United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 24, 2019

TO: Leonard J. Perez, Regional Director
Region 14

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Gallup, Inc.
Case 14-CA-234530

506-0170
506-4033-4900
506-6090-4200
512-5012
512-5036-6720
512-5072-2000

This case was submitted for advice as to whether the Charging Party was discharged for protected concerted activity when the Employer terminated [redacted] for "talking about [redacted] pay to others" where [redacted] had been unsuccessful in enlisting any other employees in [redacted] pay complaints. We conclude that, notwithstanding [redacted] lack of success, the Charging Party's ongoing complaints to [redacted] fellow employees about their pay were protected concerted activity and thus [redacted] discharge for that conduct violated Section 8(a)(1) of the Act. We also conclude that the Employer violated Section 8(a)(1) with regard to some of the statements its managers made to the Charging Party.

FACTS

In [redacted], the Charging Party was hired by Gallup, Inc. ("Employer"), a management consulting company, at its primary office in Omaha, Nebraska. The Charging Party was hired as a quality assurance coordinator ("QA") in the Employer's software development division and was classified as an "exempt" employee not entitled to overtime compensation under the Fair Labor Standards Act. In December 2017, the Employer reclassified its QA employees as "non-exempt" and thus entitled to overtime pay. At the same time, the Employer reduced these employees' base salary by $7,000. The Employer informed these employees that if they worked the same hours they had been working before (which it stated was usually over forty hours), they would make up the loss in overtime pay and earn the same amount they had earned as exempt employees.

The Charging Party was deeply unhappy with this change, since as a [redacted] was limited in how much overtime [redacted] could work and the lower base salary was not enough, in [redacted] view, to make ends meet. [redacted] raised the issue with [redacted]

[redacted] who assured [redacted] that [redacted] would make the same salary as before by the end of the year. [redacted] also raised the issue with [redacted] fellow QAs. On [redacted] team were about forty-five software developers (who were all exempt) and [redacted] non-exempt QAs, including the Charging Party. The other QA's told [redacted] the new payment system could be an improvement over the previous system, but at least one other QA shared the Charging Party's frustration, complaining of the stress of having to personally keep track of overtime each pay period to know if there would be enough money to pay the bills. Because of [redacted] complaints, the Charging Party's [redacted] raised [redacted] base pay by $2,000. The Charging Party's coworkers told [redacted] to get any end-of-year assurances in writing, and so [redacted] wrote "By end of 2018, [Charging Party] should make a total 23 of $59,000 (base + overtime)."

By June 2018, the Charging Party resumed raising the pay issue with managers and other QAs, including with at least one QA from another team, who agreed that the change in pay was a problem and told the Charging Party that another QA on that team had recently quit due to the pay problem. The Charging Party also raised the pay issue with "exempt" employees on [redacted] team to point out how unfair it was, and complained that the Employer was saying that employees only had to work forty hours but was clearly expecting them to work more. At least one such employee noted [redacted] had voiced to management a similar complaint about hours-worked expectations.

The Charging Party continued [redacted] campaign about the pay issue through November 2018, raising the issue with QAs both on [redacted] team and other teams, as well as other employees and [redacted] own supervisors. By this point some employees agreed with [redacted], having their own issues with the pay system, but for themselves mostly looked toward individual solutions such as leaving the company or transferring to different teams.

Following a company-wide meeting on November 12, 2018, the Charging Party complained to another employee about the Employer's failure to acknowledge Veterans Day and about [redacted] pay issues. The employee set up a meeting with the [redacted] [redacted]") and the [redacted] to discuss the Veterans Day issue. Before the meeting, the Charging Party expressed [redacted] optimism to a coworker, who warned the Charging Party to be careful, since the [redacted] oversaw the new pay plan. At the meeting the Charging Party brought up [redacted] pay issue. The [redacted] responded with hostility, noting that another employee had informed management that the Charging Party was complaining to employees about pay. The [redacted] told the Charging Party that [redacted] "needs to be accepting of [redacted] pay and that [redacted] shouldn't complain about not being paid enough, that they wanted [redacted] to be engaged" in [redacted] work.

The Charging Party discussed what happened at the meeting with [redacted] new [redacted], who expressed surprise at how hostile and upsetting the meeting had

been. told the Charging Party that job should not upset so much, and if was not happy should not work there. also offered to help with resume.

Shortly thereafter, the emailed the Charging Party that former denied ever having guaranteed that would make the same pay under the new system as had previously made. The Charging Party returned to current to again complain about pay situation. The told that did not have to work at the Employer, and that needed to become more engaged and "fix brand." The Charging Party's offered to help whether that was looking for a new job or fixing "brand" and becoming more engaged. The Employer assigned the Charging Party a different in December 2018.

On January 9, 2019, the Charging Party raised the pay issue to a QA in another department and asked if group was looking to hire anyone. When the QA asked manager whether they were hiring, the manager immediately asked if it was the Charging Party who wanted to know. The QA confirmed that, and in response the manager said that there had been problems with the Charging Party and that had not met hours in the previous year.

Two days later, the Charging Party's most recent called into office to ask why was talking to managers outside team. The Charging Party responded that was just looking to move, and that thought current management was not interested in helping had been dishonest with , and wanted to quit. When the stated that wished had come to first, the Charging Party asked why could not talk to coworkers on other teams. The reiterated that wished had come to first. The also told that name would probably come up at managers meeting and asked what should say. The Charging Party asked to gauge whether management wanted to leave. In response, the told the Charging Party that the company was not for everyone, and that it would be ok if went to work somewhere else if was unhappy. also shared a personal story where stayed at a job longer than should have. At the subsequent managers meeting, management decided to terminate the Charging Party.

On January 16, 2019, the Charging Party's former and current met with . first told that was fired, stating that "we know you are not happy here. You're disengaged. You're not happy and you've been talking about your pay to other people. Today will be your last day."

ACTION

We conclude that the Charging Party's campaign about the pay issue was protected concerted activity, and that the Employer violated Section 8(a)(1) when it terminated [redacted] for that activity.[1] We also conclude that the Employer violated Section 8(a)(1) by telling the Charging Party that [redacted] "shouldn't complain about not being paid enough" and by informing [redacted] that [redacted] was being terminated for "talking about [redacted] pay to other people." However, we conclude that the Employer did not violate Section 8(a)(1) when two [redacted], in response to the Charging Party's complaints to them about [redacted] pay, suggested she might be happier leaving the company.

I. The Charging Party Engaged in Protected Concerted Activity by Repeatedly Raising Pay and Hour Issues with Coworkers, and [redacted] Was Unlawfully Terminated for that Activity.

The governing standards for determining whether employee activity is concerted are set forth in the Board's decisions in *Meyers Industries*.[2] In *Meyers I*, the Board held that "[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."[3] In *Meyers II,* the Board on remand "fully embraced" the Third Circuit's holding in *Mushroom Transportation* that individual employees also act concertedly where they "seek to initiate or to induce or to prepare for group action."[4] The Board further noted that activity may be concerted that "in its inception involves only a speaker and a listener, for such activity is an indispensable

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[1] The Region should not rely on an "inherently concerted" theory of violation in its complaint or briefing. The General Counsel would urge the Board to overturn the "inherently concerted" line of cases in an appropriate case, *see Alstate Maintenance*, 367 NLRB No. 68, slip op. at 1 n.2, but this is not an appropriate case.

[2] *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 2 (Jan. 11, 2019) (citing *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987)).

[3] *Meyers I*, 268 NLRB at 497.

[4] *Meyers II*, 281 NLRB at 887 (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)).

preliminary step to employee self-organization."[5] As the Third Circuit had noted in *Mushroom Transportation*:

> [I]nasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection due to lack of fruition.[6]

In *Whittaker Corp*, the Board further clarified that the object of inducing group action need not be express and may be inferred from the circumstances."[7]

The Board has stated that it is "obvious" that discussions about wages are necessary to organizational activity, and that "dissatisfaction due to low wages is the grist on which concerted activity feeds."[8] This long-held principle is not contradicted by the Board's recent decision in *Alstate Maintenance*, where the Board found that a skycap's sole complaint to a supervisor about a *customer's* tip practice was neither concerted nor for the purpose of mutual aid or protection.[9] There, the Board concluded that the skycap's single statement that "[w]e did a similar job a year prior and we didn't receive a tip for it," while said in front of other employees, was not intended to induce group action about a workplace concern but instead amounted to "mere griping" about a customer's tip history.[10] The Board also found that the skycap's statement was not for the purpose of mutual aid or protection because the employer had no control over the customer's tip practice.[11]

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[5] *Id.*

[6] *Mushroom Transportation*, 330 F.2d at 685.

[7] 289 NLRB 933, 933–34 (1988) (finding concerted a lone employee's complaint at employer meeting announcing a wage cut, notwithstanding that the employee did not specifically address fellow employees or call for action).

[8] *Id.* at 933–34 (quoting *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976)).

[9] *See Alstate Maintenance,* 367 NLRB No. 68, slip op. at 1, 7–9.

[10] *Id.* at 3, 7–8.

[11] *See id.* at 8–9.

Unlike in *Alstate*, the Charging Party's conduct here was for employees' mutual aid or protection because it concerned the pay structure, pay amount, and hours of work requirements maintained by the Employer and over which it exerted full control. Also, unlike the skycap's isolated gripe in *Alstate*, the Charging Party acted concertedly by embarking on a dedicated campaign to enlist QAs' support against the new pay structure, which affected them all, and the pay cut resulting from [redacted] inability to work overtime hours. While some of the Charging Party's complaints were about [redacted] promise to [redacted] that [redacted] overall salary would remain the same, those complaints were intertwined with [redacted] larger ongoing complaints about pay and hours that were shared by some of [redacted] coworkers.[12] Although the Charging Party was met with at most only passive agreement from coworkers rather than a willingness to join [redacted] in seeking concrete action, the lack of "fruition" in [redacted] campaign to solicit employees' support for [redacted] complaints against the new system does not nullify the concertedness of [redacted] conduct.[13]

The Employer discharged the Charging Party because of [redacted] protected concerted activity, and thereby violated Section 8(a)(1) of the Act. To establish unlawful discrimination under Section 8(a)(1), the General Counsel must first demonstrate by a preponderance of the evidence that animus toward protected activity was a "motivating factor" for an adverse action against an employee.[14] To do that, the General Counsel must show that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take the adverse action.[15]

In *Kitsap Tenant Support Services, Inc.*, Chairman Ring explained his view that *Wright Line* is "inherently a causation test," and, therefore, the essential question is whether there is a nexus between an employee's protected activity and the challenged

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[12] Thus, the Region need not rely on *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), where the Board found concerted and for the purpose of mutual aid or protection an employee's conversations with her coworkers about sexual harassment that affected only her.

[13] *See Mushroom Transportation*, 330 F.2d at 685.

[14] *Austal USA, LLC*, 356 NLRB 363, 363–64 (2010).

[15] *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) (*clarifying NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395, 403 n.7 (1983)); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

adverse action.[16] As Chairman Ring emphasized, "[n]ot just any evidence of animus against protected activity generally" will satisfy the *Wright Line* requirement; instead the General Counsel must show evidence of animus that was a motivating factor for the specific adverse employment action at issue.[17] The General Counsel agrees with that articulation of the *Wright Line* standard.

The Region should argue that, under this correct articulation of the *Wright Line* standard, the record establishes that the Charging Party's protected activity was a motivating factor in [redacted] discharge. It is clear that the Charging Party's protected concerted discussions about pay and hours with [redacted] coworkers "contributed to" the Employer's decision, since the Employer specifically listed "talking about [redacted] pay to other people" as a reason for [redacted] discharge. Moreover, there is abundant evidence of animus directed specifically at the Charging Party's protected activity regarding [redacted] pay concerns. In addition to the 8(a)(1) statements discussed below, the Employer made it clear that the Charging Party's discontent was widely discussed and disapproved of by management.[18] Finally, the Employer cannot meet its *Wright Line* burden of establishing that it would have discharged the Charging Party independent of [redacted] protected concerted activity; its argument that the Charging Party was discharged for underperforming is a post-hoc explanation unsupported by any contemporaneous documentary evidence.

II. The Legality of the Allegedly Unlawful Employer Statements

We conclude that the CIO's statement to the Charging Party to stop discussing [redacted] pay, and the statement that the Charging Party was being terminated because "you've been talking about your pay to other people," were unlawful under Section

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[16] 366 NLRB No. 98, slip op. at 11 & n.25 (May 31, 2018). *See also Advanced Masonry Assoc., LLC d/b/a Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 3–4, 3 n.8 (Apr. 11, 2018) (Chairman Kaplan, disagreeing with majority's formulation of *Wright Line*; noting that *Wright Line* requires a nexus between the employer's animus and the employee's protected activity); *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, & n.2 (2013) (Member Johnson, clarifying his view on the correct formulation of *Wright Line* in the same manner).

[17] 366 NLRB No. 98, slip op. at 11 & n.25.

[18] *See Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n.10 (2014) (noting that undercutting morale is often a veiled reference to protected concerted activity) (citing *Inova Health Systems*, 360 NLRB 1223, 1227 (2014); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), *enforced*, 519 F.3d 373 (7th Cir. 2008); *Mid-Mountain Foods*, 291 NLRB 693, 699 (1988)).

8(a)(1). Although the Charging Party had discussed [redacted] pay with both [redacted] coworkers and [redacted], the [redacted] directive was preceded by a statement that the [redacted] was aware that the Charging Party was complaining to [redacted] coworkers. Thus, the directive clearly was addressed towards those pay discussions, and not towards [redacted] (unconcerted) complaints to the [redacted]. The statement by the [redacted] in the Charging Party's termination meeting referencing [redacted] pay discussions with "other people" as the cause for [redacted] discharge also independently violated Section 8(a)(1). However, with regard to the allegation that the Employer, through these statements, promulgated an unlawful rule, we conclude that the statements would not reasonably have been understood as orally promulgating a general rule against talking about pay. There was no directive communicated to any other employees, and the statements would not have been construed as a rule of general applicability even if other employees became aware of them.[19]

With regard to the statements by [redacted] suggesting that the Charging Party should leave the company if [redacted] were not happy, we conclude that those statements did not violate Section 8(a)(1). The Charging Party was not engaged in protected concerted activity when [redacted] complained to [redacted] and [redacted] about [redacted] pay. While some coworkers had agreed with the Charging Party that there were problems with the new pay system, there is no evidence that, in [redacted] discussions with [redacted], the Charging Party was bringing a "group complaint to the attention of management."[20] The evidence instead indicates that [redacted] conversations with management focused on the specifics of [redacted] own issues, such as whether [redacted] had promised the Charging Party [redacted] would make the same salary by the end of the year and [redacted] inability to work overtime. We therefore conclude that, even assuming that these statements could be considered veiled "threats," they were not unlawful because they were not in response to protected concerted activity and did not direct the Charging Party to stop engaging in protected concerted activity.

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[19] *See Central States Southeast & Southwest Areas, Health & Welfare & Pension Funds*, 362 NLRB 1280, 1281–82 (2015) (finding orally promulgated rule when statement that could reasonably be construed as establishing a new rule or policy was communicated to employee in front of four union stewards).

[20] *Meyers II*, 281 NLRB at 886. *Cf. Colders Furniture*, 292 NLRB 941, 943–45 (1989) (finding spontaneous lunchroom discussion among employees led to employee's impromptu visit to manager's office to make concerted complaint), *enforced sub nom. NLRB v. Henry Colder Co.*, 907 F.2d 765 (7th Cir. 1989).

Accordingly, the Region should issue complaint, absent settlement, consistent with the above analysis.

/s/
J.L.S.

ADV.14-CA-234530.Response.Gallup[redacted]