KHRG Employer, LLC d/b/a Hotel Burnham & Atwood Cafe *and* UNITE HERE, Local 1, AFL–CIO. Case 13–CA–162485

February 28, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

On January 27, 2017, Administrative Law Judge Christine E. Dibble issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

This case concerns an employee's intentional use of a security passcode to lead a group of employees and nonemployees into a secured area of the Respondent's hotel while in the process of presenting a petition to management. The judge found that the Respondent's decision to discharge the employee for breaching the hotel's security did not violate Section 8(a)(1). On exceptions, the General Counsel argues the judge erred by analyzing the facts under *Wright Line*,[3] rather than determining whether the employee engaged in misconduct in the course of otherwise protected concerted activity that was so egregious as to lose the protection of the Act. The General Counsel contends that, under the latter standard, the discharge was unlawful. For the reasons set forth below, we agree with the General Counsel that the judge applied the wrong standard, but we nonetheless conclude that the discharge was lawful.

FACTS

The Respondent operates a number of hotels and restaurants in Chicago, Illinois, including the Hotel Burnham and Atwood Cafe. Beginning in 2014, the Union engaged in a campaign to represent the Respondent's employees. Evan Demma, a member of the Union's organizing committee, worked as a server at the Atwood Cafe. In 2014 and 2015, Demma participated in dozens of Union-organized demonstrations and protests outside the Atwood Cafe. There is no evidence that the Respondent disciplined Demma, or any other employee, for that activity. In November 2014, Demma, joined by a group of other employees and a priest, presented a petition about working conditions to Respondent General Manager Tonya Scott in a public lobby on the first floor of the hotel. The Respondent did not discipline Demma or any other employee for presenting the petition inside the hotel lobby.

On October 9, 2015, Demma and about 100 other employees from various employers throughout Chicago participated in a union demonstration outside the hotel to make management aware of the working conditions of the Respondent's housekeeping employees. Shortly after the demonstration started, Demma led a delegation of 20 people, only six of whom were Hotel Burnham employees, to deliver a new petition to manager Scott. The remainder of the delegation consisted of nine persons employed by the Respondent at other hotels and five union committee members or supporters who were not employed by the Respondent. Although Demma had participated in various union committee meetings, pickets, and demonstrations with everyone in the delegation, he did not know all of their names or where they worked.

Unlike the November 2014 petition delivery, Demma knew that the delegation would have to go to a secured access area in the basement of the hotel to personally deliver the petition to Scott. Once the delegation members entered the hotel vestibule, a security guard stationed at the entrance to the hotel lobby stopped them to inform Demma that only four employees could continue downstairs to the managers' offices. Although he was aware that nonemployees were in the delegation, Demma falsely replied that everyone in the delegation was an employee with the right to deliver the petition. The security guard then allowed the entire delegation to pass.

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

[2] We do not rely on the judge's citation to *Brighton Retail, Inc.*, 354 NLRB 441 (2009), a decision that issued at a time when the Board lacked a quorum. We note that *Hoodview Vending Co.*, 359 NLRB 355 (2012), cited by the judge, was reaffirmed by the Board at 362 NLRB No. 81 (2015). The judge also cited *Relco Locomotives, Inc.*, 358 NLRB 298 (2012), a case that was decided by a panel including invalidly appointed Board Members. However, prior to the issuance of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the United States Court of Appeals for the Eighth Circuit enforced the Board's Order, see *NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013), and there is no question regarding the validity of that court's judgment.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The delegation walked through the main lobby and down a flight of stairs to a locked door; beyond the locked door were the managers' offices, employee break room, and kitchen. In this secured area, the Respondent stores cash, corporate checks, personnel files, guests' contracts, and financial reporting papers, and employees store personal items. To gain access to the secured area, Demma had to enter a security passcode on a keypad. Once inside, Demma led the delegation to manager Scott's office. Because Scott's office was very small, only Demma and a few of the protestors were able to squeeze into it. The rest were left unattended outside. Scott informed Demma that they could not all enter her office. At that point, Demma and one other employee presented the petition to Scott and asked for a response within a week. Scott responded that she would read the petition and get back to him. In the process of leaving the secured area, the delegation passed several employees in the employee break room. The whole sequence of events took approximately 5 to 10 minutes, and the group was in the secured area for approximately 2 minutes. At all times, the delegation was quiet and non-disruptive.

On October 10, Restaurant General Manager Damien Palladino began an investigation into the delegation's entry into the secured area. During this time, several employees, including three employees who were in the break room at the time, emailed Demma and management to voice their displeasure at the presence of nonemployees in the secured area.[4] The investigation resulted in Demma's suspension on October 15 and discharge on October 22 for committing a "serious security breach."

ANALYSIS

There is no dispute that the delivery of the petition by employees constituted protected concerted activity. The Respondent maintains that it discharged Demma for using the passcode to admit nonemployees to the secured area, which occurred while the delegation was delivering the petition. When, as here, an employer defends a discharge based on employee misconduct that is a part of the res gestae of the employee's protected concerted activity, the employer's motive is not at issue. Instead, such discharges are considered unlawful unless the misconduct at issue was so egregious as to lose the protection of the Act. See, e.g., *Consumers Power Co.*, 282 NLRB 130, 132 (1986) ("[W]hen an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act . . . .") (footnote omitted). To answer this question, the Board balances employees' right to engage in concerted activity, allowing some leeway for impulsive behavior, against employers' right to maintain order and respect. *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964).[5]

Applying the appropriate standard to the facts presented, we find that Demma's actions on October 9 lost the protection of the Act. While the delegation's action was not disruptive, the dispositive point is that it advanced to the secure area only because Demma misrepresented to the security guard that the delegation consisted only of employees and the delegation was able to enter the secure area only because Demma used the passcode to provide the group unauthorized access.[6] Demma thereby

[4] The record contains other instances of nonemployee access to the secured area, including by third-party vendors and family members of employees. There is no evidence that any of these individuals gained access to the secured area through misrepresentation.

[5] The judge correctly found that the Board's four-factor analysis set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), is ill-suited to determining whether an employee has lost the Act's protection by conduct that does not occur during a workplace conversation with a supervisor or manager. See generally *Triple Play Sports Bar & Grille*, 361 NLRB 308, 310-311 (2014) (discussing limits of *Atlantic Steel* analysis), enfd. 629 Fed.Appx. 33 (2d Cir. 2015). However, contrary to the judge, this does not mean that the mixed motivation *Wright Line* test applies. The Respondent's motive is still not at issue, and we look to the totality of circumstances to determine whether the employee's misconduct was so egregious as to forfeit the Act's protection. See *Honda of America Mfg*., 334 NLRB 746, 749 (2001) (language in newsletters "was so offensive as to render the otherwise protected newsletters unprotected").

[6] Although the Board has found that an employer that has previously condoned similar behavior can negate the egregiousness of an employee's misconduct, see *Pier Sixty, LLC*, 362 NLRB No. 59, slip op. at 2–3 (2015) (evaluating whether the employer had previously condoned offensive language similar to that used by employee discharged for using obscene and vulgar language), enfd. 855 F.3d 115 (2d Cir. 2017), Demma's actions are in marked contrast with other instances in which nonemployees gained access to the secured area. For example, although certain of the Respondent's vendors regularly accessed the secured area, the record establishes that the Respondent had provided those vendors with the keypad code, the Respondent had preexisting relationships with those vendors, and the vendors typically sent the same delivery people so the Respondent was familiar with them. Similarly, although employees' family members occasionally accessed the secured area in order to meet employees, it is undisputed that the Respondent and other employees knew those family members and thus could easily identify them if necessary. By contrast, in this case, Demma provided access to a significant number of nonemployees whom he only vaguely knew from union committee meetings, pickets, and demonstrations, which presented a materially greater risk to the Respondent's property and personnel alike. Further, as described, Demma facilitated this breach of the secured area only by misrepresenting the nonemployees' status to the Respondent's security personnel.

In Chairman Kaplan's view, Demma's use of his security passcode to gain unpermitted entry for nonemployees to the secured area, standing alone, is sufficiently egregious misconduct to warrant loss of statutory protection.

flagrantly violated the hotel's security protocol and unnecessarily placed at potential risk the security of other employees and the Respondent's property, including valuables, confidential files, and financial documents. This breach of security cannot be dismissed as an impulsive act. It was a predetermined course of action. Demma knew that there were nonemployee union representatives in his delegation and that, if he were to present the petition to Scott while she was in her office, he would have to breach the hotel's security protocol by improperly using the passcode to provide the nonemployee members of the delegation access to the secured area. Compare *Akal Security, Inc.*, 354 NLRB 122, 126 (2009) (employees lost the protection of the Act by failing to follow security procedures), incorporated by reference in 355 NLRB 584 (2010).

Based on the circumstances of this case, we conclude that Demma engaged in sufficiently egregious misconduct to forfeit the Act's protection. Accordingly, the Respondent did not violate Section 8(a)(1) by discharging him.

ORDER

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

Dated, Washington, D.C. February 28, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Andrea James, Esq., for the General Counsel.
Brian M. Stolzenbach, Esq., Karla Sanchez, Esq., and *Christopher W. Kelleher, Esq,* for the Respondent.
David L. Barber, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Chicago, Illinois, on May 18 and 19, 2016. Unite Here Local 1, AFL–CIO (the Union), filed the charge in Case 13–CA–162485 on October 22, 2015.[1] The Regional Director for Region 13 of the National Labor Relations Board (NLRB/the Board) issued the complaint and notice of hearing on January 25, 2016. The Respondent filed a timely answer on February 9, 2016, denying all material allegations in the complaint.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when on or October 22, the Respondent discharged employee Evan Demma for engaging in concerted protected activity.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, operates hotels and restaurants in Chicago, Illinois, and other cities. The Respondent, for the past calendar year, derived gross revenue in excess of $500,000; and purchased and received at its Chicago facility goods and services in excess of $5000 directly from points outside the State of Illinois. Therefore, I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's operation

The Respondent, a limited liability company, operates hotels and restaurants in Chicago, Illinois, among other cities. The hotel and restaurant at issue are the Hotel Burnham (the Burnham) and Atwood Café (the Atwood). The Atwood is located within the Burnham which is housed in a historical building in Chicago's downtown business district. The public can access the Atwood through the lobby of the Burnham which has an entrance on Washington Street. The Atwood also abuts State Street and has a patio for outdoor dining in the warmer months. The Respondent employs, among others, housekeepers and managers at the Burnham; and managers, servers, "busboys," food runners, and bartenders at the Atwood.

Damien Palladino (Palladino) has been employed by the Respondent for 8 years and is the current general manager of the Atwood. He is responsible for overseeing its overall operations. During the period at issue Brian Millman was the executive chef and part of the management staff. The remaining management and administrative staff for the Burnham and the Atwood included, among others: Hotel General Manager Tonya Scott (Scott), Atwood Manager John Radosevich (Radosevich), Atwood Manager Kelly Stepto (Stepto), Sous Chef Ryan Bell (Bell), Human Resources Director Samantha Polk (Polk), Senior Regional Director of People and Culture for the Kimpton Group Jennifer Hayes (Hayes), Assistant Director of Finance

[1] All dates are in 2015, unless otherwise indicated. In addition, at the start of the hearing, the General Counsel moved to amend the complaint to correct the name of the Respondent in the caption and in the introductory paragraph of the complaint to read as stated in the above caption.

Angel Patterson (Patterson), and staff accountant Yuliya Shegarfi (Shegarfi).[2] Although the Burnham and the Atwood have a separate management teams overseeing their staffs (e.g., housekeepers, hotel maintenance, servers), they are served by the same administrative personnel.

B. October 9, Employee Demonstration

By October 9, the Union had been engaged in a lengthy campaign to get the Respondent to agree to a card-check and neutrality agreement with the Union. The Union had a committee with about six committee members who worked on the effort and assisted in planning and coordinating other union organizing activities. Evan Demma, a server at the Atwood and avid union organizer, was a part of the committee and the organizing campaign. As a committee member, Demma helped in the effort to organize the Burnham and the Atwood workers. In November 2014, for example, Demma, a group of the Atwood employees, and a priest entered the Burnham to present a petition to Scott about working conditions. In addition, from October 2014 to 2015, Demma participated in about 20 to 30 union organized demonstration in front of the Atwood. He also joined in two union organizing protests from January to February. From March to May, Demma increased his participation in union protests outside the Atwood to once a week; and again between May and September when he joined in union protests twice a week.

For the month leading up to October 9, the union committee members had worked on planning a demonstration to occur on October 9. On October 9, the Union's demonstration began about 4:30 p.m. in front of the Burnham and the Atwood with about 100 workers from various employers throughout the city of Chicago. Some of the protestors held signs reading "No Contracts—Unite Here Local 1." One of the goals of this demonstration was to make management aware of the working conditions and injuries suffered by the Burnham's housekeeping staff. In order to maintain order and not block the entrance to the hotel and restaurant, the Union brought in marshals. One of the marshals was Rachael Brumleve (Brumleve), a union employee, who was responsible for ensuring that the demonstrators did not block the public sidewalks, passageways and hotel and restaurant entrances. The demonstration lasted approximately 2 hours.

C. Workers Delivery of Petition to Management on October 9

Approximately 30 minutes into the October 9 demonstration, Demma, along with his corworker KarinaTufino (Tufino) and about 20 other demonstrators went to confront Scott by entering the Burnham's lobby through the public entrance facing Washington Street. Tufino, Vina Arceo (Arceo), Edgar Vasquez (Vasquez), Sylverio Arrenos (Arrenos), and Victor Pariente (Pariente) were Demma's coworkers and part of the group of 20 demonstrators. The remaining, approximately 12, demonstrators worked either for other Kimpton properties in Chicago or for other unknown employers. The group's intention was to go to Scott's office and deliver a petition detailing the housekeeping staff's complaints of experiencing excessive pain while performing their job duties and recommendations for reducing the injuries.

Upon entering the building, the group encountered a security guard working at the property. He blocked their entrance and informed them that management would only allow four employees to go downstairs to the executive offices and the employees' only area. Demma responded that all of the demonstrators with him worked for the Respondent and had a right to deliver the petition to management. Therefore, the security guard allowed them to pass. The group proceeded through the Burnham's lobby, past the lobby side entrance of the Atwood, and down a flight of stairs. The stairs opened onto an open public area of the basement with public restrooms and several locked doors. The locked doors led to the employee locker room and break room, the Atwood's kitchen, mechanical room, plumbing/electrical/fire room, food and beverage office, housekeeping office, and administrative and management suite of offices.[3] Once on the basement level, Demma and the group of about 20 demonstrators proceeded towards Scott's office passing the kitchen area, housekeeping office, and employee break room.

The area containing the management offices is secured by two doors with passcode protected keypads. As an employee of the Respondent, Demma had a passcode to unlock the doors to the secured areas of the basement level of the building.[4] After leading the group of protestors to the lower level, Demma entered the passcode into the keypad. The group walked through the door into a small common area for the management and administrative offices. Demma continued into Scott's office, which was one of the offices off of the common area. Because Scott's office was very small, only Demma and a few of the protestors were able to squeeze into it. Scott protested that they could not all come into her office; and she would only speak with Demma and Tufino. At this point Demma told Scott that their only purpose was to deliver to her a petition which detailed problems with the working conditions experienced by the housekeepers. He asked that she respond to the petition by October 16. Scott informed him that she would read it and get back with him. The encounter with Scott lasted about 5 to 10 minutes. The group was then escorted out of the building by Radosevich.[5] As they were leaving, the group passed a few

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "CP" for Charging Party's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for Respondent's brief; and "CP Br." for Charging Party's brief.

[3] The administrative and management office suite contains confidential information and valuable items. It is undisputed that in these secured areas Respondent stores cash, corporate checks, personnel files, guests' contracts, and financial reporting papers.

[4] The Respondent's vendors are allowed into the basement's secured areas because that is where goods are received. Certain of the Respondent vendors are given the passcode for access to the secured areas of the basement level of the building. These vendors are the ones who: deliver prior to any of the employees arriving at work (about 5:30 a.m.); vendors that regularly deliver to the Burnham or the Atwood; and vendors that arrive during the Respondent's busiest times (e.g., lunch, dinner).

[5] Contrary to Demma's testimony, Tufino testified that no one escorted them out of the building after their encounter with Scott. Re-

employees in the employee break room. On their way out of the building, Demma and the protestors did not speak to anyone, chant or take any other disruptive action. Upon exiting the building, the group rejoined the other individuals demonstrating outside in front of the Atwood.

D. Post October 9 Demonstration

After participating in the October 9, demonstration, Demma was not scheduled to return to work until October 15. During the period from October 9 to 14, he was not contacted by management. However, Demma began to receive emails from about nine coworkers complaining about him entering the secured area on October 9 with other protestors. The coworkers expressed anger and concern about Demma allowing nonemployees to access the secured areas without authorization from management. Polk, Radosevich, Palladino, and Stepto were copied on the email chain.

On October 10, Demma emailed Palladino requesting a meeting because he wanted management to stop his coworkers from sending him what he felt were harassing emails. Palladino responded on October 12, informing him that they could meet in a couple of days. By email dated October 14, Demma asked for the status of his request to meet with Palladino and Hayes to discuss the daily email he had been receiving from coworkers. Hayes suggested that they meet the following morning but Demma replied that he had a prior appointment. After that exchange, there was no further communication between the parties about rescheduling the meeting.

E. October 15 meeting between Demma and management

When Demma returned to work on October 15, Palladino approached him to say that management was ready to meet with him. Demma asked for Tufino to attend the meeting as his witness; and she was allowed to participate but told that she could not speak. The meeting, held in the executive offices, included: Demma, Tufino, Palladino, Hayes, and Polk. Hayes began the meeting by asking Demma why he felt that his colleagues were harassing him. When Demma responded that he felt the emails had a harassing tone, Hayes replied, "Just like you have your opinion, they have theirs." (Tr. 78.) Hayes then asked Demma if he was the person who entered the security code to access the executive offices with the group of protestors on October 9. Demma answered that he "didn't know." She again prompted him to remember if he used the door code to access the executive suites, and Demma reiterated that he "didn't know." After this exchange, Hayes informed him that management had a videotape of him entering the code into the keypad. She admonished him that his action constituted a serious security breach; and he was suspended until a more thorough investigation of the incident could be conducted. The meeting concluded and Palladino escorted Demma out of the building. Tufino, who was not questioned by management in the meeting, returned to work.

F. Investigation into October 9 Security Breach

Palladino had been in his office with Chef Millman on October 9, when a server, Mimi Holland, came into his office to tell him that there were protestors in the secured area of the basement. He ran to Scott's office and saw a large group of about 20 people coming out of the executive suite. Palladino recognized that about six of the protestors were employees of the Burnham or the Atwood. After the incident, on October 10, Palladino viewed the Respondent's security footage, which showed Demma entering the passcode into the keypad and leading a group of about 20 protestors into the secured area. As part of his investigation into the incident Palladino: (1) viewed the security footage several times; (2) conducted the meeting with Demma that occurred on October 15 to question him and listen to his explanations; and (3) asked employees who worked on October 9, to tell him what, if anything, they witnessed on that day. Demma was also asked to submit a written statement about his version of the October 9 events. After taking the aforementioned steps, Palladino consulted with Chef Millman, Polk, Scott, and Hayes about what he saw on the videotape; and discussed with them their opinion on what, if any, action should be taken against Demma. Due to her position as the human resources director, Palladino consulted with Polk on about five or six occasions regarding his investigation into Demma's action. Polk voiced her opinion about what she saw on the security tape and made recommendations on how Palladino should proceed. Since, as the general manager of the Atwood, Palladino did not have authority over the Burnham's staff, he did not involve its general manager in the investigation or interview the housekeeping or hotel staff. Palladino admitted, however, that he discussed with Scott (and several other managers) the videotape of the incident because she was the reason Demma and the protestors entered the secured area on October 9.

G. October 22, the Respondent Terminates Demma

On October 21, Palladino asked Demma to meet with him and Hayes the next day. Consequently, on October 22, Demma, Tufino, Palladino, and Hayes met in the executive offices. Hayes began the meeting by informing Demma that he was terminated because his act of entering the passcode into the secured door and allowing the protestors, many of whom were not the Respondent's employees, to enter which was a "serious security breach." Demma objected and accused management of singling him out for adverse action because of his union activity. In response, Hayes reiterated that he had committed a serious security breach. Demma was given a copy of the termination letter, a bag to place his personal belongings in, and escorted out of the building.

By April 2016, the workers' continued agitation resulted in them voting in the Union to represent the Burnham's housekeeping staff.

III. DISCUSSION AND ANALYSIS

A. Legal Standards

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

gardless, I do find that this discrepancy is insignificant and not relevant to the ultimate decision on the merits of the complaint.

engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc.*, 354 NLRB 441, 441 (2009).

In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II),* 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." However, 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. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whitaker Corp.*, 289 NLRB 933 (1988). A conversation can constitute concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co.,* 330 F.2d 683, 685 (3 Cir. 1964)). The object of inducing group action, however, need not be expressed depending on the nature of the conversation. *Hoodview Vending Co.*, 359 NLRB 355, 358–359 (2012).

An employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee for engaging in activity that is "concerted" within the meaning of Section 7 of the Act. If it is determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action was motivated by the employee's protected, concerted activity. *Relco Locomotives Corp*., 358 NLRB 37 (2012) (citing *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). Once the General Counsel establishes such an initial showing of discrimination, the employer may present evidence, as an affirmative defense, showing it would have taken the same action even in the absence of the protected activity. The General Counsel may offer evidence that the employer's articulated reasons are pretext or false. *Relco,* supra.

As with 8(a)(3) discrimination cases, the Board applies the *Wright Line*[6] analysis to 8(a) (1) concerted activity cases that involve an employer's motivation for taking an adverse employment action against employees. *Hoodview Vending Co.,* supra; *Saigon Gourmet Restaurant, Inc*., 353 NLRB 1063, 1065 (2009). The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in concerted activities; (2) the concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity. Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Hoodview Vending Co.,* supra 359 NLRB 355, at 359. Ultimately, the General Counsel retains the ultimate burden of proving discrimination. *Wright Line,* id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). The *Wright Line* analysis is not applicable when there is no dispute that the employer took action against the employee because the employee engaged in protected concerted activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed.Appx. 524 (D.C. Cir. 2003).

While a case involving adverse action against an employee who engaged in protected concerted activity is properly analyzed under a *Wright Line* analysis, if the evidence shows that the employee engaged in an outburst of an egregious nature, the employee may lose protection of the Act. In *Atlantic Steel*[7] the Board established several factors that must be considered in determining whether an employee who is engaged in concerted protected activity loses protection of the Act because of opprobrious conduct. The factors to consider are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel* at 816. Therefore, a balancing of these factors is required to render a decision on the ultimate question.

B. Wright Line Versus Atlantic Steel Analysis

The General Counsel argues that the *Atlantic Steel* balancing test is appropriate in this case because the reason for Demma's termination is part of the *res gestae* of his protected concerted activity. The Respondent counters that the *Atlantic Steel* balancing test applies only to cases involving verbal outbursts or offensive language. Moreover, the Respondent argues that the factors in the *Atlantic Steel* balancing test are "incompatible with non-verbal conduct; and there are no Board cases that apply the balancing test to "a security breach or any other nonverbal misconduct." (R. Br. 17.)

I agree with the Respondent and reject the General Counsel's argument because I cannot find any Board law or case law to support the proposition that the *Atlantic Steel* balancing test applies to nonverbal conduct. Likewise, the General Counsel failed to present case law to support its argument on this point. Consequently, I find that this case is properly analyzed under

[6] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

[7] 245 NLRB 814 (1979).

Wright Line.

C. October 22, Respondent Terminates Demma

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by terminating Demma for engaging in protected concerted activity effective October 22. The General Counsel contends that factors pointing to evidence of the Respondent's unlawful termination of Demma are: (1) management's "sham" investigation into the charges against Demma; (2) the close timing between Demma's protected concerted activity and his termination; (3) instances of other employees engaged in similar conduct without being subjected to adverse employment actions; and (4) failure of the Respondent to take action against anyone else involved in the incident other than Demma.

The Respondent denies that Demma's union activity was a factor in its decision to terminate him. Further, the Respondent insists that the union's campaign against the Respondent was not protected activity; therefore, Demma's action of delivering the petition was likewise not protected under the Act. Regardless, the Respondent insists that Demma was discharged for breaching security, and not because he submitted a petition to Scott complaining about working conditions.

Based on the evidence, I find that the General Counsel has failed to establish that the termination of Demma violated Section 8(a) (1) for the reasons discussed below.

A *Wright Line* analysis is appropriate in this case because the Respondent's motive is at issue. Despite the Respondent's argument, the evidence is clear that Demma engaged in protected concerted activity when he, along with a group of protestors, delivered a petition to Scott detailing their issues with certain working conditions. The Board has held that employees who submit petitions to employers are engaging in protected concerted activity if the petition concerns unfair treatment or issues affecting their terms and conditions of employment. *Texas Dental Assn.,* 354 NLRB 398 (2009), reconsideration denied 354 NLRB 957 (2009) (employees anonymously emailed petition is protected concerted activity because the petition detailed concerns about management and unfair treatment); *Crowne Plaza,* 357 NLRB 1097 (2011) (petition concerning working conditions protected concerted activity); *Liberty National Products, Inc.,* 314 NLRB 630 (1994) (petition complaining about delay in receiving paychecks is protected concerted activity); *Clean Power, Inc*., 316 NLRB 496 (1995) (petition concerning complaints of employees being overworked is protected concerted activity). The evidence is undisputed that Demma lead a group of workers into management's office to deliver a petition concerning the working conditions of housekeeping staff. Likewise, it is undisputed that the Respondent was aware of this activity because Demma delivered the petition to Scott, the hotel's general manager. Also, it is clear that the termination constitutes an adverse employment action.

Therefore, the next factor to consider is whether Demma's protected activity was a substantial or motivating factor in the Respondent's decision to terminate his employment. Upon such a showing, the Respondent then must present evidence that it would have discharged Demma even absent the protected concerted activity. See *Correctional Medical Services*, 356 NLRB 277, 278 (2010). I find, however, that the General Counsel has failed to prove this final prong of its initial burden.

In its brief, the General Counsel argues that discriminatory animus can be inferred from: (1) the "sham" investigation conducted by Palladino; (2) the timing of Demma's termination; (3) Respondent's failure to discipline other employees for similar security violations; and (4) Respondent's failure to discipline other employees who followed Demma into Scott's office. I, however, do not find the General Counsel's argument persuasive.

The evidence established that within a day of Demma's security breach, Palladino reviewed the videotape of his actions. Over the next several days, Palladino continued the investigation into Demma's action by consulting with other managers about what appeared on the videotape, requesting statements from employees who witnessed the incident on October 9, asking Demma for a statement detailing his version of the incident, convening a meeting between Demma and management to discuss the incident, and consulting with the Respondent's human resources unit. The General Counsel makes the argument that because Palladino discovered by October 10, that Demma was the person who entered the passcode to open the door into the secured area "the investigation should have stopped there."(GC Br. 19.) I cannot understand the logic of this argument. It appears that the General Counsel is arguing that the Respondent should be penalized for taking the time to conduct a detailed investigation. The evidence makes clear to me that the Respondent did conduct a thorough investigation which weighs against a finding of discriminatory animus.

Moreover, unlike the General Counsel, I do not find it suspicious that Palladino did not question any housekeeping employees about the events on October 9. Palladino had the best and most objective evidence, the videotape, of whether Demma was the person who entered the passcode that allowed the protestors to enter into the secured area. Consequently, his interest was in what, if any, disruption other employees saw Demma and the demonstrators commit. I also find plausible and credible Palladino's testimony that as the general manager of the restaurant and with no managerial authority over the housekeeping staff, his investigation did not include them unless a member of the housekeeping staff had been in the employee break room and witnessed the incident of October 9.

I also find that the timing of Demma's termination does not support a finding of discriminatory animus. The General Counsel argues that the "close timing between delivering the petition and Respondent's series of adverse actions support Respondent's discriminatory motive." It is undisputed that Demma accessed the secured door and delivered the petition to Scott about working conditions within minutes of each other. Consequently, one cannot separate the timing of Demma's termination from his submission of the petition or accessing the keypad to enter the secured area with nonemployees. Demma was terminated quickly because it did not take long for an investigation to reveal that he was the person who entered the passcode into the secured door and led nonemployees into the private area containing the managerial suite. The additional time taken to investigate the incident was used to determine

whether anyone in the group acted in a disruptive manner once they accessed the secured areas.

The General also argues that because other employees have participated in the same conduct as Demma without punishment "significantly underscores Respondent's discriminatory motive." (GC Br. 20.) The General Counsel pointed to several instances when nonemployees were given access, by management, to the security codes or allowed to enter secured areas unaccompanied by employees. Demma also testified that he witnessed various vendors enter the code into the secured doors' keypads. I find, however, that these instances differ in key respects. Palladino admitted that certain vendors were given the keypad codes because their deliveries occurred early in the morning before any employees had arrived for work. The evidence was undisputed that the Respondent was able to trust these nonemployees with the door codes because: (1) they had contracts with the vendors; (2) usually the same delivery people made the deliveries; and (3) the delivery people were videotaped while in the secured areas. Consequently, the Respondent's vendors (and by extension their staff) could easily be held accountable for any misconduct committed by the vendors' employees. However, the protestors that Demma allowed access into the "employee only" area were mostly unknown to the Respondent's managers, nonmanagerial staff, and several protestors were unknown even to Demma. (Tr. 123–124) Likewise, even though there were occasions when employees' family members would be allowed to wait for them unattended or escort themselves to secured areas to meet employees, the family members were known to management and other employees. Again, management would have been able to easily hold these persons to account if they committed an unsafe act or other misconduct while in the employees' only area of the building.

Lastly, the General Counsel argues that because no disciplinary action was taken against anyone other than Demma, this should weigh in favor of a finding of discriminatory animus. However, I find that the General Counsel's final argument is also flawed. The General Counsel contends,

> While Respondent could have taken action against any of the other hotel employees present, it failed to do so. These employees' failure to report or stop the delegation was just as much of a security breach as Demma using his employee code.

(GC Br. 20.) The General Counsel's argument fails to recognize that an employee, Mimi Holland, had reported Demma and the other protestors to Palladino who ran to Scott's office to investigate. It is also undisputed that the security guard initially stopped Demma and the group from going to Scott's office but allowed them to proceed when Demma misrepresented that everyone worked for the Respondent. It is also significant to note that even though Tufino, Arceo, Vasques, Arrenos, and Pariente were engaged in the same protected concerted activity as Demma and accompanied him on October 9, to Scott's office, they were not terminated. This fact also weighs against a finding that Demma was terminated because of his protected concerted activity.

Accordingly, I find that based on the evidence, the Respondent's discharge of Demma does not violate Section 8(a) (1) of the Act. I recommend, therefore, that paragraph V of the complaint be dismissed.[8]

Dated, Washington, D.C. January 27, 2017

[8] 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.