Alternative Energy Applications, Inc. *and* David Rivera-Chapman. Case 12–CA–072037

December 16, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On May 16, 2013, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, and an answering 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, and conclusions only to the extent consistent with this Decision and Order.[1]

We affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act by instructing employee David Rivera-Chapman not to discuss wages and threatening to discharge him if he did so. Contrary to the judge, however, we find that the Respondent also unlawfully terminated Rivera-Chapman's employment because it believed that he had discussed wages with other employees.

I. INSTRUCTION NOT TO DISCUSS WAGES

A. Facts

The Respondent weatherizes homes, office buildings, and apartment buildings in the Tampa, Florida area. Rivera-Chapman was hired in July 2011 as a driver/installer by Scott Sipperley, the Respondent's field supervisor. Rivera-Chapman was hired at $9 an hour. Almost immediately after starting, he asked Sipperley for a raise, citing low pay, the hot and difficult work, and his financial need as a parent. Typically, the Company gave new employees a $1-an-hour raise after 6 weeks, but Sipperley spoke with Company President Cary Carreno and obtained Rivera-Chapman an early raise, a couple of weeks after he started. According to Rivera-Chapman's credited testimony, when Sipperley told him about the raise, Sipperley said, "I do not want you talking to anyone else about this because we have fired employees in the past for talking about their wages." The Board has long held that it is unlawful for employers to prohibit employees from discussing wages among themselves, and the judge therefore found that Sipperley's statement violated Section 8(a)(1) of the Act. See, e.g., *Waco, Inc.*, 273 NLRB 746, 747–748 (1984).

B. Exceptions and Analysis

The Respondent contends only that Sipperley made his statement outside Section 10(b)'s 6-month statute of limitations.[2] We find no merit in that contention. The Respondent first raised its 10(b) argument in its posthearing brief to the judge, and the judge appropriately rejected the argument as untimely. See, e.g., *Paul Mueller Co.*, 337 NLRB 764, 764–765 (2002) (respondent waived its 10(b) defense by failing to assert it until its posthearing brief to the judge).

But we would reject the Respondent's 10(b) argument even if it were properly before us. The Board will permit the litigation of an otherwise untimely complaint allegation if the conduct alleged occurred within 6 months of a timely filed charge and is closely related to the allegations of the timely charge. The Board's test for determining whether the otherwise untimely allegation is closely related to the timely charge is set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988). Under *Redd-I*, the Board considers (1) whether the otherwise untimely allegation is of the same class as that of the timely filed charge, i.e., whether the allegations involve the same legal theory and usually the same section of the Act; (2) whether the otherwise untimely allegation arises from the same factual situation or sequence of events as the allegation in the timely charge, i.e., whether the allegations involve similar conduct, usually during the same time period, and with a similar object; and (3) whether a respondent would raise the same or similar defenses to both allegations. Id. at 1118; see also *Carey Salt Co.*, 360 NLRB 201, 206 (2014).

Applying those factors, we find that Sipperley's statement was closely related to the timely filed charge alleging Rivera-Chapman's unlawful discharge. As to the first *Redd-I* factor, both allegations concern the same general legal issues—Rivera-Chapman's right to discuss wages and the Respondent's alleged attempts to interfere with that right—and both the statement and the discharge implicate the same section of the Act, Section 8(a)(1). The second *Redd-I* factor also favors consideration of Sipperley's statement, as that statement and Rivera-Chapman's discharge arose from the same sequence of events. Sipperley warned Rivera-Chapman not to dis-

[1] We have amended the judge's conclusions of law consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified, to clarify the language in the first substantive paragraph (as the General Counsel urges in his exceptions), and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

[2] Rivera-Chapman filed his initial charge on January 9, 2012, alleging that the Respondent unlawfully terminated him for discussing wages. Rivera-Chapman amended the charge on February 2 to include Sipperley's instruction not to discuss his wages. The Respondent contends that the conversation took place before August 2, the beginning of the 10(b) period for purposes of the amended charge.

close his wage increase and informed him that employees had been fired for discussing wages. Then, as we explain below, Sipperley was one of three supervisors who decided to discharge Rivera-Chapman, at least in part because the Respondent believed he had discussed wages. Thus, the events are part of the same chronology and involved the same people. Finally, we acknowledge that the third *Redd-I* factor does not appear to be satisfied because the alleged unlawful statement and discharge would not necessarily prompt the same or similar defenses.[3] Nevertheless, we find that this third factor is outweighed by the others, particularly given the evidence that the alleged unlawful threat and discharge allegations are part of the same sequence of events involving the same actors. Therefore, even if Sipperley made his unlawful statement outside the 10(b) period, we find that it was properly added to the complaint.[4]

II. RIVERA-CHAPMAN'S DISCHARGE

A. Facts

During his roughly 2 months of employment with the Respondent, Rivera-Chapman frequently complained about pay and working conditions. At the hearing, four supervisors and two former colleagues described Rivera-Chapman's complaints, testifying that they thought he was not a good employee and would not work out with the Company. Fellow installer Chris Hughes also testified that Rivera-Chapman had a poor work ethic and that they got into a verbal altercation because Rivera-Chapman refused to take his turn to go up in the attics and blow insulation.

In mid-August, Cary Carreno, the company president, received a call from Dreama Hughes, the stepmother of Chris Hughes and an old friend of Cary's. According to Cary Carreno, Dreama Hughes stated that her son had concerns and questions about his paycheck and that Rivera-Chapman had discussed issues relating to overtime pay with Chris. Cary Carreno also testified that Dreama Hughes complained about Rivera-Chapman's behavior. Rivera-Chapman denied telling Hughes or any fellow employee that he received a raise earlier than others, but admitted that he discussed wages generally with his colleagues.

Then, in late August, Craig Carreno, the Company's lead salesman and brother of Cary Carreno, inspected a weatherizing job at an apartment building. One aspect of the weatherization involved installing insulation in attics with a blower, a task Rivera-Chapman frequently performed. The attic spaces were particularly small, and Craig Carreno instructed Rivera-Chapman and his coworkers to blow insulation into each unit separately rather than attempting to cross from one unit's space to another without leaving the attic. (The apartments shared a single attic, but the units had separate entrances to it.) Later that day, Rivera-Chapman's foot went through the ceiling, apparently as he attempted to cross units. He texted a picture to Craig Carreno and the Company had to have the ceiling repaired, at a cost of $100. Rivera-Chapman called OSHA and filed a complaint over the incident.

At a business meeting in Orlando on August 30, Cary Carreno, Vice President Sean Farrell, and Field Supervisor Sipperley decided to terminate Rivera-Chapman's employment. The Respondent's notes from that meeting state that Rivera-Chapman was discharged because he did not fit the company "philosophy" and because fellow employees complained about working with him. Cary Carreno, Farrell, and Sipperley all testified that wage discussions Rivera-Chapman may have allegedly engaged in did not factor into the decision.[5] After the decision had been made, but before he was told he would be fired, Rivera-Chapman's foot went through the ceiling again. On September 7, Sipperley met Rivera-Chapman at the warehouse and told him that he was terminated.

After the Respondent discharged Rivera-Chapman, an OSHA investigator contacted the Respondent, investigating allegations that Rivera-Chapman was discharged because he filed an OSHA complaint about working conditions. The Respondent, through its attorney, sent a written response, stating that Rivera-Chapman was not fired for filing an OSHA complaint but instead because:

> Notably, in the less than two months Rivera had worked for Alternative Energy, he had significantly undercut morale among Alternative Energy's small group of employees. *Rivera had disclosed his rate of pay to other employees, prompting the mother of another employee to contact [Cary] Carreno and complain.* It was reported that Rivera used working time to seek out other employment by calling other companies. Furthermore, Rivera presented a negative attitude about performing duties. He frequently grumbled about the tasks he was assigned, and his refusal to perform assigned tasks resulted in other employees having to pick up the slack. Carreno also believed that on two occa-

[3] Here, for example, the Respondent argued to the judge that Sipperley did not make the threatening statement, but that the wage conversations were unprotected and that it had legitimate reasons for discharging Rivera-Chapman.

[4] The Respondent does not contend that Sipperley made his comment before July 9 (6 months before Rivera-Chapman filed his initial charge), and the record would not support any such contention.

[5] Contrary to the judge, it was Sipperley, not Farrell, who presented the evidence and led the discussion about terminating Rivera-Chapman's employment.

sions, Rivera intentionally stuck his foot through a client's ceiling in retaliation for having to perform his duties (emphasis added).

The judge found that the General Counsel had failed to show that the Respondent discharged Rivera-Chapman because it believed that he had discussed wages with other employees. The judge acknowledged that the Respondent essentially admitted as much in its position statement to OSHA, but found that the statement was not supported by any other testimony. He also found no direct evidence that Rivera-Chapman discussed his wage increase with other employees, and found that the Respondent had furnished credible evidence that Rivera-Chapman was "not a good fit" for the Company. Accordingly, the judge recommended that the discharge allegation be dismissed. For the reasons discussed below, we disagree.

B. Analysis

In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 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). Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in an employer's adverse action. The General Counsel satisfies his initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even absent the employee's protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Those same basic principles apply where, as here, the complaint alleges that an employer has retaliated against an employee in the *belief* that the employee engaged in protected activity. The General Counsel carries his initial burden by demonstrating that the employer's belief was a motivating factor in its decision. The burden then shifts to the employer to show that it would have taken the same action in the absence of its belief that the employee engaged in protected conduct. *Signature Flight Support*, 333 NLRB 1250, 1250 (2001), affd. mem. 31 Fed.Appx. 931 (11th Cir. 2002); *United States Service Industries*, 314 NLRB at 31 (1994).

1. The General Counsel carried her initial burden

Unlike the judge, we find that the General Counsel demonstrated that the Respondent discharged Rivera-Chapman because it believed that he had discussed wages with other employees. To begin, we find the statement in the Respondent's letter to OSHA that Rivera-Chapman was fired for discussing his wages is an admission against interest and thus persuasive evidence both that the Respondent believed that Rivera-Chapman disclosed his rate of pay and that it discharged him for that reason.[6] Although other reasons for the discharge were listed, the wage disclosure was featured as the first basis for the Respondent's claim that Rivera-Chapman had undercut morale.[7] In those circumstances, we find that the General Counsel established that the wage discussions were *a* motivating factor in the discharge, regardless of whether they were the only or the predominant factor; indeed, the *Wright Line* analysis was adopted ex-

[6] The Respondent argues that the statements in the OSHA letter were from its counsel (also its counsel in this proceeding) and never adopted by company officials, and therefore cannot be attributed to the company. To the contrary, the Board has held that "[a]n admission against interest may be used as evidence as well as to impeach and thus includes assertions made in position statements of counsel." *United Technologies Corp.*, 310 NLRB 1126, 1127 fn. 1 (1993), enfd. mem. sub nom. *NLRB v. Pratt & Whitney*, 29 F.3d. 621 (2d Cir. 1994); see also *United Scrap Metal Inc.*, 344 NLRB 467, 468 fn. 5 (2005) (position statements submitted by counsel are admissions against interest by the party). In this case, the first tangible reason the Respondent's attorney provided to OSHA was that Rivera-Chapman was fired because he "had disclosed his rate of pay to other employees, prompting the mother of another employee to contact [Cary] Carreno and complain." Although Cary Carreno was copied on the letter relating his discussion with Chris Hughes' stepmother, he did not take any steps to disavow either that statement or the statement that "this letter is intended to be Alternative Energy's summary response to the complaint as submitted."

[7] All of the Respondent's witnesses testified that employees were free to discuss wages and commonly did so, but all of the examples given (including from Jose Obando Jr., who became a supervisor while the case was pending) were of employees discussing wages with mid-level supervisors, who then petitioned Cary Carreno for a raise. This evidence does not establish that employees were free to discuss wages among themselves.

pressly for dual motive cases such as this. 251 NLRB at 1083 et seq., 1089 at fn. 14.[8]

The judge, however, dismissed the significance of the OSHA letter, suggesting that a party's admission against interest lacks probative force if not corroborated by other testimony. We know of no authority for that proposition, and we do not endorse it. But, in any event, the General Counsel provided additional evidence of both the Respondent's belief and its unlawful motive. Cary Carreno testified that Jose Obando Jr., at the time a coworker, had told him that Rivera-Chapman complained that wages were too low. Carreno also grudgingly admitted that in its position statement in this case, the Respondent acknowledged that it learned of Rivera-Chapman's discussion of pay from a coworker's mother, who called to complain about Rivera-Chapman's behavior. Carreno's testimony is further evidence that the Respondent believed that Rivera-Chapman had discussed wages with other employees.[9] Last, Sipperley's earlier threat to discharge Rivera-Chapman for discussing wages is additional evidence of Respondent's motive for the discharge. See *Igramo Enterprise*, 351 NLRB 1337, 1339 (2007), review denied 310 Fed.Appx. 452 (2d Cir. 2009); *Vico Products*, 336 NLRB 583, 588 fn. 16 (2001), enfd. 333 F.3d 198 (D.C. Cir. 2003); *F & C Transfer Co.*, 277 NLRB 591, 594–595 (1985). Taking into account all of those circumstances, we find that the General Counsel made a strong showing of discriminatory motivation.[10]

[8] And, of course, it is well settled that whether the Respondent was mistaken in its belief that Rivera-Chapman had engaged in wage discussions is irrelevant. See *Monarch Water Systems*, 271 NLRB 558, 558 fn. 3 (1984).

[9] Contrary to the judge, there was also uncontroverted testimony that Rivera-Chapman actually did discuss wages with other employees. Rivera-Chapman testified that he discussed low pay and working conditions with coworker Antonio Bonilla. Jose Obando Jr. testified that Rivera-Chapman raised issues about working conditions and pay. Thus, although this point is not necessary to our analysis, the Respondent's belief that Rivera-Chapman discussed wages with other employees appears to have been well founded.

[10] The Respondent and our dissenting colleague argue that Rivera-Chapman's wage-related complaints to others were individual, rather than concerted activities, because they were not undertaken in contemplation of group action. This argument lacks merit because employee wage discussions are "inherently concerted," and as such are protected, regardless of whether they are engaged in with the express object of inducing group action. See, e.g., *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624–625 (1986). This is because wages are a "vital term and condition of employment," and the "grist on which concerted activity feeds"; discussions of wages are often preliminary to organizing or other action for mutual aid or protection. *Aroostook County Regional Ophthalmology* Center, 317 NLRB 218, 220 (1995) (citations omitted), enf. denied in part on other grounds 81 F.3d 209, 214 (D.C. Cir. 1996). See also *Trayco of S.C., Inc.*, 297 NLRB 630, 634–635 (1990), enf. denied mem. 927 F.2d 597 (4th Cir. 1991) (contemplation of group action not required when employee discussion is about wages); *Whittaker Corp.*, 289 NLRB 933, 933 (1988) (particularly with respect to wage discussions, "object of inducing group action need not be express"). Our colleague rejects this view, but implicitly concedes that it represents established Board law.

Moreover, even if we did not regard Rivera-Chapman's wage-related discussions as inherently concerted, we would still find his discharge unlawful. The evidence amply supports finding not only that the Respondent believed that Rivera-Chapman had discussed wages with other employees, but also that the discharge was a product of the Respondent's unlawful intent to ensure that wage-related discussion did not lead to group action. The discharge of an employee to prevent him from engaging in protected concerted activity violates Sec. 8(a)(1). *Parexel International, LLC*, 356 NLRB 516, 518 (2011). Sipperley's early admonition to Rivera-Chapman not to talk to anyone about his raise ("because we have fired employees in the past for talking about their wages"), together with the Respondent's obvious concern when Rivera-Chapman's discussions at least apparently triggered another employee's wage complaints (which were directly linked to conversations with Rivera-Chapman), support the inference that Rivera-Chapman was discharged in order to deny him and other employees "the opportunity to compare their wages and other terms of employment and to determine whether to take further concerted action." Id. The discharge of Rivera-Chapman not only prevented his discussion of wages from developing into group action, but "also had the effect of keeping other employees in the dark about these matters, thus preventing them from discussing, and possibly inquiring further or acting in response to, substandard wages or perceived wage discrimination." Id. at 5; see also *United States Service Industries*, 314 NLRB 30, 30–31 (1994), enfd. mem. 80 F.3d 558 (D.C. Cir. 1996) (employee unlawfully discharged for "stirring up the other workers" by complaining about hours and work assignments). This case shares the same operative facts with *Parexel* and *United States Service*: an employee who engaged in conversation about wages or working conditions with coworkers and an employer who retaliated under a belief that such conversation would foster group activity. The only difference is that Respondent phrased the offensive conduct as undermining morale rather than stirring up the work force.

More generally, a recognition of the relationship between employee morale and group activity is part of the fabric of the Board's jurisprudence. See, e.g., *Quietflex Mfg. Co.*, 344 NLRB 1055, 1055 (2005); *Bridgeport Ambulance Service*, 302 NLRB 358, 362 (1991), enfd. *NLRB v. Bridgeport Ambulance Services*, 966 F.2d 725 (2d Cir. 1992). The connection between low morale and group activity is also recognized in the legislative history of the Act. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 497–498 (1978) (noting that Congress extended bargaining rights to hospital employees as a way to ameliorate low morale in the industry). Furthermore, an employer's characterization of employee conduct as undercutting morale is often a veiled reference to protected concerted activity. See, e.g., *Inova Health System*, 360 NLRB 1223, 1227 (2014); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enfd. 519 F.3d 373 (7th Cir. 2008); *Mid-Mountain Foods*, 291 NLRB 693, 699 (1988).

Our dissenting colleague argues that the "preemptive strike" theory was not properly before the Board. We disagree. As the Board stated in *Paraxel*, we recognize the Board may not change horses mid-stream, but in cases such as these, the two theories represent different parts of the same horse. Id. at 3. That description is even more apt in this case, where the General Counsel litigated the case under the theory that the employer mistakenly believed that the wage conversation would lead to group action. In those circumstances, we have no trouble finding that the theory is closely related to the subject matter and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

2. Respondent did not carry its rebuttal burden

Under *Wright Lin*e, the burden next shifts to the Respondent to demonstrate that it would have discharged Rivera-Chapman even if it had not believed that he discussed wages with other employees. Faced with the General Counsel's strong showing of unlawful motivation, the Respondent's rebuttal burden is substantial. See *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); accord *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011), enfg. *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010). We find that the Respondent has not carried that burden.

The Respondent's stated reason for discharging Rivera-Chapman was that he had a bad attitude and a poor work ethic. Although the Respondent presented evidence that Rivera-Chapman was not a sterling employee, much of that evidence is pretextual.[11] The Respondent relies on Chris Hughes' testimony about his disagreements with Rivera-Chapman; however, Hughes testified that he did not report those concerns until months after Rivera-Chapman was fired, and then only at Sipperley's request. Accordingly, Hughes' concerns could not have been part of the reason for the discharge. Similarly, the Respondent cites Cary Carreno's testimony that Rivera-Chapman had put his foot through the ceiling twice, as stated in the OSHA letter. The evidence shows, however, that the Respondent had already decided to discharge Rivera-Chapman before he put his foot through the ceiling the second time; thus, any reliance on that incident as a basis for the decision is pretextual. Moreover, many employees had put their feet through ceilings and had not been discharged. Indeed, Vice President Farrell stated to OSHA that "[w]e would not fire an employee for going [through] an attic." Craig Carreno also suspected that Rivera-Chapman intentionally put his foot through the ceiling, but that suspicion was unsupported by any objective evidence, and in any event, there is no evidence that Craig Carreno played any role in the discharge decision. Finally, Cary Carreno testified about a dispute with Rivera-Chapman over automatic withholding of child support payments, but the judge found that the reason was an afterthought and, implicitly, pretextual.

The Act protects all employees, not just exemplary employees, from adverse action by an employer based on their protected activity. In cases like this, in which there may have been lawful grounds for discipline, it is our job to determine whether the alleged discriminatee was indeed disciplined because of his protected activity, using the analytical tools developed by the Board over its many years of enforcing this provision of the Act, with the approval of the courts. The Respondent may have had legitimate reasons for discharging Rivera-Chapman. But, under the Act, given the clear evidence of unlawful motive, that is not enough. See *Bruce Packing*, supra, 357 NLRB 1084, 1086–1087. Rather, the Respondent was required to show that it actually would have discharged Rivera-Chapman absent its belief that he had been discussing wages with other employees. Because the Respondent has failed to do so, we find that the discharge was unlawful.

[11] The Respondent cites the fact that Rivera-Chapman received a raise to argue that it was unconcerned about Rivera-Chapman's initial wage complaints. But those complaints were made to Field Supervisor Sipperley, not to Rivera-Chapman's fellow employees.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

4. On or about September 7, 2011, the Respondent violated Section 8 (a)(1) of the Act by discharging employee David Rivera-Chapman because it believed that he had engaged in protected concerted activity.

5. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) by discharging David Rivera-Chapman, we shall order the Respondent to offer him full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order Respondent to compensate Rivera-Chapman for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. We shall also order Respondent to remove from its files any reference to Rivera-Chapman's unlawful discharge and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Alternative Energy Applications, Inc., Valrico, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing its employees not to discuss their wages with other employees and threatening to fire them if they did so.

(b) Discharging or otherwise discriminating against employees because it believes that they discussed wages with one another or engaged in other protected conduct.

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

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

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

(b) Make David Rivera-Chapman whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of this decision.

(c) Compensate David Rivera-Chapman for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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

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

(f) Within 14 days after service by the Region, post at its Valrico, Florida, and other facilities and warehouses that it maintains, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER MISCIMARRA, dissenting in part.

This case involves two different allegations and an important question regarding what type of interaction between two employees rises to the level of "concerted" activity protected by the Act.

The first allegation relates to whether Respondent unlawfully instructed employee David Rivera-Chapman not to discuss wages with other employees. Although the Act does not protect every discussion or disclosure of wages between two or more employees, a blanket instruction not to disclose wage information clearly encompasses situations when such discussions would be protected.[1] *Waco, Inc.*, 273 NLRB 746, 747–748 (1984). For this reason, I agree with my colleagues that the Respondent violated Section 8(a)(1) by instructing employee David Rivera-Chapman not to disclose his wages to anyone else, with the explanation that "we have fired employees in the past for talking about their wages."[2]

[12] 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."

[1] For example, the Act would protect two or more employees who discuss their wages, jointly demand a wage increase and strike in support of their demand. See *Trident Recycling Corp.*, 282 NLRB 1255, 1257, 1261 (1987).

[2] I also join my colleagues in rejecting the Respondent's 10(b) defense to the allegation that the Respondent violated Sec. 8(a)(1) by instructing Rivera-Chapman not to discuss his wages with other employees and threatening to discharge him if he did. In doing so, I rely

However, the second allegation involves a different question: whether Rivera-Chapman actually *engaged in* protected concerted activity that was responsible, in part, for his discharge. The Board has an extensive body of law regarding the type of interaction between two or more employees that constitutes "concerted" activity "protected" under the Act. See *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Here, there is no evidence that Rivera-Chapman engaged in protected concerted activity with one or more other employees relating to the discussion of wages. Therefore, unlike my colleagues, I believe we cannot reasonably find that Respondent violated the Act by discharging Rivera-Chapman because he engaged in such discussions.[3]

Section 7 protects employee conduct that is both concerted and engaged in for the purpose of mutual aid or protection. Activity is concerted if it is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers II*, above. A conversation may constitute concerted activity although it involves only a speaker and a listener, but "it must appear at the very least that it was engaged in *with the object of initiating or inducing or preparing for group action* or that it *had some relation to group action in the interest of the employees*." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (emphasis added). As to these requirements, the Third Circuit has explained:

> Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, *if it looks forward to no action at all, it is more than likely to be mere 'griping.'*

Id. (emphasis added).

Here, there is no evidence that Rivera-Chapman ever said or did anything "looking toward group action," or that the Respondent believed he did. As noted by my colleagues, the record reveals, first, that Respondent's president, Cary Carreno, received a call from a friend, who was also an employee's stepmother, and the stepmother disclosed that her stepson had discussed some pay issues with Rivera-Chapman, and second, the Respondent in an OSHA position statement (prepared by an attorney) stated that Rivera-Chapman had "disclosed his rate of pay to other employees, prompting the mother of another employee to contact Carreno and complain."

At most, this evidence suggests that the discussion about wages between Rivera-Chapman and his coemployee rose to the level of "mere griping" that, under well-established case law, does not qualify as concerted activity within the meaning of Section 7. Even if Rivera-Chapman suggested to another employee that he was entitled to more overtime pay (which is not established by the record), this would not constitute concerted protected activity unless Rivera-Chapman had the "object of initiating or inducing or preparing for group action" or the statement "had some relation to group action in the interest of the employees." *Mushroom Transportation*, above (employee not engaged in concerted activity when he informed other employees they were not getting what they were entitled to under the existing union contract).[4]

My colleagues find there is protected concerted activity based on their view that any discussion about wages is

on the untimeliness of the defense, which the Respondent first raised in its posthearing brief to the judge. See *Paul Mueller Co.*, 337 NLRB 764, 764–765 (2002). I find it unnecessary to reach the merits of the 10(b) issue.

[3] Rivera-Chapman denied that he disclosed his wage rate to any other employee. However, the Respondent stated—through its attorney in response to an OSHA complaint filed by Rivera-Chapman—that Rivera-Chapman "had disclosed his rate of pay to other employees." Thus, whether or not Rivera-Chapman had done so, the Respondent believed he had. The Respondent also believed that Rivera-Chapman spoke with employee Chris Hughes about overtime pay. There is no evidence, however, that the Respondent believed Rivera-Chapman ever sought to initiate any group activity with regard to any of his complaints, or that Rivera-Chapman sought to do so in fact, and no group action ensued.

[4] Because the General Counsel did not establish that Rivera-Chapman engaged in activity protected by Sec. 7 or that the Respondent believed he did, the General Counsel failed at the outset in his effort to meet his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of showing that protected activity, or a belief that Rivera-Chapman engaged in protected activity, was a motivating factor in Rivera-Chapman's discharge. Accordingly, I need not and do not reach the remaining elements of the General Counsel's *Wright Line* case or whether, even assuming the General Counsel met his initial *Wright Line* burden, the Respondent established that it would have discharged Rivera-Chapman even absent any protected activity on his part or belief that he engaged in protected activity. However, I disagree with the majority's statement that the General Counsel meets his initial burden by showing protected activity, employer knowledge of that activity, and generalized employer animus. Generalized animus does not satisfy the General Counsel's initial burden under *Wright Line* absent evidence that the challenged adverse action was motivated by that animus. As stated in *Wright Line* itself, the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct *was a 'motivating factor' in the employer's decision*." 251 NLRB at 1089 (emphasis added).

inherently concerted under the Act. Such a view, however, is directly contrary to the holdings of *Meyers II* and *Mushroom Transportation*, above. These cases hold that "concertedness" requires record evidence establishing there is an object of initiating, inducing, or preparing for group action. By comparison, every court that has considered any theory of "inherently concerted" activity has squarely rejected such an approach. See *Trayco of S.C., Inc.*, 297 NLRB 630, 634–635 (1990) (wage discussions inherently concerted), enf. denied mem. 927 F.2d 597 (4th Cir. 1991) (although employee "discussed her concerns about wages with other employees, there is no evidence to indicate that she sought to induce any type of group action"); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (discussions about work schedules inherently concerted), enf. denied in pert. part 81 F.3d 209, 214 (D.C. Cir. 1996) (rejecting inherently concerted theory, "which, on its face, appears limitless and nonsensical. . . . [A]doption of a per se rule that any discussion of work conditions is automatically protected as concerted activity finds no good support in the law.").[5] Because this "inherently concerted" theory is contrary to controlling precedent and the Act, I reject it as well.

Even if a theory of inherent concertedness were permissible under the Act, such a theory would need to rest on a presumption that wage discussions were so likely to lead to group activity that the mere fact of such a discussion would justify drawing an inference of concerted activity as a matter of law. See *Aroostook County*, above, 317 NLRB at 220 (finding discussions about changes to work schedule concerted because they are "likely to spawn collective action"). But the validity of such a presumption "depends upon the rationality between what is proved and what is inferred." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804–805 (1945). When a rational nexus is lacking, the presumption cannot stand. See *Painters Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985); *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). As this case and many others like it illustrate—and as common experience teaches—many employees can and do discuss wages without contemplating or seeking to initiate any type of group action. There is, accordingly, no valid basis for the presumption on which the inherently concerted theory rests.

Finally, I disagree with my colleagues that Rivera-Chapman's discharge may be found to have violated the Act, under *Parexel International, LLC*, 356 NLRB 516 (2011), on the theory that Respondent sought to prevent him from engaging in future concerted activity.[6] The "preemptive strike" (preemptive restraint) theory of *Parexel* resembles the discredited pre-*Meyers I* and *II* theory of "inherently" concerted activity: under both, a violation is found despite a lack of evidence that any employees sought to initiate, induce, or prepare for group action. Accordingly, the "preemptive strike" theory, like the "inherently concerted" theory, is contrary to the holdings of *Meyers II* and *Mushroom Transportation*, above.

But even assuming *Parexel* was rightly decided, the evidence my colleagues rely on is insufficient to support a reasonable inference that Respondent's motive in discharging Rivera-Chapman was to prevent future concerted activity. The record fails to establish that Respondent had even considered that possibility, let alone took action to preempt it. There is no evidence that any of Respondent's employees have ever engaged in concerted activity. Rivera-Chapman spoke to a coworker, who griped to his stepmother, who complained to Respondent. Perhaps Respondent was partly motivated by a desire to avoid further unpleasant conversations with irate parents, but that is not a motive the Act condemns. And there is no evidence of what prompted Respondent to tell Rivera-Chapman not to talk about his raise. My colleagues hypothesize a motive to prevent group action, but the Respondent gave no indication of anticipating group action if Rivera-Chapman remained in its employ.[7]

[5] As support for its "inherently concerted" activity theory, the majority also cites *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), together with the subsequent history of that case indicating enforcement of the Board's order by the Sixth Circuit. However, the respondent in that case failed to serve and file an answer to the Board's application for enforcement within 20 days as required under Rule 15(b) of the Federal Rules of Appellate Procedure, and the court granted the Board's motion for entry of judgment by default in an unpublished order. *NLRB v. Automatic Screw Products Co.*, 977 F.2d 528 (6th Cir. 1992) (Table). The court did not reach the merits of the "inherently concerted" activity theory.

[6] The General Counsel did not litigate this case on the theory that Rivera-Chapman was discharged to prevent him from engaging in protected concerted activity in the future. The General Counsel litigated this case on the theory that "Respondent believed, mistakenly or otherwise, that Rivera-Chapman had disclosed his wage rate to other employees." GC Br. at 12. To the extent my colleagues base their violation finding on this unlitigated theory, they deny the Respondent due process of law. *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (the Board "may not change theories in midstream without giving respondents reasonable notice of the change") (citations and internal quotation marks omitted); *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (same).

[7] In *Parexel*, by contrast, the evidence supported a reasonable inference of a motive to prevent potential group action. There, employee Neuschafer had a conversation with coworker Van der Merwe, who had previously quit and now was back. Neuschafer asked Van der Merwe if he had received a raise when he returned. He said he had, and added that his wife, who had also recently quit, would also be returning with a raise. All this was false, but Neuschafer believed him. Van der Merwe also suggested that the (fictitious) raises were owing to favoritism from Manager Liz Jones based on their shared South African heritage.

The Act protects employees when they bring the strength of the group to bear on a dispute with their employer in order to remedy "inequality of bargaining power" between an employer and its employees.[8] When the Board attempts to extend the reach of Section 7 to individual employee activity that does not have group action as its object, it goes beyond what Congress intended. Because my colleagues take that step in today's decision, I respectfully dissent.

Neuschafer repeated the story to her supervisor, Turek, adding that she thought the whole unit should quit and come back with a raise, and that Jones was going to look after all the South Africans. Turek reported the conversation to Manager Jones. Jones, accompanied by a human resources consultant, interviewed Neuschafer and asked her *if she had discussed the Van der Merwe conversation with anyone other than Turek*. Neuschafer said she had not. Six days later, she was discharged. On those facts, it was reasonable to infer a motive to prevent Neuschafer from talking about these matters to her coworkers.

My colleagues cite several cases in support of their assertion that the Respondent's belief that Rivera-Chapman's wage discussions undermined employee morale supports a finding that the discussions were concerted under a *Parexel* "preemptive strike" theory. The cases cited by the majority in this regard are readily distinguishable. None of those cases was decided on a "preemptive strike" theory, so the question of whether low morale might lead to group action was not addressed. More generally, employee morale was not cited in any of those cases as a basis for finding employee activity concerted. See *Inova Health System*, 360 NLRB 1223, 1227(2014) (employee engaged in concerted activity by discussing work-schedule concerns with coworkers and raising those concerns with management); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007) (employee's participation in discussion critical of new evaluation process and its effect on receipt of wage increases was protected concerted activity), enfd. 519 F.3d 373 (7th Cir. 2008); *Quietflex Mfg. Co.*, 344 NLRB 1055, 1055 (2005) (work stoppage by 83 employees seeking a pay raise, improved vacation and holiday pay, and better working conditions was protected concerted activity); *Bridgeport Ambulance Service*, 302 NLRB 358, 362 (1991) (group work stoppage in protest of coworker's suspension, employer's favoritism, and substandard equipment was protected concerted activity), enfd. 966 F.2d 725 (2d Cir. 1992); *Mid-Mountain Foods*, 291 NLRB 693, 699 (1988) (employee engaged in protected concerted activity by discussing working conditions with coworkers and raising concerns to management on behalf of himself and others). Indeed, in *Quietflex* and *Bridgeport Ambulance Service*, morale was an issue because of the *employer's* actions, not an employee's. And in no case cited by the majority did an employee's morale-compromising behavior include the types of unprotected activities Rivera-Chapman engaged in, including using worktime to seek out other employment, grumbling about assigned tasks, and refusing to perform some tasks and thus forcing coworkers to pick up the slack.

In support of their *Parexel* theory, my colleagues also rely on *United States Service Industries*, 314 NLRB 30 (1994) (*USSI*), enfd. mem. 80 F.3d 558 (D.C. Cir. 1996). I find that case distinguishable from this one. There, an employee was discharged because her employer believed her complaints about hours and work assignments were "stirring up the other workers." On those facts, the Board properly found the discharge unlawful. Indeed, there was no need to rely on a "preemptive strike" theory, and the Board did not do so. The employer in *USSI* believed the employee was seeking to initiate or induce group action, warranting a finding of concerted activity under *Meyers I* and *II*. For reasons already stated, the record fails to support a like finding here.

[8] Sec. 1 of the Act states that "inequality of bargaining power" between employers and employees who lack "full freedom of association or actual liberty of contract" has negative consequences that include "substantially burden[ing] and affect[ing] the flow of commerce," which also "tends to aggravate recurrent business depressions." As indicated in *Meyers II*, *Mushroom Transportation* and similar cases cited in the text, however, such concerns are only implicated in "concerted" activity that involves Sec. 7 rights.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you not to talk to fellow employees about your wages or threaten to fire you if you do so.

WE WILL NOT discharge or otherwise discriminate against any of you because we believe that you discussed wages or otherwise engaged in protected concerted activities.

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

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

WE WILL make David Rivera-Chapman whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate David Rivera-Chapman for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of David Rivera-Chapman, and WE WILL

within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ALTERNATIVE ENERGY APPLICATIONS, INC.

The Board's decision can be found at www.nlrb.gov/case/12–CA–072037 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Karen Thornton, Esq., for the General Counsel.
Shaina Thorpe, Esq. (Allen, Norton & Blue, P.A.), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge This case was heard by me in Tampa, Florida, on April 2, 2013. The complaint and the amended complaint herein, which issued on December 28, 2012, and March 11, 2013, and were based upon an unfair labor practice charge and an amended charge that were filed by Chapman on December 23, 2011,[1] and February 2, 2012, allege that Alternative Energy Applications, Inc. (the Respondent), in August, instructed its employees not to discuss their wages with other employees and threatened to discharge employees if they did so, and on about September 11 it discharged Chapman because it believed that he had discussed his wages with other employees, thereby violating Section 8(a)(1) of the Act.[2]

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

Respondent is in the business of weatherizing low income residences, both private homes and apartment buildings. In that process, they caulk windows, apply weather stripping, wrap water heaters, seal the duct systems and, the process that was most involved in the testimony herein, they blow insulation from a truck into the attics of the buildings. The insulation, contained in bags, is dumped into a hopper, is mixed and blown through a tube into the attic area, under the direction of an employee in the attic.

Craig Carreno is employed as the head of the sales department for the Respondent; his brother is Cary Carreno, the President and owner of the Company. The nature of the Respondent's business, and the work performed by its employees are crucial to the ultimate determination herein, and as Craig Carreno, (Craig), was the most credible witness herein, his description of the business will be fully discussed herein. The Respondent sells energy efficient programs to customers of Tampa Electric in order to help them reduce their energy usage. Craig inspects the property in order to determine whether it qualifies for the program. As part of this inspection, he inspects the attic to determine whether there is already enough insulation in the attic so that it would not be feasible for the Company to do the work. He also determines whether the crawl space in the attic is adequate for the employees to gain access to the area and to blow the insulation, or if it would be an unsafe area in which to work, and he testified that he has never rejected a job for this reason.

Scott Sipperley, who is employed by the Respondent as a supervisor of the installers, testified that the Respondent posted an ad on Craigslist in July for an installer/driver. Chapman responded to the ad on a Friday and Sipperley interviewed him over the phone; Sipperley asked him when he could start and Chapman said that he could start work on Monday, which he did at an hourly rate of $9. He worked Monday through Friday from 7 a.m. to 3 p.m. in an area north of Tampa, Florida. On about August 1, he received a $1 an hour wage increase. Cary Carreno (Cary), and Sipperley testified that even though the company policy was that employees receive a $1- an-hour increase after 90 days of employment, Chapman told Sipperley that he needed a raise because he was a single parent raising two children, and Sipperley, a single parent raising four children was sympathetic, discussed it with Cary, and gave him the increase. Chapman testified that he received the wage increase after telling Sipperley that the work was very hard and that they were only paid $9 an hour, and that when Sipperley told him that he was giving him the $1 raise, he also told him "but I do not want you talking to anybody else about this because we have fired employees in the past for talking about their wages," and Chapman agreed. Sipperley testified that he has no recollection of telling him that he could be fired for talking about his wages: "I don't know why I would have said that. I've never said it to any of our other employees." As to whether he told Chapman that he had terminated other employees for talking about their wages, he testified: "Not that I can recall. As far as I know, David was our first employee that we ever terminated." He also testified that he cannot remember hearing that Chapman had discussed his wage increase with others. Cary testified that he never told Chapman, or any other employee, that he was not permitted to discuss his wages with other employees and he never instructed Sipperley to tell him that. Installer/Driver Christopher Hughes testified that he received a raise about 6

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2011.
[2] Counsel for the General Counsel's unopposed motion to correct transcript, as contained in her brief, is granted.

weeks after he began his employment with the Respondent and, at that time, Sipperley never told him not to talk to other employees about it and never said that they had fired other employees for talking about their wage increase. Jose Obando, Jr. testified that he has been employed by the Respondent since it began and he has received many raises. Sipperley never told him that he was not to talk to his coworkers about the raises and he has never seen any employee fired for talking about their wages.

Chapman was discharged on September 11. Counsel for the General Counsel alleges that he was discharged because the Respondent believed that he had discussed his wages (or wage increase) with other employees in contravention of Sipperley's alleged instruction to him not to do so. Respondent defends that he was discharged because he refused to perform all the work that was required, he had a poor attitude, and that it had no knowledge that he spoke to other employees about his wages. Shortly after his termination, Chapman filed a complaint with OSHA alleging that he was terminated because of complaints that he made to OSHA. In an affidavit that he gave to OSHA, he referred to complaints that he made about the working conditions, and stated: "I know that I was discharged because of the complaint I made to OSHA." In a position statement to OSHA, in response to Chapman's charge, counsel defends that his discharge could not have been in retaliation for his call to OSHA as it was not aware of any such call, until his OSHA charge, which was filed after his termination. Further, counsel defends that he was discharged for refusing to perform assigned tasks, intentionally putting his foot through the ceiling on two occasions, having a negative attitude about the work, and undercutting the morale of other employees. In this letter, counsel also states:

> Notably, in less than two months that Rivera had worked for Alternative Energy, he had significantly undercut morale among Alternative Energy's small group of employees. Rivera [Chapman] had disclosed his rate of pay to other employees, prompting the mother of another employee to contact Carreno [Cary] and complain[3]. . . . Furthermore, Rivera presented a negative attitude about performing his duties. He frequently grumbled about the tasks he was assigned and his refusal to perform assigned tasks resulted in other employees having to pick up his slack.

In Chapman's written Response to OSHA to counsel's letter, he states: "The accusation that I spoke to the other employee [sic] about my pay is false because I had gotten threatened at the time of the pay increase by the supervisor that if I spoke I would get fired." Later in the statement he states: "I have never disclosed my pay rate to any of the other 2 employees. I remember very well being threatened with loss of employment by Scott if I divulged my pay rate; he also mentioned that they had fired people previously for this."

Respondent presented a number of witnesses who testified about Chapman's work and attitude. Hughes had been employed by the Respondent until about April 2012, when he voluntarily left its employ; he worked with Chapman for about 2 months; his stepmother and Cary are friends. He testified that Chapman, ". . .didn't want to do what he was told to do . . . The last job . . . that he worked on, he didn't feel that the attics were workable. So, he basically said that he wasn't going to do it." Because of his refusal to do the work, Hughes had to do blow the insulation in the attic, and that situation had happened previously, as well. On another occasion, while they were working at a church, they were taking turns working in the attic, and Chapman refused to take his turn. They almost got into a fight on this occasion, but they were separated by a maintenance employee. He never told any of the bosses about Chapman's refusal to perform this work prior to the time he was discharged. In a statement that Hughes provided to the Respondent dated February 13, 2012, he states, inter alia, that Chapman was lazy, insubordinate, that he always tried to find the easiest halfway to complete a job, he had a bad attitude and only changed his attitude when a supervisor appeared at the worksite. He testified that after Chapman fell through the ceiling "two days in a row" he said, "I'm done, I'm not doing this anymore, this is ridiculous. The company is asking too much of us." Obando, whose father is also employed by the Respondent, has not worked alongside Chapman at jobsites, but has spoken to him at the Company's warehouse. He testified that Chapman complained about the masks and tools that they used on the jobsites and this indicated to him that he was not a good employee and he told Sipperley about Chapman's complaints and his poor attitude: "When you complain a lot, it's because you are always going to find something to not do the work." He testified that the employees always had the proper tools to work with, and nobody else complained about the equipment that was supplied to them.

Sean Farrell is a manager of the Respondent. He only met Chapman on one occasion; it was on a jobsite and he got the impression that Chapman "was not going to work out, that he was not somebody that we would want working for us." The reason for this impression: "The first thing out of his mouth was he was complaining that he wasn't getting paid enough, that it was hot. I was like, yeah, it's a hot job. There's not much we can do about it." In addition, he was told by Hughes, Sipperley, Craig, and Cary that Chapman refused to do his work, although he never knew this on a first-hand basis. Craig testified that he met Chapman at a school job, introduced himself, and asked how was he doing? Chapman gave his name and said that it was a very difficult job, and Craig responded: "Absolutely, it is a difficult job." He saw him again at the River Grande Apartments job (where Chapman went through the floor of the ceiling). Chapman called him to say that they were having trouble gaining access to the attic in order to blow the insulation. Craig testified that there are full attics in which a person can stand and walk in and out of the attic, and there are limited access attics, where you cannot stand and you have to crawl through the attic area; River Grande was a limited access attic. Each unit had its own access to the attic, but you could see through to the adjacent attic as there was no firewall between them. Chapman said that they were having trouble with access, that they couldn't crawl through the attic to gain access to the

[3] It is clear that Hughes' stepmother called Cary, but when, what was said in this conversation, and whether Chapman was discussed, was not established.

entire area. Chapman told him that the access was too limited, and he told Chapman:

> You can't crawl through there. I said I understand. What you do in that case is go in the access of apartment A, blow that area, come down, go to apartment B, go through that attic access, and then blow the area over that apartment. It is more work, it takes longer, it's extra steps, but when you have a limited access attic, that is the absolute best way to deal with it.

Shortly thereafter, he received a text message from Chapman showing a foot through the attic floor, saying, this is what happens when you try to crawl through the attic. He understood that to mean that Chapman did not follow his directions of blowing one unit at a time, and crawled through the attic to do both units: "I just felt that it was unnecessary for that to have happened because I know from experience that if we had simply gone into each attic access, we could have successfully done that job without an incident." Craig then went to the River Grande apartments to attempt to correct the situation, by contacting their contractor to repair the damage, and to be sure that the resident of the apartment was being taken care of. Shortly thereafter, he told Cary and Sipperley of the incident, and that if Chapman had followed his instructions, it would not have occurred.[4] On September 2, while working in the attic at the same location, Chapman's feet went through the ceiling again, and he sent another text and picture to the Company.

Cary, Sipperley, and Farrell met in Orlando on August 30 to discuss the Company's operation as well as some employee issues. One of subjects that they discussed was Chapman and they decided that he "was not a good fit for the company" and should be discharged. One of the reasons that they considered him not a good fit was that he had a bad attitude and was undercutting morale. Cary testified that they did not believe that he was undercutting morale by disclosing his wages to other employees. Even when shown the position statement that they provided to OSHA, as set forth supra, he testified that this did not contribute to his discharge. Cary testified that the reasons that they terminated Chapman were that he didn't want to work, resulting in other employees complaining about him, he was not a right fit for the job and "it wasn't the right skill set," and Chapman made it clear to him and to the other employees that he wasn't happy at the job by saying that the work was too hot and the pay was too low. On notes that he took at this August 30 meeting, Cary wrote: "Not fit for AEA philosophy. Let's terminate." In addition, he put his foot through the ceiling on two occasions, the second after they had decided to discharge him. Sipperley testified that he does not know the nature of Hughes' stepmother's call to Cary, and does not remember that the conversation was spoken of when they decided to terminate Chapman at this meeting. Farrell testified that he was at the August 30 meeting where they decided to discharge Chapman and whether he talked about his wages to other employees was never discussed at this meeting. Since he had the most knowledge of Chapman's work, he presented the facts to Cary and Sipperley, recommended that Chapman be dismissed, and neither Cary nor Farrell disagreed with his recommendation. Sipperley did not meet with Chapman to tell him that he was discharged until September 7 because Cary, who handles the paperwork for the Company, was out of town and he had to wait until he returned. On the morning of September 7 he met Chapman and told him that his services were no longer needed. He doesn't remember Chapman's response, other than it was "very antagonistic."

[4] Respondent's records state that in 2012 they performed 13,600 jobs and there were 57 situations where employees' feet broke through the ceiling.

III. ANALYSIS

There are two violations alleged herein: that Respondent, by Sipperley, instructed Chapman not to discuss his wages with other employees and threatened to discharge him if he did so,[5] and discharged him on September 7 because it believed that he had discussed his wages with other employees, in violation of Section 8(a)(1) of the Act. As stated above, the most credible and believable witness herein was Craig; his testimony was direct, brief, and responsive to the questions, whether asked by counsel for the Respondent or counsel for the General Counsel. On the other hand, the least credible witness was Cary, whose answers were evasive, rarely responsive, and were never brief, especially in response to questions from counsel for General Counsel, where he often attempted to explain more than was asked of him. Sipperley was more credible than Cary, but did not have a clear recollection of the facts, which could be a result of the fact that the situation occurred 18 months prior to the hearing. Finally, Chapman, Farrell, Hughes, and Obando appeared to be fairly credible witnesses testifying to the events as they best remembered them.

Chapman was the only witness who testified about the alleged threat from Sipperley. Hughes and Obando testified that neither Sipperley, nor any other supervisor, threatened them when they were given wage increases, and Sipperley testified that he has no recollection of making such a threat. As between Sipperley and Chapman, I found Chapman to be more credible. He had a better recollection of the facts, and admitted to facts that were not helpful to his case, such as the fact that he did not tell other employees about his raise. In addition, the reality of the situation is that Sipperley gave Chapman a raise about 2 months earlier than normal company policy, and might have been concerned that the other employees would learn about it. I therefore find that the Respondent, by Sipperley, in August, told Chapman not to tell anyone else about his wage increase and threatened to fire him if he did so, in violation of Section 8(a)(1) of the Act. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992); *Windstream Corp.*, 352 NLRB 510, 513 (2008).

The remaining allegation is that the Respondent discharged Chapman on about September 7 because it believed that he had discussed his wages with other employees in contravention of Sipperley's orders. This issue is to be judged under the guidelines established in *Wright Line*, 251 NLRB 1083 (1980). The

[5] Counsel for the Respondent, in her brief, for the first time, alleges that this allegation is barred by Sec. 10(b) of the Act because it was not alleged until the filing of the first amended charge on February 2, 2012. Even if true, this defense in untimely.

initial issue, under that test, is whether counsel for the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to terminate Chapman. If that has been established, the burden then falls to the Respondent to establish that it would have terminated him even in the absence of his protected conduct. Counsel for the General Counsel alleges that Chapman was discharged because the Respondent *believed* that he had discussed his wages with other employees. The two principal difficulties with this allegation is that counsel for the General Counsel has not established the basis for the Respondent's alleged mistaken belief, and the Respondent has established that Chapman was, in fact, not a satisfactory employee.

The sole evidence establishing that Chapman spoke to other employees about his wages is contained in the position statement dated October 21 provided by counsel for the Respondent to OSHA, stating that he ". . . had disclosed his rate of pay to other employees, prompting the mother of another employee to contact Carreno and complain." However, this statement was not further supported by any other testimony. Sipperley testified that he knew that Hughes' stepmother called Cary, but didn't know anything else about the conversation, and Cary testified that he received a telephone call from Hughes' stepmother, but never testified about the substance of the call. The position statement also states that he was fired for his poor attitude, for refusing to perform the assigned tasks, and for putting his foot through the ceiling, and when Chris, Sipperley, and Farrell met in Orlando on August 30, they decided that Chapman should be discharged because he was "not a good fit" for the Company. In addition, testimony from Craig, Farrell, Hughes and Obando establishes that he didn't follow direction (Craig's testimony about the River Grande Apartments job) and that he, at times, performed the work that he wanted to do, rather than what he was assigned to do (the testimony of Craig and Hughes) as is also set forth in Respondent's position statement. While Cary testified that Chapman asked him to "break the law" by not making the required deductions from his pay as required by the State of Florida for child support, I find that this was an afterthought on the part of the Respondent and played no part in its decision to discharge Chapman on August 30.

Although I have found that Sipperley told Chapman not to discuss his August wage increase with any of the other employees, with a threat of discharge for violating the directive, there is no direct evidence that he did discuss the wage increase with any other employees and there is credible evidence to support the Respondent's defense that he was not a good fit for the company. Although Respondent's position letter refers to his alleged statement to other employees about his rate of pay, that statement, alone, is not enough to satisfy General Counsel's burden under *Wright Line*. I therefore find that counsel for the General Counsel has not sustained her initial burden herein, and recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. Respondent has been an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Cary Carreno, Scott Sipperley, and Sean Farrell are supervisory employees and agents of the Respondent within the meaning of Section 2(11) and (13) of the Act.

3. Respondent, by Sipperley, violated Section 8(a)(1) of the Act on about August 1, by ordering Chapman not to discuss his wages with other employees, and threatened to discharge him if he did.

4. Respondent did not further violate the Act by discharging Chapman on about September 7, 2011.

THE REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act by telling Chapman not to discuss his wages with other employees, I recommend that the Respondent be ordered to cease and desist therefrom and to post the notice to employees referred to below.

[Recommended Order omitted from publication.]