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American Federation for Children, Inc. *and* Sarah Raybon. Cases 28–CA–246878 and 28–CA–262471

August 26, 2023

DECISION AND ORDER REMANDING

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

This case involves the question of whether Charging Party Sarah Raybon, an employee of the Respondent, engaged in activity protected by Section 7 of the National Labor Relations Act when she advocated among her coworkers for their support in ensuring the rehire of Gaby Ascencio, a former colleague who was awaiting renewal of her work authorization status. The judge found that Raybon's actions on behalf of Ascencio did not constitute Section 7 activity because Raybon did not act concertedly or for the purpose of mutual aid or protection.[1] In reaching the latter conclusion, the judge relied primarily on the Board's divided decision in *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019), rev. denied sub nom. *Jarrar v. NLRB*, 858 F. App'x 374 (D.C. Cir. 2021) (unpublished), finding that employees' advocacy on behalf of persons who are not statutory employees under the Act, even if they are working alongside the employees in the same workplace, cannot be viewed as being for the mutual aid or protection of the employees themselves within the meaning of Section 7.

On exception, we find, contrary to the judge and in agreement with the General Counsel, that Raybon's advocacy on behalf of Ascencio constituted protected concerted activity. First, we find that the record evidence demonstrates that Raybon acted concertedly in seeking to induce group support among her coworkers to ensure that Ascencio was rehired by the Respondent. In turn, we find that Raybon acted for the purpose of mutual aid or protection in advocating for Ascencio and her employment with the organization. Contrary to the judge, we find that Ascencio was indeed a statutory employee under the Act; therefore, *Amnesty International* does not apply. Alternatively, we hold that Raybon's activity on behalf of Ascencio was for mutual aid or protection, even if Ascencio was not a statutory employee, and, in doing so we overrule *Amnesty International*, which we find both inconsistent with well-established Board and judicial precedent, and flawed as a matter of statutory policy in any case. As the protected nature of Raybon's actions had implications for other allegations dismissed by the judge, we remand those allegations to the judge for further consideration in light of this decision.

I. FACTUAL BACKGROUND

The administrative law judge's decision fully sets out the material facts, which we summarize here. This case primarily involves the efforts of Sarah Raybon, an Arizona-based employee of the Respondent, a national school-choice advocacy nonprofit headquartered in Washington, D.C., to enlist support from her colleagues in an effort to respond to issues related to the actions of a newly hired management official, Steve Smith. In early January 2019, the Respondent hired Smith, a former Arizona state senator, as the Respondent's Arizona state director, and Smith became the direct supervisor of the Arizona team, including Raybon.[2] At the time of Smith's arrival, the Respondent was in the process of facilitating the rehiring of Gaby Ascencio. Ascencio had previously been employed by the Respondent, but had lost her eligibility to work in the United States in 2017 as a result of changed circumstances in her immigration status. Ascencio was viewed as a valued colleague by coworkers and was highly regarded by the Respondent's management team, including the Respondent's president, John Schilling. As a result, the Respondent had undertaken the process of sponsoring

[1] On August 11, 2021, Administrative Law Judge Ariel L. Sotolongo issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding. We shall modify the judge's recommended Order to conform to his unfair labor practice findings and the Board's standard remedial language, to reflect the remand of several allegations to the judge for further consideration in light of this decision, and in accordance with *Paragon Systems*, 371 NLRB No. 104 (2022), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by its maintenance of the "Confidentiality" and "Solicitation and Distribution of Literature" provisions in its employee handbook. In addition, the complaint alleged that the Respondent violated Sec. 8(a)(1) by maintaining the "Equal Opportunity Employer and Open Door" provision in its handbook, but the judge notes that the General Counsel conceded the lawfulness of this provision in the posthearing brief. We thus do not consider the allegation further here.

In addition, we note that no party excepts to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by: creating the impression that Raybon's protected activity was under surveillance; threatening employees with unspecified reprisals on February 25; and warning Raybon to be careful about expressing her concerns about Steve Smith's management practices and his commitment to rehiring Ascencio. Regarding the latter, we further note that no party excepts to the judge's finding that Valeria Gurr was not established to be a supervisor under Sec. 2(11) of the Act.

[2] Dates herein are 2019 unless otherwise indicated.

her for a work permit so she could be reemployed by the Respondent.

Upon Smith's arrival in January 2019, the sponsorship process for Ascencio was ongoing, and the Respondent was holding a position for her until the sponsorship process was finalized and her work authorization was approved.[3] In initial meetings with Smith, Raybon addressed Ascencio's situation in an effort to convey Ascencio's importance to the Respondent's organization and to alert Smith that the process of rehiring Ascencio was "almost over." In addition, Smith, Raybon, and others discussed appropriate website content regarding immigration status for the Respondent's English and Spanish-language websites. As a result of these meetings, Raybon developed the belief that Smith did not understand Ascencio's importance to the Respondent's operations or why a position was being held for her. Raybon also developed concerns, based on the website content discussions, that Smith's leadership could impact outreach to the Hispanic community. On January 8, Lindsey Rust, a national-level official for the Respondent who had previously been Raybon's supervisor, emailed Raybon a copy of an application the Respondent had received for the position being held for Ascencio.[4] The application was submitted by one of Smith's former colleagues and reinforced Raybon's belief that Ascencio's sponsorship by and reemployment with the Respondent was in jeopardy.

Concerned about Ascencio's future with the organization, on January 14, Raybon raised these concerns with Rust and solicited Rust's assistance in ensuring that Ascencio's sponsorship was maintained. As a result of this conversation, Rust agreed to look into Ascencio's status. About 2 weeks later, Raybon contacted Bruce Hermie, a national-level official located in Arizona along with Raybon.[5] Raybon expressed concern to Hermie about Smith's management style generally and her view that Smith's receipt of an application from one of his former staffers cast doubt on Smith's commitment to rehiring Ascencio. She also expressed concerns about Smith's impact on the Respondent's outreach efforts to the Hispanic community, particularly in light of Raybon learning that Smith had sponsored legislation as a state senator that Raybon believed to be "anti-immigrant." Raybon sought advice from Hermie on how to navigate the situation in light of Hermie's long tenure with the Respondent. Subsequent to these conversations, on about January 30, Smith instructed Raybon to cease bringing her issues to the national staff, but to instead bring them directly to him.

On February 19, Raybon traveled to Washington, D.C. for the Respondent's annual conference. During the conference, Raybon began raising complaints about Smith's management practices to her colleagues within the organization and seeking their support in ensuring Ascencio's rehire. In this regard, Raybon testified that she spoke to multiple colleagues regarding Ascencio's situation, including, on one occasion, speaking to at least two colleagues together. Specifically, Raybon sought out Kelli Bottger—who was close to Schilling—to discuss concerns about Smith, including Smith's perceived lack of support for Ascencio's rehire. Raybon testified that she believed that Bottger could be counted on to speak up about Ascencio's status and that she hoped Bottger would use her influence with Schilling so that he would intervene and help Ascencio. Similarly, Raybon had a conversation with Hergit Llenas and Michael Benjamin about Smith.[6] Raybon spoke to Llenas because Llenas also valued Ascencio's work, and Llenas was respected by Schilling. As with Bottger, Raybon believed Llenas could "push things" and could "stand up and fight for Gaby to make sure nothing happened to her sponsorship." Raybon also spoke with Gurr, the Respondent's Nevada state director, about Smith's management practices and Raybon's concerns about Smith's perceived lack of support for Ascencio's future employment with the Respondent.[7] In addition, according to Raybon, she spoke with Calvin Lee, a grassroots outreach employee in Wisconsin, about Smith's attempts to "derail" Ascencio's sponsorship. In the conversations with her colleagues, Raybon at times asserted Smith was "racist" and described the legislation he had sponsored as a senator as "anti-immigrant." Gurr testified that, during her conversation with Raybon, she understood Raybon to be seeking to gain Gurr's support for a "mission" of addressing problems with Smith, including the possibility of terminating Smith's employment.[8]

On February 21, after receiving reports from three employees that Raybon had called Smith "racist," Schilling

[3] As part of this process, the Respondent had posted a vacancy announcement for Ascencio's position to allow others to apply. The judge found that, when no other suitable candidates emerged, the position was "closed" in April 2018, and the Respondent was able to "hold" the position for Ascencio until the sponsorship application process was completed.

[4] Rust is an admitted supervisor under Sec. 2(11) of the Act.

[5] Hermie was not established to be a supervisor within the meaning of Sec. 2(11) of the Act.

[6] Bottger, Llenas, and Benjamin were not established to be supervisors within the meaning of Sec. 2(11) of the Act.

[7] As noted, supra fn. 1, there are no exceptions to the judge's finding that Gurr was not a supervisor within the meaning of Sec. 2(11) of the Act.

[8] There is, however, no evidence that Raybon expressly sought to have Smith fired. Instead, as explained below, the evidence demonstrates that the substance of Raybon's goal was to address Smith's management practices and his perceived lack of support for Ascencio's future employment.

confronted Raybon with these reports and asked why she had been "trashing" Smith. Raybon denied having called Smith a racist, although she acknowledged she had issues with Smith's leadership. In particular, she highlighted to Schilling the concerns about Smith's treatment of Ascencio, the Hispanic outreach issue, and asserted that Smith was difficult to work with. Schilling reminded Raybon that, under the employee handbook policy, calling someone a racist was a form of harassment and "inappropriate." But Schilling also told Raybon that the Respondent would not tolerate disrespectful conduct by a manager and stated that he would talk to Smith. Although Raybon told Schilling that she did not want him to talk to Smith, Schilling informed Raybon that the employee handbook called for employees to take problems with immediate supervisors to upper management so they could address the problem.

After learning from other employees that Raybon had called him racist, Smith demanded that Schilling investigate Raybon's actions, insisted that Raybon be terminated, and indicated he would consider legal action if corrective measures were not taken. Schilling investigated the matter with six employees, including the three who had previously independently approached him. Schilling questioned the employees about whether Raybon had called Smith racist and her rationale for doing so. Schilling determined that Raybon's allegation of racial hostility was unsupported by the facts, and that nothing Smith had done indicated he was racist or biased against people of color.

Subsequently, on February 25, Schilling decided to terminate Raybon for creating a "toxic atmosphere" within the organization by making the "incendiary" accusation that Smith was racist. Schilling contacted Raybon that same day and told her that several of her colleagues had confirmed that Raybon had called Smith racist. Schilling told Raybon that she had violated the employee handbook by making such accusations and that Smith did not want to work with her anymore. Schilling then asked Raybon, "What am I supposed to do?," to which Raybon responded that she would resign. She submitted a resignation letter later that day.

After Raybon's employment with the Respondent ended, she took a position in March with another nonprofit school-choice advocacy organization, which, like the Respondent, was a member of an Arizona-based school choice coalition. In early August, the Respondent took issue with Raybon's support for an Arizona school official whom the Respondent considered a political opponent. At about the same time, Raybon's new organization was dropped from the invitation list for meetings of the school choice coalition.

In mid-August, Raybon filed an initial Board charge against the Respondent alleging that it had violated the Act by, inter alia, maintaining unlawful work rules and directives, seeking Raybon's resignation in retaliation for her concerted protected activity, and postdischarge efforts to interfere with her new employment. Subsequently, in early 2020, at least one coalition partner expressed dismay at Raybon's noninclusion at the school choice coalition meetings. The record also includes emails from Smith to Schilling, also from early 2020, suggesting Smith's displeasure with Raybon's filing of Board charges and that the Respondent was explicitly using its leverage with the coalition to keep Raybon and her new employer out of intergroup discussions.

II. ADMINISTRATIVE LAW JUDGE'S DECISION AND PARTIES' ARGUMENTS

In the complaint, the General Counsel alleged that the Respondent violated Section 8(a)(1) of the Act by: (1) instructing Raybon not to contact the national team; (2) threatening Raybon with unspecified reprisals for her activities in protest of Smith's policies; (3) interrogating employees concerning their protected concerted conversations with Raybon; (4) discharging Raybon for her protected concerted activity during the February 2019 conference in Washington, D.C.; (5) engaging in postdischarge retaliation against Raybon for her protected concerted activity; and (6) offering interpretations of work rules that restricted employees' rights to engage in protected concerted activity. The General Counsel further alleged that the Respondent's postdischarge retaliation against Raybon, after she had filed Board charges, also violated Section 8(a)(4).

As pertinent here, the judge concluded that Raybon had not engaged in protected concerted activity in February 2019 by her efforts to rally opposition to Smith's policies, including Smith's perceived lack of support for rehiring Ascencio. Specifically, the judge summarily concluded that Raybon did not act concertedly and, then, applying the Board's decision in *Amnesty International*, supra, finding that employees' efforts on behalf of a nonemployee are not for "mutual aid or protection," the judge reasoned that Raybon's actions were not protected by Section 7 because they were for the benefit of Ascencio, whom he found to be a nonemployee.[9] The judge thus dismissed the allegations that the Respondent violated

[9] The judge also found that Raybon's complaints regarding changes to the Spanish-language webpage were not "for mutual aid or protection" because such changes did not pertain to terms and conditions of employment. Because we find that the efforts with respect to Ascencio's rehire were protected concerted activity, we need not pass on the website issue. Nor, for that same reason, need we pass on whether Raybon's effort to highlight Smith's record as a state legislator was, of itself, a form of protected concerted activity.

Section 8(a)(1) by discharging Raybon and violated Section 8(a)(4) by retaliating against Raybon after she filed charges with the Board over her discharge. The judge also dismissed the remaining Section 8(a)(1) allegations involving the Respondent's conduct towards Raybon.[10]

On exception, the General Counsel contends that the judge erred in finding that Raybon did not engage in protected concerted activity during the February 2019 conference. She argues that Raybon acted concertedly by her efforts to elicit support from her colleagues to ensure Smith would not thwart the Respondent's sponsorship of Ascencio and with respect to other matters related to Smith. In addition, the General Counsel argues that Raybon acted for the purpose of mutual aid or protection by seeking to stop Smith's perceived interference with the Respondent's potential rehire of Ascencio. The General Counsel asserts that *Amnesty International*—relied on by the judge as the basis for his holding that Raybon's assistance to Ascencio, whom he found to be a nonemployee, was not for mutual aid or protection—was wrongly decided and should be overruled.[11] As to the remaining Section 8(a)(1) allegations the judge dismissed, the General Counsel similarly argues that the Board should reverse the judge and find the violations.

In response, the Respondent argues, inter alia, that Raybon's actions in support of Ascencio were not protected under Section 7 because Raybon did not act for the purpose of mutual aid or protection. In addition, the Respondent contends that Raybon was not terminated, but instead resigned and further argues that, even if Raybon was terminated, it was because she engaged in misconduct by calling Smith racist and not for any protected concerted activity.

III. DISCUSSION

Because the question of whether Raybon engaged in protected concerted activity is central to the issues in this case, we address it first. Section 7 of the Act gives employees the right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Thus, as the Board has explained, the statutory concept of protected concerted activity has two elements: the employee's activity must be "concerted," and it must be "for mutual aid or protection." E.g., *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 152–153 (2014).

> "[W]hether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers." Id. at 153 (citing, inter alia, *NLRB v. City Disposal Systems,* 465 U.S. 822, 831 (1984)). The Board has held that 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." *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).[12] Notably, the "object of inducing group action need not be express," and an employee's statement may, in certain contexts, "implicitly elicit[] support from his fellow employees." *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988). As the Board stated in *Meyers II*, "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." 281 NLRB at 886. "Mutual aid or protection," 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*, supra, 361 NLRB at 153 (emphasis in original) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). Both the "concertedness" and "mutual aid or protection" elements under Section 7 are analyzed under an objective standard, whereby motive for taking the action is not relevant to whether it was concerted, nor is motive relevant to whether it was for "mutual aid or protection." Id.

For the reasons explained below, we find, contrary to the judge, that Raybon engaged in concerted activity for the purpose of mutual aid or protection when she advocated among her colleagues for their support of Ascencio's hiring. In so doing, as stated, we overrule the Board's divided decision in *Amnesty International*.

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[10] As noted above, supra fn. 1, we adopt, in the absence of exceptions, the judge's findings that the Respondent violated Sec. 8(a)(1) by its maintenance of two work rules.

[11] The General Counsel also requests that the Board overrule the factor-based approach to determining concertedness set forth in *Alstate Maintenance*, 367 NLRB No. 68 (2019). The Board has overruled *Alstate* in *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023), applying its new decision retroactively. For the reasons stated here, *Alstate* would not apply to the facts here. and whether it was correctly decided is immaterial to our decision. We also find it unnecessary here to take up the General Counsel's request to address *Alstate* and other cases insofar as they address the outer boundaries of mutual aid or protection. The precedent referenced by the General Counsel is not implicated in this case (and the judge did not rely on it).

Further, in light of our finding below that Raybon's actions in support of Ascencio constituted concerted activity under the well-established principles of *Meyers II*, we find it unnecessary to pass on the General Counsel's request that the Board find that Raybon's conduct—insofar as it relates to workplace discrimination—was inherently concerted.

[12] The *Meyers II* Board observed that 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." 281 NLRB at 887.

A.

It is well established that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Whittaker Corp*., supra, 289 NLRB at 933 (1988) (quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)).

In finding here that Raybon did not act concertedly, the judge failed to engage with the record evidence demonstrating the concerted nature of Raybon's actions. In this regard, while the judge acknowledged that Raybon had spoken to other managers and employees about the importance of Ascencio's rehire, he did not address the evidence demonstrating that Raybon had concertedly appealed to other employees in an effort to induce their support for Ascencio and her rehire by the Respondent. As discussed below, on the facts of this case, and in light of the well-established principles regarding concerted activity, we find, contrary to the judge, that Raybon engaged in concerted activity when she sought to persuade other employees to join her in lobbying the Respondent to rehire Ascencio.[13]

As explained above, Ascencio's past work for the Respondent was highly regarded. Indeed, Ascencio's value to the organization and her coworkers was considered so important to the Respondent that it undertook the process of sponsoring her work authorization and had been preserving a position for Ascencio until she was again authorized to work in the United States. Shortly after the Respondent hired Smith, Raybon became concerned that Smith was not committed to rehiring Ascencio. In response, Raybon engaged in a series of conversations with her colleagues to raise the alarm over concerns about Smith and his commitment to rehiring Ascencio. Specifically, Raybon sought to induce support for Ascencio's rehire by engaging with managers[14] and by lobbying her fellow employees. We focus here on Raybon's interactions with other employees regarding Ascencio's rehire.

As detailed above, in January 2019, Raybon contacted Hermie, a national-level employee of the Respondent located in Arizona, to express concern about Smith's management style and his commitment to rehiring Ascencio.[15] Raybon sought advice from Hermie on how to navigate the situation with Smith in light of Hermie's long tenure with the Respondent. Upon learning that Raybon was speaking to national-level employees, Smith instructed Raybon to cease doing so. Shortly thereafter, in February 2019, Raybon attended the Respondent's conference in Washington, D.C. There, Raybon spoke to multiple employees within the organization about Ascencio and the subject of each conversation was the same—Smith's management practices were potentially jeopardizing Ascencio's future employment with the Respondent. Indeed, Raybon expressed concern to Lee that Smith would "derail" Ascencio's rehire. In addition, although Raybon apparently discussed Ascencio with numerous employees at the conference, she particularly sought to induce action by fellow employees that she expected would be sympathetic to Ascencio's situation and helpful in advocating for Ascencio's rehire by the Respondent. In this regard, Raybon sought out employees like Bottger and Llenas, who had good relationships with Schilling and who Raybon perceived as being able to "push things" and who would "stand up and fight for Gaby [Ascencio] to make sure nothing happened to her sponsorship." One of the colleagues Raybon spoke to at the conference, Gurr,[16] described Raybon as being on a "mission" to address problems with Smith and ensure her colleagues' support for Ascencio's rehire.

Viewed objectively, by her communications with other employees at the conference, Raybon was seeking to persuade those employees to join her in lobbying the Respondent to rehire Ascencio. Her actions thus constituted concerted activity under *Meyers II* because she sought to initiate or induce group action among her fellow employees in support of Ascencio's rehire. The object of the group action—to persuade the solicited employees to join Raybon in advocating to management on Ascencio's behalf—need not have been expressly stated. See, e.g., *Whittaker Corp.*, supra, 289 NLRB at 933–934. Nor did the employees Raybon spoke with need to advocate on behalf of Ascencio to the Respondent or even agree with Raybon about Ascencio's importance to the organization.

[13] *Alstate Maintenance*, supra, which the judge cited as generally applicable to determining concertedness, was subsequently overruled in *Miller Plastic Products*, supra. *Alstate* did not apply in cases like this one, but rather applied only under the specific circumstances in which an effort to induce group action is potentially inferred based on an employee's statement at a group meeting. *Alstate*, supra, 367 NLRB at slip op. at 7. Further, management was required to be present at such a meeting for *Alstate* to apply. See id.

On the facts of this case, we find that *Alstate* would not apply, even if it remained good law. Raybon's activity involved a series of impromptu conversations with coworkers and, although at least one conversation was with two colleagues, there is no indication that Raybon raised the Ascencio matter in a group setting where supervisors or managers were present.

[14] As detailed above, Raybon first contacted Rust, an admitted Sec. 2(11) supervisor, with the specific purpose of raising concerns about Ascencio's rehire and Raybon's efforts were successful in securing Rust's agreement to look into Ascencio's status.

[15] As set forth above, supra fn. 5, Hermie was not established to be a supervisor under Sec. 2(11).

[16] As set forth above, supra fn. 1, no party excepts to the judge's conclusion that Gurr was not a supervisor under Sec. 2(11).

See *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993); *Whitaker Corp.*, supra, 289 NLRB at 934; and *El Gran Combo*, 284 NLRB 1115, 1117, enfd. 853 F.2d 996 (1st Cir. 1988). It is sufficient that Raybon sought out fellow employees in an effort to induce them to join her in advocating to management for Ascencio's rehire. In these circumstances, we find, contrary to the judge, that the record evidence demonstrates that Raybon engaged in concerted activity under *Meyers II* and its progeny by her communications with fellow employees regarding Ascencio at the February 2019 conference.[17]

B.

Having found that Raybon acted in a concerted manner by seeking to persuade her colleagues to join her in lobbying management to rehire Ascencio, we next consider whether Raybon's conduct was "for the purpose of . . . mutual aid or protection." Under *Amnesty International*, which involved the efforts of employees to win pay for the unpaid interns who worked alongside them, this question turns on whether Ascencio was a statutory employee under Section 2(3) of the Act. The *Amnesty* Board held that "[a]ctivity advocating only for non-employees is not for 'other mutual aid or protection' within the meaning of Section 7 and accordingly does not qualify for the Act's protection." 368 NLRB No. 112, slip op. at 2. Citing *Amnesty International*, supra, the judge here concluded that Raybon's advocacy was for the benefit of a nonemployee (Ascencio) and thus Raybon did not act "for . . . mutual aid."

For the reasons we will explain, we reject the judge's conclusion that Ascencio was not a statutory employee. We also conclude that Raybon's concerted activity here was for mutual aid or protection with the meaning of Section 7, regardless of whether Ascencio was a statutory employee, and accordingly overrule *Amnesty International*.

To begin, it should be clear that Ascencio was, indeed, a statutory employee. The record demonstrates that Ascencio is properly considered an applicant for employment: she sought to be rehired to a position with the Respondent that she once held. In turn, it is very well established that job applicants are employees under the Act, where (as here) there is no question that they genuinely seek employment.[18] Ascencio's immigration status, meanwhile, is immaterial to her status as a statutory employee for purposes of the issue in this case, because it did not prevent her from applying for work.[19]

If Ascencio was a statutory employee, as we find, then the judge clearly erred in applying the Board's decision in *Amnesty International* here. Raybon's actions on behalf of a statutory employee (Ascencio), who sought reemployment with Raybon's employer and with whom Raybon wished to work again, were clearly for the mutual aid or protection of employees. First, Raybon (potentially with other employees) was making common cause with Ascencio, both Raybon (as well as other employees) and Ascencio stood to benefit, and the long-recognized "solidarity principle" —where one employee comes to the aid of another and can reasonably expect help in return—is implicated. See *Fresh & Easy*, supra, 361 NLRB at 155-156. The Supreme Court has recognized this principle as integral to the Act's guarantee of employees' right to take action for the purposes of mutual aid and protection. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260–261 (1975) (holding that employee's request for union representation at employer investigatory interview was for mutual aid or protection and noting that the "representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview").[20]

Second, Raybon's efforts to enlist other employees to support her lobbying efforts with management to bring Ascencio back were for the mutual aid or protection of all

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[17] For its part, in asserting, in agreement with the judge, that Raybon did not act in a concerted manner, the Respondent appears to conflate the concepts of concertedness, mutual aid, and loss of protection. At bottom, the Respondent's basic contention appears to be that even assuming Raybon engaged in some concerted activity, such activity cannot be protected under the Act because Raybon engaged in misconduct by accusing Smith of racist behavior based on her personal views of his actions. However, Raybon's purported misconduct has no bearing on the initial question of whether she was engaged in concerted activity under *Meyers II*. The preliminary inquiry here is whether, under established principles, Raybon engaged in concerted activity for the purpose of mutual aid or protection when she sought to induce support from her fellow employees in her efforts to lobby management to rehire Ascencio. Having found that she did, as explained below, we remand the question of whether the Respondent unlawfully discharged Raybon because of her protected concerted activity to the judge for further consideration in light of our findings. As also explained below, infra fn. 26, on remand, the judge may consider the extent to which Raybon's use of the term "racist" to describe Smith impacts the judge's analysis of whether Raybon's discharge was lawful, and he may also consider the appropriate legal framework for assessing the lawfulness of Raybon's discharge.

[18] See *Toering Electric Co.*, 351 NLRB 225, 227 (2007) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–186 (1941)). *Amnesty International* acknowledged this principle. 368 NLRB No. 112, slip op. at 2, fn. 7.

[19] See, e.g., *Tuv Taam Corp.*, 340 NLRB 756, 760 (2003) ("Typically, an individual's immigration status is irrelevant to a respondent's unfair labor practice liability under the Act.").

[20] See also *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664, 668 (1967) (holding that boycott was not statutorily prohibited secondary activity "because engaged in by primary employees not directly affected by the dispute, or because only engaged in by some of the primary employees, and not the entire group").

current employees. Because Ascencio was desired as a coworker, her rehire would have improved the employment terms and conditions of the employees working with her, including but not limited to Raybon. The Board has repeatedly held that employees' concerted activity directed toward the retention or discharge of their *supervisor* is for mutual aid or protection, inasmuch as it bears on their terms and conditions of employment. See, e.g., *Trompler, Inc.*, 335 NLRB 478, 479–480 (2001), enfd. 338 F.3d 747 (7th Cir. 2003); *Southern Pride Catfish*, 331 NLRB 618, 620 (2000). The same basic principle applies when the hiring or firing of a coworker is involved, given the obvious difference a coworker can make in the workplace, whether in performing work duties jointly or acting together to improve working conditions.

Neither of these two rationales depends on whether Ascencio is a statutory employee. The solidarity principle applies when another worker, whatever her statutory status, is in a position to aid statutory employees. Similarly, the hiring or firing of a coworker affects the terms and conditions of statutory employees, whatever the coworker's statutory status. However, because Ascencio's employee status is at issue here, we revisit *Amnesty*, a decision at odds with precedent and the policies of the Act.

We start with well-established principles. The Supreme Court has made clear that the "mutual aid or protection" provision of Section 7 covers a broad range of employee objectives. Activity for "the purpose of mutual aid or protection" does not merely encompass "activity by employees on behalf of themselves or other employees of the same employer," nor does it reach only activity "within the scope of the employment relationship." *Eastex, Inc. v. NLRB*, 437 U.S. at 556. The concept of "mutual aid or protection" also includes matters "outside the immediate employment context," because imposing a narrower scope would "frustrate the policy of the Act to protect the right of workers to act together to better their working conditions." Id. at 565–566.

In this case—assuming Ascencio was not a statutory employee—the question is whether (applying an objective standard) statutory employees like Raybon can be acting for *their own* mutual aid or protection when (acting with each other) they support the interests of workers who are not themselves statutory employees. Over the decades before *Amnesty International* was decided in 2019, the answer in the Board and the courts was clearly "yes." The leading case is the Second Circuit's venerable decision in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co*, 130 F. 2d 503 (2d Cir. 1941), authored by Judge Learned Hand.[21] There, statutory employees passed and published a resolution in protest of their employer's efforts to undermine a cooperative of dairy farmers, who were not employees under the Act. The Second Circuit found that the employees were acting for mutual aid or protection, regardless of the status of the dairy farmers they sought to help.

The court explained that although only statutory employees can invoke the protection of Section 7, the scope of mutual aid or protection covers the efforts of statutory employees to help themselves by helping persons who are *not* statutory employees. The court distinguished between situations where the concerted activity could benefit *only* nonemployees (and so did not satisfy the "mutual aid or protection" element) and situations where the activity could benefit *both* employees *and* nonemployees. The court explained:

> It is of course true that only those "employees" can invoke § 7, who are defined by § 2(3), and that therefore the [nonemployees] could not do so. It follows that, so far as the resolution was a "concerted activity" for the "mutual aid or protection" of the [nonemployee] farmers on the one hand and the [employees of the respondent employer] on the other, the section did not cover it. So far, however, as it was a "concerted activity for the purpose" of the "mutual aid or protection" of the [employees] themselves, the section did cover it . . . . *[N]othing elsewhere in the Act limits the scope of the language [of Section 7] to "activities" designed to benefit other "employees"; and its rationale forbids such a limitation.* When all the other workmen in the shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the *solidarity so established is "mutual aid" in the most literal sense*, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.

[21] The Supreme Court has cited *Peter Cailler Kohler* with approval. See, e.g., *NLRB v. J. Weingarten, Inc.*, supra, 420 U.S. at 260–261; *Houston Insulation Contractors Ass'n*, supra, 386 U.S. at 664–665.

* * *

> If therefore, the [employees] thought that the resolution might help to secure for them the favor of [the non-employee farmers], it was no objection that [the farmers' cooperative] was not made up of "employees" as § 2(3) defined that word; *it was as little an objection as though [the farmers' cooperative] had been made up of agricultural laborers who were equally excluded from the [A]ct.*

130 F.3d at 505–506 (emphasis added).

This is the solidarity principle already described, which the Supreme Court has recognized, citing *Peter Cailler Kohler* with approval. See fn. 21, supra. On its facts, in turn, this case presents an even stronger example of why the concept of "mutual aid or protection" under Section 7 is properly informed by the solidarity principle. It involves the prospect of reciprocal help between statutory employees and nonemployees who work together in the same workplace, for the same employer. The relationship between Raybon, her fellow employees, and Ascencio is far closer than the relationship in *Peter Cailler Kohler* between the employees and the nonemployee dairy farmers. It makes no sense in terms of the Act's policies to hold that Raybon's efforts to elicit help for Ascencio should *not* be protected by Section 7, simply because Ascencio herself was not a statutory employee (assuming this was the case).

Before *Amnesty International*, the Board's case law was not only entirely consistent with *Peter Cailler Kohler*, but it relied on the Second Circuit's decision there. Thus, in *General Electric Co.*, 169 NLRB 1101 (1968), enfd. 411 F.2d 750 (9th Cir. 1969), the Board held that employees were engaged in protected concerted activity when they collected money at their employer's facility in order to support the organizing efforts of nonemployee agricultural workers. Quoting extensively from *Peter Cailler Kohler*, the Board squarely rejected the argument made by the employer "that the collection involved herein is too remote from the interests of the Union or its members to come within the guarantee of Section 7, and further that the Act does not protect activity aimed at benefitting employees excluded from the Act's definition of 'employee[.]'" Id. at 1103. Here, the connection between employees' efforts to assist a nonemployee and their own interests is significantly closer than it was in *General Electric*. As a potential coworker, Ascencio would be in a position to help Raybon and other employees, just as they had helped her. Independently, Ascencio's return to the work force by itself had the potential to benefit Raybon and her fellow employees, because they valued her as a coworker. Neither of these considerations turns on whether Ascencio herself was a statutory employee.

We have no difficulty in returning to the traditional approach reflected in *General Electric* and in overruling *Amnesty International*, which erroneously held that employees' activity in support of nonemployees cannot be deemed for the mutual aid or protection of the employees themselves, even if (as was the case there) the two groups work together in the same workplace, for the same employer. There is simply no support for this proposition in Board precedent, in the Supreme Court's decisions, or in the policies of the Act. The effort of the *Amnesty International* Board to distinguish *General Electric*, meanwhile, is unpersuasive.

The *Amnesty International* Board explained its position entirely in a footnote.[22] Its points are easily refuted. First, the Board purported to reject the "novel position that activity in support of the interests of nonemployees can be for the purpose of mutual aid or protection under the Act." 368 NLRB No. 112, slip op. at 3 fn. 7. But the position is certainly *not* novel, as *Peter Cailler Kohler* and *General Electric* establish. Next, the Board observed that under our case law, following the Supreme Court's decision in *Eastex*, supra, "mutual aid or protection" requires that "employees' object must be to help employees—be it themselves or the employees of another employer." Id.

[22] The relevant portion of the footnote reads as follows:

> Our concurring colleague [then-Member McFerran] takes the novel position that activity in support of the interests of nonemployees can be for the purpose of mutual aid or protection under the Act. The Board, at least since the Supreme Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), has understood "mutual aid or protection" to require a finding that "the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) (quoting *Eastex*, 437 U.S. at 665) (emphasis added). Put simply, employees' object must be to help employees—be it themselves or the employees of another employer. Our colleague relies on an isolated pre-*Eastex* case, *General Electric Co.*, 169 NLRB 1101 (1968), to argue against this well-settled principle. In *General Electric*, the Board found that a union's effort to have its employee members collect money at the employer's gate on behalf of "grape worker employee-strikers who were attempting to organize" was for the purpose of mutual aid or protection. Id. at 1103. The Board reached this conclusion even though the employees were acting for the benefit of grape workers who were "agricultural laborer[s]" statutorily excluded from the Act's Sec. 2(3) definition of "employee." Id. Whether or not this case was correctly decided, and whether or not it is still valid in light of *Eastex*, we find it distinguishable because the grape workers at issue would have been employees under the Act had they not worked in an excluded industry. Thus, the employees' activities to help the grape workers' strike and effort to organize were directly analogous to assisting the statutory employees of another employer. Here, the unpaid interns had no similar economic relationship.

368 NLRB No. 112, slip at 3 fn. 7.

This statement, of course, fails to address the issue presented in cases like this one: whether in helping nonemployees, employees can have the object of helping *themselves*, as well as the nonemployees. It should be clear that they can, and the *Amnesty International* Board offered no reason for categorically ruling out this possibility.

Finally, the *Amnesty International* Board addressed *General Electric*. It first questioned whether the Board's decision "was still valid in light of *Eastex*," 368 NLRB No. 112, slip op. at 3 fn. 7, a decision that unequivocally endorsed a *broad* interpretation of "mutual aid or protection." That suggestion has no basis, however, for reasons explained in then-Member McFerran's *Amnesty International* concurrence. Id., slip op. at 5 fn. 12.[23] The Board then sought to distinguish *General Electric*, reasoning that the grape workers involved in that case "*would have been employees under the Act* had they not worked in an excluded industry" and so the "employees' activities to help the grape workers' strike and effort to organize were *directly analogous* to assisting the statutory employees of another employer." Id., slip op. at 3 fn. 7 (emphasis added). Here, too, we agree with then-Member McFerran that this reasoning is badly flawed. See id., slip op. at 5 fn. 12. The *General Electric* Board, relying on *Peter Cailler Kohler*, was clear that the status of the grape workers as nonemployees was simply immaterial to the issue of "mutual aid or protection." *Why* a nonemployee is excluded from the definition of a statutory employee under Section 2(3) of the Act also has no bearing on the issue, as *Peter Cailler Kohler* illustrates. The dairy farmers there were not employees of any sort. The relevant question in cases like this one, in short, is not whether the persons that employees seek to help are statutory employees themselves, not whether they are *like* statutory employees, and not whether they have any particular relationship with the employer. The question is simply whether in helping those persons, employees potentially aid and protect themselves, whether by directly improving their own terms and conditions of employment or by creating the possibility of future reciprocal support from others in their efforts to better working conditions. The *Amnesty International* Board failed to grasp the issue before it and failed to understand the authority that should have guided it. We correct that error today. Insofar as our decision applies a new legal standard, we apply that standard retroactively to this case and to all pending cases, in whatever stage, consistent with the Board's established retroactivity principles.[24]

IV. REMANDED ALLEGATIONS

Having found above that Raybon engaged in concerted activity for the purpose of mutual aid or protection, we have effected a fundamental change to the legal backdrop of many of the other issues presented in this case. As a result, and as explained below, we have decided to sever and remand the remaining allegations to the judge for further consideration in light of our decision here.[25]

Pertinently, the judge dismissed the allegation that the Respondent violated Section 8(a)(1) by discharging Raybon in significant part because of his conclusion that Raybon had not engaged in protected concerted activity.[26] As

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[23] As then-Member McFerran pointed out, the Board's own decision in *Eastex* cited *General Electric* with approval. See *Eastex, Inc.,* 215 NLRB 271, 274 (1974). The Fifth Circuit, in turn, not only affirmed the Board's decision but also cited with approval the Ninth Circuit's decision affirming *General Electric.* See *Eastex, Inc. v. NLRB*, 550 F.2d 198, 202 fn. 6 (5th Cir. 1977) (citing *NLRB v. General Electric Co*., 411 F.2d 750 (9th Cir. 1969)). The *Eastex* Supreme Court, finally, affirmed the Fifth Circuit. Nothing in this sequence of decisions undermines the validity of *General Electric*—just the opposite. Not surprisingly, the *Amnesty International* Board pointed to nothing in the language or logic of the Supreme Court's decision that supported its narrow interpretation of "mutual aid or protection."

[24] The Board's usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage, unless doing so would amount to a manifest injustice. *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005). To determine whether retroactive application amounts to a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. Id.

The Respondent could not have relied on *Amnesty International* in discharging Raybon, because that decision issued only afterwards. (The Board's decision in *Amnesty International*, meanwhile, did not address retroactivity, presumably because the Board there incorrectly viewed its decision as consistent with *General Electric*, supra, and thus as not changing the law.) Retroactivity here would further the purposes of the Act by restoring the Board's long-established understanding of "mutual aid or protection" in the circumstances presented, as reflected in *General Electric* and consistent with the Supreme Court's broad reading of the statutory phrase. We see no particular injustice in retroactivity, not least because the case is being remanded for further proceedings under the standard adopted here.

[25] As identified here, as to some of the dismissed allegations, we find that the judge committed other errors or overlooked relevant evidence, warranting remand.

[26] We recognize that the judge pointed to additional reasons, independent of whether Raybon engaged in protected concerted activity, in finding that her discharge did not violate the Act. The judge concluded that Raybon resigned and thus the only basis on which the case could proceed was a constructive-discharge theory (which the General Counsel failed to prove). However, we believe it is clear that Raybon was discharged within the Board's established understanding of the term—that is, that the Respondent's words and their context conveyed the reasonable impression that her employment had been terminated. See *Schwartz Mfg. Co.*, 289 NLRB 874, 897 (1988) ("The test for determining 'whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged' . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated.") (citations omitted). Schilling had, essentially, given Raybon no real choice by informing Raybon that her conduct had violated the handbook and had offended her supervisor, who

we have now determined that Raybon had indeed engaged in protected concerted activity, we remand the question of whether Raybon was discharged because of her protected concerted activity to the judge for further consideration in light of this finding. Relatedly, we remand the allegations that the Respondent violated Section 8(a)(1) and (4) by its postdischarge retaliation against Raybon.[27]

In addition, we remand to the judge the allegation that the Respondent violated Section 8(a)(1) when Smith instructed Raybon on January 30, 2019, not to contact the national staff about Ascencio's situation. In dismissing the allegation, the judge found that, at the time of the instruction, Raybon had only spoken with Rust, a supervisor, about her concerns with Smith—and thus there was an absence of group *employee* action. The judge, however, did not consider Raybon's conversation with Hermie, who was not determined to be a statutory supervisor, in late January and whether it was part of a nascent effort by Raybon to induce her coworkers to join in support for Ascencio's rehire and in opposition to Smith's policies. We thus remand the issue to the judge for further consideration of these matters.

Similarly, we remand to the judge the allegations that the Respondent unlawfully threatened unspecified reprisals against Raybon during Schilling's February 21 meeting with her. As previously noted, we have found that Raybon's activity at the Washington, D.C. conference that prompted Schilling's alleged threats constituted protected concerted activity. Our finding then raises the possibility that Schilling's remarks on February 21 would reasonably be viewed as retaliatory. On the separate question of whether what Schilling said amounted to a threat, the judge found that the terms Schilling used to chide Raybon did not invoke the possibility of punishment. However, the judge neglected to consider Schilling's use of the descriptions "inappropriate" and "unprofessional" in regard to Raybon's conduct—*in conjunction with the accusation that she violated a handbook policy*. Because invocation of a handbook rule—the violation of which could result in discipline—seemingly raises the stakes of Schilling's remarks, we remand the allegation to the judge for reconsideration in light of the full context of Schilling's remarks.

Based on that same February 21 meeting, the General Counsel further alleged the Respondent violated Section 8(a)(1) by promulgating an unlawful interpretation of its Equal Opportunity Employer and Open Door policies. Schilling referenced company policies at the meeting and told Raybon that the employee handbook called for employees to bring their problems to management, so they could address the problems. The judge found that the interpretation here, while requiring employees to bring concerns to management, did not preclude employees from talking to one another. But the judge failed to consider a context in which Raybon had been simultaneously scolded for conduct that involved her conversations *with other employees*, conversations which we now have held to include protected concerted activity. In view of this additional consideration, we remand to the judge to determine

now refused to work with her, adding "What am I supposed to do?" The professed incompatibility between Raybon and Smith, alongside the handbook violations and Schilling's failure to offer any other possibilities by which Raybon might continue working for the Respondent, would have conveyed the impression to Raybon that the Respondent wanted her gone.

In addition, we observe that the judge found, under *Wright Line*, that Raybon's protected concerted activity was not the cause of her discharge; but rather, the discharge was motivated by her characterization of Smith as racist. The judge rejected the assertion that Raybon's calling Smith racist was part of any protected concerted activity and thus shielded from retaliation. On exception, the General Counsel argues that *Wright Line* should not apply because Raybon's use of the term "racist" was part of her concerted activity for mutual aid or protection. Because it is unclear the extent to which—now that we have held that her advocacy for Ascencio is protected concerted activity—the use of the term "racist" can be considered as separate from such activity, we remand for a determination, in light of our conclusions herein, of whether Raybon's discharge violated Sec. 8(a)(1). Given our finding that Raybon engaged in protected concerted activity by her efforts to induce her colleagues' support for Ascencio and to ensure Smith did not prevent her from being rehired, the judge may revisit the question of the extent to which the "racist" accusation is part of the broader sweep of Raybon's activity and, relatedly, whether a *Wright Line* analysis is appropriate.

[27] In dismissing these allegations, the judge found that there was no evidence that the Respondent took adverse action against Raybon when it indicated its desire not to participate in coalition activities with her. The judge, however, failed to consider evidence that a coalition member responded negatively to Raybon's exclusion from a meeting, expressed concern about the matter, and urged the Respondent to include Raybon, as a long-tenured school choice advocate. This coalition partner urged the parties to mediate the matter, suggesting it was imperative to her that Raybon participate in the types of meetings at issue. The judge, in finding lack of an adverse post-termination action, suggested that the only evidence to show adversity here was Raybon's subjective testimony concerning the effect of the Respondent's unwillingness to work with her in coalition meetings. However, the coalition partner's correspondence provides an objective basis on which to find harm to Raybon's professional standing. On remand, the judge should consider this evidence in assessing the related allegations.

Further, as to the question of whether Raybon's protected concerted activity or her pursuit of Board charges may have motivated the Respondent's post-discharge actions, the judge found that it was Raybon's support for a disfavored school official that prompted any such actions. We note first, as we have explained above, that Raybon did in fact engage in protected concerted activity and thus a prerequisite for finding a retaliatory motive is now established. In addition, as to the Sec. 8(a)(4) allegation, we note that there is no indication that the judge considered an email from Smith to Schilling, sent in February 2020, linking Raybon's unfair labor practice charges and attendance at the coalition meetings. While such email and the fact of Raybon's protected concerted activity must be evaluated in the full evidentiary context, the judge's failure to consider the range of evidence potentially relevant to showing an unlawful motive warrants further consideration on remand.

whether Schilling's statement constituted an interference with Section 7 rights.

Finally, as to the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by questioning employees about their conversations with Raybon and her use of the term "racist" to describe Smith, we observe that it is potentially relevant to this allegation that the conversations the employees were questioned about were, in fact, protected concerted activity. See, e.g., *Central Valley Meat Co.*, 346 NLRB 1078 (2006) (interrogation unlawful where it occurred in the context of other unfair labor practices). We therefore remand this issue to the judge for further consideration as well.

V. RESPONSE TO THE DISSENT

Our dissenting colleague challenges both our decision to overrule *Amnesty International* and our related decision to remand several allegations here to the administrative law judge. We have carefully considered our colleague's arguments, but we are not persuaded by them.

A.

To begin, we reject the claim that our rationale for overruling *Amnesty International* is "nonprecedential *dicta*," in light of our determination (with which our colleague agrees) that Ascencio, like Raybon, was a statutory employee and, thus, that Raybon's activity was for mutual aid or protection. While this is our primary holding, it does not somehow foreclose us from making the alternate holding that the "mutual aid or protection" element was satisfied, even if Ascencio was *not* a statutory employee, consistent with Board law as it stood before *Amnesty International*.[28] As the Supreme Court has long recognized, "'adjudicated cases may and do…serve as vehicles for the formulation of agency policies, which are applied and announced therein,'" and "such cases 'generally provide a guide to action that the agency may be expected to take in future cases.'"[29] Under our colleague's view, the Board would be powerless to announce a new standard in a case finding liability when application of the previous standard would also render the respondent's actions unlawful. Historically, however, the Board has modified policies through adjudication, including in cases in which the change in standard has not changed the result for the respondent in the case, a practice that would not survive our colleague's novel theory.[30]

Moreover, our colleague misconceives the legal principle of obiter dicta. The cases our colleague purports to rely upon for his erroneous view of what separates dicta from holdings simply reiterate the uncontroversial precept that discussion of legal principles in a decision that are not a constituent part of a rationale relied upon by the decision are dicta. This well-understood concept does not suggest the entirely different (and erroneous) concept that a rationale relied upon by the tribunal in its decision is dictum if the tribunal could have adopted a different rationale. As the Supreme Court has long made clear, alternate holdings are not *dicta*.[31] The federal appellate courts follow this rule, and we choose to do so, as well.[32] Here, a three-member majority of the Board has explicitly rejected and overruled *Amnesty International's* holding that employees' advocacy on behalf of persons who are not statutory employees cannot be viewed as being for the mutual aid or protection of the employees themselves, placing a reasonable construction on the statutory scheme that we believe better effectuates the policies of the Act. This overruling of *Amnesty International* is Board precedent. Our alternate finding that the "mutual aid or protection" element was satisfied even if Ascencio was *not* a statutory

[28] Nor, as our colleague seems to suggest, are we inappropriately reaching out to overrule *Amnesty International*. As explained above, the administrative law judge relied on that decision and the parties have expressly raised the issue in their briefs. The General Counsel argues on exceptions that *Amnesty International* was wrongly decided and should be overruled, and the Respondent contends that the judge correctly relied on *Amnesty International* to find that Raybon's actions on behalf of Ascencio did not constitute Sec. 7 activity because Raybon did not act for the purpose of mutual aid or protection. Accordingly, the question of whether *Amnesty International* was correctly decided has been placed before us by the parties in this case and, therefore, we appropriately decide it.

[29] *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974) (quoting *NLRB v. Wyman-Gordon,* 394 U.S. 759, 765–766 (1969)).

[30] See, e.g., *Alstate Maintenance*, 367 NLRB No. 68, slip op. at 1 (stating "although we believe *WorldMark by Wyndham*[, 356 NLRB 765 (2011)] is distinguishable, we conclude that *WorldMark* cannot be reconciled with *Meyers Industries* and must be overruled").

[31] See, e.g., *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.") (citing *Massachusetts v. United States*, 333 U.S. 611, 623 (1948), and *United States v. Title Ins. & Trust Co*., 265 U.S. 472, 486 (1924)). See also *O'Gilvie v. United States*, 519 U.S. 79, 84 (1996) ("Although we gave other reasons for our holding in [a prior case] as well, we explicitly labeled this reason an "independent" ground in support of our decision. We cannot accept petitioners' claim that it was simply a dictum.") (citation omitted).

[32] See *Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 673 (DC Cir. 2013) (quoting *Union Pacific Railroad Co. v. Mason City & Fort Dodge Railroad Co*., 199 U.S. 160, 166 (1905), for the principle that, where "there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter [dictum], but each is the judgment of the court, and of equal validity with the other'"). See also *Hitchcock v. Secretary, Fla. Dept. of Corrections*, 745 F.3d 476, 484 fn. 3 (11th Cir. 2014) (referring to "well-established law that an alternative holding is not dicta but instead is binding precedent" and citing Supreme Court decisions), cert denied 574 U.S. 939 (2014). In *Hitchcock*, the Eleventh Circuit observed that "those who disagree with a majority opinion's alternative holdings do not get to pick the one that counts." Id.

employee, consistent with Board law as it stood before *Amnesty International,* does not make our decision any less binding.

Our colleague does not clearly defend *Amnesty International* as we understand the holding of that decision, namely that (as the decision stated) "[a]ctivity advocating only for nonemployees is not for 'other mutual aid or protection' within the meaning of Section 7 and, accordingly, does not qualify for the Act's protection." 368 NLRB No. 112, slip op. at 2. It is clear that this statement categorically rejects the long-established solidarity principle that we have described. In disagreeing with our interpretation of *Amnesty International*, and thus with our decision to overrule it, our colleague offers what amounts to a re-rationalization of that decision. He suggests that it turned on the absence of evidence demonstrating that the employees there intended to help themselves by helping the interns. This narrow reading of *Amnesty International* is untenable. Had the *Amnesty International* majority meant to leave open the possibility that advocacy for nonemployees could *sometimes* be for "mutual aid or protection," it surely would have said so in response to the concurring opinion there, which invoked the solidarity principle and pointed to prior Board decisions. In any case, our colleague's new rationale would be contrary to the already-noted principle that the "mutual aid or protection" standard is objective. No proof of an employee's subjective intention in engaging in activity that is objectively for "mutual aid or protection" is required—and, thus, the *Amnesty International* majority could not have meant its decision to turn on the failure to meet such a requirement. In short, we believe that *Amnesty International* meant what it plainly said, and we reject that interpretation of the Act.

B.

We are not persuaded by our colleague's objections to our decision to remand the remaining allegations in this case to the judge for further consideration. Our colleague asserts that the Board has "'effected a fundamental change' in this case" and thereby deprived the Respondent of its due process rights. Specifically, our colleague contends that we have altered the course of the case by finding that Raybon engaged in protected concerted activity on different grounds than that argued by the General Counsel and, in the process, have made improper assumptions about the statutory employee status of several coworkers with whom Raybon interacted during the February 2019 conference. He further contends that, even assuming we have properly found that Raybon engaged in protected concerted activity, no remand is necessary here because, in his view, it is clear that such protected activity played no role in her discharge. We find our colleague's arguments in this regard without merit.

As an initial matter, we note that 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. See *Electrical Workers IBEW Local 58 (Paramount Industries)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (emphasis omitted; collecting cases), enfd. 888 F.3d 1313 (D.C. Cir. 2018); see also *W.E. Carlson Corp.*, 346 NLRB 431, 434 (2006). Here, the complaint alleges that Raybon engaged in protected concerted activity in raising workplace issues, and the General Counsel argued to the judge that Raybon engaged in protected concerted activity at the February 2019 conference by seeking support from her colleagues for Ascencio's reemployment by the Respondent—an important workplace matter.[33] In these circumstances, we disagree with our colleague's suggestion that we have found Raybon to have engaged in protected activity on a different theory than that advanced by the General Counsel. But even assuming this is the case, Board precedent establishes that we are free to find that Raybon engaged in protected concerted activity on different grounds than argued by the General Counsel, as the complaint here alleges that Raybon engaged in protected concerted activity and the evidence establishes that she did so by her conversations with her coworkers during the February 2019 conference. See, e.g., *Morgan Corp*., 371 NLRB No. 142, slip op. at 2 (2022) (Board is not limited by the legal theories applied by an administrative law judge or advanced by the General Counsel where unlawful conduct is alleged in the complaint and the evidence establishes a violation under Board law).

Nevertheless, our colleague maintains that we have erred in finding that Raybon engaged in protected concerted activity and remanding the remaining allegations to the judge for further consideration in light of this finding. In so arguing, he first contends that our finding that Raybon engaged in protected activity during the February 2019 conference assumes that several of the coworkers with whom Raybon interacted at that conference were

[33] As support for his contention that our finding that Raybon engaged in protected concerted activity presents due process concerns for the Respondent, our colleague cites to *Lamar Advertising of Hartford*, 343 NLRB 261 (2008). In that case, the Board majority declined to consider the General Counsel's expanded theory of the alleged violation, which was raised for the first time on exception to the Board. Here, however, the General Counsel presented evidence at the hearing regarding Raybon's protected actions at the February 2019 conference and, in her posthearing brief to the judge, argued that Raybon's communications with her coworkers at the conference regarding Ascencio constituted protected concerted activity.

statutory employees because the Respondent failed to prove they were statutory supervisors. Our colleague asserts this is an error because, in his view, the Respondent had no reason to prove those individuals were statutory supervisors given the General Counsel's allegations. We disagree.

In her posthearing brief, the General Counsel argued to the judge that Raybon engaged in protected concerted activity by her conversations with employees Bottger, Lleanas, Lee, Gurr, and Benjamin at the February conference. Then, in his decision, the judge found that Gurr was not established to be a Section 2(11) supervisor and, while the judge made suppositions about the supervisory status of Bottger and Llenas, they also were not established to be statutory supervisors. As for Lee and Benjamin, their status as statutory employees never appeared to be in question by the parties before the judge. In her exceptions to the Board arguing that the judge erred in finding that Raybon had not engaged in protected concerted activity, the General Counsel reiterated the view that Raybon had engaged in protected activity with other employees at the conference and specifically noted that many of the individuals with whom Raybon engaged at the conference had not been established to be statutory supervisors. In these circumstances, the Respondent was clearly on notice of the General Counsel's arguments and had the opportunity to file its own exceptions challenging the statutory employee status of these individuals, but it did not do so. The Respondent has therefore failed to preserve this issue for consideration. Under Section 102.46(a)(1)(ii) and (f) of the Board's Rules and Regulations, "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived" and "[m]atters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding."

More broadly, our colleague criticizes our decision to remand the remaining allegations in this case, asserting that we are providing the General Counsel a "second bite of the apple to build a case upon the Board's theory and its attendant assumptions regarding supervisory status." He also contends that a remand is unwarranted because even assuming Raybon was engaged in protected concerted activity at the February 2019 conference, her protected activity played no role in her discharge and has no bearing on the other remaining allegations. As we have explained above, however, the question of whether Raybon engaged in protected concerted activity is significantly intertwined with many of the other allegations in the case. In remanding those allegations to the judge, we have explained that our decision to reverse the judge and find that Raybon had engaged in protected activity "effected a fundamental change to the legal backdrop of many of the other issues presented in this case." A remand here thus allows the judge to properly consider the remaining allegations in light of the Board's decision on a central finding in the case.

On this view, contrary to our colleague's assertions, a remand is both warranted and consistent with similar remand actions by the Board. See, e.g., *Michigan Bell Telephone Co.*, 369 NLRB No. 124, slip op. at 5 (2020) (remanding numerous Sec. 8(a)(3) violations to the judge for further consideration on the ground that the violations were premised on an improper central finding by the judge). Further, in light of our remand of the remaining allegations to the judge, unlike our colleague, we find that it would be inappropriate at this time to address the merits of any of those allegations. We have carefully explained above our basis for the remand and, on remand, the judge will have the opportunity to consider the remanded allegations in light of our decision today and supplemental briefing and evidence presented by the parties.

ORDER

The National Labor Relations Board orders that the Respondent, American Federation for Children, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a provision in the "Confidentiality" handbook rule that requires employees to maintain the confidentiality of internal affairs and use discretion in dealing with proprietary information, such as personnel matters.

(b) Maintaining a provision in the "Solicitation and Distribution of Literature" handbook rule that prohibits solicitation of other employees for any purpose during working hours.

(c) 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) Rescind the provision in the "Confidentiality" rule in its employee handbook that requires employees to maintain the confidentiality of internal affairs and use discretion in dealing with proprietary information, such as personnel matters.

(b) Rescind the provision in the "Solicitation and Distribution of Literature" rule in its employee handbook that prohibits solicitation of other employees for any purpose during working hours.

(c) Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the

unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions or (2) provide lawfully worded provisions.

(d) Within 14 days after service by the Region, post at its facility in Washington, D.C., copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 20, 2019.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 28 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 remaining allegations not already decided in this proceeding are severed and remanded to Administrative Law Judge Ariel Sotolongo for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall afford the parties an opportunity to present supplemental briefing and evidence on the severed and remanded issues and shall prepare 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.

Dated, Washington, D.C. August 26, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

My colleagues once again purport to overrule precedent in a case where the issue is not relevant to deciding the case before the Board.[1] Today, that precedent is *Amnesty International*,[2] where my colleagues themselves acknowledge that decision "does not apply." My colleagues are correct in that regard: the facts here do not present an *Amnesty International* issue. In this case, the Board unanimously rejects the judge's finding that former employee Gaby Ascencio lost her employee status. Therefore, the Board finds that Charging Party Sarah Raybon was advocating for a statutory employee.

[34] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice 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."

[1] See, e.g., *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 41 (2023) (Member Kaplan, dissenting in part) (observing that the majority purported to overrule precedent as an alternative rationale for deciding the case, even though the case did not involve facts that presented a scenario relevant to the precedent); *Miller Plastic Products, Inc.*, 372 NLRB 134, slip op. at 10 (2023) (Member Kaplan, concurring in result) (observing that the majority purported to overrule precedent as an alternative rationale for deciding the case, even though the aspect of the precedent being overruled was entirely irrelevant to the facts presented in the case before the Board); *Wendt Corporation*, 372 NLRB 135, slip op. at 24–25 (2023) (Member Kaplan, concurring in result) (observing that the majority purported to overrule precedent on remand even though no party had argued the validity of the precedent before either the Board or the court at the time of the remand and even though the court's specific remand instructions did not allow for overruling that decision).

[2] *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019), rev. denied sub nom. *Jarrar v. NLRB*, 858 F. App'x 374 (D.C. Cir. 2021) (unpublished).

Accordingly, *Amnesty International*'s holding with regard to advocacy on behalf of nonemployees where that advocacy does not further the interests of statutory employees is completely irrelevant to the Board's holding.

My colleagues nevertheless attempt to justify reaching *Amnesty International* here by addressing a hypothetical. However, even assuming that Ascencio lost her status as an employee under the Act, it is still entirely unnecessary to overrule *Amnesty International* to find that Raybon's advocacy would still be protected under the Act. In *Amnesty International,* the Board held that when employees are advocating *solely for the benefit of nonemployees*, that conduct is not protected by the National Labor Relations Act. Accordingly, there is no question in this case that, even if former employee Gaby Ascencio had lost her status as a statutory employee, Charging Party Sarah Raybon was advocating for a former coworker, which places Ascencio in an entirely different situation than the non-employee interns at issue in *Amnesty International*. Furthermore, unlike in *Amnesty International*, there was evidence that, in advocating for Ascencio, Raybon was also seeking to advance her own interests as well as those of her other coworkers. In fact, as the majority recognizes, "Ascencio was viewed as a valued colleague by coworkers . . . ." Accordingly, it is clear that, applying *Amnesty International* to the facts presented here does not affect the outcome whatsoever. Under *Amnesty International*, Raybon's advocacy for Ascencio constituted protected conduct, whether or not Ascencio lost her status as a statutory employee. For that reason, the majority's position that overruling *Amnesty International* is necessary as an "alternate rationale" for finding the violation here is simply incorrect.

My colleagues provide three additional reasons to justify their purported overruling of *Amnesty International*. First, they state that the judge expressly relied on that decision. The fact, however, that a judge erroneously applied a case that, as my colleagues agree, should not have been applied is hardly grounds for overruling that case. Next, my colleagues state that the General Counsel has urged the Board to overrule the case. Again, the General Counsel can urge the Board to overrule a case, but if it is not necessary to overrule the case to decide the case before us, the Board cannot reach the issue merely to satisfy the General Counsel's request.

The courts have made clear that the rules pertaining to *dicta* apply to the Board, just as they apply to the courts. To the extent that my colleagues purport to overrule *Amnesty International* today, that discussion is nothing more than non-binding, nonprecedential dicta.

But beyond the fact that my colleagues err in purporting to overrule *Amnesty International* even though that decision is of no moment in deciding this case, my colleagues also err in remanding the matter to the judge rather than deciding the case on the merits. The record is clear that the Respondent investigated, warned, and put Raybon in the position of resigning her employment because she repeatedly accused her supervisor, Arizona State Director Steve Smith, of being a "racist." The complaints that led to the actions taken with regard to Raybon did not mention, let alone rely upon, the fact that she was advocating for Ascencio. And I am not aware of precedent that holds that repeatedly telling others, most if not all of whom appear to be statutory supervisors,[3] that your supervisor is a "racist" is activity protected by the Act. I would therefore dismiss the case, and so should they.

I. BACKGROUND

The Respondent, a school-choice advocacy organization, has its headquarters in Washington D.C., where its national team is based. In certain states, including Arizona, the Respondent has a state team supervised by a state director. The Respondent hired Smith, a former Arizona state senator, to be its Arizona state director, and he began supervising the Arizona team in January 2019.[4] At that time, the Arizona team was comprised of Raybon, Kim Martinez, Susan Hay, and part-time canvassers. Raybon previously had reported to National Director Lindsey Rust, a stipulated supervisor, who worked remotely from Ohio. Martinez and Hay had reported to other national officials. Raybon and Martinez were the only statutory

[3] As discussed below, I note that the judge made either contradictory findings with regard to individuals' statutory status or, more commonly, declined to make such findings at all. The lack of these findings does not affect my dissent. However, in light of the fact that my colleagues are remanding the case, I believe that the parties should have the opportunity to present evidence on the status of these individuals. This is especially true with regard to Gurr's status; because of the way that the General Counsel litigated the case, the Respondent never had any reason to provide evidence pertaining to Gurr's supervisory status during the hearing. Additionally, the uncontradicted record evidence establishes that the Respondent's state directors essentially perform the same duties regardless of the state, and the parties stipulated that State Director Smith is a Sec. 2(11) supervisor and Sec. 2(13) agent, as well as to the supervisory and agency status of two national directors. In his supplemental decision, the judge should explain why the other state directors and national directors, including State Directors Gurr and Bottger and National Director Llenas, are not statutory supervisors and agents of the Respondent as well. Finally, it is not clear from the judge's decision if he gave any consideration to whether individuals identified as being part of the Respondent's "national management team" could be considered managers under the Act.

[4] Unless otherwise noted, all dates refer to 2019.

employees on the Arizona team, as the General Counsel had alleged and litigated this case.[5]

Gaby Ascencio, who is a Mexican national, was the "head canvasser" on the Arizona team until sometime in 2017, when she left the country as a result of a change in her immigration status. Wanting to bring Ascencio back to work, the Respondent supported her effort to obtain a new visa. The Respondent "posted" her former position for a period of time to allow others to apply and then "closed" the post in April 2018. As of the beginning of January 2019, the Respondent planned to "hold" the position for Ascencio, while she secured the necessary work permits. Raybon had directed Ascencio's work prior to her departure in 2017. Raybon thought Ascencio had been a valuable member of the Arizona team. Within a week of Smith becoming the Arizona state director, Raybon expressed her opinion to him that Ascencio should be rehired. However, a short time later, on January 8, Rust emailed Raybon a copy of an application for the head-canvasser position that had been submitted by a former Smith campaign staffer. Raybon suspected that Smith was against rehiring Ascencio.

On January 14, Raybon called National Director Rust and discussed her belief that Smith did not want to rehire Ascencio. During this call, Raybon also discussed an issue related to the Respondent's website. At an earlier meeting of the Arizona team, Martinez, who is Hispanic and served as the communications director of the Arizona team, had raised a concern that the Spanish-language version of the Respondent's website, unlike the English-language version, noted that individuals were eligible for certain programs regardless of their immigration status. Martinez believed that including the language on only the Spanish-language version had caused negative media attention. Smith agreed with Martinez that the statement should be removed from the Spanish-language version. Raybon, who is not Hispanic, disagreed with Martinez and thought Smith's decision was "anti-Hispanic" and would negatively affect outreach by the Respondent to the Hispanic community in Arizona.

In late January, Raybon called National Director Bruce Hermie, a member of the Respondent's national management team.[6] During this call, Raybon again discussed her belief that Smith had solicited a former campaign staffer to apply for the head-canvasser position. Raybon also complained generally that Smith was difficult to work with, including because he was "dismissive" of her opinions. In addition, Raybon told Hermie that Smith had supported "anti-immigration" legislation as an Arizona state senator. The legislation, which was not enacted, would have required emergency rooms to report patients who could not prove their lawful presence in the country. Raybon thought that Smith's support of this legislation would negatively affect outreach by the Respondent to the Hispanic community in Arizona.[7] On January 30, Smith called Raybon and said that she was "no longer to contact or communicate" with national officials and that instead "everything had to go through him."[8]

On February 19, Raybon traveled to Washington, D.C., to attend a Respondent staff conference. After arriving, Raybon waited at the airport so that she could speak with Nevada State Director Valeria Gurr, who identified herself as a Hispanic immigrant. At Raybon's suggestion, they shared a cab to their hotel. Upon arriving, Raybon followed Gurr into her room and then on to a gathering of Respondent staff members in the hotel lobby. During the cab ride, Raybon told Gurr that Smith "did not like people of color." This made Gurr feel uncomfortable. In the hotel room, Gurr advised Raybon to "be careful" in making such accusations. After joining the group of staff members in the lobby, which included Louisiana State Director Kelli Bottger, Raybon said that Smith "was a racist."

[5] The Respondent contracted with Hay, who is Raybon's mother, to provide lobbying services, and the judge found she was not a statutory employee. Neither party excepts to that finding.

Raybon directed the work of the part-time canvassers, and the judge found it was "not clear" whether they were "part time employees, casual employees, or contractors." Neither party excepts to the judge's failure to find that they were statutory employees.

Although the Complaint alleged Martinez was a statutory supervisor, the General Counsel withdrew that allegation at the beginning of the hearing.

[6] Although Hermie worked remotely from Arizona, he was not part of the Arizona team and did not report to Smith. The Complaint alleged Hermie was a statutory supervisor and agent of the Respondent, but the General Counsel withdrew those allegations at the beginning of the hearing. The judge found that it "is not clear" if Hermie was a statutory supervisor or a statutory employee. The judge did not address the fact that he found that Hermie was a member of the Respondent's national management team.

[7] My colleagues, like the judge, do not find that Raybon had engaged in any protected concerted activity before Smith's January 30 instruction, but they fault the judge for only specifically addressing the January 14 Rust call. They instruct the judge to consider whether the later Hermie call was "part of a nascent effort" to engage in the protected concerted activity that they find Raybon later engaged in, and, if so, whether the Respondent violated Sec. 8(a)(1) based on Smith "instructing Raybon not to contact the national team."

[8] Contrary to what my colleagues suggest, there is no evidence that Smith instructed Raybon "not to contact the national staff about Ascencio's situation." Indeed, there is minimal evidence at all regarding Smith's instruction. Raybon testified that Smith said generally that she was "no longer to contact or communicate [with] national [Respondent] staff" and that "everything had to go through him," but she could not recall anything about the context in which this was said. Smith, who did not recall making such statements, testified that the call was probably related to an upcoming meeting with the Arizona superintendent of public education.

Shortly after their interaction, Gurr complained about Raybon's behavior to Martinez.[9]

As the conference continued, Raybon appeared to target minority coworkers with the accusation that Smith was a racist. At a dinner, Martinez observed Raybon initiate conversations with multiple minority staff members, including two employees on the Wisconsin team, Justin Morales and Calvin Lee. Raybon also initiated a conversation with National Director Hergit Llenas,[10] who is Hispanic. Raybon testified that Michael Benjamin, whose title is not established, "approached" Llenas and Raybon at some point during that discussion. Gurr, Morales, and Llenas each reported to Martinez that Raybon had accused Smith of being a "racist" against Hispanic people. There is no evidence that Raybon discussed the Ascencio issue with any coworker in connection with accusing Smith of being a "racist."[11]

By the morning of February 21, Gurr and Martinez had complained to the Respondent's President, John Schilling, that Raybon's campaign to label Smith a "racist" was creating a hostile work environment for minority staff members. Gurr felt "targeted" by Raybon because of her race, as they did not have a prior working relationship and Raybon "was only talking to Hispanics and blacks" at the conference. Because she was "offended" and "really bothered" by Raybon's behavior, Gurr asked Schilling to speak with Raybon. Martinez viewed Raybon's conduct as "creating this separation and this racial tension" and as "prey[ing] on the Hispanics" by "trying to get them to carry her water." Because she found Raybon's conduct "so offensive," Martinez told both Smith and Schilling that she "would not work with [Raybon] anymore."

On the afternoon of February 21, Schilling met with Raybon at the Respondent's headquarters. Schilling told Raybon that leveling a "false accusation" about Smith being a "racist" was "inappropriate" and "unprofessional."[12] Schilling also suggested it was prohibited "harassment" under the Respondent's Equal Opportunity Employer policy. When asked by Schilling during the meeting on February 21, Raybon denied that she had called Smith a "racist." After Raybon discussed her grievances against Smith, Schilling referenced the Respondent's Open Door policy, which stated: "if an employee's supervisor is not able to satisfy . . . any . . . work place issue, then employees are free to contact the next higher level of supervision, President and/or CEO, or the Chief Financial Officer."

On February 23, Smith informed the Respondent that he had been told by Llenas and Martinez that Raybon had told them and others that Smith was a "racist." Smith also demanded that the Respondent take further action. On February 25, Schilling called Llenas, Martinez, and Gurr. Each confirmed that Raybon had called Smith a "racist." During these calls, Morales, Lee, and Benjamin were identified as also having heard Raybon call Smith a "racist." Later that same day, Schilling called Morales, Lee, and Benjamin, and they too confirmed to Schilling that Raybon had accused Smith of being a "racist."

After speaking with the six staff members on February 25, Schilling decided to terminate Raybon for her accusations of racism that created a hostile work environment. Later that same day, Schilling met with Raybon and told her that several of her coworkers had confirmed that she had called Smith a racist and that Smith did not want to work with her anymore. Schilling then asked, "What am I supposed to do?" Raybon responded by offering to resign and submitted a resignation letter that day, which was accepted.

In early March, Raybon was hired by another organization in Arizona that advocates for school choice.[13] Raybon's new employer and the Respondent were both member organizations of a school-choice coalition in Arizona. On August 16, Raybon filed her initial charge against the Respondent. Both before and after Raybon filed her initial charge, Smith sought to limit his work with Raybon on coalition matters to issues that did not involve legislative strategy because he thought that she had an adversarial position to the coalition's legislative goals.

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[9] The General Counsel alleged that Gurr was a statutory supervisor and that the Respondent violated Sec. 8(a)(1) when Gurr told Raybon to "be careful." In dismissing that allegation, the judge found that the General Counsel failed to prove that Gurr was, in fact, a statutory supervisor. The General Counsel does not except to the dismissal of that unfair labor practice allegation. When discussing the allegations that my colleagues remand, however, the judge observed that State Director Gurr "may have been [a] statutory supervisor[]."

The Complaint does not reference Bottger by name, but the judge likewise observed that she "may have been a statutory supervisor[]."

[10] The General Counsel alleged, and the parties stipulated, that two national directors (Lindsey Rust and Darrell Allison) were statutory supervisors. The Complaint does not reference Llenas by name. The judge observed, however, that "the facts suggest—based on her position—that Llenas [was a statutory supervisor] as well."

[11] Regarding her discussions with coworkers at the conference, Raybon testified that she characterized the legislation supported by Smith as "anti-undocumented immigrant" but never accused Smith of being a "racist." Among the coworkers who heard the relevant discussions, only Gurr was called as a witness. Gurr testified that Raybon accused Smith of being a "racist" and not liking "people of color" solely based on the website and legislation issues. Martinez testified that neither Gurr, nor Morales, nor Llenas told her that Raybon had mentioned Ascencio.

[12] Although the judge found that no witness testified that Schilling used those terms, Schilling himself testified that he explained to Raybon that leveling a "false accusation" about Smith being a "racist" was "inappropriate" and "unprofessional."

[13] Ascencio ultimately returned to work for the Respondent in April 2019 and was supervised by Raybon's replacement.

II. BECAUSE *AMNESTY INTERNATIONAL* IS ENTIRELY IRRELEVANT TO MY COLLEAGUES' DECISION, THEIR ATTEMPT TO OVERRULE THAT CASE IS NON-BINDING, NONPRECEDENTIAL DICTA

My colleagues claim to overrule *Amnesty International*, notwithstanding that we all agree that the case "does not apply." As discussed above, the facts at issue simply do not implicate the holding in that case at all, and the Board cannot effectively depart from precedent not applicable to the adjudication before it.

In *Amnesty International*, nonemployee voluntary interns decided to write a petition requesting that the respondent begin paying them for their work. After the interns asked an employee of the respondent to assist them in drafting their petition, that employee and another employee encouraged fellow employees to sign the petition. The only issue raised in the petition was a request for the respondent to begin paying interns, and the record did not contain any evidence whatsoever that any of the employees signed the petition for any reason other than supporting the nonemployees' request to be paid or that the petition's success would in any way benefit the employees' own terms and conditions of employment.

In analyzing the case, the Board first recognized that Section 7 of the Act only protects conduct that is for the "mutual aid or protection" of *employees*. My colleagues do not, and cannot, dispute that foundational point in revisiting *Amnesty International* here. As with all Section 7 rights, only "employees" have "the right . . . to engage in other concerted activities for the purpose of . . . other mutual aid or protection." Accordingly, under the long-established standard that my colleagues invoke, the "mutual aid or protection" clause of Section 7 generally protects employees' activities seeking to further "employees' interests as employees" but does not protect employees' concerted activities when that nexus is too "attenuated." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566–568 (1978).

Next, the Board found that the unpaid interns were not employees. I do not know whether or not my colleagues would support that finding, but the decision in *Amnesty International* is entirely dependent on a finding that the interns were not employees. Accordingly, as my colleagues acknowledge, in cases where the subject of the advocacy is an employee—such as the instant case—*Amnesty International* would not apply.

Nevertheless, my colleagues assert that, even though the judge *clearly erred* in finding Ascencio lost her status as an employee under the Act, they are overruling *Amnesty International* as an "alternate holding." To begin, contrary to my colleagues' suggestion, I do not take issue with their ability to proffer an alternative holding. The problem, however, is that the alternate holding that they present—namely, whether Raybon's activity would have been protected had Ascencio not been a statutory employee—does not require overruling *Amnesty International*.

In finding the General Counsel failed to establish that the employees' conduct was protected under the Act, the decision in *Amnesty International* expressly finds that "[t]here is no evidence that the employees of the Washington office joined the petition *for any reason* beyond supporting the nonemployees' effort to be paid." *Amnesty International*, 368 NLRB No. 112, slip. op. at 2 (emphasis added). To make the point even clearer, the decision asserts a second time that "there is no evidence suggesting that the employees joined the petition in order to change or protect their own terms and conditions of employment." Id., slip op. at 2 fn. 7.[14] No matter how vigorously my colleagues assert to the contrary, the holding of *Amnesty International* cannot be separated from the facts presented in that case and the fact that, in deciding the case, the Board relied on its finding that there was no record evidence that the employees were seeking to further anyone's interests other than the nonemployee interns. Because *Amnesty International* is readily distinguishable on its facts from the instant case, there is no need to overrule the case to find that Raybon's advocacy was protected activity in this case.[15]

My colleagues, in purporting to reverse *Amnesty International*, assert that "[t]he *Amnesty International* Board failed to grasp the issue before it," which they define as "whether in helping [nonemployees], employees potentially aid and protect themselves." The Act, however, protects activity that is *for* "mutual aid or protection." It is my colleagues who miss the point of *Amnesty International*. Absent any evidence whatsoever that employee activity was for mutual aid or protection of *employees*, the Board should not, and cannot, expand the scope of the Act

[14] My colleagues, somewhat bizarrely, assert that this language *expressly set forth in the Board's decision* should not be considered part of the decision because, had the Board meant to rely on that language, "it surely would have said so in response to the concurring opinion . . . ." As shown, however, the *Amnesty* majority did respond to what the concurring opinion observed "might" be the employees' motivation by finding that there was no evidence that the employees, in fact, sought to pursue one of those proffered objectives. Further, with all due respect, my colleagues' suggestion that my reliance on this *express language* in *Amnesty International* "amounts to a re-rationalization of the decision" cannot be taken seriously.

[15] In fact, my colleagues have recently recognized as much. See *Cemex Construction Materials*, 372 NLRB No. 130, slip op. at 31 fn. 161 (noting that when the Board purports to modify a legal standard based on "facts not before the Board," it is "unquestionably not an alternative rationale for the Board's decision").

by speculating that employees have their own interests in mind in advocating for nonemployees.

In any event, based on the facts involved and the rationale applied in *Amnesty International*, it should be obvious that the instant case does not present any issue addressed in that case. This case does not involve employee advocacy for any nonemployee. For the reasons set forth in the majority decision, I agree that the judge erred in finding that Ascencio lost her status as a statutory employee during the period that the Respondent was sponsoring her to obtain a work permit. Accordingly, the record is clear that, in advocating for a statutory employee—Ascencio—Raybon was engaged in protected activity. *Amnesty International* does not involve that set of facts.

Further, as my colleagues fail to recognize, this case involves employee advocacy for a coworker that is protected irrespective of the employee status of the coworker. *Amnesty International* turns on the *complete lack of evidence* that the statutory employees signed the petition for any reason affecting the statutory employees. As explained above, the record did not contain any evidence from which it could be found that the employees signed the interns' petition to be paid in support of *their own* "mutual aid or protection." By contrast, my colleagues here find that current employees were supporting Ascencio for the purpose of improving the current employees' working conditions—that "because Ascencio was desired as a coworker, her rehire would have improved the employment terms and conditions of the employees working with her, including but not limited to Raybon." For that reason, *Amnesty International* would not be controlling *even if* Ascencio were not a statutory employee.[16] My colleagues do not "reject" or "overrule" *Amnesty International.* They have distinguished it on the facts, in multiple ways.

My colleagues tilt at windmills by insisting that their "alternate holding" somehow changes Board law. They rely on precedent completely unrelated to—but not in conflict with—*Amnesty International* in finding that employees' concerted activities concerning the retention or removal of nonemployee supervisors is protected conduct. As they highlight, the Board has held—since before *Amnesty International*—that employees' concerted activities concerning the retention or removal of nonemployee supervisors "constitute protected activity . . . if the employees are protesting working conditions." *Trompler, Inc.*, 335 NLRB 478, 480 (2001), enfd. 338 F.3d 747 (7th Cir. 2003). I do not disagree with my colleagues that this precedent also applies to situations involving nonemployee coworkers other than supervisors. Nor do I disagree that where the evidence establishes that employees sought to further their *own* interests by soliciting support from or for nonemployees, the employees' concerted activities generally are protected. *Amnesty International* does not suggest otherwise, and my colleagues have no need whatsoever to overrule *Amnesty International* as part of their "alternate holding."

For all these reasons, the question whether or not *Amnesty International* was properly decided has no bearing whatsoever on the outcome of this case. The Board may properly shape its law through adjudication only where the facts of the case before it actually raise the legal doctrine. Absent notice-and-comment rulemaking, the Board is not empowered to issue general pronouncements or advisory opinions unconnected to a controversy it's resolving. As Justice Gorsuch observed in his dissent to *Torres v. Madrid*, 141 S. Ct. 989, 1005 (2021) (citing *Cohens v. Virginia*, 19 U.S. 264 (1821)), "[W]hatever utility it may have, dicta cannot bind future courts. This ancient rule serves important purposes. A passage unnecessary to the outcome may not be fully considered. Parties with little at stake in a hypothetical question may afford it little or no adversarial testing." Agreeing with this sentiment, my colleagues have recently recognized that dicta purportedly setting aside precedent should be disregarded. *See American Steel Construction, Inc.*, 372 NLRB No. 23, slip op. at 13 fn. 89 (2022) ("*PCC Structurals* did not involve a unit at a nonacute healthcare facility, and accordingly, we view *PCC Structurals'* reinstatement of *Park Manor* as dicta not binding on the Board."). Holding my colleagues to their own standard, I believe that *Amnesty International* remains binding precedent until revisited in a case where it actually applies.

III. MY COLLEAGUES ERR BY DECIDING THIS CASE ON A THEORY DIFFERENT FROM THE THEORY UPON WHICH THE GENERAL COUNSEL PROSECUTED THE CASE.

My colleagues assert that their finding that Raybon engaged in protected concerted activity in advocating for Ascencio's rehire has "effected a fundamental change" in the case. I agree that their finding, specifically the theory of concerted activity, is a fundamental departure from how the General Counsel litigated the case. Contrary to their suggestion, however, my complaint is not that they were bound by the specific theory of concerted activity proffered by the General Counsel. Rather, my complaint is with how they are handling the *effects* of that fundamental change in the case. By altering course without giving the Respondent a chance to respond, my colleagues have

[16] Again, as explained in my colleagues' decision, any finding that Ascencio was not a statutory employee during the period in question would be contrary to established Board law.

deprived the Respondent of its due process rights. See *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (stating that due process requires "notice and an opportunity to be heard" and means that the Board "may not change theories in midstream without giving respondents reasonable notice of the change" (citations and internal quotation marks omitted)).

In attempting to justify their approach, my colleagues ignore how they have changed the theory of concerted activity with respect to Raybon's interactions with national and state directors. The General Counsel alleged that Raybon engaged in "concerted activities with *other employees* for the purposes of mutual aid protection, by raising concerns with other employees and with *Respondent*." (emphasis added). Further, the General Counsel alleged and argued that several of the national and state directors were statutory supervisors and agents. As an employee cannot engage in concerted activity with supervisors, the General Counsel could not have viably argued that Raybon engaged in concerned activity *with* these national and state directors. Effectively conceding this point, my colleagues find, instead, that the national and state directors were, themselves, the "other employees" with whom Raybon was engaged in concerted activity. They justify this change in theory by emphasizing that the Respondent failed to prove that these national and state directors were statutory supervisors. However, the Respondent had no reason to prove that these individuals were statutory supervisors given the General Counsel's other allegations; it would have only aided the General Counsel's case by doing so.

To lay bare that my colleagues prejudice the Respondent, consider one of the individuals my colleagues assume was an employee in their finding of protected concerted activity—Nevada State Director Gurr. The General Counsel alleged in the Complaint that Gurr was a supervisor and agent of the Respondent and that the Respondent violated Section 8(a)(1) when Gurr told Raybon to "be careful" at the February 2019 conference. In dismissing that allegation, the judge found that the General Counsel failed to prove that Gurr was a supervisor, and no party excepts to the dismissal of that allegation. Nonetheless, because the General Counsel did not prove Gurr was a supervisor in unsuccessfully litigating the threat allegation, my colleagues treat her as an employee for the remaining allegations and conclude that Raybon discussions with her constituted protected concerted activity. Given the original posture of this case, however, the Respondent had no reason to establish that Gurr was a supervisor and, thereby, help prove the General Counsel's threat allegation.

My colleagues finding that Louisiana State Director Bottger and National Director Llenas are employees with which Raybon engaged in protected concerted activity raises similar issues. Although my colleagues are correct that they "were not established to be supervisors" by the Respondent, this again ignores that the Respondent had no reason to believe that it had to do so. The General Counsel alleged in the compliant that other state directors, like Smith and Gurr, and other national directors, like Rust and Darrell Allison, were statutory supervisors. The Respondent even stipulated to the fact that Smith, Rust, and Allison were supervisors. And the judge even observed that "the facts suggest" Llenas was a supervisor and Bottger "may have been" a supervisor.[17]

Finally, without relying on Raybon's interactions with the national and state directors, it is far from clear that my colleagues' finding has any basis in the record. As to the remaining three "other employees" whom my colleagues reference by name, none fit their finding of protected concerted activity. Hermie was not part of any relevant discussion. Raybon spoke with Hermie before the February 2019 conference, that is, before my colleagues find Raybon engaged in protected concerted activity. Benjamin was only a witness to a relevant discussion. Raybon did not seek to induce Benjamin to help advocate on behalf of Ascencio. To the contrary, Raybon testified that she sought out Llenas and that Benjamin "approached" them during their conversation.[18] As to Lee, there is evidence

[17] My colleagues observe that "[i]n her post-hearing brief, the General Counsel argued to the judge that Raybon engaged in protected concerted activity by her conversations with employees Bottger, Lleanas, Lee, Gurr, and Benjamin at the February conference." But of course, this statement on brief is consistent with the complaint allegation that Raybon engaged in concerted activity with "other employees" when she raised "concerns with other employees *and with Respondent*." (Emphasis added.) The General Counsel specifically alleged that Gurr was a statutory supervisor and agent, so in the words of the complaint, Gurr stood in the shoes of the "Respondent" in these conversations. And as the judge acknowledged, the record strongly suggests that Bottger and Lleanas, like Gurr, were statutory supervisors and, therefore, also likely stood in the shoes of the "Respondent." This statement on brief does not suggest that Bottger, Lleanas, and Gurr could have engaged in concerted activities with Raybon for purposes of the Act.

My colleagues also point to arguments advanced by the General Counsel in her exceptions. But the judge's decision dismissing the General Counsel's allegations did not give the Respondent any reason to think it needed to challenge any of the judge's supervisory findings or non-findings. Nor can the Board reasonably fault the Respondent for not anticipating the need to file certain exceptions or cross-exceptions to protect against the Board's running with a new theory the General Counsel arguably first relied on in her exceptions. Moreover, these arguments to the Board certainly did not put the Respondent on notice of the need to present relevant evidence of the employees' supervisory status at the trial. Without a fully developed record on this point, the Respondent's exceptions or cross-exceptions to the judge's decision would have fared little chance of success—as my colleagues' decision makes clear.

[18] Benjamin may also have been a national director, but the record is unclear what position he held.

that he told the Respondent that Raybon had called Smith a "racist." There is no evidence, however, that the Respondent had any knowledge of Raybon discussing Ascencio with Lee.[19]

Because the General Counsel chose not to allege and litigate my colleagues' theory of protected concerted activity, my colleagues err by remanding the case so that the General Counsel has a "second bite of the apple" to build a case upon the Board's theory and its attendant assumptions.[20]

IV. THE RESPONDENT'S ACTIONS WERE SOLELY RELATED TO RAYBON'S UNPROTECTED ACCUSATIONS OF RACISM AGAINST SMITH AND SHOULD BE DISMISSED

Finally, even assuming that my colleagues' theory that Raybon engaged in protected concerted activity by advocating for Ascencio's rehire is correct, the record is crystal clear that it played absolutely no role in the Respondent's actions here.

The timeline leaves no doubt that Raybon's accusations of racism against Smith—entirely separate from her advocacy for Ascencio—was the sole reason for the Respondent taking the relevant actions. Well before the February 2019 conference, Raybon raised her concerns about Smith related to Ascencio. She discussed them on January 14, with National Director Rust, a statutory supervisor. There is no evidence that the Respondent took any disciplinary action against Raybon at that time. There is only vague evidence that, on January 30, Smith called Raybon and told her to raise her concerns with him rather than with national officials. But there is no record evidence that Smith's instruction was in anyway connected to Raybon's advocacy for Ascencio. And in any event, that instruction was not part of the chain of events that led to the actions alleged to be unfair labor practices here.[21]

Rather, the Respondent warned, investigated, and decided to fire Raybon only upon learning about her accusations of racism against Smith at the February conference. Because multiple minority staff members complained about Raybon making the accusation of racism in a manner that created a hostile work environment for minority staff members, Schilling met with Raybon. During this meeting, Schilling said that leveling a "false accusation" about Smith being a "racist" would be "inappropriate" and "unprofessional." A couple days later, Smith demanded further action after he had heard from multiple staff members that Raybon had told them and others that Smith was a "racist." After confirming with six staff members Raybon had accused Smith of being a "racist," Schilling decided to terminate Raybon for creating a hostile work environment. As Schilling explained this decision to Raybon, she quit.

Raybon's campaign to label Smith a "racist" did not involve any protected concerted activity. Raybon was not pursuing or seeking to induce group action to oppose any perceived employment discrimination or the like.[22] Perhaps Raybon was unhappy that Smith had supported "anti-immigrant" legislation or maybe she thought that Smith was "anti-Hispanic" for altering the Respondent's Spanish-language website. It does not matter. Raybon was concerned only about how these issues would impact Hispanic outreach in Arizona, not employees' interests as employees.[23]

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[19] I also question whether there is any credible evidence in the record supporting a conclusion that Raybon sought to induce Lee to join her in group action. Raybon's testimony regarding her interaction with Lee, who did not testify, is limited to the following:

> I said that I was concerned about what was happening in Arizona. I was concerned about Gaby and her sponsorship and that there were-- there was an attempt to derail it by Mr. Smith. I said I was concerned about that anti-undocumented immigrant legislation, the Spanish language being taken off the website, the--his comments about not talking about immigration anymore. I was concerned and frankly miserable by this point, and--and I--I didn't know what to do.

The judge found Raybon's testimony not to be credible regarding various incidents, and the above, even if credited, is not sufficient to establish that Raybon sought to induce Lee to support Ascencio's rehire.

[20] See *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (reversing the judge's finding of a violation on a theory that the General Counsel did not choose to allege and litigate); *Paul Mueller Co.* 332 NLRB 1350, 1351 (2000) ("[T]he General Counsel is not entitled to a 'second bite of the apple' through a remand that would effectively permit litigation of a theory he had disclaimed.").

[21] There is no evidence that Smith had knowledge of any protected concerted activity on Raybon's part prior to issuing the instruction. Rather, Smith's January 30 instruction to Raybon appears to have been no more than a lawful attempt by a new supervisor to effectuate a new reporting structure. As the judge noted, the Arizona team did not have a direct supervisor in Arizona prior to Smith becoming the Arizona director, and Raybon therefore regularly would contact national officials about various issues prior to Smith becoming the Arizona director.

My colleagues criticize the judge for not discussing the Hermie call. but there is no evidence that the Respondent, let alone Smith specifically, was aware of what Raybon and Hermie had discussed.

[22] To be sure, when employees concertedly oppose what they perceive to be employment discrimination, that can be protected activity. But this case does not present such an issue.

[23] Raybon's advocacy for Ascencio likewise did not involve concerted opposition to what employees perceived to be employment discrimination, and my colleagues do not find that it was protected activity on such grounds.

I also note that Raybon's campaign had real-world consequences for her Hispanic coworkers. Gurr and Martinez testified that they were offended by and complained about Raybon pursuing her own personal interests by targeting minority staff members with an unfounded accusation that Smith was a "racist." At the conference, Raybon told Gurr that she was "upset about" Smith being the state director, did "not lik[e]" reporting to Smith, "wanted another position," and came to the conference on a "mission." Although Raybon never expressly said that she wanted Smith to be fired because he was a "racist," Gurr surmised that was her mission. Likewise, Martinez concluded that Raybon "thought that she could go and . . . basically prey on the

This case simply does not involve any material factual dispute regarding motive, and the undisputed motive was not Section 7 activity. There is no evidence that Raybon's advocating in support of Ascencio had anything to do with any of the actions taken by the Respondent in February 2019. This case involves what the judge correctly found was a lawful motive: the unprotected accusation of racism. My colleagues do not dispute this finding. Because the Respondent acted lawfully in responding to this unprotected conduct, I would dismiss all of the remaining allegations, and I oppose my colleagues' remand.[24]

V. CONCLUSION

When the Board acts as a quasi-judicial body, as opposed to promulgating rules through notice-and-comment rulemaking, certain limitations apply. One of those limitations is that the Board may only decide the cases brought before it and, therefore, is limited to the issues presented in those cases. For example, the Board may not use a case involving a torn ballot to overrule Board precedent addressing what markings on a ballot are sufficient to communicate voters' intent. Unfortunately, my colleagues are committing a similar error today. They acknowledge, as they must, that *Amnesty International*, the case they purport to overrule, "does not apply." Nevertheless, they attempt to justify addressing the holding in *Amnesty International* on the grounds that "Ascencio's employee status is at issue." This argument, however, is akin to saying that, even if the Board were to find in the case above that the ballot *was not in fact torn*, the Board can revise precedent pertaining to torn ballots because the case involved the question of whether the ballot was torn or not. To say the least, this is not compelling as a matter of logic, let alone as justification for the Board to exceed the authority it has to set policy through deciding cases. Even worse, the conclusion my colleagues reach on counterfactual alternative grounds—that Raybon's actions would have been protected even if Ascencio were not a statutory employee—is *entirely consistent* with the decision they purport to overrule. Accordingly, their purported overruling of *Amnesty International* has no precedential value—the law remains that employees advocating solely for the benefit of nonemployees is not protected activity. To add insult to (attempted) injury, my colleagues also exceed the proper bounds of the Board's processes by jettisoning the theory of the case originally alleged and litigated by the General Counsel, deciding the case on a different theory and unfounded assumptions, and then remanding the case for further consideration on this new theory. In doing so, my colleagues are not only allowing the General Counsel a second attempt to prove that the Respondent violated the Act, but they also creating due process concerns because the Respondent did not have the opportunity to defend itself against this theory of the case during the hearing before the administrative law judge.[25]

Based on the theory that was pursued by the General Counsel, this case is a rather straightforward one. As the judge already has found, the remanded allegations are all without merit irrespective of whether, as my colleagues find, Raybon engaged in protected concerted activity by advocating for Ascencio. Raybon's campaign to label Smith a "racist" was not for "other mutual aid or protection" within the meaning of Section 7 and is thus not

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Hispanics that work for the organization, and try to get them to carry her water because she didn't like the change of leadership or the addition of leadership in Arizona."

[24] In addition to Raybon's constructive discharge, which was only motivated by unprotected accusations of racism and should be dismissed, there is no merit to any of the other allegations that my colleagues remand.

First, as discussed above, there is no evidence that Smith's January 30 instruction to Raybon had anything to do with Raybon having engaged in any protected concerted activity. Even more fundamentally, this allegation is barred by Sec. 10(b). Smith's instruction on January 30, is more than 6 months before Raybon's initial charge on August 16. The General Counsel alleged Smith's instruction promulgated a work rule that was maintained into the 10(b) period, but oral instructions, as here, "solely [to one employee that] were never repeated to any other employee as a general requirement" are not work rules. *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 243–244 (2014). Such statements may be unlawfully coercive, but the 10(b) period runs from the date of the statements.

Second, there is no merit to allegations that Schilling made coercive statements to Raybon on February 21, nor that he coercively questioned her coworkers on February 25. The February 21 statements to Raybon were no more than a lawful warning that she would be disciplined for her unprotected conduct accusing Smith of racism. The February 25 questions to her coworkers, including to any employees among them, were no more than a lawful attempt to determine whether she had engaged in the unprotected conduct. Further, none of this concerned the protected concerted activity my colleagues found regarding advocating for Ascencio.

Finally, I also agree with the judge that the General Counsel failed to prove an unlawful motive with respect to either allegation of post-discharge retaliation against Raybon. There is no evidence that any action was taken against Raybon because she had engaged in any protected concerted activity or filed a charge. Apart from Raybon's unprotected campaign to label Smith a "racist," there is only evidence that Smith and the Respondent were motivated by political disagreements with Raybon. My colleagues reference emails that Smith sent after Raybon filed a charge to support his efforts not to work with her, but they too are not probative of any unlawful motive. The record reflects that Smith, prior to the charge being filed, had used Raybon's tweets ("political reasons") to avoid having to work with Raybon and that this effort had been unsuccessful (did not "sway" the other coalition members). Thus, the emails just show that Smith, before and after Raybon filed the charge, tried to avoid having to work with Raybon. Because I do not believe that the Respondent engaged in these actions for an unlawful motive, I find it unnecessary to reach whether the General Counsel proved an adverse action sufficient to sustain an allegation of post-discharge retaliation.

[25] My colleagues do not indicate in their decision whether they are directing the judge to reopen the record to allow the Respondent's to proffer evidence addressing new issues that are implicated based on my colleagues' new theory of the case.

protected activity. And Raybon's unprotected activity to label Smith a "racist" was the only motivation behind the Respondent's relevant actions. The proper disposition here is to affirm the judge's findings and dismiss the remanded allegations.

For these reasons, I respectfully dissent.

Dated, Washington, D.C. August 26, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated 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 maintain a provision in our "Confidentiality" handbook rule that requires employees to maintain the confidentiality of internal affairs and use discretion in dealing with proprietary information, such as personnel matters.

WE WILL NOT maintain a provision in our "Solicitation and Distribution of Literature" handbook rule that prohibits solicitation of other employees for any purpose during working hours.

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

WE WILL rescind the unlawful provisions of the "Confidentiality" and "Solicitation and Distribution of Literature" handbook rules.

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

AMERICAN FEDERATION FOR CHILDREN INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-246878 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.

Katherine E. Leung, Esq., for the General Counsel.
Tyler J. Freiberger, Esq. (Centre Law & Consulting, LLC), for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether American Federation For Children, Inc. (Respondent or AFC) violated Section 8(a)(1) of the Act by discharging, or constructively discharging, Sarah Raybon (Raybon), because she engaged in protected concerted activity, and whether Respondent violated Section 8(a)(1) and (4) of the Act by retaliating against Raybon because she filed Board charges or gave testimony or evidence related to those charges. Also, at issue is whether Respondent violated Section 8(a)(1) of the Act by making coercive or otherwise unlawful statements, and by enforcing rules in its employee handbook in an unlawful manner or for an unlawful purpose.

I. PROCEDURAL BACKGROUND

Based on charge in Case 28–CA–246878 filed by Raybon on August 16, 2019, and on a charge and amended charge in Case 28–CA–262471 filed by Raybon on June 30, 2020, and August 28, 2020, respectively, the Regional Director of Region 28 of the Board issued a consolidated complaint on September 1, 2020, alleging that Respondent had violated the Act as described above. In light of the restrictions required by the current COVID-19 pandemic, I conducted a video hearing in this matter via the Zoom video platform on March 2 through March 5, 2021.

II. JURISDICTION

The parties (counsel for the Acting General Counsel and Respondent) stipulated that at all material times Respondent has

been a California nonprofit corporation exempt from taxation under Section 501(c)(4) of the Internal Revenue Code, with its principal office and place of business in Washington, D.C., where it has been engaged in advocating and lobbying for school choice. The parties also stipulated that in conducting its business operations during the 12-month period ending August 16, 2019, Respondent derived gross revenues in excess of $250,000, and that during the same time period Respondent performed services valued in excess of $50,000 in States outside the District of Columbia. Finally, the parties stipulated, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 2.)

III. FINDINGS OF FACT

A. Background Facts

As briefly described above, Respondent is an organization dedicated to the promotion of education reform nationally, and more specifically, the promotion of school choice for families. Together with other similarly-minded organizations, it lobbies state and local governments, as well as private institutions or sources, for financial or other material support to provide families with access to schools of their choice, be they public or private. Besides its headquarters in Washington, DC, Respondents employs staff members in several States, including Arizona, where Raybon was located and where many of the events at issue in this case took place. Respondent's national management team, during all material times, were John Schilling, President; Lindsey Rust, National Implementation Director; Jennifer Miller, Chief Financial Officer; and Darrell Allison, National Director of State Teams.[1] These managers were all based in Washington, DC, except for Rust, who was based in Ohio.

Respondent's (full-time) Arizona contingent, through the end of 2018, consisted of Raybon, who was Arizona director of implementation; Sydney Hay, who is Raybon's mother, was its lobbyist;[2] and Kim Martinez was Arizona communications director, although she also had some national responsibilities as a National Correspondent.[3] Sometime during the first week of January 2019, Respondent hired Steve Smith, a former Arizona state senator, as its Arizona state director, and as such he became the direct supervisor of the Arizona team.[4] The events that followed Smith's hiring as Arizona state director, as described below, is at the heart of the dispute at issue in this case.

B. The Events of January 2019[5]

Sometime during the 1st week of January, Smith held a "get acquainted" meeting of the Arizona team that he now supervised. The meeting was held at a local restaurant (California Pizza Kitchen), since Respondent has no office space in Arizona and team members work remotely out of their homes. Present at the meeting were Smith, Raybon, Martinez, and Hay. Raybon testified that during the meeting, which she recalled occurred on January 2, each of the team members generally discussed what projects they were working on, and what their goals were. As part of her discussion, Raybon mentioned the team of canvassers that worked under her guidance or auspices, including Gabby Ascencio, the head canvasser who Raybon said was currently on "leave."[6] Martinez', Hay's, and Smith's recollection of the meeting was generally similar, with a slight difference in the case of Smith and Martinez.[7] Following the meeting, according to both the testimony of Raybon and Hay, a conversation took place between them and Smith outside the restaurant, on their way to their cars. According to Raybon, she brought up the subject of Ascencio, attempting to convey to Smith her importance to the organization, and said that the process of re-hiring her was "almost over." Raybon got the impression that Smith did not understand Ascencio's importance—or why job was being held for her, a concern that would impact Raybon's future course of actions, as described below.

Raybon testified that a few days later, on January 8, Rust emailed her a copy of an application she had received for the

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[1] The parties stipulated that all of these individuals were Sec. 2(11) supervisors and Sec. 2(13) agents of Respondent. Additionally, the parties stipulated that Steve Smith, who became Arizona state director in early January 2019, as discussed below, was a Sec. 2(11) supervisor and Sec. 2(13) agent of Respondent. Additionally, the parties also stipulated that Tim La Sota, outside counsel for Respondent in Arizona, was a Sec. 2(13) agent of Respondent (GC Exh. 2). Finally, also part of the national managerial team was Greg Block, Respondent's CEO, and as such presumably a supervisor/agent of Respondent, but the parties did not stipulate to this.

[2] Hay was a contractor/consultant, and as such not an employee of Respondent.

[3] Part of the Arizona team were also canvassers, but apparently these were not full time. It is not clear if they were part time employees, casual employees, or contractors.

[4] Prior to Smith's hiring, Raybon reported directly to Rust, who was based in Ohio, while Martinez and Hay reported to others at headquarters. Thus, the Arizona team appears to have operated semi-autonomously, with no immediate local supervision.

[5] All dates hereafter shall refer to calendar year 2019, unless otherwise specified.

[6] Ascencio had left Respondent's employment in 2017, when she lost her work permit in the United States apparently due to her divorce and resulting change in her immigration status. She was highly regarded by AFT management and the Arizona team, according to the testimony of Schilling and others, and accordingly AFT begun the process of sponsoring her so she could obtain a work permit. As part of this process, AFT had to "post" her job to allow others to apply. When, apparently, no suitable candidates emerged, the position was "closed" in April 2018, and AFT was able to "hold" the position for her until the application process was completed, a process that apparently took a lot longer than anyone expected. Thus, as of early 2019 Ascencio had not yet received her work permit and had not been re-hired by AFC. As discussed below, Ascencio's status played a prominent role in the events that were to follow.

[7] Smith, who was called as an adverse witness under FRE 6(11)(c) by the General Counsel, recalled, after reviewing his affidavit, that there was a discussion about Respondent's English and Spanish website. According to Smith, prior to his hire, there had been a controversy regarding the Spanish website, which contained a message to the effect that immigration status would not be raised when applications were submitted for scholarships—language that was apparently not used in the English version of the website. According to Smith, a decision had been made that both websites should use the exact same language, without any reference to immigration status. Martinez also recalled that the issue with the websites had been discussed, with Smith saying that both websites should contain the same language.

position being held for Ascencio. The application was submitted by a former campaign staffer for Smith, which caused Raybon to suspect that Smith was attempting to undermine Asencio's sponsorship, the "safety" of which Raybon was now concerned about, she testified.[8]

On January 11, Smith held his now regularly scheduled weekly staff meeting with the Arizona team via conference call. Smith, Raybon, Hay, and Martinez were the participants. Raybon testified that Smith said he had concerns about a certain portion of the Spanish website and wanted to take that page down. He mentioned that the Spanish website stated that immigration status was not a factor (for scholarship applicants), and he did not want immigration status mentioned at all. Raybon testified that when she pushed back, explaining that the immigrant community should be informed of their rights, Smith replied that "we need to treat Hispanics like white people."[9]

On January 14, Raybon called Rust, her former direct supervisor (prior to Smith's hiring), to express her concerns about the status of Ascencios' (future) job, in light of the recent events, as described above.[10] Rust told Raybon that she would check into Ascencio's status and get back to her—but Raybon did not hear back from Rust. A couple of weeks later, Raybon phoned Bruce Hermie, the Director of Private School Partnership for AFC, a national-level official of Respondent, although he is located in Arizona.[11] Raybon testified that she called Hermie to seek his advice because he was a very experienced "old hand" at AFC, and they had good rapport. She told Hermie about her concerns about Ascencio's job status, and her concerns about "Hispanic outreach." The latter concern was exacerbated by Raybon's recent discovery that a few years earlier Smith, as an Arizona State senator, had sponsored legislation which Raybon considered to be "anti-immigrant."[12] Raybon also told Hermie that it had become difficult for her to work with Smith, because he would be "dismissive" toward her, often talking over her.

On January 30, Raybon testified, Smith called her and said that she was no longer to contact the national AFC staff, that "everything had to go through him."[13]

C. The Events in February

On February 15 a weekly staff conference call was held with the Arizona team. Participating in the call were Smith, Raybon, Hay, Martinez, La Sota (outside counsel), and James Klein, a consultant who did legislative for AFC. The main topic discussed on this call involved a recent committee meeting in the state legislature which Raybon and Hay had attended. Both Raybon and Hay testified that Smith had instructed Hay, through Martinez, to phone him on her cell phone during the committee meeting so he could listen in to what was being said and could in turn instruct Hay on what to say to the legislators. Hay had previously raised ethical objections with AFC management regarding alleged conduct by Smith which she believed to be in violation of anti-lobbying Arizona laws.[14] During the conference call, Raybon testified, she asked La Sota whether Smith directing Hay to let him listen to the committee meeting through her phone could be considered "lobbying." Apparently, before La Sota could answer, Smith instructed him to get off the call, and the call soon ended after Martinez and Smith denied that this occurred.[15]

A much more significant event, in the sense of the results it would engender, occurred a few days later, when AFC staffers met in Washington, DC, for their annual conference. On February 19 Raybon traveled to Washington, DC, landing At Reagan National airport. Prior to her departure, Raybon had communicated with Valeria Gurr, AFC's Nevada state director, with whom she was acquainted, and arranged to meet her at the Washington airport so they could share a cab to the hotel where they

[8] For his part, Smith denied that he had anything to do with his former's staffer's application. There is no need for me to make any credibility resolutions as to this issue, as it is ultimately immaterial to the issues at hand.

[9] I do not credit Raybon's testimony in this regard. As a witness, I found Smith to be articulate and possessed of a professional demeanor that, in my view, makes it highly unlikely that he would have used such crude terms to describe what he wanted done regarding the website. I credit Smith's testimony that what he said was that the English and Spanish websites should contain identical language, and inasmuch the English version did not contain any language about immigration status, neither should the Spanish website. Indeed, the emails exchanged between Smith, Raybon (and Martinez) on this subject, support this conclusion. (GC Exh. 57.) Although Smith believed this conversation occurred at the first meeting in the restaurant, whereas Raybon testified that it occurred a week later during a conference call, this is a distinction without a difference. I note that Martinez' testimony corroborated Smith, and that Hay, who also took part in this conversation, did not address this issue in her testimony.

[10] Raybon testified that she told Rust her concerns regarding the job application they had received from Smith's former staffer, and concerned about the remarks regarding the website that Smith had allegedly made and how that would impact the outreach to the Hispanic community.

[11] It is not clear if Hermie is a Sec. 2(11) statutory supervisor, since the record is silent on that issue, but based on Raybon's testimony it appears he is a national-level "official" with AFC, who is not part of the Arizona team, despite the fact that he resides there.

[12] A copy of this legislation, Arizona Senate Bill 1445 (2012), was introduced into the record by the Acting General Counsel (GC Exh. 42).

[13] Smith did not recall this conversation, and thus did not specifically deny it (Tr. 388). I thus credit Raybon on this issue. In this regard, Raybon testified that "previously," she would contact national staff routinely. While no doubt true, I would note that previously Raybon did not have an immediate, direct supervisor in Arizona, which she now did in Smith.

[14] By way of background, Arizona law prohibits former legislators, following their departure from the legislature, from engaging in lobbying of legislators for a period of 1 year. Hay had reported to AFC management that she had issues with some of Smith's alleged actions regarding his former colleagues, and AFC had retained the services of attorney La Sota to advise AFC management (and the Arizona team) as to whether Smith was engaging in conduct that might violate antilobbying laws. On February 10, La Sota issued a memorandum addressed to Schilling and Allison, discussing Smith's conduct and concluding, in essence, that Smith had done nothing unlawful, including telling others what to say to legislators (which presumably addressed the cell phone allegation). (GC Exh. 10.) Schilling testified that La Sota's memo was shared with Hay, but not Raybon.

[15] Presumably, as discussed in the footnote above, La Sota would have answered Raybon's question in the negative, in light of his February 10 memorandum. Hay testified that Smith "went ballistic" during this call, apparently because Hay (and Raybon, presumably) were questioning his conduct or authority.

were staying during the conference.[16] According to Raybon, once she and Gurr boarded the cab, she told Gurr how difficult things were going for her in Arizona. Raybon said she was concerned about Ascencio, and about the changes in (AFC's) Hispanic outreach and in the Spanish language website. She told Gurr about the legislation that Smith had sponsored in the Arizona senate, and how he wanted to get rid of the Spanish website and had said that Whites should be treated like Hispanics. According to Raybon, when they arrived at the hotel, while in Gurr's room (where Raybon apparently followed her), Gurr told Gurr to "be careful," with tears in her eyes.

Gurr's account of her encounter with Raybon, and what Raybon had said to her, was not only different, but far more detailed. Gurr testified that when she encountered Raybon at the airport, she was very upset, even agitated. On their way to their hotel, Raybon told her she was very upset with the Arizona state director, Smith, whom Raybon said "did not like people of color." Raybon told her about her concerns regarding Ascencio, and about the anti-immigrant legislation that Smith had sponsored. Gurr testified that she felt very uncomfortable with this conversation, because she did not know Smith and felt this was not the time or place to speak about race matters. Part of her discomfort stemmed from the fact that she is a Hispanic woman, and she felt Raybon was trying to gain her support for her "mission," which Gurr surmised was getting Smith fired. Gurr advised Raybon, "as a friend, not a colleague" to take her concerns to her supervisors, which probably meant upper management, since Smith was Raybon's direct supervisor. According to Gurr, after they arrived at the hotel, and were at a reception, she repeated her allegations about Smith to others sharing their table, telling others that Smith was a "racist" or that he did not like people of color—and bringing up the legislation he had sponsored.[17] Burr could not identify the AFC individuals at their table, since she did know their names, but testified there were two individuals from Louisiana and one from Tennessee.[18]

Regarding her interaction with other AFT staffers at the hotel and during the conference, Raybon testified that she told others, while sitting together, that she was concerned as what was happening in Arizona regarding Smith, citing her concerns about Ascencio, the Spanish website and its impact on outreach, and Smith's sponsorship of legislation which she said was very "anti-undocumented immigrants." One of the individuals she expressed these concerns to was Kelli Bottger, the Louisiana State Director, because Raybon believed her to be close to AFC President Schilling. Another of the individuals Raybon discussed her concerns with was Calvin Lee, who works with grassroots outreach in Wisconsin (his exact title of position, unknown), who she told about Smith's attempts to "de-rail" Ascencio's sponsorship and his anti-undocumented immigrant legislation. Raybon also spoke to Hergit Llenas, commonly known at AFC as "Coco," the National Community Outreach Director, to whom she repeated the above concerns, and Michael Benjamin (position unknown), who joined during Raybon's conversation with Llenas.[19]

On February 21, Raybon had a meeting at AFC's headquarters in Washington, DC, with AFC President Schilling and CFO Miller, in Schilling's office. Raybon testified that Schilling began the meeting by asking her why she had been "trashing" Smith, adding that it had been reported that she was calling him a "racist." Schilling also added that she had violated the employee handbook by doing so, although he did not specify which provision(s) of the handbook she had violated. Raybon, who claimed she was startled by this, denied that she had "trashed" Smith, but stated that she had concerns about his stand on some issues, explaining that she was concerned that he had tried to undermine Ascencio by having someone apply for her job, and about his stand on Hispanic outreach and the Spanish language website. She also added that Smith was difficult to work with, was demeaning and dismissive, and had not allowed her to contact the National staff, telling her that everything had to go through him.

Schilling's version of what occurred at this meeting did not significantly differ from Raybon's account, except that he provided more details. He testified that he called Raybon to the meeting because 3 individuals, "Coco" Llenas, Gurr, and Martinez, had reported that Raybon had been calling Smith a racist. Schilling asked if that was true, adding that calling someone a racist was a form of harassment in violation of the "personnel manual" (i.e., the employee handbook).[20] Raybon denied calling Smith a racist, but admitted saying that he had sponsored legislation that was hostile to Hispanics, and that he had solicited resumes for the position being held for Ascencio, conduct which she considered to be "anti-Hispanic." Raybon also added that she had concerns about Smith's leadership style, that he spoke to her in a disrespectful manner. Schilling responded that AFC would not tolerate such disrespect and would talk to Smith about it. Raybon told Schilling that she did not want him to talk to

[16] Much testimony was dedicated to the immaterial issue of how long Raybon waited at the airport for Gurr to arrive from Nevada. Raybon testified that it was about 45 minutes, whereas Gurr believed it may have been as long as 2 hours. What is clear is that Raybon very much wanted to meet with Gurr, so she could talk to her about the issues discussed below.

[17] Pressed by counsel and well as myself as to whether Raybon had specifically used the term "racist" to describe Smith, Gurr insisted that Raybon had indeed used that term, but testified Raybon had also repeatedly said Smith "did not like people of color." In her testimony, Raybon specifically denied ever using the term "racist" to describe Smith, but did not deny saying he didn't like people of color—which, in my view, is saying the same thing in a different way. Indeed, it is apparent that Raybon truly came to believe that Smith was biased against immigrants, based on her perception of his attitude toward Ascencio (and her prospective employment), of her perception of what Smith wanted to do regarding the Spanish language website, and on her interpretation of the legislation Smith had sponsored years before. Although, as I discuss below, I find this conclusion was supported by the thinnest of reeds, it is apparent that she believed it and that such belief guided her actions. I therefore I conclude it is more likely than not that she used the term "racist" in describing Smith to others. Even if she didn't, however, I find she did say that he did not like people of color—which is tantamount to calling him a racist.

[18] Gurr testified that she pulled AFC President Schilling aside to report what Raybon was saying about Smith, and later confirmed to him, when he called her to inquire, that Raybon had called Smith a racist.

[19] During this conversation Raybon also said that Smith had said that "whites" should be treated like Hispanics.

[20] In that regard, Schilling testified that he explained to Raybon that leveling a "false accusation" about her supervisor being a "racist" was inappropriate. (Tr. 192.)

Smith, that she would handle it herself. Schilling added that the employee handbook called for employees to take problems with immediate supervisors to upper management, so they could address the problem.[21] The meeting ended shortly thereafter, and Raybon returned to Arizona later that day, since the conference had concluded.[22]

On February 23, Smith sent Allison an email, in which he informed Allison that he had heard from 2 AFC staffers ("Coco" Llenas and Martinez) that Raybon told them and others that he was a racist. In essence, Smith demanded that AFC management investigate and take action, including discharge, against Raybon (and Hay, whom Smith believed was conspiring with Raybon to damage his reputation), and threatening legal action if these corrective measures were not undertaken (GC Exh. 38).[23] Allison forwarded the email to Schilling on the same day, according to Schilling's testimony.[24] Schilling testified that following his receipt of the forwarded Smith's email, he spoke to 6 AFC staffers to ask them about what Raybon had said to them regarding Smith. The staffers were Llenas, Gurr, and Martinez, who had initially approached Schilling to report about Raybon' statements, and Justin Morales, Calvin Lee, and Michael Benjamin, whom the first 3 mentioned as having also heard Raybon's comments. Apparently, these staffers confirmed that Raybon had accused Smith of being a racist.

Schilling testified that at this time, after consulting with other AFC managers, he decided to terminate Raybon, whom Schilling believed had created a "toxic atmosphere" within AFC by labeling Smith as a racist.[25] On February 25, he sent an email to Miller, informing her that after consulting with Brock and Allison, they had decided to terminate Raybon in light of her accusations of racism against Smith (GC Exh. 12). Later on the same day, Schilling sent Raybon an email requesting a conference call that afternoon, to which Raybon agreed (GC Exh. 13).

On the afternoon of February 25, Schilling and Miller, in Washington, DC, held a telephonic conference meeting with Raybon, who was home in Arizona. Raybon testified that Schilling began the meeting by telling her that he had spoken to several AFC staffers, who had all confirmed that she had called Smith a "racist." Raybon responded that she had never used such word. Schilling said that she had violated the employee handbook provisions by making such accusations, adding that Smith did not want to work with her anymore, and then asked, "what am I supposed to do?" Raybon responded that in that case, she would resign, offering to send her resignation letter that same day. Later that day, Raybon submitted her resignation letter (GC Exhs. 15; 16). Schilling's account was briefer that Raybon's, testifying that he was beginning to inform Raybon of what he had found out pursuant to his investigation of the matter when Raybon offered to resign. Miller testified along the same lines as Raybon but adding a few additional details. She testified that Schilling told Raybon that AFT staffers had come forward stating that she had accused Smith of being a racist, and that the staffers had been offended, and that she had created a hostile work environment. Miller then testified that Raybon offered her resignation.[26] Following Raybon's resignation, on February 25, Schilling sent Miller and Brock an email describing and summarizing the events that had led to the fateful meeting with Raybon earlier in the day (GC Exh. 20, p. 2).[27]

D. The Events Following Raybon's Resignation

In early March, not long after her resignation from AFC, Raybon began working as Executive Director for Arizona STO Organization, one of several organizations in Arizona which are part of the school choice working group or coalition.[28] Not long after Rayon joined Arizona STO, Smith participated with her as part of a coalition taskforce in a series of meetings with Arizona

[21] Schilling made a reference to the "Open Door" provision in the handbook (GC Exh. 6).

[22] CFO Miller, who was also present at this meeting, briefly testified about the meeting, and her description of the events generally followed the contours of Schilling's account, without adding or detracting anything. As I indicated above, Raybon's and Schilling's account of the meeting did not vary in a significant way, except that Schilling's description of the meeting was far more detailed than Raybon's. I thus credit Schilling's testimony as being the most accurate, to the extent there is any disparity in their accounts.

[23] In his email to Allison, which can be fairly described as having an angry tone, Smith states that Raybon's conduct was "reprehensible, vile, and slanderous" and amounted to "character assassination" and in violation of AFC's anti-harassment policy in its handbook, which he quoted. Smith testified that he recommended Raybon's termination for the reasons described in his email (Tr. 404). I credit his testimony, which is consistent with his contemporaneous message.

[24] Allison testified that he could not even remember receiving the email from Smith, which is difficult to believe, given the nature of its contents. Allison, who had recently left AFC for another job, gave the impression of someone who would rather be anywhere else but the witness chair—including a dentist's chair, undergoing a root canal. To say that his testimony was not helpful would be an understatement.

[25] In making this determination, Schilling testified, he not only considered the incendiary nature of the accusation, but also the fact that it was completely unjustified, given the basis which had been proffered by Raybon: Smith's suspected interference with Ascencio's re-hiring; his views regarding the content of the Spanish-language website; and his sponsorship of allegedly anti-immigrant legislation in 2012.

[26] While the 3 above-described versions of the February 25 conversation vary somewhat, they do not conflict with one another in any significant way. I credit the versions of Raybon and Miller, which were a little more detailed than Schilling's. In that regard, I credit Raybon to the effect that Schilling said that Smith did not want to work with her, and then asked what he was supposed to do. I would note that all 3 versions agree on one fact, which is that Raybon offered her resignation before there was any mention of her being terminated. Indeed, Raybon was never told that she was going to be terminated, or disciplined in any way, during this conversation or at any other point (Tr. 192; 250; 253).

[27] This exhibit also includes a later email, date October 1, from Schilling to Miller, apparently sent in light of a pending Board investigation pursuant to a charge filed by Raybon, in which he again describes the events in February. The February 25 email describes the reasons AFC had decided to discharge Raybon before her resignation made that unnecessary. Those reasons were: (1) her making unwarranted and unproven accusations against Smith (calling him a racist), in violation of the personnel manual, and not reporting an issue with a supervisor through the proper chain of command; and (2) the fact that Smith, because of Raybon's conduct in calling him a racist, no longer wanted to work with her, and as State Director he was entitled to decide who worked in his team, in consultation with management (GC Exh. 20).

[28] Some of the other members of this coalition include: AFC; The Goldwater Institute; Americans For Prosperity; Center For Arizona Policy; Ed Choice; and the Catholic Conference.

State School Superintendent Hoffman. Nonetheless, both Smith and Schilling testified that AFC considered Hoffman a political opponent who was opposed to many of the goals and programs supported by AFC and many of the members of the school-choice coalition.[29]

On August 8, Smith sent an email to several of the coalition partners, attaching a series of tweets posted by Raybon where she defended Hoffman, an action that Smith criticized as "unbelievable" (GC Exh. 45).[30] Nonetheless, it is notable that this email came at the very tail end of a long chain of emails exchanged between coalition member organizations beginning on July 3, where a meeting between coalition partners was planned for August 7, the day prior to Smith's email about Raybon. Neither Raybon nor any other member of her organization was copied or included in the email chain, and thus they did not participate in the meeting between coalition partners that took place on August 7.[31] On October 2, Matt Beienburg of the Goldwater Institute sent an email to a number of the coalition partners suggesting that they have another planning meeting to discuss their legislative agendas, which was followed by a chain of emails between those who had been initially copied by Beienburg. Again, neither Raybon nor her organization was included in this initial list of invitees (GC Exh. 47). On that same day, Clark, in response to Beienburg's email, responded to the entire group, asking if Ron Johnson and Raybon should be invited. Beienburg replied on the same day, clarifying that he had added Johnson to the list of invitees (but did not mention Raybon). On October 14, Smith emailed the group, suggesting that Justin Olson be invited. On October 15, Beienburg replied to Smith, informing him that it had been suggested that the meeting be limited to those who had attended the prior meeting (on August 7), and that Olson would be consulted later. The meeting apparently took place on October 21, at the Goldwater Institute, and Raybon did not participate.

In February 2020, there were additional exchanges of emails between certain members of the school choice coalition. In one of these exchanges, on February 22, 2020, Cathi Herrod of the Center for Arizona policy, emailed the other coalition members, bemoaning the fact that Sydney Hay and Raybon had not been included in the meetings their group had been having and suggesting that mediation be attempted to resolve any differences—between them and AFC, presumably (GC Exh. 23).[32] Smith, in a separate email to Schilling on February 28, 2020 reports that he had spoken by phone (based on Schilling's advice) to other coalition members about this issue, and that at least one (Jenna Bentley at the Goldwater Institute) had indicated that she would prefer that Smith be on the meetings, if that meant having to exclude Hay and Raybon. While there are no direct written communications in the record from AFC or Smith to members of the coalition suggesting or demanding that Raybon not be permitted to participate in their meetings, the above evidence indicates that Smith (and AFC) would not participate in any strategy meetings if Raybon was present. Indeed, Smith admitted as much, testifying that he told the coalition members that he would not participate in any meetings with Raybon where legislative strategy was discussed, although he never advocated for her exclusion. Smith explained that Raybon was opposed to legislation AFC and other coalition members supported, and that it therefore made no sense to include someone who amounted to an adversary in their discussions—or as he put it, "be careful on who [sic] you share strategy with" (Tr. 422; 441–445).[33]

On June 19, 2020, Smith emailed Sally Henry, a board member for Arizona STO Association, suggesting that Arizona STO organizations be recruited to join in signing a letter to Congress requesting that private school funding be part of the stimulus package it was considering. Henry forwarded Smith's email to Raybon, Arizona STO Association Executive Director, and informed her that she had advised Smith to contact Raybon directly, since she was the go-to person for Arizona STO in these type of matters (GC Exh. 58). Thereafter, Smith communicated with Raybon to coordinate on this matter.[34]

E. Respondent's Handbook

Finally, it is undisputed that the 2019 and/or 2020 versions of Respondent's employee handbook contained the following provisions:

> CONFIDENTIALITY
>
> Each employee is expected to maintain the confidentiality of AFC's internal affairs. Utmost discretion shall be observed in dealing with proprietary information. Information on donors and personnel matters shall not be shared with anyone not employed by AFC, unless authorized by the President. Information on projects in the development stages shall be considered sensitive and not for public dissemination. Any departure from this policy shall be grounds for immediate dismissal. Employees will be asked to sign a confidentially agreement to protect the proprietary information, including but not limited to databases and any information of strategic value to the organization.

[29] For example, Smith testified that Hoffman was "not a fan" of ESA's and STO's, and "not a friend" of what AFC and its allies were trying to promote (Tr. 414–417).

[30] Raybon's tweets are included in GC Exh. 19.

[31] The email chain, inviting a number of coalition partners to plan for a meeting which eventually took place on August 7, originated with W. Michael Clark, an official with the Center for Arizona Policy. Thus, it appears that Clark was the person who decided whom among the coalition partners to invite to plan for this meeting.

[32] In her email, Herrod appears to be more concerned about Hay's absence from the meetings, highlighting the fact that Hay had been the "de facto leader" of the group for many years. It should be noted that Hay resigned her position as consultant/lobbyist for AFC shortly after Raybon resigned. Hay testified she resigned due to her differences with Smith and AFC management regarding Smith's lobbying activities.

[33] Emails exchanged between Smith, Schilling and other AFC staff suggest that Raybon's political opposition to some of the legislative agenda supported by AFC was a principal factor driving Smith's (and AFC's) opposition to being part of any strategy meetings if Raybon was included (GC Exh. 25).

[34] In this regard, Smith testified that he has worked and participated in meetings with Raybon, since her departure from AFC, on issues not involving legislative strategy involving ESAs. Raybon admitted that she has worked with Smith since she left AFC, and that was participating on a weekly call with him at the time of the hearing (Tr. 629–630).

SOLICITATIONS AND DISTRIBUTION
OF LITERATURE

It is the intent of AFC to maintain a proper business environment and to prevent interference with work and inconvenience to others from solicitations and/or distribution of literature.

Group meetings for solicitation purposes, distributing literature or circulating petitions during work hours or in work areas at any time is prohibited unless it is approved as an organization-sponsored event. The following guidelines will apply throughout the organization:

- Employees will not engage in any solicitation of other employees for any purpose whatsoever during working hours or in work areas.
- The organization's facilities may not be used as a meeting place, which involves solicitation and/or distribution of literature.
- Certain types of information may be posted on AFC's bulletin board. The President or CEO will approve and post all information that is displayed on the organization bulletin board.

EQUAL OPPORTUNITY EMPLOYER

The American Federation for Children (AFC) provides equal employment opportunities to all employees and applicants for employment and prohibits discrimination and harassment of any type without regard to race, color, religion, age, sex, national origin, disability status, genetics, protected veteran status, sexual orientation, gender identity or expression, or any other characteristic protected by federal, state or local laws. This policy applies to all terms and conditions of employment, including recruiting, hiring, placement, promotion, termination, layoff, recall, transfer, leaves of absence, compensation and training.

Any employee who feels that a violation of this policy has occurred should bring the matter to the immediate attention of his or her supervisor. An employee who is uncomfortable for any reason in bringing such a matter to the attention of his or her supervisor shall report the matter to the President, Chief Executive Officer (CEO) or Chief Financial Officer (CFO). AFC will investigate all such allegations and prohibits any form of retaliation against any employee for making such a complaint in good faith. An employee who feels subjected to retaliation for bringing a complaint of harassment or participating in an investigation of harassment should bring such matter to the attention of his or supervisor, the President, CEO or CFO.

OPEN DOOR POLICY

AFC strongly believes in an open-door, open-communication policy and feels it is an important benefit for all employees. This policy, we believe, will allow an employee to come forward and discuss problems with his or her supervisor to resolve issues quickly and efficiently. However, if an employee's supervisor is not able to satisfy the questions regarding the interpretation or application of this handbook or any other work place issue, then employees are free to contact the next higher level of supervision, President and/or CEO, or the Chief Financial Officer. If an employee has or foresees a problem that may interfere with that employee's ability to adequately perform his or her responsibilities, the employee should discuss the matter with the President or his or her designee. (GC Exhs. 6; 7)

In the complaint, the Acting General Counsel alleges that that above-cited provisions of the manual are "overly-broad and discriminatory," as discussed below.

IV. ANALYSIS

As described in the Statement of the Case section at the very outset of this decision, the complaint alleges that Respondent made unlawful statements or engaged in unlawful interrogations, maintained or applied unlawful overly broad rules, discharged Raybon for engaging in protected activities, and thereafter retaliated against her by interfering with or diminishing her professional standing, because she had engaged in protected activities or filed charges with the Board. I will discuss these allegations in that precise order.

A. The Allegations Regarding Unlawful Statements or Interrogations

1. The allegation regarding communicating with the national headquarters team[35]

This allegation stems from a phone conversation between Smith and Raybon on January 30, when Smith told Raybon that she was no longer to contact the national staff directly, that such communications had to go through him first. According to Raybon's testimony, however, the only "national headquarters" staffer she had contacted prior to this conversation with Smith was Rust, her former supervisor (and admitted 2(11) supervisor),[36] whom she called to inquire about the status of Respondent's sponsorship of Ascencio. I conclude that Raybon was not engaged in protected concerted activity in her communication with Rust, for two reasons. First, this particular communication with Rust, a 2(11) supervisor and thus not a statutory employee, was neither concerted nor protected activity, because Raybon was not raising a group concern but rather her own personal grievance, or concern, about Ascencio's status for future employment.[37] *Alstate Maintenance,* LLC, 367 NLRB No. 68, slip op. at 3 (2019). Moreover, the conversation with Rust about Ascencio, who at the time was not legally authorized to work in the United States and was therefore not a statutory employee, cannot be deemed protected activity. Activity for or on behalf of

[35] Par. 4(c) of the complaint, which alleges as follows:

- From about February 20, 2019 to about February 26, 2019, Respondent interfered with the right of its employees to discuss working conditions with employees employed at Respondent's Headquarters or to *concertedly* raise concerns with supervisors employed at Respondent's Headquarters by maintaining a prohibition on employees communicating with its national team, including by telephone or email, which prohibition was promulgated by Steve Smith, by telephone, on January 29, 2019. (emphasis supplied)

[36] GC Exh. 2

[37] Thus, there is no evidence that Raybon had discussed her concerns about Ascencio with other employees at this point.

persons who are not statutory employees are not considered activity for "mutual aid or protection," and thus not protected under the Act. *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019). Thus, even assuming that Smith did not want Raybon to talk to national officers about Ascencio without first obtaining his approval, such prohibition was not unlawful. Smith, the new Arizona State Director and Raybon's immediate supervisor, was apparently attempting to establish a "chain of command" hierarchical protocol for communications with national headquarters, not trying to suppress concerted protected activity—of which there was none, in this instance. Accordingly, I recommend that this allegation be dismissed.

2. The allegation that Respondent warned Raybon to be careful about expressing concerns[38]

This allegation stems from a long conversation that Raybon had with Valeria Gurr, Respondent's Nevada State Director, upon their arrival in Washington, DC, for AFC's yearly conference in mid-February. As described in the Facts section, Raybon told Gurr about her concerns about Smith—whom she had described as not liking people of color, or of being a racist. While in Gurr's hotel room, Gurr told to be careful, and to take concerns about Smith to her supervisors. In essence, the General Counsel is alleging that by making these statements Gurr, whom it claims is a 2(11) supervisor (which Respondent denies), Gurr was "interfering" with employees' rights to "concertedly raise concerns with supervisors." I conclude this allegation lacks merit, for several reasons. First, the General Counsel has the burden to establish that Gurr is a 2(11) supervisor, and I am not persuaded that the General Counsel met this burden by the preponderance of the evidence.[39] Assuming, however, that this burden was somehow met, I am not persuaded that under the circumstances described Gurr's statement could be deemed to be coercive. Thus, the facts showed that Raybon beseeched Gurr to listen to her story and concerns about Smith, waiting for her to arrive at the airport, sharing a cab ride to the hotel, and even following her to her hotel room. After Raybon repeatedly accused Smith of being biased or being a racist, Gurr, who was made to feel very uncomfortable by these accusations, told Raybon to be careful *and to take her concerns to her supervisors*—as described by the General Counsel's own brief. Yet, the complaint alleges that by saying this, Gurr interfered with Raybon's right to take her concerns to her supervisors, which is self-contradictory and simply makes no sense. The test as to whether statements are unlawful under Section 8(a)(1) of the Act, is whether such statement(s) can reasonably be said to interfere with the free exercise of employee rights under the Act, by being threatening or otherwise coercive. If an employee could reasonably interpret or construct a statement as threatening or otherwise coercive, such statement would be unlawful. *Double D Construction Group*, 339 NLRB 303, 303–304 (2003); *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995), enfd. 101 F.3d 1243 (8th Cir. 1996); *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). In the above-described circumstances, I conclude that no reasonable employee could conclude that Gurr's statement was coercive or threatening—particularly since she advised Raybon to do the very thing the complaint alleges she interfered with—the right to take her concerns to supervisors. Accordingly, I recommend that this allegation be dismissed.

3. The allegation that Respondent, through Schilling, promulgated an unlawful interpretation of its Equal Opportunity Employer and Open Door Policies[40]

This allegation centers around comments that Schilling made to Raybon during the meeting he and Miller held with Raybon in Washington, DC, on February 21. As discussed in the Facts, after Raybon had described her concerns and issues with Smith, Schilling told her that the Employee Handbook called for employees to bring such type of problems to management's attention, so that management could address them, citing the Open-Door Policy. The General Counsel argues that this statement was unlawfully coercive, because embedded is those words was the implied message that employees should take those problems *solely* to management, rather than discuss them with other employees—as the Act gives them the right to do, for mutual aid and protection. In that regard, I note that neither Raybon nor Schilling (nor Miller) testified that Shilling ever said that such problems should *only* be discussed with management, rather than with fellow employees.[41] Thus, the General Counsel's theory of a violation rests solely on the premise that such statement was reasonably implied. I conclude that such implication cannot reasonably be made under the totality of the circumstances here, and that the General Counsel's theory of a violation goes a bridge too far. Accordingly, I recommend that this allegation should be dismissed.

4. The allegation that Schilling created the impression that Raybon's protected activity was under surveillance[42]

As with the prior allegation, this allegation also stems from a statement Schilling made to Raybon during their February 21 meeting. Based on reports he had received from employees, Schilling started the meeting by saying he had been informed that she had been calling Smith a "racist," and asked if that was true.[43] The General Counsel argues that since Schilling did not reveal the source of the information, this statement unlawfully created the impression of surveillance. I disagree. As correctly noted by the General Counsel, the test of whether an employer

[38] Complaint par. 4(d).

[39] In that regard, the General Counsel argues (in its brief) that Gurr has the authority to effectively recommend hiring because the one person Gurr recommended for hiring, an individual named Edgar, was hired. However, Edgar was interviewed by Allison, Gurr's superior, before he was hired, so Respondent did not rely solely on Gurr's recommendation. This does not show that Gurr had the authority to effectively recommend hiring. On the other hand, Gurr was Nevada State Director, a position equivalent to that of Smith in Arizona, an admitted 2(11) supervisor. The General Counsel, however, did not produce evidence showing that the State Director in one State had the same authority as that of another state, something that I cannot simply presume, reasonable as that presumption may be. It is the General Counsel's burden to so establish.

[40] Complaint Par. 4(e)(2).

[41] In any event, to the extent that their versions of this conversation differ, I credited Schilling's version as being more thorough and accurate.

[42] Complaint par. 4(f)(1).

[43] This comes from Shilling's version of their conversation, which I credited.

has unlawfully created the impression of surveillance is whether the employee could *reasonably* conclude from the employer's statement or conduct that his/her protected activities had been placed under surveillance. *Dignity Health d/b/a Mercy Gilbert Medical Center*, 370 NLRB No. 67, slip op. at 9 (2021); *Greater Omaha Packing Co., Inc.*, 360 NLRB 493, 495 (2014) (emphasis supplied). It is also true that such an unlawful impression is created when an employer informs an employee that it knows of his/her protected activity without disclosing the source of this information. *Dignity Health, supra.*; *Conley Trucking*, 349 NLRB 308, 315 (2007). In those cases, however, the employee(s) in question had been discreet, even stealthy, while engaging in protected activity, so it came as a true surprise when the employer revealed it knew what the employees were up to. In this case, Raybon's activities were neither discreet nor stealthy. She repeatedly approached various employees and other AFC staffers, in public settings and during group gatherings, and openly spoke about her views regarding Smith, in a rather noticeable manner. In such circumstances, it would not have been reasonable for Raybon to conclude, when Schilling asked if she had been calling Smith a racist, that Respondent had placed her activities under surveillance. Rather, a reasonable person would conclude in such circumstances that someone had reported her conduct, i.e., "turned her in," which is exactly what occurred in this instance. Indeed, not one but rather several individuals reported her conduct to Schilling. In this instance, the General Counsel appears to be applying the test of whether the impression of surveillance was created in a rigid and mechanical manner, rather than analyzing the context and the surrounding circumstances. Accordingly, and in view of the above, I find no merit in this allegation, and recommend that it be dismissed.

5. The allegations that other Schilling statements to Raybon during the February 21 meetings constituted threats of unspecified reprisals[44]

These allegations again stem from the above-described February 21 meeting. The General Counsel points out that during this meeting Schilling accused Raybon of "trashing" Smith and told her that she had violated the Employee Handbook, without citing any specific section. The General Counsel argues that these two statements represent unspecified unlawful threats of disciplinary action, in response to Raybon's protected activity. I disagree, for the following reasons. First, I would note that I credited Schilling's account of what transpired during the February 21 meeting, to the extent that his and Raybon's accounts differed, and thus I did not credit Raybon's testimony that Schilling said that she had been "trashing" Smith. Rather, I found that Schilling began the meeting by asking Raybon whether it was true that she had been calling Smith a "racist," which Raybon denied doing, but which I concluded most likely she had done.[45] Even assuming that Schilling had accused Raybon of "trashing" Smith, however, I do not find the use of term to have amounted to an unlawful unspecified threat, under the circumstances. As discussed above, the test in determining whether a statement is coercive is an objective one, whether such statement(s) can reasonably be said to interfere with the free exercise of employee rights under the Act. Schilling was investigating multiple reports from other employees that Raybon had openly called Smith a racist, a term that can fairly be labeled as offensive and incendiary and could reasonably be viewed as misconduct. Thus, Schilling was not criticizing Raybon's arguably protected activity in reaching out to other employees for support, but rather signaling that Raybon's use of the term "racist" to describe Smith was improper and went too far. There is accordingly no nexus between Raybon's protected activity—her reaching out to other employees—and Schilling's scolding of Raybon, which was strictly limited to her use of the term "racist" to describe Smith.[46] I therefore find that it cannot be reasonably concluded that Schilling's alleged statement interfered with the free exercise of employee rights under the Act. Accordingly, I recommend that these allegations be dismissed.

6. The allegation that Schilling interrogated employees about their protected activity[47]

This allegation centers on phone calls that Schilling allegedly made to six (6) employees, to wit, Martinez, Gurr, Llenas, Justin Morales, Calvin Lee, and Michael Benjamin, on or about February 25. This allegation relies primarily on the testimony of Schilling, who testified that he phoned the above-named employees on or about February 25 after Allison forwarded him a copy of the email sent by Smith in which he complained of being slandered by Raybon's accusations of being racist (GC Exh. 38). Schilling testified that he phoned the six employees to get more details about what Raybon had said to them, and that they confirmed that Raybon had called Smith a racist. The General Counsel alleges these phone calls as unlawful interrogations about their protected activities or those of others—presumably Raybon's. There are several problems with this allegation, but first a primer about the factors the Board considers in determining whether there has been an unlawful interrogation. In determining whether an unlawful interrogation has occurred, the Board looks at whether under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with the rights guaranteed by the Act. Relevant factors in that determination include: the nature of the information sought; the identity of the questioner; the place and method of the questioning; and the truthfulness of the employee's reply to the questioning. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), citing

[44] Complaint pars. 4(f)(2); 4(f)(g)

[45] I would also note that in the complaint ¶ 4(f)(g) alleges that Schilling accused Raybon of being "inappropriate" and "unprofessional" during the February 21 meeting. No witness, including Raybon, however, testified that Schilling used such terms. Accordingly, this allegation must be dismissed.

[46] While the General Counsel did not explicitly say so in its brief, it clearly implies that employees are free to make *any* accusations they wish against their employer or its supervisors, so long as they believe it to be true and share their opinions with other employees and are therefore shielded by the Act. I find this expansive view of protected activity troubling, and not supported by Board and court precedents. Without getting into an unnecessarily lengthy recitation of Board law, I would cite the example of an employee who disparages the employer's products or image while discussing his/her working conditions with fellow employees, conduct which the Board has repeatedly found to be unprotected.

[47] Complaint par. 4(h).

Bourne v. NLRB, 332 F.2d 47 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000).

In considering the above factors, I note the following facts: first, Gurr and Martinez testified that *they* initially approached Schilling to inform him about Raybon's conduct, and Schilling testified that Llenas initially approached him with such information—something undenied by Llenas, who did not testify. Thus, these employees were the ones who initiated their interactions with Schilling, and the February 25 phone calls to them were mere follow-ups to further confirm what they had already volunteered to Schilling. Moreover, the individuals in questions truthfully—and voluntarily—answered the questions or provided the information sought, which pertained as to whether Raybon referred to Smith as a racist, a possible violation of the handbook rules. In these circumstances, and applying the criteria described above, I conclude the February 25 phone calls to these employees did not "restrain, coerce or interfere" with their Section 7 rights.[48] With regard to Schilling's questioning of the 3 other individuals, Morales, Lee and Benjamin, the issue bears closer scrutiny. The problem, however, is that the only information regarding the "interrogation" of these 3 individuals came from Schilling alone, because these 3 individuals did not testify. Schilling testified that he called these individuals after Gurr, Martinez and Llenas informed him that these individuals had also witnessed Raybon's comments about Smith or had been approached by her. He asked them what Raybon had said about Schilling and told them that the allegations against him were unsupported by the facts, that nothing that he had done indicated he was a racist or biased against people of color. These are all the facts on the record regarding these conversations between Schilling and these 3 individuals. Although these facts arguably indicate the possibility of a coercive interrogation, in my view they are insufficient to establish a violation of the Act. The General Counsel bears the burden of establishing a violation by the preponderance of the evidence, and that evidence is insufficient to meet that threshold. We simply do know enough about what transpired and what was said by whom in these conversations to apply the factors discussed above in determining whether restraint, coercion or interference with Section 7 rights occurred. Given the General Counsel's burden of proof, any doubts must be resolved against it—and doubts abound, particularly since the alleged subjects of the unlawful interrogation did not testify. Accordingly, and in view of the above, I recommend that this allegation be dismissed in its entirety.[49]

B. The Allegations Regarding Respondent's Employee Handbook[50]

The complaint alleges that Respondent maintains "overly broad and discriminatory" rules in 4 specific sections of its handbook, namely the "Confidentiality," "Solicitation and Distribution of Literature," "Equal Opportunity Employer," and "Open Door" sections, duplicated above in the Facts section. These individual sections will be discussed below.

1. The Confidentiality Section

The General Counsel's objection to this rule focuses on the portion that requires employees to maintain the confidentiality of Respondent's "internal affairs," including "personnel matters," which the rule prohibits sharing with anyone "not employed by AFC." The General Counsel argues that such rules "expressly" prohibit employees from sharing any information "including working, hours, and working conditions" with third parties such as unions, government agents or entities, and the press, activities that are protected under the Act. As such, the General Counsel argues that the rule is so broad as to be facially unlawful under Category 3 of the Board's framework under *Boeing Co.*, 365 NLRB No. 154 (2017). Contrary to the General Counsel, however, I do not agree that rule "expressly" prohibits employees from discussing wages hours and working conditions with third parties, but arguably does so by implication. Accordingly, this rule must be analyzed under the Boeing framework.[51]

Under *Boeing*, I must first determine whether a facially neutral rule, reasonably interpreted from the employees' perspective, would potentially interfere with the exercise of Section 7 rights. In this regard, I conclude that this rule does. The stated purpose of the rule is to protect the confidentiality of Respondent's "internal affairs," a term that is vague as to its meaning—but not necessarily misleading by itself. The rule then goes on directing discretion in dealing with "proprietary information," a term that might be crystal clear to patent or copyright attorneys but not the average worker. Even at this point, it may be argued, a reasonable employee may discern that the employer is trying to protect truly confidential information. The rule, however, goes on to state that information on "personnel matters" cannot be shared with others not employed by AFC. I find that a reasonable employee would conclude that "personnel matters" would likely include wages, hours and working conditions, and that as such the rule prohibits sharing that information with third parties. It is for this reason that I find that the rule, as written, would potentially interfere with Section 7 rights.

I must now proceed, under *Boeing*, to determine whether such rule is lawful or not, by balancing the nature and extent of the potential impact on Section 7 rights against legitimate justifications associated with the rule-viewed from the employees' perspective. Again, I find that the potential impact of this rule on Section 7 rights is significant, and outweighs the legitimate justifications of the rule, which is, presumably, to protect truly confidential information. While protecting truly confidential information is justified and an important goal, such goal could have

[48] Moreover, the General Counsel has argued that Gurr is a 2(11) supervisor, and the facts suggest—based on her position—that Llenas is one as well. If such is the case, there can be no unlawful "interrogation" by the employer in those circumstances.

[49] In Complaint par. 4(g), the General Counsel alleges that about February 25, Schilling threatened employees with unspecified reprisals for engaging in protected concerted activities. No evidence was introduced to support this allegation, and it is therefore dismissed.

[50] Complaint par. 4 (b) (1) & (2), and 4 (e)(1) (A) & (B).

[51] Indeed, the General Counsel erroneously analyses the rule, in that the *Boeing* framework only applies to *facially* neutral rules. If the rule expressly bans protected activity, as argued by the General Counsel, it is still unlawful under *Lutheran Heritage Village Livonia*, 343 NLRB 646 (2004).

been easily accomplished not necessarily by drafting the rule more narrowly, but rather by being more explanatory or expansive in making it clear that employees are not being prohibited from discussing certain things with third parties—such as wages, hours and working conditions. In making this observation, I am not ignoring the Board's admonition against reading the rule out of context, as instructed by the Board in *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019). Nor am I reading a particular phrase of the rule in isolation, as the Board warned against doing in *Interstate Management CO., LLC*, 369 NLRB No. 84, slip op. at 4 fn. 10 (2020), and *Bemis Co., Inc.*, 370 NLRB No. 7, slip op. at 3 (2020). To the contrary, it is when read in full context that the impact of the rule on Section 7 rights becomes magnified and apparent. Thus, employees are expected to maintain the confidentiality of "internal affairs," using discretion in dealing with "proprietary information," such as "personnel matters." To a reasonable employee, this means that discussing with third parties, wages, hours and working conditions, which any reasonable individual would understand to be encompassed under "personnel matters," is to share "proprietary information" and to divulge "internal affairs." I thus conclude that the "reasonable employee" described by the Board in *LA Specialty Produce*, supra., as one possessing common sense, self-reliance and team spirit, would likely play it safe upon reading the above-quoted rule, and refrain from discussing wages hours and working conditions with outside parties, lest he/she violate the rule.

It is for these reasons that I conclude that the rule does not fall under "Category 1(b)" and thus lawful to maintain. Rather, I conclude that these circumstances and facts place this rule in Category 2 under *Boeing*, requiring further scrutiny. I note in that regard that the only business justifications in the record are those contained in the rule itself, and that no explanation was provided, or testimony proffered explaining why the rule is written in the rather clumsy manner that it is. In my view, the General Counsel has met its initial burden to prove that this facially neutral rule, when read in its full context, would be interpreted by a reasonable employee to interfere with his/her Section 7 rights. The burden then switches to the employer to show that the business justification for the rule outweighs its degree of infringement on Section 7 rights. I conclude that Respondent has not met this burden. In so concluding, I note that the reasonable goal of protecting confidential information cannot be an impenetrable shield that allows careless, if unintentional, infringement on employee Section 7 rights. The rule could—and should—have been written in a manner that made clear that employees were still allowed to discuss certain "personnel matters," such as wages, hours and working conditions, with third parties. Such goal could have been accomplished not by writing the rule in a narrower manner, but rather in a *broader*, more expansive manner. I find the Board's rulings in cases dealing with too narrowly-written "escape clauses" in arbitration agreements to be analogous to this situation. In those cases, the Board has found a violation where the arbitration agreement infringed on the rights of employees by appearing to limit their right to bring statutory claims before the Board or other government entities, as is their right to do. The Board held that the sin in those cases was the scope of the language, which in context appeared to limit employee rights, a sin that could have been cured by simply adding "savings" language that explicitly carved out an exception to bringing cases before the Board or other similar governmental entities. See, e.g., *Century Fast Foods, Inc.*, 370 NLRB No. 4 (2020); *CBRE, Inc.*, 368 NLRB No. 152 (2019).[52]

Accordingly, and for the above reasons, I conclude that the language of the Confidentiality clause of Respondent's employee handbook violates Section 8(a)(1) of the Act.

2. The Solicitation and Distribution of Literature Section

At issue is the portion of the rule that prohibits "solicitation of other employees for any purpose during *working hours. . . .*" It is by now axiomatic under well-established Board precedent that employers may prohibit solicitation during working *time*, but not during working *hours,* which would presumably include breaktimes and other non-working times, during which employees are allowed to engage in activity protected by Section 7. *Our Way, Inc.*, 268 NLRB 394 (1983). Accordingly, this overbroad prohibition is presumably invalid, and no *Boeing* analysis is required. *UPMC Presbyterian Shadyside*, 366 NLRB No. 142 (2018).

In light of the above, I find that this section of Respondent's employee handbook violates Section 8(a)(1) of the Act.

3. The Equal Opportunity Employer and Open Door Policy Sections

In the complaint, the General Counsel alleges that these Sections, as worded and *maintained*, are overly broad and discriminatory.[53] In its brief, the General Counsel sings a different tune, conceding that these employee handbook sections are lawful under step 1 of the *Boeing* analysis. I agree. Instead, the General Counsel argues that these rules were unlawfully "promulgated" by Schilling during his February 21 meeting with Raybon, when he allegedly told her that she should have brough her complaints about Smith directly to management, as directed by the employee handbook, rather than discussed them with other employees.

First, it should be noted that the General Counsel should have amended its complaint to reflect its new theory, prior to the submission of briefs, but did not. This is unfair to Respondent, as it misdirected its arguments on brief to address the language of the sections, which the General Counsel belatedly conceded (on brief) were lawful, and prevented Respondent from addressing what the General Counsel now argues is the true violation. While this may not be fatal to the General Counsel's allegations,

[52] Indeed, I would note that the scope of the language in this and other similarly-worded employee handbooks can represent a more present and realistic threat to employee rights under Section 7 than do restrictively-written arbitration agreements. This is because in the vast majority of cases, employees sign arbitration agreements that are never to be seen again, let alone remembered, and which may only surface if and when an employee attempts to bring a cause of action outside of such agreement. Employee handbooks, on the other hand, govern the day-to-today conduct of employees at work, are usually readily available for review, and are often used as justification for discipline. The existence of such potentially unlawful restrictive rules in a handbook therefore represent more immediate and present dangers to such rights than safely-tucked away arbitration agreements.

[53] Complaint par. 4(e)(1).

because all the facts were litigated at trial, it does not reflect well on the General Counsel. I will now address the merits of the General Counsel's belated theory of a violation.

As discussed in the Facts section, I found that Schilling told Raybon that she had violated the employee handbook, although he did not cite which specific section of the handbook when he did.[54] Although he did mention the "open door," section at one point, it was in the context of telling Raybon that she should have brought her concerns to management. The facts do not show that Schilling ever told Raybon, as alleged by the General Counsel, that she should have brough her complaints to management *rather than* to other employees, which would arguably have been a violation of Section 8(a)(1). At most, considering the context of the conversation, Schilling simply told Raybon she should have brought her concerns to management, and I find nothing unlawful about that. Accordingly, I find no merit in the General Counsel's belated theory of a violation and recommend that the allegation be dismissed.

C. The Termination of Raybon's Employment

At the outset, it is important to note that the above heading is worded the way it is, rather than "Respondent's discharge of Raybon," because the facts make clear that Raybon resigned her employment. In its brief, the General Counsel half-heartly concedes as much, but nevertheless argues in its brief that Raybon was actually discharged although Respondent never said so, but intended it, and argues in the alternative that Raybon was "constructively discharged." I will discuss the merits of these theories below, but I would again note that the General Counsel did not amend its complaint to reflect its constructive discharge theory, as it should have. To be fair, however, during its opening arguments the General Counsel did mention that as an alternative theory, it would argue that Raybon was constructively discharged, so Respondent was on notice and had full opportunity to litigate all the facts.

In a nutshell, the General Counsel argues that Raybon was engaged in protected concerted activity when she discussed Ascencio's situation with Rust, Gurr, and with others; that she was involved in protected concerted activity when she discussed her concerns about Smith's (perceived) views about undocumented immigrants and his treatment of her with the above-named individuals and others; that Respondent had animus toward her because she engaged in the above-described protected activity; and that Respondent discharged her at least in part for engaging in these activities, or constructively discharged her by making her continued employment so unbearable or unpleasant that she had to resign.

As both the General Counsel and Respondent correctly point out, the above-described allegation(s) must be reviewed under the *Wright Line* analytical framework.[55] Under this framework, the General Counsel has the initial burden to prove, by preponderance of the evidence, that Raybon engaged in protected (concerted) activity, that Respondent knew about it, that Respondent harbored animus based on such protected activity, and that it took an adverse employment action against Raybon, motivated, at least in part, by such animus. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp.*, 294 NLRB 924, 956 (1989).

For the following reasons, I conclude that the General Counsel did not meet its initial burden under *Wright Line*, and even if it did, Respondent met its burden to show it would have taken the same action even in the absence of protected activity by Raybon. The reasons for the General Counsel's failure to meet its burden are various and multi-faceted, as discussed below.

First, it is not crystal-clear that Raybon was engaged in protected concerted activity. As shown by the evidence, particularly by Raybon's own testimony, Raybon's actions were initially triggered and fueled by her concern about Asencio's return to AFC as a future employee. Ascencio had lost her legal right to work in the United States as a result of her divorce and thus left AFC's employ in 2018, and AFC was attempting to "sponsor" her under U.S. immigration laws to secure her future employment, a process which was by no means guaranteed given the complexities and vagrancies of U.S immigration laws. AFC was thus holding Ascencio's former job "open" pending the resolution of her immigration status, something which Raybon informed Smith about during their first meeting shortly after Smith took the reins as Arizona State Director for AFC. Something about Smith's reaction to that information, perhaps his lack of enthusiasm, triggered undue concern in Raybon's part. This concern grew into outright suspicion when a few days later Raybon learned from her former supervisor, Rust, that a former staffer for Smith had submitted a resume for the position being "held" for Ascencio. Worried about Ascencio, Raybon contacted Rust to inquire about Ascencio's status, and Rust told her she would check into it—but Rust did not get back to her. Raybon next contacted Bruce Hermie, a national-level official of AFC who happened to reside in Arizona. She told Hermie about her concerns regarding Ascencio's job status (which she feared Smith was trying to interfere with), concerns which were by now magnified by Smith's directive that the English and Spanish "outreach" websites should be worded the same.[56] Apparently, in Raybon's mind, this signaled that Smith had a racial bias, or at least a bias against Hispanic immigrants. The final straw in Raybon's "suspicion trifecta" was her discovery that years earlier, when he was a State senator, Smith had sponsored legislation

[54] Indeed, although it is not completely clear, it appears that Schilling may have been referring to the no harassment policy in the handbook, which Smith complained had been violated by Raybon by referring to him as a racist.

[55] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F2d 899 (1st Cir. 1981). Cert. denied 455 U.S. 989 (1982). As discussed below, however, there is another analytical framework that may be applicable under these circumstances.

[56] Raybon testified that Smith had said that "whites" should be treated the same as Hispanics. I did not credit this testimony, finding instead that Smith had simply said that the language in both websites should be identical.

which Raybon considered to be "anti-immigrant." This trifecta apparently morphed in Raybon's mind into a conviction that Smith was a racist or was biased against people of color. This opinion about Smith, supported only by the slenderest of reeds, colored and guided her subsequent conduct, as discussed below.

Before I proceed to discuss Raybon's subsequent conduct, which eventually resulted in the end of her employment, it is important to note that, contrary to the General Counsel's assertion, I conclude that Raybon's activity regarding Ascencio is not protected concerted activity. As discussed above, at the time, Ascencio was not legally entitled or able to work in the United States, and thus not an "employee" within the meaning of Section 2(3) of the Act. Thus, Raybon's advocacy, or more accurately, expressed concern for Ascencio, a nonemployee, was accordingly not conduct for "mutual aid or protection" within the meaning of Section 7. *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019).[57]

Likewise, I do not find that Raybon's remarks to, or discussions with, others regarding the content of Respondent's websites to be protected activity. The content of the website is akin to an employer's "product," that has little if anything to do with wages, hours or working conditions that employees are entitled to attempt to improve in concert with others, for "mutual aid or protection." Simply put, Respondent has no obligation to discuss the nature or content of its website with employees, either individually or as a group, let alone negotiate with them about it.[58] Thus, even assuming that Raybon's mention of her concern about the website was concerted, it was not protected.

The culmination of the events leading to the end of Raybon's employment occurred during the annual employee conference held by Respondent in Washington, DC, in February. As previously recounted, Raybon waited for Burr, who was flying in from Nevada, at the DC airport, and rode with her in a cab to the hotel where they were staying. Raybon told Gurr that Smith was a racist (or did not like people of color), explaining that she thought Smith was attempting to sabotage Ascencio's return and telling Gurr about the legislation he had sponsored years earlier. Raybon later repeated the same things to others individually or in group settings during the conference.[59] At least 3 of the individuals whom Raybon spoke to, reported her conduct to management, and word reached Smith, who strenuously objected to Allison (and Schilling) about Raybon's characterization of him as a racist—and even threatened legal action if management did not address Raybon's conduct. These events led to the February 21 meeting between Raybon, Schilling and Miller, when Schilling confronted Raybon about what she had been saying about Smith, and culminated in the February 25 telephone conference between them, at which time Raybon announced her resignation.

The General Counsel argues that Raybon's "good faith belief" that Raybon was a racist, or at least was racially biased, even if incorrect, still shielded her conduct, which the General Counsel asserts was protected concerted activity because she shared her views with other employees. I disagree. It is notable that in support of these arguments, the General Counsel cites cases where the Board has found that employees protesting actually discriminatory terms and conditions of employment was protected activity. See, e.g., *Churchill's Restaurant*, 276 NLRB 775, 777 (1985); *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enf. 788 F.2D 1378 (8th Cir. 1986). In other words, employees were protesting conduct engaged in or policies implemented by employers which were discriminatory or racially biased. In the instant case, there isn't a single shred of evidence that Smith actually engaged in any discriminatory conduct or implemented any policies that were discriminatory or biased during his tenure as Respondent's Arizona State Director. Rather, Raybon was concerned that Smith had (as notably argued by the General Counsel on brief) a discriminatory *viewpoint*—a concern based on extremely dubious evidence. Raybon acted on this ill-supported suspicion and publicly accused Smith of being a racist—an incendiary accusation, and one that was justifiably viewed as misconduct by Respondent.[60] Accordingly, I find that in these circumstances Raybon's conduct was neither concerted nor protected.

Even assuming that Raybon' conduct was both concerted and protected, the General Counsel still bears the burden to establish, by the preponderance of the evidence, that Respondent harbored animus against Raybon because of her protected activity, and that this animus was a factor in the adverse action taken against her. On this burden, the General Counsel fails on various fronts. The General Counsel thus argues that Raybon's "conversations with other employees" were the basis for their decision to discharge Raybon, that Respondent's investigation "focused solely" on whether Raybon contacted other employees do discuss Smith's "legislative history," or his statements about Hispanic outreach, or whether Raybon had discussed Smith's "potential anti-immigrant bias or racist bias." These assertions are

[57] I am aware that in *Amnesty International*, supra., the Board indicated that the unpaid interns at issue were not employees, inter alia, because they did not receive or *anticipate* economic compensation, inasmuch the employer had never hired them or created that expectation. In Ascencio's case, that expectation might reasonably exist, both because she had previously worked for Respondent and because Respondent was sponsoring her in the hope that she would return to their fold. Nonetheless, I would note that unlike in the case where an employer could instantly transform a "non-employee" into one by simply uttering the magic words "you are hired," Respondent was legally unable to do so in this case given Ascencio's immigration status. At the time of Raybon's inquiries about her, it was by no means certain that Ascencio would obtain the legal ability or right to work in the United States, a process that was totally dependent on a third party—the U.S Government's immigration authorities. In that regard, I would note that the General Counsel's argument that Ascencio was a "statutory employee" merely on a "leave of absence," as if she had been on maternity leave, for example, is disingenuous.

[58] To argue otherwise would be akin to stating that the employees of Coca-Cola, for example, can join together to complain that they don't like the red color of Coke cans, and that such activity would be protected. I can find no support for such view.

[59] Some of the individuals whom Raybon spoke to may have been statutory supervisors, like Gurr (Nevada State Director, whom the General Counsel argues is a supervisor), Bottger (Louisiana State Director) and Llenas (National Community Outreach Director). As such, those conversations may have been neither concerted nor protected.

[60] Indeed, it was some of the very same employees whom Raybon supposedly acted in "concert" with who were so offended by her conduct that they reported her to management.

simply not supported by the record. As I found in the Facts section, Respondent's main focus of its investigation was whether Raybon was going around calling Smith a "racist." There is no evidence that Respondent was the least concerned about whether Raybon was discussing Smith's (remote) "legislative history or potential bias," or anything of the sort with other employees. It's main, if not only, concern was that Raybon was publicly accusing him of being a "racist," creating a toxic working environment. That is how Respondent's inquiry began, when Schilling asked Raybon, during the February 21 meeting, whether it was true that she had been calling Smith a racist.[61] That is how Respondent's inquiry also ended, when Schilling inquired of several employees (3 of whom had voluntarily approached Schilling), whether Raybon had called Smith a racist. Thus, even if Raybon's discussions with other employees was protected activity, there is no evidence of animus directed at, or caused by, those conversations per se. Further, even assuming that some evidence could be extracted from this record indicating that Respondent harbored some animus toward Raybon's protected activity of engaging with other employees, there must be a nexus established between such animus and the adverse action taken against Raybon. *Tschiggfrie Properties Ltd.,* 368 NLRB No. 120 (2019). Once again, the General fails in its burden of proof on that score, because there is no evidence that Respondent took adverse action against Raybon because of her protected activity (such as discussing Smith with other employees), but rather because she called him a racist during the course of those encounters.[62] Accordingly, I conclude that the General Counsel has failed to meet its burden of proof in this regard.

The final failure of the General Counsel's burden of proof under *Wright Line* has to do with its failure to establish that an *adverse action* was taken by Respondent in the wake of Raybon's alleged protected activity. This is because the facts clearly establish, as detailed above, that Raybon *resigned* from her employment, before Respondent had the chance to discharge her. While it is true that Respondent had every intention to discharge Raybon, as admitted by Schilling and otherwise established in the record, Raybon announced her resignation before Respondent informed her, and before she had any knowledge of Respondent's intention. Accordingly, Respondent did not take any adverse action against Raybon, and Respondent's intent is ultimately irrelevant. The Act proscribes certain *conduct* and gives the Board authority to remedy such conduct. The Act does not, and cannot, proscribe *intent*, and the Board has no authority to fashion a remedy for such. Accordingly, the only way for the General Counsel to establish a violation in these circumstances is to show that Raybon was constructively discharged by Respondent. The General Counsel makes such attempt, but not before disingenuously arguing that Respondent, really, truly fired Raybon, even though Respondent never got the chance to do so before she resigned.[63]

In order to establish a constructive discharge, the General Counsel must prove that Respondent made conditions so onerous for Raybon, as a result of her protected activity, that she was forced to resign, or show that she was offered a "Hobson's choice" between continued employment or abandoning Section 7 protected activities. *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004); *Kosher Plaza Supermarket*, 313 NLRB 74, 87 (1993); *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 4 (2001). The General Counsel asserts that during the February 25 telephonic meeting between Raybon, Schilling and Miller, Schilling, told Raybon that in light of her accusing Smith of being a racist, Smith was no longer willing to work with her. Schilling then asked, "what I am supposed to do?," which prompted Raybon to resign. According to the General Counsel, this question by Schilling conveyed to Raybon that there was no work left for her in the Arizona Chapter, thus reducing her hours to zero, and that such reduction of hours was so onerous that she was forced to resign. The problem with this argument, other that it makes no sense (again, forcing the square peg in the round hole. . .) is that Raybon testified that she resigned because she feared she was going to be fired, and was trying to salvage her professional reputation, which would have been harmed by the news of her firing. Thus, Raybon was not resigning because her working conditions had suddenly become onerous, or because she was presented with the choice between continued employment or abandoning protected activity, but rather she was resigning to preserve her professional reputation from perceived *potential* harm. Such choice does not fit under the Board's definition of a true Hobson's Choice, and does not support an argument for constructive discharge.[64] Accordingly, I conclude that Raybon was

[61] Even in Raybon's own version of this meeting, which I did not credit, Schilling began the meeting asking her why she had been "trashing" Smith, which would be an apt description of the impact of calling someone a racist.

[62] It could be argued that Raybon's calling Smith a racist, while in the course of engaging in protected activity (if such were the case), could bring this matter into the analytical fold of *Burnup & Sims*, 379 U.S. 21 (1964), an analytical framework not raised by the General Counsel or Respondent. Under *Burnup & Sims*, the General Counsel must first establish that the discharged employee was engaged in protected activity, and that the alleged "misconduct" for which that employee was discharged occurred during the course of such protected activity. Thus, if such alleged misconduct is part of the res gestae of the employees' protected activity, the employer's motive is not at issue—and therefore *Wright Line* is not the proper analytical framework. Once the General Counsel meets this burden, the burden switches to the employer to show that it had a good faith belief that the employee engaged in misconduct in the course of his protected activity. If this burden is satisfied, the burden moves back to the General Counsel to establish that the misconduct did not, in fact occur. I have concluded, however, that Raybon was not engaged in protected activity. In any event, even under the *Burnup & Sims* framework I would conclude that Respondent has established that Raybon was engaged in misconduct by calling Smith a racist.

[63] This effort once again shows the General Counsel attempting to force a square peg into a round hole when the facts do not favor its theories of a violation.

[64] As for the General Counsel's argument that Schilling's question "what am I supposed to do" amounted to an effective termination, I completely disagree. In this situation, it was Raybon's turn to place the ball back on Schilling's court, and to force his hand. She could have done so by simply saying that this was his decision to make—or more pointedly, in keeping with her professed beliefs, by saying that he could fire Smith, because there was no room in AFC for racists. This, of course, would not likely have resulted in Respondent changing its mind of its intention to discharge her, but would have allowed Raybon, after she was informed that she was being terminated, to offer her resignation instead in order to

not constructively discharged—she resigned on her own volition.

In light of the above, I find that the General Counsel failed, on multiple grounds, to sustain its burden of proof under *Wright Line*, and therefore conclude that its allegation(s) with regards to Raybon's discharge do not have merit and should be dismissed.

D. The Allegations that Respondent Attempted to Interfere with or Undermine Raybon's Professional Reputation[65]

With regard to these allegations, the General Counsel asserts that Respondent violated the Act by:

- Sending copies of Raybon's social media posts to her clients (AASTO) in order to interfere with Raybon's relationship with that client;
- Excluding Raybon from professional meetings and deliberations in order to diminish her professional standing;
- Refusing to work with Raybon in her professional capacity in order to interfere with her relationship with AASTO and diminish her standing with coalition partners.

There is a myriad of fundamental problems with the above allegations, both from the factual standpoint, the burden of proof standpoint, and from the legal—and constitutional—standpoint. First, from the factual standpoint, the record shows, for example, that in August, Smith sent not only AASTO but also a number of the other coalition partners copies of tweets that Raybon had posted. These tweets essentially praised Arizona School Superintendent Hoffman, who was seen by Smith, AFC and other coalition partners as a political opponent who stood against many of the programs, policies and legislative goals of the coalition. I credited Smith's testimony that he was concerned about including Raybon in coalition discussions about strategy to advance legislation that Hoffman, and by extension, Raybon, opposed. His intent was thus to alert the coalition about Raybon's possible conflict of interest, not to "interfere" with Raybon's relationship with her (new) employer, AASTO. Regarding the second bullet point above, the record shows that the emails chains inviting members of the coalition to different events or meetings originated not with Smith or AFC, but from others who were the original hosts. The General Counsel, in essence, suggests that either Smith, AFC or both, somehow persuaded the hosts not to invite Raybon to these meetings. Such speculation is simply not supported by the evidence—more than mere conjecture is needed for the General Counsel to meet its burden of proof. While it is true that Smith admitted informing the other members of the coalition that he would not participate in any legislative *strategy* meetings with Raybon (for the reasons explained above), this does not establish, by the preponderance of the evidence, that this was *the* reason the hosts failed to invite Raybon. Finally, regarding the final allegation (in the third bullet point, above), the record does not support a finding that Smith (or AFC) refused to work with Raybon altogether. To the contrary, the record shows that Smith (and AFC) has worked, and continues to work, with Raybon on a number of issues where they share common ground and goals. It is in legislative goal strategy sessions, where Raybon and AFC appear to have different goals, that Smith has declined to participate with her in.

Thus, these facts undermine the General Counsel's allegations, and the lack of factual support for its allegations alone would appear to doom the General Counsel's case. From the legal standpoint, the General Counsel's case grows more dubious. Thus, even assuming the facts to be as the General Counsel alleges, there are fundamental legal flaws that prove fatal to the General Counsel's allegations. In this regard, it is no mystery that the General Counsel failed to cite a single Board or court case in support of these allegations. This is because there are none, and for a good reason: there are fundamental constitutional constraints that prevent the Board from forcing Respondent, or any other entity or individuals, such as the coalition, for example, to associate with others they do not want to associate with, in order to remedy a potential unfair labor practice.

In essence, the complaint seeks to make unlawful Respondent's refusal to invite Raybon to meetings of a coalition it belonged to, or its refusal to participate in meetings of this coalition if Raybon was present. Under the First Amendment, however, individuals and entities have a fundamental right of expressive association, which is the right to associate or refuse to associate with others without governmental intrusion. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). This right is not absolute, of course, as the government may infringe on it when it has a compelling interest in preventing certain unlawful practices, such as sex or race discrimination. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). Thus, a balancing act is called for, weighing a fundamental constitutional right versus the government's interest in preventing unlawful conduct. Without engaging in a lengthy and perhaps unnecessary constitutional analysis, however, I simply cannot see how the Board's interest in preventing *possible* retaliatory conduct by Respondent, can outweigh Respondent's fundamental constitutional right—and that of the other coalition members—not to associate with Raybon by not inviting her to their meetings, or of refusing to participate in those meetings if she is invited. This is particularly true in light of the fact that as described above, the evidence of a retaliatory motive is weak, and mostly circumstantial. Thus, there is no compelling government interest here that would outweigh the constitutional constraints in question. In the final analysis, this constitutional question can be avoided altogether by applying the *Wright Line* analysis to this situation, since it is applicable to alleged violations of Section 8(a)(4) & (1).[66] I conclude that the General Counsel has not met its burden of proof under such analytical framework, inasmuch it has not established, by a preponderance of the evidence, that Raybon's exclusion from the coalition's meetings was either caused by Respondent, or motivated by animus as a result of her protected activity. Moreover, even assuming that General Counsel had met such threshold (an

protect her interests. At such point, even if Respondent afforded her the option to resign instead of being fired, the constructive discharge theory would have been viable, because the discharge would have been official in the absence of a resignation.

[65] Complaint allegations 4(k); (l); and (m), respectively.

[66] Nonetheless, I believe the constitutional question needed to be mentioned, lest the General Counsel make allegations with such import in a cavalier fashion.

extremely generous assumption), it failed to satisfy the last factor required by *Wright Line*, which is to show that the employer took an adverse action that actually harmed the employee. In this regard, the General Counsel has utterly failed to introduce any significant, let alone persuasive, evidence that Raybon (or her "professional standing," as alleged in the complaint) was in fact harmed by Respondent's alleged conduct. The only evidence proffered by the General Counsel in this regard was Raybon's testimony that she has not been invited to meetings of the "coalition," that she "felt" that it was because of Smith, and that this has "impacted" her ability to do her job.[67] Nothing more. This testimony is inherently insufficient to meet the General Counsel's burden of proof under the *Wright Line* analytical framework. Indeed, based on the allegations of the complaint, it appears that the General Counsel believes that *intent* to cause harm, assuming it has even established that, is actionable and subject to remedy under the Act. Nothing in the Act proscribes intent, however, nor gives the Board the authority to remedy such; only certain *conduct* is proscribed, conduct that results in adverse consequences, and it is such conduct that the Board may remedy under Section 10(a). No adverse consequences or harm has been established in this instance.

Accordingly, and for the above reasons, I find that these allegations lack merit and should be dismissed.

CONCLUSIONS OF LAW

1. American Federation for Children, Inc. (Respondent or AFC) (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining the overly broad "Confidentiality" clause in its Employee Handbook, as described above.

3. Respondent additionally violated Section 8(a)(1) of the Act by promulgating and maintaining the overly broad "Solicitation and Distribution of Literature" clause in its Employee Handbook, as described above.

4. Respondent did not otherwise violate the Act as alleged in the complaint.

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

REMEDY

The appropriate remedy for the Section 8(a)(1) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from promulgating or maintaining a confidentiality rule in its employee handbook that employees would reasonably interpret as requiring them to refrain from discussing wages, hours or working conditions with third parties without first obtaining the approval from Respondent; and shall additionally cease and desist from promulgating or maintaining a rule in its employee handbook that prohibits solicitation or distribution during "working hours."

Respondent shall also cease and desist, in any other manner, from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's Washington, DC facility, or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since [date of first unfair labor practice] When the notice is issued to the Employer, it shall sign it or otherwise notify Region 28 of the Board what action it will take with respect to this decision.

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[68]

ORDER

Respondent, American Federation for Children, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in any of the conduct described immediately above in the remedy section of this decision.

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

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

(a) Rescind the confidentiality and distribution and solicitation of literature provisions of its employee handbook or revise them in all its forms to make clear that employees may discuss wages, hours and working conditions with third parties without seeking permission from Respondent and may solicit and distribute literature during times other than working time.

(b) Within 14 days after service by the Region, post its Washington DC facility and other locations where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[69] Copies of the notice, on forms provided by the

[67] See, Tr. 607–608.

[68] 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.

[69] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the

Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28, 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.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT maintain the following rules in our employee handbook:

- a Confidentiality rule requiring employees to "maintain the confidentiality of AFC's internal affairs" and providing that "[i]nformation on […] personnel matters shall not be shared with anyone not employed by AFC, unless authorized by the President;" or

- a Solicitations and Distribution of Literature rule that interferes with your right to engage in solicitation in furtherance of the above rights during non-working time or in non-working areas or to distribute literature in furtherance of the above rights during non-working time and in non-working areas

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

AMERICAN FEDERATION FOR CHILDREN, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-246878 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.

notice if the Respondent customarily communicates with its employees by electronic means. 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."