King Soopers, Inc. *and* Wendy Geaslin. Case 27–CA–129598

August 24, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

The primary issue in this case is whether the Board should modify the current make-whole remedy to require respondents to fully compensate discriminatees for search-for-work expenses and expenses incurred in connection with interim employment. The General Counsel urges the Board to discontinue its traditional practice of treating discriminatees' reasonable search-for-work and interim employment expenses as an offset that reduces the amount of interim earnings deducted from gross backpay, arguing that this approach unfairly forces discriminatees to bear work-related expenses that result directly from a respondent's unlawful action. The General Counsel instead proposes that these expenses be calculated and paid separately from backpay, regardless of whether the discriminatee received interim earnings.

Before considering the General Counsel's remedial request, we must first decide the merits of the case. For the reasons stated by the judge,[1] we find that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employee Wendy Geaslin about her protected, concerted activity.[2] Additionally, as discussed below, we affirm the judge's conclusions that the Respondent violated Section 8(a)(3) and (1) by twice suspending and discharging Geaslin for engaging in protected, concerted activity. Although our dissenting colleague would find that Geaslin's first suspension was lawful, the dissent ultimately agrees with all of our other unfair labor practice findings.

I. GEASLIN'S SUSPENSIONS AND DISCHARGE

Facts

Geaslin worked as a barista at the Starbucks kiosk in the Respondent's Denver, Colorado grocery store. She was covered by the meat contract between the Respondent and the Union pursuant to the parties' Letter of Agreement #26, Coffee Shops. The parties have additional contracts, such as the retail contract which covers, among others, clerks whose duties involve "bagging . . . sold merchandise." Article 1 of the meat contract and Article 2 of the retail contract describe the work to be performed by employees covered by each agreement.

On May 9, 2014, store manager Theresa Pelo called for employees, and specifically baristas, to assist with bagging in the front of the store. Geaslin was surprised because she had never been asked to bag groceries. Geaslin walked to the front of the store and attempted to tell Pelo that she needed to take her lunchbreak since she would be leaving at 2 p.m.[3] Pelo stated that Geaslin needed to do as directed and not worry about her lunch. Geaslin asked whether she should be performing these duties because she belonged to a different bargaining unit or union. Pelo repeated her directive. Geaslin turned to bag,[4] raising her hands in the air and stating that she was just asking about her lunch. Geaslin then walked toward the check stands to bag groceries but Pelo called her back, saying they needed to talk. Pelo accused Geaslin of refusing to bag groceries. Geaslin replied that she did not refuse, and had only inquired about her lunchbreak and whether the Union's contract permitted her to perform bagging work. Pelo disagreed and placed her on a 5-day suspension.

On May 14, 2014, Geaslin, Union Representative Danny Craine, Pelo, and two other managers met to discuss Geaslin's suspension. The meeting grew tense as

[1] On October 22, 2015, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief. The General Counsel filed a limited exception, a supporting brief, and an answering brief.

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; to modify the recommended remedy; and to adopt the recommended Order as modified.

We affirm the judge's decision to grant the General Counsel's motion to amend the complaint to add an interrogation allegation. In doing so, we note that the Respondent had the opportunity to fully litigate this allegation because the amendment was made mid-trial, giving the Respondent the opportunity to call Geaslin as a witness.

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

In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change.

[2] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(1) when its manager Theresa Pelo interrogated Wendy Geaslin, we do not rely on *Century Restaurant & Buffet, Inc.*, 358 NLRB 143 (2012), cited by the judge. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

[3] Article 24 of the meat contract requires employees to take a lunchbreak at approximately the middle of their shift. Geaslin had completed approximately 6 hours of her 8.5 hour shift.

[4] Our dissenting colleague explains that he finds it unnecessary to resolve the parties' disagreement as to whether Geaslin refused Pelo's order to bag groceries. We note, however, that the judge fully credited Geaslin's testimony that she attempted to bag groceries and discredited Pelo's contrary testimony. The dissent does not present any reason to disturb the judge's credibility findings.

the parties disputed whether Geaslin refused to bag groceries or whether she simply questioned the propriety of the task. Ultimately, Pelo placed Geaslin on a second 5-day suspension. During the meeting, Pelo admitted that Geaslin's duties do not include bagging groceries. Subsequently, on May 21, 2014, Pelo terminated Geaslin for alleged gross misconduct during the May 14, 2014 meeting.

Craine testified that he interprets both the meat and retail contracts to prevent employees from performing work outside of their assigned department. Assistant Deli Manager Angelica Eastburn testified that it was unusual for employees other than produce, bakery, and grocery employees—who are all in the retail unit—to bag groceries.

Discussion

Pursuant to the Board's *Interboro* doctrine, an individual employee's assertion of a right grounded in a collective-bargaining agreement constitutes protected, concerted activity. 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). As the Supreme Court explained in *NLRB v. City Disposal Systems, Inc.*, "an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated." 465 U.S. 822, 840 (1984).

We agree with the judge that Geaslin engaged in protected, concerted activity when she questioned whether she should be bagging groceries because the work belonged to a different bargaining unit or union. In particular, we agree that Geaslin's interpretation of the contract was honest and reasonable; indeed, it was consistent with her union representative's interpretation of the agreements, the assistant deli manager's testimony that it was unusual for employees outside the retail unit to bag groceries, and Pelo's own admission that Geaslin's duties did not include bagging groceries.

The Respondent and our dissenting colleague contend that the Respondent's suspension of Geaslin on May 9, 2014 was lawful because she did not engage in protected, concerted activity.[5] Our colleague argues that when questioning the directive to bag groceries, Geaslin was not invoking "a right grounded in the 'meat' agreement." He contends that "the type of mistake that is permitted under the *Interboro* doctrine is a reasonable mistake *about the facts* . . ., and the *Interboro* doctrine does *not* protect an employee who invokes a non-existent right." In support, he cites *City Disposal.* However, the Supreme Court neither adopted nor suggested such a limited interpretation of the *Interboro* doctrine. In fact, the Court noted that the employee's conduct is concerted so long as "the complaint does, in fact, refer to a reasonably perceived violation of the collective bargaining agreement." Id. at 839–840.

Further, the Board and the courts have interpreted the *Interboro* doctrine to cover mistakes about contractual rights. For example, in *Tillford Contractors*, the Board found that an employee engaged in protected, concerted activity when he argued that the presence of another employee on the jobsite violated the contract, even though his contractual claim was incorrect. 317 NLRB 68, 69 and fn. 5 (1995).[6] In *NLRB v. H.C. Smith Construction Co.*, the Ninth Circuit agreed with the Board's finding that an employee engaged in protected, concerted activity under the *Interboro* doctrine even though he was incorrect in believing that the contract contained a provision regarding the chain of command on the job. 439 F.2d 1064 (9th Cir. 1971). The court explained that an "employee does not lose the protection of the Act as a matter of law simply because his understanding of the contract turns out to be mistaken." Id. The Seventh Circuit has likewise agreed that "[t]hough incorrect . . . an employee's understanding of the collective bargaining agreement may nevertheless be reasonable." *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 515 (7th Cir. 1991) (finding that the employee's refusal of an assignment based on his honest and reasonable understanding of an oral agreement, rather than a contract, was protected, concerted activity).

The dissent's narrow interpretation of the *Interboro* doctrine is contrary to precedent and the Supreme Court's observation that "[i]n the context of a workplace dispute, . . . the participants are likely to be unsophisticated in collective-bargaining matters." *City Disposal*, 465 U.S. at 840. Were the *Interboro* doctrine limited to mistakes about facts, as urged by our colleague, employees would need to be virtual legal experts regarding their contractual rights in order to enforce those rights in the workplace. Holding employees to such a high standard is unreasonable and would certainly chill employees' exercise of their Section 7 rights. Indeed, the Seventh Circuit has recognized that "the exercise of rights pro-

[5] The Respondent cites *ABF Freight Systems*, 271 NLRB 35 (1984), in support. For the reasons stated by the judge, we agree that this case is distinguishable.

[6] See also *K-Mechanical Services, Inc.*, 299 NLRB 114, 118 (1990) (finding employee's assertion that he had a contractual right to preferential weekend overtime work was protected, concerted activity even though he was not actually covered by the portion of the agreement that formed the basis for his assertion); *Peerless Plating Co.*, 263 NLRB 1025, 1028 (1982) ("Employee attempts to enforce provisions of an existing collective bargaining agreement are protected, regardless of the employer's or the Board's appraisal of the validity of the employee's interpretation of the contract.").

tected under the Act would be severely hampered if employees could face retaliation for good faith interpretations of collective bargaining agreements." *NLRB v. P*I*E Nationwide*, 923 F.2d at 515.

Contrary to the dissent, we find that Geaslin's question whether she should perform bagging work was sufficiently grounded in the contract to be covered by the *Interboro* doctrine. Article 1 of the meat contract covering Geaslin and article 2 of the retail contract describe the work to be performed by the employees covered by each contract. Article 2 of the retail contract specifically states that "[a]ll work and services performed in the bargaining unit connected with the handling or selling of merchandise to the public shall be performed exclusively by bargaining unit members except as provided below."[7] Based on these contract provisions alone, Geaslin could honestly and reasonably believe that she should not bag groceries. Moreover, we find that article 7, Section 26, on which the dissent relies, reasonably tends to support Geaslin's understanding of the contract. Article 7 lists the meat unit classifications and their respective duties and restrictions. Section 26, the last provision of the article, states, "It is understood that employees may perform incidental work in another classification without violating this agreement." Section 26 could reasonably be interpreted to permit incidental work among the enumerated meat classifications rather than the exchange of incidental work between the meat unit and the retail unit. In any event, even if it turns out that Geaslin's belief that only retail unit employees should perform retail unit bagging work is incorrect, there is no basis to find on this record that her belief was not honest and reasonable.

Finally, we agree with the judge that Geaslin engaged in protected activity at the grievance meetings on May 14 and 21, 2014, and that her conduct during the May 9 and 14, 2014 meetings did not cause her to lose the protection of the Act. See *Atlantic Steel Co.*, 245 NLRB 814 (1979). Therefore, we affirm the judge's findings that the Respondent violated Section 8(a)(3) and (1) by twice suspending and discharging Geaslin for engaging in protected, concerted activity. We note that our dissenting colleague joins us in finding that Geaslin's second suspension and discharge were unlawful based on an alternative rationale.

II. REMEDIAL CHANGES

Having found the suspension and discharge violations, we next consider the remedial changes urged by the General Counsel.[8] We find, for the reasons discussed below, that the requested remedial changes are clearly warranted in order to satisfy the Board's statutory obligation to provide meaningful, make-whole relief for losses incurred by discriminatees as a result of a respondent's unlawful conduct.

Analysis

Section 10(c) of the Act grants to the Board "broad, discretionary" authority to order remedies that will "effectuate the policies" of the Act. *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 262–263 (1969) (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). Because Congress could not "define the whole gamut of remedies to effectuate [the policies of the Act] in an infinite variety of specific situations[,]" it vested the Board with the authority to develop appropriate remedies based on administrative experience. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The underlying policy of Section 10(c) is "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." Id. "From the earliest days of the Act, a make-whole remedy for employees injured by unlawful conduct has been a fundamental element of the Board's remedial approach. . . . The Supreme Court has repeatedly underscored the essential role of make-whole relief in the statutory scheme." *Goya Foods of Florida*, 356 NLRB 1461, 1462 (2011).

In providing make-whole relief, the Board serves the dual purposes of reimbursing discriminatees for losses suffered as a direct result of the unlawful conduct and furthering the policy interest of deterring illegal actions. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965). The Supreme Court and the Board have recognized that "'[a] backpay order is a reparation order designed to vindicate the public policy of the statute by making employees whole for losses suffered on account of an unfair labor practice." *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101, 102 (2014) (quoting *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. at 263). See also *Kentucky River Medical Center*, 356 NLRB 6, 9

[7] Contrary to our dissenting colleague's assertion, it is appropriate to consider this provision from the retail contract in assessing whether Geaslin's question is covered by the *Interboro* doctrine. See, e.g., *Omni Commercial Lighting, Inc.*, 364 NLRB 612, 614–615 (2016); *K-Mechanical Services, Inc.*, 299 NLRB at 118.

[8] On February 19, 2016, the Board invited all interested parties to file briefs regarding whether the Board should make the changes requested by the General Counsel. In addition to the supplemental and responsive briefs filed by the Respondent and the General Counsel, amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations, the Service Employees International Union, the International Brotherhood of Electrical Workers, Local 304, and the law firm Weinberg, Roger & Rosenfeld. The amici support the General Counsel's requested changes, and the Respondent opposes them. No individual or association other than the Respondent filed a brief in support of retaining the Board's traditional approach regarding search-for-work and interim employment expenses.

(2010) (Board recomputed interest on backpay owed discriminatees from simple to compounded daily interest, stating "[w]e believe that daily compounding . . . will lead to more fully compensatory awards of interest and thus come closest to achieving the make-whole purpose of the remedy"). Stated differently, backpay is to be computed in such a way as to restore, as nearly as possible, that which the discriminatee would have obtained but for the unlawful act while also serving as a deterrent to future unfair labor practices. *NLRB v. Mastro Plastics Corp.*, 354 F.2d at 175; see also *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 194; *Pressroom Cleaners*, 361 NLRB 643, 644 (2014). Where the Board has found that its remedial structure fails to fulfill its make-whole objective, "[it] has revised and updated its remedial policies . . . to ensure that victims of unlawful conduct are actually made whole." *Don Chavas*, 361 NLRB 101, at 102–103.

For example, in *F.W. Woolworth Co.*, the Board modified its computation of make-whole relief to award backpay on a quarterly basis. 90 NLRB 289 (1950).[9] The Board made this modification because "[t]he cumulative experience of many years" demonstrated that the Board's traditional approach "f[e]ll short of effectuating the basic purposes and policies of the Act." Id. at 291. As the Board explained, if a discriminatee received higher wages from an interim employer, the traditional backpay computation "resulted in the progressive reduction or complete liquidation of back pay due." Id. at 292. The traditional computation also had the two-fold deleterious effect of incentivizing employers to "deliberately refrain[] from offering reinstatement, knowing that the greater the delay, the greater would be the reduction in back-pay liability" and encouraging discriminatees to "waiv[e] their right to reinstatement in order to toll the running of back pay and preserve the amount then owing." Id. For these reasons, the Board found it appropriate to adopt a new backpay computation method.

The Supreme Court expressly approved the Board's new remedial approach as consistent with the Board's "broad discretionary" authority in *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346–347 (1953). Quoting *Phelps Dodge v. NLRB*, 313 U.S. at 200, the Court emphasized that "'the relation of remedy to policy is peculiarly a matter for administrative competence'" and held that the "Board [has] the discretionary power to mould remedies suited to practical needs." 344 U.S. 349, 352. The Court rejected the argument that the Board's new approach would result in greater than make-whole relief for discriminatees and would penalize employers. 344 U.S. at 348. Additionally, the Court declined to debate whether the *Woolworth* formula was remedial or punitive, explaining that the Court "prefer[red] to deal with these realities and avoid entering into the bog of logomachy." Id.[10]

Today, we assess whether the current remedial framework properly awards make-whole relief, or fails to truly make whole the aggrieved victims of unlawful conduct. Discriminatees who have lost their jobs are some of the most seriously aggrieved victims of unlawful conduct. As the Board and courts have recognized, loss of employment is "'the industrial equivalent of capital punishment.'" *Plaza Auto Center, Inc.*, 360 NLRB 972, 979 (2014) (quoting *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1209 (7th Cir. 1987)). Discharging an employee for engaging in protected, concerted activity sharply demonstrates an employer's power over its employees and has a long-lasting coercive impact on the work force. See *White Plains Lincoln Mercury*, 288 NLRB 1133, 1140 (1988). Further, the individual most harmed by an employer's unlawful discharge is the discriminatee, who is deprived of his or her job, causing a loss of income and employment benefits. Under the duty to mitigate, the discriminatee is then required to find and maintain interim employment, potentially causing the discriminatee to endure additional, significant financial hardship—hardship that is traceable to the employee's activity protected by the statute that we are charged to enforce. Therefore, we believe it is vitally important that the Board ensure that the make-whole remedy fully compensates unlawfully discharged employees for the losses they incurred and "deter[s] further encroachments on the labor laws." *Goya Foods of Florida*, 356 NLRB at 1464 (quoting *Hedstrom Co. v. NLRB*, 629 F.2d 305, 317 (3d Cir. 1980) (en banc)). We find the Board's current treatment of search-for-work and interim employment expenses fails to fully compensate discriminatees for losses incurred as victims of unlawful conduct.

Pursuant to our "broad, discretionary" authority under Section 10(c), the Board has awarded search-for-work and interim employment expenses as part of our standard

[9] Until this point, the Board had calculated backpay by tabulating the difference between the money the discriminatee should have been paid by the respondent and the discriminatee's actual earnings over the entire backpay period.

[10] Similarly, in *Mimbres Memorial Hospital & Nursing Home*, where the Board explained its rationale for finding that, under *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), a discriminatee's interim earnings would not be deducted from backpay where there was no cessation of employment, the Board drew support from the Court's reasoning in *Seven-Up*. See 361 NLRB 333, 336 (2014) ("The Court [held] . . . that it was sufficient that the Board had relied on its cumulative experience" and that "[i]t is the business of the Board to give coordinated effect to the policies of the Act."), enfd. 812 F.3d 768 (10th Cir. 2016).

make-whole remedy for nearly eight decades. As the Board first recognized in *Crossett Lumber Co.*, 8 NLRB 440, 497–498 (1938), enfd. 102 F.2d 1003 (8th Cir. 1938), discriminatees may incur significant expenses as they search for and maintain interim employment, such as increased transportation costs in seeking or commuting to interim employment, room and board while seeking employment and/or working away from home, and the cost of moving if required to assume interim employment. In *Crossett Lumber*, the Board found it appropriate to compensate discriminatees for these additional expenses, but treated them as an offset to interim earnings, rather than as a separate element of the backpay award. Id.

However, as argued by the General Counsel and amicus AFL–CIO, the Board has never provided an explanation or reasoned policy rationale for its treatment of search-for-work and interim employment expenses as an offset to interim earnings. The Board did not provide any rationale for its approach in *Crossett Lumber*. See id. In a handful of subsequent cases, the Board stated that it would not award search-for-work and interim employment expenses that exceeded a discriminatee's interim earnings, but again the Board did not explain or justify its approach. See *English Mica Co.*, 101 NLRB 1061, 1062, 1064 fn. 8 (1952); *West Texas Utilities Co.*, 109 NLRB 936, 937 fn. 3 (1954); *Mastro Plastics Corp.*, 136 NLRB 1342, 1348 (1962); *North Slope Mechanical*, 286 NLRB 633, 638 fn. 19 (1987).

The practical result of the Board's traditional approach has been less than make-whole relief for the most seriously aggrieved victims of unlawful conduct, contrary to the central remedial principle underlying the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 194; *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Because the Board's traditional approach treats search-for-work and interim employment expenses as an offset to interim earnings, discriminatees who are unable to find interim employment do not receive any compensation for their search-for-work expenses. Similarly, discriminatees who find jobs that pay wages lower than the amount of their expenses will not receive full compensation for the search-for-work and interim employment expenses. As expressed by amicus SEIU, "In cases of low wage workers, where the costs associated with the reasonable search for interim employment can quickly outweigh the interim pay received, if any, the employee is, in essence, subsidizing the employer's violation." An example illustrates the shortcomings of the Board's traditional approach. Juana Perez worked at a remote location earning $1000 per month prior to her unlawful discharge. During the month following her discharge, Perez spent $500 traveling to different locations looking for work. Perez could only find interim employment in another state that paid $750 per month. Perez moved to the new state to be closer to her new job and was also required to obtain training for her new position, costing her $5000 and $500, respectively. Under the Board's traditional approach, Perez would receive compensation for only $1500 of her $6000 total expenses, far less than make-whole relief.[11] Thus, the Board's traditional approach fails to fully reimburse losses incurred by those discriminatees who have already been the most economically injured by unlawful actions.

The Board's traditional approach not only fails to make victims of unlawful discrimination whole, but may also discourage discriminatees in their job search efforts. The Board imposes a duty on discriminatees to mitigate by engaging in reasonable efforts to seek and to hold interim employment. See, e.g., *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006), enfd. 508 F.3d 418 (7th Cir. 2007). Discriminatees do not receive backpay for any periods during which they fail to mitigate. See id.; NLRB Casehandling Manual (Part Three) Compliance (CHM), Sec. 10558.1. Yet, under the Board's traditional approach, discriminatees, who have already lost their source of income, risk additional financial hardship by searching for interim work if their expenses will not be reimbursed.

Modifying the Board's treatment of search-for-work and interim employment expenses to eliminate the offset will bring these payments in line with the Board's treatment of similar expenses incurred by discriminatees. When a respondent unlawfully discharges an employee, the respondent not only deprives the employee of his or her wages, but may also cause the employee to lose benefits and to incur additional expenses. See *Knickerbocker Plastic Co.*, 104 NLRB 514, 538 (1953), enfd. 218 F.2d 917 (9th Cir. 1955). The Board compensates discriminatees for the inequity of lost wages through backpay. However, in order to make discriminatees whole, the Board also compensates discriminatees for the separate inequity of additional expenses, such as medical

[11] During the first quarter after her unlawful discharge, Perez's gross backpay would be $3000 ($1000 x 3 months), her interim earnings would be $1500 ($750 x 2 months), and her search-for-work and interim employment expenses would be $6000 ($500 travel expenses + $5000 moving expenses + $500 training expenses). Under the Board's traditional approach, Perez could only receive compensation for $1500 of her expenses because such payment cannot exceed the amount of her interim earnings.

In its amicus brief, IBEW, Local 304 stated that, based on its first-hand experience representing utility workers in Kansas, discriminatees may face significant financial hardship when seeking interim employment, such as the costs described in the example above.

expenses and retirement fund contributions.[12] The Board awards compensation for these expenses regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest. See CHM Sections 10544.2, 10544.3. Like medical expenses and retirement fund contributions, search-for-work and interim employment expenses are a direct result of a respondent's unlawful actions. No other expense incurred by discriminatees as a result of a respondent's unlawful conduct is treated as an offset to interim earnings. Thus, in order to fully compensate discriminatees for their losses, we shall treat search-for-work and interim employment expenses in a manner consistent with our treatment of other losses suffered by the discriminatee. See *Goya Foods of Florida*, 356 NLRB at 1463.

Additionally, awarding search-for-work and interim employment expenses separately from taxable net backpay, with interest, will avoid potential tax complications caused by the Board's traditional approach. The Internal Revenue Service (IRS) and the Social Security Administration (SSA) consider backpay taxable wages in the year received. See *Don Chavas, LLC*, 361 NLRB 101, at 103–104. Despite search-for-work and interim employment expenses being nonwage components of backpay, not subject to payroll or social security taxes (see CHM Sec. 10578.1), the Board's traditional approach has resulted in mixing these expenses with wages. The remedial changes urged by the General Counsel will avoid the potential complications engendered by this approach, resulting in a clearer accounting for the discriminatee, the IRS, and the SSA.

In reaching our decision, we have given careful consideration to the arguments raised by the Respondent and the dissent. The Respondent contends that search-for-work and interim employment expenses are compensatory damages, which are not permitted by the Act. Contrary to the Respondent, the Act does not prohibit the Board from awarding damages because they could be characterized under the broad umbrella of "compensatory damages." Search-for-work and interim employment expenses are clearly not disallowed under the Act, as they have been granted for years. The cases cited by the Respondent simply stand for the proposition that the Board is not permitted to award general tort remedies. See, e.g., *UAW v. Russell*, 356 U.S. 634, 644–645 (1958) (finding that Act did not preempt a state court's tort remedy, including mental anguish and punitive damages); *Operating Engineers Local 513 (Long Construction Co.)*, 145 NLRB 554, 555 (1963) (declining to award damages for bodily injury suffered during labor dispute). In fact, *UAW v. Russell* recognized that the Board is authorized to "restore to the employees in some measure what was taken from them because of [a respondent's] unfair labor practices," and thus, backpay awards "may incident[al]ly provide some compensatory relief to victims of unfair labor practices." 356 U.S. at 643, 645. Moreover, the Supreme Court has held that "the Board has wide discretion in ordering affirmative action; its power is not limited to . . . reinstatement with or without backpay." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 539, 543 (1943). As we explained in *Pacific Beach Hotel*, there are many remedies the Board has properly imposed that are not explicitly provided in the Act. 361 NLRB 709, at 713 fn. 18 (2014). "Congress did not expressly authorize notice mailing or posting, orders to unions and employers alike to engage in bargaining, granting of access rights, or indeed many of the other remedies we order as part of our mandate under Sec[tion] 10(c) to effectuate the policies of the Act." Id.

In any event, the Board has been awarding search-for-work and interim employment expenses for 80 years. The changes we make today only affect how the Board calculates search-for-work and interim employment expenses, not whether these expenses are a permissible remedy. Moreover, these changes are consistent with the Board's broad, discretionary authority under Section 10(c) to revise our remedial policies to ensure that discriminatees are made whole. See *Don Chavas, LLC*, 361 NLRB 101, at 102–103; *Pressroom Cleaners*, 361 NLRB 643, at 644. "When the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, supra, 344 U.S. at 346–347 (internal quotations omitted).[13]

[12] The Board compensates discriminatees for a wide variety of additional expenses. See, e.g., *Kartarik, Inc.*, 111 NLRB 630 (1955) (vacation benefits), enfd. 227 F.2d 190 (8th Cir. 1955); *United Shoe Machinery Corp.*, 96 NLRB 1309 (1951) (bonuses); *Kohler Co.*, 128 NLRB 1062 (1960) (employer-owned housing), enfd. in part 300 F.2d 699 (D.C. Cir. 1962), cert. denied 370 U.S. 911 (1962); *Central Illinois Public Service Co.*, 139 NLRB 1407 (1962) (employee discounts on purchases), enfd. 324 F.2d 916 (7th Cir. 1963); *Garment Workers*, 300 NLRB 507 (1990) (car allowances); *Ji Shiang, Inc.*, 357 NLRB 1292 (2011) (tips). See also CHM Sec. 10544.7 (listing numerous examples of "other forms of compensation" that may be included in backpay awards).

[13] We note that the Board has not previously ruled against the General Counsel's requested changes based on the merits of the General Counsel's arguments. See, e.g., *Island Management Partners, Inc.*, 362 NLRB 1298, 1300 fn. 4 (2015) (declining to rule on this issue because it had not been fully briefed by the parties).

The dissent agrees that the Board's traditional treatment of search-for-work and interim employment expenses as an offset to interim earnings has resulted in less than make-whole relief for discriminatees whose interim earnings are less than their expenses. Despite recognizing this injustice, however, our dissenting colleague would not adopt the changes requested by the General Counsel because he perceives them as providing a windfall for certain other discriminatees whose interim earnings equal or exceed the sum of their lost earnings and their search-for-work and interim employment expenses.

Contrary to the dissent, discriminatees will not receive more than make-whole relief under the General Counsel's request, because incurring search-for-work and interim employment expenses represent a different injury than losing wages. Thus, reimbursement of these expenses compensates discriminatees for a separate injury than lost pay. As discussed above, the Board has recognized this distinction by awarding other expenses incurred by discriminatees regardless of interim earnings and separately from taxable net backpay, with interest.

Further, even if the Board's revised remedial policy might result in a limited number of discriminatees with unusually high interim earnings receiving additional reimbursement, this fact would not cause us to reject it. In our view, such a circumstance would constitute "a permissible remedial outcome if it bears 'an appropriate relation to the policies of the Act.'" See *Mimbres Memorial Hospital & Nursing Home*, 361 NLRB 333, at 338 (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. at 348). In *NLRB v. Seven-Up Bottling Co.*, the Supreme Court found that "[i]t is the business of the Board to give coordinated effect to the policies of the Act[,]" and stated that "[w]e prefer to deal with these realities and to avoid entering into . . . debate about what is 'remedial' and what is 'punitive.'" 344 U.S. at 348. Fully compensating discriminatees for search-for-work and interim employment expenses even when a discriminatee's interim earnings equal or exceed his or her lost earnings and expenses appropriately relates to the policies of the Act because this approach will deter unfair labor practices and encourage robust job search efforts.[14]

Additionally, we disagree with the dissent that our revised remedial policy will create a substantial risk of protracted litigation. As a preliminary matter, contrary to the dissent's suggestion, the vast majority of Board cases do not involve years of litigation.[15] Moreover, as the dissent recognizes, Board proceedings have rarely involved litigation over search-for-work and interim employment expenses. The changes we make today will not affect the underlying considerations that have led to the Board's current and historic high settlement rate or the Board's ability to resolve the majority of cases in less than 1 year. To accept the dissent's position would be to presume that the current treatment of job search and interim employment expenses operates as a substantial driver of settlement efforts. We make no such presumption and find it extraordinarily unlikely that changed treatment of such expenses would outweigh the more pressing issues of the relative risk, cost, and delay in choosing litigation over settlement. Thus, we do not share the dissent's speculative concern that our revised remedial policy will lead to an increase in protracted litigation. Furthermore, in the unlikely event that the revised remedial policy has any effect on our high settlement rate or ability to expeditiously resolve cases, we would give priority to redressing the admitted injustice to discriminatees who are deprived of make-whole relief under the Board's current policy.

We also disagree with the Respondent and the dissent that our revised remedial policy will discourage discriminatees from seeking "legitimate and realistic employment opportunities." As recognized by the General Counsel, employees who have lost their livelihood due to

[14] The dissent criticizes this rationale as at odds with *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938), where the Supreme Court held that the Board lacks the authority to impose remedies that do not serve a remedial purpose "even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." Contrary to the dissent, and as noted above, our revised treatment of search-for-work and interim employment expenses serves a remedial purpose by fully compensating discriminatees for the separate injury of these expenses. Furthermore, it is entirely appropriate to consider whether our revised remedial policy "bear[s] appropriate relation to the policies of the Act." See *NLRB v. Seven-Up Bottling Co.*, 344 U.S. at 348. As the Supreme Court and the Board have recognized, it is the Board's duty to "'adapt [our] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly' in ways that best effectuate the purposes of the Act, provided they are not purely punitive." *Pacific Beach Hotel*, 361 NLRB 709, at 719 (quoting *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 194)). Our revised treatment of search-for-work and interim employment expenses ensures that "the victims of discrimination [are] treated fairly," "effectuates the purposes of the Act," and is not "purely punitive." See id. Thus, there is no merit to the dissent's criticism of this rationale.

[15] See the Board's Performance and Accountability Reports (PAR) at https://www.nlrb.gov/reports-guidance/reports/performance-and-accountability. Indeed, in fiscal year 2015, 92.4 percent of meritorious unfair labor practice cases were settled. PAR 2015 at 36. Furthermore, 70.6 percent of all unfair labor practice charges were resolved within 120 days, and 80.4 percent of meritorious charges were resolved within 1 year. PAR 2015 at 25–26. The Board's performance in these areas has been consistent over time. See, e.g., PAR 2014 at 24–25, 41 (95.7 percent settlement rate, 72.3 percent of all charges resolved within 120 days, and 83.9 percent of meritorious charges resolved within 1 year); PAR 2013 at 19, 38 (92.8 percent settlement rate, 73.3 percent of all charges resolved within 120 days, and 82.4 percent of meritorious charges resolved within 1 year).

unlawful discharges have "no reason to incur unnecessary out-of-pocket costs in the hope that they may one day receive a favorable ruling and reimbursement of those expenses in an unfair labor practice proceeding," long after those expenses were incurred.

Furthermore, we do not agree with the Respondent and the dissent that our revised remedial policy will lead to the award of speculative expenses or otherwise open the door to abuse. The General Counsel bears the burden of establishing those expenses incurred by discriminatees, and the Board only awards expenses that are both reasonable and actually incurred. The Board is experienced in making these determinations and respondents retain their rights to challenge them in compliance proceedings.[16]

Contrary to the dissent, we find it immaterial whether other federal agencies follow the Board's traditional or new approach regarding search-for-work and interim employment expenses. The dissent cites three sources in support of his assertion that other agencies follow the Board's traditional approach—a decision from the Equal Employment Opportunity Commission, a regulation from the Office of Personnel Management, and a whistleblower investigation manual from the Department of Labor, Occupational Safety and Health Administration—[17] but also acknowledges, a decision from the Administrative Review Board of the Department of Labor that follows the Board's revised remedial policy.[18] What matters, however, is that (as discussed above) our new remedial policy is consistent with the Board's treatment of other expenses incurred by discriminatees, effectuates the policies of the Act, and avoids potential tax complications.

Finally, the Respondent's due process rights have not been denied because the judge revoked the Respondent's subpoena seeking documents regarding Geaslin's search-for-work and work-related efforts and expenses. These documents are relevant only in compliance proceedings. Thus, the Respondent had no need for the subpoenaed documents at the merits stage of the proceedings, and the judge's revocation will not prevent the Respondent from examining such documents in a later compliance proceeding. Indeed, the Board's policy is "to make available to the respondent, on request, after issuance of the compliance specification, all factual information or documents obtained or prepared by the Region that are relevant to the computation of net backpay, restitution, or reimbursement." CHM Sec, 10650.5.

Accordingly, for the reasons set forth above, we adopt a new policy of awarding search-for-work and interim employment expenses regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest.[19] We will apply this policy retroactively in this case and in "all pending cases in whatever stage" given the absence of any "manifest injustice" in doing so. See *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)); *Pressroom Cleaners*, 361 NLRB 643, at 648 (finding no manifest injustice in applying a remedial change retroactively). In determining whether retroactive application would be unjust, we consider "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *SNE Enterprises*, supra at 673. We find no manifest injustice here. This case involves a remedial issue, and thus, reliance on preexisting law is not an issue. Furthermore, we see no "particular injustice" to the Respondent from retroactivity. The General Counsel's notice of intent to amend the complaint put the Respondent on notice that the General Counsel sought to change the Board's method of awarding search-for-work and interim employment expenses, and the Respondent had a full opportunity to litigate this issue. Finally, retroactive application of our new approach significantly promotes the purposes of the Act.

AMENDED REMEDY

In addition to the remedies ordered by the judge, we shall order the Respondent to compensate Geaslin for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim

[16] See, e.g., *Baker Electric*, 351 NLRB 515, 537–538 (2007) (finding that the discriminatee was entitled to reasonable search-for-work and interim employment expenses, but remanding discriminatee's claim for mileage expenses and directing that these expenses only reflect the costs over and above what the discriminatee would have incurred working for, and commuting to and from, the respondent); CHM Sec. 10660.4 ("The General Counsel has the burden of establishing expenses incurred by discriminatees in seeking and holding interim employment. . . . [T]he respondent has the overall burden to establish, based on a preponderance of the evidence, that a discriminatee failed to make a reasonable search for work.").

The dissent asserts that claims for search-for-work and interim employment expenses should "receive close scrutiny as to reasonableness." In light of the existing safeguards and limitations discussed above, we see no need to implement a heightened standard of review.

[17] See *Carmon-Coleman v. Rumsfeld*, EEOC Appeal No. 04A30030, 2004 WL 2423454 (October 20, 2004); 5 C.F.R. § 550.805(b), (e)(1); Department of Labor, Occupational Safety and Health Administration, *Whistleblower Investigation Manual* (January 28, 2016).

[18] See *Hobby v. Georgia Power Co.*, Case Nos. 98–166, 2001 WL 168898, at *29 (Feb. 9, 2001), affd. *Georgia Power Co. v. U.S. Department of Labor*, 52 Fed. Appx. 490 (11th Cir. 2002) (Table).

[19] *Crossett Lumber*, 8 NLRB 440, *English Mica Co.*, 101 NLRB 1061, and their progeny are overruled to the extent they are inconsistent with today's decision.

earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, 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).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(b).

"(b) Make Wendy Geaslin 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 the judge's decision, as amended in this decision."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, I agree with some of the Board majority's conclusions and disagree with others. I respectfully dissent from the majority's finding that the Respondent violated the Act when it suspended employee Wendy Geaslin on May 9. As explained in Part A below, the conduct for which Geaslin was suspended on May 9 was not protected by Section 7 of the Act. However, I join my colleagues in finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) when Store Manager Theresa Pelo questioned Geaslin about a protected conversation Geaslin had engaged in with her union steward. I also agree, for the reasons explained in Part B of this opinion, that the Respondent violated the Act when it suspended Geaslin on May 14, 2014,[1] and when it discharged her a week later on May 21.

Based on three considerations, I also respectfully dissent from the changes adopted by my colleagues regarding the remedial treatment of search-for-work and interim employment expenses. First, as explained in Part C below, the Board's traditional approach to compensating claimants for these expenses makes claimants whole in most cases, and the change adopted by my colleagues will result in greater than make-whole relief in other cases. This would exceed the Board's statutory authority, which is limited to relief that is remedial.[2] Second, I believe the new standard does not adequately safeguard against the risk that awarding search-for-work and interim employment expenses, divorced from interim earnings, will tend to produce more protracted Board litigation over such expenses, particularly when such expenses are disproportionately high in comparison to the claimants' lost earnings or interim earnings; in turn, more protracted litigation over these issues would substantially delay the time when *any* Board-ordered remedies would be available to the claimants. Third, the Board's traditional approach—treating search-for-work and interim employment expenses as an offset against interim earnings, which in turn are deducted from gross backpay—is consistent with other statutes that deal with such expenses as a component of backpay.

Accordingly, I concur in part and dissent in part from the majority's decision.

DISCUSSION

A. The May 9 Suspension

May 9, the Friday before Mother's Day, was an extremely busy day at the King Soopers Store #1 in Denver. Wendy Geaslin was working her scheduled 5:30 a.m. to 2 p.m. shift at the store's Starbucks kiosk. Sometime between 11:30 and 11:45 a.m., Store Manager Pelo asked for assistance bagging groceries, and she specifically asked for assistance from the employees assigned to the Starbucks kiosk. Geaslin finished with her customers, walked over to Pelo, and started to tell Pelo that she needed to take her lunchbreak because she had to leave work by 2 p.m. Pelo responded that she was the store manager and Geaslin needed to do what she said. Pelo also told Geaslin that she would get her lunchbreak, but now she needed to bag groceries. Geaslin asked if she should be bagging groceries since she belonged to a "different union."[3] Article 7, Section 26 of the collective-bargaining agreement covering Geaslin (the "meat"

[1] All dates herein refer to 2014 unless otherwise stated.

[2] See fn. 9 and accompanying text, infra.

[3] Geaslin did not belong to a "different union" than the union that represents baggers. Rather, she was covered by a different collective-bargaining agreement—the "meat" agreement—while baggers are covered by the "retail" agreement.

agreement or CBA) states: "It is understood that employees may perform incidental work in another classification without violating this agreement." Pelo repeated that Geaslin needed to bag groceries. Geaslin turned away from Pelo, raised her hands in the air and said, "Well, all I was doing was asking about my lunch." Pelo called Geaslin back, further discussion ensued in Pelo's office, and at the end of that discussion, Pelo gave Geaslin a 5-day suspension.

The parties disagree whether Geaslin insubordinately refused to obey Pelo's order to bag groceries. Pelo believed she did, but according to Geaslin, when she turned away from Pelo she did so to move toward bagging groceries in compliance with Pelo's order. It is unnecessary, however, to resolve this disagreement. The issue here is whether the Respondent violated Section 8(a)(1) of the Act when it suspended Geaslin on May 9. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act, which includes the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." The judge found that Geaslin was suspended because she challenged Pelo's right to order her to bag groceries. Assuming that finding is correct, the issue here is whether Geaslin was engaged in "concerted activities for the purpose of . . . mutual aid or protection" when she challenged Pelo's order. It is undisputed that Geaslin acted alone.

To determine whether an activity is concerted, the Board applies the standards set forth in its decisions in *Meyers Industries*.[4] Under these standards, activity is usually deemed concerted only if engaged in by two or more employees.[5] However, actions of a single employee may sometimes constitute "concerted activity," provided they are sufficiently linked in some way to group action.[6] The Board and the courts have held that one such circumstance is when an employee invokes "a right grounded in his collective-bargaining agreement." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 832 (1984). Thus, under the Board's longstanding *Interboro*[7] doctrine, approved by the Supreme Court in *NLRB v. City Disposal*, an employee who invokes a right grounded in his or her collective-bargaining agreement is engaged in concerted activity, provided the invocation of that collectively bargained right is "honest and reasonable."[8]

My colleagues adopt the judge's finding that Geaslin engaged in protected concerted activity under the *Interboro* doctrine when she challenged Pelo's right to order her to bag groceries. Contrary to my colleagues, I believe the judge's finding is erroneous. Geaslin did not invoke a right grounded in the "meat" agreement. That agreement contains no provision that would preclude Geaslin from bagging groceries. While some job descriptions in the CBA include work restrictions—for example, "wrappers" are not allowed to use the band saw, and (in some stores) deli clerks cannot prepare certain specialty meat items—there is nothing in the CBA that would prevent a Starbucks barista from performing incidental bagging duties. To the contrary, Article 7, Section 26 of the CBA provides that "employees may perform incidental work in another classification without violating this agreement." Accordingly, Geaslin could not have *reasonably* believed that she was invoking a collectively bargained right when she challenged Pelo's order to bag groceries. Not only does the CBA not provide Starbucks' baristas a right to refuse to perform work in another classification, it affirmatively states that the performance of incidental work in another classification does *not* violate the agreement. Accordingly, Geaslin's conduct during her encounter with Pelo on May 9 was not "concerted activity" under the *Interboro* doctrine, and therefore the Respondent did not violate Section 8(a)(1) when it suspended her for that conduct.

It is possible, under *City Disposal*, that an employee may be mistaken and still remain within the scope of the *Interboro* doctrine so long as he or she acts reasonably and in good faith. However, the type of mistake that is permitted under the *Interboro* doctrine is a reasonable mistake *about the facts* (i.e., whether relevant events actually violate the contract), and the *Interboro* doctrine does *not* protect an employee who invokes a nonexistent right. The Supreme Court made this clear in *City Disposal* itself. In that case, the collective-bargaining agreement gave unit employees the right to refuse to drive

[4] *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), on remand *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).

[5] "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497.

[6] For example, an individual employee engages in concerted activity when he or she seeks "to initiate or to induce or to prepare for group action" or brings "group complaints to the attention of management." *Meyers II*, 281 NLRB at 887.

[7] *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[8] *City Disposal*, 465 U.S. at 840 ("The rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated.").

unsafe trucks. Employee James Brown was discharged after he refused to drive a truck he reasonably and honestly believed had faulty brakes, and the issue was whether that refusal was concerted activity. Approving and applying the *Interboro* doctrine, the Court found that Brown's refusal *was* concerted activity even if Brown was reasonably mistaken about the facts (whether the truck was objectively unsafe). The Supreme Court reasoned that "[t]he invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement":

> That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

465 U.S. at 831–832.

As indicated in the above quotation, when the Supreme Court approved the *Interboro* doctrine, the Supreme Court's premise was the actual existence of the "right grounded in the collective-bargaining agreement." Id. The Supreme Court only extended protection to the possibility that Brown might have been mistaken about the relevant facts—specifically, whether the truck he was ordered to drive was actually unsafe. That supporting rationale would vanish were the *Interboro* doctrine extended to situations where the contract right relied upon by the employee does not actually exist. If the contract does not contain the right, an employee mistakenly invoking that nonexistent right would not be "reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise" from that employer to honor that right, id., since there was no promise and there is no right.[9]

My colleagues cite a provision in the Respondent's retail agreement as a basis for finding Geaslin protected under the *Interboro* doctrine. However, Geaslin was not covered by the retail agreement, and an employee cannot be protected under *Interboro* by invoking rights in someone else's collective-bargaining agreement. See *Omni Commercial Lighting, Inc.*, 364 NLRB 612, 619 fn. 10 (2016) (Member Miscimarra, dissenting). Because the meat agreement did not give Geaslin the right to challenge an order to bag groceries, and because the meat agreement affirmatively provided that the performance of incidental work outside Geaslin's classification did not violate the agreement, I believe the conduct for which Geaslin was suspended on May 9 was not concerted activity under the *Interboro* doctrine, and the Respondent did not violate Section 8(a)(1) when it suspended Geaslin on that date.

B. The May 14 Suspension and the May 21 Discharge

On May 14, Geaslin and her union representative met to discuss the May 9 suspension with Pelo. As discussed in more detail by the judge, things got heated between Pelo and Geaslin, and rather than resolve the issues from the first suspension, Geaslin left the meeting with another suspension. Subsequently, on May 21, Geaslin's employment was terminated for "gross misconduct" during the May 14 meeting.

Article 48 of the CBA outlines the grievance procedures to be followed by the Union and the Respondent. The first step in those procedures is for the Respondent and the Union to meet, with the employee optionally present as well, to try to settle the dispute. If the grievance cannot be resolved through that meeting, it is submitted in writing to the Respondent. It is well settled that grievance processing is protected concerted activity. In *City Disposal*, the Court stated: "To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance according to whatever procedures his collective-bargaining agreement establishes. No one

[9] I am aware that there is precedent contrary to my position. I believe this precedent is ungrounded in the rationale the Court relied on when it upheld the *Interboro* doctrine.

doubts that the processing of a grievance in such a manner is concerted activity within the meaning of § 7." 465 U.S. at 836. Similarly, the Board has long recognized that the processing of a grievance is protected concerted activity. See, e.g., *Exxon Mobil Corp.*, 343 NLRB 287, 287 (2004), revd. on other grounds sub nom. *Slusher v. NLRB*, 432 F.3d 715 (7th Cir. 2005); *Roadmaster Corp*. 288 NLRB 1195, 1197 (1988).

I believe that Geaslin's May 14 meeting with Pelo, accompanied by her union representative, was sufficiently grounded in Article 48 of the CBA to constitute a grievance meeting under the CBA and thus protected concerted activity under the Act. Therefore, I believe the judge was correct to apply *Atlantic Steel*, 245 NLRB 814, 816 (1979), to determine whether Geaslin's behavior during the May 14 meeting lost her the protection of the Act, and I agree with the judge, for the reasons she states, that Geaslin did not lose the Act's protection. On this basis, I concur with my colleagues' finding that the Respondent violated the Act when it suspended Geaslin on May 14 and discharged her on May 21.

C. Search-for-Work and Interim Employment Expenses

The Board has consistently compensated employees for their search-for-work and interim employment expenses ("employment/search expenses"): the Board has awarded employment/search expenses as a setoff from interim earnings, which in turn are subtracted from gross backpay.[10] However, the General Counsel and other parties have presented arguments for changing the way the Board treats these expenses, and the Respondent has argued in favor of maintaining the current, traditional approach.

The Board's traditional approach is illustrated by the following two examples:

- *Example 1 – No Employment/Search Expenses.* If an unlawfully discharged claimant lost $5,000 in gross earnings from the respondent employer, and he earned $1,000 in interim earnings with no employment/search expenses, the Board would award $4,000 in net backpay ($5,000 in gross backpay minus the $1,000 in interim earnings). The claimant's combined Board recovery and interim earnings would total $5,000 (equal to the gross amount of lost earnings resulting from the unlawful discrimination).
- *Example 2 – $250 in Employment/Search Expenses.* If the same claimant lost $5,000 in gross earnings from the respondent employer, and he earned $1,000 in interim earnings but also incurred $250 in employment/search expenses, the Board would award $4,250 in net backpay ($5,000 in gross backpay minus interim earnings *reduced* by the $250 in employment/search expenses, so that the calculation would be $5,000 gross backpay minus $750 in net interim earnings for a net award of $4,250). In this example, the claimant incurred $250 in employment/search expenses, for which the claimant was compensated in full, and the claimant's combined backpay award plus interim earnings—taking into account employment/search expenses—would again total $5,000 (equal to the gross amount of lost earnings resulting from the unlawful discrimination).

As my colleagues recognize, there is one circumstance in which the Board's traditional approach does not compensate a claimant's employment/search expenses in full: where there are insufficient interim earnings to be offset by those expenses. This is illustrated by the following example:

- *Example 3 – Employment/Search Expenses with No Interim Earnings.* If the same claimant lost $5,000 in gross earnings from the respondent employer, and he incurred $250 in employment/search expenses *without* securing another job (so the claimant had no interim earnings), the Board would award $5,000 in backpay. There would be no recovery of the $250 in employment/search expenses because, under the Board's traditional approach, this amount is *only* awarded as an offset against interim earnings. Accordingly, had the claimant remained employed, he would have received $5,000 from the employer; but if one takes into account the $250 in uncompensated employment/search expenses, the claimant's actual net recovery only totals $4,750 ($5,000 in Board-ordered backpay, reduced by $250 in unrecovered employment/search expenses).[11]

[10] Interim earnings reduce the amount of backpay an employee receives. Therefore, when the Board sets off or deducts employment/search expenses from interim earnings, this increases the amount of backpay the employee receives and thus compensates him or her for the employment/search expenses.

[11] In addition, the Board's traditional approach results in an incomplete recovery of employment/search expenses where a claimant has *some* interim earnings, but less than the amount of the employment/search expenses. For example, taking our claimant who has lost $5000 in gross earnings, assume that he incurred $1250 in employment/search expenses and earned $1000 in interim earnings. Under the traditional approach, the Board would award $5000 in net backpay ($5000 in gross backpay *unreduced* by interim earnings because the $1250 in employment/search expenses completely offsets the $1000 in interim earnings). In this example, the claimant incurred $1250 in

Based on the above examples—in particular, Example 3—I might be inclined to support changing the Board's handling of employment/search expenses. The Board should provide remedies for unfair labor practices that are effective and complete, provided that we remain within the limits of our statutory authority. See, e.g., *Pacific Beach Hotel*, 361 NLRB 709 (2014) (ordering broad range of remedies, including numerous extraordinary remedies, based on substantial unfair labor practices committed by the respondent).

However, I dissent from the approach that has been adopted by my colleagues because of three considerations, which are addressed in turn below.

1. *The Change Adopted by the Board Majority Will Produce a Windfall in Certain Cases, and Therefore Exceeds the Board's Remedial Authority*. It is well established that the Board has broad remedial authority, but our authority is limited to relief that is remedial. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938)); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267–268 (1938).[12] Accordingly, it is incumbent on the Board to consider the impact of our remedial measures on a *range* of cases and not limit our evaluation to scenarios that, when viewed selectively, suggest the existence of deficiencies in the Board's remedial scheme.

In Example 3 above—where an employee has $250 in employment/search expenses and no interim earnings—the Board's traditional treatment of employment/search expenses does not provide a recovery of those expenses because there are no interim earnings against which employment/search expenses can be offset.[13] However, the change adopted by my colleagues will produce a financial windfall in certain other cases—specifically, where claimants have interim earnings that equal or exceed the sum of their lost earnings and their employment/search expenses. In this situation, the claimants are already in an equivalent or more favorable financial position than would have resulted from uninterrupted employment with the respondent employer. Consequently, the claimants have experienced no financial loss—even taking into account their employment/search expenses—which means there is no reasonable argument that a remedial purpose is served by a Board-ordered award of employment/search expenses.[14] This is evident from the following illustration:

Example 4–Higher Interim Earnings; New Backpay Calculation Provides Greater Than Make-Whole Relief. If the claimant lost $5000 in gross earnings from the respondent employer, obtained a higher-paying job that produced interim earnings of $6000, and incurred $250 in employment/search expenses, the Board's traditional approach would result in no Board-ordered backpay because (i) the claimant's $6000 in interim earnings are greater than his $5000 in lost earnings; (ii) his $250 in employment/search expenses are treated as an offset against his $6000 in interim earnings, producing net interim earnings of $5750; and (iii) the $5750 in net interim earnings is still greater than the claimant's $5000 in lost earnings, so the backpay award would equal zero (because the $5000 gross backpay amount would be completely offset by the $5750 in net interim earnings, even taking into account the $250 in employment/search expenses). However, based on the change adopted by my colleagues, the Board will now directly award $250 in employment/search expenses, even though the employee has incurred *no financial loss* when one takes into account (as the Board must) the employee's lost earnings, his interim earnings, and the $250 in employment/search expenses.

employment/search expenses, but only $1000 of that amount was compensated (limited by the fact that the claimant earned only $1,000 in interim earnings). Based on the claimant's $1000 interim earnings and his $5000 Board-ordered backpay, the claimant receives a total of $6,000 (which is $1000 more than his lost wages), but this does not fully compensate the claimant for his out-of-pocket losses, which totaled $6250, consisting of his lost income ($5000) plus employment/search expenses ($1250) because $250 of the claimant's $1250 employment/search expenses are not recovered.

[12] The Supreme Court has stated that the Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act." *Republic Steel*, 311 U.S. at 12. And the Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison*, 305 U.S. at 235–236. See also *Alamo Rent-A-Car*, 362 NLRB 1091, 1097 (2015) (Member Miscimarra, concurring in part and dissenting in part).

[13] Similarly, the Board's traditional treatment of employment/search expenses does not provide a *full* recovery of those expenses where employment/search expenses exceed interim earnings. In this situation, there are insufficient interim earnings against which employment/search expenses can be offset. See fn. 30, supra.

[14] My colleagues acknowledge that their new method of calculating employment/search expenses may result in employees "with unusually high interim earnings receiving additional reimbursement," but they defend this result in part on the basis that it will "deter unfair labor practices." This rationale is at odds with Supreme Court precedent, where the Court held that the Board lacks the authority to impose remedies that do not serve a remedial purpose, "even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison*, 305 U.S. at 236. See supra fn. 12. My colleagues also say their approach will "encourage robust job search efforts." Board law already *requires* job search efforts, and that is the strongest possible encouragement.

I do not discount the fact that parties and claimants experience substantial, often oppressive nonmonetary consequences as the result of unfair labor practices. Nonetheless, the Act only permits the Board to award relief that is remedial. *Republic Steel Corp. v. NLRB*, 311 U.S. at 11-12; *Consolidated Edison Co. v. NLRB*, 305 U. S. at 235–236; *NLRB v. Pennsylvania Greyhound Lines*, 303 U. S. at 267–268; accord *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (Board-ordered remedies should secure "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."). See also fns. 31 & 14, supra.

I am also persuaded that my colleagues' approach is ill-advised because the problem identified above could be easily addressed, *even if* the Board otherwise changes its treatment of employment/search expenses. For example, my colleagues could specify that employment/search expenses—even if they were otherwise recoverable—would not be awarded to the extent that a claimant's interim earnings during the applicable time period[15] equaled or exceeded the sum of (i) his or her lost earnings plus (ii) his or her employment/search expenses.[16] In this respect, it is a significant omission for the Board *not* to restrict the recovery of employment/search expenses in circumstances where such a recovery would constitute greater than make-whole relief.

Accordingly, because the change adopted by my colleagues will result in relief that is more than remedial in certain cases, I believe that in this respect, my colleagues' new method for calculating backpay exceeds our statutory authority. See *Republic Steel Corp. v. NLRB*, 311 U.S. at 11–12; *Consolidated Edison Co. v. NLRB*, 305 U. S. at 235–236; *NLRB v. Pennsylvania Greyhound Lines*, 303 U. S. at 267–268.

2. *Awarding Employment/Search Expenses Separately Creates a Substantial Risk of Protracted Litigation That Will Delay the Availability of Backpay Awards*. Unfortunately, the nature of Board litigation entails substantial delay in getting unfair labor practices resolved. Our procedures require the filing of a charge that is investigated by one of the Board's regional offices, which decides whether to issue a complaint, which is followed by a hearing before an administrative law judge, with posthearing briefing in most cases. After the judge issues a decision, parties have the right to file exceptions with the Board, which typically are supported by another round of briefs, and the Board renders a decision, which can be followed by court appeals. When the Board has found a violation and has ordered backpay and other remedial measures, there are additional compliance proceedings handled by the Board's regional offices, which can result in additional hearings before administrative law judges, additional posthearing briefs, supplemental decisions by the judges, and further appeals to the Board and the courts.

In spite of everyone's best efforts, this lengthy litigation process consumes substantial time and, too often, causes unacceptable delays before *any* Board-ordered relief becomes available to the parties. Many cases involve years of Board litigation, and often dozens or even hundreds of employee-claimants. For example, the dispute in *CNN America, Inc.*, 361 NLRB 439 (2014)—involving approximately 300 employee-claimants—required 82 days of trial, more than 1,300 exhibits, more than 16,000 transcript pages, and more than 10 years of Board litigation, and the case still remains pending on appeal. Another example, in the early stages of Board

[15] Under *F. W. Woolworth Co.*, 90 NLRB 289 (1950), the Board computes backpay for employees unlawfully separated from their employment on a quarterly basis.

[16] If this restriction were in effect, then claimants could be awarded employment/search expenses in all cases in which they experienced a financial loss, but they would be denied a separate recovery of employment/search expenses when they did *not* experience a financial loss.

This can be illustrated using Example 4 (set forth in the text), where the claimant lost $5000 in gross earnings from the respondent employer, obtained a higher-paying job that produced interim earnings of $6000, and incurred $250 in employment/search expenses. Here, the claimant finds himself in a more favorable financial position—even taking into account his employment/search expenses—than if he had not been discharged because his $6000 in interim earnings, when reduced by his $250 in employment/search expenses, totaled $5,750 in net interim earnings, which is still greater than his $5000 in lost wages. In this situation, awarding $250 in employment/search expenses would constitute a recovery in the absence of any financial loss (again, even taking the $250 employment/search expenses into account).

If my colleagues awarded a direct recovery for employment/search expenses, but with the limitation that such expenses would not be awarded to the extent that interim earnings during the applicable time period equaled or exceeded the sum of lost earnings plus employment/search expenses, then claimants could recover employment/search expenses whenever they experienced an overall financial loss, but they would be denied such a recovery if they did not experience an overall financial loss. In the above example, even if the claimant might otherwise be awarded $250 in employment/search expenses, such a recovery would *not* be awarded because his $6000 in interim earnings were greater than $5250, which is the sum of his lost wages ($5,000) plus his employment/search expenses ($250). If the same claimant had $5000 in lost wages and $250 in employment/search expenses, with interim earnings that were less than $5250, the above limitation would permit a recovery of employment/search expenses, but only up to the claimant's actual overall financial loss (i.e., the extent to which the claimant's interim earnings were less than the sum of his lost earnings and employment/search expenses). Using the same example (claimant had $5000 in lost wages and $250 in employment/search expenses), if the claimant had no interim earnings, the direct recovery of employment/search expenses would be $250 (on top of Board-ordered backpay); if the claimant had $5249 in interim earnings, the recovery of employment/search expenses would be $1.

litigation, involves consolidated claims being pursued against McDonald's USA, LLC and 31 other employer parties, based on 61 unfair labor practice charges filed in six NLRB regions alleging 181 unfair labor practices involving employees at 30 restaurant locations. See, e.g., *McDonald's USA, LLC*, 363 NLRB 847 (2016).

Given the substantial delays that, unfortunately, can be associated with Board proceedings, backpay issues—and, in particular, questions regarding an employee-claimant's efforts to mitigate damages and the reasonableness of employment/search expenses—present onerous challenges: employee-claimants often have difficulty reconstructing job-search efforts, locating and retaining relevant documentation, and recalling details regarding what expenses were undertaken and why. Unions and employers have similar difficulties dealing with these issues: Board cases do not allow prehearing discovery, and claimants often present extremely general testimony regarding job-search efforts and relevant expenses. In a single-employee discharge case involving accrued backpay over a period of years, the litigation of these details may require substantial time. When there are dozens or hundreds of employee-claimants, the other substantive legal issues may be overwhelmed by litigation over backpay, mitigation and the reasonableness of employment/search expenses.

In this context, the Board's traditional treatment of employment/search expenses has some positive features. First, as noted above, the Board's traditional approach has generally provided for the recovery of employment/search expenses, even though they have been awarded as a setoff from interim earnings (which, in turn, are subtracted from gross backpay). Second, awarding employment/search expenses as a setoff from interim earnings provides an incentive for such expenses to bear a reasonable relation to the potential interim earnings available to employee-claimants and to the prior earnings provided by the respondent employer. Third, to the extent that employment/search expenses have tended to be reasonable in relation to interim earnings and lost wages, Board proceedings have rarely involved protracted litigation over employment/search expenses. Finally, the handling of employment/search expenses as an offset to interim earnings is consistent with a recognition that, in most if not all cases, it is much more important for the Board to address the question of unfair labor practice liability and the Board's more substantial remedies: backpay, reinstatement, and potential injunctive relief.

The Board's traditional approach does not permit a full recovery of employment/search expenses in the one circumstance noted previously: where there are insufficient interim earnings to be offset by those expenses. I am troubled by this aspect of the Board's traditional approach. However, the changes adopted by my colleagues affect *all* cases—including those where the Board's traditional approach already provides a full recovery of employment/search expenses—and I am also troubled by the fact that the Board's new approach will award employment/search expenses in cases where the employee-claimants have experienced no financial loss (specifically, where interim earnings are greater than the sum of the employee's lost earnings and employment/search expenses), which in my view exceeds the Board's remedial authority. See subpart 1, above. Additionally, I believe that awarding employment/search expenses directly, without any connection to interim earnings or lost wages, will eliminate the positive features of the Board's traditional approach. In *all* cases, therefore, I believe the changes adopted by my colleagues may produce a substantial increase in contentious disputes over employment/search expenses, and these disputes, in *all* cases, are likely to delay the availability of *any* monetary remedies for employee-claimants who have been adversely affected by unlawful conduct.

The changes adopted by my colleagues would be more defensible if the Board acknowledged that detaching employment/search expenses from interim earnings creates the risk of producing more frequent claims for employment/search expenses that are disproportionate to both lost earnings and potential interim earnings. Likewise, the Board could indicate that—in addition to the conventional requirements that they be nonspeculative and proven based on a preponderance of the evidence—such claims will receive close scrutiny as to reasonableness because more protracted litigation over employment/search expenses operates to the detriment of all parties, including employee-claimants themselves. I believe the absence of these qualifications undermines the rationale for abandoning the Board's traditional treatment of employment/search expenses.

3. *The Board's Traditional Treatment of Employment/Search Expenses Is Consistent with the Practice of Other Agencies under Other Employment Statutes*. As a final matter, the Board does not stand alone in its traditional treatment of employment/search expenses. For example, similar to the constraint placed on the Board not to exceed remedial relief (see subpart 1, above), the Equal Employment Opportunity Commission (EEOC) has indicated that backpay awards should not place claimants in a more favorable financial position than would have resulted from their continued employment, and the EEOC has likewise treated employment/search expenses as a setoff from interim earnings. To this effect, in *Carmon-Coleman v. Rumsfeld*, EEOC Appeal

No. 04A30030, 2004 WL 2423454 (October 20, 2004), the EEOC stated:

The purpose of a back pay award is to restore to petitioner the income she would have otherwise earned, but for the discrimination. . . . The agency is required to make *certain deductions from back pay awards to ensure that the employee does not receive more in total benefits than she would have received in the absence of the personnel action*. The person who has been discriminated against must receive a sum of money equal to what would have been earned by that person in the employment lost through discrimination (gross back pay) *less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted* (net interim earnings). The difference between gross back pay and net interim earnings is net back pay due.[17]

See also 5 C.F.R. § 550.805(b), (e)(1) (Office of Personnel Management regulation states that "[n]o employee shall be granted more pay . . . than he or she would have been entitled to receive if the unjustified or unwarranted personnel action had not occurred," and describes "offsets and deductions" from backpay as including "outside earnings" minus "ordinary and necessary business expenses . . . undertaken to replace the employment from which the employee was separated"); Department of Labor, Occupational Safety and Health Administration, *Whistleblower Investigations Manual* (January 28, 2016), at 6–3 ("Interim earnings should be reduced by expenses incurred as a result of accepting and retaining an interim job.").[18]

[17] Emphasis added; citations omitted.

[18] Separate from the potential award of backpay (as to which the EEOC treats employment/search expenses as an offset against interim earnings), in 1991 Congress amended the Civil Rights Act of 1964 to permit the EEOC to award "compensatory damages," which the EEOC has defined as including "pecuniary losses" such as "moving expenses" and "job search" expenses. See EEOC Enforcement Guidance, Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, 1992 WL 189089 (1992). However, as noted previously, the National Labor Relations Act only permits the Board to award remedial relief, which does not include compensatory damages. See *UAW v. Russell*, 356 U.S. 634, 643 (1958) ("Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct."). Similarly, although the Administrative Review Board in a Department of Labor proceeding awarded "employment search expenditures" to an employee-claimant in a case cited by the General Counsel, *Hobby v. Georgia Power Co.*, Case Nos. 98-166, 98-169, 2001 WL 168898, at *29 (Feb. 9, 2001), affd. *Georgia Power Co. v. U.S. Department of Labor*, 52 Fed. Appx. 490 (11th Cir. 2002) (Table), this was a whistleblower claim under the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (1988), which permits the recovery of "compensatory" damages, and neither party contested the award of employment search expenditures. Id. See also 42 U.S.C. §5851(b)(2)(B) (stating that, in the event of a violation, the Secretary of Labor may award reinstatement with backpay, plus "compensatory damages to the complainant").

CONCLUSION

For these reasons, as to the above issues, I respectfully dissent in part and concur in part.

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 coercively question you about your protected concerted activities.

WE WILL NOT suspend or terminate or otherwise discriminate against any of you when questioning your work duties under the collective-bargaining agreement.

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 Wendy Geaslin 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 Wendy Geaslin whole for any loss of earnings and other benefits resulting from her two 5-day suspensions and termination, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful 5-day suspensions and unlawful termination of Wen-

dy Geaslin, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the said disciplinary actions will not be used against her in any way.

KING SOOPERS, INC.

The Board's decision can be found at www.nlrb.gov/case/27–CA–129598 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Isabel C. Saveland, Esq., and *Jose Rojas, Esq.*, for the General Counsel.

Raymond M. Deeny, Esq., and *Jonathon Watson, Esq.*, for Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Denver, Colorado, on August 11–12, 2015. Wendy Geaslin (Geaslin or Charging Party) filed the charge on May 29, 2014, and the first amended charge on August 18, 2014, and the General Counsel issued the complaint on October 31, 2014,[1] which was amended twice at the hearing. King Soopers, Inc. (King Soopers or Respondent) filed a timely answer.

The complaint and amended complaint allege that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it interrogated Geaslin in March; and violated Section 8(a)(3) and (1) of the Act when it suspended Geaslin on May 9 and 14, and terminated Geaslin on May 21.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION INVOLVED

King Soopers, Inc., a Colorado corporation, is engaged in the business of operating retail grocery stores with multiple facilities including a facility located at 1331 Speer Boulevard, Denver, Colorado 80204 (Store #1), where it annually derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 directly from points outside of the State of Colorado. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the United Food and Commercial Workers Union, Local 7 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Based on the above, I find that these allegations affect commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates several retail grocery stores in Colorado, including Store #1 in Denver. Respondent admits, and I find that Theresa Pelo (Pelo), store manager; Lisa Panzarella (Panzarella), assistant store manager; and Roxandra Barbos (Barbos), manager, are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. A variety of employees, or associates, work for Respondent including deli clerks, checkers, bakery clerks, and coffee clerks (baristas).

Respondent's employee handbook details standards of conduct expected and provides various actions which would warrant discipline including termination (Jt. Exh. 3). Respondent's standards of conduct state that employees are expected to behave in a professional manner when interacting with his or her fellow associates, management, and customers. As defined by Respondent, insubordination, or the failure to follow management directive, is considered misconduct, and any words or deeds that are in violation of the policy will subject the employee to discipline up to and including termination; insubordination includes the willful or intentional failure by an employee to obey a lawful and reasonable verbal or written instruction of

[1] All dates are 2014 unless otherwise indicated.

[2] The transcripts in this case are generally accurate, but I make the following corrections to the record: Transcript (Tr.) 16, Line (L.) 14–15: the speaker is Mr. Deeny, not Judge Tracy; Tr. 18, L. 24: "hear" should be "here"; Tr. 37, L. 2, Tr. 38, L. 24: "Spear" should be "Speer"; Tr. 46, L. 2: "Oaky" should be "Okay"; Tr. 66, L. 1: sentence should end with a period, not a question mark; Tr. 70, L. 2: "set" should be "sack"; Tr. 132, L. 19: "and" should be "an"; Tr. 164, L. 9: "as" should be "was"; Tr. 171, L. 7: "whey" should be "why"; Tr. 211, L. 3: "further lefts" should be "further left"; Tr. 269, L. 9: "cute" should be "cut"; Tr. 269, L. 21-22, Tr. 270, L. 4: "Latice" should be "Latrice"; Tr. 292, L. 25: "Gleason" should be "Geaslin"; Tr. 293, L. 20: "Kin" should be "King"; Tr. 309, L. 19: "fi" should be "if".

In addition, Respondent notes that witness Panzarella's name is misspelled in the index: Tr. 3: "Pandearella" should be "Panzarella." Furthermore, throughout the transcript, Panzarella's name spelling should be corrected as well.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[4] Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief.

the supervisor or manager which relates to the employee's job function.

For many years, the Union has been a bargaining agent for units of Respondent's Denver area employees, and the parties have signed successive collective-bargaining agreements. The most recent collective-bargaining agreement covering the meat employees, which includes baristas who work in the Starbucks' kiosks within the stores, was effective from May 13, 2012, through September 12, 2015 (the meat contract). The collective-bargaining agreement covering the retail employees (clerks), which includes bakery employees, was effective during the same time period as the meat contract (the retail contract).

Article 1 of the meat contract covers the work to be performed by the employees (Jt. Exh. 1). Article 2 of the retail contract covers the work to be performed by the retail employees. Danny Craine (Craine), a union representative, and Geaslin testified that they interpret both collective-bargaining agreements to prevent employees from performing work outside of their assigned department; in other words, both collective-bargaining agreements state that the employees are limited to the duties assigned for their position. For example, baristas who work in the Starbucks' kiosk are not expected to provide Respondent's bakery items as samples to customers; the baristas should only provide samples of Starbucks' pastries (Tr. 155).[5] Nevertheless, the Union has not filed a grievance on this issue.

Employees abide by the same rules and procedures of Respondent including being respectful and not insubordinate. Furthermore, the grievance procedure is the same in both collective-bargaining agreements. The first step of the grievance process includes speaking at the store level with the manager, and if not resolved, then the second step includes filing a written grievance with Respondent's labor relations office. Thereafter, the Union's executive committee meets and determines whether to arbitrate the grievance. A union member may appeal the decision not to arbitrate to the Executive Board with their appeal determination final.

B. Geaslin's Employment with Respondent

Geaslin began working for Respondent on August 19, 2009, until her termination on May 21, 2014.[6] When she was terminated, she had been working as a barista for the prior year in the Starbucks' kiosk of Store #1. As a barista, Geaslin prepared and served coffee beverages as well as the Starbucks' pastries sold within the kiosk (Jt. Exh. 1 at Letter of Agreement #26; Tr. 40). The opening shift brews the coffee and puts pastries in the pastry case. The mid-day shift restocks items within the kiosk. The closing shift pulls pastries from the freezer and restocks items for the opening shift. Prior to her suspensions and termination at issue, Geaslin had been disciplined at Respondents' Store #29 for failing to take her lunchbreak at the appropriate time.[7] In accordance with article 24 of the meat contract, employees should take a lunchbreak "at approximately the middle of his workday" (Jt. Exh. 1).

1. March 2014: Alleged interrogation of Geaslin by Pelo

On an unspecified day in March, Geaslin arrived at work for the morning shift and discovered that the night-shift employee failed to restock items and defrost the pastries for Geaslin to place in the display case (Tr. 42). Later that day Geaslin complained to coworker Latrice Jackson (Jackson), a produce clerk, about the Starbucks' employees not being able to complete their own duties, such as restocking, due in part to having to help Respondent's bakery department with sampling its own bakery products (Tr. 44, 75).[8] Unbeknownst to Geaslin, Jackson also served as one of two union stewards at Store #1.

Respondent offered testimony from Panzarella and Pelo regarding another possible incident with Geaslin in March. Panzarella asked Geaslin to provide samples of King Sooper's bakery products to customers. Geaslin disagreed with Panzarella regarding the propriety of performing the task because the Starbucks employees had a "hard enough time getting our own samples cut and out for sampling without having to do the bakery's products," but ultimately handed out samples of the bakery product (Tr. 125). Geaslin spoke to Jackson about the situation, and Jackson, in turn, "complained" to Panzarella about her work directive (Tr. 226). Jackson advised Geaslin to do what upper management tells her to do. Respondent did not discipline Geaslin for initially refusing to perform the task. Panzarella testified that she told Pelo that Geaslin complained to Jackson about sampling (Tr. 238).

Sometime in March, thereafter, Pelo approached Geaslin, stating, "I wasn't going to ask you, but did you really complain to the Union about having to sample out stuff for the bakery?" (Tr. 44, 79.)[9] Geaslin responded that she had not spoken to the Union; at the time, Geaslin was unaware that Jackson was a

[5] Whether Danny Craine (Craine) and Wendy Geaslin's (Geaslin) interpretation of the collective-bargaining agreement is legally sound is not before me.

[6] Overall, Geaslin testified in a calm demeanor but did become understandably agitated under Respondent's argumentative cross-examination. Despite this tough cross-examination, Geaslin's testimony did not waver. Geaslin testified generally consistently, and her testimony was corroborated by her Board affidavit. However, as discussed further, there are some inconsistencies in the details of what occurred, and in some instances I cannot credit Geaslin.

[7] Prior to working at Store #1, Geaslin worked at Store #29 in a similar position. While at Store #29, Respondent in May 2011 issued Geaslin a written warning for unsatisfactory job performance and violation of company policy, rule or procedure when she failed to take a lunch (R. Exh. 1). One month later Geaslin failed to take a lunch again, and Respondent issued her a 1-day suspension; Respondent failed to schedule the date for her suspension, and thus she never actually served her suspension (R. Exh. 2).

[8] Latrice Jackson (Jackson) did not testify.

[9] Theresa Pelo (Pelo) denied speaking to Geaslin about going to the Union with her complaint (Tr. 269–270). In response to the question of whether Pelo interrogated Geaslin about this incident, Pelo testified, "No, there would be no reason to. I know that Lisa and Latice [sic] had already addressed it" (Tr. 270). However, Geaslin completed the assignment from Lisa Panzarella (Panzarella) before she even spoke to Jackson; there was nothing to "address" by Panzarella and Jackson as claimed by Pelo. As stated previously, I found Geaslin to be a generally credible witness, and it seems unlikely she would fabricate such an interaction with Pelo. Thus, I do not credit Pelo's testimony that she did not interrogate Geaslin.

union steward (Tr. 46, 142). Pelo then stated, "Well, that's not the truth. You did complain to them and I don't like that." (Tr. 46).

2. May 9, 2014: Respondent's first suspension of Geaslin

On Friday, May 9, Respondent scheduled Geaslin to work from 5:30 a.m., to 2 p.m. Store #1 was extremely busy that day because it was the Friday before the Mother's Day holiday. Between 11:30 and 11:45 a.m., Pelo used the intercom to call for employee assistance in the front end of the store, both to check out customers and to bag or sack groceries, because queues were quickly forming at the check stands. Pelo specifically called for employee assistance from Starbucks, which is not a typical request but she did so because of the store's volume of customers (Tr. 48). Upon hearing this request, Geaslin looked at her coworker with "amazement" because they had never been asked to sack groceries (Tr. 48).[10]

Geaslin finished with her Starbucks' customers, removed her apron, and then stepped out of the kiosk (Tr. 48). Pelo, thinking that Geaslin came to assist, testified that she immediately thanked Geaslin for coming over to help bag groceries.[11] Pelo, who was standing behind self-checkout, was 30 to 50 feet from Geaslin. Geaslin then walked up to her, put her hand on her shoulder, and tried to tell her she was going to take her lunch since she needed to leave at 2 p.m. that day (Tr. 49, 110, 116).[12]

Before Geaslin could finish her statement, Pelo interjected that she was the store manager and Geaslin needed to do what she said. Pelo told Geaslin not to worry about her lunch, that she would get her lunch and to go ahead and sack groceries. Geaslin responded asking Pelo if technically she should be performing these duties since she belonged to a different bargaining unit or "different Union" (Tr. 49, 116, 143). Pelo told Geaslin that she was the store manager, and Geaslin needed to bag groceries. By this point in the conversation, both Pelo and Geaslin's voices were raised. Geaslin turned to go sack groceries, and while doing so she raised her hands in the air and said, "Well, all I was doing was asking about my lunch" (Tr. 50).[13] Geaslin did not refuse to bag the groceries but also did not affirmatively say she would bag them. Instead, she turned and walked towards the check stands to bag groceries while also physically demonstrating her frustration with Pelo by raising her arms in the air.

In reaction to this gesture, Pelo called Geaslin back over to her stating, "You get back here. We need to talk" (Tr. 50). Geaslin walked back and agreed to talk with Pelo, suggesting that they speak in Pelo's office after their voices became raised.[14] The discussion on the store floor lasted only a few minutes.

Angelica Eastburn (Eastburn), the assistant deli manager who also in the same bargaining unit as Geaslin and also a current employee of Respondent, witnessed some portion of this exchange as she walked back from the time clock.[15] The exchange between Pelo and Geaslin was at a sufficient volume that Eastburn could hear them over the customers gathered in the front of the store. Eastburn did not see or hear whether Geaslin agreed or disagreed to bag groceries. Eastburn accompanied them to the manager's office.

Once Geaslin, Pelo, and Eastburn entered the office, Pelo began saying that Geaslin refused to bag groceries, and instead

[10] Angelica Eastburn (Eastburn), an assistant deli manager, testified that she had never been asked to bag groceries as deli employee; it was unusual for employees other than the produce, bakery, and grocery employees to bag groceries (Tr. 215).

[11] Geaslin testified that Pelo yelled, "Where do you think you're going?" (Tr. 48). I decline to credit Geaslin's testimony on this point. Two other witnesses, one of whom is current bargaining unit employee Eastburn, testified that Pelo thanked Geaslin, rather than yelling at Geaslin in an abrasive manner. Thus, I credit Pelo's testimony on this point. Generally, under Board law, current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

[12] Based upon Respondent's rule to take a lunchbreak midway through the shift, Geaslin's lunchtime should have been earlier that morning, perhaps between 10 and 11 a.m., rather than between 11:30 and noon (Tr. 87). Nevertheless, Respondent did not discipline Geaslin for this incorrect lunchtime nor did they discuss with her the violation of the rule.

[13] Geaslin consistently and credibly testified that she attempted to bag the groceries but could not even begin the task because Pelo called her back to talk with her. Throughout Respondent's rigorous cross-examination of Geaslin, she repeated that she tried to bag groceries. At one point, Geaslin stated, "and if people would listen to me, I tried to go and sack the groceries" (Tr. 136–137). Geaslin's unwavering testimony, despite Respondent's attempt to confuse her testimony, convinced me that her testimony on this point should be credited, not Pelo's testimony. Pelo testified that after Geaslin left the Starbucks' kiosk, she immediately came towards her rather than attempt to sign out for lunch which demonstrates that she was not ignoring Pelo's request but rather wanted to let her know she still needed to take her lunchbreak. Both Pelo and Geaslin testified that Geaslin asserted her belief that the collective-bargaining agreement precluded her from bagging groceries but Pelo claimed that Geaslin refused to bag groceries. Geaslin's past behavior supports her testimony—in March Geaslin questioned the non-Starbucks related tasks assigned to her and her coworker, but ultimately performed the task. Geaslin's May behavior is consistent, and thus her version of events will be credited.

[14] Roxandra Barbos (Barbos), a current assistant manager at Respondent, testified that she witnessed less than 1 minute of the exchange between Pelo and Geaslin before she headed to a meeting. Barbos testified that she only heard Pelo thanking Geaslin for coming over to help bag groceries, and Geaslin responding negatively. She did not witness the remainder of the incident, and thus, I decline to rely on her testimony for the May 9 incident.

[15] Eastburn testified that she overheard Pelo say, "Thank you for coming to help sack" (Tr. 207–208). Geaslin responded, "I'm on my way to take my lunch." Eastburn testified that she could not remember if she heard Geaslin objecting to sacking groceries. For the critical portion of the exchange, Eastburn could not recall if Geaslin objected to bagging groceries or affirmatively agreeing to sack groceries (Tr. 208–209). Eastburn gave generally sincere testimony but ultimately her testimony was not completely reliable due to her lack of recollection. Respondent needed to use her statement given proximate to the events in May to refresh her memory. Eastburn could not testify about the conversation between Pelo and Geaslin in the manager's office without her statement to recall her testimony. However, her statement, which I credit since it was given closer in time to the events and issue, indicates that both Pelo and Geaslin discussed the collective-bargaining agreement, and her statement is silent as to whether Geaslin refused to bag groceries (Tr. 218). This omission from Eastburn's statement supports Geaslin's testimony that she did not refuse to bag groceries.

was going to take a lunch. Geaslin responded that Pelo was not telling the truth and that she was walking towards where she needed to bag groceries but Pelo called her back. Geaslin also stated that she never said she would not sack groceries (Tr. 54). Geaslin explained that she only inquired about her lunchbreak and whether the Union's collective-bargaining agreement permitted her to perform those job duties (Tr. 51–52). They argued back and forth. Both Geaslin and Pelo's voices were raised; Geaslin admitted she was agitated (Tr. 64).[16] Pelo then told Geaslin to clock out because she would be on a 5-day suspension.

During this meeting, Geaslin was emotional but did not use any profanity, threaten, or physically touch Pelo. As Geaslin left the meeting, Pelo told her the suspension would be without pay, and Geaslin responded, "Oh waa," mimicking a baby's cry (Tr. 55). The meeting lasted 10 to 20 minutes. Geaslin clocked out at 12:05 p.m. (R. Exh. 5). She left the store on her own accord and was not escorted out by security guards.

After the meeting, Pelo spoke with Labor Relations Manager Stephanie Bouknight (Bouknight). Bouknight recommended immediate termination for insubordination but Pelo wanted to give Geaslin another chance. Geaslin called Craine, as her union representative, to inform him of what occurred. She told him that she did not refuse Pelo's direct order; she only questioned whether she should be performing the work since it could be a violation of the collective-bargaining agreement (Tr. 181).

3. May 14, 2014: Respondent's second suspension of Geaslin

On Wednesday, May 14, Geaslin along with her Union Representative Craine met with Pelo in the manager's office at Store #1 to discuss her suspension from the prior week.[17] Panzarella and Barbos were at the meeting for most of the time. The meeting occurred between 10 and 11 a.m., behind a closed door.

Pelo started the meeting by telling Geaslin she would let her work again but then started talking to Craine about Geaslin's refusal to bag groceries on May 9. In response to this exchange, Geaslin made a surprised look at Craine because she was in disbelief that Pelo continued to make alleged false statements. Her surprised expression included raising her arms in the air (Tr. 132, 182). Pelo stood up and said, "Do you see the disrespect she shows me? She is making faces at me and being very disrespectful" (Tr. 57). Craine intervened by saying that Geaslin merely made a facial expression, and Pelo responded, "No, she is making faces at me and being disrespectful."

Craine testified that Pelo admitted that Geaslin's duties did not include bagging groceries but that she was shorthanded and needed assistance, and Geaslin needed to respect her as her boss. Meanwhile, Geaslin told Pelo that she could have asked her to bag groceries without yelling at her, and stated that she never refused to bag the groceries.

This back and forth disagreement continued with both Pelo and Geaslin raising their voices, and Geaslin interrupting Pelo. At one point during the meeting, Geaslin testified that she said to Pelo, "If you want people to respect you, maybe you should try to respect them" (Tr. 57, 99). Pelo responded that she did not need to respect Geaslin.[18] Craine felt that Geaslin became more agitated or "aggressive" during this meeting (Tr. 81). He explained that Geaslin's tone of voice became louder, and she was gesturing frequently with her hands but she was not physically leaning forward towards Pelo. Pelo remained calmer than Geaslin, but her face began to turn red.

Because the situation was getting heated, Craine decided to take Geaslin out of the room for a break.[19] Craine led Geaslin out of the room and into the break room. Craine advised Geaslin to calm down, to not raise her voice and to give Pelo more respect. They went back into the meeting. After returning to the meeting, Geaslin remained subdued. Pelo told Geaslin and Craine that Geaslin would be suspended for misconduct.[20] Craine told Pelo that Geaslin was "just defending

[16] Pelo testified that during the May 9 meeting Geaslin spoke about not needing to respect Pelo and do what she was asked to do, and Pelo responded by telling Geaslin that she must follow her orders (Tr. 275). Again, I cannot credit Pelo's testimony. Eastburn, who is a current employee testifying against her own pecuniary interests, did not testify about any discussion of respect by either Pelo or Geaslin during the May 9 meeting nor was this testimony elicited from her statement. Instead the credited evidence shows that the exchange between Pelo and Geaslin regarding respect occurred during the May 14 meeting, not the May 9 meeting.

[17] Craine testified in a deliberate, calm manner; his tone measured, paused when thinking about his responses to the questions. Craine's testimony generally did not contradict the testimony of Geaslin but rather supplemented her testimony with his recollection of events.

[18] Around the time when Geaslin filed her unfair labor practice charge with the Board, she noted in a handwritten document that what Pelo wrote on her termination paperwork was not true—"I did say that if she wanted people to respect her she should give respect! Not I was not going to respect her because she didn't respect me" (R. Exh. 3; Tr. 92). In contrast, Craine testified that Geaslin told Pelo that Pelo should earn her respect. On this point, I do not credit Craine's testimony but rather I credit Geaslin's testimony. Geaslin's testimony on what she relayed to Pelo regarding the issue of respect is corroborated by her statement to the Board. I also discredit the testimony of Panzarella on this issue. Panzarella testified that Pelo told Geaslin that she was being disrespectful, and Geaslin responded that she did not need to respect Pelo (Tr. 232). Again, I credit the testimony of Geaslin whose testimony was corroborated by her notes closest to the date the meeting occurred.

[19] Pelo and Craine testified that Pelo asked Craine to take Geaslin out of the room. Based upon the entire record it seems more likely than not that Craine decided to take Geaslin out of the room, rather than Pelo making this decision. Geaslin clearly became upset during this meeting, and it seems more likely for Craine to bring Geaslin out of the meeting to calm her down.

[20] Geaslin testified that Pelo left the room to consult with her manager after she said she would terminate Geaslin and after Craine reminded her that she could not simply terminate Geaslin. I cannot credit Geaslin on this portion of her testimony. Respondent's managers typically consult with labor relations prior to disciplining employees (Tr. 184), and it seems unlikely Pelo would need to be reminded by Craine of her responsibility. In contrast, Craine testified that after they returned to the room, Pelo stated she called her manager and decided to leave Geaslin in suspension status (Tr. 160). Furthermore, Pelo testified that after she told Geaslin she would be suspending her again, she told Geaslin and Craine that she would think about whether she would retain Geaslin (Tr. 279). Craine's version of events seems more likely and I credit his testimony.

herself," but Pelo said that Geaslin was being rude and making faces at her (Tr. 160).

During this meeting before she first left the room with Craine, Geaslin was upset and agitated that Pelo was not telling the truth (Tr. 60). Geaslin spoke with a "heightened" voice and gestured with her hands but did not use any profanity, did not threaten anyone, and did not approach Pelo or the other managers (Tr. 60–61). Geaslin was emotional and defensive with the volume on her voice elevated but she was not yelling. After she came back into the room with Craine, Geaslin's demeanor changed to being subdued and not speaking (Tr. 61). Throughout this meeting, Geaslin did not use profanity or threaten Pelo or any other manager physically or verbally (Tr. 160).[21] When Geaslin left the meeting and the store, she left on her own accord without an escort by security guards.

4. May 21, 2014: Respondent's termination of Geaslin

On Wednesday, May 21, Pelo met with Geaslin and Craine in the management office. Panzarella also attended the meeting as a management witness. Pelo terminated Geaslin for misconduct and being disrespectful (Tr. 62). Pelo told Geaslin and Craine that "what happened at the prior meeting was terrible" and "she had never been treated like that before" (Tr. 162). Pelo elaborated that she was terminating Geaslin for gross misconduct during the May 14 meeting when Geaslin talked back to her, made faces at her, and made an inappropriate comment about respect (Tr. 163). Craine asked several more questions regarding the May 9 incident, and Pelo continued to allege that Geaslin refused to bag groceries. Geaslin did not speak at this meeting. Again, no security guards were present for the meeting and Geaslin was not escorted out of the store by any security guards.

Pelo provided Geaslin with her termination paperwork. The paperwork, dated May 21, indicated that Geaslin was terminated for misconduct and being disrespectful to her manager. Pelo wrote,

> On 5-14-14 Wendy [Geaslin] + the union met with me to discuss an incident that had occurred the prior week. During this meeting Wendy [Geaslin] was very obstinate + was being very disrespectful by making faces + saying inappropriate things. She was warned to stop this behavior when she stated she did not have to respect me until I respected her or earned her respect. I am terminating her at this time for gross misconduct.

(Jt. Exh. 4.) Panzarella signed this paperwork as well. Craine considered this meeting to be the first step grievance meeting.

5. The Union's appeal of Geaslin's suspensions and termination

The Union filed a grievance on behalf of Geaslin contesting her suspension on May 9 and termination on May 21, and the May 21 meeting was Step 1 of the grievance process (R. Exh. 4). The Union did not file a grievance concerning Starbucks' baristas needing to sample Respondent's bakery items (Tr. 75). The Union also did not file a grievance concerning Pelo's order to Geaslin to bag groceries. Ultimately according to what Geaslin understood and speculated, the Union declined to arbitrate the claim because they felt that Geaslin should have bagged groceries without asking about her lunch or her contractual rights (R. Exh. 10; Tr. 134).[22] Craine testified that he thought the Union declined to arbitrate Geaslin's discipline and terminations because they felt they could lose (Tr. 177–178).[23]

III. DISCUSSION AND ANALYSIS

A. Procedural Issues

1. General Counsel's amendments to the complaint

Respondent objected to the General Counsel's two motions to amend the complaint at the hearing to include search-for-work and work-related expenses to the make whole remedy, and to include an allegation of interrogation of Geaslin's union activity by Pelo in March 2014. I overruled the objections, and allowed the amendments. Respondent continues to object in its posthearing brief. In *Rogan Brothers Sanitation, Inc.*, 362 NLRB 547, 549 fn. 8 (2015), the Board stated that the administrative law judge has wide discretion to grant or deny motions to amend complaints under Section 102.17 of the Board's Rules and should consider the following when permitting an amendment to the complaint during the hearing: (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse

[21] In contrast, Panzarella, Barbos and Pelo testified that Geaslin kept moving forward or "lunging" in her chair, and clenching and baring her teeth and shaking her hands and fists (Tr. 250–251). Panzarella testified that Geaslin was agitated and angry, her face turning red and she became vocal and loud (Tr. 230). Pelo, in response, scooted back from the desk at which she sat facing Geaslin. Barbos also stated that Geaslin rolled her eyes at Pelo, and lunged forward 2 times. Her face was also flushed. Pelo said to Geaslin, "What are you doing? Why are you making faces at me?" Both Panzarella and Barbos expressed concern about Geaslin's demeanor. I do not credit Panzarella, Barbos and Pelo's description of Geaslin's actions during the meeting. Their version of events seemed exaggerated and hyperbolic; if they truly were concerned about Geaslin's behavior, then one would expect an aggressive response such as calling security guards to escort Geaslin from the premises.

Furthermore, in a Colorado Department of Labor and Employment hearing, held on November 10, Panzarella testified as follows in response to the hearing officer's question as to why she believed Geaslin was angry: "She was sitting and clenching her fists and making real nasty faces. She was red [. . .] Wendy kept getting louder and louder, and Theresa had asked her to calm down" (Tr. 239). Panzarella failed to mention in her prior testimony that Geaslin allegedly lunged toward Pelo. This significant omission from her prior testimony clearly undermines Panzarella's testimony.

[22] No representatives from the Union's Executive Committee testified to explain why they declined to arbitrate Geaslin's grievance. The Executive Committee does not inform the member or her union representative why they decline to take a grievance to arbitration (Tr. 177–178).

[23] Respondent, in its brief, argues that "attached" to Craine's Board affidavit were notes belonging to another union representative who attended the Step 2 grievance meeting, and Respondent should have been able to review those notes (R. Br. at 15, fn. 12). I disagree. The union representative to whom these alleged notes belong to did not testify, and Craine's affidavit stated, "I provided the notes taken by the Union representative" to the General Counsel (Tr. 169). These notes cannot be considered a prior statement given by Craine, and thus would not need to be disclosed by the General Counsel to Respondent. See Board Rule Sec. 102.118.

for the delay in moving to amend, and (3) whether the matter was fully litigated.

Motion to Amend the Complaint: Make-Whole Remedy

With regard to the make-whole remedy, the General Counsel requests Respondent to reimburse Geaslin for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). Upon notice of the intent to amend the complaint at the hearing with this specific remedy, Respondent submitted a subpoena duces tecum to the Charging Party essentially requesting evidence of any work-related search expenses. In response, the General Counsel filed a petition to revoke. At the hearing, I granted the General Counsel's motion to amend the complaint and granted the petition to revoke (Tr. 12–18).

Respondent argues that it was surprised by the amendment, and needed the subpoenaed documents to fully litigate the matter. The General Counsel argued in its brief as to why these expenses should be reimbursed, but Respondent failed to address in its brief, despite my invitation to do so, why these expenses should not be authorized despite its objection to the amendment of the complaint (Tr. 18). Instead Respondent focused on my denial of its subpoena duces tecum. Respondent argues that to determine whether such a remedy is warranted, it needs the amount of the interim earnings and Geaslin's efforts to seek interim employment (R. Br. at 51). I disagree. The issue of what specific expenses were actually incurred by Geaslin should be addressed during the compliance stage of these proceedings, and not before, if such a remedy is authorized. Hence, I granted the General Counsel's petition to revoke. Respondent's objection to the amendment and my subsequent granting of the motion to amend the complaint opened the door for Respondent to argue in its posthearing brief why the remedy is not appropriate. Rather than argues these merits, Respondent essentially argues that it cannot make an argument because it does not know *how much* these expenses are—Respondent misses the point. See *Katch Kan USA, LLC*, 362 NLRB 1324, 1324 fn. 2 (2015) (Board declines to order relief of all search-for-work and work-related expenses because the parties did not fully brief these issues).

Reviewing the General Counsel's arguments on this issue, I believe that the General Counsel raises strong arguments as to why these work-related search expenses should be included as part of a make whole remedy (GC Br. at 41–44). Similar to the Board's actions in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101, 103 (2014), the General Counsel argues that the Board should revise the existing rule regarding search-for-work and work-related expenses to ensure that "victims of unlawful conduct are actually made whole." The General Counsel further states, "these expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged in these amounts," citing *Kentucky River Medical Center*, 356 NLRB 6, 6 (2010). However, the revision of this remedy must come from the Board, and accordingly, I decline to include the requested remedy in my recommended order. See also *East Market Restaurant, Inc.*, 362 NLRB 1189, 1192 fn. 5 (2015)

Motion to Amend the Complaint: Alleged Interrogation

With regard to the interrogation allegation, Respondent via the first amended charge, dated August 18, 2014, was put on notice of the alleged interrogation of the Charging Party, and cannot claim lack of notice. Certainly, the General Counsel should have included this allegation in its original complaint since the amended charge included this allegation which presumably was investigated. Nevertheless, such an oversight should not preclude an amendment. Finally, contrary to Respondent's argument (R. Br. at 18), Respondent was given an opportunity to fully litigate the allegation when it cross-examined Geaslin regarding the alleged interrogation and questioned its witnesses (Tr. 68–80). See *Amalgamated Transit Local 1498 (Jefferson Partners L.P.)*, 360 NLRB 777, 778 fn. 7 (2014) (mid-hearing complaint amendment properly granted, as issue "was fully litigated from that point forward"). Hence, the amendment to the complaint is appropriate.

2. Deferral argument

Respondent contends that "this case should be deferred to the [collective bargaining agreement's] grievance and arbitration process" (R. Br. at 24–27). The General Counsel argues that deferral is not appropriate (GC Br. at 37–39). As set forth below, I find that deferral is not appropriate.

The Board in *United Technologies Corp.*, 268 NLRB 557, 558 (1984), and *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971), articulated that deferral of an unfair labor practice charge to the parties' grievance procedure under the collective-bargaining agreement is appropriate when numerous factors are present.[24] Furthermore, the burden of proof lies with the party asserting deferral which in this instant is Respondent. See *Doctors' Hospital of Michigan*, 362 NLRB 1220, 1232 (2015).

As a precondition of a *Collyer* deferral, the charging party should have the arbitral consideration of the grievance. *U.S. Postal Service*, 324 NLRB 794 (1997). In *U.S. Postal Service*, the union refused to process an employee's grievance to arbitration. The evidence failed to show that the union's refusal to arbitrate the grievance was unlawful or motivated to avoid deferral. In such a situation, deferral to arbitration is inappropriate. Likewise, the facts presented in this instance demonstrate that deferral would not be appropriate.

Here, on May 22, the Union by Craine filed a grievance re-

[24] These factors include: if the dispute arose within the confines of a long and productive collective-bargaining relationship; if there is no claim of employer animosity to employees' exercise of protected rights; if the parties' collective-bargaining agreement provides for arbitration of a very broad range of disputes; if the arbitration clause clearly encompasses the dispute at issue; if the employer asserts its willingness to utilize arbitration to resolve the dispute; and if the dispute is eminently well suited to resolution by arbitration. *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

In *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014), the Board made some modifications to the standards for deferral to arbitration, but stated that the new standard would be generally applied prospectively, and not to cases, such as this case, already pending at the time the decision was issued.

garding Geaslin's two 5-day suspensions and termination. Subsequently on October 20, the Union denied Geaslin's request to arbitrate her claim. Geaslin, who filed the May 29 unfair labor practice charge on her own behalf, did not withdraw the grievance, and in fact, appealed the decision to the Executive Board to re-evaluate its decision declining to arbitrate her grievance. The Union Executive Committee does not share the reasons behind its decision with the member or the steward, and the record only contains Craine and Geaslin's speculation as to why the Union declined to arbitrate her grievance. Geaslin has exhausted the grievance procedures. Geaslin does not have the power to arbitrate her own grievance, and I cannot compel the Union, who is not a party to these proceedings, to arbitrate Geaslin's grievance. Hence, deferral to arbitration is inappropriate.

Respondent argues that once the Union filed the grievance on behalf of Geaslin, Geaslin and the General Counsel should be precluded from proceeding with this Board case. Despite the cases cited by Respondent, these cases can be distinguished from the facts presented here. In *General Dynamics Corp.*, 271 NLRB 187 (1984), a charging party filed grievances over his suspensions in accordance with his collective-bargaining agreement. However, after pursuing the grievance through four of the five grievance steps but prior to arbitration, the charging party *voluntarily* withdrew the grievance and filed an unfair labor practice. The Board concluded that deferral was appropriate under *United Technologies* because there was no showing that the grievance-arbitration procedure was unfair or would produce a result repugnant to the Act and that to permit withdrawal from the grievance procedure would be contrary to *United Technologies.*

The situation presented here is directly on point with the Board's decision in *U.S. Postal Service*. Thus, I decline to defer this matter to arbitration.

B. Witness Credibility

As often happens in these cases, the testimony of the various witnesses differed as to what happened and what was said. The statement of facts is a compilation of credible and uncontradicted testimony. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of event, particularly when the witness is the party's agent). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

Along with my credibility findings set forth above in the findings of fact, I found the testimony of Geaslin and Craine to be mostly credible despite a few minor contradictions. Despite Respondent's rigorous cross-examination, Geaslin consistently testified that she attempted to bag groceries but could not do so since Pelo told her to come back and talk to her. Furthermore, I credit Geaslin's testimony as to Pelo approaching her questioning if she complained to the Union about sampling bakery items. Geaslin's version of events leading up to the question posed by Pelo was corroborated by Panzarella's testimony; it is more likely than not that Pelo approached her with such as question. I also credit Geaslin's testimony as to her behavior and demeanor during the May 9 and 14 meetings with Pelo. Although Pelo's version of events during the May 14 meeting was corroborated by Panzarella and Barbos, I decline to credit the testimony of Pelo, Panzarella, and Barbos. Most significantly, if Geaslin posed such an imposing concern as expressed by all three managers, it seems nonsensical that they did not attempt to have Geaslin escorted from the premises or even to have security personnel attend the May 21 termination meeting. As such, I credit Geaslin's testimony.

Craine related the facts accurately, logically and to the best of his ability to do so. Craine's testimony was not exaggerated. Craine corroborated Geaslin's testimony regarding her behavior and demeanor during the May 14 meeting. Craine offered that Geaslin's voice was getting louder and she was interrupting Pelo but that her facial expressions were mild compared to Pelo's over-the-top reaction. Thus, Craine testified without a hint of bias, and I credit most of his testimony.

Eastburn testified sincerely but could not recall significant details on which she was questioned. Thus, I decline to rely completely upon Eastburn's testimony except when it was corroborated by her statement. Significantly, Eastburn did not recall if Geaslin agreed or disagreed to bag the groceries, and her contemporaneous statement is silent on this critical issue.

In contrast, I cannot rely on most, if not all, of the testimony provided by Pelo, Panzarella and Barbos. Their testimony seemed generally unreliable and inconsistent with the details of the events. Pelo claims that Geaslin refused to bag the groceries. However, Eastburn could not recall whether Geaslin actually refused and Barbos only heard the beginning of the conversation. Furthermore, Geaslin's prior behavior of questioning her duties but ultimately performing those duties supports her version of events. Panzarella's testimony regarding Geaslin's behavior during the May 14 meeting was undermined by her Colorado Department of Labor and Employment hearing testimony given closer in time to the May incident where she failed to mention that Geaslin allegedly lunged at Pelo.

C. Geaslin Engaged in Protected, Concerted Activity

Before discussing whether Respondent violated the Act when allegedly interrogating, twice suspending and terminating Geaslin, I must first address the issue of whether Geaslin engaged in protected concerted activity when she questioned in March whether she should be sampling King Sooper's bakery products and complained about having to perform work for the bakery department at Respondent, and when she questioned in May whether she should be bagging groceries instead of taking her lunchbreak. Respondent argues that Geaslin's questioning

in May was personal and individual, and the fact that the Union never filed a grievance on her behalf supporting her interpretation of the collective-bargaining agreement demonstrates that her "protest" was not valid (R. Br. at 36–43).[25] I disagree with Respondent's argument; under Board precedent, Geaslin engaged in protected concerted activity in March and May.

Section 7 of the Act protects the right of employees to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection. For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The statute requires the activities under consideration to be "concerted" before they can be "protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). The Board has held that 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 I*, supra; *Meyers II*, supra. Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, supra at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986), enfd. 833 F.2d 1012 (6th Cir. 1987); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995). In certain circumstances, the Board had found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *Plumbers Local 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations, Inc.*, 344 NLRB 191, 196 (2005). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

Geaslin engaged in protected concerted activity numerous times from March to May when she was terminated. In March, Geaslin engaged in protected concerted activity when she complained to a coworker about Respondent having the Starbucks' baristas perform bakery duties rather than their own duties, and when she initially refused to sample King Sooper's bakery products, complaining to the Assistant Manager that the Starbucks' employees had a difficult time performing the duties assigned to them as Starbucks' baristas. When Geaslin complained, she spoke as if she were speaking on behalf of Respondent's employees who work in Starbucks. She used the terms such as "we" and "our" when complaining to Jackson, who is a coworker, and Panzarella. Furthermore, although unbeknownst to her, Geaslin actually complained to the Union. Thus, Geaslin engaged in protected concerted activity since she sought group action, even if her coworkers were not aware of it, to change working conditions.

When an employee makes an attempt to enforce a collective-bargaining agreement or exercise a right established by the collective-bargaining agreement, she is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). The assertion of such a right "is an extension of the concerted action that produced the agreement," and thus a single employee's invocation of that right generally affects all the employees covered by that agreement negotiated on their behalf. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) (endorsing Board's view that employee's refusal to perform work as ordered (driving a truck in this instance) because of his honest and reasonable invocation of a contractual right is protected and concerted activity). Thus in May, Geaslin engaged in protected concerted activity when she asserted her contractual rights as to whether she should be bagging groceries and also when she could take her lunchbreak, regardless of whether she was correct or incorrect in the basis for her assertion. See *Tillford Contractors*, 317 NLRB 68, 69 (1995) (employer unlawfully discharged union steward who argued that the presence of another employee on the jobsite violated the collective-bargaining agreement); *Kingsbury, Inc.*, 355 NLRB 1195 at 1204 (2010) ("It is beyond cavil that an honest and reasonable assertion of collectively bargained rights—even if . . . it is incorrect—is protected and concerted activity"). The complaint raised by Geaslin is considered to be grievances within the contract that affects all employees in the unit, and thus constitutes concerted activity protected by the Act.

Respondent argues that on May 9 on the store floor since Geaslin failed to use the term "contract" or "collective bargaining agreement," she did not assert a contractual right (R. Br. at 40). Even though Geaslin did not state those exact terms, when she questioned whether she should be performing bagging duties (instead of taking her lunch at that time) because she belonged to a different bargaining unit or "different Union," Geaslin asserted rights under her collective-bargaining agreement. Moreover, Geaslin explained as such in the subsequent meetings with Pelo. Thus, Geaslin's actions in May can only be considered protected concerted activity.

The Act protects an employee's right to protest a contractual violation so long as this action is reasonably directed toward enforcement of a collectively bargained right. See *Francis Building Corp.*, 327 NLRB 485 (1998). Craine testified in support of Geaslin's interpretation that although the employees at Respondent's store are represented by the Union, the various

[25] Neither Respondent nor the General Counsel address the issue of whether Geaslin engaged in protected concerted activity in March. As a preliminary step to making a determination on the alleged March interrogation, I must make a determination as to whether Geaslin engaged in protected concerted activity.

collective-bargaining agreements cover the work they are to perform. These contracts, specifically at article 1 of the meat contract and article 2 of the retail contract, do not preclude performance of other duties, but make clear what work the employees in each contract should cover. Craine also credibly testified that Pelo admitted that the Starbucks' employees should not be bagging groceries but she needed assistance on May 9. Eastburn credibly testified that it was unusual for a Starbucks' employee to be asked to bag groceries. As supported by the credible testimony of Craine and Eastburn, Geaslin asserted an honest and reasonable belief that the collective-bargaining agreement precluded her from performing bagging duties. It is irrelevant that the Union has yet to file a grievance over the assignment of duties as Geaslin protested.

Furthermore, at the May 14 meeting, Geaslin continued to assert her contractual rights when she insisted that she agreed to bag groceries and merely questioned whether such an assignment was appropriate under the contract. I agree with the General Counsel that the May 14 meeting also constitutes a "grievance" meeting since Geaslin and her representative met with Respondent's managers to discuss her discipline from the week prior. Furthermore, the May 21 meeting was considered a first step grievance meeting under the meat contract. Thus, both meetings constitute protected concerted activity under the Act.

In support of its argument that Geaslin was not engaged in protected concerted activity Respondent cites to *ABF Freight Systems*, 271 NLRB 35 (1984).[26] In *ABF Freight Systems*, a truck driver had a history of rejecting trucks to drive for alleged safety or equipment violations four times more than any other driver. Thus the company decided to send all the truck driver's trucks to be driven to the auto shop for inspection before being assigned to him. Even after these inspections and subsequent inspections, the truck driver refused to drive. The company discharged the truck driver. The Board held that the evidence, taken as a whole, indicates that the truck driver did not act reasonably and honestly when invoking a contractual right but was "obstructively raising petty and/or unfounded complaints." *ABF Freight Systems*, supra, at 37. The truck driver's opinion was contrary to the opinion of others including other drivers, mechanics and the Union's business agent. Thus, the truck driver's refusal to drive was neither concerted nor protected under the Act.

The facts set forth in this case do not mirror the facts found in *ABF Freight Systems*. Geaslin raised the issue of whether certain duties should be performed by baristas in the Starbucks two times in March and one time in May. The evidence does not show that Geaslin is a chronic complainer as the truck driver in *ABF Freight Systems*. Rather Geaslin raised her questions but ultimately performed or attempted to perform the tasks. As explained previously, Geaslin's belief was also supported by several other employees as well as Pelo based on Craine's credited testimony.

In sum, I agree with the General Counsel that all times at issue in March and May, Geaslin engaged in concerted activity protected by the Act.

D. Pelo Interrogated Geaslin in March 2014

The General Counsel alleges that in March Pelo interrogated Geaslin about speaking to the Union when she complained about having to sample King Soopers' bakery items thereby violating Section 8(a)(1) of the Act (GC Br. at 17–18). Respondent disagrees, alleging that Pelo never questioned Geaslin about going to the Union, and even if it were determined that Pelo questioned Geaslin in such manner, this interrogation was not improper (R. Br. at 48–50).

Questioning of employees is not automatically unlawful. The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (the Board set forth a test for examining whether an interrogation is unlawful); *Stoody Co.*, 320 NLRB 18, 18 (1995) (the Board considers background, nature of information sought, and method of interrogation). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The Board seeks to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 941 (2000). The Board has also found that questioning an employee about her protected concerted activity may constitute an unlawful interrogation. See *Century Restaurant & Buffet, Inc.*, 358 NLRB 143, 170.

As set forth in the findings of facts and credibility determination, Pelo approached and questioned Geaslin, perhaps rhetorically, on whether she complained to the Union about being required to sample bakery items for Respondent. Geaslin legitimately denied complaining to the Union because she did not realize that Jackson was a union steward. However, during the conversation with Pelo, when Geaslin denied complaining to the Union, Pelo told her she was not telling the truth, and expressed her displeasure that Geaslin spoke to the Union. How Geaslin felt in response to this question by Pelo is irrelevant. Rather objectively, would such a question restrain an employee from pursuing her Section 7 rights, which in this case are to seek union assistance for workplace and contractual questions.

I find that Pelo unlawfully interrogated Geaslin when she questioned whether she went to the Union. Pelo's question, even in isolation, was unlawful since she told Geaslin she was displeased that she went to the Union. Moreover, Pelo knew that Geaslin complained to Jackson so asking Geaslin whether she went to the Union had no other intention but to make Geaslin think twice about complaining to the Union. The context in which this question was asked further supports the coercive nature of Pelo's question. In March, Geaslin complained to her coworker about the inability to manage the workload in

[26] Respondent also argues that my decision in *SB Tolleson Lodging, LLC*, 2015 WL 1539767 (April 7, 2015), parallels the facts in this case. In *SB Tolleson*, which has no precedential value since it was not appealed to the Board, the discriminatee complained about how her manager treated her. The discriminatee's complaint focused solely on herself as I found. Thus, the facts are not similar.

the Starbucks' kiosk while being asked to perform work for the bakery department. That same month, it appears that Panzarella asked Geaslin to sample bakery products, and she initially refused alleging the same workload problem. Thus during the month of March, Geaslin actively questioned the propriety of such duties, and complained to her coworker who was also union steward. Eventually, Pelo learned of Geaslin's questioning when Panzarella told her that Jackson approached her to discuss the issue of sampling bakery items.

Pelo's question to Geaslin of whether she complained to the Union about sampling the bakery items, in isolation and with such context, is unlawful. Under the totality of the circumstances in this case, Pelo's conduct was coercive and sought information from Geaslin about her protected concerted activity. Hence, I find that Respondent violated Section 8(a)(1) of the Act.

E. Respondent Discriminatorily Twice Suspended and Terminated Geaslin

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended Geaslin for 5 days and when it terminated her after she asserted her rights to enforce the collective-bargaining agreement. Respondent argues that Geaslin's behavior lost the protection of the Act, and Geaslin was terminated for insubordination, not for any alleged protected concerted activity. As set forth below, I find that Geaslin was terminated for engaging in protected concerted activity, and that her actions on May 9 and 14 did not lose the protection of the Act.

An employee's discipline violates Section 8(a)(1) of the Act, without regard to an employer's motive, and without regard to a showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). Furthermore, when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford Hotel, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002).

In this case, the credited evidence shows that around the time Pelo called for assistance for bagging groceries on May 9, Geaslin left the Starbucks' kiosk to take her lunchbreak, albeit later than the time period stated in the collective-bargaining agreement. Despite seeking to take her lunchbreak later than the middle of her shift (for which she had been previously disciplined), Geaslin sought to take a lunchbreak before the end of her shift (for which she had been previously disciplined). When Geaslin reached Pelo, a disagreement ensued between the two. Pelo needed Geaslin to bag groceries before taking her lunchbreak, and Geaslin questioned the propriety of such a task. Geaslin and Pelo continued to disagree briefly, and then Geaslin turned toward the check stands to bag groceries. As she turned and walked toward the check stands, Geaslin raised her arms in the air in frustration and said that all she was asking was about her lunch. Pelo then called Geaslin back to talk with her, before Geaslin began bagging groceries. Both Pelo and Geaslin's voices were raised and loud enough such that Eastburn could hear them talking over the customers gathered to check out of the store.

Pelo and Geaslin, along with Eastburn who witnessed a portion of the exchange, continued the discussion in the manager's office. Pelo accused Geaslin of refusing to bag groceries, and Geaslin consistently stated that she did not refuse to bag groceries but merely inquired as to whether the collective-bargaining agreement permitted her to perform such a task. Both Pelo and Geaslin's voices were raised, and Geaslin admitted to being agitated. After Pelo suspended Geaslin for 5 days, Geaslin, in an expression of frustration, mimicked a baby's cry out loud. Overall, as set forth above, Geaslin credibly attempted to bag groceries but was thwarted in her attempt when Pelo called her back to continue the discussion after Geaslin raised her arms in the air in frustration. It is true that Geaslin did not verbally agree to bag groceries, but she also did not refuse the task. Geaslin's movement toward the check stands shows that she sought to perform the task Pelo asked her to do.

Geaslin's actions on May 9 are similar to the events which occurred in March. At that time, Panzarella asked Geaslin to sample Respondent's bakery items. Geaslin initially refused, questioning why she should perform the task requested when she had her own Starbucks' duties to perform. Geaslin eventually sampled the bakery items. At that time, Panzarella did not discipline Geaslin for initially refusing. Likewise, it is unlikely that Geaslin refused Pelo's directive in May. Thus, I find that Geaslin was suspended on May 9 for asserting her contractual rights.

Thereafter, during the May 14 meeting, Geaslin along with Craine continued to disagree with Pelo's version of events on May 9. Geaslin insisted that she tried to bag groceries but could not when Pelo called her back over to talk with her. Pelo disagreed with Geaslin's version of events. Eventually, Pelo suspended and terminated Geaslin for "gross misconduct" during the May 14 meeting. Geaslin had a short history of questioning the legality or appropriateness of performing certain duties but never refused to perform those duties. Pelo punished her for questioning whether the contract permitted such action and when Geaslin would not acquiesce in the manner she felt appropriate (being "obstinate" as stated in the termination paperwork) she suspended and terminated Geaslin. The events of the May 14 meeting are inextricably intertwined with the events of May 9. Thus, I find that Pelo suspended and terminated Geaslin during the May 14 and 21 meeting for asserting her contractual rights.

Respondent discharged Geaslin for "gross misconduct" or insubordination. However, the Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and defiant. *Goya Foods, Inc.*, 356 NLRB 476, 478 (2011), citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992). In *Goya Foods*, an employee who initially refused a supervisor's instruction to punch out and go home, but then complied, was found to have engaged in disrespectful, rude, and defiant behavior, and thus, to fall under the Act's protection. Id. Similarly, Geaslin initially disagreed with Pelo's assignment of the task of bagging groceries but then attempted to perform the task

assigned.[27] In subsequent meetings, Geaslin continued to disagree with Pelo's characterization of events on May 9. The credited evidence shows that neither on the store floor on May 9 nor in the meetings on May 9 and 14 in the management office did Geaslin yell, use profanity or utter threats. Thus, I find that Geaslin's behavior was not truly insubordinate and that her initial disagreement to the task of bagging groceries did not remove her from the Act's protection.

Where, as here, the conduct arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other grounds sub nom. *Media General Operations, Inc., v. NLRB*, 560 F.3d 181 (4th Cir. 2009). However, the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems, Inc.*, supra at 837. "[T]here is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996).

An employees' "right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious." *Coors Container Co.*, 238 NLRB 1312, 1320 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980). In order for an employee engaged in such activity to forfeit her Section 7 protection her misconduct must be so "flagrant, violent, or extreme" as to render her unfit for further service. *United Cable Television Corp.*, 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). The Board will not find that an employee's "disrespectful, rude, and defiant demeanor and the use of a vulgar word" loses the protected of the Act while engaged in concerted activity despite the employer's characterization of the employee's conduct as "insubordinate, belligerent, and threatening." *Severance Tool Industries*, 301 NLRB at 1170 (1991).

To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors which must be carefully balanced: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979).[28] Contrary to Respondent's contention that Geaslin's behavior lost the protection of the Act, I find that the *Atlantic Steel* factors weigh in favor of Geaslin not forfeiting protection of the Act.

(1) The place of the discussion

The first factor, the place of the discussion, ultimately favors protection in the circumstances of this case. On May 9 the discussion between Pelo and Geaslin occurred on the store floor and the manager's office. First, they began their dispute on the busy store floor; although Geaslin raised her voice, she did not yell. Furthermore, there is no evidence that there were any customer complaints. However, Eastburn testified that the dispute was at a sufficient volume that she could hear both Pelo and Geaslin. This portion of the discussion was not private, which could weigh against protection. Compare *Goya Foods of Florida*, 347 NLRB 1118 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (Board upheld administrative law judge decision finding that less than 1 minute of loud shouting by union leaders in a grocery store was not misconduct so egregious to lose

[27] Respondent argues that Geaslin violated the meat contract, Art. 44, Sec. 121, when she engaged in a work stoppage by refusing to bag groceries (R. Br. at 35–36). As established by the credited evidence, Geaslin did not refuse to bag groceries. Geaslin attempted to bag the groceries but before she could begin, the task was called back to talk with Pelo. Even if Geaslin's action of initially questioning whether she should be bagging groceries, rather than taking her overdue lunch, is considered a work stoppage, the Board has held that on-the-job work stoppages of significantly longer duration remain protected. *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101 (2011), citing *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 202 fn. 8, and 11 (2009), adopted by 355 NLRB 602 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with hotel's operations); *Goya Foods*, supra, 356 NLRB 476, 478 (after only a few minutes employee followed supervisor's instruction to punch out and go home). Thus, Geaslin's conduct remains protected by the Act.

[28] Respondent provides an alternate analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, the *Wright Line* analysis is not appropriate in this case. Respondent suspended and terminated Geaslin for "gross misconduct" or insubordination for her behavior during the May 14 meeting after she questioned her duties under her contract on May 9. Thus, Geaslin's suspensions and termination are inextricably intertwined with her engagement in protected concerted activity, and a *Wright Line* analysis is inapplicable. See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (dual-motive analysis inappropriate where there was a causal connection between alleged protected activity and resulting discipline). Even under the burden-shifting framework of *Wright Line*, Respondent's suspensions and termination of Geaslin violates the Act. The General Counsel has met her initial burden under the *Wright Line* test. As set forth above, Geaslin engaged in protected and concerted activity, and Pelo was well aware of such activity (i.e., when Geaslin questioned whether bagging duties were appropriate for her to perform instead of taking her lunchbreak). Thus, the General Counsel has established that Geaslin engaged in protected concerted activity, and Respondent was aware of such. As for motivation, Respondent suspended Geaslin for refusing to bag groceries. The credited evidence shows Geaslin did not refuse to bag groceries but rather questioned the propriety of such a task. At the follow up meeting, Pelo suspended Geaslin again for her conduct and behavior during the May 14 meeting when Geaslin insisted she tried to perform the task. Subsequently, Pelo terminated Geaslin for her behavior during the May 14 meeting. Pelo previously confronted Geaslin about speaking to the Union about performing tasks she did not feel was appropriate. Thus, although Pelo did not initially seek to terminate Geaslin, Pelo did not appreciate the vigor and obstinance with which Geaslin defended herself. Thus, Pelo's motivation to twice suspend and terminate Geaslin was due to her protected concerted activity. The General Counsel has met its initial burden of persuasion under *Wright Line*. Respondent failed to sustain its burden of proof by failing to provide any evidence, other than anecdotal evidence that other employees have been suspended or terminated for engaging in similar conduct absent protected concerted activity. Thus, even under right *Wright Line*, Respondent illegally suspended and terminated Geaslin.

the protection of the Act). However, before the discussion became noticeable to the customers and other employees, Geaslin, not Pelo, suggested they continue their discussion in the manager's office. Thereafter, Geaslin and Pelo, along with Eastburn who was asked to accompany them by Pelo, continued their discussion in the manager's office. This portion of the discussion was private, out of the earshot of employees (other than Eastburn who was invited by Pelo) and customers. Thus, this portion of the discussion weighs in favor of protection.

The same can be said for the meeting on May 14. That meeting occurred in the manager's office with the presence of Pelo and two other managers, who are not considered employees under the Act, along with Geaslin and Craine. There is no evidence that anyone else heard the discussion, and even when Craine took Geaslin to the break room, there is no evidence that Geaslin and Craine's discussion was overheard by other employees. Thus, overall, this factor favors protection under the Act.

Respondent argues that after Geaslin was suspended on May 9, she mocked Pelo's authority by mimicking a crying baby "as she walked down the hall" thereby causing others to potentially hear her (R. Br at 28). Respondent also argues that because Geaslin acted in an insubordinate manner in front of Eastburn and the other managers, this factor weighs in favor of losing protection under the Act. I do not agree with Respondent's argument. First, even if other employees heard Geaslin's mimicking baby cry, she had already been suspended, and her termination was based on her "gross misconduct" during the May 14 meeting, not her conduct during the May 9 meeting. Furthermore, *Atlantic Steel* and its progeny focus, in part, on whether other employees heard and observed the alleged inappropriate conduct. Such conduct when observed could affect workplace discipline or undermine Pelo's authority. Here, Eastburn and the two managers observed the conduct during a meeting in the manager's office to discuss whether Geaslin refused a direct order and to discuss that incident. The circumstances surrounding such a situation would be reasonably contentious, and these individuals were there as witnesses, not coworkers merely observing.

Respondent cites to another non-precedential decision to support its decision. In *King Soopers, Inc.*, 2001 WL 1598704 (2001), an administrative law judge held that under the factual scenario presented the employee's conduct which occurred in the area of the check stands and could have possibly been heard by customers was an *Atlantic Steel* factor which weighed against protection. In that case, the entire conduct in question occurred on the store floor rather than in this instance where Geaslin and Pelo spent only a short time on the store floor engaged in disagreement. They then moved to the manager's office where the May 9 meeting was held as well as the subsequent meeting. Thus, the factual scenario presented here is not analogous to that found in *King Soopers*, and does not support a loss of protection of the Act.

In sum, I find this factor weighs in favor of protection for Geaslin's conduct on May 9 and 14.

(2) The subject matter of the discussion

The second factor, the subject matter of the discussion, favors protection. At the heart of the May 9 incident on the store floor and the May 9 meeting in the manager's office was Geaslin's assertion of her collective-bargaining rights. Geaslin reasonably interpreted the contract which applied to her as limiting her duties to her work in the Starbucks' kiosk. Ultimately, the credited evidence shows that Geaslin attempted to bag groceries despite her initial disagreement. The May 14 meeting was a continuation of the discussion on May 9. Pelo sought to ensure that Geaslin understood that she needed to perform the duties assigned to her, and Geaslin disagreed with Pelo's characterization of the events on May 9. See *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969), enfd. 430 F.2d 724 (5th Cir. 1970) (during a grievance meeting, the veracity of management was at the primary issue and as such frank and not always complimentary views must be expected and permitted), citing *Bettcher Manufacturing Corp.*, 76 NLRB 526, 527 (1948). Thus, Geaslin's expression of her opinion on her duties per her interpretation of the collective-bargaining agreement is a fundamental Section 7 right.

Although Respondent disagrees with Geaslin's interpretation of the contract, it may not rely upon the Union's lack of grievance filing on the subject matter as a valid excuse to discipline Geaslin for asserting her Section 7 rights. Respondent also argues that Geaslin did not discuss the basis for her belief that the contract precluded her from bagging groceries. This argument has no basis; during the May 9 and 14 meetings, Geaslin initially questioned the legitimacy of the task but then sought to perform the tasks. The meetings were not to discuss the validity of Geaslin's claim under the collective-bargaining agreement, but the validity of Geaslin and Pelo's claims about the bagging duties Geaslin was asked to perform. Respondent also appears to claim that Geaslin's actions after she was suspended on May 9, when she mockingly cried like a baby, was not protected conduct. This argument is irrelevant since Pelo never claimed to discipline Geaslin for her immediate behavior after she was suspended on May 9.

Overall, the nature of the subject matter weighs in favor of protection of Geaslin's behavior and conduct on May 9 and 14.

(3) The nature of the outburst

The third factor, the nature of the outburst, favors protection as well. During May 9 discussion on the store floor, Geaslin did not use intemperate language, profanity, or threats but admitted to raising her voice. Thereafter, during the May 9 meeting in the manager's office, Geaslin's voice was raised, and she was agitated but again she did not yell, use profanity or threaten Pelo. Furthermore, during the May 14 meeting, it appears Geaslin became more agitated at this meeting than the events of May 9. During this meeting, the credited evidence shows that after Pelo began the meeting by insisting that Geaslin refused to bag groceries, Geaslin raised her voice, raised her arms in the air, and made facial expressions of disbelief towards Pelo. As the meeting progressed, Geaslin became more agitated with her tone of voice becoming louder; Geaslin also gestured frequently with her hands but was not physically leaning toward Pelo. "The Board has repeatedly held that merely speaking loudly or

raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection." *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101; see *Goya Foods*, 356 NLRB 476, 478. Likewise, Geaslin's conduct on May 9 and 14 do not forfeit the protection of the Act.

In sharp contrast, Pelo, Panzarella and Barbos all testified, with variations, that Geaslin was making faces at Pelo and lunging at her with her face turning red, clenching her teeth. I have discredited the testimony of Pelo, Panzarella and Barbos on the issue of Geaslin's behavior during the May 14 meeting for the reasons explained above, but even crediting such testimony, Geaslin's behavior would not lose the protection of the Act. The Board has held that an employee's deliberate physical contact to restrain a manager during the course of protected concerted activity loses the protection of the Act. See *Crowne Plaza LaGuardia*, supra, at 1101 (employees lose protection of the Act when attempting to restrain a manager). In contrast, in *Kiewitt Power Constructors Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011), an employee did not lose protection of the Act despite angrily telling his supervisor that things could get "ugly" and he "better bring [his] boxing gloves." Geaslin's behavior falls well short of these two examples, even crediting the testimony of Respondent's witnesses. Furthermore, I find it significant that despite Geaslin's alleged behavior, none of the managers called security to escort Geaslin from the office on May 14 or on 21 when they gave her the termination paperwork.[29]

The Board has generally found that an employee's behavior loses the protection of the Act when engaged in egregious behavior, not the "mild" behavior displayed by Geaslin. Compare, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee used profanity repeatedly and loudly before coworkers and other witnesses, refused to move the discussion to a private location, threatened the supervisor and refused to follow orders, losing protection of the Act); *Starbucks Coffee Co.*, 354 NLRB 876 (2009) (employee participated with group of people following employer's regional vice president at night after a union rally, shouting threats, taunts and profane comments at him, losing protection of the Act), adopted in 355 NLRB 636 (2010) enf. denied in part, and remanded on other grounds 679 F.3d 70 (2d Cir. 2012) decision on remand *Starbucks Coffee* Co., 360 NLRB 1168 (2014).

Respondent cites two cases in support of its position that Geaslin's conduct under this *Atlantic Steel* factor loses the protection of the Act. Neither case supports Respondent's argument. In *Mead Corp.*, 331 NLRB 509 (2000), the Board upheld an administrative law judge decision finding that a union steward lost the protection of the Act when, in the presence of another manager and three employees, a union steward verbally attacked the supervisor with personal remarks and refused to leave the meeting. Geaslin's conduct does not compare to the conduct by the union steward in *Mead Corp.*, and is distinguishable. For example, Geaslin did not verbally attack Pelo; she simply insisted that she attempted to bag groceries and became agitated and visibly upset when Pelo continued to mislead the participants in the room.

Respondent also cites to *Richmond District Neighborhood Center*, 361 NLRB 833 (2014). Again, that decision is distinguishable. In *Richmond District Neighborhood Center*, the Board found that the employer did not violation the Act when it rescinded two employees' rehire letters after discovering a Facebook conversation between the two employees which contained an extensive and detailed discussion concerning advocacy of insubordination. The Board, which did not decide the appropriateness of the *Atlantic Steel* test for analyzing a private Facebook conversation, determined that the "pervasive advocacy of insubordination in the Facebook posts, comprise of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection." Id. at 835. The Board did not rely on employees' use of profanity or disparaging remarks about the employer's administrative personnel and managers. In contrast, Geaslin's questioning on May 9 of the bagging task, and her subsequent disagreement with Pelo's version of events do not compare with the actions of the two employees in *Richmond District Neighborhood Center*. Geaslin did not look to create a work stoppage, undermine leadership, neglect her duties or jeopardize the future of Store #1. Geaslin did not verbally attack any of her managers either on the store floor or in the privacy of the manager's office. She merely questioned the propriety of the task, and then sought to defend herself when faced with discipline. Thus, Geaslin's behavior on May 9 and 14 weighs in favor of protection under the Act.

(4) Provocation by Respondent

The fourth factor, provocation by Respondent, weighs in favor of protection under the Act. Here, Pelo continued to misrepresent Geaslin's actions on May 9. In response, Geaslin disagreed with Pelo, explaining her attempt to bag the groceries, and explaining that she only questioned whether such as task was appropriate considering her "union." Pelo, not approving of Geaslin's explanation, suspended her that day.

The following week, Pelo testified credibly that she had no intention of terminating Geaslin but for her behavior during the May 14 meeting. Again, during this meeting, Pelo insisted that Geaslin refused to bag groceries, and that Pelo must follow what she directs since she is her supervisor. Geaslin, surprised by Pelo's version of events on May 9, became visibly upset, making facial expressions; Geaslin interrupted Pelo and became agitated. Geaslin insisted that she attempted to bag groceries but did not actual bag the groceries because Pelo called her back to speak with her. It is clear that Pelo provoked Geaslin's outburst which stems from an assertion by Geaslin of her protected concerted rights. Thus, this factor weighs in favor of protection under the Act.

In sum, I find that Geaslin's actions on May 9 and 14 were not so opprobrious as to warrant the loss of the Act's protection. Thus, because her actions were protected on May 9 and 14, Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended and discharged Geaslin.

[29] Pelo, Panzarella, and Barbos' testimony regarding their concerns about Geaslin's behavior is not relevant. The Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB 972, 976 (2014).

CONCLUSIONS OF LAW

1. By interrogating, twice suspending, and terminating Geaslin, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating Geaslin, Respondent violated Section 8(a)(1) of the Act.

3. By suspending Geaslin on May 9, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By suspending Geaslin on May 14, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By terminating Geaslin on May 21, Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

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

Having interrogated an employee about union activity, Respondent will be ordered to cease and desist from this action.

Respondent, having discriminatorily twice suspended and terminated an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. As discussed above, the General Counsel requests that Geaslin be reimbursed for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). I cannot authorize such a remedy, such approval lays with the Board. 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), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

Respondent King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating an employee about her union activity.

(b) Suspending twice and terminating an employee because she questioned her work duties under the collective-bargaining agreement.

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 the Board's Order, offer Wendy Geaslin full reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Wendy Geaslin 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 the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and two 5-day suspensions, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge and two 5-day suspensions will not be used against her in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its Store #1 in Denver, Colorado, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 27, 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, the 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. In the event that, during the pendency of these proceedings, 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

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] 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."

former employees employed by the Respondent at any time since March 1, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director 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.