SABO, Inc. d/b/a Hoodview Vending Co. *and* Association of Western Pulp and Paper Workers Union, affiliated with United Brotherhood of Carpenters and Joiners of America. Case 36–CA–010615

April 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On December 14, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 355. Thereafter, the Respondent filed a petition for review and the General Counsel filed a cross-application for enforcement in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

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

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein.[1] Accordingly, for the reasons stated in the Decision and Order reported at 359 NLRB 355, which is incorporated herein by reference, we affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order, we reverse the judge's dismissal of the complaint, and we find that the Respondent violated Section 8(a)(1) of the Act by discharging employee LaDonna George.[2]

AMENDED CONCLUSIONS OF LAW

1. The Respondent, SABO, Inc. d/b/a Hoodview Vending Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Association of Western Pulp and Paper Workers Union, affiliated with United Brotherhood of Carpenters and Joiners of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about January 18, 2010, the Respondent violated Section 8(a)(1) of the Act by discharging employee LaDonna George for engaging in protected concerted activity.

4. 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 an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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[1] We agree with the Decision and Order's statement that employee activity is protected under Sec. 7 of the Act when it is concerted and engaged in for the purpose of "mutual aid or protection," see 359 NLRB 355, 357 (citation omitted), but in doing so we rely on *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) (citing *Summit Regional Medical Center*, 357 NLRB 1614, 1616 (2011)). We also find it unnecessary to rely on *McClain & Co.*, 358 NLRB 1070 (2012), cited in fn. 14 of the prior decision.

Our dissenting colleague would find, applying *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), that LaDonna George's conduct in this case was neither concerted nor engaged in for "mutual aid or protection." In the prior decision, however, the Board applied the doctrine of inherently concerted activity—which has historically been applied to wage discussions—to George's conversation about job security with coworker Steve Boros. Our dissenting colleague argues that the Board should overrule the doctrine of inherently concerted activity because, he contends, it is "irreconcilable" with *Meyers II*. We disagree. *Meyers II* and the doctrine of inherently concerted activity have coexisted for more than 20 years, and as explained in the prior decision, the rationale for finding that discussions of wages are inherently concerted applies with equal force to conversations about job security. That is because wages, like job security, are a vital term and condition of employment and the "grist on which concerted activity feeds." *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in part on other grounds 81 F.3d 209, 214 (D.C. Cir. 1996); see also *Triana Industries*, 245 NLRB 1258, 1258 (1979). Indeed, job security is about the very existence of an employment relationship, and a statement about an employee's being let go has a powerful impact on the work force, especially when that work force is small. See *Triana Industries*, 245 NLRB 1258. We note that the prior decision did not purport to address other possible topics of conversation, nor do we do so today. As to our colleague's further contention that the conversation was not engaged in for the purpose of mutual aid or protection, as explained in the prior decision, discussions of job security, like 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." *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 fn. 10 (2014) (emphasis added). In any event, our colleague's "mutual aid and protection" argument hinges on the unsupported inference that George initiated the conversation out of the fear she would be discharged and therefore was acting to benefit herself alone. The record establishes only that George and Boros discussed job security, a topic of mutual (and obvious) concern and directly linked to their interests as employees. See *Fresh & Easy*, supra at 153 (explaining "mutual aid or protection" analysis focuses on if there is a link between the activity "and matters concerning the workplace or employees' interests as employees").

[2] In light of this determination, we find it unnecessary to address the 8(a)(3) allegation.

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

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[3] The Respondent shall also be required to expunge from its files and records any and all references to the unlawful discharge, and to notify George in writing that this has been done and that the discharge will not be used against her in any way.[4]

ORDER

The National Labor Relations Board orders that the Respondent, SABO, Inc. d/b/a Hoodview Vending Co., Tualatin, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

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

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

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

(b) Make LaDonna George whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate LaDonna George for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards 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 her 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 Tualatin, Oregon facility, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Subregion 36, 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 January 18, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Subregion 36 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.

[3] Consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), we shall require the Respondent to reimburse discriminatee LaDonna George 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 to the appropriate calendar quarters.

In addition, we shall substitute the attached notice in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

[4] We shall also provide for the electronic distribution of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

[5] 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."

Section 7 of the Act protects employees who engage in "concerted" activity "for the purpose of . . . mutual aid or protection," and Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce" employees in the exercise of their right to engage in such activity. In this case, the Board must address two questions. First, did an employee (LaDonna George) engage in "concerted" activity when she had a brief conversation with a coworker (Steve Boros) about a "help wanted" ad, when the employee had no object of initiating or inducing group action? Second, was the employee's conversation for the "purpose" of "mutual aid or protection" when her purpose was to protect herself alone and she did not seek the coworker's assistance?

The judge answered the first question in the negative.[1] I agree with the judge. *Meyers Industries*[2] sets forth the standard governing "concerted activity." To prove under *Meyers* that a conversation was "concerted activity," the General Counsel must show 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 employees.'"[3] The General Counsel did not make such a showing here. Nor do I believe the record permits a finding that the employee, George, had a "purpose" that involved "mutual aid or protection." The judge correctly found that the instant case does not involve activity protected under Section 7, which means George's discharge was lawful under Section 8(a)(1). Accordingly, I respectfully dissent.

Facts

The Respondent, owned by Sally and Bob Hill, operated a vending-machine servicing business in Tualatin, Oregon. Employee George was a vending-machine route driver. On Friday, January 15, 2010,[4] she did not service her route, and she left work early without notifying management in violation of the Respondent's rules. Over the weekend, she saw a "help wanted" ad for a vending-machine route driver for a Tualatin company. When George returned to work on Monday, January 18, she had a brief conversation with another route driver, Steve Boros. George asked Boros if he had seen the ad, and Boros said he had. George speculated that the ad must have been posted by the Respondent because the only other vending-machine servicing business in Tualatin did not have as much turnover as the Respondent. Boros agreed. George said she thought the ad meant the Respondent was going to fire someone, and she asked Boros who he thought it would be. Boros responded that he did not know. He believed, however, that George was implying that *he* was going to be discharged.

Boros discussed this concern with Owners Bob and Sally Hill. They each assured Boros that he would not be discharged and asked Boros why he had this concern. Boros referred to the "help wanted" ad and his conversation with George. The Hills decided to discharge George. They advised her she was untrustworthy, and at an employee meeting, they stated that George was discharged for gossiping and telling other employees they would be fired. At the unfair labor practice hearing, Sally Hill testified that George's discharge resulted from an accumulation of infractions that culminated with her actions on January 15 and 18, including the conversation with Boros.[5]

The Judge's Decision

The judge determined that George did not engage in concerted activity and therefore dismissed the complaint allegation that George's discharge violated Section 8(a)(1) of the Act.[6] According to the judge, no evidence

[1] Having found that George did not engage in concerted activity, the judge did not need to reach the issue of "mutual aid or protection" in order to determine that George's activity was not protected under Sec. 7.

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

[3] *Meyers II*, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

[4] All dates herein are in 2010, unless otherwise stated.

[5] Sally Hill testified she did not know whether George would have been fired absent her conversation with Boros. For purposes of this opinion, I assume that the Respondent discharged George because of her conversation with Boros.

[6] There was a union organizing drive among the Respondent's employees early in 2009 in which George participated, and the General Counsel also alleged that her discharge violated Sec. 8(a)(3). The judge dismissed this allegation, finding that the Respondent "met its burden of proving that it would have discharged Ms. George even in the absence of employees' union activity." *Hoodview Vending Co.*, 359 NLRB 355, 367 (2012). I agree with the judge's dismissal of this allegation, but I disagree that the burden of proof ever shifted from the General Counsel to the Respondent. For the burden of proof to shift, the General Counsel must first satisfy his initial burden of proof. In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board characterized the General Counsel's initial burden as requiring proof that the challenged adverse action was motivated by antiunion animus. 251 NLRB at 1089 (requiring the General Counsel, as an initial matter, to make "a prima facie showing sufficient to support an inference that protected conduct was a 'motivating factor' in the employer's decision"). Generalized antiunion animus does not satisfy the General Counsel's initial burden of proof absent evidence that *the challenged adverse action* was motivated by antiunion animus. Here, although the record contains some evidence of generalized antiunion animus on the Respondent's part in 2009, there is no evidence that connects George's 2010 discharge to her union activity early the previous year. Accordingly, I believe the General Counsel failed to meet his initial burden under *Wright Line* because he failed to establish a link or nexus between George's union activity

existed that George, "in speculating about the origin and ramifications of an internet job posting, contemplated taking any action regarding the job posting or its theoretical consequences." *Hoodview Vending*, 359 NLRB 355, 368. The judge further found that the conversation between George and Boros was "mere conjectural grousing and not concerted activity." Id. Concluding her analysis of this allegation, the judge stated: "Since there is no evidence that the George/Boros conversation was anything more than an exchange of speculative employee opinions or that its purpose, explicit or implicit, was to initiate or to induce or to prepare for group action, I cannot find that it was concerted activity entitled to protection under Section 7 of the Act." Id., at 369. The judge dismissed the complaint. Id. For the reasons that follow, I believe the complaint was properly dismissed.

Discussion

1. George's conversation with Boros was not concerted activity

In *Meyers I* and *II*, the Board discussed the meaning of the statutory phrase "concerted activity" and established the standard that controls whether an employee, such as George in this case, has engaged in concerted activity. In *Meyers I*, the Board overruled *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and its progeny, where the Board had adopted a "per se standard of concerted activity" under which activity, though undertaken by a single employee, was deemed concerted if it involved "an issue about which employees *ought* to have a group concern." *Meyers I*, 268 NLRB at 495–496. The Board rejected this "per se standard of concerted activity" as being "at odds with the Act" because it "artificially presume[d]" that "what *ought to be* of group concern . . . *is* of group concern." Id. at 496. Instead, the Board in *Meyers I* held that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in *with or on the authority of other employees*, and *not* solely by and on behalf of the employee himself." Id. at 497 (emphasis added). The Board emphasized that "the question of whether an employee engaged in concerted activity is, at heart, a factual one, the fate of a particular case *rising or falling on the record evidence*." Id. (emphasis added).

In *Meyers II*, the Board responded to several questions posed by the D.C. Circuit, including whether the *Meyers* standard "would protect an individual's efforts to induce group action."[7] The Board in *Meyers II* explained that a single employee's efforts to "induce group action" would be deemed concerted activity, based on "the view of concertedness exemplified by the *Mushroom Transportation* line of cases," which the Board in *Meyers II* "fully embraced." *Meyers II*, 281 NLRB at 887. In *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), the court held that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees." The court added that "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'" Id.[8]

Applying the *Meyers* standard here, I believe it is clear that George's conversation with Boros did not involve concerted activity. George had courted discipline or discharge by leaving work early without permission in violation of the Respondent's rules. George was a vending-machine route driver for a company based in Tualatin, and she saw a "help wanted" ad for a vending-machine route driver for a Tualatin company. There are only two vending-machine companies in Tualatin. Since the other company apparently has little turnover, George reasoned that the ad must have been placed by the Respondent. Concerned that *she* was about to be discharged, George told Boros she thought the ad meant the Respondent was going to fire someone and asked Boros who he thought it would be. There is no evidence that in doing so, George had an object of initiating, inducing or preparing for group action. Thus, George did not engage in concerted activity.

My colleagues disagree with this conclusion based on cases in which the Board has found conversations about wages or work schedules to be "inherently" concerted,[9]

and her discharge. See generally *Libertyville Toyota*, 360 NLRB 1298, 1307fn. 5 (2014) (Member Miscimarra, concurring in part and dissenting in part); *Starbucks Coffee Co.*, 360 NLRB 1168, 1174 fn. 1 (2014) (Member Miscimarra, concurring).

[7] *Prill v. NLRB*, 755 F.2d 941, 955 (D.C. Cir. 1985).

[8] The Board in *Meyers II* also held concerted the activity of "individual employees bringing truly group complaints to the attention of management." 281 NLRB at 887. Such activity, although individual in its culmination, is typically preceded by group activity and thus "ha[s] some relation to group action in the interest of employees." *Mushroom Transportation*, 330 F.2d at 685.

[9] See, e.g., *Trayco of S.C., Inc.*, 297 NLRB 630, 634–635 (1990) (discussions about wages inherently concerted), enf. denied mem. 927 F.2d 597 (4th Cir. 1991); *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992) (same), enfd. mem. 977 F.2d 528 (6th Cir. 1992); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (discussions about work schedules inherently concerted), enf. denied in pertinent part 81 F.3d 209 (D.C. Cir. 1996). In *Automatic Screw Products*, the Sixth Circuit granted the Board's motion for default judgment in an unpublished order, the employer having 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

and they extend these cases to a new subject, job security.[10] For several reasons, I believe the majority's finding and supporting analysis fail to withstand scrutiny.

First, the notion that conversations about certain *subjects* are inherently concerted is irreconcilable with *Meyers Industries*. There, as noted above, the Board "fully embrac[ed] the view of concertedness exemplified by the *Mushroom Transportation* line of cases," 281 NLRB at 887, and in *Mushroom Transportation* the court held that a conversation qualifies as concerted activity only if "it . . . *appear[s] at the very least* it was engaged in *with the object of initiating or inducing or preparing for group action* or that it had *some relation to group action* in the interest of the employees." Id. (emphasis added; internal quotations omitted). There is no wiggle room in this language. It does not allow for the possibility of "inherently concerted" activity where there is no evidence of an object of initiating, inducing, or preparing for group action or some relation to group action. Moreover, *Meyers* draws a distinction between conversations that look toward group action and "mere griping." Id. This distinction is erased by the majority's test, which sweeps within the phrase "inherently concerted" *all* conversations regarding wages, work schedules, or job security, even if there is no group-action object and the conversation involves "mere griping" or, as here, a fishing expedition. The "inherently concerted" theory is not precisely *Alleluia Cushion* all over again, but it closely resembles it—a per se standard under which the Board asks whether the topic addressed is "likely to spawn collective action," *Aroostook County*, 317 NLRB at 220, and, if it decrees that it is, deems the activity "concerted" without regard to whether anyone had a group-action object.[11] This contradicts *Meyers*' insistence that "the question of whether an employee engaged in concerted activity is, at heart, a factual one, the fate of a particular case rising or falling on the record evidence." *Meyers I*, 268 NLRB at 497. Clearly, the *Meyers* Board did not contemplate a factual inquiry that would begin and end with the subject of the conversation. Yet under my colleagues' analysis, the fate of a particular case rises or falls on the Board's decision, *as a matter of law*, that the subject discussed is likely to spawn collective action. *Meyers* dictates otherwise.[12]

Second, although the courts must afford deference to the Board as to matters within its authority and expertise,[13] it is significant that the courts of appeals have uniformly rejected the Board's theory of "inherently concerted" activity.[14] Indeed, the Court of Appeals for the D.C. Circuit, to which every Board decision can be appealed, has criticized this theory as being "nonsensical" and "limitless" and having "no good support in the law." *Aroostook County Regional Ophthalmology Center*, 81 F.3d at 214.[15]

Appellate Procedure. *NLRB v. Automatic Screw Products Co.*, mem. 977 F.2d 528 (6th Cir. 1992). The court did not reach the merits of the "inherently concerted" activity theory.

[10] My colleagues concede the evidence fails to establish that George's conversation with Boros "contemplated future group action." 359 NLRB 355, 357. I take that as an admission that George did not engage in "concerted activity" as *Meyers* construes that term.

[11] Cf. *Meyers I*, 268 NLRB at 496 (stating that under *Alleluia Cushion*, the Board "questioned whether the purpose of the activity was one it wished to protect and, if so, it then deemed the activity 'concerted,' without regard to its form").

[12] The Board panel majority that previously decided the instant case understood that *Meyers Industries* does not support the theory of "inherently" concerted activity. This is reflected in their suggestion that *Meyers Industries* applies to concerted activity determinations "[g]enerally speaking," but not "in all circumstances." *Hoodview Vending*, 359 NLRB 355, 357. However, neither they nor my colleagues today offer any principled basis for determining which cases fall into the "generally speaking" category governed by *Meyers* and which do not. In fact, *Meyers Industries* and the "inherently concerted" theory are simply irreconcilable and cannot rationally coexist. In *Aroostook County Regional Ophthalmology Center*, the two members who found the discussion of work schedules to be inherently concerted apparently appreciated this fact, as they "decline[d] to rely on, and questione[d] the continuing vitality of *Meyers Industries*." 317 NLRB at 220 fn. 12. (The third member of the panel did not pass on whether the discussion was protected activity. Id. at 220 fn. 7.)

[13] The Board is charged with the "'difficult and delicate responsibility'" of administering the Act, *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 499 (1960) (quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)), and in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), the Supreme Court "recognize[d] the Board's special function of applying the general provisions of the Act to the complexities of industrial life" (citation omitted). However, the Supreme Court has also held that, concerning "a judgment as to the proper balance to be struck between conflicting interests, 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *NLRB v. Brown*, 380 U.S. 278, 292 (1965) (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)). "Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Id. at 291.

[14] *Trayco of South Carolina, Inc. v. NLRB*, 927 F.2d 597 (4th Cir. 1991) (rejecting the Board's finding of concerted activity where, 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 v. NLRB*, 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.").

[15] On grounds similar to those expressed here, former Member Hayes dissented from the decision of the Board majority that previously decided the instant case, 359 NLRB 355, 361–363, and I agree with the views expressed in his dissenting opinion.

Third, the cases my colleagues cite for the proposition that "contemplation of group action is not required in all circumstances" in order to find activity concerted either address a different issue altogether or are otherwise unsound. Two of those cases stand for an entirely different proposition: that a blanket prohibition of all wage discussions is unlawful.[16] In a third case, *Trayco of S.C.*, supra, an employee (Katie Marlowe) was discharged for engaging in wage discussions with other employees. The Board adopted without comment the judge's finding that Marlowe's conduct was concerted, which was based on his erroneous declaration that "discussions about wages between two or more employees" are protected by the Act. 297 NLRB at 633.[17] In *Aroostook County*, supra, the Board simply relied on and extended *Trayco*. 317 NLRB at 220.[18]

In short, I believe the "inherently concerted" theory cannot be reconciled with *Meyers Industries*. As the D.C. Circuit held in *Aroostook County*, the theory of "inherently concerted" activity has "no good support in the law," and the Board's extension of this theory in the instant case to encompass all discussions of job security demonstrates its "limitless" nature. 81 F.3d at 214. The standard set forth in *Meyers* remains the applicable test for determining when activity that "in its inception involves only a speaker and a listener" constitutes concerted activity. 281 NLRB at 887 (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951)). Under that standard, "'*it must appear at the very least*'" that such activity "'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.'" Id. (quoting *Mushroom Transportation*, 330 F.2d at 685 (emphasis added)). No such object may be reasonably inferred from George's exchange with Boros, which warrants a finding that George did not engage in concerted activity.

2. George's conversation with Boros was not for the "purpose" of "mutual aid or protection"

As noted above, a separate prerequisite for Section 7 protection is that concerted activity be conducted for the "purpose" of "collective bargaining or other mutual aid or protection." My colleagues find George's conversation with Boros to be protected by Section 7 solely on the basis of their conclusion that the conversation was "inherently concerted." However, even if the conversation could be deemed concerted, there is no evidence that the conversation had the "purpose" of fostering "collective bargaining or other mutual aid or protection." This independently warrants a finding that the conversation was unprotected under Section 7, which means George's discharge was lawful under Section 8(a)(1).

Nothing about George's conversation with Boros suggests that either employee had a purpose that involved mutual aid or protection. George had a legitimate con-

[16] In *Triana Industries*, 245 NLRB 1258 (1979)—which predated *Meyers I and II* and cannot be considered controlling to the extent inconsistent with those decisions—the Board found unlawful the employer's directive to new employees "not to go around asking the other employees how much they were making," reasoning that such a directive "clearly tends to inhibit employees in the exercise of their Section 7 rights." Id. at 1258. The *Triana* decision contains a statement that discussing wages "is clearly concerted activity," but this comment was unnecessary to decide whether it is unlawful to prohibit a discussion of wages and thus was mere dictum. See, e.g., *Best Life Assurance Co. v. Commissioner*, 281 F.3d 828, 834 (9th Cir. 2002) (stating that dictum is "a statement . . . that is unnecessary to the decision in the case and therefore not precedential"). The Act prohibits a blanket rule prohibiting wage discussions, not because *all* wage discussions are concerted and protected, but because *some* wage discussions are (those that look toward group action in the interest of employees). 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). Therefore, a blanket prohibition of *all* wage discussions is overbroad and unlawful.

In another case my colleagues cite, *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992), the employer promulgated and maintained a rule prohibiting employees from discussing their salaries, and it discharged an employee for violating that rule. The case did not present any issue of whether any particular salary discussion was or was not concerted activity. Citing *Triana Industries*, the Board characterized salary discussions as "inherently concerted activity," id. at 1072—but the unsoundness of an unsound statement of law is not cured by repetition. Again, the court of appeals decided the case on purely procedural grounds and did not address the merits of any of the Board's findings. See supra fn. 9.

[17] For his statement of the legal test governing "concerted activity" determinations, the judge in *Trayco* quoted from *Whittaker Corp.*, 289 NLRB 933 (1988)—omitting, *without indicating the omission by ellipsis*, the passage in *Whittaker* where the Board reiterated *Meyers*' requirement that speech, to be concerted, must seek to initiate or induce group action. Compare *Trayco*, 297 NLRB at 634, with *Whittaker*, 289 NLRB at 933–934. In *Whittaker*, the Board applied the correct test, adding that "a concerted objective may be inferred from the circumstances," particularly "in a group-meeting context." 289 NLRB at 934. The Board did infer an object to initiate group action from the totality of the circumstances in that case, stating: "We find that, in the presence of other employees, [employee] Johnston protested, at the earliest opportunity, a change in an employment term affecting all employees just announced by the [r]espondent at that meeting. This is clearly the initiation of group action as contemplated by the *Mushroom Transportation* line of cases which was specifically endorsed by *Meyers II*." Id. Reasonable people may disagree about the correctness of this finding, but the *Whittaker* Board clearly applied *Meyers*. The judge (and the Board) in *Trayco* did not. Thus began the deviation from *Meyers* that the majority perpetuates and extends today.

[18] Ironically, the Board in *Aroostook County* also cited *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976), in which the court stated it was *not* true "that every wage discussion is protected." Id. at 918. In other words, the "inherently concerted" theory the Board applied and extended in *Aroostook County* was contradicted by the very court precedent cited in that decision.

cern that she might be facing discipline or discharge because she left work on Friday, January 15 without having serviced her vending-machine route and without notifying management. This was clearly an individual concern. After George saw the "help wanted" ad that prompted her to suspect that the Respondent might be about to discharge someone, she communicated her suspicion to Boros. However, this discussion did not have a purpose of mutual aid or protection. To the contrary, George was obviously concerned that *she* might be discharged, and Boros misinterpreted the discussion as suggesting that *he* might be discharged. Nor did Boros's subsequent actions reflect a purpose of mutual aid or protection. Boros approached the two owners and asked whether *he* might be discharged. He mentioned his conversation with George only when asked to explain the reason for his question—a question that reflected a concern relating only to himself.

The conversation between George and Boros cannot be considered to have the purpose of mutual aid or protection even under *Fresh & Easy Neighborhood Market*, 361 NLRB 151 (2014), where a Board majority expansively interpreted Section 7's "mutual aid or protection" clause.[19] In *Fresh & Easy*, a single employee was found to have a purpose of mutual aid or protection when she sought to have two coworkers sign a piece of paper (reproducing an obscene message scrawled on a whiteboard) relating to her individual complaint. In reliance on a "solidarity principle," the Board majority reasoned that a purpose of mutual aid or protection could be inferred because the employee was "soliciting assistance from coworkers." Id., supra at 156 (internal quotation omitted). Here, my colleagues dispense even with the requirement that an employee acting to benefit himself or herself at least solicit assistance from a coworker. George did not ask Boros to do *anything*, let alone to do something *for George*. The solidarity principle finds no foothold on these facts. Thus, even applying *Fresh & Easy*—which constitutes the outermost limit of "mutual aid or protection" within the meaning of Section 7—the absence of any solicitation of assistance means there was no purpose of mutual aid or protection, which again warrants a conclusion that George did not engage in protected activity during her conversation with Boros.

Conclusion

The judge here correctly found that there was no evidence that the conversation between George and Boros "was anything more than an exchange of speculative employee opinions." Nonetheless, my colleagues find George's conduct concerted, applying an "inherently concerted" standard that is at odds with the governing test set forth in *Meyers Industries* and that has been rejected by the courts and criticized as "nonsensical" by the D.C. Circuit. My colleagues also find that George had a purpose of mutual aid or protection—to the extent they do not simply dispense with that separate statutory requirement by collapsing it into their finding of inherent concertedness—without any record evidence that either George or Boros acted with such a purpose, and even though George did not solicit assistance from Boros. Even assuming the Respondent decided to discharge George based on her discussion with Boros, I believe the Board cannot reasonably conclude that George engaged in conduct protected under Section 7, and the judge properly found that George's discharge was lawful under Section 8(a)(1). For these reasons, I respectfully dissent.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

WE WILL NOT 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 LaDonna George full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make LaDonna George whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate LaDonna George for the adverse tax consequences, if any, of receiving a lump-sum award,

[19] In *Fresh & Easy*, I dissented in relevant part from the majority decision. See 361 NLRB 151, 167–169 (Member Miscimarra, dissenting).

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

SABO, INC. D/B/A HOODVIEW VENDING CO.

The Board's decision can be found at www.nlrb.gov/case/36-CA-010615 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.