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Home Depot USA, Inc. *and* Antonio Morales Jr. Case 18–CA–273796

February 21, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, PROUTY AND WILCOX

On June 10, 2022, Administrative Law Judge Paul Bogas issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[4] The Board has long recognized that the Act's protection of concerted activities for mutual aid and protection includes efforts by employees to protest and redress racial discrimination in the workplace. See *Tanner Motor Livery, Ltd.*, 148 NLRB 1402, 1404 (1964) ("[T]he concerted activities of employees in protest of what they consider unfair hiring policies and practices are clearly within their Section 7 right 'to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .'"), affd. in relevant part 349 F.2d 1 (9th Cir. 1965). Indeed, "[i]t can hardly be argued, given the history of race relations in this country, that alleviating racial discrimination is not of interest to all employees in the workplace, irrespective of [the] race or ethnicity of the person bringing the charge." *Dearborn Big Boy No. 3, Inc.*, 328 NLRB 705, 710 fn. 33 (1999).

As explained below, this case involves protected concerted activity to protest racial injustice at the Respondent's New Brighton, Minnesota store. Among the employees involved in that activity was Antonio Morales, who (like other employees) wrote "BLM," an initialism for "Black Lives Matter," on the orange apron issued by the Respondent that customer-facing employees are required to wear while on duty.[5] Contrary to the judge, we

[1] On July 31, 2023, the Respondent filed a notice of supplemental authority bringing *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023), to the Board's attention. The General Counsel filed a response on August 10, 2023. We have accepted those submissions pursuant to *Reliant Energy*, 339 NLRB 66 (2003).

[2] The General Counsel has excepted to some of the judge's credibility determinations. 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.

[3] We adopt the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(1) by criticizing and thereby impliedly threatening employee Antonio Morales for having sent a February 17, 2021 email to assistant store manager ("ASM") Enrique Ellis urging an open discussion about racism at the New Brighton store. The judge made a credibility determination that store manager Jason Bergeland did not utter the alleged coercive threat, and, as stated above, we find no basis for disturbing the judge's credibility determinations.

The judge dismissed the complaint's allegation that the Respondent violated Sec. 8(a)(1) by directing Morales not to discuss, and to otherwise keep confidential, an ongoing investigation of alleged racist misconduct by a coworker. In dismissing this allegation, the judge found the Respondent's confidentiality instruction to be categorically lawful, citing *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019); *Watco Transloading, LLC*, 369 NLRB No. 93 (2020); and *Alcoa Corp.*, 370 NLRB No. 107 (2021). Recently, in *Stericycle, Inc*., 372 NLRB No. 113, slip op. at 11 (2023), we rejected the categorization of certain types of work rules as always lawful to maintain. In light of our decision in *Stericycle*, we shall sever and remand this issue to the judge for consideration of the effect of *Stericycle* on whether the oral confidentiality instruction is unlawful. Our dissenting colleague contends that it is unnecessary to sever and remand this complaint allegation to the judge because it allegedly presents a straightforward legal issue; he would instead issue a notice to show cause to inquire whether the parties would welcome a remand. As noted above, the judge dismissed this complaint allegation after applying *precedent that has since been overruled.* In *Stericycle* itself, under the same material circumstances, we found that a remand was appropriate to allow the judge to analyze the lawfulness of a confidentiality restriction under the new standard. We shall follow that approach here.

[4] 29 U.S.C. § 157.

[5] Morales uses they/them pronouns, and we refer to Morales accordingly. The judge chose not to use any pronouns when referring to Morales on the grounds that using they/them pronouns could be confusing in addressing whether certain activities were "concerted" for Sec. 7 purposes. The General Counsel excepts.

As a matter of federal and agency policy, the personal pronouns that individuals indicate they use should be used in decisions issued by the Board, its administrative law judges and regional directors, and in all other agency communications. See, e.g., President Biden's Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 F.R. 7023, 2021 WL 229396 (Jan. 20, 2021) ("[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation"); *Starbucks Corp.*, 372 NLRB No. 93, slip op. at 1 fn. 1 (2023) ("It is the Board's practice to refer to individuals by the personal pronouns that they indicate they use."). We have done so in this decision, and we are confident

find that the Respondent violated Section 8(a)(1) by directing Morales to remove the BLM marking, by applying its dress code and apron policy to prohibit Morales from wearing the BLM marking, and by constructively discharging Morales for declining to remove it.

FACTUAL BACKGROUND

Morales, who identifies as Hispanic, Mexican, and a person of color, was employed by the Respondent as a sales specialist in the flooring department at the Respondent's New Brighton, Minnesota store from August 2020 until February 19, 2021.[6] The store is located in a northeastern suburb of Minneapolis. From the outset of Morales' employment, flooring department employee Allison Gumm subjected customers and employees of color, including Morales, to racially discriminatory behavior.[7] On August 20, for example, Gumm erroneously attributed Morales' difficulty in registering a customer's credit card in the Respondent's computer system to Morales' entry of the relevant data in Spanish. A day later, Gumm advised Morales to watch a Black customer closely because, according to Gumm, people of Somali descent were more inclined than others to steal.

As more fully detailed in the judge's decision, Gumm's racially discriminatory conduct toward customers, Morales, and their coworkers of color persisted throughout Morales' employment by the Respondent. On numerous occasions, Morales discussed this offensive conduct with coworkers in the flooring department, including Sarah ("Sadie") Ward, Nebiy Tesfaldet, Blessing Roberts, and Jamesha Kimmons. In addition, Morales' coworkers discussed Gumm's racist conduct between and among themselves. Morales and Ward also spoke about their complaints with Carissa Simmons and Kyle Bennyhoff, who were employees in other departments. All agreed that Gumm had exhibited racial bias toward customers and fellow employees and that management should deal with her misconduct. Reflecting this consensus, the other flooring department employees even made a conscious effort to "intercept" customers of color so that they would not be subjected to Gumm's bias.

Morales and their coworkers also complained to supervisors and managers about Gumm's misconduct on at least a monthly basis. Ward and Morales spoke with their flooring department supervisor, Michelle Theis, in mid-September. Taylor Flemming, the ASM responsible for the flooring department at that time, and Jordan Meissner, a store supervisor, spoke with Ward in early October to get more details about Gumm's offenses. Morales again spoke with Theis on November 2 and met with Flemming and Theis on November 27 and December 18.

During the fall or winter, Tesfaldet and Ward also met with Flemming and Theis to report that Gumm's offenses were continuing and "getting worse." Before relaying these concerns, Tesfaldet and Ward got Morales' approval because they would be speaking on Morales' behalf. Shortly thereafter, Tesfaldet conveyed his concerns about Gumm to ASMs Suzette Johnson, Enrique Ellis, and David Stolhanske, who had replaced Flemming as the ASM responsible for the flooring department.

On February 3, Morales, Kimmons, and Roberts met with ASM Ellis to report that Gumm had photographed the three of them, without warning or permission, while they worked at the flooring department's desk. Morales also described other instances of Gumm's behavior, including her refusal to help Morales with a rug, an incident in which Gumm suddenly turned off Morales' work computer for no apparent reason, and another incident in which Tesfaldet witnessed Gumm abruptly hang up on a phone conversation with a customer of color. Also on February 3, Morales spoke with ASM Johnson about Gumm's racist misconduct and noted that coworkers Kimmons, Roberts, and Tesfaldet also had concerns about Gumm. In response, Johnson agreed that the complaints about Gumm were "very serious" and assured Morales that she would report them to "corporate HR."

The record shows that the Respondent held a documented "verbal performance discussion" with Gumm in late October, and that Gumm received a "disciplinary coaching" on December 19 and a "counseling" on February 9. Employees, however, were not aware of those interventions, seeing only that Gumm persisted in her misconduct with no evident consequences.

In February, Tesfaldet and other employees, including Ward, prepared materials for the observance of Black History Month at the New Brighton store at the Respondent's request. With Morales' help, Tesfaldet created posters depicting prominent figures in Black history and culture and hung them in the break room. Flooring department ASM Stolhanske contributed flash cards with facts about prominent Black historical figures. Shortly thereafter, unidentified persons tore down the posters, ripped up the flash cards, and threw them in the trash. Stolhanske repaired the display, and, on February 13, emailed certain managers, supervisors, and employees to inform them that the Black History Month materials had been vandalized. The

that Board personnel will be able to follow this policy in their own communications as well.

[6] All dates are between August 2020 and March 2021 unless otherwise indicated.

[7] At the hearing, many of the witnesses utilized the terms "people of color" and "customers of color" in their testimony. Additionally, as noted, Morales testified that they identified as Hispanic, Mexican, and a person of color.

email's final two sentences stated, "I will continue to replace these items through the end of B[lack]H[istory]M[onth], and would appreciate any help with keeping an eye on them. **Intolerance and disrespect will not be tolerated**." (Emphasis in original).

Morales, Kimmons, and Tesfaldet discussed the vandalism among themselves and agreed to convey their group concerns about it to Stolhanske. Morales thus told Stolhanske that, while his email was a good start, it did not go far enough. Morales emphasized that, given the severity of the vandalism, the Respondent's reaction should include "a storewide conversation" about racism so that "people of color [would] feel safe at this store." Stolhanske disagreed, replying that his brief email should suffice.

It did not. On February 17, ASM Ellis learned that the Black History Month display had been vandalized again. He promptly emailed certain store employees and supervisors, advising them of the incident and suggesting that they be "aware of the pictures" in walking to and from the time clock and break room.[8] Management did nothing more.

Morales discussed Ellis' email, separately, with coworkers Tesfaldet, Ward, and Kimmons. They agreed that management's response to the racist vandalism was lacking and that more should be done. To that end, Morales told Kimmons that Morales would draft a reply to Ellis' email about the second vandalism incident. Kimmons commented that an email was a good idea and asked Morales to let her review the draft before sending it. Morales drafted a reply email proposing that all store personnel have a broader discussion about racial issues in the New Brighton workplace. Morales shared their draft with Kimmons. She responded that it was "very well written" and encouraged Morales to send it, which they did. As emailed to Ellis, Morales' February 17 reply read as follows:

> Thank you for letting us know [about the second vandalism episode], we will keep an eye out.
>
> ***I would like to open the floor for a wider discussion if possible. I believe these actions are part of a very serious underlying issue that needs to be a store wide discussion. While email may be the easiest most responsive form of communication, I think it is crucial to have discussions as a whole with our fellow coworkers. Home Depot needs to acknowledge that these actions will not be condoned*** and that they are not a reflection of our policies. During this month of all months especially, our fellow coworkers of color need to feel the support from the store they work for. There are multiple incidents in the break room especially where certain people feel the need to express their intolerant beliefs which cause people like me to feel uncomfortable and disrespected. These actions and those words are blatant intolerance and example [sic] of hatred that is unwelcomed. I do hope that a private investigation is underway, but I believe it is important to help our fellow coworkers of color feel safer about the environment they work in starting with ***opening up this discussion in a more public manner that shows us that we are as valued as everyone else at Home Depot.***

(Emphasis added.)

Later that same afternoon (February 17), Morales was called to meet with Ellis and store manager Jason Bergeland. The stated purpose of the meeting was to talk about Morales' above-quoted request for "opening up," i.e., a storewide discussion about the racism problem. Bergeland began by stating that Morales' reply email was very well written and that he agreed with much of it. But Bergeland was plainly upset with the reply. He mistakenly thought that it had been widely distributed when, in fact, it could be read, like Ellis' email, only by those with access to "sent" emails. Bergeland admonished Morales that the Respondent "was taking care of" the vandalism incidents and that they should leave the problem to management.

Bergeland then began discussing the BLM initials on Morales' apron. This was the first time that a manager or supervisor had said anything about the BLM marking even though Morales had worn it continuously for the prior 5 months, including during numerous face-to-face meetings with supervisors. Bergeland said that the BLM initials were contrary to the dress code and apron policy's ban on "displaying [on an apron] causes or political messages unrelated to workplace matters." Thus, Bergeland stated, Morales could not return to work until they removed the BLM initials. Morales replied that they would not remove the BLM initials. Bergeland then explained that, if he allowed Morales to keep the BLM initials, he would have to let other employees wear swastikas. Morales objected to this comparison, explaining that BLM could not be compared to a swastika. Bergeland also contended that "All Lives Matter" was preferable as a slogan to "Black Lives Matter." After Morales became upset, Bergeland agreed to end the meeting.

The following day, February 18, district manager Melissa Belford and district human resources manager

[8] It appears that many rank-and-file employees did not receive the email. It was available only to those with access to "sent" email files.

Casey Whitley met with Morales via videoconference.[9] At Belford's request, Morales spent the first half of the roughly 90-minute meeting chronicling Gumm's pattern of prejudice toward Morales, other employees, and customers and recounting the two Black History Month vandalism incidents. In discussing those events, Morales emphasized how much they and other employees had done to call attention to the incidents and related their deep disappointment at management's prolonged failure to rectify those problems. In response, Belford admitted, repeatedly and emphatically, that the Respondent had failed in its duty to protect Morales and others from racist misconduct.

About midway through the meeting, Belford switched the discussion to the BLM initials on Morales' apron. Belford repeatedly informed Morales that the BLM marking violated the Respondent's dress code and that they could not work for the Respondent unless they removed the BLM marking. Like Bergeland, Belford argued that the Respondent would have to allow employees to wear swastikas if Morales and others were permitted to display BLM insignia. Morales replied that swastikas were not at all comparable to BLM markings and that the logic of Belford's argument was flawed. The following exchange ensued:

> MORALES: By allowing it [the wearing of swastikas] it gives us [the store] the image that we are, even though we are not saying we are actively supporting it, it gives us the image that we are allowing this to happen. And that to me is wrong. ***And that's why I will not be taking this [the BLM insignia] off.***
>
> BELFORD: Okay. You don't think that there's any other way that you could show your support for people of color or [***B***]***lack associates***[10] or anything like that without having the actual Black Lives Matter racial cause symbol on your apron? There's no other way that you could do that?
>
> MORALES: There's plenty of other ways, ***but this is the best way.***
>
> BELFORD: Okay. You're sure? You're sure that there's no other way that you would be willing to show your support?
>
> MORALES: There are other ways, and I will do that as well, ***but I will also do this.***
>
> BELFORD: Okay. Unfortunately, Antonio, because it's against dress code, I can't have you work in the store if you're going to have that on your apron.
>
> MORALES: Mm-hmm, that's fine.
>
> BELFORD: You know that?
>
> MORALES: Yep, I know that, and I am willing to be fired over this.
>
> BELFORD: I'm not going to fire you over that. That's not how that's going to work. You haven't done anything wrong, okay. ***Quite honestly, there's a lot of things that have not been taken care of for you that have put you in a position where I know you don't feel respected when you come to work, and that's what breaks my heart.***
>
> MORALES: Breaks mine, too.
>
> * * *
>
> BELFORD: And I don't -- I don't want you to go home for that [refusing to remove the BLM marking].
>
> MORALES: I don't either, but I don't think there's any other choice. ***It seems like no one is listening, and unfortunately --***
>
> BELFORD: Why do you say that no one's listening?
>
> MORALES: ***It's been six months, and nothing has been done.***[11]
>
> BELFORD: I -- in your particular case, I absolutely -- I don't know that it's, again, there have been some steps taken***, but I don't know that to the level that we should have because I just don't think it all came together.***
>
> MORALES: Right.
>
> BELFORD: ***And that's where we failed you. So that is absolutely true.***
>
> * * *
>
> MORALES: I said I think I'm leading a great example by refusing to take BLM from my apron. I think that is something that people need to understand. And me as a person of color, coming to you, ***having these meetings so that you guys can listen, and it doesn't seem like there's any resolution from what I can see.*** So that -- that's what I'm seeing. That's what I'm thinking about right now.

[9] Morales recorded the meeting with Belford and Whitley and a transcript of the recording was entered into evidence as General Counsel Exhibit 4. Aside from stipulated corrections to the transcript, there is no challenge to its accuracy.

[10] The Respondent refers to its employees as "associates."

[11] Morales was clearly referring here to issues of race discrimination in the Respondent's New Brighton store during Morales' 6-month tenure there, not to societal issues of systemic racism outside the workplace. District Manager Belford's response to Morales demonstrates she understood that.

> BELFORD: Sure, I get that but what you're telling me is that there's only one resolution from your perspective. The only resolution in your mind is to keep the BLM on your apron.
>
> MORALES: ***It's the one that's going to make the biggest impact, yes.***
>
> BELFORD: Okay. As opposed to coming up with a different idea or trying to come a different way to show respect to everyone but to celebrate [B]lack leaders or ***associates of color***? Like, there's no other option? That's the only option?
>
> MORALES: ***And then have it taken down, ripped apart? Because that [the Black History Month display] was an option. That was an alternative, the poster that was put up, the cards. They were torn apart. And that was an alternative, so I'm really not seeing the alternative here.***

(Emphasis added.)

As the meeting ended, Belford acknowledged that Morales was unwilling to remove the BLM protest marking from their apron. She had been equally clear that Morales could not return to work unless they did so. Hence, Belford asked Morales to consider whether they could choose other displays to put on their apron "to show your support for what is important to you but also still uphold Home Depot dress code . . . . " She also told Morales that they could leave early while they considered those options but would be paid for a full day.

Morales departed early on February 18 and took the next day off as well. After considering the quandary facing them, Morales sent a letter dated February 19 to Belford, Bergeland, and Theis. In it, Morales resigned their employment, explaining that the racial harassment and discrimination that they and their coworkers had suffered had gone on long enough and that Morales had not felt safe, supported, or heard during their employment. The letter further stated that the "injustices, micro-aggressions and blatant racism [they had] experienced will not go unnoticed." Although Morales' resignation letter did not specifically mention Belford's directive that they remove BLM from their apron, Morales testified without contradiction that Belford's directive was "an important aspect" of Morales' decision to resign. That testimony is supported by the fact that, just the day before resigning, Morales expressed their insistence on continuing to display BLM on their apron despite Belford having stated that doing so would preclude a return to work. Morales testified without contradiction that they did not mention Belford's directive in the resignation letter because they did not want to jeopardize the employment of coworkers who were then displaying BLM on their aprons.

Seven days after Morales resigned, the Respondent discharged Gumm.[12] The Respondent also, for the first time, posted copies of the dress code and apron policy throughout the store and advised all employees that displaying "BLM" insignia was contrary to the policy. As part of that effort, the Respondent directed Tesfaldet and Kimmons to remove BLM markings from their aprons, and they complied with that directive.[13]

ANALYSIS

A. Morales' Refusal to Remove a BLM Marking From Their Work Apron was Protected Concerted Activity.

Section 7 protects employees when they "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. To be protected by Section 7, employee activities must be both "concerted" and engaged in for the purpose of "mutual aid or protection." See, e.g., *Morgan Corp.*, 371 NLRB No. 142, slip op. at 2-3 (2022). "[B]oth the concertedness element and the 'mutual aid or protection' element are analyzed under an objective standard." *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014). Of course, "[t]he motive of the actor in a labor dispute must be distinguished from the purpose for his activity." Id. (quoting *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976)). "The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of 'mutual aid or protection' of employees." Id.[14]

[12] On March 1, Belford contacted Morales to inform them that Gumm had been discharged.

[13] The record shows that Tesfaldet wrote "BLM" on his apron at some point beginning in the spring or summer of 2020. Although he removed the BLM message after the Respondent's February 2021 direction, he did so expressly under protest. Kimmons also displayed the BLM message on her apron, though the record does not indicate when she first did so.

[14] Consistent with our precedent, we shall examine evidence of Morales' *purpose* in mid-February 2021 for insisting on continuing to display BLM on their work apron to determine whether that purpose relates to matters of mutual aid or protection of employees. Contrary to the dissent's assertion, we have not erroneously considered Morales' *motives*. See *Circle K Corp.*, 305 NLRB 932, 933 (1991) (finding that employees "may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one"), enfd. mem. 989 F.2d 498 (6th Cir. 1993); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 499 (2d Cir. 1967) ("Even if it were true that [the employee] was acting for his personal benefit, it is doubtful that a selfish motive negates the protection that the Act normally gives to Sec[.] 7 rights."), enfg. 157 NLRB 1295 (1966). As explained below, the record

Whether an employee's activity is concerted depends on the manner in which the employee's actions may be linked to those of their coworkers, though "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984). "Although one could interpret the phrase, 'to engage in concerted activities,' to refer to a situation in which two or more employees are working together at the same time and at the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning." Id. at 831.[15]

Under longstanding Board precedent, an employee's conduct is "concerted" when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Among other things, it "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." Id. at 887. But this definition is "by no means exhaustive and . . . a myriad of factual situations . . . arise calling for careful scrutiny of record evidence on a case-by-case basis." Id. We have recently pointed this out. See, e.g., *Miller Plastic Products, Inc.*, 372 NLRB No. 134, slip op. at 3, 5 (2023).[16]

Whether an employee's activity falls within the ambit of the mutual aid or protection clause, in turn, "focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Fresh & Easy*, 361 NLRB at 153 (emphasis in original) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

As the judge found, Morales and their coworkers engaged in protected concerted activities in October and November 2020 when they together discussed Gumm's racially discriminatory conduct toward employees and toward customers and when they brought those group

evidence establishes that an objective purpose for Morales' insistence on continuing to display BLM was to protest and draw attention to issues of race discrimination in the Respondent's New Brighton workplace.

[15] Further, as the Supreme Court explained in *NLRB v. City Disposal Systems*, the Board's construction of the term "concerted" in Sec. 7 of the Act is entitled to "considerable deference" because it implicates the Board's expertise in labor relations. Id. at 829-830 & fn. 7; see also *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 577 (7th Cir. 1983) ("We will not reposition a line drawn by the Board between protected and unprotected behavior unless the Board's line is 'illogical or arbitrary.'") (citations omitted).

[16] We reject our dissenting colleague's accusation that we have engaged in a "blatant misrepresentation of *Meyers II's* holding" by recognizing that its definition of concertedness is not exhaustive. The Board issued its decision in *Meyers II* after the District of Columbia Circuit refused to enforce the Board's prior decision in *Meyers I,* 268 NLRB 493 (1984), which held that "[i]n 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" while cautioning that this definition was "by no means exhaustive." Id. at 496–497. After the District of Columbia Circuit questioned whether the *Meyers I* definition included situations in which individual employees sought to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management, the Board assured the court in *Meyers II* that it did. But the *Meyers II* clarification, like the *Meyers I* definition itself, was not intended to set out an exhaustive definition of concerted activity, nor was such a definition needed to address the narrow issue presented in those cases: whether an employee engaged in protected concerted activity when he refused to drive an unsafe truck and reported the vehicle to state authorities.

Thus, to illustrate, neither decision addresses the principle that, as more fully discussed below, an individual employee's activities also may be concerted as a logical outgrowth of prior concerted activity – a principle that at the very least predated *Meyers II* but is not mentioned there. See, e.g., *JMC Transport*, 272 NLRB 545, 545 fn. 2 (1984), enfd. 776 F.2d 612, 617–618 (6th Cir. 1985). Notwithstanding that fact, our dissenting colleague has previously applied the logical-outgrowth precedent and does not question its validity here. See *International Brotherhood of Teamsters, Local 70 (United Parcel Service (UPS))*, 372 NLRB No. 19, slip op. at 1–2 fn. 3 (2022).

In sum, the Board made clear in both *Meyers* cases that it did not intend to exhaustively define concertedness and that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." *Meyers II*, 281 NLRB at 886; see also *Five Star Transportation, Inc. v. NLRB,* 522 F.3d 46, 51 (1st Cir. 2008) *("*The critical inquiry [for concertedness] is not whether an employee acted individually, but rather whether the employee's actions were in furtherance of a group concern."). Accordingly, any suggestion that either *Meyers I* or *Meyers II* exhaustively defines the scope of concerted activity under Sec. 7 of the Act is untenable, as is the dissent's assertion that, by recognizing as much, we have "open[ed] up a Wild West frontier of concerted activity by individual employees."

What our colleague calls a "Wild West frontier" is no more than the broad boundary of concerted activity that the *Meyers II* Board contemplated when it recognized (1) that *Meyers I* required "*some linkage to group action* in order for conduct to be deemed 'concerted' within the meaning of Sec[.] 7," 281 NLRB at 884 (emphasis added); (2) that neither decision "states that conduct engaged in by a single employee at one point in time can never constitute concerted activity within the meaning of Sec[.] 7," id. at 885; (3) that the "actions of the individual employee engaged in concerted activity might be remote in time and place from group action," id.; and (4) that "at some point the relationship between some kinds of individual conduct and collective employee action may be 'so attenuated' as not to mandate inclusion of that conduct in the 'concerted activity' clause," id. at 888.

Our decision here, of course, is entirely consistent with the holding in *Meyers II* that the employee there had *not* engaged in protected concerted activity, because the employee acted alone and there was no linkage to group action. See *Meyers I*, 268 NLRB at 498 (observing that employee "alone refused to drive the truck and trailer; he alone contacted the [state authority] after the accident; and, prior to the accident, he alone contacted the [different state] authorities" and that employee "acted solely on his own behalf").

complaints to management's attention. No party excepts to those findings. As the judge further found, Morales and their coworkers engaged in protected concerted activities in February 2021 when they discussed their concerns about the two incidents of vandalism of the Black History Month materials, criticized the manner in which the Respondent addressed that vandalism, and brought their group concerns to management. There are no exceptions to those findings either.

The judge also found that Morales had conversations with employee Ward about Gumm's behavior during the first month of Morales' employment. Although the judge did not specifically refer to it, Morales testified that they discussed Gumm's behavior and the fact that it was not getting better, and Morales and Ward decided that they should therefore bring it to management's attention. The judge did find that Morales and Ward met with Theis in her office on about September 14, 2020, to complain about Gumm's treatment of customers. The judge did not go on to address whether any of those conversations constituted protected concerted activity and the General Counsel relevantly excepts. We find merit to those exceptions.

The September 14 meeting with Theis and the prior conversations between Morales and Ward that led to that meeting plainly were concerted, inasmuch as Morales and Ward were bringing to management's attention a group complaint about Gumm. See *Miller Plastic Products, Inc*., 372 NLRB No. 134, slip op. at 3. We find that they were also for the purpose of mutual aid or protection. Gumm's mistreatment of customers of color impacted the working conditions of employees who, the record shows, took pains to "intercept" and serve those customers in order to spare them from Gumm's race-based mistreatment. See *NLRB v. Parr Lance Ambulance Service*, 723 F.2d at 578 ("Even if a health care employee phrases a complaint about a situation solely in terms of its effect on patient welfare, the employee is protected if the situation relates to a working condition.").[17] Although Morales may not have articulated this link to working conditions to the Respondent during the September 14 meeting, the employees were not required to do so at that time in order to establish that the protest had a mutual aid or protection objective. *Fresh & Easy*, 361 NLRB at 156 fn. 17 (where employee's activity had a purpose relating to working conditions at the Respondent's facility, it was irrelevant that "she did not articulate any mutuality of interest at the time."); *Senior Citizens Coordinating Council of Riverbay Community,* 330 NLRB 1100, 1104 and 1104 fn. 15 (2000) (job-related issues with supervisor not articulated to the employer at the time of employees' group protest supported finding that protest was protected, explaining that "[s]pecificity and/or articulation are not the touchstone of . . . protected concerted activity") (quoting *Springfield Library and Museum Assoc*., 238 NLRB 1673 (1979)); see also *Atlantic-Pacific Construction Co. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995) (same).

1. Morales' mid-February insistence on continuing to display the BLM marking was concerted

Morales, Kimmons, and Tesfaldet all displayed BLM markings on their aprons at around the same time as those protected concerted activities. All three worked in the flooring department and all three participated in the protected concerted activities described above. The judge nevertheless found that Morales' display of the BLM marking was not concerted, noting the absence of record evidence that Morales discussed the BLM insignia with other employees before adding it to their apron or that other employees subsequently expressed approval or support for it. We disagree with this finding.

Longstanding precedent establishes that an individual employee's action is "concerted" within the meaning of Section 7 if it is a "logical outgrowth" of employees' prior or ongoing protected concerted activity. *Mike Yurosek & Son, Inc*., 306 NLRB 1037, 1038 (1992) ("We will find that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group."), after remand 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).[18] In determining whether an employee's activity is a logical outgrowth of prior group activity, where the record shows the existence of a group complaint, the Board does not "require evidence of formal authorization in order to find that steps taken by individuals in furtherance of the group's goals are a continuation of activity protected by Section 7[.]" *Every Woman's Place, Inc.*, 282 NLRB 413, 413 (1986), enfd. mem. 833 F.2d 1012 (6th Cir. 1987).

In light of this precedent, the judge erred insofar as he required proof that other employees authorized or endorsed Morales' placing of the BLM marking on the apron. See, e.g., *Mike Yurosek*, 306 NLRB at 1038 (individual employees' separate refusals to work overtime were protected by Section 7 because they were a "logical outgrowth" of earlier group protests even though the employees acted individually and without coordination when they refused the overtime). The record here plainly shows the existence of a group complaint about working conditions. Specifically, Morales and their coworkers raised

[17] *Five Star Transportation, Inc.*, 349 NLRB 42 (2007), enfd. 522 F.3d 46 (1st Cir. 2008), discussed in fn. 26, below, is not to the contrary.

[18] See also *Salisbury Hotel*, 283 NLRB 685, 687 (1987); *JMC Transport*, 272 NLRB at 545.

objections about the Respondent's racially discriminatory working conditions and the manner in which the Respondent addressed those concerns. Morales, Kimmons, and Tesfaldet were displaying the BLM marking at around the same time as they expressed those concerns. The Respondent first began asking Morales to remove the BLM marking during meetings in which Morales voiced group concerns about the Respondent's response to discriminatory working conditions and articulated the connection between Morales' display of BLM and those group concerns. In these circumstances, Morales' insistence on continuing to wear the BLM marking on their apron in February was, at a minimum, a logical outgrowth of the employees' prior concerted activities. Id.[19]

This conclusion is reinforced by Morales' statements at the February 18 meeting with Belford and Whitley, where Morales specifically explained that the BLM marking was a way for Morales to "show . . . support for people of color or [B]lack associates" and that they would not remove it because "this is the best way" to show support. Morales thereby linked the BLM marking to prior concerted protests of racially discriminatory working conditions and to the fact that "it doesn't seem like there's any resolution from what I can see." Morales made clear that, under those circumstances, continuing to "keep the BLM marking on [their] apron" was the "[resolution] that's going to make the biggest impact." Morales also noted that the BLM marking seemed like the only viable alternative in light of the manner in which the Black History Month posters and cards had been repeatedly torn up, thereby further connecting their insistence on continuing to display the BLM marking to the prior protected concerted protests of the vandalism of those materials and the manner in which the Respondent addressed it. In the same vein, when Belford said that she did not want Morales "to go home [i.e., be precluded from working]" for wearing the BLM marking, Morales explained quite clearly, "I don't [want to be precluded from working] either, but I don't think there's any other choice. It seems like no one [in management] is listening, and unfortunately – [i]t's been six months, and nothing has been done." As noted above, the "six months" was a specific reference to Morales' tenure with the Respondent, the workplace racial issues that Morales confronted during that time, and the manner in which the Respondent had addressed those issues after Morales and coworkers had brought them to the Respondent's attention.

We disagree with the judge's reasoning, which our dissenting colleague effectively endorses, for concluding that Morales' display of the BLM marking was not a logical outgrowth of the protected concerted activities described above. The judge found that the employees' group concerns did not predate Morales' *initial* display of the BLM marking and that Morales did not expressly object at the February 18 meeting when Belford asserted that employees' concerns about racial issues in the workplace were a separate matter from the Respondent's dress code policy, which Belford understood to prohibit the display of the BLM marking. However, Morales testified that they added the BLM marking to their apron during the first month of their employment. The racially discriminatory conduct to which Morales and other employees objected, and the employees' concerted discussions with each other about those conditions, in contrast, began at the outset of Morales' employment.[20]

In any event, the relevant inquiry is not whether the BLM marking was a logical outgrowth of prior protected concerted activity at the time Morales added it to their apron, but whether it was a logical outgrowth of that activity *in February*, when the Respondent first directed Morales to remove it and, as explained below, thereafter constructively discharged them for refusing to do so.[21] For the reasons stated above, it plainly was a logical outgrowth, and to the extent that a showing of employer knowledge of the concertedness of the display is required, the Respondent was on notice of that fact.[22] In this regard,

[19] See also *International Brotherhood of Teamsters, Local 70 (United Parcel Service (UPS))*, 372 NLRB No. 19, slip op. at 1–2 fn. 3 (individual employee's complaints about seniority-based work assignments and other employees' work habits "were protected as a logical outgrowth of the employees' ongoing group concerns over the job assignment system in the small sort department."); *Constellium Rolled Products Ravenswood LLC*, 366 NLRB No. 131, slip op. at 2 (2018) (individual employee's writing "whore board" to protest an employer's overtime policy was a logical outgrowth of employees' prior group boycott of the policy by refusing to sign the overtime list), remanded on other grounds 945 F.3d 546 (D.C. Cir. 2019), on remand 371 NLRB No. 16 (2021), rev. denied 45 F.4th 234 (D.C. Cir. 2022); *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170, 170 (2011) (individual employee's wearing "I don't need a WOW to do my job" T-shirt was logical outgrowth of prior protected concerted activity that brought a group complaint to management's attention), remanded on other grounds 701 F.3d 710 (D.C. Cir. 2012), on remand 364 NLRB 1687 (2016).

[20] As Morales testified, before their September 14 meeting with Theis, Morales and Ward had discussed Gumm's behavior *and the fact that it was not getting better*, reflecting that their discussions of Gumm's behavior had begun even earlier.

[21] Belford and Bergeland both testified that they were not even aware of the marking until they saw it during the February 17 and 18 meetings. Accordingly, the circumstances present in August and September are not determinative of the protected concerted status of the BLM marking at the time Morales was ordered to remove it.

[22] In light of this determination, we do not reach the issue of whether concertedness also could be inferred solely on the basis of Morales being one of three flooring department employees who displayed BLM markings on their aprons at about the same time after engaging with each other

we find, contrary to the judge, that Morales' asserted failure to challenge Belford's characterization of the BLM marking as "completely separate" from the prior group activity has limited significance to a determination of whether the BLM marking was, in fact, a logical outgrowth of that group activity. As we have explained, the preponderance of the objective evidence, including an assessment of Morales' statements as a whole, clearly establishes that they were closely linked, regardless of how the Respondent's manager may have subjectively characterized the relationship and whether Morales explicitly challenged that characterization.[23]

2. Morales' mid-February insistence on continuing to display the BLM marking was for the purpose of mutual aid or protection

It is beyond dispute that employees' protests of racially discriminatory working conditions and of their employer's failure to respond to those conditions fall within the ambit of mutual aid or protection. *Vought Corp*., 273 NLRB 1290, 1294 (1984) (mutual aid or protection object established where employee's remarks "concerned the topic of a racial discrimination, which had aroused the attention and concern of employees in the production department, and which was the subject of periodic meetings between management and employees aimed at resolving the problem."), enfd. 788 F.2d 1378 (8th Cir. 1986). Here, there is no dispute that Morales and other employees acted for "mutual aid or protection" when they discussed their concerns about Gumm's racially discriminatory conduct toward *employees* of color, the vandalism of the Black History Month materials, and the manner in which the Respondent had addressed those matters, as well as when they brought those concerns to management's attention. Additionally, no party excepts to the judge's finding that the employees likewise acted for mutual aid or protection when they discussed and complained to management in October and November about Gumm's race-based mistreatment of *customers* of color.[24] For the reasons stated above, Morales also acted for mutual aid or protection when they discussed Gumm's race-based mistreatment of customers of color with other employees in September, and when Morales and Ward concertedly complained about that conduct to Theis on about September 14. Given the direct relationship between those protected concerted activities and Morales' subsequent insistence on continuing to display the BLM marking, we find that the latter was for the purpose of mutual aid or protection.[25]

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in concerted protests of racially discriminatory conditions at the Respondent's store.

[23] While it is clear that Morales' wearing of the BLM insignia on their apron was concerted because it was a logical outgrowth of their prior protected activities protesting racially discriminatory working conditions, we note that we would also find it concerted on the alternate rationale that their wearing of the insignia was an attempt to bring "truly group complaints to the attention of management." *Meyers II,* 281 NLRB at 885. In *Miller Plastic Products, Inc*., we recently explained that whether an employee sought to bring a truly group complaint to management is a factual determination based on the totality of record evidence. 372 NLRB No. 134, slip op. at 6-7. Having thoroughly reviewed the record, we find that the totality of the circumstances demonstrates that Morales' refusal to remove the BLM marking (i.e., their insistence on continuing to display it) was, at least in part, for the purpose of bringing to the Respondent's attention the prior group complaints that the Respondent, by Belford's admission, had theretofore failed to effectively address. See *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB at 170 (individual employee's wearing "I don't need a WOW to do my job" T-shirt was concerted both because it was a logical outgrowth of prior protected concerted activity and because it brought a group complaint to management's attention). Indeed, Morales expressly linked their refusal to remove the BLM marking to the Respondent's failure to take effective action to address the employees' prior concerted complaints about racially discriminatory conditions at the New Brighton store.

The General Counsel asserts, in the alternative, that the Board should find that protests of workplace racial discrimination are inherently concerted under the rationale of cases such as *Hoodview Vending Co*., 362 NLRB 690, 690 fn. 1 (2015) (incorporating by reference 359 NLRB 355 (2012)). We need not decide here whether this rationale should be extended to cases like this one. The record evidence here makes clear that Morales' refusal to remove the BLM marking was concerted under well-established precedent. In declining to take up this issue, we do not suggest that protesting workplace racial discrimination is any less central to the exercise of Sec. 7 rights than seeking to improve wages, to obtain desirable work schedules, or to protect job security, all of which we have found inherently concerted, and we express no view as to whether, in a future appropriate case, we would find protests of workplace racial discrimination to be inherently concerted.

[24] The Board thus may treat this point as established. Board's Rules & Regulations, Sec. 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived.") & 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding."). E.g., *Goddard College Corp.,* 372 NLRB No. 85, slip op. at 1 fn. 2 (2023). Even if the Board chose to revisit the issue, the judge was correct in finding that Gumm's race-based mistreatment of customers impacted the working conditions of employees who, the record shows, took pains to "intercept" and serve customers of color to spare them from Gumm's race-based mistreatment. As explained above, those interceptions, at a minimum, affected the way coworkers were able to carry out their own duties. Further, Morales and their coworkers protested both Gumm's mistreatment of customers of color and the Respondent's ongoing failure to remedy it. An employer's failure to remedy race-based mistreatment of customers also affects the interests of employees as employees insofar as they may be required to perform additional tasks to assist and interact with customers aggrieved by mistreatment and may reasonably feel responsible for, or otherwise implicated in, mistreatment that they and others find morally or legally objectionable.

[25] We do not hold that a direct relationship between wearing the BLM marking and prior protected activity is necessary to establish that wearing such a marking is itself protected activity, only that here the relationship is sufficient for that purpose. See *Eastex*, 437 U.S. at 563 & 567 (when concerted activity relates to "employees' interests as employees," it falls within the mutual aid or protection clause, even if the employees'

Here, indeed, the relationship was made explicit. At the February 18 meeting, Morales linked their refusal to stop displaying the BLM marking to the workplace issues previously raised concerning the treatment of customers and employees of color when they stated that it was "the best way" to "show [their] support for people of color or [B]lack associates." In addition, Morales stated at that meeting that they believed that they were "leading a great example [for other employees] by refusing to remove BLM from [their] apron." These comments further demonstrate that Morales' refusal to remove the BLM marking was directly related to their broader effort to "improve terms and conditions of employment or otherwise improve their lot as employees." *Fresh & Easy*, 361 NLRB at 153 (quotation omitted). Finally, Morales stated at the meeting that the BLM marking meant "respect for all people, especially [B]lack people" and testified at the hearing that "[i]t means Black Lives Matter. It's a symbol of alliance. I have never seen it as something political myself. It's something that I put on *so that people know to approach me*. I am a person of color myself so it's a form of solidarity. It's a way to keep—for people to feel safe around me." (emphasis added). As noted above, this object also was directly related to the interests of flooring employees as employees in light of their ongoing efforts to "intercept" customers of color in order to protect them from mistreatment by Gumm.

In finding that the BLM marking was not displayed for the purpose of mutual aid or protection, the judge primarily relied on generalized evidence that "the BLM messaging originated, and is primarily used, to address the unjustified killings of [B]lack individuals by law enforcement and vigilantes. To the extent the message is being used for reasons beyond that, it operates as a political umbrella for societal concerns and relates to the workplace only in the sense that workplaces are part of society." We reject that reasoning. Neither the origins of "BLM messaging," nor its primary use, dictate how the BLM marking may be used or understood in a particular workplace context (or, indeed, in a broader setting). The judge erred by discounting the evidence discussed above establishing that, at least by the time that Morales refused to remove the BLM marking in February, a purpose for their display of the BLM marking—objectively speaking—was to further protest racial discrimination at the Respondent's store and the Respondent's failure to adequately address it. Board precedent establishes that the particular workplace context and the circumstances surrounding the display of a message may inform whether a message falls within the statutory ambit of mutual aid or protection. See, e.g., *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB at 170 ("I don't need a WOW to do my job" T-shirt); *Mt. Clemens General Hospital*, 335 NLRB 48, 48–50 (2001) (button with a line drawn through the letters "FOT"), enfd. 328 F.3d 837 (6th Cir. 2003).[26] That is so here as well.

activity does not "relate to a specific dispute between employees and their own employer over an issue which the employer has the right or power to affect"). Insofar as BLM has become a well-known abbreviation, and the phrase "Black Lives Matter," when displayed in the workplace, could reasonably be understood as referring to issues of racial equity and equality at work, it is arguable that displaying the phrase in the workplace, standing alone, would support a mutual aid or protection finding. We need not decide that issue here.

[26] *Five Star Transportation, Inc.*, 349 NLRB 42 (2007), enfd. 522 F.3d 46 (1st Cir. 2008), above, cited by our dissenting colleague, is readily distinguishable. There, the Board found that certain school bus drivers' letters to the school committee deciding whether to award the busing contract to a company other than their employer were not protected because they raised only generalized safety concerns on behalf of the general public without articulating concerns about the employees' terms and conditions of employment. Id. at 44-45. Here, by contrast, the circumstances demonstrate that Morales, by insisting on wearing a BLM marking on their apron, was not solely "acting for the benefit of non-employees," as the dissent claims, but instead seeking "to improve [employees'] terms and conditions of employment or otherwise improve their lot as employees." *Eastex*, 437 U.S. at 565. Morales' display of the BLM marking was therefore for the purpose of mutual aid or protection even if it *also* expressed a more general opposition to racial discrimination. See id. at 570 fn. 20 (rejecting the employer's claim that employees' activity that sought to improve their lot as employees was unprotected because it also sought to "advanc[e the] union's political views" because "the clear purpose of the 'mutual aid or protection' clause would be frustrated if the mere characterization of conduct or speech removed it from the protection of the Act."). We reject the judge's speculation that Morales' BLM marking was related exclusively to the murder of George Floyd simply because that crime was committed six and a half miles from the Respondent's store and Morales first added the marking to their apron about the same time as the perpetrator's trial and related protests. Again, Morales referred specifically to New Brighton workplace racial issues when explaining the refusal to cease displaying the BLM insignia at the February 18 meeting. At no point in that interview did Morales mention the Floyd murder or any related social issue outside of the workplace.

In a similar vein to the judge, our dissenting colleague would find that Morales' BLM display was not for mutual aid or protection in part because, in his view, a reasonable observer with knowledge of all the relevant facts would be "far more likely" to connect the display to concerns about societal racism and the murder of George Floyd than to concerns about employees' working conditions. We are not persuaded by that reasoning. As the dissent acknowledges, a reasonable observer with knowledge of all the relevant facts would be aware of the employees' protected concerted complaints to management about racism in the workplace and the fact that Morales expressed to District Manager Belford that a purpose of Morales' BLM display was to protest and bring attention to those issues. A reasonable observer also would be aware of the fact that Morales never mentioned the Floyd murder during the critical February 18 meeting. Under an objective standard, Morales acted to improve employees' lot as employees in these circumstances. As noted above, it is well settled that an employee's concerted actions are protected by Sec. 7 of the Act so long as *an* objective is protected. The fact that the employee's actions may have other objectives, or even that those other objectives may predominate, is immaterial. *Fresh & Easy*, 361 NLRB at 154–156. The dissent's focus on what "a reasonable observer"

3. The Respondent has not demonstrated special circumstances justifying the prohibition of BLM markings

For the reasons stated above, Morales's refusal to cease displaying the BLM marking on their apron was protected concerted activity within the meaning of Section 7 of the Act. The Respondent's refusal to allow Morales to work while wearing that marking plainly interfered with the right to display it and thus was presumptively unlawful. See, e.g., *American Medical Response West*, 370 NLRB No. 58, slip op. at 1 (2020) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)). When an employer interferes with its employees' right to display such insignia, it may seek to rebut the presumption by showing that its interference was justified by special circumstances. In doing so, the employer bears the burden of proof. See id. If it cannot meet that burden, the Board will find that the employer violated the Act. *Tesla, Inc.*, 371 NLRB No. 131, slip op. at 1, 6–7 & fn. 19 (2022), enf. denied other grounds 86 F.4th 640 (5th Cir. 2023);[27] see also *Boch Honda*, 362 NLRB 706, 707 (2015), enfd. sub nom. *Boch Imports, Inc. v. NLRB*, 826 F.3d 558 (1st Cir. 2016). The Respondent argues that special circumstances exist here, but it has not met its burden.

Special circumstances may include, inter alia, "situations where display of . . . insignia might 'jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.'" *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007) (quoting *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. 99 Fed. Appx. 233 (D.C. Cir. 2004)). To establish a special circumstances defense, an employer must show that its interest in banning particular insignia outweighs the employee's Section 7 right to wear it. *AT&T*, 362 NLRB 885, 887 (2015). Even if an employer demonstrates an otherwise sufficient interest in restricting its employees' right to wear protected items, a rule doing so is unlawful unless the employer also shows that it is "narrowly tailored to the special circumstances justifying [its] maintenance." *Boch Honda*, 362 NLRB at 707. "[T]he 'special circumstances' exception is narrow." *E & L Transp. Co*., 331 NLRB 640, 640 fn. 3 (2000). The Respondent contends that special circumstances justify its ban on BLM markings because such markings interfere with its public image, jeopardize employee safety, and exacerbate employee dissension. We find that the record does not support these contentions.

a. Public Image

To establish that protected insignia interfere with an employer's public image, the employer must establish a carefully cultivated public image that is so consistently preserved that the nonconforming symbol, button, or other insignia would jeopardize the image. See, e.g., *In-N-Out Burger, Inc*., 365 NLRB No. 39, slip op. at 1 fn. 2 (2017), enfd. 894 F.3d 707 (5th Cir. 2018), cert. denied 139 S. Ct. 1259 (2019); *W San Diego*, 348 NLRB 372, 373–374 & fn. 9, 380–381 (2006). As the Fifth Circuit has recognized,

> The scope of the "public image" exception is exceedingly narrow, and it is well established that none of the following considerations, standing alone, justifies a rule restricting employees from wearing items protected by Section 7: an employer's requirement that employees wear uniforms or adhere to a dress code; an employer's status as a retailer or service provider; the fact that employees interact with the public or that customers may be exposed to employees displaying protected items; or the possibility that an employer's customers might be offended by the items' content or message.

In-N-Out Burger, 894 F.3d 707, 716–717 (5th Cir. 2018) (footnotes omitted).

In this case, the Respondent requires that customer-facing employees wear orange aprons over their clothing. This trademarked apron is part of the Respondent's public image. As the judge found, however, the Respondent not only permits but encourages employees to personalize their aprons by adding written messages, images, and other elements. The record includes numerous examples of extensively personalized aprons with large, colorful, and expansive designs, including LGBTQ Pride symbols, the Pan-African flag colors, holiday symbols, and insignia and slogans of professional or college sports teams. Morales' BLM marking, in contrast, was written in modestly sized black letters. Because the Respondent does not require employees to wear standardized aprons, but instead encourages employees to extensively personalize them, its public image defense necessarily fails. *In-N-Out Burger*, 894 F.3d at 717 ("If the employee uniform—which In-N-Out describes as an integral component of its overall public image—changes several times each year, then either the company's interest in maintaining a 'consistent' public image is not as great as it suggests, or, alternatively, the uniform does not play as critical a role in maintaining that public image as In-N-Out claims."); *AT&T*, 362 NLRB at

would purportedly have been "far more likely" to believe cannot be reconciled with this basic principle.

[27] As the Board noted in *Tesla*, above, "Sec. 7's protection also extends to adornments that are unrelated to a labor organization, but that nonetheless concern employees' terms and conditions of employment." 371 NLRB No. 131, slip op. at 7 fn. 19 (citing cases).

887–888 (employees wearing nonconforming clothing militated against "special circumstances" finding).

The Respondent contends that the BLM marking is controversial in ways that permitted markings are not and that it conveys a message that the Respondent may lawfully ban in order to remain neutral with respect to that controversy. The potential for controversy that the Respondent invokes would also be present for other messages that the Respondent permits. In any event, the Board has long held that "[t]he lawfulness of the exercise by employees of their rights under the Act, including union-button wearing, does not turn upon the pleasure or displeasure of an employer's customers." *Howard Johnson Motor Lodge*, 261 NLRB 866, 868 fn. 6 (1982), enfd. 702 F.2d 1 (1st Cir. 1983); accord: *Casino Pauma*, 362 NLRB 421, 425 (2015) (rejecting argument that a rule prohibiting employees from wearing "any badges, emblems, buttons or pins on their uniforms" was justified by the employer's concern that the messages on such items might offend its customers); *Nordstrom, Inc*., 264 NLRB 698, 701–702 (1982) (employer's "fears regarding the creation of controversy on the part of the buying public" were insufficient to justify a ban on union insignia on the selling floor).

The Board has observed that "[a]lthough it is possible that an employer's desire to remain neutral on a controversial political issue could establish special circumstances sufficient to justify a restriction on union insignia," such a claim would first have to be "substantiated by the record." *AT&T*, 362 NLRB at 889. That is not the case here. Nothing about Morales' BLM marking suggests that the Respondent has taken a position on the Black Lives Matter movement, any more than the other permitted markings suggest that the Respondent has a position on other causes that employees choose to support. In a store full of personalized aprons, customers are far more likely to assume that the markings on any particular employee's apron reflect the sentiments of the employee wearing it. Id. (ban on "No on Prop 52" buttons not justified by special circumstances); *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB 1687, 1690 (2016) (an employer must show that the wearing by its employees of insignia adversely affected its business sufficiently that the employer's need to ban the wearing of such insignia outweighs the employees' statutory right); *Inland Counties Legal Services*, 317 NLRB 941, 941 (1995) ("Neither the mere possibility that the Respondent's employees may come into contact with a customer or supplier nor an employer's interest in avoiding controversy among its clientele that an expression of union membership or support might engender outweighs the employees' Section 7 right to wear these emblems.").[28]

b. Employee Safety

The Respondent asserts that the BLM marking was especially controversial in the Minneapolis area following the murder of George Floyd and the subsequent protests, and it claims that particularly in those circumstances wearing BLM symbols posed a safety risk for New Brighton store employees at the hands of customers who might object to them. In support, the Respondent cites two instances in which customers of other retailers engaged in altercations with employees regarding Black Lives Matter and a third incident, in 2016, involving a Home Depot employee at a different store involving different insignia.

To support a "safety" justification, there must be evidence of nonspeculative, imminent risks. See, e.g., *Boch Honda*, 362 NLRB at 708; *Northeast Industrial Service Co*., 320 NLRB 977, 979–980 (1996). There is no such proof here. The Respondent fails to cite any evidence that any of its employees have been confronted over BLM insignia or any evidence of any customer-employee confrontation at the New Brighton store with respect to any insignia. To the contrary, several New Brighton employees displayed BLM markings on their apron for months without ever being confronted by any customer, so far as the record shows. The Respondent's evidence thus falls well short of demonstrating that a ban on BLM insignia is warranted to protect employees from confrontations with customers.

[28] The cases cited by the Respondent are readily distinguishable. See *Pathmark Stores, Inc*., 342 NLRB 378, 379–380 (2004) (grocery store lawfully prohibited T-shirt slogan reading "Don't Cheat About the Meat"); *Noah's New York Bagels*, 324 NLRB 266, 275 (1997) (bagel store lawfully prohibited T-shirt stating, "[i]f its not Union, its not Kosher"); and *Southwestern Bell Telephone Co*., 200 NLRB 667, 669–671 (1972) (employer lawfully prohibited T-shirts stating "Ma Bell is a Cheap Mother"). Those cases involved product disparagement or profane messages critical of the employer that differed markedly from the BLM displays here. See *Medco Health,* 364 NLRB at 1690 (distinguishing cases where "employee's protected message relates to terms and conditions of employment, not the employer's products . . . .").

We respectfully disagree with the decisions in *NLRB v. Starbucks Corp*., 679 F.3d 70 (2d Cir. 2012) (employer entitled to limit employees to one union button to avoid the distraction from its own buttons that multiple employee buttons would entail) and *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93 (D.C. Cir. 2015) (employer lawfully prohibited public facing employees from wearing T-shirts that read "Inmate No." on the front and "Prisoner of AT$T" on the back in black and white), also cited by the Respondent, to the extent that they are inconsistent with the Board's decisions in those cases and the principles stated herein. Those cases are, however, readily distinguishable from this case in any event. The concern about multiple employee buttons distracting from the employer's own buttons articulated in *Starbucks* is not present here, where employees are permitted to extensively decorate their aprons and only a single BLM marking on Morales' apron is at issue. Nor can the BLM marking reasonably be likened to the circumstances presented in *Southern New England Telephone Co.*, where employees wore clothing that read "inmate" while seeking entry to customers' homes to provide service.

c. Employee Dissension

The Respondent also asserts that the ban on BLM markings is justified to prevent employee dissension, citing evidence that some employees at the New Brighton store objected to the markings and that Black Lives Matter markings have been divisive in other workplaces. Obviously, an employer cannot meet its special circumstances burden simply by showing that some employees disagree with a particular message. Few, if any, messages would be protected by the Act if that were the case. To the contrary, the Board has consistently rejected the notion that employee complaints about other employees' display of Section 7-related items is a sufficient basis on which to base a lawful ban on the items. See *Power Equipment Co*., 135 NLRB 945, 965–967 (1962) (employee complaints about other employees wearing union bowling shirts not sufficient to justify ban on shirts), enfd. in pertinent part 313 F.2d 438, 441–442 (6th Cir. 1963); *Kimble Glass Co.,* 113 NLRB 577, 579-581 (1955) (threats of violence against employees supporting rival union by incumbent union adherents did not establish special circumstances justifying ban on all union insignia), enfd. 230 F.2d 484 (6th Cir. 1956).

As the Board stated in *Kimble Glass,*

> [I]n balancing the rights of employees to engage in reasonable and legitimate union activities as against the rights of management to maintain discipline and avoid interruption to production, we believe that in the circumstances of this case it was incumbent upon the Respondent to attempt to enjoin the abusive conduct [by dissenting employees] before it prohibited otherwise proper organizational activity and established as a condition of employment that employees abandon their statutory rights in order to forestall the misconduct.

113 NLRB at 581. A ban on BLM insignia is even less justified in this case, where "not only is there no evidence that the Respondent sought to discipline the perpetrators of any violent or disruptive acts or threats thereof, there is no evidence that such conduct or threats occurred." *Escanaba Paper Co*., 314 NLRB 732, 734 (1994) (footnote omitted) (employer unlawfully banned slogans relating to prior contentious contract negotiations and "No Scab" buttons opposing job flexibility program that other employees supported), enfd. 73 F.3d 74 (6th Cir. 1996). See also *Constellation Brands, U.S. Operations, Inc. d/b/a Woodbridge Winery*, 367 NLRB No. 79, slip op. at 1 fn. 3, 8–10 (2019) (employee's display of "Cellar Lives Matter" slogan protected notwithstanding employer's concern that slogan might offend employees on the separate basis that it mocked Black Lives Matter), enfd. 992 F.3d 642 (7th Cir. 2021).[29]

d. Summary

For the reasons stated above, we find that the Respondent has failed to prove that special circumstances justify its ban on BLM markings on employee aprons. Even assuming that the Respondent has shown some cause for concern, the concern does not outweigh employees' Section 7 right to display those markings in the circumstances presented here. *AT&T*, 362 NLRB at 887 (employer must show that its interest in banning particular insignia outweighs the employee's Section 7 right to wear it). Nor is the Respondent's ban "narrowly tailored to the special circumstances justifying [its] maintenance." *Boch Honda*, 362 NLRB at 707. Indeed, as explained above, the Respondent has not shown that special circumstances existed that would justify the ban's maintenance, even if it were narrowly tailored.

For all the foregoing reasons, we find that the Respondent violated Section 8(a)(1) of the Act by directing Morales to remove the BLM marking from their apron.

B. Requiring the Respondent to Permit BLM Markings Does Not Violate the First Amendment

The Respondent contends that a Board order requiring it to permit the display of BLM insignia on company-issued aprons would constitute compelled speech in violation of the First Amendment's Free Speech Clause. According to the Respondent, the aprons "are Home Depot's speech" inasmuch as they include its logo and "Value Wheel," and compelling the Respondent to permit employees to add BLM markings to their aprons would "interfere with its carefully crafted image." In this regard, the Respondent claims that employees' personalized additions to the aprons are actually the Respondent's speech, but it also argues that, even if the personalized markings on the aprons are viewed as the employees' own speech, requiring it to permit BLM markings would violate its First Amendment rights by forcing it to serve as a conduit for that speech. Contrary to the Respondent's arguments, nothing in our decision today in any way infringes on the Respondent's First Amendment rights.

The Respondent's interpretation of its First Amendment rights would abrogate decades of court and Board precedent, insofar as it would broadly permit employers to

[29] Cases cited by the Respondent in support of its position are not to the contrary. See *Southwestern Bell Telephone Co*., 200 NLRB 667 (1972) (employer lawfully prohibited obscene and derogatory "Ma Bell is a Cheap Mother" T-shirt), and *Honda of America Mfg*., 334 NLRB 746 (2001) (employer lawfully disciplined employee for newsletter calling on another employee to "Come Out of the Closet" and repeatedly using the term "bone us" in a section of the newsletter criticizing the employer's bonus program). In both cases, the messages used obscene and objectively offensive language. No such circumstances are present here.

suppress activity protected by Section 7 simply because the employer did not approve of it. See, e.g., *Republic Aviation Corp. v. NLRB*, above; *American Medical Response West*, above, slip op. 1, 7 (employer unlawfully prohibited "No on Prop. 11" button). None of the First Amendment cases cited by the Respondent even remotely support that view.

This case is easily distinguishable from those cases, cited by the Respondent, in which individuals were required to convey a message selected by the government. Here, the relevant message is the statutorily protected message chosen by an employee, communicated through a medium that the Respondent has permitted (but not required) employees to use.[30] The Act protects the right of employees to choose *for themselves* whether to engage in or refrain from engaging in protected concerted activities. When an employee chooses to display particular insignia in a manner that the Act protects, it is the employee's desired message that is being conveyed, not the government's.[31]

The Respondent fares no better with its contention that requiring it to permit BLM markings on its aprons impermissibly compels it to serve as an unwilling conduit for employees' speech. As the Supreme Court has plainly stated, "the compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR*, 547 U.S. at 63.[32] In this case, as in *FAIR*, "accommodating the [employee's] message does not affect the [Respondent's] speech, because the [Respondent is] not speaking when" employees personalize their aprons. Id. at 64. Our determination that the Respondent has violated the Act, like the federal law at issue in *FAIR,* affects what the Respondent must do—permit employees to display Section 7-protected insignia if the employees so choose—not what the Respondent may or may not say. Id. at 60. To be clear, nothing in our decision today interferes with the Respondent's right not to support the Black Lives Matter message. The Respondent is free to oppose that message just as employers who oppose unionization are free to do so, even as the Act typically requires them to permit prounion employees to wear union insignia.

We therefore reject the Respondent's contention that a determination that it unlawfully prohibited the display of BLM insignia in the circumstances of this case would require employers to "allow employees to display virtually all political or social messages on company owned uniforms." To the contrary, our decision today pertains to the display of BLM insignia that fall within the protection of the Act as concerted activity for the purpose of mutual aid or protection, in the absence of special circumstances justifying a restriction.

C. *Requiring the Respondent to Permit BLM Markings Does Not Violate Federal Trademark Laws*

Finally, the Respondent argues that its orange work aprons are protected by the federal trademark laws and that those statutes preclude a Board order that employees be permitted to display BLM markings on its aprons. We find no merit to this contention.

It is undisputed that the Respondent holds a trademark on its orange aprons. The federal trademark laws protect trademark owners against uses by other entities that cause customer confusion as to the source of a good or service or erode the trademark's value by association with inferior merchandise. See, e.g., *Scarves by Vera, Inc. v. Todo Imports Ltd.*, 544 F.2d 1167, 1172 (2d Cir. 1976). But neither of those interests is implicated by the BLM marking that Morales placed on their apron. There is no evidence that Morales sought to exploit the Respondent's trademark

[30] Since the record demonstrates that uniform customizations are the associates' own speech, this case is distinguishable from *303 Creative*, where the Court found that a wedding website designer's final product constituted her speech even though she received input from her clients. 143 S. Ct. at 2313. There, the Court explained that the web designer intended to vet each prospective project to determine if it was one that she was willing to endorse and, after consulting with the clients, to produce a website using her own words and original artwork. Id.

[31] Cases cited by the Respondent, in which individuals were required to convey a message selected by the government, all are plainly distinguishable on that basis alone. See *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (state law requiring that professional fundraisers disclose to potential donors the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity); *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2459–2460 (2018) (state-imposed requirement that public employees pay fees to union representing them); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state-imposed requirement to display state motto "Live Free or Die" on license plate); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (state-imposed requirement to salute flag). Compare *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47 (2006) ("*FAIR*") (federal law conditioning receipt of federal funding by educational institutions on permitting military recruiters the same access as other recruiters did not require schools to say anything or limit what they could say); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (upholding state law requiring shopping center owner to allow certain expressive activities by others on its property in part because views expressed "will not likely be identified with those of the owner," who was free to disavow them).

[32] See id. (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (because every participating unit affects the message conveyed by the parade's organizers, a law dictating that a particular group must be included in the parade alters the expressive content of the parade); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) (when the state agency ordered the utility to send a third-party newsletter four times a year, it interfered with the utility's ability to communicate its own message in its newsletter); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974) (the compelled printing of a reply takes up space that could be devoted to other material the newspaper may have preferred to print)).

by adding a BLM marking to the apron that they were required to wear and that employees were both permitted and encouraged to decorate. In these circumstances, there is no risk that the public will believe that Morales' small, hand-drawn BLM marking was part of the Respondent's trademarked apron or that the Respondent was the source of the marking.[33]

D. The Respondent Applied Its Dress Code and Apron Policy to Restrict Section 7 Activity

The Respondent's dress code and apron policy relevantly provides that an employee's work apron is "not an appropriate place to promote or display religious beliefs, causes or political messages unrelated to workplace matters." A corollary provision similarly prohibited employees from using work aprons to "display[] causes or political messages unrelated to workplace matters." There is no allegation that this policy was facially unlawful. However, it is undisputed that Bergeland and Belford told Morales that their BLM marking violated that policy and, thus, must be removed before they could return to work. Having found that the Respondent violated Section 8(a)(1) by directing Morales to remove the BLM marking, we further find that the Respondent violated Section 8(a)(1) by applying its facially neutral dress code and apron policy to restrict Section 7 activity. See, e.g., *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 4 (2021) (application of lawful rule to unlawfully restrict protected activity violated Section 8(a)(1) of the Act).

E. The Respondent Constructively Discharged Morales

As explained above, on February 18, the Respondent conditioned Morales' return to work on removing "BLM" from their work apron. We have found that this directive violated Section 8(a)(1) of the Act. Rather than accept this unlawful condition, Morales submitted a letter of resignation on February 19. Thus, Morales was constructively discharged. See, e.g., *Zeigler North Riverside, LLC d/b/a Zeigler Ford of North Riverside*, 370 NLRB No. 41, slip op. at 3–4 (2020).

A constructive discharge "is not a discharge at all but a quit which the Board treats as a discharge because of the circumstances which surround it." *Remodeling by Oltmanns*, 263 NLRB 1152, 1161 (1982), enfd. 719 F.2d 1420 (8th Cir. 1983). Under a Hobson's choice theory of constructive discharge, an employer confronts an employee with a choice between resignation on the one hand and continued employment conditioned on relinquishment of rights guaranteed by Section 7 of the Act on the other. See *Mercy Hospital*, 366 NLRB No. 165, slip op. at 4 (2018) ("[T]here are two elements to a Hobson's Choice constructive discharge: conditioning continued employment on the abandonment of Section 7 rights, and a quit that results from the imposition of that condition."). In determining whether an employee has been presented with a Hobson's choice, the Board views the circumstances from the employee's perspective. See *Intercon I (Zercom)*, 333 NLRB 223, 224 (2001).

Applying these principles here, we find that Morales was constructively discharged. As noted above, the Respondent sent Morales home for the day on February 18. In so doing, Belford expressly advised Morales that "because it's against dress code, I can't have you work in the store if you're going to have that [the BLM marking] on your apron . . . . [Y]ou would go home and basically wouldn't come back to work until you can find a different way to express your belief and your support of Black History Month or [B]lack people in general and racial equality." While Belford also told Morales that "I'm not going to fire you over that. That's not how that's going to work" and the Respondent paid Morales for a full day on February 18, there is no indication that the Respondent was prepared to pay Morales to stay home forever. Certainly, the Respondent made no such representation to Morales, nor does it make such a claim on brief. Under these circumstances, a prudent person in Morales' position would reasonably believe that they would be discharged if they did not forgo their protected activity. *Intercon I (Zercom)*, 333 NLRB at 224. That is so even though Morales did not reference the refusal to remove the BLM marking in their resignation letter. Id. at 236 (constructive discharge where employee signed out, writing "Done" on her daily time report: "I just really felt I had no future left."). Morales was not required to wait for the Respondent's ax to fall. Id. at 224.

F. Response to the Dissent

We have addressed certain arguments made by our dissenting colleague already. Here we address the dissent's arguments that, in finding that Morales was engaged in protected, concerted activity when they insisted on

[33] The Respondent cites *Hershey Co. v. Friends of Steve Hershey*, 33 F. Supp. 3d 588 (D. Md. 2014), and *MGM-Pathe Communications Co. v. Pink Panther Patrol*, 774 F. Supp. 869 (S.D.N.Y. 1991), but those cases are readily distinguishable. In both cases, third parties chose to use trademarks for their own commercial purposes in a manner that created significant risk of confusion about whether the use was affiliated with the trademark owner. Here, Morales' use of the apron was not for their own commercial purpose, and there was no risk that the public would conclude that the BLM marking was affiliated with the Respondent. See also 15 U.S.C. § 1125(c)(3) ("Any noncommercial use of a mark" "shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection . . . . "); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906-907 (9th Cir. 2002) (rejecting trademark dilution claim based on noncommercial use of "Barbie" mark in song "Barbie Girl"), cert. denied 537 U.S. 1171 (2003).

continuing to display the BLM marking in February 2021, we have denied the Respondent due process by finding a violation that was not alleged in the complaint and have "relie[d] on an unprecedented extension of the 'logical outgrowth' theory." Neither of these arguments has any merit.

Our colleague is simply mistaken when he contends that the action we find concerted "differs from the act the General Counsel alleges was concerted." Quoting only a portion of paragraph 5(a) of the complaint, the dissent asserts that the complaint "alleges that Morales engaged in concerted activity '[b]eginning about August 2020,' by 'displaying the slogan "BLM" on [their] apron.'" Read in full, however, paragraph 5(a) states:

> Beginning about August 2020, Respondent's employee Antonio Morales engaged in concerted activities for the purposes of mutual aid and protection related to racial policies and practices at the New Brighton Facility; this included displaying the lettering "BLM" on [their] apron, writing emails, engaging in various conversations with coworkers, supervisors, and managers about subjects such as ongoing discrimination and harassment, and/or engaging in other BLM-related protected concerted activity.

The complaint does not state that Morales engaged in all those activities *in* August 2020; rather, it alleges that Morales engaged in those activities "beginning about August 2020." This allegation plainly encompasses Morales' protected, concerted discussions with coworkers and managers about Gumm in September, October, and November 2020, as well as their protected, concerted protest of the vandalism of the Black History Month materials in February 2021, even though those activities did not take place in August 2020. It therefore encompasses Morales' insistence on continuing to display the BLM marking in February 2021 as well.[34]

Paragraphs 5(b)-(f) of the complaint further reinforce this point. They make it clear that the "material act" at issue in this case was that, in *February 2021*, the Respondent "required Antonio Morales to choose between engaging in protected concerted activity, including displaying the 'BLM' slogan, and" leaving the New Brighton Facility and quitting their employment.[35] This is especially true in light of the General Counsel's opening statement at the hearing, which explained the connection between Morales' insistence on continuing to display "BLM" and the employees' protected concerted activities from September 2020 through February 2021 regarding Gumm's misconduct and the vandalism.[36] For all these reasons, there is no basis for concluding that due-process principles preclude the Board from considering the circumstances existing in February 2021 and Morales' purpose in insisting on continuing to display a BLM marking on their apron at that time.[37] In fact, ignoring those circumstances would constitute error.

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[34] The dissent elevates form over substance to the extent that it views Morales' "refusal to remove 'BLM' from their apron" as materially different from "their display of 'BLM.'" The complaint alleges that Morales displayed the lettering "BLM" on their apron beginning in August 2020, and their subsequent refusal to remove it was, in substance, an insistence on continuing to "display" it.

[35] The relevant portions of the amended complaint are as follows:

> 5. (a) Beginning about August 2020, Respondent's employee Antonio Morales engaged in concerted activities for the purposes of mutual aid and protection related to racial policies and practices at the New Brighton Facility; this included displaying the lettering "BLM" on [their] apron, writing emails, engaging in various conversations with coworkers, supervisors, and managers about subjects such as ongoing discrimination and harassment, and/or engaging in other BLM-related protected concerted activity.
>
> (b) *About the middle of February 2021*, Respondent required Antonio Morales to choose between engaging in protected concerted activity, including displaying the "BLM" slogan, and leaving the New Brighton Facility.
>
> (c) By the conduct described above in subparagraph 5(b), Respondent caused the suspension of its employee Antonio Morales.
>
> (d) *About February 19, 2021*, Respondent required Antonio Morales to choose between engaging in protected concerted activity, including displaying the "BLM" slogan, and quitting [their] employment.
>
> (e) By the conduct described above in subparagraph 5(d), Respondent caused the termination of its employee Antonio Morales.
>
> (f) Respondent engaged in the conduct described above in subparagraphs 5(b) through 5(e) because Antonio Morales engaged in the conduct described above in subparagraph 5(a), and to discourage employees from engaging in these or other concerted activities.

GC Exh. 1(j) (emphasis added).

[36] During that opening statement, counsel for the General Counsel stated:

> You'll also hear why when presented with a choice of removing BLM from [their] apron, [] Morales refused and was discharged from [their] job as a result.
>
> Of course Respondent will likely frame [] Morales' display of BLM on [their] apron as wholly divorced from group concerns [Morales] and other employees repeatedly brought to manager's [sic] attention and that it was just a coincidence that [Morales] was suspended immediately after protesting for wider discussion about blatant acts of racism and racialized vandalism in the store . . . .
>
> Here General Counsel will show that a display of BLM was specifically and inextricably intertwined with workplace matters, namely the racist behavior . . . towards [] Morales, [their] coworkers and the Home Depot customers and the repeated vandalism to the Black History Month posters in the employee break room but rather than enforcing its own rule as written, Home Depot brands BLM as violative of this policy regardless of the circumstances in blatant disregard to its own related[-]to[-]workplace[-]matters caveat.

Tr. 33–35.

[37] Even assuming *arguendo* that our rationale for finding Morales' constructive discharge unlawful differed in some respect from the theory urged by the General Counsel, our finding fully accords with due-process principles. See, e.g., *W.E. Carlson Corp.*, 346 NLRB 431, 434

Our dissenting colleague's substantive objections to our decision fare no better. First, he contends that, in prior logical outgrowth cases, "the link between prior protected concerted activity and subsequent individual activity was plainly evident" and that the required link is missing here. Second, the dissent asserts that today's decision represents an "unprecedented extension" of the logical-outgrowth doctrine on the basis that, assertedly, we have unjustifiably found "that an act that was *not* concerted as a logical outgrowth of prior protected concerted activity at its inception *can become* concerted on a 'logical outgrowth' theory in light of subsequent events." (emphasis in original.) We disagree.

Our dissenting colleague has consistently advocated for a narrow reading of Section 7 in the past.[38] In keeping with those prior positions, he does so here as well. As we have previously explained, the narrow view of Section 7 our colleague consistently espouses is inconsistent with its text and purpose.[39] That is equally true in this case as well.

First, there is no merit to the dissent's claim that, to be protected under extant logical-outgrowth precedent, an employee's activity must have a "plainly evident" link with earlier protected concerted activity. Our colleague cites no case in which the Board has so held, nor are we aware of any. Nor does the dissent cite any case in which logical outgrowth was *not* found on the basis that the connection to earlier concerted activity was not "plainly evident." Indeed, the dissent does not cite any case in which the Board rejected a claim of logical outgrowth on any basis.

In any event, and contrary to the dissent, the Board has found that an individual employee's actions in furtherance of "truly group activity" grew logically out of it in a variety of circumstances.[40] Nor did the Board apply a "plainly evident" standard in *Mike Yurosek*, a case the dissent appears to accept. Rather, the employees' individual refusals to work overtime were found to be logical outgrowths of prior concerted protests of a reduction in work schedules to 36 hours because the employees all reacted in an identical fashion, and they attributed their refusal to work overtime to the prior schedule reduction. In sum, an individual employee's actions need not relate to prior protected concerted activity "in any particular way" to fall within the ambit of Section 7 under the logical outgrowth doctrine, as long as they are in fact a logical outgrowth of it, any more than employees' actions in any other context must combine "in any particular way" before concertedness will be found. *NLRB v. City Disposal Systems,* 465 U.S. at 835 (Congress did not intend to limit Section 7 protection "to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way.").

Nor would any policy of the Act be served by adopting the limited conception of concerted activity that the dissent espouses. In enacting Section 7 of the Act, "Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB v. City Disposal Systems*, 465 U.S. at 835. It would undermine this policy to hold, as the dissent advocates, that an employee who seeks to further prior group activity through individual action that is logically related to the group activity, in fact, does so at the employee's peril if

(2006) (no deprivation of an employer's due process rights by the Board relying on a different rationale than the General Counsel in finding a violation); *Local 58, International Brotherhood of Electrical Workers (IBEW), AFL-CIO (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) ("The Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful *conduct* was alleged in the complaint.") (emphasis in original, citing cases), enfd. 888 F.3d 1313 (D.C. Cir. 2018). Here, the amended complaint alleged that the Respondent unlawfully required Morales to choose between engaging in protected concerted activity, *including displaying the "BLM" slogan*, and quitting their employment *in February 2021*. And the parties fully and fairly litigated Morales' purpose for insisting upon continuing to display BLM on their apron in February 2021.

[38] See, e.g., *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019); *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019).

[39] *Miller Plastic Products, Inc.*, 372 NLRB No. 134, slip op. at 5–7 (2023).

[40] For example, in *KNTV, Inc.*, 319 NLRB 447 (1995), the Board held that reporter Ken Wayne engaged in concerted activity when he conditioned his willingness to serve as a temporary television news anchor on his employer's willingness to consider the issue of extra pay for the special assignment. One month before raising this "anchor-pay issue," Wayne and his coworkers had engaged in protected concerted activities when they discussed their shared desire for a general wage increase (not an increase in anchor pay) and raised that group concern to the employer. The Board explained that Wayne's raising of the anchor-pay issue was concerted "as a continuation of" his protected concerted activities in support of general wage increases the preceding month. Id. at 450. The Board separately found that Wayne's conduct was concerted as a logical outgrowth of a discussion that Wayne had with a coworker about temporary anchor pay the day before. Id. The two grounds were independent bases for finding Wayne's conduct concerted.

In *Blue Circle Cement Co.*, 311 NLRB 623 (1993), enfd. 41 F.3d 203 (5th Cir 1994), the Board held that an employee's use of his employer's photocopier to print a Greenpeace article on sham recycling for use by a third-party environmental organization was concerted as a logical outgrowth of employees' prior protected, concerted protest of their employer's plans to burn hazardous waste as fuel to heat its cement kilns.

Together with the other precedent cited in today's decision, *KNTV and Blue Circle Cement* demonstrate that the dissent's insistence that our precedent requires a "plainly evident" connection is untenable. Rather, an individual's activity can be a "logical outgrowth" of prior protected concerted activity even though there is not a "plainly evident" connection so long as the circumstances demonstrate the existence of a logical connection.

the logical relationship is subsequently deemed not to also be "plainly evident" to a hypothetical reasonable person with knowledge of the facts.[41] We reject our colleague's effort to advance an "interpretation of [Section] 7 [that] might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Here, as discussed fully above, the record demonstrates that Morales' mid-February insistence on continuing to display a "BLM" marking on their apron was logically related to employees' prior protected concerted activities opposing racism in the workplace. Even assuming, however, that our precedent required a "plainly evident" connection between Morales' mid-February insistence on continuing to display the "BLM" marking and employees' prior protected concerted activities opposing racism in the workplace, the record in this case amply demonstrates that the connection *was* plainly evident. Home Depot employees (including but not limited to Morales, Tesfaldet, Ward, Blessing, and Kimmons) experienced and witnessed months of racial hostility at the New Brighton store. They saw Gumm mistreat employees and customers based on their race. And the employees learned that vandals with access to the breakroom had twice vandalized the store's Black History Month display. Those employees also experienced and witnessed what they considered to be the Respondent's unsatisfactory responses to those acts of racial intimidation. Against that background, it would have been "plainly evident" to employees in that workplace—some of whom were themselves displaying "BLM" markings on *their* aprons—that Morales' insistence on continuing to display a "BLM" marking on Morales' apron was at least in part a continuation of those prior concerted activities. Morales hammered this point home when Morales specifically conveyed it to District Manager Belford during their February 18 meeting. Under these circumstances, the relationship would have been "plainly evident" to the Respondent as well.[42]

Finally, our determination that Morales' insistence on continuing to display the BLM marking when challenged on it in February 2021, for the first time, was protected concerted activity properly considers the record as a whole. Simply put, Morales' initial act of affixing BLM to their apron sometime around September 2020 and their subsequent February 2021 insistence on continuing to display BLM (on penalty of being unable to return to work) are separate acts in a course of conduct culminating in Belford's instruction to remove the display. Contrary to the dissent's accusation, we are not finding that the former act was somehow converted from a purely individual act into a concerted act based on subsequent events. Rather, we find that the latter act is concerted as a logical outgrowth of employees' previous and then-ongoing protected concerted activities consistent with the allegations contained in the amended complaint.[43] In this context, we note that a symbol (such as the BLM marking), can accumulate meaning in a workplace over time, as events occur and employees respond. Based on events on the ground at the New Brighton store from September 2020 through February 2021, the BLM symbol accumulated meaning relevant to working conditions there. And, as an objective matter, Morales insisted on continuing to display that symbol in furtherance of employees' prior and then-ongoing protected concerted activities regarding racism in the workplace. Our dissenting colleague's arguments to the contrary necessarily "fail because they espouse an unduly cramped interpretation of concerted activity under § 7—one that assesses concerted activity in terms of isolated points of conduct rather than the totality of the circumstances." *MCPc, Inc. v. NLRB*, 813 F.3d 475, 486 (3d Cir. 2016).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Employee Antonio Morales' February 17, 18, and 19, 2021 refusals to remove their BLM insignia from their

[41] In *Meyers I*, the Board held that, "once an activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, *the employer* knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity." 268 NLRB at 497 (emphasis added). Any suggestion that the General Counsel must also prove that some entity other than the employer (such as "a reasonable person with knowledge of the facts") also knew of the concerted nature of the employee's activity would be inconsistent with that precedent.

[42] We thus need not decide whether Morales' conduct could be deemed concerted as a logical outgrowth of that prior group activity even if the employees lacked a mutual aid or protection object, despite acting concertedly. We observe, however, that ascertaining whether employee conduct is concerted and whether it has a mutual aid or protection object involves two "analytically distinct" concepts. *Fresh & Easy*, 361 NLRB at 153.

[43] Recently, in *Miller Plastic Products, Inc*., 372 NLRB No. 134, slip op. at 6, we held that contextual evidence arising after alleged concerted activity can be relevant objective evidence of whether an employee's initial remark was concerted. We disclaimed any suggestion that "future action can 'retroactively change' whether an initial remark was concerted" while explaining that subsequent events can be relevant to determining whether an employee's conduct sought to initiate, induce, or prepare for group action or otherwise related to group action. Id. Contrary to our colleague's contention in that case and his similar contention here, in so finding, "we hew to the essential holding of *Meyers II* that whether the employee has engaged in concerted activity is a factual [determination] based on the totality of the record evidence." Id. (internal quotation omitted).

work apron constituted protected concerted activity within the meaning of Section 7.

3. The Respondent violated Section 8(a)(1) by

a. directing Morales to remove a BLM marking from their work apron.

b. constructively discharging Morales by conditioning their continued employment on forfeiting their right to wear a BLM marking in the workplace.

c. applying its apron and dress code policies, specifically the provisions disallowing "causes or political messages unrelated to workplace matters," to prohibit Morales from displaying "BLM" and/or "Black Lives Matter" markings on their person.

4. The above unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by constructively discharging employee Antonio Morales Jr., we shall order the Respondent to offer Morales full reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We also shall order the Respondent to make Morales whole, with interest, for any loss of earnings and other benefits suffered as a result of their unlawful constructive discharge. Morales' 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). Further, we shall order the Respondent to compensate Morales for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 18, 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 year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). And we shall order the Respondent to file with the Regional Director for Region 18 a copy of Morales' corresponding W-2 form(s) reflecting the backpay award. *Cascade Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

Moreover, in accordance with *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall compensate Morales for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful constructive discharge, including reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Compensation for these harms and expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Additionally, the Respondent shall be required to remove from its files any references to the unlawful constructive discharge of Morales and to notify them in writing that this has been done and that the unlawful constructive discharge will not be used against them in any way.

We shall order the Respondent to cease and desist from applying its dress code and apron policy to Section 7-protected employee activity. *AT&T Mobility*, 370 NLRB No. 121, slip op. at 2–8.[44]

Finally, the General Counsel requested nationwide notice-posting. Because our findings of violations here rely only on events at the New Brighton store, we shall order notice-posting only at that store.

ORDER

The National Labor Relations Board orders that the Respondent, Home Depot USA, Inc., New Brighton, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Prohibiting its employees from engaging in protected concerted activities, including by displaying BLM or Black Lives Matter markings on their aprons.

b. Applying its dress code and apron policy to restrict employees in the exercise of their Section 7 rights.

c. Constructively discharging employees by confronting them with a choice between abandoning their Section 7 rights and resigning their employment.

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

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

a. Within 14 days from the date of this Order, offer Antonio Morales Jr. full reinstatement to their former job or,

[44] Under *AT&T Mobility*, the remedy for unlawfully applying a facially neutral rule to restrict Sec. 7 activity is an order to cease and desist. Chairman McFerran dissented in *AT&T Mobility* and adheres to the views stated there. She nevertheless applies it for institutional reasons for the purpose of determining the remedy in this case. Members Prouty and Wilcox did not participate in *AT&T Mobility* and express no view as to whether it was correctly decided. They apply it here as extant Board precedent for institutional reasons.

if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

b. Make Antonio Morales Jr. whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of their unlawful constructive discharge, in the manner set forth in the remedy section of this decision.

c. Compensate Antonio Morales Jr. for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, 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 year(s).

d. File with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Antonio Morales Jr.'s corresponding W-2 form(s) reflecting their backpay award.

e. Within 14 days from the date of this Order, remove from its files any references to the unlawful constructive discharge of Antonio Morales Jr. and, within 3 days thereafter, notify them in writing that this has been done and that the constructive discharge will not be used against them in any way.

f. 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.

g. Post at its facility in New Brighton, Minnesota, copies of the attached notice marked "Appendix."[45] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its New Brighton, Minnesota facility at any time since February 17, 2021.

h. Within 21 days after service by the Region, file with the Regional Director for Region 18 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.

IT IS FURTHER ORDERED that the allegation concerning the Respondent's instruction to Morales not to discuss, and to otherwise keep confidential, the ongoing investigation into misconduct by a coworker is severed and remanded to Administrative Law Judge Paul Bogas for further appropriate action including reopening the record, if necessary, and the preparation of a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 21, 2024

_____

Lauren McFerran, Chairman

_____

Gwynne A. Wilcox, Member

[45] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part.

The National Labor Relations Act protects employees when they act collectively for certain purposes. Among other rights, Section 7 of the Act grants employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Whether activity is concerted and, if so, whether it is engaged in for the purpose of mutual aid or protection present distinct issues.[1]

As I will show, employee Antonio Morales Jr. did not engage in concerted activity by their[2] individual act of displaying "BLM" on their work apron under the *Meyers Industry* cases.[3] Nor was Morales's use of "BLM" concerted under a logical outgrowth theory, and my colleagues' conclusion otherwise gives way at multiple points. First, Morales's decision to display "BLM" on their apron was not preceded by protected concerted activity, which is a prerequisite to find logical outgrowth. Second, my colleagues' finding of logical outgrowth disregards the Respondent's right to due process because it focuses on Morales's *refusal* to remove "BLM" from their apron in February 2021, rather than, as the General Counsel alleged, on Morales's *display* of "BLM" that began in August or September 2020. Third, the majority's finding of logical outgrowth ultimately rests on a misinterpretation of the Board's decisions in the *Meyers Industries* cases, to which my colleagues claim to adhere but which they effectively repudiate.

But even if Morales engaged in concerted activity by displaying "BLM" on their work apron, they did not do so for the purpose of mutual aid or protection. Employees act concertedly for the purpose of mutual aid or protection "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees."[4] Whether concerted activity has this purpose is determined under an objective standard, i.e., from the perspective of a reasonable person with knowledge of the relevant facts.[5] Morales wrote "BLM" on their work apron sometime during the first month of their employment at the Respondent's New Brighton, Minnesota store. That employment began in August 2020, and the New Brighton store is less than seven miles away from the site where George Floyd was murdered by a Minneapolis police officer on May 25, 2020. That tragic event and the widespread protests that ensued dramatically heightened public awareness of the "Black Lives Matter" movement. Particularly given the proximity, temporally and geographically, of Morales's display of "BLM" to those events, a reasonable person with knowledge of the relevant facts would have linked Morales's display of "BLM" with the Black Lives Matter movement and its goal of combating police violence against Black individuals—not with improving terms and conditions of employment of employees at the Respondent's New Brighton store or otherwise improving their lot as employees.

Whether an act constitutes concerted activity for the purpose of mutual aid or protection presents a highly fact-intensive issue. In a different case with different facts, it could well be that an employee who displays "BLM" in the workplace is protected by the Act in doing so. On the facts of this case, however, I cannot so find. Accordingly, in relevant part, I respectfully dissent.[6]

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[1] *Fresh & Easy Neighborhood Market*, *Inc.*, 361 NLRB 151, 152-153 (2014).

[2] "It is the Board's practice to refer to individuals by the personal pronouns that they indicate they use." *Starbucks Corp.*, 372 NLRB No. 93, slip op. at 1 n.1 (2023). Morales's pronouns are "they" and "them."

[3] *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), supplemented *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).

[4] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

[5] *Fresh & Easy Neighborhood Market*, *Inc.*, 361 NLRB at 153.

[6] I join my colleagues in upholding the judge's credibility determinations and in dismissing, on credibility grounds, the allegation that the Respondent violated Sec. 8(a)(1) by criticizing and thereby impliedly threatening Morales for sending an email urging an open discussion about racism.

Because I would find that Morales did not engage in protected concerted activity by displaying "BLM" on their work apron, I necessarily dissent from my colleagues' findings that the Respondent violated Sec. 8(a)(1) of the Act by directing Morales to remove the "BLM" marking, by applying its apron and dress code policies to prohibit Morales from displaying the "BLM" marking, and by constructively discharging Morales for declining to remove the "BLM" marking. For the same reason, I find it unnecessary to decide whether special circumstances privileged the Respondent to require Morales to remove the "BLM" marking or address the Respondent's defenses that requiring it to permit the display of "BLM" on its orange work aprons violates federal trademark law and the First Amendment.

The General Counsel alleged that the Respondent violated Sec. 8(a)(1) by instructing Morales, during an investigatory interview on February 18, 2021, to keep their discussion confidential. The judge dismissed the allegation, finding that the instruction was lawful under *Alcoa Corp.*, 370 NLRB No. 107 (2021), and *Watco Transloading LLC*, 369 NLRB No. 93 (2020). *Alcoa* and *Watco Transloading* relied on *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019), and *Apogee* relied on *The Boeing Company*, 365 NLRB No. 154 (2017), and

FACTS

The Respondent operates approximately 2200 retail stores across North America and employs about 400,000 employees. It requires its employees to wear a distinctive orange apron when working on the store floor. The Respondent encourages its employees to customize their aprons with personal messages and images, but it prohibits "unacceptable" displays, including "causes or political messages unrelated to workplace matters."

On May 25, 2020, George Floyd was murdered by Minneapolis Police Officer Derek Chauvin, six-and-a-half miles from the Respondent's New Brighton, Minnesota store. Soon after, protests began in the vicinity of Floyd's murder. The Respondent had to close the New Brighton store on multiple occasions due to ensuing protests. New Brighton store employee Sarah Ward testified that the week following Floyd's death "was a particularly memorable week," during which several employees wrote "BLM" on their aprons. Suzette Johnson, the assistant store manager for operations at the New Brighton store, also testified that "the BLM on the aprons started right after the George Floyd situation." New Brighton store employee Nebiy Tesfaldet linked his decision to write "BLM" on his apron "with the protests and the fresh murder of Floyd."

Antonio Morales Jr. was employed as a sales specialist in the flooring department of the New Brighton store beginning sometime in August 2020 until they resigned on February 19, 2021. Morales testified that they wrote "BLM" on their apron sometime during the first month of their employment.[7] Soon after Morales began working at the store, Allison Gumm, a coworker in the flooring department, told Morales to keep an eye on a particular customer because "statistically Somalia people [sic] tend to steal more." Morales also observed Gumm being unhelpful to Black customers.

Morales asked Ward and Tesfaldet "if they had any experiences with Allison treating people of color differently."[8] Ward, who is White, replied (inappositely) that Gumm had remarked to Ward that it was weird she was not married. According to Morales, Tesfaldet, who is Black, replied that Gumm would not pay attention to him when he was speaking to her. According to Tesfaldet, he replied that Gumm is "an interesting character but she hasn't brought me any trouble."

On September 14, Morales and Ward met with Flooring Department Supervisor Michelle Theis to complain about the way Gumm was treating customers. Theis told Morales and Ward that she would talk to Taylor Flemming, an assistant store manager. Sometime in October, Flemming and Jordan Meissner[9] approached Ward and asked her for more details about Gumm's behavior. During that meeting, Ward told Flemming and Meissner that employees had begun concertedly intercepting Black customers before Gumm could reach them. In November, Morales met with Theis a second time and complained about Gumm's treatment of Morales—specifically, that whenever Morales rested their arm on the desk in the flooring department, Gumm would immediately sanitize that area, and that Gumm did not do likewise with any other coworker. Morales also told Theis of incidents involving Gumm's mistreatment of Black customers. In late 2020 or early 2021, Tesfaldet also reported Gumm's mistreatment of Black customers to management.

On February 2, 2021, Gumm photographed Morales and employees Jamesha Kimmons and Blessing Roberts without their consent. After discussing the incident among themselves, Morales, Kimmons, and Roberts reported it to Merchandising Assistant Manager Enrique Ellis. The next day, Morales met with Operations Assistant Manager Johnson and repeated their complaints about Gumm.

During February 2021, employees put up a display to celebrate Black History Month. The display was approved by management, and Tesfaldet was allowed to use work time and store supplies to create posters. One poster featured a photograph of former San Francisco 49ers quarterback Colin Kaepernick, who famously protested police violence against Black individuals by kneeling during the

LA Specialty Produce Co., 368 NLRB No. 93 (2019). Recently, in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), a Board majority, over my dissent, overruled *Boeing*, *LA Specialty Produce*, "and their progeny." Id., slip op. at 11. My colleagues now remand this allegation for further proceedings consistent with *Stericycle*. However, it presents a straightforward legal question: whether, under the new legal standard established in *Stericycle*, the instruction was unlawful. The Board is quite capable of answering this question without remanding it to the judge. Accordingly, I would issue a Notice to Show Cause to inquire whether the parties would even welcome a remand. See *West Shore Home, LLC*, 372 NLRB No. 143, slip op. 1–3 (2023) (Member Kaplan, dissenting).

[7] Although Morales did not testify to the exact date they wrote "BLM" on their apron, General Counsel's Exhibit 50 is a photograph of Morales's apron taken on September 29, 2020, which shows the letters "BLM" displayed on the apron. Accordingly, Morales wrote "BLM" on their apron no later than September 29, 2020. In addition, Morales testified that they put "Halloween decorations" on their apron "at the end of September, if not very early October," and that they put "BLM" on the apron before the Halloween decorations.

[8] As my colleagues observe, many of the witnesses at the hearing used the terms "people of color" and "customers of color." Additionally, Morales testified that they identify as Hispanic, Mexican, and a person of color. Accordingly, I use those terms in this opinion as well.

[9] Meissner's position is unclear from the record. The judge describes Meissner as "a supervisor who performed some human resources tasks at the store."

pre-game National Anthem.[10] Someone ripped the photo of Kaepernick off the poster. On February 13, Flooring Assistant Manager David Stolhanske sent an email to the staff condemning the vandalism and committing to undoing it. Morales discussed the vandalism and the email with Kimmons and, with Kimmons' encouragement, spoke with Stolhanske. Morales told Stolhanske that his email was a good start but insufficient and that the incident merited a storewide discussion. Stolhanske replied that he thought the email was sufficient. Kaepernick's photo was reattached to the poster, but it was torn off again, and another part of the Black History Month display was also vandalized. On February 17, Ellis sent an email to the staff asking for help identifying the culprit. After talking with coworkers, Morales replied to Ellis's email, writing in part: "I believe it is important to help our fellow coworkers of color feel safer about the environment they work in starting with opening up this discussion in a more public manner that shows us that we are as valued as everyone else at Home Depot."

Later that day, Ellis and Store Manager Jason Bergeland met with Morales to discuss Morales's email about opening up the discussion. During this meeting, Bergeland noticed for the first time the letters "BLM" on Morales's apron. Bergeland told Morales that "BLM" was impermissible under the dress code because it was a social cause and that Morales had to remove it. Morales refused to do so and clocked out, falsely claiming a family emergency.

The next day, District Manager Melissa Belford and District Human Resources Manager Casey Whitley met with Morales virtually. Morales recorded the meeting.[11] Belford began the meeting by asking Morales for further specifics about Gumm's behavior. This part of the meeting was an investigatory interview in connection with the Respondent's ongoing investigation of Gumm's misconduct. Belford expressed regret that more had not been done, assured Morales that steps had been taken to address Gumm's behavior, and hinted that further steps would be taken.[12]

Midway through the meeting, Belford raised the subject of Morales's "BLM" marking. She asked Morales why they put "BLM" on their apron. Morales replied, "I put it on as a signal to show that I support [B]lack people; I support people of color. And I think what happened over the course of the summer, I think that needs to be addressed and how we need to continue to support [B]lack people." Belford agreed that Home Depot "[has] to be a company that leads the way on how we support people exactly for who they are," but she explained that the Respondent's dress code prohibits displaying symbols that represent "political, religious views, anything political, religious, racial views, any things like that." She suggested other ways that Morales could "show support for people of color or [B]lack associates." Morales acknowledged that there were other ways and said that they would do those things as well, but they would "also do this," i.e., continue to display "BLM" on their apron. Morales added that they were willing to be fired over it. Belford told Morales that she was not going to fire them but, she added, "you can't be at work if you won't be in dress code."

Belford said that she would arrange for Morales to be clocked out after their meeting, and she made it clear that Morales could not come back to work until they found "a different way to express your belief and your support of Black History Month or [B]lack people in general and racial equality." But she also made it clear that she wanted Morales to find a different way and remain "a part of the Home Depot team." Morales said, "I don't think there's any other choice. It seems like no one is listening . . . ." "Why do you say that no one's listening?" asked Belford. Morales replied: "It's been six months, and nothing has been done." Belford disagreed that "nothing" had been done—Gumm had been disciplined, twice[13]—but she acknowledged that not enough had been done, and she expressed regret once again. But, Belford added, Home Depot's response to that situation "is a completely separate issue from you having the Black Lives Matter on your apron." Morales did not disagree with that statement. Belford then made a final appeal to Morales to think about "other ideas of things that could either go on aprons or that we could do to show support for our associates of color or our . . . contractors of color or the community, without it being something that would go against dress code." Morales said that they were willing to think of something. Nevertheless, the next day, Morales sent the following message to Belford, Bergeland, and Theis:

> After allowing myself the time to reflect on the events that have transpired over the course of my 6 months of employment at Home Depot, I have come to the decision that I am resigning from my position as a Sales Associate for flooring effective 2/19/2021.
>
> Home Depot has failed to adhere to their Diversity and Inclusion policy. I endured 6 months of harassment

[10] Eliott C. McLaughlin, Colin Kaepernick reveals what led him to risk his career kneeling for social justice, *CNN*, Aug. 20, 2019, https://www.cnn.com/2019/08/20/us/colin-kaepernick-mario-woods-paper-magazine/index.html (last visited Jan. 26, 2024).

[11] A transcript of the recording is included in the record as General Counsel's Exhibit 4.

[12] The Respondent discharged Gumm on February 26, 2021.

[13] Gumm received a disciplinary coaching on December 19, 2020, and a disciplinary counseling on February 9, 2021.

> while at work. Additionally the discrimination towards myself and my fellow POC coworkers has gone on long enough. I have not felt safe, I have not felt supported, and I have not felt heard during my employment. The injustices, micro-aggressions and blatant racism I have experienced will not go unnoticed.

Morales's letter of resignation made no mention of "BLM."

DISCUSSION

1. *Morales's display of "BLM" was not concerted activity.*

a. Morales's display of "BLM" was not concerted activity under Meyers I and II.

Section 7 of the Act grants employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." In *Meyers Industries*, the Board held that in general, to be concerted, activity must be engaged in "with or on the authority of other employees, and not solely by and on behalf of the employee himself."[14] Although other employees also wrote "BLM" on their work aprons, there is no evidence that Morales acted with or on the authority of other employees when Morales did so. Indeed, the record reflects that other employees wrote "BLM" on their aprons before Morales was even employed by the Respondent. Ward testified that New Brighton store employees wrote "BLM" on their aprons during the week following George Floyd's death; Operations Assistant Manager Johnson testified that "BLM on the aprons started right after the George Floyd situation." Floyd died on May 25, 2020; Morales did not begin working at the New Brighton store until August 2020. Moreover, even if one or more employees wrote "BLM" on their aprons around the same time Morales did, there is no evidence that Morales acted with anyone else in doing so. "*[I]ndividual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action." *Meyers I*, 268 NLRB at 498 (emphasis in original). Accordingly, Morales's display of "BLM" on their apron was not concerted activity within the *Meyers I* definition of that statutory term.

Charging Party Kenneth Prill petitioned for review of *Meyers I*, and the D.C. Circuit remanded the case to the Board, asking whether the *Meyers I* definition encompasses certain kinds of acts by individual employees.[15] On remand from the D.C. Circuit, the Board held that acts by individual employees do constitute concerted activity under certain circumstances. Specifically, the Board held in *Meyers II* that the *Meyers I* definition of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[16] There is no evidence that in displaying "BLM" on their apron, Morales sought to initiate, induce, or prepare for group action. Morales did bring group complaints to the attention of management, but not by displaying "BLM" on their apron. Morales did so when they met with Flooring Department Supervisor Theis on September 14[17] and in November and with various managers on several occasions in February 2021, and when Morales replied to Ellis's email on February 17. But no manager would extrapolate a complaint about working conditions, let alone a group complaint, from the initials "BLM" on Morales's apron.[18] Accordingly, Morales's display of "BLM" on their apron was not concerted activity within the *Meyers II* clarification of the *Meyers I* definition.

b. Morales's display of "BLM" was not concerted activity under the Board's "logical outgrowth" precedent.

The Board also has held that individual employees engage in concerted activity when they engage in activity that constitutes a logical outgrowth or continuation of prior or ongoing protected concerted activity. Note the word *protected* in the preceding sentence. In the Board's "logical outgrowth" cases, the act of an individual employee deemed concerted was preceded by *protected* concerted activity, i.e., by activity that was concerted *and* sought to improve terms and conditions of employment or otherwise improve employees' lot as employees. For example, in *Teamsters Local 70 (United Parcel Service)*, an individual employee's expression of support for assigning jobs by rotation rather than seniority was found concerted as "a logical outgrowth of the employees' ongoing group concerns over the job assignment system." 372 NLRB No. 19, slip op. at 2 fn. 3 (2022). In *Constellium Rolled Products Ravenswood, LLC*, an individual employee's act of writing "whore board" on an overtime sign-up sheet

[14] *Meyers I*, 268 NLRB at 497.

[15] *Prill v. NLRB*, 755 F.2d 941, 954–955 (D.C. Cir. 1985).

[16] *Meyers II*, 281 NLRB at 887.

[17] Although Morales engaged in concerted activity when they (and Ward) met with Theis on September 14, that concerted activity was not for the purpose of mutual aid or protection, as I explain below.

[18] Although my colleagues primarily rely on a "logical outgrowth" rationale to find that Morales engaged in concerted activity, they also rely, in the alternative, on a finding that Morales was bringing group complaints to the attention of management. They do not find, however, that Morales brought group complaints to the attention of management by *displaying* "BLM" on their apron. Rather, they find that Morales did so when Morales *refused to remove* "BLM" from their apron. This finding is problematic on due process grounds. I address that issue below.

was found concerted as a "continuation and outgrowth of" employees' concerted boycott of a new overtime-sign-up system. 366 NLRB No. 131, slip op. at 2 (2018), enf. denied on other grounds 945 F.3d 546 (D.C. Cir. 2019). In *Mike Yurosek & Son, Inc.*, employees' individual refusals to work overtime were found concerted as a logical outgrowth of their prior concerted protest over a reduction in hours. 306 NLRB 1037, 1038–1039 (1992), enfd. 53 F.3d 261 (9th Cir. 1995). In *Salisbury Hotel*, an individual employee's act of calling the Department of Labor regarding her employer's lunch-hour policy was found concerted as a logical outgrowth of employees' concerted complaints about the policy. 283 NLRB 685, 687 (1987). In these and other cases,[19] individual employees were found to have engaged in concerted activity where the act of the individual grew out of concerted activity that sought to improve employees' terms and conditions of employment, i.e., where it was the logical outgrowth of *protected* concerted activity.

Here, Morales's individual act of displaying "BLM" did not grow out of protected concerted activity. Morales testified that they wrote "BLM" on their apron sometime during the first month of their employment at the New Brighton store, which began sometime during August 2020. Although the lack of specificity in the record makes it impossible to know for sure, I will assume for the sake of argument that before Morales wrote "BLM" on their work apron, they had their first conversation about Gumm with coworkers Ward and Tesfaldet and raised concerns, together with Ward, about Gumm's treatment of Black customers in a September 14 meeting with Supervisor Theis.[20] The meeting with Theis certainly constituted concerted activity because Morales and Ward acted in concert.[21] Whether Morales's prior conversation with Ward and Tesfaldet also qualified as concerted activity presents a closer question—whether it looked toward group action may reasonably be disputed—but I will assume it was, again for the sake of argument.[22] Nevertheless, Morales's act of writing "BLM" on their apron was not concerted on a "logical outgrowth" theory because to qualify as such—as the "logical outgrowth" cases cited above show—it would have to have grown out of *protected* concerted activity, and the record evidence fails to establish that Morales engaged in concerted activity *for the purpose of mutual aid or protection* before they began displaying "BLM" on their work apron.

Again, *Eastex* teaches that, to be for the purpose of mutual aid or protection, concerted activity must seek to improve *employees'* terms and conditions of employment or otherwise improve *their* lot as employees. However praiseworthy it might be in itself, concerted activity does not have a purpose of mutual aid or protection where employees seek to improve conditions for non-employees. See *Waters of Orchard Park*, 341 NLRB 642, 643 (2004) (finding that nursing home employees' concerted activity was not for the purpose of mutual aid or protection where that activity consisted of calling the state health department's patient care hotline to report concerns about patients); *Lutheran Social Service of Minnesota*, 250 NLRB 35, 42 (1980) (finding that concerted activity of employees at a home for troubled youth was not for the purpose of mutual aid or protection where that activity consisted of criticizing managerial decisions that threatened the quality of care, the quality of the program, and the welfare of the children). Indeed, the General Counsel fails to sustain her burden to prove that concerted activity was for the purpose of mutual aid or protection if it is simply *unclear* whether employees were seeking to improve their own conditions of employment or acting for the benefit of non-employees. See *Five Star Transportation, Inc.*, 349 NLRB 42, 44 (2007) (finding school-bus drivers' concerted letter-writing campaign was not for the purpose of mutual aid or protection where letters raised safety concerns but did not indicate that the writers' concerns were related to the safety of drivers as opposed to that of the schoolchildren), enfd. 522 F.3d 46 (1st Cir. 2008).[23]

[19] See *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170, 170, 175 (2011) (employee's individual act of wearing T-shirt saying "I don't need a WOW to do my job" deemed concerted as logical outgrowth of employees' prior concerted complaints about employer's performance-incentive "WOW" program), enfd. in relevant part 701 F.3d 710 (D.C. Cir. 2012); *JMC Transport*, 272 NLRB 545, 545 fn.2 (1982) (employee's individual complaint about not being paid for unloading palletized goods deemed concerted as a continuation of prior concerted protest over pay), enfd. 776 F.2d 612 (6th Cir. 1985). My colleagues cite no case, and I have found none, where an individual employee's act found concerted on a "logical outgrowth" theory was preceded by activity that was concerted but did *not* seek to improve terms and conditions of employment or otherwise improve employees' lot as employees.

[20] It is entirely possible, however, that Morales wrote "BLM" on their apron before they met with Theis on September 14. General Counsel's Exhibit 50 established that Morales did so no later than September 29, and there is no evidence that Morales wrote "BLM" on their apron after September 14 but before September 29.

[21] Even if Morales had met with Theis alone, it still would have been concerted activity because in that meeting, a group complaint about Gumm's conduct was brought to the attention of management.

[22] My colleagues find that Morales's testimony about the September 14 meeting suggests Morales and their coworkers were already having discussions about Gumm's behavior prior to that meeting. I have already given the General Counsel the benefit of the doubt and assumed employees were engaged in concerted discussions prior to the September 14 meeting.

[23] The majority says that *Five Star Transportation* is distinguishable because Morales *did* seek to improve terms and conditions of employment within the New Brighton store prior to their material act. However, the distinction my colleagues urge rests on their position that the material

Here, when Morales and Ward met with Theis on September 14, they complained about the way Allison Gumm treated customers. They were engaged in concerted activity, but that activity did not have mutual aid or protection as its purpose because they sought to improve the experience of customers at the New Brighton store, not employees' terms and conditions of employment or their lot as employees.[24] Similarly, assuming arguendo that Morales was engaged in concerted activity when they first spoke with Ward and Tesfaldet about Gumm, the evidence fails to establish a purpose of mutual aid or protection. Morales testified that they asked Ward and Tesfaldet if they had any experiences with Gumm "treating people of color differently." It is unclear, at best, whether "people of color" referred to employees of color as opposed to customers of color, so the evidence does not establish the requisite statutory purpose. See *Five Star Transportation*, supra. Moreover, between those possibilities, the likelier of the two is that Morales was referring to customers of color. Morales posed that question to Ward and Tesfaldet after Gumm told Morales that Somali customers have a proclivity for theft, and after Morales had observed Gumm being unhelpful to Black customers. If Morales's conversation with Ward and Tesfaldet looked toward group action at all, the group action it looked toward was the September 14 meeting with Theis, where Morales and Ward complained about Gumm's treatment of Black customers without saying anything about intercepting those customers before Gumm could reach them—a subject that came up for the first time when Ward met with management in October—or otherwise linking Gumm's mistreatment of Black customers to conditions of employment within the New Brighton store or employees' lot as employees. Accordingly, Morales's display of "BLM" was not concerted on a "logical outgrowth" theory because the evidence fails to establish that Morales wrote those initials on their apron after, and as a continuation of, *protected* concerted activity.[25]

act was Morales's refusal to remove "BLM" from their apron in mid-February 2021, not Morales's choice to begin displaying "BLM" on their apron in August or September 2020. Again, this position is problematic on due process grounds, as I explain below.

[24] My colleagues say that I take issue here with a finding by the administrative law judge to which no exceptions were filed. I do not. Again, my finding is that Morales's concerted activity on September 14 of complaining, together with Ward, about Gumm's mistreatment of Black customers was not for the purpose of mutual aid or protection. The judge did not find that Morales engaged in concerted activity for the purpose of mutual aid or protection on September 14. His unexcepted-to finding was that Morales engaged in concerted activity for the purpose of mutual aid or protection in "October or November." In October, Gumm's mistreatment of Black customers was linked to conditions of employment when Ward told management that employees were intercepting Black customers before Gumm could reach them. Morales did not participate in that meeting, which perhaps explains the tentativeness of the judge's finding—i.e., that Morales first engaged in protected concerted activity in October *or* November, when Morales met with Theis a second time. Either way, Morales began displaying "BLM" on their apron no later than September 29, so their decision to do so cannot have been a logical outgrowth of prior protected concerted activity that took place after that date in October or November.

In the same footnote, my colleagues state that "[a]n employer's failure to remedy race-based mistreatment of customers also affects the interests of employees as employees insofar as they may be required to perform additional tasks to assist and interact with customers aggrieved by mistreatment and may reasonably feel responsible for, or otherwise implicated in, mistreatment that they and others find morally or legally objectionable." To the extent that this statement could be read to suggest that such feelings alone are a sufficient basis for finding mutual aid and protection, I disagree. Morales may very well have experienced those very feelings during their initial conversations with their coworkers about Gumm's mistreatment of customers of color, but as I explain, those initial conversations were not for mutual aid and protection.

[25] My colleagues find to the contrary, but based—once again—on taking Morales's refusal to remove "BLM" from their apron as the material act for purposes of applying the "logical outgrowth" standard. Nobody could reasonably dispute that by the time Morales refused to remove "BLM" from their apron in mid-February 2021, employees (including Morales) had engaged in protected concerted activity. The issue is whether Morales's decision to display "BLM" beginning no later than September 29, 2020, was preceded by protected concerted activity. It was not, as I have shown.

My colleagues observe that in *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 578 (7th Cir. 1983) (emphasis added), the court found that "if a health care employee phrases a complaint about a situation solely in terms of its effect on patient welfare, the employee is protected *if* the situation relates to a working condition." The court reasoned that, "[i]n the health care field[,] patient welfare and working conditions are *often* 'inextricably intertwined.'" Id. (emphasis added). Critically, the court did not find that such complaints were *always* protected. In any event, my colleagues cite to no evidence that this case, involving retail workers, presents the same degree of connection as that found in the health care setting.

Apparently recognizing that the record does not contain any evidence linking the employees' concerns raised at the September 14 meeting to their working conditions, my colleagues also cite several cases for the proposition that employees are not required to specifically articulate such a link. These cases are readily distinguishable. In *Fresh & Easy Neighborhood Market*, 361 NLRB 151 (2014), an employee solicited her coworkers' assistance in complaining to management about sexual harassment. The Board found that the employee was engaged in activity for mutual aid and protection because she reasonably believed other employees were also offended and that filing a complaint about the sexual harassment might prevent similar conduct in the future. The Board reasoned: "The solicited employees have an interest in helping the aggrieved individual—even if the individual alone has an immediate stake in the outcome—because 'next time it could be one of them that is the victim.'" Id. at 156. The fact that the employee "did not articulate any mutuality of interest at the time" did not matter under the circumstances. Id. at 156 fn.17. There, of course, the purported sexual harassment occurred in the workplace, obviously affected that employee's terms and conditions of employment, and the Board reasoned, could reasonably have affected other employees' terms and conditions as well. Likewise, in *Senior Citizens Coordinating Council of Riverbay Community Inc.*, 330 NLRB 1100, 1104 & fn. 15 (2000), employees submitted a letter to the employer complaining about the failure to hire a new director. Although not specifically mentioned in the letter, the Board observed that employees were

But even assuming otherwise—i.e., even assuming that Morales and Ward engaged in *protected* concerted activity when they brought Gumm's mistreatment of Black customers to management's attention on September 14—concertedness is determined under an objective standard,[26] so the link between prior protected concerted activity and subsequent individual activity must be sufficiently apparent to a reasonable person aware of the relevant facts for the latter to constitute a logical outgrowth of the former. Even if they do not expressly state this commonsense principle, the Board's "logical outgrowth" cases amply illustrate it. For example, a reasonable person aware of the relevant facts would readily perceive the connection between employees' ongoing group concerns over their employer's system for assigning jobs and an individual employee's expression of support for assigning jobs by rotation rather than seniority (*Teamsters Local 70 (United Parcel Service)*, supra), between employees' ongoing protected concerted boycott of a new overtime-sign-up system and an individual employee's act of writing "whore board" on the overtime sign-up sheet (*Constellium Rolled Products Ravenswood*, supra), between employees' protected concerted protest over a reduction in hours and their subsequent individual refusals to work overtime (*Mike Yurosek & Son*, supra), and between employees' prior protected concerted complaints about a new lunch-hour policy and an individual employee's subsequent call to the Department of Labor to ask if the policy was lawful (*Salisbury Hotel*, supra). In these and other "logical outgrowth" cases, the link between prior protected concerted activity and subsequent individual activity was plainly evident.[27]

That evident link is missing here. Reasonable people with knowledge of the relevant facts would have been aware of employees' efforts to bring Gumm's mistreatment of Black customers to the attention of management, but they would not have connected those efforts with Morales's individual act of writing and displaying "BLM" on their work apron. As I explain in greater detail below in addressing whether that display, even if concerted, was undertaken for the purpose of mutual aid or protection, a reasonable observer would have been far more likely to connect Morales's display of "BLM" with the recent murder of George Floyd mere miles from the Respondent's New Brighton store and with the broader Black Lives Matter movement that Floyd's murder catapulted into public awareness than with two employees' complaints to management about Gumm's treatment of Black customers. Additionally or alternatively, a reasonable observer might have perceived the "BLM" marking on Morales's apron to signal Morales's solidarity with people of color in a time of trouble. Again, that connection would have been more likely than one linking the "BLM" marking with employees' complaints about Gumm's behavior. The mere fact that an act by an individual takes place *after* protected concerted activity does not establish that it grows logically out of that activity if a reasonable person with knowledge of all the relevant facts would view that individual act as growing out of something other than the preceding protected concerted activity. That, I believe, is what we have here.[28]

Accordingly, even assuming Morales's decision to display "BLM" on their work apron in August or September

concerned about their lack of supervision, which the Board found affected the employees' working conditions in part because, in the absence of a licensed director, they had to consult each other on case work and perform additional computer work. Id. at 1104. The Board found that it could rely on this unarticulated purpose because "[s]pecificity and/or articulation are not the touchstone of . . . protected concerted activity. The nexus between the activity and working conditions must be gleaned from the totality of the circumstances[.]" Id at 1104 n.15 (citing *Atlantic-Pacific Construction Co. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995) (internal quotations and citations omitted). The Board concluded that the "while the Respondent may not have known of these [specific] concerns, it did know of [the employees' general] concerns regarding lack of 'appropriate supervision.'" Id. Again, in that case, the lack of supervision in the workplace obviously affected employees' terms and conditions of employment. In each of these cases, the Board did not require employees to articulate a link between their conduct and their working conditions because that link was plainly evident from the totality of the circumstances. As I explain, there was no such evident linkage between the employees' concern over Gumm's mistreatment of customers of color and their lot *as employees* either during the September 14 meeting or during the discussions leading up to that meeting.

[26] *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB at 153 ("Under Section 7, both the concertedness element and the 'mutual aid or protection' element are analyzed under an objective standard.").

[27] My colleagues say that "logical outgrowth" is established where "the circumstances demonstrate the existence of a logical connection." I agree, provided one adds that the logical connection must be apparent to a reasonable person with knowledge of *all* the relevant circumstances, including, as here, world-historical events to which the act in dispute is logically *more* connected. *KNTV, Inc.*, 319 NLRB 447 (1995), and *Blue Circle Cement Co.*, 311 NLRB 623 (1993), enfd. 41 F.3d 203 (5th Cir. 1994), cited by the majority, are not to the contrary.

[28] My colleagues criticize me for not citing precedent in support of this proposition, but they cite no case to the contrary, and so far as I can make out, the circumstances this case presents are novel. My colleagues also refute an argument I do not make. They write:

> In *Meyers I*, the Board held that, "once an activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, *the employer* knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. 268 NLRB at 497 (emphasis added). Any suggestion that the General Counsel must also prove that some entity other than the employer (such as "a reasonable person with knowledge of the facts") also knew of the concerted nature of the employee's activity would be inconsistent with that precedent.

But of course, what is at issue here is not whether the Respondent had knowledge of concerted activity. It is whether Morales engaged in

2020 was preceded by protected concerted activity, the General Counsel failed to carry her burden of proving that Morales's decision was concerted on a "logical outgrowth" theory because, in light of the temporal and geographical proximity of that decision to the murder of George Floyd and the ensuing widespread public awareness of the Black Lives Matter movement, a reasonable person with knowledge of all the relevant facts would have linked Morales's display of "BLM" with that movement—as, indeed, it appeared to be on its face—not with the preceding protected concerted activity. But, as explained above, Morales's decision to display "BLM" on their apron was not preceded by protected concerted activity at all, and therefore that display cannot constitute concerted activity on a "logical outgrowth" theory.

2. Morales' display of "BLM" was not for the purpose of mutual aid or protection.

Because Morales's individual act of displaying "BLM" on their work apron did not constitute concerted activity, the analysis may end there. Nevertheless, even assuming that Morales engaged in concerted activity by displaying "BLM" on their work apron, Morales still did not enjoy the protection of the Act in doing so because the display was not for the purpose of mutual aid or protection.

Again, whether concerted activity is for the purpose of mutual aid or protection is determined under an objective standard.[29] Morales's subjective motive in writing "BLM" on their work apron is therefore irrelevant, and Morales's act must be viewed from the perspective of a reasonable person with knowledge of the relevant facts, which include a great deal more than Allison Gumm's reprehensible behavior and the vandalism of the Black History Month display.

To begin, a reasonable person would be unlikely, as a general matter, to associate a "BLM" insignia with racism in the workplace. Black Lives Matter is a global organization, founded in 2013, "whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes."[30] It is also a decentralized political and social movement some members of which "have broader agendas, such as economic redistribution."[31] Whether as an organization or a decentralized movement, Black Lives Matter is not widely known for advocating for racial justice in the workplace. Without something more to connect the "BLM" marking on Morales's work apron to conditions of employment in the New Brighton store—such as by writing "BLM at Home Depot" or "BLM in this store" on their apron—a reasonable person with knowledge of all the facts would be unlikely to associate a "BLM" insignia with improving conditions of employment.

More specifically, a reasonable person would view Morales's display of "BLM" beginning in August or September 2020 in light of what had happened in Minneapolis just a few months earlier. Morales wrote "BLM" on their apron sometime during the first month of their employment at the New Brighton store. Morales's employment began in August 2020, and the New Brighton store is just six-and-a-half miles from the site where George Floyd was murdered by a Minneapolis police officer on May 25, 2020, sparking protests nationwide.[32] Although the Black Lives Matter movement certainly did not begin with George Floyd's death, its profile was dramatically heightened after, and as a result of, his death and the widespread protests that ensued.[33] In August 2020 and thereafter, a reasonable person with knowledge of the relevant facts would have been far more likely to link Morales's display of "BLM" with that organization or movement than with improving terms and conditions of employment within the New Brighton store.

Of course, a reasonable person in these circumstances would also have been aware of Gumm's racist behavior, Morales's discussions with coworkers, and Morales and Ward's concerted activity in bringing their concerns about Gumm's behavior to management's attention. However, the General Counsel does not sustain her burden to prove a purpose of mutual aid or protection where the purpose of concerted activity is unclear or equivocal, *Five Star Transportation*, supra, and nothing in Morales's display of "BLM" would have indicated to a reasonable observer that Morales's concerns were related to racism within the New Brighton store as opposed to the goals of the Black Lives Matter organization or, more generally, those of Black

concerted activity in the first place, and an objective standard, i.e., a "reasonable person" standard, governs the determination of that issue, as my colleagues acknowledge.

[29] *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB at 153.

[30] About – Black Lives Matter, https://blacklivesmatter.com/about/ (last visited Oct. 19, 2023). The "Black Lives Matter" website makes no mention of countering racism in the workplace.

[31] Conor Friedersdorf, "How to Distinguish Between Antifa, White Supremacists, and Black Lives Matter," *The Atlantic* (Aug. 31, 2017).

[32] See Jiachuan Wu et al., *Map: Protests and Rallies for George Floyd Spread Across the Country*, https://www.nbcnews.com/news/us-news/map-protests-rallies-george-floyd-spread-across-country-n1220976 (last visited Oct. 19, 2023).

[33] "Protesters around the world rally for George Floyd and against police brutality," *France24* (July 6, 2020); Larry Buchanan et al., "Black Lives Matter May Be the Largest Movement in U.S. History," *New York Times* (July 3, 2020).

Lives Matter as a decentralized political and social movement.[34]

Accordingly, even if one assumes for the sake of argument that Morales engaged in concerted activity by displaying "BLM" on their apron, the General Counsel failed to carry her burden of establishing that such concerted activity was undertaken for the purpose of mutual aid or protection, and therefore she failed to prove that Morales engaged in *protected* concerted activity by displaying "BLM."

3. The majority's decision is flawed both procedurally and substantively.

My colleagues invoke the Board's "logical outgrowth" precedent to find that Morales engaged in concerted activity by refusing to remove "BLM" from their work apron in February 2021. In the alternative, they find Morales's refusal to remove "BLM" concerted on the basis that by doing so, Morales was bringing a group complaint to the attention of management. For several reasons, these findings cannot stand.[35]

a. The majority's concertedness finding denies the Respondent due process.

"'To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case.'" *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (quoting *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992)). The majority's concertedness finding fails this basic standard of fairness because the act my colleagues find concerted differs from the act the General Counsel alleged was concerted. The complaint alleges that Morales engaged in concerted activity "[b]eginning about August 2020" by "displaying the slogan 'BLM' on [their] apron." My colleagues, however, find that Morales engaged in concerted activity, not by *displaying* "BLM" on their apron beginning about August 2020, but by *refusing to remove* "BLM" from their apron during their meeting with Store Manager Bergeland on February 17, 2021, and with District Manager Belford the next day.[36] Displaying "BLM" and refusing to remove "BLM" are distinct acts, and nothing in the way the General Counsel alleged or litigated Morales's BLM-related conduct would have put the Respondent on notice that Morales's material act was their refusal to remove "BLM" from their apron in February 2021, not their display of "BLM" beginning in August or September 2020. To the contrary, paragraph 5(a) of the complaint alleged that Morales engaged in concerted activity by *displaying* "BLM" on their work apron "[b]eginning about August 2020,"[37] and a good deal of questioning of Morales by counsel for the General Counsel was devoted to pinning down, as precisely as possible, when Morales wrote "BLM" on their apron.

This denial of due process vitiates both "concertedness" rationales my colleagues rely on, i.e., their "logical outgrowth" rationale and the rationale that Morales was bringing a group complaint to the attention of management. Both depend on abandoning the General Counsel's theory of the case by making Morales's February 2021 refusal to remove "BLM" from their apron the material act.

b. The majority relies on an unprecedented extension of the "logical outgrowth" theory.

As explained above, the Board has found acts performed by an individual to constitute concerted activity where those acts were the continuation or logical outgrowth of prior or ongoing protected concerted activity. As further already explained, although Morales's act of writing "BLM" on their work apron may have been preceded by concerted activity, it was not preceded by *protected* concerted activity because by complaining to management on September 14 about the way Gumm treated customers, Morales and Ward were seeking to improve

[34] As I have explained above, the General Counsel failed to establish that a reasonable person would believe that Morales's decision to write "BLM" on their apron was undertaken for the purpose of mutual aid or protection. The majority's argument that an employee's conduct may have other objectives is irrelevant because the General Counsel failed to establish that even *one* objective was for mutual aid or protection. Mere speculation that the "BLM" marking may have related to working conditions is insufficient to find that it was, in fact, an objective of Morales's conduct.

[35] My colleagues also err by relying on evidence of Morales's subjective intent to find that their conduct was for mutual aid or protection, despite repeatedly acknowledging that the test is an objective one. Further, even if this evidence were relevant, which it is not, it not only fails to support my colleagues' conclusion, but actually undermines it.

[36] My colleagues paper over their due process problem by recharacterizing Morales's refusal to remove "BLM" as an insistence on continuing to display it, but these are just two different ways of saying the same thing. Besides, Morales did not continue to display "BLM" after Bergeland and Belford told Morales to remove it and Morales refused to do so. Morales clocked out and left the New Brighton store immediately after their February 17 meeting with Bergeland ended, and Belford had Morales clocked out immediately after their February 18 meeting ended. Morales never worked at the New Brighton store after that.

[37] The majority points to complaint paragraphs 5(b) and 5(d) as demonstrating that acts performed in mid-February 2021 are indeed material. They are, but not for the purpose of alleging that Morales engaged in concerted activity. Those paragraphs allege mid-February acts by *the Respondent*, not by Morales. Moreover, those acts are material to the allegations in complaint paragraphs 5(c) and 5(e) that the Respondent suspended and constructively discharged Morales, The majority also cites precedent holding that the Board may rely on a different *theory* from that pursued by the General Counsel, but here, my colleagues base their concerted-activity finding on a different *fact*: Morales's mid-February refusal to remove "BLM" from their apron and not, as alleged, Morales's display of "BLM" beginning the previous August or September. Indeed, the majority frankly acknowledges that these are "separate acts."

conditions for nonemployees, not employees' terms and conditions of employment or their lot as employees, and therefore their concerted activity did not have mutual aid or protection as its purpose.

Perhaps it was these considerations that persuaded my colleagues to abandon the General Counsel's theory of the case (at the expense of the Respondent's due process rights) and find that Morales engaged in concerted activity, not by displaying "BLM" on their apron beginning within a month of their August 2020 start at the New Brighton store as alleged, but by refusing to remove "BLM" from their apron in February 2021. By that time, the act of refusing to remove "BLM" from the apron was unquestionably preceded by protected concerted activity.

But by their analysis, my colleagues effectively find that an act that was *not* concerted as a logical outgrowth of prior protected concerted activity at its inception *can become* concerted on a "logical outgrowth" theory in light of subsequent events. This represents an unprecedented extension of the "logical outgrowth" theory. It must be recalled that deeming acts by an individual employee concerted is an exception to the general rule that employees engage in concerted activity when they actually act in concert, i.e., when they act "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. In *Meyers II*, the Board identified two circumstances under which an act by an individual employee constitutes concerted activity, and the "logical outgrowth" scenario represents a third. Nevertheless, Section 7 protects employees when they act *collectively*, and although acts by individual employees are concerted where they have some relation to group action, such acts lie at the outside edge of Section 7 activity. In my opinion, holding that an act by an individual employee that was not concerted at its inception can *become* concerted as a logical outgrowth of subsequent protected concerted activity pushes that outside edge beyond the breaking point.[38]

c. The majority misreads Meyers Industries.

Underpinning the majority's unprecedented extension of the "logical outgrowth" theory of concerted activity—under which activity that is not a logical outgrowth of protected concerted activity at its inception can evolve into "logical outgrowth" status in light of later events—is an interpretation of *Meyers Industries* that presents itself as faithful to *Meyers I* and *II* but in fact stands those decisions on their head. My colleagues misinterpret the *Meyers* decisions, and in doing so they blur the distinction between protected group action and unprotected individual action. They have already misread *Meyers I* and *II* and applied their misreading to blur this distinction;[39] they do so again here; and their repetition of that misreading as though it were settled Board law portends more of the same to come.

Again, the *Meyers I* Board defined "concerted activity" as activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." 268 NLRB at 497. But it prefaced the definition with a caution. "Although the definition of concerted activity we set forth below is an attempt at a comprehensive one," the Board wrote, "we caution that it is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law." Id. at 496–497. Applying its definition of "concerted activity" to the facts before it, the *Meyers I* Board found that Charging Party Kenneth Prill, a truckdriver, did not engage in concerted activity when he refused to drive his truck and contacted state authorities regarding its brakes, which had malfunctioned, causing an accident. Id. at 498. The Board recognized that Prill's situation "was a sympathetic one" but, it observed, "[w]e do not believe . . . that Section 7, framed as it was to legitimize and protect group action engaged in by employees for their mutual aid or protection, was intended to encompass the case of individual activity presented here." Id. at 499.

As noted above, Prill petitioned for review of *Meyers I* in the D.C. Circuit, and the court remanded the case to the Board. In doing so, it questioned the Board's definition of "concerted activity" as follows:

> [T]he *Meyers* test appears to be narrower in at least two important respects than the standards traditionally applied by the Board and the courts to define concerted activity. First, both the Board and the courts have long held that an individual who brings a group complaint to the attention of management is engaged in concerted activity even though he was not designated or authorized to be a spokesman by the group. In applying the *Meyers* test, however, the Board has essentially required that

[38] My colleagues say that I am engaging here in an "effort to advance an 'interpretation of [Section] 7 [that] might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects'" (quoting *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962)). Elsewhere, my colleagues likewise accuse me of being on a mission to "narrow [the] reading of Section 7." To the contrary, I am simply endeavoring to apply well-settled precedent to a novel set of facts, and to do so without moving the goalposts on the Respondent contrary to principles of due process as my colleagues have done. If anyone is engaging in "an effort" here, it is my colleagues, and that effort is to expand the reach of the Act beyond anything contemplated in *Meyers*, as I proceed to show.

[39] See *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023).

> such a complaint have been specifically authorized by the group in order to be protected under section 7.
>
> Second, the courts have long followed the Board's view that individual efforts to enlist other employees in support of common goals is [sic] protected by section 7. The leading case is *Mushroom Transportation Co. v. NLRB,* which holds that conduct is protected if it is "engaged in with the object of initiating or inducing or preparing for group action or . . . had some relation to group action in the interest of employees." . . . It is not clear . . . that the *Meyers* standard would protect an individual's efforts to induce group action.

Prill v. NLRB, 755 F.2d at 954–955 (footnotes omitted).

On remand, the Board in *Meyers II* responded to the D.C. Circuit, making clear that the *Meyers I* definition of concerted activity does indeed encompass both scenarios of individual conduct the court identified:

> To clarify, we intend that *Meyers I* be read as fully embracing the view of concertedness exemplified by the *Mushroom Transportation* line of cases. We reiterate, our definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

281 NLRB at 887. In response to the D.C. Circuit's view that *Meyers I* appeared to exclude these two circumstances, the *Meyers II* Board was at pains to show that it did not. It pointed out that *Meyers I* "noted with approval" a case in which the Board had recognized that "'the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.'"[40] It observed that it had recently "noted with approval" the decision of the United States Court of Appeals for the Third Circuit in *Mushroom Transportation v. NLRB*,[41] and it also noted that *Meyers I* had relied on a decision by the United States Court of Appeals for the Second Circuit in which the court had held "that individual activity looking toward group action is deemed concerted."[42] Concluding this section of its decision, the Board in *Meyers II* adverted to its caution in *Meyers I*. "To recall," it stated, "the Board cautioned in *Meyers I* that the definition formulated was by no means exhaustive and that a myriad of factual situations would arise calling for careful scrutiny of record evidence on a case-by-case basis. The record facts of the case simply did not warrant an examination of the viability of *Mushroom Transportation*." Id.

It is perfectly clear, then, that when the *Meyers II* Board reiterated the *Meyers I* caution that the definition of concerted activity set forth there "was by no means exhaustive and that a myriad of factual situations would arise calling for careful scrutiny of record evidence on a case-by-case basis," it did so in the context of defending *Meyers I* against the D.C. Circuit's charge that the definition appeared to disregard *Mushroom Transportation v. NLRB* and to exclude from "concerted activity" circumstances where an individual employee seeks to initiate, induce, or prepare for group action or brings a group complaint to the attention of management. The *Meyers II* Board explained that in holding that "concerted activity" encompasses those two circumstances, it was not departing from *Meyers I* because it had cautioned in *Meyers I* that its definition of "concerted activity" "was by no means exhaustive," and the facts presented in the case "did not warrant an examination of the viability of *Mushroom Transportation*." In adverting to the *Meyers I* caution, the Board did not intend to open up, and was not opening up, a Wild West frontier in which all sorts of acts by *individual* employees may constitute concerted activity, *beyond* instances where an individual employee seeks to initiate, induce, or prepare for group action or brings a truly group complaint to the attention of management.

Fast forward to the majority's decision in this case, where my colleagues summarize the *Meyers Industries* standard as follows:

> Under longstanding Board precedent, an employee's conduct is "concerted" when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Among other things, it "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." Id. at 887. But this definition is "by no means exhaustive

[40] 281 NLRB at 887 (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951)).

[41] Id. (citing *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986)). In *Mushroom Transportation Co. v. NLRB*, the Third Circuit held that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees. . . . Activity which consists of mere talk must, in order to be protected, be talk looking toward group action." 330 F.2d 683, 685 (3d Cir. 1964).

[42] Id. (citing *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980) (internal quotation marks omitted)).

> and . . . a myriad of factual situations . . . arise calling for careful scrutiny of record evidence on a case-by-case basis." Id.

This is a blatant misrepresentation of *Meyers II*'s holding. In *Meyers II*, what is "by no means exhaustive" is the *Meyers I* definition of concerted activity, period. In my colleagues' version of *Meyers II*, what is "by no means exhaustive" includes *both* the *Meyers I* definition *and* the *Meyers II* clarification that the *Meyers I* definition encompasses circumstances where an individual employee seeks to initiate, induce, or prepare for group action or brings a group complaint to management's attention. Beyond these, my colleagues posit, lie "a myriad of factual situations" where activity by individual employees may be deemed concerted based on "careful scrutiny of record evidence on a case-by-case basis." They open up a Wild West frontier of concerted activity by individual employees, contrary to the obvious intent of the Board in *Meyers I* and *II*.[43]

Ironically, my colleagues also adhere to the theory of so-called inherently concerted activity, and they drop a broad hint that "protests of workplace racial discrimination" may be deemed inherently concerted "in a future appropriate case." Apparently, then, whether an individual employee has engaged in concerted activity depends on the totality of the record evidence unless it turns on a single fact, the topic spoken about. And concertedness determinations demand careful scrutiny of record evidence on a case-by-case basis unless that topic renders the speaker's activity inherently concerted as a matter of law. In other words, whether the act of an individual employee constitutes concerted activity presents an issue of fact to be determined based on the totality of the evidence in the particular case—unless it doesn't.

CONCLUSION

This case is not about whether employees are protected by the Act when they engage in concerted activities to improve their terms and conditions of employment by acting collectively to counter racism in the workplace. Of course they are, and I sympathize with my colleagues' desire to extend the Act's protection to Morales's display of "BLM" on their work apron. But the right of employees to engage in concerted activity for the purpose of mutual aid or protection is not infinitely elastic, and it cannot reasonably be stretched to protect the act of an individual employee that had no relation to group action and that, even if it did, was not undertaken for the purpose of mutual aid or protection. That is what we have here, and that is why I cannot join my colleagues' decision. Accordingly, in relevant part, I respectfully dissent.

Dated, Washington, D.C. February 21, 2024.

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
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 prohibit you from engaging in protected concerted activities, including by displaying BLM or Black Lives Matter insignia on your apron.

WE WILL NOT apply our dress code and apron policy to restrict you in the exercise of your Section 7 rights.

[43] My colleagues point to the "logical outgrowth" cases as demonstrating that concerted activity by individuals is not limited to the two circumstances identified by the D.C. Circuit and addressed by the Board in *Meyers II*. However, the mere fact that there are three such scenarios rather than two does not license the Board to make the *Meyers I* "caution" into the central holding of *Meyers II*. Anyone who doubts that the Board has done so should consult the press release accompanying its recent decision in *Miller Plastic Products*, a case in which my colleagues similarly turned the "caution" that the *Meyers I* definition of "concerted activity" was by no means exhaustive into a springboard for liberating concertedness determinations from *Meyers II*'s limits. See 372 NLRB No. 134, slip op. at 3; Press Release, "Board Returns to Totality of Circumstances Test for Determining Concerted Activity," August 31, 2023 (stating that in *Miller Plastic Products*, "the Board reaffirmed the principle—originally announced in 1986 in *Meyers Industries*—that 'the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence'").

My colleagues' strategy here and in *Miller Plastic Products* resembles a strategy that I identified in my dissenting opinion in *Stericycle, Inc.*, 372 NLRB No. 113 (2023). There, I explained how for several years, a Board majority claimed to apply *Lutheran Heritage Village–Livonia*, 343 NLRB 646 (2004), to determine whether workplace rules were violative of the Act, all the while having effectively overruled it. 372 NLRB No. 113, slip op. at 23–25 (Member Kaplan, dissenting). My colleagues appear to have embarked on a similar project regarding *Meyers II*.

WE WILL NOT constructively discharge you by confronting you with a choice between abandoning your Section 7 rights and resigning your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Antonio Morales Jr. full reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Antonio Morales Jr. whole for any loss of earnings and other benefits suffered as a result of their unlawful constructive discharge, less any interim earnings, plus interest, and

WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful constructive discharge, including any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Antonio Morales Jr. for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, 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 year(s).

WE WILL file with the Regional Director for Region 18 a copy of Antonio Morales Jr.'s corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful constructive discharge of Antonio Morales Jr., and WE WILL , within 3 days thereafter, notify them in writing that this has been done and that the unlawful constructive discharge will not be used against them in any way.

HOME DEPOT USA, INC.

The Board's decision can be found at https://www.nlrb.gov/case/18-CA-273796 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.

David Stolzberg and *Tyler J. Wiese*, for the General Counsel.
Harrison C. Kuntz, Keith Frazier, C. Thomas Davis, Brian E. Hayes, Roman Martinez, Brent T. Murphy, Joseph E. Sitzmann, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case remotely using videoconferencing technology on November 2, 3, 4, and 5, 2021. Antonio Morales Jr., an individual, filed the charge in this case on March 9, 2021, and filed amended charges on April 7 and July 27, 2021. The Director of Region 18 of the National Labor Relations Board (the Board) issued the original complaint on August 12, 2021, the amended complaint on September 13, 2021, and the second amended complaint (the Complaint) on September 28, 2021. The Complaint alleges that Home Depot USA, Inc., (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (Act or NLRA): at all facilities in the United States by applying its dress code and apron policies prohibiting employees from "displaying causes or political messages unrelated to workplace matters" to encompass a prohibition on displaying the messages "Black Lives Matter" and/or "BLM"; in February 2021, by "selectively and disparately" applying the rule against "displaying causes or political messages unrelated to workplace matters" to "employees who displayed the slogan 'BLM' on their aprons and engaged in other related protected concerted activities"; in the middle of February 2021, by causing the suspension of Morales by requiring "Morales to choose between engaging in protected concerted activity, including displaying the 'BLM' slogan, and leaving the . . . facility"; on February 19, 2021, by causing the termination of Morales employee by requiring "Morales to choose between engaging in protected concerted activity, including displaying the 'BLM' slogan, and quitting [ ][1] employment," and; on February 14 and 15, 2021, by threatening employees with unspecified consequences if they engaged in protected concerted activities regarding racial harassment; and, on February 15, 2021, by instructing employees not to discuss at any time an

[1] In the complaint and throughout the hearing, Morales was referred to using male pronouns. In its brief, the General Counsel states that this was in error, and that Morales' pronouns are "they" and "them." Brief of the General Counsel at pg. 1 fn. 1. The General Counsel uses they/them/their pronouns to refer to Morales except to the extent that it is quoting the usage in transcript or exhibit selections. I think the use of the pronouns they/them/their to refer to Morales would be unacceptably confusing in this decision since the parties dispute whether certain activities were "concerted" and reference to actions taken by Morales alone as actions taken by "they" or "them" could give the mistaken impression that those actions were undertaken by multiple persons. Therefore, it is my intention in this decision to avoid using any pronouns to refer to Morales. All they/them/their pronouns in this decision are plural and should be understood to refer to more than one person. See *Little Big Burger*, 2019 WL 831959 fn. 6 (ALJ explains decision to avoid using pronouns to refer to a nonbinary individual who purportedly engaged in concerted activity).

employer investigation.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in New Brighton, Minnesota, that sells and delivers home improvement merchandise. In conducting these business operations, the Respondent annually derives gross revenues in excess of $500,000 and has purchased and received goods valued in excess of $50,000 at its New Brighton location directly from points located outside the State of Minnesota. The 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.

II. THE RESPONDENT'S NATIONWIDE DRESS CODE AND APRON POLICIES

The Respondent is a retail chain that sells home improvement products. It operates approximately 2200 stores in the United States, Canada, and Mexico, and has approximately 400,000 to 500,000 employees across its operations. The Respondent's employees wear orange Home Depot aprons while working in its retail stores. The Respondent's apron bears some pre-printed messages – among them, "I put customers first," the words "I am" above a place for employees to write their names, and a circle listing eight company "values." Employees are encouraged to personalize their aprons by adding written messages and other elements. The record shows that the additions employees make to the aprons are sometimes extensive.

The Respondent's written dress code policy sets forth a number of requirements and prohibitions regarding work attire. The dress code policy has, at all relevant times, been applicable at the Respondent's facilities in the United States. The requirements and prohibitions at-issue in this case are as follows. While in stores, employees are generally required to wear the company apron. Joint Exhibit Number (J Exh.) 1 at Page 1. The dress code states that this apron "is not an appropriate place to promote or display religious beliefs, causes or political messages unrelated to workplace matters." (Id. at pp. 1 and 3.) The dress code states that employees are prohibited from using the apron for "displaying causes or political messages unrelated to workplace matters." (Id. at 4.) The dress code's reach is not confined to the apron. For example, the dress code states that it is also "unacceptable" for employees to wear shirts, sweatshirts, or hats with "wording, logos or pictures . . . that address causes or political matters unrelated to the workplace." (Id. at pp. 4 to 5.)

This case includes an allegation that the Respondent violated the Act by interpreting its dress code prohibitions on the display of cause/political messaging to encompass a prohibition on the display of the messages "Black Lives Matter" and "BLM." The written policy makes no mention of Black Lives Matter or BLM; however, the parties stipulate that across the United States the Respondent interprets the dress code policy prohibition on displays of "causes or political messages unrelated to workplace matters" to encompass a prohibition on displays of the messages "BLM" and "Black Lives Matter." The record does not show, however, that the Respondent has promulgated this nationwide interpretation in writing or otherwise made a general announcement regarding it to managers at the district or store level.

As is discussed later in this decision, the parties presented substantial evidence about the circumstances surrounding Charging Party Morales' display of the message "BLM." Morales worked at one of the Respondent's Minneapolis-area stores. That store is referred to in the record as the New Brighton store or store 2807. The New Brighton store was the only one of the Respondent's locations for which the record provides meaningful evidence about the circumstances surrounding employee displays of BLM or Black Lives Matter, or about local management's response, if any, to such displays. As far as what the dress code meant nationwide to management, the Respondent presented the testimony of Derek Bottoms the Respondent's chief diversity officer, and vice-president of associate relations. Bottoms, testified that, as a black man with three black sons, he understood BLM to be a "political message, a political statement, a political movement" "unrelated to the workplace." (Tr. 789–790, 804.) He testified that his understanding was that BLM was about "try[ing] to prevent or raise awareness of police violence towards African-American males" and, in some quarters, about an effort to "defund the police," but that he did not think there was "one view of what BLM stands for." Ibid. He testified that employee displays of the BLM message on their work attire violate the dress code because BLM is a political message unrelated to the workplace.

The General Counsel and the Respondent each submitted media reports and web site print outs in an effort to support their position regarding the question of whether the messages "Black Lives Matter" and "BLM" addressed employees' terms and conditions of employment. See General Counsel Exhibit Number (GC Exh.) 101 to 113; Respondent Exhibit Number (R. Exh.) 24(a) to (i). Also included among those exhibits are documents that the Respondent proffers as evidence that the display of Black Lives Matter/BLM and similar messages have led to workplace conflict and that Black Lives Matter/BLM protests and counterprotests have occasioned civil unrest in the vicinity of the New Brighton Store and elsewhere. The General Counsel and the Respondent stipulated to the admission of one another's selections, and the record provides no reason to doubt the authenticity of those selections.[3] I note, however, that there was no testimony or analysis showing that the media and web page selections the

[2] At the start of the hearing, but before any evidence or opening statements were made, I granted the General Counsel's motion to amend the complaint to add the last of these allegations. Transcript at Page(s) (Tr.) 8–9.

[3] In its brief, the Respondent also cites to a web page, not submitted as an exhibit, that sets forth "BLM's 7 Demands." Brief of Respondent at Pages 10, 73–74. That web page was still available at the time of my review of the briefs and record, and is sponsored by the Black Lives Matter Global Network. See https://blacklivesmatter.com/blm-demands/ (viewed on May 12, 2022). The website included recent news stories, showing that the site was actively maintained at the time of my review. I consider the "BLM's 7 Demands" web page along with the other, similar, web pages that were submitted by the parties.

parties chose to identify are representative of the public discourse on the meaning of Black Lives Matter/BLM or were authoritative regarding either what that phrase encompasses or everything the Black Lives Matter organization or movement does, or does not, support. For these reasons I find that the materials are entitled to limited weight.

To the extent that I was able to glean something consistent and meaningful from reviewing these materials it is as follows. The Black Lives Matter message and movement originated in 2013 to protest the unjustified killing of unarmed black individuals by law enforcement or vigilantes and the lack of appropriate consequences for the killers. The Black Lives Matter Global Network was created by the persons who originated or popularized the phrase and hashtag "Black Lives Matter," and those persons have used the Black Lives Matter Global Network to advocate for changes aimed at preventing and punishing unjustified state and vigilante violence against black communities and at eradicating societal racism.[4] Subsequently, the phrase Black Lives Matter/BLM has sometimes been used to refer not only to the organization created in 2013 and 2014, but also to a political movement that expresses the views of the originators and the organization they created, as well as the views of other groups and individuals who seek to harness the attention and energy that the Black Lives Matter organization and phrase have attracted. Among the additional issues that the parties' submissions indicate have in some instances been associated with the Black Lives Matter political movement are: defunding the police; convicting former President Donald Trump and banning him from political office and digital media platforms; expelling members of Congress who attempted to overturn the results of the 2020 presidential election; appropriately funding the U.S. Postal Service; supporting Amazon employees' efforts to unionize; and calling attention to Black Women's Equal Pay Day. This is not an exhaustive list of the political causes that the materials cited by the parties indicate have been associated to some degree with Black Lives Matter and as noted previously, those materials were themselves not shown to be comprehensive or representative.

III. EVENTS AT NEW BRIGHTON LOCATION

A. Background

The Charging Party, Morales, worked at the Respondent's New Brighton store, which is one of the Respondent's multiple locations in the Minneapolis-Saint Paul area. At the time of the hearing in this matter, the Respondent employed 236 persons at the New Brighton store. A number of managers and supervisors at that store played a part in the events of this case. The store manager for the New Brighton store was Jason Bergeland. Assistant store managers who reported to Bergeland included Enrique Ellis (merchandising assistant store manager), Taylor Flemming (specialty assistant store manager), Suzette Johnson (operations assistant store manager), and David Stolhanske (flooring assistant store manager). During the relevant time period, Michelle Theis was a supervisor for the flooring department, and Jordan Meissner was a supervisor who performed some human resources tasks at the store. The Respondent organizes its operations into districts, and the New Brighton store is in a district of eleven retail stores with a total workforce of about 2000 persons. Melissa Belford is the overall manager for the district, and Casey Whitley is the human resources manager for the district.

The New Brighton store is located approximately six and a half miles from where George Floyd, an unarmed black man, was murdered on May 25, 2020, by one or more officers of the Minneapolis Police Department. Floyd's murder triggered protests in May and June 2020 by, among others, persons identifying themselves with the Black Lives Matter movement and persons engaging as counter protestors. In some instances the protests and counter protests led to civil unrest in Minneapolis. Tr. 339. Some of this unrest was visible directly outside the New Brighton store. During the protests, another store in the same shopping center as the Respondent's New Brighton store was looted. On two occasions, the Respondent found it necessary to close the New Brighton store as a result of protest-related disruptions. (Tr. 515–516, 747–748, 751–752.) There was another period of heightened concern about unrest in Minneapolis before, and during, the trial in February, March, and April 2021 of an officer responsible for Floyd's death. (Tr. 365–366, 683–684.) Belford was concerned that allowing employees to display BLM messages in a retail setting could lead to them being "involved in situations that were less than favorable, unsafe, very volatile," and, in Morales' case, could lead Morales "to receive some unwanted . . . scrutiny, verbiage . . . from a customer or from anywhere else." (Tr. 673.) Both Morales and employee Sarah Ward stated that some co-workers at the New Brighton store had expressed hostility towards Black Lives Matter/BLM. (Tr. 227, 372–373.) The New Brighton store has a very diverse workforce, and the most diverse workforce of the eleven stores that are part of the same Home Depot district. ()

B. Morales' Employment at New Brighton Store and Complaints Regarding Co-Worker and Vandalism of Black History Month Displays

Morales, who identifies as Hispanic, Mexican, and a person of color, was employed at the New Brighton Store for approximately 6 months from August 2020 until February 19, 2021. During that time, Morales was a sales specialist in the flooring department. Shortly after beginning work, Morales used a marker to customize the work apron by writing "Antonio" beneath the pre-printed "Hi, I'm" and also by writing the message "BLM." These remained on the apron Morales wore to work throughout the period of employment. Later, Morales drew cartoons on the apron – including a snow man, a spider web, a smiling pumpkin, a skeleton, flying bats, and Santa hats – and those, too, remained on the apron until Morales' employment ended.

Morales observed a more experienced co-worker in the flooring department, Allison Gumm, behaving in what Morales viewed as a racially biased manner. The first such instance occurred soon after Morales started work when Gumm told

[4] The Black Lives Matter Website, R Exh. 24(d), states: "#BlackLivesMatter was founded in 2013 in response to the acquittal of Trayvon Martin's murderer. Black Lives Matter Global Network Foundation, Inc. is a global organization in the US, UK, and Canada, whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes."

Morales to watch out for a particular customer because "statistically Somalia people tend to steal more." Morales also noticed Gumm being unhelpful to black customers and also being unhelpful when Morales had a problem submitting a Spanish-speaking customer's credit card.

During the first month of employment, Morales had conversations with Sarah Ward, a co-worker, about Gumm's behavior. On about September 14, Morales and Ward met with Theis in her office to complain about Gumm. These complaints were about Gumm's treatment of customers. (Tr. 345.) The meeting lasted about 30 minutes and ended with Theis telling Morales and Ward that she would talk to Flemming (an assistant store manager) "and see if anything could be done." (Tr. 96.) A few weeks after the September 14 meeting—i.e., in early October—assistant store managers Flemming and Meissner approached Ward and requested more details about Gumm's behavior. (Tr. 346–347.) At that time, Ward reported that employees had begun to engage in a "concerted effort" to "intercept customers of color to prevent [Gumm] from working with customers of color." Ibid.

In November, Morales met with Theis in her office a second time and stated that "the situation" with Gumm was not getting better. Morales now complained about Gumm's treatment of other employee— stating that Gumm would excessively clean any area that Morales touched and also that Nebiy Tesfaldet—a black co-worker—"had some stories about" Gumm's treatment of Tesfaldet himself.[5]

On November 27, Morales was called to Assistant Store Manager Flemming's office. Theis was also present. Flemming stated that Gumm had now made her own complaints, stating that Morales was treating her "differently from other coworkers." Morales denied this and stated that Gumm was the one who was "treating other people differently, specifically people of color." Flemming offered to meet with Morales and Gumm together to address their issues, but Morales declined. Then Flemming offered Morales a transfer to an assignment away from Gumm, but Morales declined that course of action as well, telling Flemming "I would see how the situation played out first before I made my decision." (Tr. 111.)

Tesfaldet, Jamesha/Kamesha Kimmons[6] (another black co-worker) and Ward also had discussions among themselves about Gumm's behavior. During the Fall or Winter of 2020–2021, Tesfaldet and Ward went to Flemming's office to advise Flemming and Theis that the interactions between Gumm and Morales were "getting worse." (Tr. 389.) Tesfaldet testified that prior to raising this issue at the meeting, they obtained Morales' "permission" because they "were speaking on [Morales'] behalf." (Tr. 390.) Tesfaldet also commented on what he described as Gumm's "microagression stuff towards customers of color." Tr. 391. Shortly thereafter, Tesfaldet brought concerns that Gumm was treating black customers in a biased way to the attention of three different assistant store managers—Johnson (who is Black), Ellis (who is Hispanic), and Stolhanske (who is white).

On about February 2, 2021, Morales, Kimmons, and co-worker Blessing Roberts (who Morales identified as Ethiopian) were at the flooring desk when it appeared to them that Gumm took their picture using her phone. Morales, Kimmons and Roberts went to Ellis and complained that Gumm had taken their photograph without obtaining consent. ()Tr. 126. On February 3, 2021, Morales met with assistant store manager Johnson. Morales recounted the complaints about Gumm and also represented to Johnson that Kimmons, Roberts, and Tesfaldet all had stories about Gumm's conduct. Johnson stated that the allegations about Gumm were "very serious", and she was "going to bring it up with corporate HR." (Tr. 134–137.)

The record shows that during the period when the Respondent was receiving Morales' complaints about Gumm's behavior, the company took a number of corrective actions with respect to Gumm. On October 22, 2020, Flemming had a documented "verbal performance discussion" with Gumm. On December 19, 2020, Theis issued a "disciplinary coaching" to Gumm. The documentation from that coaching warned Gumm that "further violations would result in further disciplinary action up to and including termination." On February 9, 2021, Stolhanske issued a "counseling"—the next step in the progressive discipline process— to Gumm. The counseling again warned Gumm that further violations could result in termination. Later in February, the Respondent did, in fact, terminate Gumm's employment after completing an investigation into the complaints about her conduct. The reason the Respondent gave for Gumm's termination was that she had failed to uphold the Respondent's values regarding "respect" in her interactions with customers, co-workers, and, in particular, with Morales. (Tr. 622–623, 742–743. The Respondent had some communications with Morales and other employees about these corrective steps. During a meeting on about December 18, 2020, Flemming told Morales that "something was being done" about Gumm and the Respondent had given Gumm "an ultimatum, that she has to change her behavior." (Tr. 115–116.) Ward testified that "we knew that management was having conversations with [Gumm]." (Tr. 350–351.)

During February 2021, employees posted displays in the New Brighton store's break room to celebrate Black History Month. Some of these were handmade posters developed and constructed by Tesfaldet with assistance from Morales. These were management-sanctioned displays, and Stolhanske and Ellis had authorized employees to use work time and store supplies to create them. The break room displays were subsequently vandalized by unidentified persons. After the vandalism, Stolhanske repaired or re-posted the displays and sent out an email on February 13 to staff, noting the vandalism and stating: "I will continue to replace these items through the end of B[lack]H[istory]M[onth], and would appreciate any help with keeping an eye on them. Intolerance and disrespect will not be tolerated." (GC Exh. 7.) Morales, Kimmons, and Tesfaldet had discussions about the vandalism and decided to raise concerns with Stolhanske about it. Morales did so, telling Stolhanske that the email was insufficient and that the incident should be the occasion for "a storewide conversation" about racism so that "people

[5] Tesfaldet testified, however, that he had told Morales that Gumm had not "brought" him "any trouble," Tr. 388, and that she "never did any microagressions towards me." Tr. 431.

[6] The record sometimes renders Kimmon's first name as Kamesha and other times as Jamesha. Both refer to the same employee.

of color [would] feel safe at this store." (Tr. 148.) Stolhanske replied that he considered his email to be sufficient and that he was working to identify who was responsible for the vandalism. (Tr. 149.)

On or before February 17, assistant store manager Ellis was informed that the Black History Month display had been damaged again. Ellis, sent an email to staff that day acknowledging the incident, and asking employees to keep an eye on the displays to help identify the culprit. Later that day, Morales, after discussions with co-workers, replied to Ellis' email. Morales' reply stated: "I believe it is important to help our fellow coworkers of color feel safer about the environment they work in starting with opening up this discussion in a more public manner that shows us that we are as valued as everyone else at Home Depot." Morales sent the email only to Ellis; however, since Morales sent the email from the flooring department email address, other employees with the proper credentials could find Morales' email by searching the system's sent mail folder.

Later on February 17, Bergeland (the overall manager of the store) and Ellis met with Morales to discuss Morales' email request to "open up the discussion." Bergeland stated that Morales' email was very well written and asked Morales to help him come up with ideas for celebrating Black History Month. There is conflicting testimony about whether Bergeland made a statement criticizing Morales for sending the email. Morales testified that Bergeland said Morales "shouldn't have sent the email in the first place . . . . it was something that the management was taking care of and that [Morales] should just let them handle it." (Tr. 171.) Bergeland denied that he made any statements criticizing Morales for the email. (Tr. 511.) Bergeland's denial was corroborated by Ellis, who also witnessed the meeting. (Tr. 477.) I find that the record does not provide a basis for crediting Morales' testimony over the testimonies of Bergeland and Ellis on this point. To the contrary, I note that Morales made no mention of Bergeland's criticism when spontaneously testifying about what was said during the meeting. It was only when counsel for the General Counsel subsequently prompted Morales—asking "Did [Bergeland] tell you anything about whether you should have or shouldn't have sent the email"that Morales augmented his account to include Bergeland's purported criticism regarding the email. (Tr. 171.) Bergeland's and Ellis' testimonies denying the statement were mutually corroborative and confident on this point. I find that the record does not establish that Bergeland made any statement criticizing Morales for sending the February 17 email.

During the February 17 meeting, Bergeland noticed for the first time that Morales' apron had the message "BLM" on it.[7] (Tr. 511–512.) Bergeland told Morales that the BLM message was impermissible under the dress code because it was "seen as a social cause and in violation of the dress code policy" and that Morales had to remove it from the apron. (Tr. 478; see also Tr. 512) (Bergeland testifies that his understanding was that "most" considered BLM to be a cause or political message). Bergeland expressed the view to Morales that if he allowed Morales to wear the BLM message at work, he would also have to allow an employee who wanted to wear a swastika at work to do so. (Tr. 169.) He opined that "black lives matter" and that "all lives matter." (Tr. 170.)[8] Morales declined to remove the BLM message. Instead, Morales left work early, falsely stating that this was necessitated by a family emergency.

C. Morales and Belford Have Virtual Meeting on February 18 And Morales Tenders Resignation the Next Day

Belford (district manager) met with Morales virtually on February 18, to follow up on Morales' meeting with Bergeland. Also participating in this virtual meeting was Whitley, the district human resources manager. Belford manages a district with approximately 2000 employees and Morales had not previously met her. (Tr. 181, 605.) The February 18 meeting lasted almost 90 minutes and addressed two general topics: (1) Morales' complaints about Gumm's conduct and the vandalism of Black History Month displays; and (2) the Respondent's communication that Morales' display of the BLM message violated the company dress code and the discussion of possible alternatives.[9]

During the February 18 meeting, Belford said she understood that "a lot of things had been happening to Antonio" at the store, and then Morales described some concerns and also recounted communications with supervisors and managers regarding those concerns. Belford stated that she was "sick to my stomach right now at the thought that this is what you have been experiencing," and "we have failed you right now because this has continued to happen . . . . I am so sorry." (GC Exh. 4 at pgs. 17 and 22.)[10] She stated that the Respondent wanted Morales to "feel great about who you are and what you bring to the table" with the Respondent. (Id. at pg. 19.) Belford told Morales that the Respondent had taken "steps" to address Gumm's behavior and asked Morales to assist the investigation by providing a written statement describing any other conduct Morales thought was relevant and the names of witnesses to the conduct. (Id. at pp. 17 and 22–

[7] Bergeland testified that prior to the February 17 meeting he had not been aware of any of the specific markings on Morales' apron. Tr. 496. I credit Bergeland's testimony that he noticed the BLM message on Morales' apron for the first time at that meeting. There was no contradictory testimony, from Morales or anyone else, indicating that Bergeland had previously done or said anything indicating that he was aware of Morales' display of the BLM message. Indeed, Morales testified that, prior to February 17, no manager had made a comment indicating awareness of Morales' BLM display. Tr. 275. Contrary to the General Counsel's suggestion, I do not consider it implausible that Bergeland would not have noticed Morales' BLM message until the February 17 meeting. The message was written clearly, but not so large as to dominate the apron, and was only one of numerous things that Morales had drawn or written on the apron. Bergeland is the overall manager of the store, which has 236 employees, and he had previously only encountered Morales in passing on the store floor about 2 or 3 times weekly. Tr. 495–496. The Respondent did not perform routine inspections of the aprons or other clothes worn by employees of the New Brighton store, Tr. 868, and the record indicates that many Home Depot employees decorated their aprons.

[8] Morales testified that it would be offensive if co-workers were permitted to wear Make America Great, MAGA, Thin Blue Line, All Lives Matter, or Blue Lives Matter messaging. Tr. 233–234.

[9] Morales recorded this meeting, and both that recording and a complete transcript of it were received into evidence at the hearing. See GC Exhs. 4 and 5.

[10] Page references to GC Exh. 4 refer to the transcript's original page numbers, not the subsequently added exhibit page numbers.

24.) After these discussions, Belford told Morales:

> Casey[Whitley] reminded me, too. Just obviously, this is confidential. I would ask that you please don't speak about this, you know, to anybody else, not because I don't care, but just out of -- I would like to be able to, as we need to, speak to them and have their own personal story. And I really want this to be something that we do that shows value and respect to you as well as to everybody else involved, okay? So just keep it confidential. I mean, obviously, [assistant store manager Stolhanske] knows that you're here, but that sort of thing, okay?

(Id. at pg. 26.) Belford testified that the reason she asked Morales "to keep it confidential [was] so we could get a good, clean understanding by our investigation." (Tr. 669.)

Belford and Morales then discussed how Morales believed the Respondent should have responded to the vandalism incidents and racial environment at the store (GC Exh. 4 at pp. 30–33), and asked if Morales would help the store celebrate Black History Month and other identity-based holidays. (Id. at Pages 36–38.) Belford told Morales, "[W]e need people that can help with the resolution. And I—I don't have the answers that you would have." Ibid.

About halfway into the meeting, Belford raised the subject of Morales' display of the BLM message on the apron. Morales responded: "I put it on as a signal to show that I support black people; I support people of color. And I think that what happened over the course of the summer, I think that needs to be addressed and how we need to continue to support black people." (GC Exh. 4 at pg. 39.) Belford said, "I think you're absolutely right," Ibid., but told Morales that the display of the BLM message was contrary to the Respondent's dress code. Id. at Page 45. Belford said that if the Respondent allowed Morales to display that message at work, then it would "have to allow the opposite" – she used swastikas as an example – and said that thinking about allowing the opposite made her want "to vomit." (Id. at pp. 48–49, 52.) Morales responded that Belford's stated concern "doesn't make any sense" and rejected the idea that "allowing employees to wear BLM messages would give other employees the "right" to wear "something like a swastika." (Id. at pp. 52.) Morales declared to Belford that "I will not be taking this [BLM message] off." (Id. at pp. 53.)

Despite Morales' declaration, Belford continued to try to convince Morales to comply with the Respondent's dress code by removing the BLM message so that Morales could continue working at the store. Belford pointed out that BLM "does not mean the same thing to everybody else that you encounter," and then Belford made a number of suggestions for alternative ways that Morales could show "support for people of color or black associates." Id. at pp. 52–54.) Those suggested alternatives included the display of messages saying "diversity," "equality," or "inclusion," and also messages celebrating Black History Month. Ibid. Morales agreed that there were "plenty of other ways" to express support for racial justice, but that insisting on continuing to wear the BLM message was "the best way." Ibid. At other points during the meeting, however, Morales expressed a willingness to consider whether there was an acceptable alternative to the BLM message. (Id. at pg. 73.)[11]

When Belford repeated that Morales could not work in the store with the BLM message displayed, Morales responded, "Yep, I know that, and I am willing to be fired over this." (Id. at pg. 54.) Belford responded: "I'm not going to fire you over that. That's not how that's going to work. You haven't done anything wrong." Ibid. She also opined that the issues Morales had raised about Gumm was a "completely separate issue from you having the Black Lives Matter on your apron," (Id. at 56)—an assertion that Morales did not contradict then or at any other time in the meeting.[12]

Belford spent much of the rest of the meeting on February 18 entreating Morales to comply with the dress code so that Morales could continue working for the Respondent. Belford's entreaties included telling Morales: "If you leave us, we will lose the good that you could do for us," (Id. at pg. 57); that she hoped Morales "would be willing to stay with Home Depot and teach us how to be better at supporting our communities and associates of color," (Id. at pg. 61); "I would hate for you to leave Home Depot when I know that you have a lot to offer us if you're willing" (Id. at pg. 62); "[I]f you leave, Antonio, you aren't there to help us move forward," (Id. at pg. 65); if Morales left the people who vandalized the Black History Month displays would have wonId. at (pp. 65–66); "[I]f you tell them you left because you wouldn't adhere to Home Depot dress code, which again, Antonio, that's your choice, but what I feel bad for is that you're someone that has passion around this, and you're somebody that could make a difference for some of your peers. Not every one of your peers that is of color knows how to have a voice, right? . . . . And if you leave, there's – you're not helping them learn how to move forward either. You're not helping us learn how to move forward." (Id. at 66–67); "[D]on't leave because . . . [i]t won't change things. Stay and help us be part of the solution, right? . . . . I want you to know that you could have a voice in helping us be better." (Id. at 67–68); "Don't leave, Antonio. I want you to stay. Yes, I need you to be in dress code." Ibid.: and "I'd love for you to be part of the committee that helps decide what we celebrate and how we celebrate it at Home Depot in a way that teaches people, engages people, makes them feel respected and supported. I don't want you to leave, okay?" (Id. at pg. 72.)(

Belford's entreaties did not persuade Morales to remove the BLM display. The meeting ended with Belford stating that she would arrange for Morales to be "clocked out" for the day and asking Morales to "over the next few hours to just think a little bit about ideas of what you could put on an apron that you would

[11] At no point during Belford's discussions with Morales regarding the BLM apron display, did anyone suggest that Morales could display the BLM message on work attire other than the Respondent's trademarked apron.

[12] This despite the fact that Morales freely expressed disagreement with Belford regarding other subjects during this meeting. G Exh. 4 at Pages 34–35 (disagrees that the store's recognition of Black History Month was meaningful); Id. at pg. 43–44 (disagrees that, based on Whitley's height, one would assume that Whitley played basketball); Id. at pp. 46–47 (disagrees with comparison of BLM display to a religious display); Id at Pages 48–49, 52–53 (disagrees with Belford's suggestion that if the Respondent permitted BLM display, it would also have to permit the "opposite").

feel confident to show your support for what is important to you but also still uphold Home Depot dress code." (Id. at p. 73.) Morales responded, "I can think of something." Belford said, "That would be awesome," and then provided Morales with ways to contact her directly.

Morales did not contact Belford with a proposal for an alternative to displaying the BLM message. Rather, in a letter dated February 19, 2021, Morales resigned. Morales' resignation letter stated:

> After allowing myself the time to reflect on the events that have transpired over the course of my 6 months of employment at Home Depot, I have come to the decision that I am resigning from my position as a Sales Associate for flooring effective 2/19/2021.
>
> Home Depot has failed to adhere to their Diversity and Inclusion policy. I endured 6 months of harassment while at work. Additionally, the discrimination towards myself and my fellow POC coworkers has gone on long enough. I have not felt safe, I have not felt supported, and I have not felt heard during my employment. The injustices, micro-aggressions and blatant racism I have experienced will not go unnoticed.

(GC Exh. 9.) At trial, Morales acknowledged that the resignation letter made no mention of the BLM display and testified that the reason this was not mentioned was that "I don't owe Home Depot a full explanation as to why I am resigning." (Tr. 262.)

On March 1—about 2 weeks after Morales resigned – Belford contacted Morales to inform him about the results of the investigation at the New Brighton store. (R Exh. 18.) Gumm had been terminated for disrespectful behavior towards coworkers and customers. (Tr. 622–623, 742–743.)

D. Other Applications of the Apron/Dress Code Rules at the Store and Testimony about the BLM Message

The Respondent stipulated that, nationwide, it interprets the dress code policy prohibiting displays of "causes or political messages unrelated to workplace matters," to encompass a prohibition on employees displaying BLM/Black Lives Matter on their aprons or other work attire. The evidence, however, did not show that guidance regarding how the dress code applied to BLM displays had been communicated to the individuals who prohibited employees from displaying the message at the New Brighton store. Indeed, Whitley specifically testified that he had not received such guidance at the time he participated in the decision to apply the dress code to prohibit Morales and others from displaying the BLM message at the New Brighton store. (Tr. 701–703, 753–754.) Whitley testified that his conclusion that the dress code prohibited the BLM display was based, in part, on the view that it was important to consistently apply the prohibition on causes/political messages. (Tr. 753.) As an example of consistent application, Whitley stated that he was aware that the Respondent had previously prohibited employees from displaying "*Blue* Lives Matter" messaging. (Tr. 753–754.) Similarly, Belford testified that before she told Morales not to return to work without removing the BLM message, she had told another employee not to wear "Thin Blue Line" messaging at work. Between May and October 2000, managers required two New Brighton employees other than Morales to remove BLM from their aprons as a condition of continuing to work at the store, and both employees did so and continued working. (Tr. 844–845, 848.) This type of enforcement continued after Morales' employment ended—for example, when the Respondent required Tesfaldet and Kimmons to remove BLM messages from their aprons. [13] Tesfaldet and Kimmons complied with the dress code instruction and continued working at the store. (Tr. 422–424, 513–515, and 699.)

A number of witnesses testified about their understandings of the meaning of employees' BLM/Black Lives Matter messaging at the New Brighton Store. Morales testified: "It means Black Lives Matter. It's a symbol of alliance. I have never seen it as something political myself. It's something that I put on so that people know to approach me. I am a person of color myself so it's a form of solidarity. It's a way to keep – for people to feel safe around me." (Tr. 68.) Morales testified that this was necessary, because "there is a lot of prejudice and racism in our world today and especially in our state, so I want to show that as a symbol of solidarity." (Ibid.)[14] Morales testified that BLM was an organization that supported, among other things, defunding police departments and better addressing police violence against people of color. (Tr. 213.)

Ward, a coworker with whom Morales engaged in discussions regarding racism in the store, stated that she understood BLM to be an organization "that works to bring to light systemic injustices and systems of oppression that affect primarily African-Americans," and is considered part of a movement to prevent police brutality against African-Americans. (Tr. 338–339, 371.) She testified that employees at the New Brighton store placed the BLM message on their aprons at the time of the murder of George Floyd. (Tr. 337.) Tesfaldet stated that, to him, the BLM message was about equal treatment for people of color and that he wrote BLM on his apron in the summer of 2020 because "it was a hot time for everybody especially with the protests and the fresh murder of Floyd" and he was "trying to relate to the customers to let them know . . . it's still a safe place and I'm still

[13] Tesfaldet wore the BLM message on his apron during the period from the spring or summer of 2020 until the spring of 2021. Tr. 419–421. Although this means that Tesfaldet and Morales displayed the BLM message during some of the same time period, it does not show that Tesfaldet and Morales discussed displaying the BLM message or agreed with one another to do so, or about the reasons for doing so. Kimmons was not called to testify about the timing of, or reasons for, her display of the BLM message.

[14] In response to that answer, counsel for the General Counsel stated, "Okay. You mentioned the world. You mentioned the state. How about the store?" In response to that suggestion, Morales replied, "Yes." Tr. 68. I do not find this answer credible evidence that Morales' BLM display, even subjectively, was motivated by concern over racist working conditions. Morales, when testifying spontaneously about the reasons for making the BLM display, spoke about racism in the "the world" and "the state." It was only in response to the leading questioning of counsel for the General Counsel that Morales acceded to the suggestion that the BLM display was also "about the store." Second, Morales created the BLM apron display very shortly after starting work and at a time when the record does not show that Morales had decided to engage with others to address concerns about working conditions or their lot as employees.

here willing to work for them, to help them buy whatever they need." (Tr. 419.) Tesfaldet stated that he was also aware that some people in Minneapolis understood that one aspect of the BLM movement was an effort to defund the police. (Tr. 444.)

Belford stated that at the time she told Morales that the BLM message would have to be removed from the apron, her understanding was that Black Lives Matters/BLM was "a social organization that focused on diversity and protecting the rights of people of color and in some cases related to . . . police brutality" and therefore "falls under the category of a social organization outside of Home Depot policy which we do not permit on an apron." (Tr. 672.) Whitley testified that he understood the BLM message to "focus on social injustice and police matters, like defunding the police which creates controversy." (Tr. 701.)

DISCUSSION

I. NATIONAL APPLICATION OF DRESS CODE POLICY TO BLM DISPLAYS

The General Counsel does not allege that the Respondent violated the Act by maintaining its nationwide dress code policy prohibiting employees from displaying "causes or political messages unrelated to workplace matters." (Tr. 34–35.) What the General Counsel argues, rather, is that the Respondent violated the Act by classifying BLM/Black Lives Matter[15] as a message that falls within the facially lawful dress code prohibition. (Ibid.; GC Exh. 1(m) at Par. 4.) As discussed below, I find that the General Counsel has not met its burden of showing that the Respondent's nationwide interpretation of its dress code violated Section 8(a)(1) by interfering with employees' Section 7 right to engage in concerted activity for their mutual aid and protection.[16]

In order for the General Counsel to establish that prohibiting BLM displays interferes with concerted activity protected by Section 7, it must show both that the prohibited displays were "concerted" and engaged in by employees to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). To establish that activity is concerted, the General Counsel must make a factual showing, based on the totality of the evidence, *National Specialties Installations*, 344 NLRB 191, 196 (2005), that the employees' activity "was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees." *Meyers Industries*, 281 NLRB 882, 887 (1986) (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The General Counsel's nationwide challenge stumbles at the outset because the General Counsel does not show, or even attempt to show, that the Respondent prohibited displays that were concerted[17] – i.e., were "engaged in with or on the authority of other employees." *Healthy Minds, Inc.*, 371 NLRB No. 6 (2021), slip op. at 2, quoting *Meyers Industries*, 268 NLRB 493, 497 (1984); *Trayco of South Carolina, Inc.*, 297 NLRB 630, 634 (1990), enf. denied 927 F.2d 597 (4th Cir. 1991). The General Counsel attempts to avoid the necessity of showing concerted activity by asserting that employees' BLM displays are so vital to their efforts to improve terms and conditions of employment that such displays should be added to the list of subjects that the Board considers "inherently concerted" – i.e., presumed to be concerted even absent a showing that employees were acting in concert. (Br. of GC at pp. 37–44.) However, it is for the Board, not me, to decide whether to create additional exceptions to the Board precedent requiring the General Counsel to make that evidentiary showing. *Pathmark Stores*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("It is for the Board, not the judge, to determine whether precedent should be varied."). In the more than 30 years since the Board held that a subject might be considered "inherently concerted" it has granted that status to only three subjects—wages, work schedules, and job security.[18] As the General Counsel recognizes, none of those three "inherently concerted" subjects bear on the circumstances present here. Since the record does not establish that the nationwide interpretation of the dress code interfered with employee BLM displays that were either concerted *or* inherently concerted, I find that the Respondent's application of its dress code to prohibit BLM messages did not interfere with employees' protected concerted activity in violation of Section 8(a)(1).

Even if one assumes, contrary to the above, that the General Counsel has cleared the hurdle of establishing that the nationwide interpretation interfered with concerted displays of the BLM messaging, the General Counsel would still have failed to prove a nationwide violation because it did not meet the second requirement for establishing protection—that is, showing that employees' displays of BLM messaging had a direct nexus to employee efforts to "improve [their] terms and conditions of employment or otherwise improve their lot as employees." *Eastex*, 437 U.S. at 565. To the contrary, as discussed in the statement of facts, the BLM messaging neither originated as, nor was shown to be reasonably perceived as, an effort to address the working conditions of employees. Rather the record shows that the message was primarily used, and generally understood, to address the unjustified killings of black individuals by law enforcement and vigilantes. That was, the record shows, the understanding of Bottoms, the Respondent's chief diversity officer.

[15] In the following discussion, I will refer to these two versions collectively as BLM.

[16] It is a violation of Sec. 8(a)(1) of the Act for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

[17] The possibility that the result might be different in the specific circumstances relating to the allegation concerning Morales and the New Brighton location is treated separately in Sec. II of the Discussion section of this decision.

[18] Discussions of those three subjects were granted an exception to the usual requirements because the Board considered them to be particularly "vital" terms and conditions of employment and the "grist upon which concerted activity feeds." *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 fn. 10 (2014) (discussion of wages inherently concerted); see also *Hoodview Vending Co.*, 362 NLRB 690, 690 fn. 1 (2015) (discussion of job security inherently concerted); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (discussion of work schedules inherently concerted), enf. denied in part 81 F.3d 209 (D.C. Cir.); *Trayco of South Carolina, Inc.*, 297 NLRB at 634 (discussion of wages inherently concerted).

A message about unjustified killings of black men, while a matter of profound societal importance, is not directly relevant to the terms, conditions, or lot of Home Depot's employees *as employees.* This would be true even if it were possible to conclude here that employees' subjective motivation for displaying the BLM message was shown to be dissatisfaction with their treatment as employees since, as the General Counsel and the Respondent agree, the question of whether an activity addresses "mutual aid or protection" is analyzed under an objective standard and the employee's subjective motive for the activity is not relevant.[19] See *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) ("Under Section 7, both the concertedness element and the 'mutual aid or protection' element are analyzed under an objective standard. An employee's subjective motive for taking actions is not relevant . . . . to whether activity is for 'mutual aid or protection."). For these reasons, I find that the General Counsel has failed to show the second element necessary for protection – that the Respondent's nationwide interpretation of its dress code policy interfered with messages that were addressed to "improv[ing] terms and conditions of employment or otherwise improv[ing employees'] lot as employees." *Eastex, Inc.,* 437 U.S. at 565.

To the extent that an expanded understanding of the meaning attributed to the BLM message can be seen as implicating employment issues, it is only because that expanded meaning amounts to a broad political or social justice message. The broader range of subjects that have been associated to some degree with the BLM message include not only racial justice, but also squarely political subjects—for example, expelling members of Congress who sought to overturn the results of the 2020 election and barring former President Trump from political office and social media. The display of political messages is, as the United States Supreme Court stated in *Eastex*, not protected when the "relationship to employees' interests as employees" is "so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." 437 U.S. at 567-568. Thus the Board, while recognizing that political outcomes "may have an ultimate effect on employment conditions," has held that employers do not violate employees' Section 7 rights by prohibiting workplace displays supporting a political party or candidate See *Ford Motor Co.*, 221 NLRB 663, 666 (1975) ("While it may be argued that the election of any political candidate may have an ultimate effect on employment conditions," newsletter advocating the election of a particular party "does not relate to employees' problems and concerns *qua* employees" and is not protected by the Act), enforced mem., 546 F.2d 418 (3d Cir. 1976); see also *Firestone Steel Prods. Co.*, 244 NLRB 826, 826–827 (1979) (leaflets discussing statewide elections were unprotected under Section 7 because they were political and did not "relate to employee problems and concerns as employees"), affd. 645 F.2d 1151 (D.C. Cir. 1981). Any relationship between BLM messaging in the Respondent's workplaces nationally and employees' interests as employees that can arguably be found in the record here is not meaningfully different than the political messaging involved in *Firestone* and *Ford Motor*. As in those cases, the BLM message here does not relate to "employees' problems and concerns *qua* employees" and any connection to working conditions is too attenuated and indistinct to satisfy the mutual aid or protection requirement for protection. *Eastex*, supra. [20] For these reasons, I find that the General Counsel has failed to show that the Respondent's nationwide application of its dress code to BLM messaging interfered with activities protected by Section 7.

The General Counsel has not shown that the Respondent's national interpretation and/or application of its dress code policy violated Section 8(a)(1) of the Act.

II. ALLEGATIONS REGARDING TREATMENT OF MORALES

A. Morales' Conversations and Emails Regarding Employees' Race-Related Concerns at the New Brighton Location

The complaint alleges that Morales engaged in concerted activities for mutual aid and protection by engaging in activities including "writing emails, engaging in various conversations with coworkers, supervisors and managers about subjects such as ongoing discrimination and harassment." The complaint further alleges the Respondent violated Section 8(a)(1) by forcing Morales to choose between the protected activities and leaving the New Brighton facility, thereby causing Morales' suspension and termination, and also threatened employees with unspecified consequences if they engaged in protected concerted activities regarding racial harassment.

The evidence shows that Morales engaged in protected concerted activities by discussing racial harassment with co-workers and with supervisors and managers. This is clearly the case with respect to the concerns that Morales brought to store manager Bergeland and assistant store managers Stolhanske and Ellis about the vandalization of the Black History Month displays in the employee break room. The evidence shows that Morales raised these concerns with the Respondent in February 2021 after having discussions about the problem with co-workers Kimmons and Tesfaldet. The Board has recognized that discussions that, like these, seek to end ongoing racial discrimination in the workplace fall within the protection of the "mutual aid and protection" clause. *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 1 fn.2

[19] See Brief of General Counsel at pg. 26 and Brief of Respondent at pg. 60.

[20] The General Counsel cites three cases in which a message, although political, had a direct connection to employees' working conditions and was found to be protected under the "mutual aid and protection" clause. See *Eastex*, 437 U.S. at 569 (finding protected a message encouraging opposition to a "right to work" statute that could negatively affect employees by increasing employer's "edge" "at the bargaining table" and also encouraging support for a raise in minimum wage that could impact wages generally), *Nellis Cab Co.,* 362 NLRB 1587, 1588 (2015) (taxicab drivers political activity opposing a regulatory change that could reduce drivers' pay found to be protected), and *Kaiser Engineers,* 213 NLRB 752, 755 (1974), enfd. 538 F.2d 1379 (9th Cir. 1976) (letter to Congress protesting resident visas for foreign engineers is protected since such visas could impact the job security of engineers). Unlike the messages in those cases, the BLM message relates primarily to the unjustified killing of black individuals by police and vigilantes, not to any workplace concerns. To the extent that the message's broad, political, meaning addresses societal ills more generally, that meaning relates to employment only in the sense that the workplace is part of society, rather than to employee "concerns *qua* employees." *Ford Motor*, supra.

and 11 (2020); *PruittHealth Veteran Services-North Carolina, Inc.*, 369 NLRB No. 22, slip op. at 1 fn. 1, 8–10 (2020). *Dearborn Big Boy No.3, Inc.*, 328 NLRB 705, 705 fn.2 and 710 (1999); *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).

I find that in October or November 2020, Morales was shown to have engaged in protected concerted activity regarding Gumm's conduct. In early October, Ward, who had previously joined Morales in complaining to Theis about Gumm's treatment of customers, told the Respondent that Gumm's conduct was affecting other employees insofar as they found it necessary to engage in a "concerted effort" to "intercept customers of color to prevent [Gumm] from working with customers of color." In November, Morales met with Theis about Gumm's conduct again, this time focusing on Gumm's treatment of employees. Morales told Theis that Gumm would make a show of excessively cleaning any area that Morales touched. In addition, Morales told Theis that Tesfaldet – a black co-worker – also "had some stories about" Gumm's treatment of Tesfaldet. These complaints fall within the mutual aid and protection clause. Not only do they raise the issue of the harassment of employees at work, *Nestle USA,* supra, *PruittHealth*, supra, *Dearborn Big Boy*, supra, *Vought*, supra, but also the issue of how Gumm's mistreatment of customers was affecting the way co-workers were able to carry out their own duties, *Holy Rosary Hospital*, 264 NLRB 1205, 1205 fn. 2 (1982) (hospital employee's protest about inadequate staffing affecting patient care is protected concerted activity because staffing also affects employees' ability to carry out their duties) and *Misercordia Hospital*, 246 NLRB 351, 356 (1979) (same) enfd. 623 F.2d 808 (2d Cir. 1980).[21]

The Complaint includes an allegation that the Respondent enforced its dress code "selectively and disparately" against persons who engaged in protected concerted activities. In its brief, the General Counsel asserts that "the facts of this case suggest that, in fact, the Respondent seized upon its apron policy to retaliate against Morales for [the] escalating course of protected concerted activities in the workplace, rather than any alleged violation of the apron policy." Brief of General Counsel at Page 33. The evidence does not support that assertion. The record shows that the Respondent was aware of Morales' protected communications regarding Gumm and the vandalism of Black History Month displays but does not show that the Respondent bore any hostility at all towards those communications.[22] Indeed, supervisors and managers were receptive to Morales' complaints and indicated to Morales that they considered the complaints serious and deserving of the Respondent's attention and investigation. The Respondent investigated the complaints, discussed the conduct with Gumm, issued progressive discipline to Gumm, warned Gumm that further such conduct would result in disciplinary action up to and including discharge, and eventually discharged Gumm. The store's management responded to information about the Black History Month vandalism in a similarly appropriate manner. It issued a stern warning to employees about the vandalism, replaced the damaged material, and sought employees' assistance in the store's effort to identify the perpetrator or perpetrators.[23]

[21] But see *Five Star Transportation, Inc.*, 349 NLRB 42, 44–45 (2007) (employee addressing customer safety did not fall within the protection of the "mutual aid and protection" clause), enfd. 522 F.3d 46 (1st Cir. 2008) and *Waters of Orchard Park*, 341 NLRB 642, 643 (2004) (complaints about patient care unprotected where employees "explicitly disclaimed an interest in their own working conditions").

[22] The General Counsel does not discuss the Board's *Wright Line* standard for determining whether the enforcement of the dress code against Morales was motivated by the protected communications about vandalism and Gumm's conduct. Instead, it treats those protected activities as being one and the same as the purportedly protected BLM display, and then analyzes them all using a constructive suspension/discharge analysis. Because I find that the protected activities found above are separate from the BLM display (which, for the reasons I discuss herein, was not protected activity) I am left with the obliquely raised issue of whether the Respondent enforced its dress code against Morales in retaliation for his protected communications relating to Gumm and vandalism. That question is appropriately analyzed under the *Wright Line* framework. Under that framework, the General Counsel bears the initial burden of showing that enforcement was motivated, at least in part, by activities protected by the Act. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983) (Section 8(a)(3) and (1)). The General Counsel may meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union or other protected activity, and there was a causal connection between the discipline and the protected activity. *General Motors LLC*, 369 NLRB No. 127, slip op. at 10 (2020); *Camaco Lorain Mfg. Plant,*356 NLRB at 1184–1185; *ADB Utility Contractors,* 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville,* 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1105 (2000). Animus may be inferred from the record as a whole, including timing and the employer's resort to shifting explanations. See *Novato Healthcare Center*, 365 NLRB No. 137, slip op. at 16 (2017), enfd. 916 F.3d 1095 (D.C. Cir. 2019) and *Camaco Lorain* supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *General Motors*, supra; *Camaco Lorain*, supra; *ADB Utility*, supra*; Intermet Stevensville*, supra *Senior Citizens*, supra. In this case, the evidence does not meet the General Counsel's initial burden because it does not show that the Respondent harbored animosity towards the Morales' protected concerted activities.

[23] The Complaint includes an allegation that on February 14 and 15, 2021, the Respondent threatened New Brighton employees with unspecified consequences if they engaged in protected concerted activities regarding racial harassment. GC Exh. 1(m), Par. 6. The only arguable support I find in the record for this allegation as it relates to activity that was, in fact, protected is Morales' disputed testimony that during the February 17, 2021, meeting Bergeland stated that Morales "shouldn't have sent the email" regarding the vandalism of the Black History Month displays. For the reasons discussed in the findings of fact, above, I find that the record does not show that Bergeland made that statement.

In its brief the General Counsel also alleges that the Respondent made threats in violation of Section 8(a)(1) on February 17 and 18 when it instructed Morales to remove the BLM display. Brief of the General Counsel at Page 53. It is not clear that this allegation fairly falls within the Complaint allegation regarding threats relating to employee complaints of racial harassment on about February 14 and 15. Assuming that it is within the bounds of the Complaint, the claim fails because, as discussed

Moreover, contrary to the General Counsel's assertion regarding disparate enforcement, the evidence demonstrates consistent enforcement of the dress code with respect to BLM messaging. Months before the Respondent told Morales to remove the BLM message, the Respondent required two other employees of the New Brighton store to remove BLM messages from their aprons. Subsequent to enforcing the dress code with respect to Morales, the Respondent required two additional New Brighton store employees to remove BLM messages from their work attire. Similarly, the Respondent previously enforced the dress code to prohibit "Thin Blue Line" messaging in the workplace. I am not persuaded by the General Counsel's contention that the Respondent's application of the dress code prohibition to Morales should be seen as retaliatory because Morales had been wearing the BLM message since August or September of 2020 and was not directed to remove it until February 2021. That timing is not closely linked to protected complaints, or otherwise suspicious, inasmuch as Morales had been making such complaints since October/November 2020 – about 2 months after being hired and 4 months before the Respondent told Morales that the BLM message violated the dress code. Moreover, the record demonstrates an innocent explanation for the delay. It shows that Bergeland could not enforce the dress code with respect to Morales' BLM display prior to the February 17 meeting because he did not know about the display prior to that meeting. Even if I thought the timing raised some suspicion of discrimination against Morales, that suspicion is easily outweighed by the evidence showing that the Respondent enforced the prohibition against other employees at the New Brighton store both before and after doing so with respect to Morales.

For the above reasons I find that the allegation that the Respondent violated Section 8(a)(1) of the Act by selectively and disparately enforcing its dress code against Morales based on Morales' protected concerted communications should be dismissed.

B. Morales' Display of BLM Message

The General Counsel alleges that the Respondent interfered with protected concerted activity in violation of Section 8(a)(1) of the Act when it applied a facially lawful dress code prohibition on the display of "issues or political causes unrelated to the workplace" to Morales' display of the BLM message on the work apron. For the reasons previously discussed with respect to the Respondent's nationwide interpretation of the dress code prohibition, BLM messaging is not inherently concerted. Nor does it have an objective, and sufficiently direct, relationship to terms and conditions of employment to fall within the mutual aid and protection clause. A review of the evidence shows that a different conclusion is not warranted in the case of the Respondent's application of the dress code in Morales' case.

The record here does not show that Morales' display of the BLM message was concerted. The evidence does not establish that Morales and other employees had discussed the possibility of Morales displaying the BLM message, or that other employees had encouraged that display, at the time Morales wrote BLM on the work apron. Nor does the evidence show that other employees subsequently informed Morales that they approved of, or supported, Morales' display of the message.[24] Morales' BLM display cannot reasonably be seen as a "logical outgrowth" of the protected concerted communications regarding Gumm's misconduct and the vandalism of Black History Month displays. Cf. *C& D Charter Power Systems*, 318 NLRB 798 (1995) (individual employee complaint "constituted concerted activity because they were the logical outgrowth of the prior concerned complaints employees voiced"), enfd. 88 F.3d 1278 (D.C. Cir. 1996), cert. denied 519 U.S. 1006 (1996). The evidence does not show that those group concerns preceded Morales' display of the BLM message. Morales wrote BLM on the apron shortly after beginning work in August – prior to the protected concerted communications that started in October and November. Indeed, the Black History Month vandalism did not even occur until four months later, in February of the following year. Moreover, at the February 18 meeting, Belford opined that the apron display of BLM was a "completely separate issue" from the complaints about Gumm, and Morales did not express any disagreement with that assessment even though Morales repeatedly disagreed with Belford on other subjects during the meeting. The General Counsel's failure to show that the BLM display was concerted precludes a finding that the display was protected concerted activity or that prohibiting it was a violation of the Act.

Even if the General Counsel had shown that Morales' BLM display was concerted, this claim would still fail because the BLM message had, at best, an extremely attenuated and indirect relationship to any workplace issue at the New Brighton store. As discussed earlier, the BLM messaging originated, and is primarily used, to address the unjustified killings of black individuals by law enforcement and vigilantes. To the extent the message is being used for reasons beyond that, it operates as a political umbrella for societal concerns and relates to the workplace only in the sense that workplaces are part of society. The Board has previously held that employees' displays of political messages are not protected by Section 7 since such messages are not about employees' "concerns *qua* employees" even when politics "may have an ultimate effect on employment conditions." *Ford Motor Co.*, supra.

The record does not show that Morales' BLM display was any more directly related to working conditions than are BLM displays in general. Morales created the display at the outset of

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infra, the Respondent did not interfere with protected activity when it applied its dress code to Morales' display of the BLM message.

For these reasons, I find that the allegations that the Respondent violated Sec. 8(a)(1) of the Act on February 14 and 15, 2021, by threatening employees with unspecified reprisals if they engaged in protected concerted activity regarding racial harassment should be dismissed.

[24] I considered the fact that Tesfaldet wore the BLM message on his apron from the spring/summer of 2020 until he removed it at the Respondent's request in the spring of 2021. However, the evidence does not show that Tesfaldet and Morales discussed displaying the BLM message or had agreed upon the purpose of the display. Tesfaldet testified that he made the display because "it was a hot time for everybody especially with the protests and the fresh murder of [George]Floyd." Ibid. Kimmons also displayed BLM on her apron, but the record does not show much about that other than that Kimmons stopped displaying the message when the Respondent informed her that the dress code prohibited it.

employment and at a time when, as discussed above, the evidence does not show that Morales had begun to engage in concerted communications regarding concerns affecting employees *qua* employees. Morales did not augment the BLM display with any other messaging that directly referenced a labor dispute or workplace issue. The General Counsel concedes that Morales "did not explicitly connect BLM to any particular incident with Gumm." (Br. of GC at pg. 29.

The three managers who testified about Morales' display of the BLM message indicated that their understanding of the display was consistent with the view that the message did not address employees' concerns *qua* employees. Whitley the district human resources manager stated that his understanding was that the BLM message "focus[ed] on social injustice and police matters, like defunding the police which creates controversy." Bergeland, the store manager who first told Morales that the dress code prohibited the BLM display, testified that he understood that the BLM message was viewed by "most" people as a cause or political message. Belford, the district manager who also told Morales that displaying the message was a violation of the dress code, stated that her understanding was that BLM was "focused on diversity and protected the rights of people of color and in some cases related to . . . police brutality." Even Morales described the message in a way that related to societal ills. Morales explained the display by stating "there is a lot of prejudice and racism in our world today and especially in our state, so I want to show it as a symbol of solidarity." Morales' understanding was that the BLM organization's initiatives included better addressing police violence against people of color and defunding police departments. No one—not Morales, other employees, supervisors, or managers—testified that they understood Morales' display of the BLM message to relate to Gumm's conduct, the vandalism, or any other complaints regarding employees' treatment *qua* employees at the New Brighton store.

The conclusion that Morales' BLM display was objectively about addressing the unjustified killings of black individuals, and not about employees' concerns as employees, is buttressed by consideration of the time and place of the display. Morales created and maintained the display at a location only six and half miles from where George Floyd was murdered by a Minneapolis police officer and close in time to the officer's trial and widescale protests near the store. Under all the circumstances, the message can only reasonably be understood as relating to those issues, rather than to any labor dispute or concern about the conditions of employment at the store.[25]

For the above reasons, the allegation that the Respondent violated Section 8(a)(1) of the Act when it applied its dress code to prohibit Morales from displaying the BLM message should be dismissed.[26]

C. Constructive Suspension/Discharge Allegation

An employee resignation "will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition." *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 4 (2001); see also *Mercy Hospital*, 366 NLRB No. 165, slip op. at 4 (2018). The General Counsel states that Morales was constructively discharged because the Respondent conditioned Morales' employment on removing BLM from the apron. Brief of the General Counsel at pages 31–32. The Complaint also includes an allegation that the Respondent forced Morales' suspension in the same manner.

The record does support finding that the Respondent conditioned Morales' return to work on removing the BLM message. The constructive suspension/discharge argument fails, however, because, for the reasons discussed above, Morales' display of the BLM message was not activity protected by Section 7. Therefore, the Respondent, by enforcing its dress code policy with respect to that display, was not requiring Morales to abandon Section 7 rights.[27]

To the extent that the Complaint can also be read as alleging that the Respondent constructively suspended/discharged Morales by conditioning further employment on ceasing to engage in protected communications regarding Gumm's conduct and the Black History Month vandalism, I find that constructive suspension/discharge was not shown. Although the record does show that Morales engaged in protected concerted activity about those concerns, it does not show that the Respondent required Morales to cease that activity. To the contrary, as discussed above, the Respondent made no attempt to stop Morales from engaging in those protected concerted activities, but rather responded to them in a receptive and appropriate manner.

The allegation that the Respondent violated Section 8(a)(1) of the Act by constructively suspending and/or constructively discharging Morales should be dismissed.

D. Allegation that Respondent Gave Morales an Unlawful Confidentiality Instruction Regarding Investigation

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act during the February 18 investigatory interview when Belford instructed Morales to keep their discussion confidential. While asserting in passing that Belford's

[25] I might have reached a different result had Morales' BLM display been augmented with messaging that connected it to working conditions, or if the record otherwise established such a connection. But that was not the case here.

[26] Since I find that the record does not show the BLM display at-issue here was Sec. 7-protected expression, I need not address the Respondent's novel arguments that requiring an employer to allow employees to engage in Sec. 7-protected expression in the workplace would violate the U.S. Constitution and federal trademark law. See Brief of the Respondent at pp. 35–57.

[27] The General Counsel does not allege that constructive discharge is shown under the alternative, "traditional," theory that Morales quit because his employer retaliated for protected activity by "deliberately ma[king] the working conditions unbearable" with the intent of forcing Morales to resign. *Intercon I*, 333 NLRB at 223 fn. 3; *Mercy Hospital*, supra. At any rate, the evidence is overwhelmingly at odds with any suggestion that the Respondent acted with the intention of forcing Morales to resign. During an approximately 90-minute meeting, Belford pleaded with Morales to continue working at the store, praised Morales' abilities, character and value to the store, and encouraged Morales to accept or suggest alternatives that were consistent with the Respondent's dress code. The record shows that four other employees of the New Brighton store were told that their displays of the BLM message violated the dress code and all four ceased the display and continued working.

instruction is unlawful even under existing Board precedent, the General Counsel's primary argument is that the Board should find a violation based on a return to earlier precedent. Specifically, the General Counsel argues that the Board should return to the standards it set forth regarding confidentiality instructions in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), enfd. in part 851 F.3d 35 (D.C. Cir. 2017), and abandon the contrary standards adopted in a recent trio of cases on the subject—*Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019) (reversing *Banner Estrella* in the context of written confidentiality rules), *Alcoa Corp.*, 370 NLRB No. 107 (2021) (applying *Apogee* in the context of oral confidentiality instruction), and *Watco Transloading LLC*, 369 NLRB No. 93 (2020) (same).[28] While the General Counsel offers substantial arguments for returning to the *Banner Estrella* standard, the decision about whether to do that is for the Board to make, not me. *Pathmark Stores*, 342 NLRB at 378 fn. 1; *Waco, Inc.*, 273 NLRB at 749 fn. 14. Therefore, I confine my analysis to the question of whether Belford's statement to Morales was unlawful under the standards set forth in *Apogee*, *Alcoa Corporation, and Watco Transloading.*

In both *Alcoa* and *Watco* the Board stated that, pursuant to the Board's holding in *Apogee*, confidentiality rules that "apply only for the duration of any investigation are *categorically* lawful." 370 NLRB No. 107, slip op. at 2 and 369 NLRB No. 93, slip op. at 8 (emphasis original in *Alcoa* decision, but not *Watco* decision). The Board further stated that in the case of "an oral one-on-one confidentiality instruction" it will decide whether the "only for the duration of any investigation" category applies by assessing "the surrounding circumstances to determine what employees would have reasonably understood concerning the duration of the required confidentiality." *Alcoa*, slip op. at 2; see also *Watco*, slip op. at 9 fn. 25 (finding that employee would have understood that confidentiality instruction applied only during the pending investigation because the instruction was "embedded in a particular set of circumstances"). On the face of it, that describes a relatively open inquiry, but in practice the Board applied this standard to essentially assume that an employee would understand the confidentiality restriction to be limited to the duration of the specific investigation as long as there is "*no record evidence* that th[e confidentiality] instruction was *not* limited to the term of the investigation." *Watco*., slip op. at 8-9 (emphasis added). In *Watco*, the Board noted that the purpose of the confidentiality restriction was to prevent persons from "coordinating their stories or suggesting helpful interview answers to others." Id. at 9. Given that purpose, which the employer was not shown to have articulated to the employee in *Watco*, the Board stated it "would have been apparent" to the employee that the confidentiality instruction "would apply only while the investigation remained active." *Watco*, slip op. at 9 and 9 fn. 25.

Under the standards as articulated and applied by the Board in the cases cited above, I find that the confidentiality instruction Belford gave to Morales was limited to the duration of the investigation and therefore is "categorically lawful." As in *Watco*, there was "no record evidence" here that the instruction "was *not* limited to the term of the investigation." Moreover, Belford did use some language suggesting to Morales that the purpose for the confidentiality instruction was to protect the integrity of the investigation – stating that confidentiality was necessary because "we need to speak to [other witnesses] and have their own personal story." Under *Alcoa* and *Watco*, Morales is presumed to understand that a confidentiality rule imposed for that reason would be limited to the duration of the specific investigation. There was no testimony that Morales believed the confidentiality instruction extended beyond the end of the particular investigation.

For the reasons discussed above, I find that the allegation that the Respondent violated Section 8(a)(1) of the Act during the February 18, 2021, investigatory interview should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent was not shown to have violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[29]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 10, 2022

[28] The General Counsel also states that the Board should take the opportunity to overrule the related standards that it set forth in *Boeing Co.*, 365 NLRB No. 154 (2017).

[29] 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.