qualify as such, *it must appear* at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."

[13] Nor has the Board found that only communications among coworkers that are "prior [to] or contemporaneous" with such meetings bear on the question of concert. Indeed, the Board, with court approval, has found the contrary. See, e.g., *Hugh H. Wilson Corp.*, 171 NLRB 1040, 1046–1048 & fn. 11 (1968) (finding that employees who griped when informed separately about employer's withholding contributions to the profit sharing plan, asked questions during a subsequent meeting management conducted to explain the decision, and continued to discuss the issue after the meeting engaged in concerted activity and that "[t]he concerted nature of this activity was not limited to the meeting, but was later carried on in the shop as was demonstrated by conversations between the employees about the matter"), enfd. 414 F.2d 1345 (3d Cir. 1969), cert. denied 397 U.S. 935 (1970).

Id., quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).[14]

Our colleague asserts that "the mens rea required to establish the 'intent to induce' under *Meyers II* is that *at the time* that a single employee raises a concern with the employer, the employee acted with the intent to induce group action" (our colleague's emphasis). Thus, our colleague contends that "[t]he fact that an employee's remark may 'spark[ ] group action or prompt a "truly group complaint" to crystallize' does not provide evidence of, nor can it retroactively change, the employee's initial intent." Relatedly, our colleague suggests that a "relation to group action" cannot be found based on group action occurring after the alleged concerted activity.[15]

We disagree with our colleague's claim that contextual evidence arising after the alleged concerted activity, including whether an individual employee's remark sparks group action, is irrelevant to the determination of concerted activity. We do not suggest that future action can "retroactively change" whether an initial remark was concerted. Rather, we find that later events can be relevant objective evidence of whether an employee's conduct sought to initiate, induce, or prepare for group action, or was related to group action, and that this evidence is appropriately considered in analyzing the alleged concerted activity. In so finding, we hew to the essential holding of *Meyers II* that "whether the employee has engaged in concerted activity is a factual one based on the totality of the record evidence." Id. at 886.[16]

WorldMark is fully consistent with these principles and with *Meyers II*. Thus, the *Alstate Maintenance* majority's reversal of *WorldMark* was both unwarranted under *Meyers II* and—as the Third Circuit's decision in *MCPc* makes clear—unnecessary. Making matters worse, *Alstate Maintenance* then announced a new set of factors that served to substantially narrow the situations in which statements made by individual employees in front of their coworkers will be found concerted. *Alstate Maintenance*, 367 NLRB No. 68, slip op. at 7. While capturing some examples of concerted activity, the five factors set forth by the majority are far too restrictive to delineate the boundaries of concerted conduct. Guided by the *Meyers II* principle that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence, the Board had always before rejected the imposition of strict criteria, such as the majority's checklist of factors.[17]

The sound policy reasons underlying such a holistic approach are clear. As the Board explained in *Meyers II*, one of the fundamental purposes of Congress's decision to protect "concerted" activities by employees was to "reduce the industrial unrest produced by the lack of appropriate channels for the collective efforts of employees to improve working conditions." 281 NLRB at 883. The Board can best achieve that statutory goal if it avoids an artificially narrow interpretation of "concerted" activity. But instead, the *Alstate Maintenance* majority did the opposite. Its checklist of factors effectively imposes a minimum threshold for concerted activity in place of the fact-sensitive approach required under *Meyers*.[18] *Alstate Maintenance* thus suffers from the same flaw the Third Circuit criticized in *MCPc* when it rejected the employer's attempt to pick apart an employee's protest based on assertedly missing elements: it "espouse[d] an unduly cramped interpretation of concerted activity under [Section] 7—one that assesses concerted activity in terms of isolated points of conduct rather than the totality of the circumstances." *MCPc*, 813 F.3d at 486.

It is easy to see how *Alstate Maintenance*'s "unduly cramped" checklist of factors is likely to exclude concerted activity from protection. For example, factor 1—whether the statement was made in an employee meeting called by the employer to announce a decision affecting terms or conditions of employment—fails to recognize that, as discussed above, employees may initiate protest through spontaneous, informal means that also deserve

[14] Our colleague contends that there is "no language whatsoever that indicates that an employee who 'appears to' engage in the express requirements for establishing concerted activity satisfies the test in *Meyers II*." But as the passage quoted above makes clear, *Meyers II* endorses the view that this may satisfy the test for concerted activity. And, indeed, the Board has held that "[u]nder Section 7, both the concertedness element and the 'mutual aid and protection' element are analyzed under an objective standard." *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) (making clear that "[a]n employee's subjective motive for taking action is not relevant to whether that action was concerted").

[15] Our colleague asserts that "the language of *Meyers II* establishes that the concerted nature of activity is to be judged *at the time the action took place*." (Our colleague's emphasis.) He does not, however, point to any such language. Indeed, the Board in *Meyers II* recognized that "the actions of the individual employee engaged in concerted activity might be remote in time and place from group action." 281 NLRB at 885.

[16] Contrary to our colleague's assertion, our position does not mean that concertedness "depend[s] upon *others' reactions*" (his emphasis) to an employee's conduct. Of course, intent to induce group action can be inferred regardless of whether anyone else takes up the concern raised by the employee. See, e.g., *Whittaker*, 289 NLRB at 934. As with any other contextual evidence, however, what happens after an employee's alleged concerted activity may shed light on how an objective observer would have interpreted the purpose of that activity. See id. at 934 fn. 5 (finding employee Johnston's remarks during meeting concerted and noting that "postmeeting support" from coworkers "shows that other employees interpreted Johnston's remarks the same way we have").

[17] See, e.g., *Fresh & Easy*, 361 NLRB at 154 (no requirement that solicited coworkers actually join the protest in order to prove an intent to induce group action); *Whittaker Corp.*, 289 NLRB at 933–934 (rejecting requirement that the "object of inducing group action [be] express" and finding concerted an employee's "statement at the meeting implicitly elicited support from his fellow employees against the announced change").

[18] Although the *Alstate Maintenance* majority insisted that the five factors are not exhaustive, it also expressly declined to hold "that all of these factors *must* be present" (367 NLRB No. 68, slip op. at 7 fn. 45, emphasis in original), thus implying that at least one factor must be present and that situations not encompassed by these factors will not support an inference of concerted action.

Section 7 protection.[19] Factor 3—whether the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely to ask questions about how it will be implemented—is similarly dismissive of complaints raised outside the formal meeting context, and further suggests that employee questions, as opposed to declarative protests, are less likely to be inducements of group action. Indeed, the Respondent's exceptions brief relies on this very factor in arguing that Vincer's conduct was not concerted, claiming that "asking questions . . . is not concerted activity." But asking questions is frequently an indirect way of criticizing and drawing others to oppose a new policy.[20] Finally, factor 5—whether the meeting presented the first opportunity employees had to address the decision—suggests that an intent to induce group action is absent if the employee previously had an opportunity to discuss a matter with his coworkers but did not do so. An employee, however, may choose to confront their employer in the presence of other employees about a matter of mutual employee concern before discussing the matter with coworkers. An employee's choice of this approach will not detract from their intent to induce group action, nor does it preclude an employee's remark from sparking group action or prompting a "truly group complaint" to crystallize.[21] Moreover, an employee may choose to confront their employer at a second (or third, or 10th) meeting, regardless of whether the employee had previously discussed the issue with their coworkers, and, in so doing, may strike a chord that causes a "truly group complaint" to manifest or group action to take shape. Section 7 protects employees who bring a group complaint to the attention of management or make an explicit or implicit call to group action. It does not impose artificial limits on when and how employees engage in concerted activity.

For the foregoing reasons, we overrule *Alstate Maintenance* and reaffirm the fundamental principle of *Meyers II* that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." 281 NLRB at 886. Contrary to *Alstate Maintenance*, we regard *WorldMark* as correctly decided and consistent with *Meyers II* and other prior precedent.

Having considered the totality of the evidence here, we easily conclude that Vincer's conduct was concerted. At the all-hands meeting on March 16, 2020, Chief Operating Officer Zeliesko told employees that it was his belief that the Respondent would be classified as an essential business and outlined the health and safety measures taken by the company. Vincer, clearly upset, spoke up and directly challenged Zeliesko, blurting out that "we shouldn't be working" and voicing concern over the Respondent's lack of proper precautions. Vincer's COVID-related comments were concerted because they sought to bring "truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. The group nature of Vincer's complaints is further evinced by the fact that he was not the only employee who voiced concerns about the Respondent being deemed an essential business at this meeting.

Moreover, in the days after the March 16 meeting, Vincer continued speaking to other employees about his concerns regarding the Respondent's return-to-work procedures for employees who contracted or were exposed to COVID. On March 23, Vincer learned that an employee had returned to work on March 20—only 2 days after he had been sent home because his wife was believed to have contracted COVID. Concerned, Vincer stopped Zeliesko and asked him about the Respondent's return-to-work protocol and again suggested that the company should close. This conversation is concerted, even though Vincer was speaking one-on-one with Zeliesko, because it was a "logical outgrowth" of the "truly group complaint" Vincer had raised at the March 16 all-hands meeting. See *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038–1039 (1992), after remand, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).

For these reasons, we conclude that Vincer's conduct was concerted under the Board's longstanding totality-of-the-circumstances test, which we reaffirm today.[22] As

[19] Certainly, the fact that an employee raised a protest at an official meeting might strengthen the inference of intent to induce group action, but it is not and has never been a requirement. See *MCPc*, supra, 813 F.3d at 484 (endorsing Board's concerted activity finding in cases of "lone employee who complains to management in a less organized group context and who, in so doing, successfully attracts the impromptu support of at least one fellow employee"); *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 24–26 (D.C. Cir. 2011) (finding protected concerted activity where employees objected to a new break policy in front of other employees while on the job); *Colders Furniture*, 292 NLRB 941 (1989), enfd. sub nom. *NLRB v. Henry Colder Co.*, 907 F.2d 765 (7th Cir. 1990) (spontaneous lunchroom discussion among employees led to employee's impromptu visit to manager's office to make concerted complaint); *Salisbury Hotel*, 283 NLRB 685, 686, 694 (1987) (complaints exchanged among employees themselves were concerted where they led to group protest to management).

[20] See *NLRB v. Talsol Group*, 155 F.3d 785, 791, 797 (6th Cir. 1998) (employee's questions of management concerning details of safety policy found to be concerted inducement of group action).

[21] Indeed, this is precisely what occurred in *Alstate Maintenance*, when one employee's impromptu complaint to management in front of his coworkers about an arriving customer's ungenerous tipping practices was followed by the coworkers collectively walking away when the customer appeared and asked for assistance. In our view, the "object of initiating" and "relation to group action" could not be clearer. *Meyers II*, 281 NLRB at 887.

[22] Moreover, even under *Alstate Maintenance,* we would find no merit in the Respondent's argument that the majority's decision in that case precludes a finding of concerted activity. There is evidence of "prior or contemporaneous discussion of the concern between or among members of the workforce." 367 NLRB No. 68, slip op. at 3. In the days leading up to the March 16 all-hands meeting, the emerging COVID pandemic was a frequent topic of conversation among employees. During this time, Vincer had daily conversations about the virus with employee Boustead, communicated to several employees his belief that the Respondent was not an essential business and should close, and suggested to Boustead that someone should contact the authorities and tell them that the Respondent was still open. These facts show that Vincer "was

stated in footnote 9, above, we adopt the judge's findings that Vincer's conduct was also for mutual aid or protection, that it was a motivating factor in his discharge, and that the Respondent failed to prove that it would have discharged Vincer even absent this conduct. Accordingly, we affirm the judge's conclusion that the Respondent violated Section 8(a)(1) by discharging Vincer.

AMENDED REMEDY

In addition to the remedies ordered by the judge, and in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall compensate Ronald Vincer for any other direct or foreseeable pecuniary harms incurred as a result of his unlawful termination, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[23]

We shall modify the judge's recommended Order in accordance with our decisions in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Thryv,* supra. We shall substitute a new notice to conform to the Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Miller Plastic Products, Inc., Burgettstown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Ronald Vincer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ronald Vincer whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Ronald Vincer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) File with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Ronald Vincer's corresponding W-2 forms reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Burgettstown, Pennsylvania facility, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized

indeed bringing to management's attention a 'truly group complaint,' as opposed to a purely personal grievance." Id.

Likewise, the evidence supports a reasonable inference that, in making his statements at the March 16 meeting, Vincer was seeking to initiate, induce, or prepare for group action under the factors set forth in *Alstate Maintenance*, id., slip op. at 7. Thus, Vincer complained about the Respondent's COVID protocols and decision to remain open; he spoke up at an all-hands employee meeting convened by COO Zeliesko specifically to announce his belief that the Respondent would remain open as an essential business; those issues affected all the employees; and the meeting was the first opportunity employees had to comment on or protest the Respondent's decision to remain open.

[23] The General Counsel asks the Board to order the Respondent's managers, supervisors, and employees to undergo training regarding employees' rights under the Act. We decline to do so in this case.

[24] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 24, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 25, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, concurring in the result.

In this case, the judge found that the Respondent unlawfully terminated employee Ronald Vincer for engaging in protected concerted activities when he raised concerns about the Respondent's COVID-19 protocols and its decision to remain open for business during the pandemic.[1] In finding that Vincer engaged in concerted protected conduct, the judge applied the longstanding established law in this area, the two *Meyers Industries* cases ("*Meyers* cases").[2]

My colleagues and I agree that Vincer's COVID-related complaints constituted concerted activity under the *Meyers* cases, as found by the judge. Furthermore, we agree that, even applying the recent *Alstate Maintenance*[3] case, as the Respondent urged in its exceptions brief, the conduct at issue would still be found to be concerted and protected.

That should be the end of the matter, as there is nothing left to discuss that would affect the outcome of this case. Nevertheless, my colleagues have concluded, in indisputable dicta not necessary to deciding this case, that the *Alstate* decision "invited unwarranted restrictions on what constitutes concerted activity," and, therefore, that it must be overruled.[4] In asserting that their analyses are not dicta, my colleagues attempt to rely on the fact that "the parties have expressly raised the issue in their exceptions and cross-exceptions." To be clear, only the General Counsel raised the issue that *Alstate* should be overruled; the Respondent merely cited *Alstate* as relevant precedent. And my colleagues and I agree that the application of that relevant precedent to the case before us would not affect the outcome.[5]

But more importantly, even if both parties had raised the issue, that would not change the fact that my colleagues' decision to overrule *Alstate* is completely unnecessary to the *holding* in this case, which of course is that Vincer engaged in concerted protected activity and that the Respondent violated the Act by terminating him for engaging in that activity. Courts have long recognized that, regardless of what is said in an opinion, "the decision can hold nothing beyond the facts of that case." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) (internal citations omitted); see generally *Jiminez v. Walker*, 458 F.3d 130, 142 (2d Cir. 2006) ("Holdings—what is necessary to a decision—are binding. Dicta—no matter how strong or how characterized—are not."); *Rohrbaugh v. Celotex*, 53 F.3d 1181, 1184 (10th Cir. 1995) ("Dicta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.") (quotation

[1] I acknowledge and apply *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), as Board precedent regarding modifications to the Board's electronic notice-posting requirements, although I expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance*, 369 NLRB No. 68 (2020).

Further, I would require the Respondent to compensate Ronald Vincer for other pecuniary harms only insofar as the losses were directly caused by the unlawful action, or indirectly caused by the unlawful action where the causal link between the loss and the unfair labor practice is sufficiently clear, consistent with my partial dissent in *Thryv, Inc.*, 372 NLRB No. 22 (2022).

[2] *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[3] 367 NLRB No. 68 (2019).

[4] To be clear, contrary to my colleagues' representation, I do not disagree with their "decision to overrule *Alstate Maintenance*," insofar as that suggests that I believe that they have overruled that case. They have not.

[5] My colleagues appear to be taking the position that merely citing a case as relevant precedent in a party's brief or a judge's decision is sufficient to put the issue of whether that case should be overturned before the Board, regardless of whether the outcome of the case turned on that precedent. I disagree.

omitted). The courts have also recognized that, as in court decisions, analyses in Board decisions are dicta where they are not necessary to decide the case at issue. See, e.g., *Allied Mechanical Services v. NLRB*, 668 F.3d 758, 768 (D.C. Cir. (2012) (recognizing a statement that "is unnecessary to the decision" is "dicta"); *NLRB v. Master Slack*, 773 F.2d 77, 82 (6th Cir. 1985) (judge's finding "was not essential to either his order or the Board's order; it was mere dicta"); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982) (finding joint employer analysis to be dicta where the employers were found to be a single employer).

As for my colleagues' contention that overruling *Alstate* provides an "alternative rationale" for finding the violation here, I do not disagree that the Board has the ability to proffer an alternative rationale for either finding or not finding a violation when that alternative rationale would be controlling on the facts on the case being litigated. The problem here, however, is that my colleagues' overruling of *Alstate* does not constitute an actual alternative rationale for their holding in this case.

My colleagues find that Vincer engaged in concerted activity on March 16 by bringing a truly group complaint to the attention of management and that his conduct on March 23 was a "logical outgrowth" of this earlier concerted activity. Neither of these theories of concertedness was at issue in *Alstate*. Alternatively, my colleagues *rely* on *Alstate* to find that Vincer intended to initiate group action on March 16. All the relevant evidence cited and relied upon in the majority decision is consistent with *Meyers* and *Alstate,* which my colleagues acknowledge. But then my colleagues state that they have "explicitly rejected *Alstate Maintenance's* articulation of concerted activity and overruled it," which they follow with a bare assertion that they have applied their new standard "to the facts of this case" to find a violation of the Act. Although my colleagues assert this to be so, not one of "the facts of this case" is actually cited in or relevant to my colleagues' analysis rejecting *Alstate*.[6]

Accordingly, I disagree with my colleagues' assertion that their conclusions regarding the propriety of *Alstate* are anything but nonprecedential dicta.[7] Ordinarily I would not comment on dicta, but because the majority is attempting to use dicta to overrule Board precedent, I feel that I must respond, in dicta.

I. THE *MEYERS* CASES REQUIRE GROUP ACTION OR, IN THE ABSENCE OF GROUP ACTION, THE INTENT TO INITIATE GROUP ACTION

Section 7 of the Act gives employees 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." Accordingly, the Board has long recognized that, in order to be protected by Section 7, the conduct at issue must be both "protected"—involving matters of "mutual aid or protection"—and "concerted." The definition of what is required under Board law for activity to be considered "concerted" is the central focus of my colleagues' dicta.

As mentioned above, the standards for determining whether an activity is concerted are controlled by the *Meyers* cases. Under these standards, activity is usually deemed concerted only if engaged in by two or more employees. As the Board held in *Meyers I*, "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[8] In *Meyers II*, on remand from the Court of Appeals for the D.C. Circuit, the Board clarified that the *Meyers I* standard could encompass the actions of single employees, so long as one of two specified requirements was met. In establishing these two requirements, the Board "fully embrac[ed] the view of concertedness" developed by the Third Circuit in *Mushroom Transportation*, 330 F.2d 683 (1964).

In *Mushroom Transportation*, the court held that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action *or* that it had some relation to group action in the interest of employees."[9] The court added that "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'"[10] The Board, noting again that it was basing its definition of concertedness on that contained in *Mushroom Transportation*, reiterated the standard as "those circumstances where individual employees seek to initiate or to induce or to prepare for group action' or where individual employees bring truly group complaints to the

[6] In urging the overruling of *Alstate* in her Brief in Support of Cross Exceptions, the General Counsel also did not refer to the facts of the instant case or suggest that overruling *Alstate* was in any way relevant to determining whether Vincer's activity was concerted.

[7] I further note that my colleagues' decision to address an issue not necessary to deciding this case does not merely implicate the legal principle of obiter dicta; such decisions have real-world consequences. First, drafting decisions that are nothing more than dicta requires an expenditure of Board resources for no real purpose other than providing Board members with the opportunity to express their disagreement with current precedent. Second, and more importantly, those employees whom the Act is meant to protect, such as Ronald Vincer, must wait for the Board to engage in such meaningless exercises before receiving the relief owed to them.

[8] 268 NLRB at 497.

[9] 330 F.2d at 685 (emphasis added).

[10] Id.

attention of management.'"[11] Finally, the Board emphasized that the assessment of "'whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.'"[12]

Given that my colleagues' decision plays loose and fast with the two requirements set forth in *Meyers II*, it is important to emphasize that every definition of concerted activity focuses on whether or not the activity involves *group action*. Accordingly, to establish concertedness in the case of a single employee based on a "truly group complaint," the General Counsel must establish that the employee was bringing a complaint to management that had been derived from group action. The quotation from *Mushroom Transportation*, cited above, requires "some relation to *group action.*" Id. at 685 (emphasis added). Further, in discussing group complaints, the Board also cited, with approval, prior cases establishing the principle that "[w]hen the record evidence demonstrates *group activities*, whether 'specially authorized' in a formal agency sense, or otherwise, we shall find the conduct to be concerted." *Meyers II* at 886 (emphasis added). Similarly, when an employee is not bringing a truly group complaint to the attention of management, the General Counsel must establish that, based on the totality of the circumstances, the activity was taken with a specific purpose: to initiate *group action*.

II. THE STANDARD THAT MY COLLEAGUES ARE SUGGESTING CANNOT BE RECONCILED WITH EITHER OF THE TWO CONDITIONS MANDATED BY THE *MEYERS INDUSTRIES* CASES

(*a*) *My colleagues oversimply, and thus misrepresent, Board precedent in order to avoid the specific facts and analysis set forth in the cases upon which they rely.*

My colleagues take the position that my "view" of what is required under Board precedent to establish concerted activity—consistent with the holding in *Alstate*—is an "overly circumscribed—and incorrect—interpretation of *Meyers II*." As explained above, my "interpretation" is nothing more than the application of the express language set forth in the *Meyers* cases and the well-established precedent interpreting them.[13] In particular, I note that my colleagues suggest that I have erred by taking the position that *Meyers II* requires that the alleged concerted conduct arose from group action.[14] In making this suggestion, however, they fail to cite a single case[15] where the Board found that the "relation to group action" requirement, as opposed to the "intent to induce" requirement, was satisfied where the conduct at issue did not arise from existing group action. Further, my colleagues seem to take the puzzling position that the "group action" that the remark must be related to can be group action that takes place *after* the remark is made. Specifically, they contend that the single employee's "impromptu" complaint to management in *Alstate* was clearly related to group action because, *after* the single employee raised a concern with management about a customer's "ungenerous tipping practices," the employee's coworkers collectively walked away when the customer arrived and asked for assistance.[16] *Meyers II*, however, does not require that the concerted nature of the activity be judged based on whether it is related to *future* group action. Rather, the language of *Meyers II* establishes that the concerted nature of activity is to be judged *at the time the action took place*, and my colleagues have failed to cite to any case suggesting otherwise.[17]

Similarly, with regard to the "intent to induce" requirement, my colleagues contend that a single "employee . . . may choose to confront their employer in the presence of other employees about a matter of mutual employee concern before discussing the matter with coworkers." That is true, but the requirement in *Meyers II* is not that a single employee "chose to raise an issue with management in the presence of other employees." Rather, the requirement is that the employee *sought* to initiate or induce group action. Put another way, the mens rea required to establish the "intent to induce" under *Meyers II* is that *at the time* that a single employee raises a concern with the employer, the employee acted with the intent to induce group action.[18]

---

[11] *Alstate*, 367 NLRB No. 68, slip op. at 6 (quoting *Meyers II*, 281 NLRB at 887).

[12] Id. (quoting *Meyers II*, 281 NLRB at 886).

[13] Furthermore, if the *Alstate* Board's "interpretation" of the express language set forth in the *Meyers* cases and *Mushroom Transportation* were so incorrect, one would expect that my colleagues would be able to cite numerous cases that issued during the nearly six decades between the seminal cases and *Alstate* where the result would be reversed under *Alstate*. To the contrary, the *only* such case my colleagues can point to is *WorldMark by Wyndham*, which proffered an unprecedented interpretation contrary to the language set forth in the *Meyers* cases.

[14] In my view "derived from," the phrase highlighted by my colleagues, means the same thing as "arises from" or "is related to" group action that precedes the alleged concerted activity.

[15] With the possible exception of *WorldMark by Wyndham*, which was wrongly decided. It's not clear to me how conduct could be "related to" group action without in some way arising from that action.

[16] I note that, in referring to the walkout in *Alstate* as evidence of concertedness, my colleagues also misrepresent the holding in that case. "[T]he General Counsel's theory of the case was strictly limited to the allegation that [the skycap's] *statement* constituted protected concerted activity," and did not contend that this individual skycap was bringing a truly group complaint to management's attention. 367 NLRB No. 68, slip op. at 3, 4. The General Counsel in fact excepted to the judge's finding that there was a walkout at all.

[17] Not only would consideration of subsequent actions to determine whether an activity was concerted in the first place be inconsistent with both *Meyers II* and common sense, it would be unworkable. What if a single employee raised a concern about personally wanting to work more overtime, but then three months later his coworkers decided that they wanted the employer to provide more overtime and took collective action. Would that render the initial activity concerted? What if the collective action took place one week later?

[18] My colleagues disagree with this conclusion, asserting that I do not "point to any such language." To the contrary, I point to the language set forth in *Meyers II* itself. Although my colleagues are correct that the phrase "at the time" is not expressly set forth in the *Meyers II* test, I do not believe that there is any other reasonable interpretation of the express language set forth by the Board in that case.

The fact that an employee's remark may "spark[ ] group action or prompt a 'truly group complaint' to crystallize" does not provide evidence of, nor can it retroactively change, the employee's initial intent.[18] And, other than in *Worldmark*, the Board has never held that simply discussing a concern in the presence of other employees is sufficient to establish the required original intent.[19]

One fundamental error in my colleagues' analysis is that it centers on a false premise: that the Board has "consistently found activity concerted when, in front of their coworkers, single employees protest terms and conditions of employment common to all employees." That broad statement, however, is simply not an accurate representation of Board law. The Board, in fact, has not "consistently found" such activity concerted. Rather, the Board has consistently inferred group action in scenarios where specific facts are present. Specifically, the Board has found it appropriate to infer that the action of the single employee was *intended* to initiate group action when the action was taken in the context of a gathering where employees and management are discussing terms and conditions of employment.[20] No such group gathering was in play in *WorldMark*[21] or in *Alstate*, and on that basis the cases upon which my colleagues rely are easily distinguishable.[22]

The first case upon which my colleagues rely is *Whittaker Corp.*, 289 NLRB 933 (1988). In that case, employees were called by the employer's president to a series of meetings, at which he informed the gathered employees that they would not be receiving their regular annual wage increases. He invited questions from the employees, and several employees asked questions about the announced change. At the final meeting, after the president informed the gathered employees, an employee stated that he didn't "remember us being called together when there's been a good year and saying here's something extra. But now that there's a little downturn, I feel we're being asked to bear the brunt of it by not having an increase." Id. at 933 (internal quotation marks omitted).

In finding that the activity was protected, the Board primarily relied upon the fact that the case was "strikingly similar" to the circumstances presented in another case, *Enterprise Products.*[23] Id. at 934. As in *Whittaker*, the employer in *Enterprise* convened a meeting with employees at which it announced that it could not increase employees' wages or give them their customary annual bonus. It offered employees the opportunity to respond to the announcement, and one employee expressed a negative reaction to the employer's announcement. As in *Enterprise*, the employer in *Whittaker* had called employees into a meeting and solicited their responses, thereby "lump[ing] them together and view[ing] them as a group." *Whittaker* at 934 (quoting *Enterprise* at 949) (additional internal brackets omitted). Finally, the employee in *Whittaker* phrased his remarks, in front of a gathering of employees and managers, in terms of "us" and "we." The Board noted the employee's use of those common terms were "[o]bviously . . . addressed to everyone assembled to discuss the topic of the proposed wage increase suspension, including his fellow employees." Id. at 934.

The additional cases cited by my colleagues in support of their position also involved single employees voicing

By contrast, my colleagues must effectively *rewrite* the language set forth in *Meyers II* to support their view that post-conduct reactions by "objective observers" is relevant to establishing whether or not the initial activity was concerted. To that end, they state that "*Meyers II* broadly defines concerted conduct, explaining that 'to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.'" With due respect to my colleagues, there is no language whatsoever in *Meyers II* that indicates that an employee satisfies the test in *Meyers II* absent a *finding by the Board*, based on objective evidence, that the employee appears to have acted with the requisite "object."

[18] There is no question that non-concerted conduct can spark concerted conduct. But my colleagues suggest that the determination of whether the initial conduct bore the requisite intent for concerted activity is affected by what happens *after* the conduct takes place. This cannot be correct. If it were, then the conclusion whether or not certain conduct is concerted would depend upon *others' reactions* to that conduct. Under such a test, if two employees engaged in the same conduct under the same conditions, with the same intentions, only the employee whose conduct sparked others to act would be protected by the Act. Nothing in the *Meyers* cases or in Board law supports that result. To the contrary: in the cases establishing that intent to initiate group action can be inferred when a single employee speaks up in the context of a meeting with management to discuss terms and conditions of employment, the intent is inferred *regardless of whether anyone else takes up the concern raised by the single employee*.

[19] My colleagues assert that "Section 7 protects employees who bring a group complaint to the attention of management or make an explicit or implicit call to group action. It does not impose artificial limits on when and how employees engage in concerted activity." It cannot be disputed, however, that Sec. 7 of the Act does not cover all employee activity; rather, it requires that the *conduct seeking the protection of the Act* be concerted. The *Meyers* cases and their progeny set forth certain requirements that must be met in order for conduct to be considered "concerted"; in so doing, the *Meyers* cases necessarily excluded some employee activity from protection. Unless my colleagues are contending that those requirements constitute "artificial limits," we are bound to apply the requirements set forth in those cases, which is exactly what the Board held in *Alstate*. I further note that my colleagues' reference to an "implicit call to group action" must be interpreted consistent with the requirements set forth in *Meyers II*.

[20] Thereby satisfying the "intent" prong of *Meyers II*: that the individual engaged in the conduct had the "object of initiating or inducing or preparing for group action." 281 NLRB at 887. Again, the specific situation of speaking in a group meeting in those circumstances has been found sufficient to establish an intent on the part of the speaker to initiate group action.

[21] *Worldmark by Wyndham*, 356 NLRB 765 (2011).

[22] Contrary to my colleagues' suggestion, I am not stating that this specific scenario is the *only possible* scenario in which the Board could find, based on the totality of the circumstances, that activity by a single employee was taken with the *intention* of initiating group action, although I lack the imagination to conjure a hypothetical scenario where that would be the case. Rather, I am simply disagreeing with my colleagues' position that cases presenting completely different facts, where the analysis of concertedness turns on those specific facts, support the position they are taking today in dicta. That is simply not the case.

[23] 264 NLRB 946 (1982).

concerns in meetings arranged by the employer, where a group of employees met with management and terms and conditions of employment were discussed. *Chromalloy Gas Turbine* expressly noted that *Whittaker* was "a case remarkably similar factually to the instant case."[24] Accordingly, applying the finding in *Whittaker* "that the objective of 'initiating . . . or . . . inducing group action . . .' may be inferred from the *context of the group meeting* where the comments are made,"[25] the Board found that a single employee, who raised a complaint in a group meeting called to announce changed terms and conditions of employment, engaged in concerted activity. Similarly, in *Cibao Meat Products,* the Board quoted from *Whittaker* and, without any additional analysis, concluded that "an employee, like [the employee at issue in this case], who protests, in the presence of other employees, a change in an employment term affecting all employees just announced by the employer at an *employee meeting* is engaged in [concerted activity]." 338 NLRB 934, 934 (2003), enfd. mem. 84 Fed.Appx 155 (2d Cir. 2004), cert. denied 543 U.S. 986 (2004) (emphasis added).

Finally, my colleagues cite to *MCPc, Inc.*, 813 F.3d 475 (3d Cir. 2016), which, as they note, expressly states that "merely complaining in a group setting would surely not be sufficient in itself to transform an individual grievance into concerted activity." Id. at 484-485.[26] More importantly, I must clarify my colleagues' description of the context in which the employee's statement was made. When the manager in charge would visit employer's location at which the employees worked (in a different state), which occurred once or twice a month, he invited available employees to join him for lunch. At the lunch at issue, the employees were discussing how busy they were. In that context, the employee told the manager that they should hire more engineers, especially given the high salary of a new management hire. The court found that, given that the employee's comment was made in a "*group meeting context*," namely "a team building lunch related to improving working conditions," the comment was protected. Id. at 484, 486 (emphasis added).

(b) Alstate *properly found that the single employee's activity in that case was not "concerted" under the* Meyers *cases and, therefore, did not need to be overturned.*

My colleagues assert that *Alstate* must be overruled not only because it reached the wrong result by creating an "unduly restrictive test" based on an "'unduly cramped' checklist of factors."[27] To the contrary, the Board's holding in *Alstate* was an accurate application of the requirements set forth in *Meyers II* for finding a single employee's conduct concerted under the Act.

In *Alstate*, the Board adopted the judge's finding that a skycap at JFK International Airport who made an offhand complaint about a past client in the presence of his coworkers was not acting concertedly and was lawfully fired. There, a skycap was working with three coworkers when his supervisor told him that a customer airline requested skycap assistance with an incoming soccer team's equipment. The skycap told the supervisor, "We did a similar job a year prior and we didn't receive a tip for it." When the team's equipment arrived and managers sought the skycaps' assistance, the skycaps walked away. The General Counsel alleged that the skycap's single comment was concerted and that, therefore, his subsequent discharge was unlawful. The Board disagreed, finding that under the *Meyers* cases—as well as any reasonable interpretation of concerted activity—merely complaining to a supervisor in the presence of coworkers was not sufficient to establish that the complaint was made with the intention of initiating group action.[28] Moreover, the direct evidence reinforced that the skycap had no mind toward concerted action: he testified that his statement was "just a comment" and was not aimed at changing the Respondent's policies or practices.[29] The *Alstate* Board correctly adopted the judge's finding that the skycap's remark was neither concerted nor undertaken for the purpose of mutual aid or protection and dismissed the complaint.[30] It also reversed *WorldMark* and "reaffirm[ed] the standards articulated in *Meyers I* and *II*, under which individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural."[31]

[24] 331 NLRB 858, 863 (2000), enfd. 262 F.3d 184 (2d Cir. 2001).

[25] Id. at 863 (emphasis added) (quoting *Whittaker*).

[26] Although my colleagues cite this case as affirmation that their view that "a lack of prior planning does not foreclose a finding of concerted activity," that is hardly a controversial view. As detailed above, the Board has consistently found that when an employer calls a group meeting with employees and announces new terms and conditions of employment, the first employee to voice a complaint related to the terms and conditions announced at the meeting will have engaged in concerted activity, even though they did not have the opportunity to engage in prior planning.

[27] My colleagues repeatedly contend that, despite the fact that *Alstate* never indicated that "one factor must be present" to find activity to be concerted, language contained in fn. 45 of the decision can only be interpreted as making that requirement. This interpretation, however, only considers the first sentence in the footnote. The second sentence in the footnote expressly states that "the determination of whether an individual employee has engaged in concerted activity remains a factual one based on the totality of the record evidence." Id., slip op. at 7 n.45. Later in the footnote, the Board expressly states that the draft contains "*factors*, not necessary elements, and that the concertedness determination remains a factual one based on the totality of the evidence." Id., slip op. at 8 fn. 45. Finally, I note that, had the Board intended that the first sentence be interpreted in the way that my colleagues do, the sentence surely would have emphasized that "*all* these factors" need not be present rather, as written, that the Board was not holding that "all these factors *must* be present." Id., slip op. at 7 fn. 45.

[28] *Alstate Maintenance*, 367 NLRB No. 68, slip op. at 4.

[29] Id.

[30] My colleagues, in contending that his comment should have been found concerted, must supply the requisite intent on his behalf.

[31] Id., slip op. at 7.

(c) To the extent my colleagues are suggesting that the activity in WorldMark *constitutes concerted activity, that view cannot be reconciled with the requirements set forth in the* Meyers *cases.*

Once again, in support of their position that the conduct at issue in *WorldMark* was concerted, my colleagues assert that "[t]he *WorldMark* decision merely reflected the Board's longstanding recognition that a complaint made in front of a group of coworkers is a relevant consideration that, in combination with other relevant facts, may support an inference that an employee is seeking to induce group action." Because I have already set forth what the actual "longstanding recognition" of the Board is in inferring that an employee is seeking to induce group action, I hardly need point out that my colleagues' representation of Board precedent is not quite accurate. Indeed, an examination of the conduct at issue in *WorldMark*, reveals that the conduct fails to satisfy either of the *Meyers II* requirements, nor does it contain "other relevant facts" that would suggest that group action was involved in, or sought to initiate, the conduct. Accordingly, to the extent that my colleagues are asserting that the activity at issue in *WorldMark* can be held out as an example of concerted activity, their decision cannot be reconciled with the *Meyers* cases.

In *WorldMark*, an employee just back from vacation had heard a rumor that the employer was planning to change its dress code. While on the sales floor, in the presence of two other employees, a manager approached the employee and "mentioned two new company policies . . . including that sales representatives had to tuck in their shirts." The employee indicated that he had heard a rumor and, apparently still doubting the veracity of the manager, asked whether the change in policy was true. When the manager confirmed the policy, the employee inquired whether it was a company-wide policy or "is it just us." Again, seeming to question whether the policy actually existed, the employee inquired why the new policy had not been posted as a memo because "any time they have changes, we always see a memo." At that point, an employee who had overheard the conversation between the employee and the manager chimed in, expressing his disagreement with the new dress code policy.[32]

On the record facts, the judge determined that, before the second employee decided to voice his opinion, the single employee had not engaged in concerted activity. The judge found that "there exists no evidence that [the employee] sought any form of group action in support of his individual protest" and dismissed the complaint.[33]

Assuming for the sake of argument that the questions from the single employee to the manager constituted a "complaint" about the new policy—and I am doubtful that they did—the conduct does not meet either of the requirements set forth in *Meyers II*. There is no evidence that the employee had been aware of, let alone part of, any group action with regard to the rumored rule change leading to a truly group complaint. Nor is there evidence that he asked the manager those questions with the intent of initiating group action.

Nevertheless, the Board in *WorldMark* concluded that the "surrounding circumstances" supported a finding of concerted activity, and my colleagues endorse that decision today. In support of that position, my colleagues state that *WorldMark* based its finding of concerted activity on the following facts:

> (1) the employee took the first opportunity to question the newly announced dress code change;[34] (2) the dress code affected him and his coworkers as a group; (3) the employee presented his objection in group terms, using "we," (4) the employee knew from past experience that his coworkers preferred to wear their shirts untucked, and thus the employee would reasonably expect this issue to be a matter of concern to his coworkers; and (5) in fact, a coworker did join his protest.

My colleagues contend that these facts, plus the fact that the single employee's statements were made on the sales floor with two employees nearby, support a finding that the employee acted with the intent of initiating group action. I don't see it. To begin, although the employee may have been aware that his coworkers preferred to wear their shirts untucked, and therefore might have speculated that the policy change would be a "matter of concern" to his coworker, that merely shows that the employee assumed that the subject of his statements was a matter of "mutual aid and protection." There is no question, however, that *Meyers II* does not find that individual employees raising complaints for "mutual aid and protection," in the absence of group action, constitutes concerted activity. Rather, it requires an intention to *initiate group action*. These facts do not touch on that matter.

As noted above, the Board in *Whittaker* found that the employee's use of "us" and "we" was a contributing factor in finding an intent to initiate group action based on the context in which those pronouns were used. Specifically, the Board found that the employee's use of those terms was "[o]bviously addressed to *everyone* assembled to discuss the [proposed change in terms and conditions of employment], *including his fellow employees*." Id. at 934 (emphasis added). No such analysis applies to the statements made by the employees' comments in *WorldMark* or *Alstate*, where the comments were solely directed to the

[32] Agreeing with the judge's dismissal of the complaint, Member Hayes aptly noted in his dissent that the coworker's expression of personal frustration "did not transform" the charging party's questioning into group action. Id. at 768 (Member Hayes, dissenting).

[33] 356 NLRB at 779.

[34] My colleagues appear to find that the *WorldMark* decision erred in relying on this fact, insofar as they suggest that if the employee had the opportunity to raise the issue before, but declined to do so, that would impose an "artificial limit" on employees' ability to engage in concerted activity. Accordingly, I will not address this fact here.

other person involved in the conversation – a manager. In that context, and absent any other facts suggesting that the employee was directing his statements to fellow employees, the use of "us" or "we" supports a finding of protected, rather than concerted, activity.

My colleagues suggest as a result of the fifth fact—that the employee's activity did result in group action—that the Board should infer that the employee acted with the intent to initiate that action. However, that is not the test under *Meyers II*. *Meyers II* requires that the General Counsel establish, by the totality of the circumstances, that the statements were *made with the intent* of initiating group action. Absent the group meeting context, the mere fact that an employee who was not part of the conversation happened to chime in after the fact does not transform, post hoc, the employee's motivation for making the statements in the first place.

Finally, my colleagues, in light of the fact that the cases upon which they rely are readily distinguishable, assert that the caselaw supports their position because "the Board [has] never held that asserting an objection during a formal meeting was either necessary or sufficient."[35] This assertion, however, completely misses the point. The only question to be answered is whether the conduct at issue in *WorldMark* and *Alstate* satisfies one of the two requirements set forth in *Meyers*. As described thoroughly above, none of the facts upon which the Board in *WorldMark* relied actually supports finding an inference that group action was the goal of the employee's actions. It could well be that my colleagues believe that the requirements set forth in the *Meyers* cases create an "unduly restrictive test" for finding concerted activity. But that is the current law, and my colleagues' view that concerted activity exists where the General Counsel has not established, based on the totality of the circumstances, that a single employee brought a "truly group complaint" to the attention of management or acted with the specific intention of initiating group action cannot be reconciled with that law.

Conclusion

As I stated at the beginning of my comments, the analysis set forth by my colleagues pertaining to whether a discussion in front of, but not involving, other employees satisfies the requirements of *Meyers II,* above, plays no role in deciding this case. Nevertheless, for the reasons set forth above, the dicta contained in their decision cannot be reconciled with the *Meyers* cases. The Act requires that, to be covered by the statute, employee actions be both protected and concerted. Accordingly, the *Meyers* cases, mindful of the Act's clear direction, define the limited circumstances in which a single employee, acting alone, will be considered to be acting in a concerted manner with other employees, focusing on the requirement that "concerted" involve some form of "group action." My colleagues today attempt to stretch the meaning of "group action" beyond all recognition, asserting that a single employee can, in effect, act on his own so long as other employees are present and certain other circumstances—which do not, in fact, support a finding of concerted activity—are present. The fact that an employee is raising an issue concerning a group *concern* goes to whether the conduct is protected, not whether it was undertaken in connection with group *action*. None of the facts relied upon by my colleagues are comparable to the facts that have, in the past, led the Board to infer the required "group action" that is the foundation of concerted activity. Nor have they cited any facts, not present in earlier cases, that would support a finding that the employee's activity was concerted. Accordingly, to the extent that my colleagues take the position that concerted activity can be established by protected activity taken without the requisite intent toward group action, their view is contrary to the requirements of both the Act as well as the *Meyers* cases.

Dated, Washington, D.C. August 25, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[35] My colleagues appear to suggest that various inapposite cases, whether involving groups of employees protesting together, or a complaint arising as a direct result of group action, or a coworker directly soliciting others to join their protest, support their view that the conduct at issue in *WorldMark* and *Alstate* constituted concerted activity. In each of those cases, however, the conduct at issue *literally* satisfies one of the *Meyers II* requirements. The issue raised by my colleagues in dicta is whether the conduct in *WorldMark* and *Alstate*—that does not literally satisfy either of the *Meyers II* requirements—should be found to satisfy the "intent to initiate group action" requirement of *Meyers II*.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Ronald Vincer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Vincer whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Ronald Vincer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Ronald Vincer's corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days from the date of the Order, remove from our files any reference to the unlawful discharge of Ronald Vincer, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MILLER PLASTIC PRODUCTS, INC.

The Board's decision can be found at www.nlrb.gov/case/06-CA-266234 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Katherine E. Leung, Esq., for the General Counsel.

Robert Bracken, Esq. (Bracken Lamberton, LLC), of Pittsburg, Pennsylvania, for the Respondent.

Benjamin Salvina, Esq. (Murphy Law Group, LLC), of *Philadelphia, Pennsylvania,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried via Zoom virtual technology on March 30–31, 2022. The amended complaint alleges that Miller Plastic Products, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by discharging Ronald Vincer, the Charging Party, on March 24, 2020, because he raised health and safety concerns with the Respondent.[2] The Respondent denies that Vincer engaged in protected concerted conduct and asserts that he was discharged for poor performance and violating the Respondent's policies and practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Burgettstown, Pennsylvania, is engaged in the manufacture and non-retail sale of plastic machining and fabrication products, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

The Respondent, located in Washington County, is owned by Donnie Miller. It produces plastic storage products for chemicals, waste water, and drinking water. Those products are used primarily in the pharmaceutical, food, water purification and metal processing industries. Timothy Zeliesko has been the chief operating officer since September 2019. His management duties encompass company finances, policies, operations, health care, and safety. Blake Trenary was plant manager from 2018 to February 2022. He was succeeded by Josh Bonanno, a fabricator, as plant manager. Both Zeliesko and Trenary had the authority to hire, fire and discipline employees.

Approximately 26 to 33 employees work in the Respondent's production facility, which includes a machine shop, fabricating department, and office. They consist of machinists, welders, fabricators, and clerical and sales staff. Plant employees work at 8-foot long tables, most of which are adjacent to each other. Two of those employees, Vincer and James Boustead, are at the center of this dispute.

B. Ronald Vincer

Vincer, an experienced welder, was hired as a fabricator in 2015. For much of his tenure, the managers considered Vincer to be highly skilled employee who performed excellent work. However, Vincer was also very social and would talk with other employees at their work stations, especially Boustead. Casual discussion among employees while they worked was

[1] 29 U.S.C. §§ 142-159.

[2] All dates are 2020 unless otherwise indicated.

commonplace and accepted by management, which wanted employees to "enjoy themselves at work."[3] By 2019, however, Vincer began to experience marital problems. Trenary was supportive, accommodating his schedule, allowing him to come to work late, leave at lunch to pick up his child, or leave work for various reasons.[4] Zeliesko also counseled Vincer periodically about performance deficiencies, late attendance, excessive talking, and distracting coworkers. He was also counseled about talking on his cell phone.[5] On March 5, Miller counseled Vincer and Boustead about excessive talking and production times. However, Vincer was never issued a warning by Trenary, Zeliesko, or Miller.[6]

Boustead, a welder/fabricator who worked at the table adjacent to Vincer, has been employed by the Respondent since 2018. When he started, Vincer trained him in the plastic fabrication process. Vincer and Boustead became close friends and spoke frequently at work, especially in the beginning. In addition, Vincer often visited Boustead's home and Boustead's wife provided child care for Vincer's child.

C. The Respondent's Disciplinary Policies and Practices

The Respondent's Employee Handbook recites its workplace rules and is distributed to all employees. It includes the following pertinent provisions:

> STANDARDS OF CONDUCT
>
> Each employee has an obligation to observe and follow MPPI policies and to maintain proper standards of conduct at all times. If an individual's behavior interferes with the orderly and efficient operation of a department, corrective disciplinary measures will be taken.
>
> Disciplinary action may include a verbal warning, written warning, suspension sand/or discharge. The appropriate disciplinary action imposed will be determined by the corporation. MPPI does not guarantee that one form of action will necessarily precede another. nongenuine
>
> The following may result in disciplinary action, up to and including discharge, Violation of the MPPI policies or safety rules; insubordination; unauthorized or illegal possession, use or sale of alcohol or controlled substances on work premises, during working hours, while engaged in corporation activities or in corporation vehicles; unauthorized possession, use or sale of weapons, firearms or explosives on work premises; theft or dishonesty; physical harassment; sexual harassment; disrespect toward fellow employees, visitors or members of the public; poor attendance or poor performance; use of cell phones during work hours.[7] These examples are not all inclusive. We emphasize that discharge decisions will be based on an assessment of all relevant factors.
>
> NOTHING IN THE POLICY IS DESIGNED TO MODIFY OUR EMPLOYMENT-AT-WILL POLICY.

In addition to the Employee Handbook, the Respondent requires employees to sign a separate document of Company Policies. That form, which Vincer signed and acknowledged on February 2, 2015, supplements the disciplinary provision in the Employee Handbook.[8]

> I. Cause for discharge or discipline: Causes for discharge or disciplinary action may be, but are not limited to the following categories.
>
> A. Bringing in or consuming intoxicants on company premises.
> D. Reporting for work under the influence of alcohol.
> E. Endangering the health or safety of himself or others.
> F. Neglect of duty.
> G. Willful destruction or removal of company's or another employee's property.
> H. Refusal to comply with advertised rules.
> I. Dishonesty.
> J. Sleeping on duty.
> K. Failure to report for work without good reason/ Failure to report off.
> L. Disorderly conduct.
> M. Gambling on company premises.
> N. Insubordination.
> O. Zero illegal / non-prescribed drug tolerance.
>
> II. *Discharge and discipline*
>
> A. Management may take several steps for discharge or disciplinary action of any severity on the basis of the seriousness of the case of the employee's past record.
> B. Where such severe action is not considered necessary, the following procedures will apply.

[3] Zeliesko conceded that he supported the practice of employees talking with one another while they worked. (Tr. 46-47.)

[4] Boustead confirmed that Trenary was supportive and consistently accommodated Vincer's needs. (Tr. 172-173, 221.)

[5] Vincer was a credible witness, testifying spontaneously and readily admitting his shortcomings. Although he did not refute the testimony of Zeliesko, Trenary, and Boustead that his conversations distracted employees others, there is a scant evidence that his production diminished as a result. (Tr. 46, 96, 140, 172.). He was counseled about his behavior by Trenary, Zeliesko and Miller, and warned by Miller on March 5. However, I do not credit the hearsay testimony of Bonanno, the current plant manager, on this point since he never supervised Vincer. (Tr. 284–85.)

[6] The weight of the credible evidence indicates that undocumented verbal warnings, including the one by Miller on March 5, were actually a form of counseling. As Zeliesko described it when asked whether he ever issued Vincer a "verbal warning," he replied that he "communicated verbally to him in the plant about his distractions and not following company policy and distracting other employees." (Tr. 46, 223, 262–266.) Moreover, I did not give any weight to three dubious "Employee Warning Report" forms reflecting warnings allegedly issued to Vincer on June 28, 2019, September 4, 2019, and January 15, 2020 (GC Exh. 5-7.) With the exception of a December 2, 2019 warning signed by Trenary that was issued to, but not signed by, Christopher Cowger (GC Exh. 41.), the Respondent's disciplinary practice would be to have disciplinary forms signed by the employee and supervisor. (GC Exh. 14-15, 27-30, 32-39; R. Exh. 20.) In contrast, none of the three warning forms allegedly issued to Vincer were even signed by a supervisor. Nor was he ever informed that a warning would be placed in his file. (Tr. 248–250.) The January 15 warning was allegedly issued to both Vincer and Boustead. Strangely, however, Zeliesko wrote that he "moved [Boustead] to a different work station" on Vincer's form but *not* on Boustead's form. (GC Exh. 5, 16.) Moreover, Boustead's credited testimony further undermined the reliability of those documents. Boustead, unclear about the timing of his move, confirmed his past recollection, as recorded in his Board affidavit, that it "was before" or "not long before" Vincer's termination on March 24. (Tr. 210–211.)

[7] There are signs throughout the plant prohibiting the use of cell phones in work areas. (Tr. 222.)

[8] Both Zeliesko and Trenary testified that employee discipline should be based on violations of the Respondent's policies, either in the handbook or the list of company policies, except in circumstances where the handbook and Respondent's policies fail to anticipate a particular type of misconduct. (Tr. 36, 139–140.)

> The employee shall receive a verbal warning and explanation.
>
> 1. A second offense in the same category shall warrant a written reprimand stating the nature of the offense.
>
> 2. A third offense in the same category shall warrant a written reprimand and three scheduled days of disciplinary time off.
>
> 3. Further offenses in the same category shall warrant discharge.
>
> 4. Written reprimands will become part of the employee's permanent record.
>
> 6. Demotion will not be used as a disciplinary measure.

Policy violations are to be documented on the "Employee Warning Report" form, and placed in the employee's file. The Respondent's disciplinary protocol requires that form to be completed by the front line supervisor with as much detailed information about the infraction as possible, and then signed by the issuing supervisor.[9] That supervisor is usually the plant manager. Zeliesko and Trenary typically coached employees, but issued and documented warnings if warranted based the nature and/or frequency of the conduct. In severe instances, an employee could be suspended or terminated.[10]

C. Pennsylvania Responds to the COVID-19 Pandemic

As of March 6, 2020, there were two presumed positive cases of the COVID-19 coronavirus disease in Pennsylvania. On that day, Governor Tom Wolf issued an Order proclaiming the existence of a disaster emergency in Pennsylvania as a result of the COVID-19 pandemic (the pandemic) and committing state government's emergency resources and assistance, and the emergency responses of state agencies and county and municipal governments.

On March 16, Governor Wolf announced state-wide mitigation efforts to combat the pandemic, effective March 17, including a stay-at-home-order, and the closure of schools, dine-in facilities including restaurants and bars, and non-life-sustaining business. Life sustaining businesses, however, were not yet identified:

> THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA REGARDING THE CLOSURE OF ALL BUSINESSES THAT ARE NOT LIFE SUSTAINING
>
> WHEREAS, the World Health Organization and the Centers for Disease Control and Prevention ("CDC") have declared a novel coronavirus ("COVID-19") a "public health emergency of international concern," and the U.S. Department of Health and Human Services ("HHS") Secretary has declared that COVID-19 creates a public health emergency; and
>
> WHEREAS, as of March 6, 2020, I proclaimed the existence of a disaster emergency throughout the Commonwealth pursuant to 35 Pa. C.S. § 7301(c); and
>
> WHEREAS, I am charged with the responsibility to address dangers facing the Commonwealth of Pennsylvania that result from disasters. 35 Pa. C.S. § 7301(a); and
>
> WHEREAS, in addition to general powers, during a disaster emergency I am authorized specifically to control ingress and egress to and from a disaster area and the movement of persons within it and the occupancy of premises therein; and suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, and combustibles. 35 Pa. C.S. § 7301(f); and
>
> WHEREAS, in executing the extraordinary powers outlined above, I am further authorized during a disaster emergency to issue, amend and rescind executive orders, proclamations and regulations and those directives shall have the force and effect of law. 35 Pa. C.S. § 7301(b); and
>
> WHEREAS, in addition to my authority, my Secretary of Health has the authority to determine and employ the most efficient and practical means for the prevention and suppression of disease. 71 P.S. § 532(a), 71 P.S. 1403(a); and
>
> WHEREAS, these means include isolation, quarantine, and any other control measure needed. 35 P.S. § 521.5.
>
> NOW THEREFORE, pursuant to the authority vested in me and my Administration by the laws of the Commonwealth of Pennsylvania, I do hereby ORDER and PROCLAIM as follows:
>
> Section 1: Prohibition on Operation of Businesses that are not Life Sustaining
>
> All prior orders and guidance regarding business closures are hereby superseded.
>
> No person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business regardless of whether the business is open to members of the public. This prohibition does not apply to virtual or telework operations (e.g., work from home), so long as social distancing and other mitigation measures are followed in such operations.
>
> Life sustaining businesses may remain open, but they must follow, at a minimum, the social distancing practices and other mitigation measures defined by the Centers for Disease Control to protect workers and patrons. A list of life sustaining businesses that may remain open is attached to and incorporated into this Order.
>
> Enforcement actions will be taken against non-life sustaining businesses that are out of compliance effective March 21, 2020, at 12:01 a.m.

D. Employees Talk About the Pandemic at Work

By March, the looming pandemic was a frequent topic of conversation within the plant. Trenary and Zeliesko periodically

[9] Zeliesko, called as an adverse witness by the General Counsel, was not a credible witness. He seldom answered a question directly and was evasive when asked about the Respondent's disciplinary practices. When asked if there were any, he asked, "do you have a scenario? Typically, if something wrong, try to coach to correct, if repetitious, take corrective action if necessary because it costs money to retrain employees if possible. Not documented if see for first time, repeats – try warning first, every scenario is unique, can't quantify how many repetitions before escalating the discipline." (Tr. 36–37, 47, 104–105.)

[10] Trenary also lacked credibility. Although no longer employed by the Respondent, his roommate still works for the company. Most importantly, he testified that he issued verbal warnings to Vincer and other employees that were not documented. However, the Respondent's protocol required supervisors to document violations. On the other hand, Trenary was a sympathetic, accommodating manager who had a good relationship with his subordinates. As such, it is clear that his communications with employees about undocumented rules violations amounted to coaching. (Tr. 136–140.)

updated employees about any developments, and measures were taken to implement social distancing, sanitize work and common areas, and provide employees with face masks.[11] Vincer and Boustead spoke about the virus every day. Boustead was especially at high risk for serious illness during the pandemic. He has had his spleen removed, suffered a collapsed lung, and his grandmother, who lives next door, has chronic obstructive pulmonary disease. Vincer had other worries, including the possibility that the federal government would declare martial law, order a lockdown, and other gloomy scenarios. At the same time, however, Vincer vented his about reluctance to continuing to work. He believed that the Respondent was not an essential or life-sustaining business and should close down, like other companies were doing. Vincer also communicated that belief to other employees, including Larry Pierson, Josh Bonanno, Mike Miller, and Christopher Cowger. He even suggested to Boustead that someone should contact the authorities and tell them that the Respondent was still open.[12]

E. The March 16 Meeting

On March 16, after Governor Wolf issued his latest proclamation, Zeliesko convened an all-hands meeting in the center of the plant. Zeliesko opined that the Respondent would be classified as an essential business and able to stay open because its plastic products are used for food and purified water. He outlined the health and safety measures taken by the company in accordance with guidance from the Center for Disease Control. They included instructing employees to wash their hands, not touch their face, cover their mouths, clean and sanitize work stations, use sanitizer wipes and hand sanitizer provided throughout the plant, and avoid gatherings outside of work. The Respondent also purchased a fogger to sanitize the plant after hours.

Prior to this meeting, employee conversations relating to the pandemic revealed interest as to whether the Respondent would be classified as an essential business. At this meeting, employees asked about the company's sanitization and other health and safety efforts, the process by which businesses would be determined to be essential, and Zeliesko's basis for believing that the company would be classified as essential. Zeliesko explained that he was working hard to ensure that the Respondent was designated as an essential or life-sustaining business and, thus, able to continue operating. Vincer, clearly upset, disagreed, asserting that the Respondent did not have the proper precautions in place and the employees should not be working for the time being. Zeliesko replied that the Respondent was a small company and the employees needed to keep working until they got further clarification from the government.[13]

After the March 16 meeting, Boustead approached Trenary to discuss his apprehension about his health risks. Trenary, familiar with Boustead's health issues, assured him that they would make anyone that came into contact with COVID-19 stay home, follow proper procedures and enforce social distancing. Boustead, whose son also works for the Respondent, was satisfied by the explanation.

F. The Respondent's March 18 PowerPoint Presentation

On March 18, Zeliesko prepared a PowerPoint presentation for employees and ran it repeatedly on a 60-inch screen in the front of the plant. The slides included sanitary precautions and tips to avoid the spread of coronavirus. The PowerPoint slides also updated employees that certain non-essential businesses were ordered to close on March 18 and the number of confirmed COVID-19 cases. The Respondent was not among them. In the PowerPoint slides, Zeliesko also updated employees about House Bill 6201, which pertained to child care, as an employee had asked about that issue. The PowerPoint urged employees to ask questions and included information about the number of confirmed COVID-19 cases around the world. As of March 17, there was one confirmed case of COVID-19 in Washington County. The final slide included the bulletin from the Governor's office indicating that essential services, including industrial manufacturing, were allowed to remain open.

G. The Respondent is Classified as an Essential Business

On March 19, 2020, Governor Wolf issued an Order prohibiting the operation of non-life sustaining or non-essential businesses. That evening, Zeliesko emailed the Respondent's managers and supervisors that "We are still open! Friday." It read:

> Despite this new ruling, we will be open tomorrow for business as usual. It doesn't go into effect until midnight Friday (Saturday). They are listing plastic manufacturing "Ok to open physical location."
>
> Tomorrow we will have to determine if we fall under the plastic manufacturing category. Seeing that plastic manufacturing is actually the making of the raw materials. They have closed metal fabricating shops and metal machining shops. So, if any employees reach out to you please ensure them that tomorrow is business as usual. And nothing is changing until we have a definite answer tomorrow during the day.
>
> Any conversations with employees please keep it short and brief that they have listed plastic manufacturing still essential unless we find out otherwise. Which at this time we have not.
> Thank you very much.

H. Zeliesko Updates Vincer on March 20

The March 19 Order did not elaborate as the types of business considered to be life-sustaining or essential. That clarification came on March 20, when the Governor's Office identified "plastics product manufacturing" as an essential business sector. On the same day, Zeliesko met with and conveyed that information to the employees. Employees did not voice any concerns regarding that announcement. After the meeting, Zeliesko approached Vincer and showed him the list of essential business services and

[11] Although there is no direct evidence that Trenary and Zeliesko were aware of specific discussion among employees about the pandemic, they communicated with them about it. As Zeliesko recalled, "I think that the alarm started when everybody started hearing about COVID." (Tr. 39-41, 147-148.)

[12] Boustead, still in the Respondent's employ, was the most credible witness in this case. His testimony was spontaneous, his demeanor was calm and consistent, and he was genuinely receptive to inquiry from both sides throughout. (Tr. 199-208.)

[13] Zeliesko denied that anyone, including Vincer, raised any concerns about the Respondent's safety measures during his presentation. (Tr. 79-80.) Vincer's credible assertion to the contrary, however, was corroborated by Trenary and Boustead. Boustead also added that "[t]here were several people more than Vincer stating that we were not an essential business." (Tr. 149-151, 173-174, 203-210, 226-229, 237-275). Boustead did not recall whether Vincer spoke out at the mid-March all-hands meeting. However, he confirmed that his past recollection, as accurately recorded in his Board affidavit, was that Vincer did express his opinion at that meeting. (Tr. 202-206, 226-227.)

sectors. Vincer did not contest the accuracy of that information or otherwise express any concerns at the time.

On March 24, Zeliesko submitted a "COVID-19 Closure Exemption Request Submission" to the Governor's Office. In pertinent part, Zeliesko explained that "I know Plastic Product Manufacturing is on the list to be OK to operate. But for the comfort of knowing that we are operating within the guidelines correctly we are applying for the waiver." On March 29, the Pennsylvania Department of Community and Economic Development replied, in pertinent part:

> Based on the information submitted in your request, Governor Wolf and Secretary Levine's recent orders calling for the closure of non-life-sustaining businesses do not appear to require your business to close at this time. Certain operations of your business described in your request appear to be within the life-sustaining business sector that contributes to the health and safety of Pennsylvania.

I. Vincer's March 23 Conversation with Zeliesko

On March 18, Pierson received a telephone call from his wife, who works at a nursing home, that she was sent home with flu-like symptoms. When Pierson shared that information with Vincer, the latter suggested Pierson inform Trenary. Pierson was sent home and was out of work on March 19 and 20. Vincer was off on March 20, but when he returned to work on March 23, Boustead informed him that Pierson returned to work on March 20. Concerned about the Respondent's COVID protocol, Vincer stopped Zeliesko when he saw him and asked what the requirements were for employees to return to work after having COVID-19 or being exposed to COVID-19. Zeliesko replied that he would have to get back to him. Vincer also asked Zeliesko if he thought the company should be open and operating. Zeliesko replied that the Respondent believed it was a life-sustaining business based on the information provided by government agencies. He stated that the Respondent would continue operating and as soon as more information was obtained, it would be communicated to the employees. Vincer griped briefly and the conversation ended. [14]

After his conversation with Zeliesko Vincer went and spoke with Boustead. He urged Boustead to speak with Trenary or Zeliesko about his own health vulnerabilities and the protocols the Respondent was putting in place when people were sick or exposed to COVID-19. Boustead ultimately went and spoke with Trenary about this issue and asked to be notified, because of his high-risk status, if anyone in the plant was ill. Trenary assured Boustead that he would keep him informed about any active cases of COVID-19 in the plant. Boustead did reference the Respondent's status as a life-sustaining business or needing to close its facility for employee safety during this conversation.[15]

J. Vincer's Termination

By March 24, a confluence of events would lead to Vincer's termination. By the time Vincer expressed his concerns to Zeliesko on March 23 about the business remaining open, the Respondent was experiencing financial repercussions from the COVID-19 pandemic. The Respondent accrued a net loss of $34,548.71 for the month of January, while the same period in January 2019 resulted in a net income of $125,450.39 – a decrease of $160,314 for the year. The onset of COVID-19 forced the Respondent to change its credit terms with its customers. The Respondent also suspended an incentive bonus program in March because of financial concerns.[16]

On March 27, the *Coronavirus Aid, Relief and Economic Security Act* (*the CARES Act*) was signed into law in response to the economic repercussions from the COVID-19 pandemic.[17] Section 1102 of the Cares Act provided for relief to adversely impacted businesses by establishing a Payment Protection Program (PPP). Under the PPP, a business such as the Respondent would be provided with a Small Business Administration (SBA) loan to cover payroll and certain operating expenses. Loan awards under the PPP, however, were subject to certain conditions. One such condition was an acknowledgment that funds "to retain workers and maintain payroll" would be used for those purposes. *CARES Act* Section 1102 (a)(1)(G)(i)(II).

In March, the Respondent were concerned about needing to take a PPP loan and the impact terminating employees could have on the loan being forgiven. The Respondent took out two PPP loans during the COVID-19 pandemic. These considerations would become a factor in the termination of four employees, including Vincer, during the last week in March.[18]

On March 24, Trenary observed Vincer text messaging on his cell phone and reported it to Zeliesko. Almost immediately, and without further investigation or evaluation of Vincer's work efficiency, production, or impact on company profit, they went to Miller. Trenary and Zeliesko informed Miller of the latest texting episode and recommended termination. Miller agreed.[19]

Shortly thereafter, Miller, Zeliesko, and Trenary informed Vincer that he was terminated for poor attitude, talking, and lack of profit, Upon being told that he was terminated, Vincer stated that there were people worse than or slower than him and nodded towards Cowger. Vincer then packed up his tools and left.[20]

The Respondent did not give Vincer anything in writing when he was terminated on March 24. On June 4, Trenary finally did so by email: "To whom it may concern: This is an official

[14] Zeliesko vaguely recalled the conversation as occurring within "a day or so" after the March 16 meeting (Tr. 48–49, 80.). The credible evidence suggests otherwise. Vincer's detailed testimony regarding this encounter was corroborated by Boustead's testimony that Pierson was absent from work two times that year (March and July) because of concern that his wife might have been exposed to COVID. (Tr. 208-209, 224–225, 229, 244–245–246.) On rebuttal, Zeliesko denied, unconvincingly, that he spoke with Vincer on March 23, and attempted to explain Pierson's absence from work in March to "vacation time . . . for different reasons." (Tr. 276–277.)

[15] This finding is based on Vincer's credible testimony. (Tr. 245–246.)

[16] R. Exh. 14.

[17] Pub. L. 116–136.

[18] Although comparable information for February was not provided, the reliability of this financial data, and the Respondent's financial concerns in general, were not disputed. (R. Exh. 14–15; Tr. 106–111, 190–120.)

[19] Zeliesko and Trenary denied that Vincer's expressed concerns to Zeliesko were mentioned on May 24, much less the reason for the decision to terminate him. Neither was credible on that point. Zeliesko testified that Vincer posed a safety hazard to his coworkers. However, Zeliesko could not point to a single incident in which an employee had been injured or nearly injured as a result of Vincer's conduct. (Tr. 50, 53.) Trenary testified similarly, that the decision to discharge Vincer was based upon his excessive talking during working time, and that there was no particular inciting incident that prompted Respondent to discharge him on March 24. (Tr. 153–155.)

[20] I based this finding on the credible testimony of Vincer over the inconsistent, shifting positions taken by the Respondent for his discharge. (Tr. 52–53, 56–60, 97, 156–157, 246–247; GC Exh. 40.)

employment termination letter for Ronald Vincer. He was let go from [the Respondent] on March 24, 2020."[21]

K. Vincer's Unemployment Compensation Claim

After being terminated, Vincer went home and immediately completed an application for unemployment compensation benefits. On his application, Vincer listed the rules violations that led to his discharge on March 24 as: "[too] much talking to coworkers, lack of profits and poor attitude." In response to a question as to whether the discharge was for a specific incident, Vincer stated that he was discharged on March 5 because "was talking to coworker at the end of the shift during . . ." [end of answer cut off].[22]

L. The Respondent's Application of Discipline

1. Discharges During the March 24–31 Period

The Respondent also terminated three other employees during the last week of March: Christopher Cowger—March 24; Eric Saloom—March 25; and David Onuska—March 31.

Cowger, a fabricator, had been warned and suspended several times for costly mistakes. Cowger received his first warning on August 31, 2017. On October 4, 2017, Cowger was warned and suspended for three days for repeatedly being "careless towards quality of work resulting in bad parts." On December 3, 2018, Cowger was warned after arriving one hour late for work and "holding up delivery on a project." He was also warned that the next violation would result in a three-day suspension. On December 21, 2018, Cowger was warned for carelessness, disobedience, failure to follow instructions, unsatisfactory work quality, and violating company policies. On December 2, 2019, Cowger was warned after being on his cell phone during work time. Trenary told him to put it away. On March 24, Cowger was terminated in writing "due to poor performance that does not meet the standard for [the Respondent]." [23]

Saloom was terminated the next day. Employed for two years as a salesperson, Saloom was discharged based on productivity. In 2019, management met with him three times, but he was never issued a warning.[24]

Onuska was discharged six days later. Employed for four years as a fabricator, Onuska received numerous warnings and suspensions between 2018 and 2020. He was warned about excessive absenteeism (18 days with no excuse) on July 23, 2018. In November 2019, Zeliesko met with Onuska to discuss his detailed analysis of Onuska's missed and late days for the year. That analysis calculated the additional cost incurred by the company – $6,903. On January 24, Onuska was warned and suspended for one week for missing or being late seven out of 17 work days. He was terminated based on the Respondent's determination that his poor attendance record resulted in a lack of productivity due to the delayed completion of ongoing jobs.[25]

2. Additional Disciplinary Incidents

The Respondent's approach to employee discipline before and after Vincer's termination has varied. Shawn Peterson, a machinist, was discharged on November 19, 2019 for slow production times and failing to meet company standards. He had no prior history of warnings. In deciding to discharge Peterson, Zeliesko calculated the number of jobs that Peterson's machine could complete in a day and the number of jobs Peterson completed in a day. The difference indicated the amount of time Peterson wasted.[26]

Marcus Quinones, a fabricator, was terminated on October 8. His disciplinary record consisted of four prior written warnings. In December 2018, Quinones was disciplined for improper use of a tool. He received a written warning, and signed to acknowledge receipt of the discipline. In May 2019, Quinones was disciplined for excessive tardiness. This discipline was issued in writing, and signed by Quinones and Trenary. On October 1, Quinones was warned that his "[n]ext infraction of any kind will result in termination" after purposely spiking his tool on a tank he was working on. On October 6, he was issued another warning for using a grinder on a plastic tank after being told not to do so. In addition, he was cited for building a tank that was significantly out of square that it would be impossible to use and required additional resources to fix the mistake. Quinones was given the warning to sign and remain employed. Although he signed the three previous warnings, Quinones refused to sign and became enraged. He was terminated two days later.

Jason Hedrick, a laborer, was terminated on January 12, 2021 for "talking back to [his] superior and not following company policy." His disciplinary record consisted of four prior written warnings, all of which he signed. In February 2019, Hedrick received a final warning for intentionally hiding the keys to the delivery truck, making the delivery driver late for a drop-off. In April 2019, he was warned for carelessness after failing to include all the parts in an order before it was shipped. As a result the Company incurred additional costs in getting those parts to the customer. In November 2019, Hedrick received a final warning for dropping a tank off of another employee's workstation and damaging it. In November 2020, he was suspended for one day for climbing on the trailers of trucks picking up orders after being told multiple times not to do that.

In contrast, Boustead, having been warned and counseled on several occasions regarding his talking and productivity, avoided termination as the Respondent laid off employees in March. More recently, on January 11, 2022, he was issued a written warning after a lengthy disciplinary meeting for failing to record the time spent on completed jobs. The oversight created a billing problem on those jobs, and interfered with the Respondent's ability to provide accurate quotes for future jobs. Boustead remains in the Respondent's employ.

[21] In its position statement, the Respondent claimed to have discharged Vincer because he talked too much, distracted other employees, and used his cell phone in the plant, and because these behaviors could lead to a slowdown in plant efficiency. (GC Exh. 25–26, 40.)

[22] The Respondent highlights the fact that Vincer, contrary to his testimony, did not state on the unemployment application that *he* believed he was terminated because he raised health and safety concerns related to COVID-19. (R. Exh. 16; Tr. 245–245, 251–256, 275.) Nor did Vincer produce or preserve any emails or text messages evidencing *his* belief that he was discharged due to COVID-related complaints. (Tr. 258-262.)

[23] Zeliesko credibly testified that Cowger regularly violated the cell phone use policy and cost the company about $3,000 in repairs on one occasion. (GC Exh. 27–29; Tr. 96–101.)

[24] Although he produced no documentation to support his assessment that Saloom was "an unproductive sales person" and "consistently missed his goals," Zeliesko's assessment was not disputed. (Tr. 101.)

[25] Zeliesko did not testify as to the performance of a similar analysis regarding Onuska's performance in the week leading to his termination. (GC Exh. 13-15; Tr. 67–69, 168–171.)

[26] Although the timeframe is unclear, Zeliesko conceded that he based Peterson's discharge, at least in part, on his calculations of the machine runtimes. (GC Exh. 13, 18; R. 14.; Tr. 70-72, 101-104.)

LEGAL ANALYSIS

1. Applicable law

Under Section 7 of the Act, employees have the right to engage in concerted activities for the purpose of "mutual aid or protection." *Alstate Maintenance, LLC,* 367 NLRB No. 68 (2019). "Section 8(a)(1) enforces this guarantee by deeming it 'an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise' of their § rights." *MCPc, Inc. v. NLRB,* 813 F.3d 475, 482 (2016). Under *Wright-Line*, 251 NLRB 1083, 1089 (1980), 1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in order to establish such a violation, the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). The General Counsel meets this burden by proving that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relation between the discipline and the Section 7 activity.

Proof of union animus can be based on direct evidence or can be inferred from circumstantial evidence. *Tubular Corp. of America*, 337 NLRB 99 (2001) (antiunion motivation inferred from circumstantial evidence of, among other things, employer's deviation from past practice). The Board does not require the General Counsel to produce direct proof of animus under *Wright Line*. Animus toward an employee's protected activity may be inferred from the pretextual nature of an employer's proffered justification, as long as the surrounding facts support such an inference. *Electrolux Home Products*, 368 NLRB No. 34 slip op. at 3 (2019). Similarly, when an employer presents shifting defenses for its actions, this too may be evidence of unlawful motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978).

Once the General Counsel sustains her initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *Manor Care Health Service.–Easton*, 356 NLRB 202, 204, 225–226 (2010), *enforced per curiam*, 661 F.3d 1139 (D.C. Cir. 2011) (citations omitted).; *Wright Line*, 251 NLRB at 1089.

II. VINCER'S PROTECTED AND CONCERTED CONDUCT

A. Vincer's Initial Concerns

In Myers Industries (Myers 1), 268 NLRB 493 (1984), and Myers Industries (Myers 11)

281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Generally, conduct becomes concerted when it is "engaged in with or on the authority of other employees, " or when an employee seeks "to initiate or to induce or to prepare for group action." Meyers II, 281 NLRB at 887.

Vincer spoke every day with coworkers in March, especially Boustead, regarding the health and safety risks posed to employees and their families by the pandemic. However, conversation during work time was not limited to Vincer and Boustead, his close friend at the adjoining table. It was also a popular topic of discussion among employees throughout the plant. During some of these discussions, Vincer even urged that other employees approach management or complain to unspecified government "authorities" that the Respondent should not be open. Vincer's conduct was clearly concerted. See Quicken Loans, Inc., 367 NLRB 112 (2019) quoting Meyers Industries, 281 NLRB 882, 887 (1986) (Meyers II) (concerted activity includes cases 'where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.'"). See also *Salisbury Hotel, Inc.*, 283 NLRB 685, 687 (1987) (employee's call to Department of Labor grew out of employee's concerted protest of employer's change in lunch hour policy, and was therefore a continuation of that concerted activity)

Conspiracy talk notwithstanding, Vincer's conduct was also protected. See Wabash Alloys, 282 NLRB 391, 391 (1986) (employees' discussions of safety concerns or hazards in the workplace are protected concerted activities); Systems with Reliability, Inc., 322 NLRB 757, 757-760 (1996) (employees' discussion over the toxic effects of methyl ethyl ketone in the workplace and threatening to contact OSHA). The fact that Vincer was outspoken about the threats posed to employees and their families by the pandemic, and was the only employee known to advocate for the Respondent to close, did not negate his Section 7 protections. The activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Meyers II, 281 NLRB at 887 (concerted activity includes cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."). See also, *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71, slip op. at (2018), enfd. 790 Fed.Appx. 256 (2d Cir. 2019 (employee who spoke out to group about workplace concerns engaged in protected concerted activity). *Wal-Mart Stores, Inc.* 341 NLRB 796, 804 fn. 9 (2004), enfd. 137 Fed.Appx. 360 (D.C. Cir. 2005) (when a complaint is made to improve the working conditions of all employees it is a protected concerted activity), citing *Hanson Chevrolet*, 237 NLRB 584 (1978).

Moreover, the fact that Vincer's efforts included a desire to go home is irrelevant, since the standard for assessing whether the purpose of his conduct was for mutual aid or protection is an objective one. See *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 n.10 (7th Cir. 1976) (the purpose, not the motives, of conduct relating to matters of "mutual aid or protection" of employees is relevant). Vincer's understanding as to whether the Respondent was or was not a life-essential business was not actually settled until the Department of Community and Economic Development informed Zeliesko on March 29 that the Governor's closure orders "do "not appear to require your business to close at this time. Certain operations of your business described in your request appear to be within the life-sustaining business sector."

B. The March 16 Meeting

Group activity was the essence of the Respondent's March 16 all-hands employee meeting. During that meeting, Zeliesko provided employees with assurances regarding the health and safety measures being taken by the company. He also fielded employees' questions as to whether the company's operations qualified as life-sustaining and it would be permitted to remain open. Zeliesko expressed confidence that the company would qualify as essential and assured them that the business would remain open until the government informed it otherwise. Vincer, however, challenged Zeliesko's statements, blurting out angrily that "we shouldn't be working" and voicing concern over the lack of quarantine measures. Vincer's statements, which were heard

and responded to by Trenary and Zeliesko, involved all of his coworkers and was inherently concerted since it was an outgrowth of concerns discussed among employees throughout the plant. That no other employee openly agreed with Vincer at the meeting is immaterial because employees need not agree with the message or join in an employee's cause for the communication itself to be concerted. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014). Cf. *Bud's Woodfire Oven d/b/a Ava's Pizzeria*, 368 NLRB No. 45 slip op at 6 (2019) (employee's criticism of his restaurant manager's lack of assistance in the kitchen, a matter that employees merely joked about, was not concerted). The other employees' participation in the meeting is sufficient to render his statements inherently concerted, even if none of them agreed with his message.

C. Vincer's March 23 Discussion with Zeliesko

Vincer did not let the issue go. He continued speaking to Boustead and other employees at work about COVID-19 and his concerns regarding the Respondent's return-to-work procedures for employees who contracted or were exposed to COVID-19. One employee, in particular, Larry Pierson, concerned Vincer because Pierson's wife was believed to have contracted the virus and he had returned to work. On March 23, Vincer stopped Zeliesko as he walked by his table and inquired about the company's return-to-work protocol. Vincer also suggested that the company should close. Zeliesko replied that the Respondent would remain open until told otherwise by the government. Vincer briefly grumbled and the conversation ended.

The Board has long recognized that where an employee's individual action is a direct outgrowth of an earlier group discussion of a shared concern or grievance, the subsequent individual action is still protected because of its relation to the group discussion. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038–1039 (1992) (four employees' individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over new scheduling policy), supplemented *by* 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995). The very nature of Vincer's concern—that nonexistent or inadequate return to work protocols would allow the virus to spread within the plant – inherently relates to the health and safety of every employee at that location. See *Trayco of South Carolina, Inc,* 297 NLRB 630 (1990), enf. denied, 927 F.2d 597 (4th Cir. 1991); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995), enf. denied in part on other grounds, 81 F.3d 209 (D.C. Cir. 1996).

Vincer's statements to management and conversations with coworkers was targeted at amassing employee support or spurring employees to speak up about a genuine safety concern for the purpose of changing the conditions in Respondent's facility for the benefit of every employee in the plant, as opposed to "mere griping." *Mushroom,* 330 F.2d 683, 685 (3d Cir. 1964); *NLRB v. Datapoint Corp.,* 642 F.2d 123, 128–129 (5th Cir. 1981).

D. The Respondent's Motivation for Terminating Vincer

(1) The timing

Vincer was discharged one day after he stopped Zeliesko to complain about the Respondent's return-to-work protocol and express dismay, yet again, at the Respondent's insistence on staying open. The action was triggered after Trenary told Vincer to get off his cell phone and then observed Vincer walk away from his table as he continued talking on his cell phone. Trenary immediately reported it to Zeliesko, and the two of them went to Miller and recommended Vincer's termination.

Vincer, one of the Respondent's most skilled welders, was issued one warning (March 5) over the course of five years with the Respondent. Talking between employees while working was tolerated by supervisors, and Vincer certainly liked to talk with coworkers during the entire time he was employed by the Respondent. He spoke ever work day with Boustead, his close friend who worked at the table adjacent to his. There were occasions during work time when he would be talking with Boustead or other coworkers and not be working, and Trenary or Zeliesko would counsel him to get back to work. On March 5, Miller warned him about excessive talking and his production.

The timing of Vincer's discharge also occurred in the midst of an economic downturn and as the Respondent pondered who to keep on its payroll in order to get funding from the PPP program. The Respondent was aware that the PPP program guidelines required it to retain employees for whom it sought payroll reimbursement. In that regard, the Respondent also laid off three other employees that week, an action clearly related to the staffing decisions that it needed to make prior to entering the PPP program. However, as explained below, its decision to include Vincer in that mix was partially motivated by his protected concerted conduct in advocating for the Respondent to close shop and implement a a quarantine policy.

(2) The lack of an investigation

Vincer's discharge uncharacteristically lacked any investigation. In contrast to Zeliesko's investigations of other terminated employees, Vincer was hurriedly shown the exit without so much as a termination letter. Nor did Zeliesko or Trenary document Vincer's production deficiencies as was done for Onuska and Peterson before they were discharged for the same reason. Moreover, the presentation of unreliable documents as evidence suggests the subsequent papering of Vincer's file in an effort to justify the Respondent's motive for terminating him.

(3) Shifting defenses

The Respondent presented inconsistent reasons for terminating Vincer. In contesting his application for unemployment benefits, the Respondent claimed that Vincer was discharged due to his inability to meet production times. During the investigation of this case, however, the Respondent asserted that Vincer was terminated for excessive talking, using his cell phone during work time, both of which could lead to a slowdown in the plant. Finally, at the hearing, the Respondent added two additional grounds – the safety risks posed by his conduct, and the Respondent's financial condition. As previously noted, the Respondent's financial condition was a factor in the decision to discharge four employees, including Vincer, between March 24 and 31. The problem there was the decision to include Vincer in that group.

(3) The Respondent's disciplinary practices

Vincer's disciplinary history was relatively bare in comparison to that of other employees who were who received numerous disciplines or were terminated on the basis of productivity, disrespecting a supervisor or manager, safety, or cell phone use: Onuska, Cowger, Hedrick, Quinones, and Boustead. Each of these employees were issued written warnings signed by the issuing supervisor, and in all but one case, by the employee. They were all given second or more chances for misconduct, some of which was malicious, intentional and/or cost the company

money. More recently, Boustead, who remains employed, was given yet another chance after he failed to document his work on certain jobs, which hampered the Respondent ability to quotes future jobs.

In conclusion, the facts and circumstances indicate that the Respondent's decision to terminate Vincer, one of its most skilled welders, was based on animus towards his protected concerted conduct on March 16 and 23. *United States Coachworks, Ind.*, 334 NLRB 118, 122 (2001); *NLRB v. Henry Colder Co., Inc*., 907 F.2d 765, 769 (7th Cir. 1990); *Sound One Corp.*, 317 NLRB 854, 858 (1995); *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985). The hurried manner in which Vincer was terminated reveals that he was treated disparately in comparison to other employees. *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999). Moreover, the Respondent failed to prove by a preponderance of the evidence that it would have discharged Vincer in the absence of his protected concerted conduct. Facing a likely economic downturn, the Respondent did have some hard decisions to make – keep the business running but downsize in order to apply for the amount of PPP program relief that it believed would accurately reflect its payroll. In the absence of documentary or other reliable evidence, however, there is no way to determine how Vincer's production compared to other employees.

CONCLUSIONS OF LAW

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

2. By discharging employee Ronald Vincer, the Respondent has engaged in an unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging Ronald Vincer because he engaged in protected concerted conduct, the Respondent shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be ordered to offer Vincer reinstatement to his prior position and make him whole for any loss of earnings and other benefits incurred as a result of his unlawful termination. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also compensate Vincer for his reasonable search-for work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally the Respondent shall compensate Ronald Vincer for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Respondent will file with the Regional Director for Region 5 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Miller Plastic Products, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted conduct.

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

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

(a) Within 14 days from the date of the Board's Order, offer Ronald Vincer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ronald Vincer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Compensate Ronald Vincer for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fix, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(d) Within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of backpay recipient's corresponding W-2 forms reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Ronald Vincer, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

[27] 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.

shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Burgettstown, Pennsylvania, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 24, 2020.

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

Dated: Washington, D.C. May 27, 2022

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT discipline, suspend or terminate you because you bring issues, health and safety concerns, or complaints to us on behalf of yourself and other employees.

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

WE WILL make Ronald Vincer whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Ronald Vincer for the adverse consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Ronald Vincer, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MILLER PLASTIC PRODUCTS, INC.

[28] If the facilities are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."