Every Woman's Place, Inc. *and* **Cathee Doran.** Case 7–CA–20797

11 December 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 19 September 1983 Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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 and to adopt the recommended Order as modified.

Contrary to our dissenting colleague, we are not repudiating the rationale of *Meyers*[2] in concluding that employee Cathee Doran's telephone call to the Wage and Hour Division of the U.S. Department of Labor was sufficiently linked to group activity to constitute "concerted" activity within the meaning of Section 7 of the Act. We note the judge's finding, supported by the credited testimony of Doran and the Respondent's former acting director Michael Tardani, that during at least several weeks before Doran made that telephone call she and two fellow employees had brought the matter of overtime compensation for holidays to Tardani on at least four or five occasions.

That Tardani was treating this as more than just a complaint of Doran's is indicated by his testimony that, after approaching the new chief management officer, Beverly Geyer, with the employees' complaints, he "went [back] to them" with the news that the matter was "being investigated." Although Doran made the subsequent telephone call on her own, she made it because "*we* had no response" (emphasis added) on the complaint. The call was a logical outgrowth of the original protest by all three employees.

Unlike employee Prill in *Meyers*, who it was found, was simply registering complaints about his own truck and never made common cause with any fellow employee with similar complaints, Doran was seeking information *because* she and fellow employees had received no response to their common complaint. As a continuation of protected activity, her conduct was concerted within the meaning of Section 7 of the Act.[3] It is immaterial that she was not following express instructions from the other employees in doing so. It was specifically noted in *Meyers* that, where the record showed the existence of a group complaint, the Board would not require evidence of formal authorization in order to find that steps taken by individuals in furtherance of the group's goals are a continuation of activity protected by Section 7 of the Act.

Neither, contrary to our dissenting colleague, does our decision here represent a return to *Alleluia Cushion Co.*, 221 NLRB 999 (1975). Under that doctrine the Board required no actual demonstration of common complaints; the Board simply assumed that any complaint to a government agency that could benefit others automatically qualified as an expression of common concern. We need rely on no such assumption here. The employees had spoken for themselves, and Doran was advancing those expressed interests with her call.[4]

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[1] 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.

[2] *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct 313, 352 (1985), reaffirmed 281 NLRB 882 (1986). Member Johansen, who did not participate in *Meyers*, agrees that *Meyers* and similar decisions are distinguishable.

[3] *JMC Transport*, 272 NLRB 545 fn. 2 (1984), enfd. 776 F.2d 612, 617–618 (6th Cir. 1985); *Dayton Typographical Service*, 273 NLRB 1205 (1984), enfd. in relevant part 778 F.2d 1188, 1191–1192 (6th Cir. 1985). See also *Walter Brucker & Co.*, 273 NLRB 1306, 1307 (1984) (employee Wright's complaint about wages deemed concerted where employee Culbreath refrained from taking action because of Wright's plan to complain).

We note that in *Walter Brucker*, supra, we dismissed the complaint because there was no showing that the employer knew of other employees' concerns and because it could reasonably have believed that employee Wright was simply protesting about his own wages Id. at 1307. To the extent that we require a showing of employer knowledge of concerted activity, it is satisfied in the present case by Tardani's testimony, noted above, concerning the employees who came to him and by the linkage of the telephone call to the subject matter of those vocal complaints. It is also noteworthy in this connection that when it was suggested, several months after Doran was laid off, that she be rehired for a part-time position Director Geyer vetoed the suggestion, observing that Doran and another of the employees who had raised questions about the holiday compensation policy were "negative influences." Management thus evidently viewed with alarm Doran's potential for stirring up opposition to its policies.

[4] In two of the cases on which our dissenting colleague relies, *Access Control Systems*, 270 NLRB 823 (1984), and *American & Efird Mills*, 269 NLRB 1077 (1984), each charging party employee had complained to his employer about his own circumstance, and there was no evidence of any relationship to group complaints. Another case he cites, *Allied Erecting Co.*, 270 NLRB 277 (1984), is closer to the present case, but there are still distinguishing facts. In *Allied Erecting*, charging party Collins was the only employee who ever complained to the employer about wages, so the employer would have had no necessary reason to connect his action to group activity. Member Stephens also notes that in *Mannington Mills*, 272 NLRB 176 (1984), the employee action at issue was a threat of a partial work stoppage—a strike that would arguably be unprotected. It may well make sense to require more in the way of a showing of authorization where threats of actions that could cause employees to lose their jobs are concerned.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Every Woman's Place, Inc., Muskegon, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in Order as modified.

Substitute the following for paragraph 2(e).

"(e) Post at its place of business in Muskegon, Michigan, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material."

CHAIRMAN DOTSON, dissenting.

I dissent on two grounds from my colleagues' adoption of the judge's finding that the Respondent violated Section 8(a)(1) by discharging employee Cathee Doran because of her protected concerted activities. First, I would decline to assert jurisdiction over the Respondent, a nonprofit corporation that provides shelter and counseling to runaway youths. As I have stated previously, I would return to the policy of *Ming Quong Children's Center*, 210 NLRB 899 (1974), and decline to assert jurisdiction over nonprofit, charitable institutions unless it has been demonstrated that such institutions have a massive impact on interstate commerce. See my dissenting opinions in *Salvation Army of Massachusetts*, 271 NLRB 195 (1984), and *Alan Short Center*, 267 NLRB 886 (1983). As no such showing has been made here, I would not exercise jurisdiction over the Respondent.

Secondly, I do not agree with my colleagues' conclusion that Doran engaged in concerted activity when she individually contacted the Wage and Hour Division of the U.S. Department of Labor, the act for which the Respondent discharged her. A review of the undisputed facts will help to put the issue into focus.

In 1981 Webster House for Runaways, Inc. merged with the Respondent. During the merger process employees of Webster House became concerned as to what the Respondent's policy was going to be with respect to holidays and compensatory time. In October 1981 several employees, including Doran, questioned Michael Tardani, the Respondent's program coordinator, about the Respondent's policy regarding these issues.[1] On 9 November 1981 Doran called the Wage and Hour Division to ask what pay employees were entitled to receive for working on holidays. Doran subsequently reported the information she received to Beverly Geyer, the Respondent's chief management official. The Respondent subsequently discharged Doran for having contacted the Wage and Hour Division.

On these facts I cannot conclude that Doran's contact of the Wage and Hour Division was concerted. As an initial proposition, I find that the General Counsel failed to establish that the employees' questioning of Tardani regarding compensatory time for holiday work was concerted. As noted above, the record is silent as to the circumstances surrounding this questioning. My colleagues apparently presume that the employees questioned Tardani together. Yet nothing in the record supports this presumption. From the record evidence it is equally plausible that the employees questioned Tardani individually on separate occasions. Under *Meyers*,[2] such questioning is not concerted. As the Board emphasized in that decision, "*individual* employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action." *Meyers*, supra at 498. Obviously then, if the initial questioning of Tardani were not concerted, there can be no basis for finding any subsequent individual act relating to that questioning to be concerted.

Even assuming, arguendo, that the prior questioning of Tardani was concerted, I would not find Doran's contact of the Wage and Hour Division to be concerted. There is no evidence that Doran was acting on the authority of any employees when she made the call. In this regard, there is no evidence that the employees intended to pursue the matter further or that, if the matter were to be pursued, the Wage and Hour Division should be contacted. In fact, Doran testified, "I *took it upon myself* to call the Wage and Hour Division." (Emphasis added.) There is also no evidence that the employees in any way chose Doran as their spokesman, directed her to make the contact, or were even aware that she made the contact. Partial parallelism of concern is not activity in concert. Moreover, there is no evidence that Doran made the contact in an attempt to initiate, induce, or prepare for group action. Indeed, her *first* action after making the call to Wage and Hour was to telephone the

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[1] The record is silent as to the circumstances surrounding this questioning.

[2] *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985), reaffirmed 281 NLRB 882 (1986).

Respondent's official Geyer, an action obviously taken on an individual basis. Further, there is no evidence that the Respondent knew of the alleged concerted nature of Doran's call—a necessary element to establish a violation. See our first *Meyers* decision, supra at 497.

Implicitly acknowledging this lack of evidence that is required by the Board's *Meyers* decision to establish the concerted nature of the activity, the majority, nevertheless, finds Doran's contact of the Wage and Hour Division and subsequent relay of that information to the Respondent to be concerted as they were a "logical outgrowth"[3] of the original (unproved) joint protest and thus a "continuation of protected activity," citing *JMC Transport*, 272 NLRB 545 (1984) (Chairman Dotson dissenting).

In so finding, my colleagues have chosen to ignore the dictates of *Meyers*, in which the Board pointed out that, for individual acts to be protected on the basis of concertedness, they must be performed on the authority of the protected group, the act involved must be protected, and the General Counsel must prove that the adverse action was directed at the protected acts of the group's specifically designated agent.

In my opinion the majority, without regard to what the General Counsel has in fact established or failed to establish, finds concertedness by applying the *Alleluia*[4] presumption that individual actions regarding "group concerns" are concerted—the very legal fiction that the Board intended to eliminate in its *Meyers* decision. The continued attempt to create legal fictions—here a so-called logical outgrowth—as functional substitutes for evidence of employees' actual behavior in the workplace contributes little to realistic analysis and again turns the Board into an ombudsman for the remedy of every injustice in the workplace. Such a role is not contemplated by the statute.[5]

Moreover, the majority's unexplained departure from the *Meyers* analysis in this case leaves the Board open to correction by a reviewing court for failing to explain the reasoning behind its departure from its own precedent. As then Judge Scalia recently criticized the Board:

> The purpose of the APA requirement that there be included in the agency's decision the "conclusions, and the reasons or basis therefor, on all the material issues of . . . law" is only secondarily to enable reviewing courts to discern irrationality. Its primary purpose is to impose a discipline upon the agency itself, assuring that it has undergone a process of reasoned decision-making rather than haphazardly reached a result that could (on one or another basis of analysis) be sustained. . . . In the circumstances of this case, we think it was unquestionably incumbent upon the Board to explain why it did not consider its decision a departure from the principles established in its prior cases, or why it considered a departure appropriate.

Iron Workers Local 111 v. NLRB, 792 F.2d 241, 247–248 (D.C. Cir. 1986), denying enf. 274 NLRB 742 (1985). Accord: *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443–444 (1965); *NLRB v. Indianapolis Mack Sales*, 802 F.2d 280, 284–285 (7th Cir. 1986), denying enf. 272 NLRB 690 (1984); *Restaurant Corp. of America v. NLRB*, 801 F.2d 1390, 1395 (D.C. Cir. 1986), denying enf. 271 NLRB 1080 (1984). As another judge has observed, "There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (C.J. Brown, concurring specially), quoted with approval in *NLRB v. Operating Engineers Local 925*, 460 F.2d 589, 604 (5th Cir. 1972). The Board's recent reaffirmation of the *Meyers* decision at 281 NLRB 882 (1986) stands in sharp contrast to my colleagues' reasoning in this case, and their failure to recognize this point fatally flaws their decision here.

All that the evidence in this case in fact reveals is that Doran, of her own accord, sought information from the Labor Department and, of her own accord, reported her findings to management. Doran was discharged for individually contacting the Labor Department. It is this type of conduct that the Board found not to be concerted activity

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[3] The appearance of such an undefined connective in the majority's reasoning is a matter of deep concern. One may derive almost any finding by the use of such terms. One might, e.g., prove that separately owned and operated aircraft were flying in formation. Such a finding could, after all, be a "logical outgrowth" of the facts that the aircraft departed the same airport within a minute or two of one another and had the same destination. The respective pilots need not, of course, be aware of their "concerted" act. Such reasoning does serious harm both to the legal grammar of the term "concerted activity" and the logic of our *Meyers* decision.

[4] *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

[5] Although not raised by my colleagues, I do not view Doran's discharge for her call to the Wage and Hour Division as having a "chilling effect" on the exercise of other employees' Sec. 7 rights. As the Board observed in *Meyers II*, in which employee Gore had also complained to the respondent about the same truck as prompted employee Prill's call to OSHA, whatever remote incidental effect an otherwise lawful discharge may have on other employees does not render the discharge unlawful 281 NLRB 882, 887.

in *Meyers* and subsequent cases.[6] For these reasons, I dissent.

[6] *American & Efird Mills*, 269 NLRB 1077 (1984); *Allied Erecting Co.*, 270 NLRB 277 (1984); *Access Control Systems*, 270 NLRB 823 (1984); *Mannington Mills*, 272 NLRB 176 (1984). I readily acknowledge that in certain situations, unlike the present case, the evidence will warrant a finding that an individual's conduct is a factual continuation of prior concerted activity. See *Dayton Typographical Service*, 273 NLRB 1205 (1984); *The Loft*, 277 NLRB 1444 (1986).

J. Frederick Gatzke, Esq., for the General Counsel.
Michael M. Knowlton, Esq. (O'Toole, Stevens, Johnson, Knowlton, Potter & Rolf), for the Respondent.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On an original charge filed in Case 7-CA-20797 by Cathee Doran, the Regional Director of Region 7 of the National Labor Relations Board (the Board) issued a complaint on July 2, 1982, which alleged, in substance, that Every Woman's Place, Inc. (EWP or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act), on January 6, 1982, by laying off Cathee Doran because she had engaged in protected concerted activity by contacting the Wage and Hour Division of the Department of Labor concerning overtime pay for employees who worked on holidays. Respondent filed a timely answer denying that it had engaged in the unfair labor practice alleged in the complaint.

The case was heard in Muskegon, Michigan, on March 17, 1983. All parties appeared and were afforded full opportunity to participate in the proceedings. Subsequent to the close of the hearing, the General Counsel and counsel for Respondent filed briefs that have been carefully considered. On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Michigan corporation, is headquartered at Muskegon, Michigan, where it is engaged in providing crisis intervention, counseling services, and shelter to women and youths. Its Webster House facility located at 125 Delaware Street in Muskegon is the only facility involved in the proceeding.

The complaint alleges, and Respondent admits, that during its fiscal year that ended September 30, 1981, its gross revenue exceeded $500,000 and it provided services for the State of Michigan that were valued at in excess of $50,000. It was further stipulated that during its fiscal year 1982 Respondent's gross income dropped to approximately $354,598 although it continued to furnish services to the State of Michigan in an amount valued at in excess of $50,000.

Observing that the operative facts in the instant case all occurred during its 1982 fiscal year, Respondent contends I should find the Board has no jurisdiction in this case as its gross revenue during fiscal year 1982 was less than $500,000. I find the contention to be without merit. As noted by the General Counsel, the Board in *St. Louis Christian Home*, 251 NLRB 1477 (1980), asserted jurisdiction over a facility that provided residential care and therapy for abused and neglected children, that experienced an annual gross income of $250,000, and that purchased electricity and telephone services valued at approximately $16,000 from firms engaged in interstate commerce. Here, Respondent's gross income for fiscal year 1982 exceeded $250,000 and it performed services for the State of Michigan during fiscal year 1982 that were valued in excess of $50,000. On these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Board has jurisdiction over Respondent's operations.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Prior to October 1, 1981,[1] Webster House for Runaways, Inc. was a small nonprofit corporation that provided shelter and counseling to runaway youth pursuant to two contracts with the Michigan Department of Social Services. It was headquartered in Muskegon, Michigan, where it operated a resident facility called Webster House.[2] During the time period under discussion, Mike Tardani was acting director of the operation. He reported to a board of directors. Other persons employed included: Cathee Doran, counselor; Vicki Dunn, outreach counselor; Bobby Thompson, paraprofessional counselor; Cathy Hoff, office manager; Nellie Day, house manager; and several hourly paid employees who, in effect, babysat at the facility when no salaried staff member was present.

During the late summer of 1981, the board of directors of Webster House for Runaways, Inc. voted to merge with Every Woman's Place, Inc. Under the terms of the merger agreement, Webster House was to convey its assets to EWP. EWP was to become the licensee of the residential and outreach contacts described above, and the Webster corporation was to be dissolved.

When the merger of the two nonprofit corporations became effective on October 1, Tardani no longer held his commanding position as Beverly Geyer and her assistant, Sue Ashby, became the chief management officials at the facility. Tardani was demoted to the position of program director. In addition to the fact that the management hierarchy at the Webster House facility changed at the time of the merger, the policies and procedures followed by EWP became the new policies and procedures of Webster House. As a consequence, the members of the Webster House staff, who met with Tardani once each week at so-called supervisory meetings,

[1] All dates herein are 1981 unless otherwise indicated.

[2] One contract funded activities at Webster House and was valued at approximately $130,000. The second funded outreach community and counseling services performed in Oceana and Newaygo Counties, which are contiguous to Muskegon County. The latter contract was valued at approximately $22,000.

asked numerous questions about the new policies and procedures.[3] One area of concern was the policy that would be followed with respect to holidays and compensatory time. Tardani testified that Cathee Doran, Cathy Hoff, and Vicki Dunn, in particular, asked him four or five times what the holiday and compensatory policy would be under EWP. Although Tardani sought to ascertain what the policy would be in those areas, he indicated Geyer could give him no definite answers.

B. *Doran's Wage and Hour Inquiry*

On approximately November 9, Doran telephoned the Wage and Hour Division of the U.S. Department of Labor to ask what pay employees were legally entitled to receive if they worked on holidays. She indicated she was informed employees were entitled to double time in such situations. After discussing the matter with the wage and hour spokesman, she telephoned Geyer and relayed the information she had received. She also told Geyer whom she had talked to and who furnished her with the wage and hour telephone number to enable her to verify the information provided. Geyer subsequently contacted the Wage and Hour Division and was furnished information by mail. After studying the information provided, Geyer concluded that members of the professional staff of EWP were exempt from the overtime provisions of the Fair Labor Standards Act. It is undisputed, however, that as a result of Doran's actions, EWP amended its policies and procedures about November 19 to provide that members of the professional staff who were required to work on holidays observed by EWP would be granted 2 compensatory days off.[4]

Tardani testified that on November 18, Geyer informed him that Doran had failed to observe the chain-of-command policy of EWP by contacting her in the wage and hour situation. She further indicated to Tardani that Doran had displayed a lack of tact in the situation, and that she felt that Tardani did not have his staff under control. Tardani testified he defended Doran and himself by informing Geyer that Doran had followed the chain-of-command because she had asked him what EWP's holiday policy was and had contacted Wage and Hour Division and Geyer only after Tardani was unable to answer the inquiries made by Doran and other employees.[5]

C. *The Fund Reduction*

In early October, the Michigan Department of Social Services notified Respondent by letter that it would fund its existing runaway programs through December 31, but that shortage of funds would require changes thereafter. Subsequently, about November 19, that department notified Respondent that its residential (the Webster House in Muskegon) contract would be reduced by 20 percent and/or or $19,487 for services to be provided from January 1 to September 30, 1982.

David Mills, the program manager for the Michigan Department of Social Services Office of Children and Youth Services, testified that when the budget cuts in the residential contracts were announced, he contacted the man in charge of the so-called "A" or outreach contracts, which had not been cut, and ascertained that counselors could devote less time to those contracts, thereby enabling them to devote more time to the slashed residential programs. While Mills indicated he communicated such news to providers over the telephone and during network meetings attended by providers, he could not recall any specific contact with any Respondent management official.

Geyer testified that, after considering various alternatives for 3–4 weeks, she decided that Respondent would have to lay off counselors to permit it to operate under its reduced budget. As the residential rather than the outreach contract had been cut, she indicated that she decided, in accordance with her normal policy, to lay off counselors working in that program. The counselors chosen were Cathee Doran and Bobby Thompson, the paraprofessional counselor. Geyer explained that she felt Mike Tardani, assisted by EWP master counselor Tony Senna, who was working at Webster House approximately 25 percent of the time, could, if assisted by outreach counselor Vicki Dunn, accomplish the necessary counseling at Webster House. Geyer further indicated that Sue Ashby, her assistant, could relieve Tardani of some of his administrative duties.

D. *Tardani's Attempts to Cause Geyer to Retain Doran*

After learning that Geyer had tentatively decided to absorb the budget cut in the residential contract by laying off counselors, Tardani met with her on December 30, 1981, and January 4, 1982, in an attempt to cause her to consider other possible solutions. During the December 30 meeting, he made suggestions that would absorb approximately $18,500 of the $19,487 cut. The plan involved, inter alia, reducing the house manager (Nellie Day) and the secretary (Cathy Hoff) from an 8-hour day to a 6-hour day. Geyer rejected his proposal, indicating that she planned to lay Doran off and go to a live-in arrangement for child care when the regular staff was off. Tardani testified he asked Geyer to reconsider her decision to lay Doran off, observing that Doran accomplished half of the counseling performed at Webster House. Geyer's response was that Doran did not fit into the team approach; that she had attitude and morale problems and had not participated in some of the fund-raising activities. Tardani further indicated that Geyer told him that if Doran had been an EWP employee outside the merger situation, she would have been fired on the spot for violating the chain-of-command and approaching Geyer in a manner that lacked tact. At the conclusion of the meeting, Geyer informed Tardani that she still planned to lay Doran off, but would think about it.

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[3] Tardani indicated in reports sent to Geyer after such meetings that Webster House employees were apprehensive and concerned. See G.C. Exhs. 23–26.

[4] See G.C. Exh. 4. The language adopted as a direct result of Doran's contact with the Wage and Hour Division and Geyer is found at item 12, p. 17 and under the heading "Exemption from Overtime" on pp. 50–52.

[5] After meeting with Geyer, Tardani informed Doran that Geyer was angry with her because she had not followed the chain-of-command in the wage and hour matter.

When Tardani and Geyer next met on January 4, Tardani proposed that Respondent avoid a layoff by cutting both Doran and Vicki Dunn's hours by 50 percent. Geyer rejected the suggestion. Tardani then compared Doran and Dunn at length, pointing out his feeling that while Dunn had adequate qualifications and had done a good job as outreach counselor, Doran had superior qualifications and experience and had done an excellent job as residential counselor. Geyer ended the meeting by indicating her final decision was to lay Doran off. At some point in the conversation, she informed Tardani that Doran and Cathy Hoff had pressured Tardani to do things that did not facilitate a smooth merger and that Doran had some manipulative tendencies.

E. *The Layoffs*

On January 6, 1982, Geyer and Tardani met with Doran in the latter's office. Geyer informed the employee that the budget cut necessitated laying her off effective January 21. Doran became hysterical and could recall little of what happened. While Geyer claims she told Doran they were going to a live-in arrangement and she offered the live-in position to Doran, the employee and Tardani recall that no such offer was made; that instead she was offered relief staff work.[6]

It is undisputed that Bobby Thompson, a paraprofessional counselor who was also employed at Webster House, was informed on January 6 that he was being laid off as of January 22 for economic reasons. The record further reveals he was offered and accepted the live-in attendant position created about the time he and Doran were informed they were being laid off.

When they were informed of their layoffs on January 6, both Doran and Thompson were given letters indicating the reason for the action. Geyer indicated in such letters that each had been a valuable employee and that Respondent could be counted on to give an excellent reference.

F. *Post-termination Events*

By memorandum dated January 8, 1982, Vicki Dunn was informed by Geyer, inter alia, that effective January 1 her salary was increased to $6.75 per hour and that her duties would change to include more time in Muskegon.[7] Shortly thereafter, on January 28, Tardani informed Wood, who supervised outreach services in Newaygo County, by letter that due to budget cuts Dunn would be spending less time in outreach counties. Thereafter, Dunn spent approximately 1 day a week in each of the outreach counties for approximately 3 months. Thereafter, she spent almost all of her time in Muskegon. Eventually the outreach contract was given to another provider because Respondent was not performing adequately.

In February 1982, Sue Ashby replaced Tardani as the project coordinator at Webster House and Tardani was demoted to the position of casework supervisor. In April 1982, Ashby was to be assigned other duties and on April 21 she interviewed Tardani who had applied for the project coordinator position. Tardani testified without contradiction that during the interview Ashby asked him what he would like to do if he obtained the position. When he indicated he would like to rehire Doran, Ashby told him Doran was not a team player and in Ashby's mind Doran had cut her own throat. The next day, April 22, Geyer interviewed Tardani. Tardani testified that when Geyer asked him which individuals in which capacities he would use if selected as a program coordinator, he informed her he would keep the current staff and consider rehiring Doran, at least part-time. Geyer told him that was out of the question, and made further comments to the effect that Doran as well as Cathy Hoff did not fit the team approach and were negative influences.

G. *Accrediting Evidence Offered to Show Doran's Excellence*

To bolster his claim that Doran was an excellent employee who was more highly qualified to perform the Webster House work than Vicki Dunn, the General Counsel placed a resume prepared by Doran and two employee evaluations prepared by Tardani during the period Doran was employed by Respondent in evidence.[8] The resume reveals, inter alia, that Doran obtained a B.S. degree in sociology in 1974; that she was a juvenile case worker from January 1973 until May 1974; that she was a youth home director from January to May 1974; that she was a child care worker at a youth home from September 1975 to March 1977; that she was a court screener working with the court, prosecutor, and public defender in Lowell, Massachusetts, from August to December 1974; and that she was a research assistant from January to April 1975. In brief, the employee evaluations prepared by Tardani on June 24, 1981, and January 4, 1982, respectively, reveal that Doran was given "Better than Average Performance" or "Outstanding Performance" ratings in all categories in both reviews. The single exception was that she was given an "Average Performance" rating in the June evaluation on responsibility.

Analysis and Conclusions

A threshold issue is whether Doran was engaged in protected concerted activity when she contacted the Wage and Hour Division and subsequently contacted Geyer concerning the holiday matter.

It is well established that the conduct of an individual employee may constitute "concerted activity" for purposes of Section 8(a)(1). *Alleluia Cushion Co.*, 221 NLRB 999 (1975); *Air Surrey Corp.*, 229 NLRB 1064 (1977). Expounding on the issue in *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (1979), the Sixth Circuit stated:

[6] As Tardani was not employed by Respondent at the time of the hearing and he was an extremely persuasive witness, I credit his testimony when it conflicts with that of Geyer who has an obvious interest in the outcome of this case.

[7] G.C. Exh. 21. The record reveals that even though she had been employed after Doran, Dunn was hired at a higher hourly rate than Doran received.

[8] See G.C. Exhs. 27, 29, and 30.

> For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

Here, the factual situation is one in which practically all the Webster House employees voiced concern during meetings with their supervisor over the policies and procedures to be followed by Respondent after the merger. Employees Cathy Hoff, Cathee Doran, and Vicki Dunn specifically inquired what the policy on holidays and compensatory time would be and, although he attempted to obtain answers for their inquiries, Supervisor Tardani was unable to do so. It was in the above context that Doran individually contacted the Wage and Hour Division and thereafter Geyer on November 9.

Although Respondent argues that Doran acted individually and solely for her own benefit, the record reveals that after Geyer investigated the matter she caused Respondent's written policies and procedures to be amended to indicate that salaried employees who worked on holidays recognized by Respondent would receive 2 compensatory days for each holiday worked and that professional employees were exempt from the overtime provisions of the Fair Labor Standards Act.

In the circumstances described, I find that Doran's actions reflected a commonality of purpose meant to inure to the mutual aid and benefit of the entire staff of Webster House. Indeed, Respondent seemingly recognized this by deciding, after Doran had contacted the Wage and Hour Division and Geyer, to clarify its holiday policy by amending its policies and procedures. I find that Doran engaged in protected concerted activity when she telephoned the Wage and Hour Division and subsequently briefed Geyer on the matter on November 9, 1981.

The more difficult issue in this case is whether Respondent discharged Doran because of her November 9 activity, or whether, as it contends, she was discharged for economic reasons.

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board indicated the causation test to be employed in discharge cases involving alleged violations of Section 8(a)(1) or (3) as follows:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

I find, without hestitation, that the General Counsel adduced sufficient facts in the instant case to support an inference that Doran's protected activities were a "motivating factor" in Respondent's decision to terminate the employee. Thus, the record clearly reveals that: (1) Geyer exhibited marked animosity towards Doran because she questioned Respondent's holiday policy in early November; (2) Doran was a senior employee at Webster House and was shown to have been exceptionally well qualified to perform work required by both the residential and the outreach contracts; (3) Geyer was shown to have stated immediately before Doran was terminated that she would have been terminated "on the spot" if she had engaged in protected conduct in a nonmerger situation; and (4) in April 1982, Geyer rejected a suggestion that Doran be rehired stating it was "out of the question" because she and Cathy Hoff (who also inquired concerning EWP's holiday policy) were negative influences (on Tardani). The factors described compel an inference that Doran's November 9 actions were a "motivating factor" in the decision to terminate her.

Turning to Respondent's defenses, I note that they consist, in main, of bare assertions, which are uncorroborated in any respect. The first contention is that Doran's November 9 activity was unprotected. My findings, supra, resolve this matter adversely to Respondent's. The remaining defenses are that Respondent's policy is to lay off persons who are performing work related to the contacts that are cut; that Vicki Dunn was retained because of her valuable contacts with people in Oceana and Newaygo counties; and that Geyer determined that Tardani and Senna could accomplish the necessary counseling work required at Webster House. These defenses are discussed individually below.

With respect to Geyer's claim that she customarily counters cuts in the funds for specific programs or contracts by laying off employees engaged in the performance of such contracts, I note that this is a bare claim unsupported by any evidence whatsoever. Although the record suggests that EWP had experienced other cuts in its budget around the same time the Department of Social Services cut its Webster House residential contract by 20 percent, Geyer made no mention of personnel layoffs, which were effectuated in other programs, that were made to permit Respondent to operate under reduced budget conditions. To the contrary, she testified that such situations were handled, in part, by posting all jobs available and permitting employees to bid on them. In the circumstances, I am unwilling to attach significant weight to Geyer's bare assertion that Respondent's normal policy is to lay off employees who perform work under contracts that are cut.

Similarly, Geyer's claim that Dunn rather than Doran was retained because her contacts in Oceana and Newaygo Counties were valuable is a bare assertion unsupported by any evidence. As noted by the General Counsel in brief, the record reveals that the Department of Social Services notified providers at the time Respondent's residential contract was cut that the supervisor of the outreach contracts had agreed the providers could devote less time to outreach contracts. Viewing Tardani's letter to that department that indicates Respondent intended to devote less effort to the Oceana and Newaygo outreach contracts with that record evidence that reveals that Respondent caused Dunn to spend so little time in the named counties during 1982 that the contract was awarded to another provider, I

conclude that Geyer was not as concerned with the outreach contracts and Dunn's contracts as she claims.

Finally, although Geyer claimed that she decided prior to Doran's termination that Senna and Tardani could accomplish the necessary counseling at Webster House after Doran was gone, the record clearly reveals that, in fact, Dunn was required to spend the vast majority of her time counseling at Webster House after Doran left. Thus, it appears that by terminating Doran, Respondent chose to use a less qualified employee who was paid more to do the job previously performed by alleged discriminatee Doran.

In sum, the record evidence in this case fails to persuade me that Respondent would have selected Doran for layoff in January 1982 if she had not engaged in the protected activity described, supra. I find Respondent has failed to rebut the General Counsel's prima facie showing that Respondent selected Doran for termination for discriminatory reasons. Accordingly, I find, as alleged, that by terminating Doran on January 21, 1982, Respondent violated Section 8(a)(1) of the Act.

Conclusions of Law

1. Every Woman's Place, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By terminating Cathee Doran because she engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.
3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent discharged Cathee Doran in violation of Section 8(a)(1), I shall recommend that Respondent reinstate Cathee Doran to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and I shall recommend that Respondent make Doran whole for any loss of earnings she may have suffered because of the discrimination practiced against her by payment to her of a sum equal to what she normally would have earned from the date of her discharge on January 21, 1982, to the date Respondent offers her reinstatement, less her net earnings during that period. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Every Woman's Place, Inc., Muskegon, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for the purpose of discouraging employees from engaging in protected concerted activity.

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

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

(a) Offer Cathee Doran immediate and full reinstatement to her former position of employment or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges previously enjoyed.

(b) Make whole employee Cathee Doran for any losses of pay she may have suffered by reason of the discrimination agianst her in the manner set forth above in the remedy section.

(c) Remove from its files any reference to the layoff or termination of Cathee Doran on January 21, 1982, and notify her in writing that this has been done and that evidence of this unlawful termination will not be used as a basis for future personnel actions against her.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to the analysis of the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Muskegon, Michigan, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[9] 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.

[10] 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against employees for the purpose of discouraging them from engaging in protected concerted activity.

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 offer Cathee Doran immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights, and WE WILL make her whole for any loss of pay she may have suffered by reason of our discrimination against her, with interest.

WE WILL remove from our files any references to the discharge of Cathee Doran on January 21, 1982, and WE WILL notify her that this has been done and tht evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.