Fresh & Easy Neighborhood Market, Inc. ***and*** **Margaret Elias.** Case 28–CA–064411

August 11, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

This case raises the issue of whether an employee was engaged in "concerted activity" for the purpose of "mutual aid or protection" within the meaning of Section 7 of the National Labor Relations Act when she sought assistance from her coworkers in raising a sexual harassment complaint to her employer. The judge found that she was not, and the Acting General Counsel excepts.[1] We find that the employee was indeed engaged in concerted activity for the purpose of mutual aid or protection. We also agree with the Acting General Counsel that, to the extent the Board's divided decision in *Holling Press, Inc.*, 343 NLRB 301 (2004), would require a finding that the employee's activity was *not* for mutual aid or protection, that case—which lies far outside the mainstream of Board precedent—should be overruled. Nevertheless, in the particular circumstances of this case, we agree with the judge that the employer did not violate Section 8(a)(1) when it questioned the employee about why she obtained witness statements from her coworkers and instructed her not to obtain additional statements.

[1] On April 23, 2012, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations 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. We shall modify the judge's recommended Order to reflect the violations found and in accordance with the Board's standard remedial language, and consistent with our decision in *J. Picini Flooring*, 356 NLRB 11 (2010). We shall also substitute new notices to conform to the Order as modified and with *Durham School Services*, 360 NLRB 694 (2014).

The judge found that the Respondent violated Sec. 8(a)(1) of the Act by maintaining an overbroad and discriminatory confidentiality rule in its employee handbook, on its company-wide intranet portal, and on its New Hire CDs, and by failing to notify its employees at the Phoenix, Arizona facility of changes to its solicitation and distribution rule. In the absence of exceptions, we adopt the judge's findings in this regard. As discussed in the Amended Remedy section of this decision, we shall amend the remedy and modify the recommended Order to require notice posting by the Respondent at all of its facilities nationwide with respect to its maintenance of the unlawful confidentiality policy. In addition, in the absence of exceptions, we adopt the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by maintaining an overly broad and discriminatory solicitation policy, by creating an impression of surveillance, and by threatening employees with unspecified reprisals.

I. FACTS

On August 24, 2011,[2] employee Margaret Elias, a cashier at the Respondent's grocery store, asked supervisor Bruce Churley if she could participate in training related to the sale of alcohol, known as "TIPS." Churley told her to write a note to him on a whiteboard in the breakroom, which Elias did on August 25. Her message read, in relevant part: "Bruce . . . Could you please sign me up for TIPS training on 9/10/11?"

On August 26, Elias saw that the word "TIPS" had been changed to "TITS" and that a picture of a worm or peanut urinating on her name had been added to her original whiteboard message. Elias asked Michael Anderson, her team leader, about filing a sexual harassment complaint and showed him the whiteboard. When Anderson asked why she would want to do so, Elias left the breakroom, angry at his reaction. Afterward, Anderson telephoned Churley and, when informed of Elias' plan to file a sexual harassment complaint, Churley told Anderson to take a photograph of the altered whiteboard message and erase it.

That same day, Elias hand copied the whiteboard picture and the altered message to a piece of paper.[3] She asked Anderson and two coworkers, Krista Yates and Victoria Giro, to sign the document. All three did so. Regarding the substance of Elias' conversations with those employees, the credited evidence establishes the following:[4] Before Anderson signed, Elias told him that she wanted to depict what was on the whiteboard and to file a sexual harassment complaint in connection with that content. Likewise, before Yates signed, Elias indicated to her that she wanted to file a complaint.[5] When Giro signed the document, she knew Elias was upset by the whiteboard alteration and, at some point during their conversation about the document, Elias mentioned wanting to file a complaint.[6] Giro, who testified that she personally found the whiteboard alteration inappropriate, suggested that Elias report the matter to Churley so he could review the breakroom cameras, find out who al-

[2] All dates are 2011 unless otherwise stated.

[3] Employees at Elias' level were not permitted to carry or use cameras at the facility.

[4] The judge generally credited the testimony of Anderson, Yates, and Giro.

[5] Yates testified that when Elias raised the whiteboard alteration to her, Elias indicated that she wanted to file a complaint, but Yates could not recall if Elias specifically stated that she wanted to file a sexual harassment complaint.

[6] As the hearing transcript reflects, Giro testified that Elias *did* inform Giro of her desire to file a complaint about the whiteboard incident, and the judge credited Giro's testimony generally. The judge's finding that Elias never told Giro that she wanted to file a complaint is clearly erroneous.

tered Elias' message, and take appropriate corrective action. As found by the judge, during these conversations Elias was loud and angry.

At the time that Anderson, Yates, and Giro signed Elias' document, only the hand- drawn picture and the altered whiteboard message appeared on the paper. At some later point, Elias added the following statement: "Someone changed the board to 'TITS' instead of TIPS and [sic] and put a worm pissing on my name. I take this as sexual harassement [sic]. This has been on the [b]oard since I got here at 2PM." Elias testified that although she did not intend that statement to be a joint complaint, "I was offended and I believe that the other girls were offended too. And it just seemed that if we were to file a harassment charge that it wouldn't happen again." Elias also testified that she felt the altered message was "sexual-based harassment" for her and the two other women who were working that night.[7]

Later on August 26, Churley returned to the store and saw the photograph of the altered whiteboard that Anderson had taken. Churley then reviewed the breakroom's video footage and identified Gary Hamner as the employee who altered Elias' whiteboard message. Churley emailed Employee Relations Manager Monyia Jackson to report the incident. He also spoke to Anderson, Giro, and Yates about Elias' request that they sign her handwritten reproduction of the altered whiteboard message. The three stated that they believed they were only witnessing that Elias' reproduction was correct, that they did not want to help her bring a sexual harassment complaint, and that they felt forced to sign the document. Nonetheless, Giro testified that she would not have liked the whiteboard alteration if it had happened to her and thought that management should have been notified in some way so that disciplinary action could be taken. In fact, Giro testified that, the day after she signed Elias' document, she went to Churley and told him that she thought the whiteboard alteration was inappropriate and that she hoped he would "take care of it."

In the following days, Yates made a formal complaint against Elias for "bullying" her into signing the statement showing the reproduced whiteboard message and accused Elias of altering the statement after Yates signed it. In addition, Hamner complained that Elias cursed at him upon his arrival to work on August 26.

[7] Although the judge discredited Elias' testimony regarding her demeanor while soliciting her coworkers to sign the reproduced whiteboard message, he did not discredit her testimony as to her reasons for seeking to raise the sexual harassment complaint to the Respondent. We may thus properly rely on Elias' testimony on this point. See *River Ranch Fresh Foods, LLC*, 351 NLRB 115, 117, 117 fn. 15 (2007).

Employee Relations Manager Jackson then began an investigation into the whiteboard incident and the complaints against Elias. After interviewing Anderson, Yates, and Hamner, Jackson telephoned Elias on August 31.[8] Jackson spoke to Elias about her sexual harassment complaint, as well as her coworkers' complaints against her. When Jackson questioned Elias about why she felt that she had to obtain her coworkers' signatures on the statement, Elias responded that it was for her own protection. Jackson also instructed Elias not to obtain any further statements so that Jackson could conduct her investigation into the incident. She told Elias, however, that Elias could talk to other employees and ask them to be witnesses for her. Elias was never threatened with and did not receive discipline for her actions. Upon completing the investigation, Jackson concluded that the whiteboard alterations were inappropriate, disciplined Hamner for making the alterations, informed Elias of her decision in writing, and assured Elias that she would be protected against retaliation. Jackson found no merit to Yates' and Hamner's complaints against Elias.

II. THE JUDGE'S DECISION

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by questioning Elias about why she felt she had to obtain her coworkers' signatures on the hand-drawn reproduction of the altered whiteboard, or by instructing Elias not to solicit additional written statements from her coworkers. Relying largely on *Holling Press*, 343 NLRB 301, the judge reasoned that Elias had not been engaged in concerted activity for the purpose of mutual aid or protection at the time she sought her coworkers' assistance in raising a sexual harassment complaint to management. Instead, he found that Elias' complaint was personal and not shared by other employees, and that her goal in raising the issue to management was a purely individual one. In addition, the judge, observing that the Respondent did not bar Elias from speaking with her coworkers, found that Jackson's request that Elias take no further statements was not meant to deprive her of the right to engage in concerted activities, but rather to prevent disruption at the store. He thus concluded that the Respondent's questions and instructions to Elias were not unlawful.

III. DISCUSSION

A. Elias Engaged in Concerted Activity for the Purpose of Mutual Aid and Protection

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." Although these

[8] The judge credited Jackson's version of the telephone call.

elements are closely related, our precedent makes clear that they are analytically distinct. See *Summit Regional Medical Center*, 357 NLRB 1614, 1616 (2011). As described more fully below, whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 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). The Supreme Court has observed, however, that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. at 835. The concept of "mutual aid or protection" 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." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

Under Section 7, both the concertedness element and the "mutual aid or protection" element are analyzed under an objective standard. An employee's subjective motive for taking action is not relevant to whether that action was concerted. "Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one." *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). Nor is motive relevant to whether activity is for "mutual aid or protection." Rather, the analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees. As one court has explained:

> The motive of the actor in a labor dispute must be distinguished from the purpose for his activity. The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of "mutual aid or protection" of employees.

Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976).

Applying those principles, we disagree with the judge's findings that Elias' solicitation of her coworkers' assistance was neither concerted nor for the purpose of mutual aid or protection.

1. Elias was engaged in concerted activity

In *Meyers I*, the Board defined concerted activity as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497. In *Meyers II*, the Board clarified that the *Meyers I* definition of concerted activity includes cases "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 II*, 281 NLRB at 887. The requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7. In this regard, "inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). In addition, 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.*, 289 NLRB 933, 933 (1988), quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

Here, Elias sought her coworkers' assistance in raising a sexual harassment complaint to management, by soliciting three of them to sign the piece of paper on which she had copied the altered whiteboard message in order to "prove" the harassment to which she had been subjected. Although she did not intend to pursue a joint complaint, her testimony establishes that she wanted her coworkers to be witnesses to the incident, which she would then report to the Respondent. Two of those coworkers testified that they were aware of her intent to memorialize the incident for the purpose of reporting it to management. Even without more, under *Meyers II* and its progeny, Elias' conduct in approaching her coworkers to seek their support of her efforts regarding this workplace concern would constitute concerted activity. Elias did not have to engage in *further* concerted activity to ensure that her initial call for group action retained its concerted character. See *Circle K Corp.*, 305 NLRB at 933; and *Whittaker Corp.*, 289 NLRB at 934. The Board has previously found similar action to support a finding of concerted activity. See *Holling Press*, 343

NLRB at 302 (employee appealing to her coworkers to support her sexual harassment claim was engaged in concerted activity), citing *Mushroom Transportation v. NLRB*, above, 330 F.2d 683.[9]

In concluding that Elias was not engaged in concerted activity, Member Miscimarra and the judge maintain that Elias was raising a personal complaint not shared by others and that her coworkers signed the statement only to stop her "annoying" conduct.[10] But under Board precedent, concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed. See, e.g., *El Gran Combo*, 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988); and *Meyers II*, 281 NLRB at 887. The concerted nature of Elias' request would not be diminished even if Elias' coworkers did not agree with her sexual harassment complaint, or, as Member Miscimarra argues, did not want to sign the document. The Board has also recognized that activity such as Elias' solicitation in this case may be protected even if the solicited employee is uncomfortable with the request. See *Frazier Industrial Co.*, 328 NLRB 717, 719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). It is also well established that an employee may act partly from selfish motivations and still be engaged in concerted activity, even if she is the only immediate beneficiary of the solicitation.[11] Thus, Elias' initial request, on its own, establishes concerted activity, regardless of whether her coworkers signed or refused to sign the document and notwithstanding their irritation with the manner of her request for their assistance.[12]

Member Miscimarra further contends that our decision today will result in unprecedented Section 7 protection for an employee soliciting assistance from his or her coworkers in raising a complaint to management even if the solicited employees are unwilling to help or file their own complaint against the employee seeking assistance, they do not have a shared interest in the matter raised by the employee, and the complaint raised by the soliciting employee lacks merit. However, what our colleague deems unprecedented protection is, in fact, consistent with decades of Board precedent. As noted, solicited employees do not have to agree with the soliciting employee or join that employee's cause in order for the activity to be concerted. See *Mushroom Transportation*, 330 F.2d at 685; *Circle K Corp.*, 305 NLRB at 933; *Whitaker Corp.*, 289 NLRB at 934; and *El Gran Combo*, 284 NLRB at 1117. Nor do the solicited employees have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. See *El Gran Combo*, 284 NLRB at 1117; and *Hintze Contracting Co.*, 236 NLRB 45, 48 (1978), enfd. mem. 1979 WL 32447 (9th Cir. 1979). Further, the protected, concerted nature of an employee's complaint to management is not dependent on the merit of such a complaint. See *Spinoza, Inc.*, 199 NLRB 525, 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973). It is thus clear that, in finding Elias' conduct to be concerted, we are applying established precedent. Our colleague's criticisms, therefore, represent a dispute with existing Board jurisprudence.

2. Elias' concerted activity was for the purpose of mutual aid and protection

We turn now to the question whether Elias' concerted activity was for the purpose of mutual aid or protection. Our finding that it was flows from the Supreme Court's endorsement, in *Eastex*, of the view that Congress designed Section 7 "to protect concerted activities for the *somewhat broader* purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'" 437 U.S. at 565 (emphasis added). Thus, the "mutual aid or protection" clause encompasses "much legitimate activity [by employees] that could improve their lot as employees." Id. at 567. The Court concluded that it was appropriate for the Board to draw the precise boundaries of that

[9] To this extent, we agree with *Holling Press*, despite our rejection below of other aspects of that decision. *Abramson, LLC*, 345 NLRB 171 (2005), meanwhile, is distinguishable. In that case, the Board addressed whether an employee pursuing a Title VII claim was engaged in concerted activity. In concluding that he was not, the Board found that there was no evidence that the employee discussed his wage concerns underlying the Title VII claim with other employees or that he sought his coworkers' support in remedying the alleged discrimination. Id. at 173–174. By contrast, Elias discussed the whiteboard alteration with three coworkers, informed them of her intention to raise a complaint to management, and solicited their assistance in doing so.

[10] Nor does the record establish that Elias was raising a wholly personal complaint. Employee Victoria Giro credibly testified that she would have been concerned had she been the victim of Hamner's misconduct, that she agreed that management should have been notified in some way so that disciplinary action could be taken, and that she herself raised the whiteboard alteration to Churley and asked him to "take care of it."

[11] See *Circle K Corp.*, 305 NLRB at 933; *El Gran Combo*, 284 NLRB at 1117; and *Dreis & Krump Mfg. Co.*, 221 NLRB 309, 314 (1975), enfd. 544 F.2d 320, 328 (7th Cir. 1976). Further, the Board has held that "[w]here an employee's objectives in taking certain action may be mixed, and one supports a finding of concertedness, [the Board] may not ignore it in favor of one that does not." *Circle K Corp.*, 305 NLRB at 934 fn. 9.

[12] In finding that Elias did not act concertedly, the judge also found that Elias' conduct was disruptive to the store's operations. In our view, such evidence is more relevant to the question, not presented here, whether an employee engaged in protected concerted activity loses such protection by her conduct. See *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

clause "as it considers the wide variety of cases that come before it." Id. at 568.

In *Meyers II*, the Board "acknowledged that efforts to invoke the protection of statutes benefitting employees are efforts engaged in for the purpose of 'mutual aid or protection'" and reiterated the Supreme Court's view that "proof that an employee action inures to the benefit of all" is "proof that the action comes within the 'mutual aid or protection' clause of Section 7. 281 NLRB at 887. In exercising the authority affirmed by the *Eastex* Court, the Board has found that a broad range of employee activities regarding the terms and conditions of their employment falls within the scope of the "mutual aid or protection" clause. See, e.g., *Dreis & Krump Mfg.*, 221 NLRB at 314 (employees' complaints over supervisory handling of safety issues); and *Tanner Motor Livery*, 148 NLRB 1402, 1404 (1964), enfd. in relevant part 349 F.2d 1 (9th Cir. 1965) (employees' protest of racially discriminatory hiring practices). See also *Ellison Media Co.*, 344 NLRB 1112, 1113–1114, 1119 (2005) (conversation between two employees was for mutual aid or protection where one employee, who had previously complained about offensive comments from a supervisor, urged a second employee to report sexually suggestive comments from same supervisor); and *Owens Illinois*, 290 NLRB 1193, 1204–1205 (1988), enfd. 872 F.2d 413 (3d Cir. 1989) (employee's action in contacting OSHA was protected).

As those cases indicate, Elias' activity unquestionably would be deemed for "mutual aid or protection" had she attempted to join forces with another employee who likewise had been the victim of alleged sexual harassment by Hamner (or anyone else in the Respondent's workplace for that matter). Thus, the question presented here is whether Elias' solicitation of support from her coworkers should be treated any differently simply because, on this occasion, Elias was confronting misconduct that Hamner seemingly directed at her alone.[13] After a review of well-established precedent, we answer that question in the negative.

In other contexts, the Board has found that an employee who asks for help from coworkers in addressing an issue with management does, indeed, act for the purpose of mutual aid or protection, even where the issue appears to concern only the soliciting employee, the soliciting employee would receive the most immediate benefit from a favorable resolution of the issue, and the soliciting employee does not make explicit the employees' mutuality of interests. In *IBM Corp.*, 341 NLRB 1288, 1294, 1307 fn. 13 (2004), for example, the Board reaffirmed that the "mutual aid or protection" element is satisfied where a single employee, facing a disciplinary interview, requests assistance from a coworker.[14] The Supreme Court has held the same. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (single employee's appeal for help from other employees implicates "mutual aid or protection" even though only that employee may have had an immediate stake in the outcome). Discipline, of course, is often highly individualized—and the *IBM* Board certainly did not suggest that concerted activity exists only where the employee asked for help has engaged in the same or similar alleged conduct for which his coworker is being investigated. Likewise, in *El Gran Combo*, 284 NLRB at 1116–1117, the Board found that an employee who, unlike his band mates, did not receive a share of the band's album sales nonetheless acted for the purpose of mutual aid or protection by soliciting fellow band members to support his individual demand for a share of the group's earnings. Similarly, in *Circle K Corp.*, 305 NLRB at 932–934, the Board found that even where an employee may have been motivated by personal concerns in soliciting a coworker to sign a letter to management regarding terms and conditions of employment of concern to all employees, the employee was nonetheless engaged in concerted activity that satisfied the "mutual aid or protection" requirement. In *Rock Valley Trucking Co.*, 350 NLRB 69, 69, 83–84 (2007), the Board found that a truckdriver who was assigned lower mileage than his coworkers was engaged in protected conduct when he raised the disparities with his coworkers and his manager and asked a coworker to bring the issue to management. Although the driver was the one who directly suffered from the unequal assignment, the Board agreed that his actions were aimed not merely to secure a personal benefit, but also sought a change from a flawed assignment process that could affect all employees.

Although arising in widely varying circumstances, all of those cases are grounded in the "solidarity" principle. In enacting Section 7, Congress created a framework for employees to "band together" in solidarity to address their terms and conditions of employment with their employer. *City Disposal Systems*, 465 U.S. at 835. "[M]ak[ing] common cause with a fellow workman over his separate grievance" is a hallmark of such solidarity,

[13] Although it was directed at Elias, Hamner's misconduct *affected* other employees, too, as indicated by Giro's testimony that she would not have liked the altered wording if it had been aimed at her, that she thought management should have been notified in some way so that disciplinary action could be taken, and that she did ask Supervisor Churley to take action. Moreover, the inappropriate and offensive message was publicly posted on a whiteboard in the employee breakroom and not delivered privately to Elias.

[14] A Board majority held that in a nonunion setting, the employer lawfully may refuse the request. Id. at 1294.

even if "only one of them . . . has any immediate stake in the outcome." *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505 (2d Cir. 1942). By soliciting assistance from coworkers to raise his issues to management, an employee is requesting that his coworkers exercise vigilance against the employer's perceived unjust practices. See *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1005 fn. 4 (1st Cir. 1988), quoting *J. Weingarten*, 420 U.S. at 260–261. The solicited employees have an interest in helping the aggrieved individual—even if the individual alone has an immediate stake in the outcome—because "next time it could be one of them that is the victim." Id.[15] "An injury to one is an injury to all" is one of the oldest maxims in the American labor lexicon.[16]

Applying that bedrock principle here would lead to the conclusion that Elias, too, was acting for the purpose of mutual aid or protection in soliciting her coworkers' assistance in complaining to management about an incident of alleged sexual harassment.[17] Nevertheless, we recognize, as did the judge, that such a finding appears to be foreclosed by the Board's decision in *Holling Press*. In that case, over a dissent by then-Member Liebman, the Board found that an employee, although acting concertedly, did *not* act for the purpose of mutual aid or protection when she sought a colleague's assistance in connection with her sexual harassment complaint. In doing so, the Board concluded:

> [W]here one employee is the alleged victim, that lone employee's protest is not concerted. And, even if the victim seeks support from another employee, and that seeking of support is concerted activity, the "mutual aid or protection" element may be missing. The bare possibility that the second employee may one day suffer similar treatment, and may herself seek help, is far too speculative a basis on which to rest a finding of mutual aid or protection. [343 NLRB at 303–304.]

Thus, *Holling Press* effectively nullifies the solidarity principle when it comes to claims of sexual harassment involving conduct directed at only one employee. In doing so, *Holling Press* seemed to create a special exception for sexual harassment claims.

The General Counsel asks us to reverse *Holling Press* in that respect. Drawing on the Board's decision in *Meyers II*, above, he argues that when an individual employee effectively invokes statutory protections benefitting employees—here, protections against sexual harassment in the workplace—that employee's efforts are for the purpose of "mutual aid or protection" under established Board and Supreme Court precedent, discussed above.[18] We agree that *Holling Press* cannot be reconciled with that precedent.

The fundamental flaws of *Holling Press* were persuasively articulated by the dissent in that case. First, the Board erroneously discounted the solidarity principle as it applies to sexual harassment in the workplace. Faced with the *IBM* case described above, the Board accepted that the solidarity principle may apply when a single employee is threatened with discipline because "discipline and the threat thereof are commonplace occurrences," *Holling Press*, 343 NLRB at 304, and so other employees are likely to seek similar assistance in return in the future. By contrast, the Board posited, claims of sexual harassment "are not a common everyday occurrence," and so there is merely a "theoretical possibility" of future reciprocation. Id. As pointed out by the dissent, the premise that claims of sexual harassment are rare is simply indefensible.[19] More broadly, as the dissent ex-

[15] As Judge Learned Hand observed more fully in *Peter Cailler Kohler Swiss Chocolates*:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "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. 130 F.2d at 505–506.

[16] The phrase is traced at least as far back as the motto of the nineteenth-century Knights of Labor. See, e.g., Atleson, *Values and Assumptions in American Labor Law* 206 fn. 13 (1983).

[17] As described, after seeing the altered whiteboard message, Elias engaged her fellow employees in conversations about the message, expressed her position that it constituted sexual harassment, stated that she planned to file a complaint with management, and asked her coworkers to sign the document she had prepared showing the altered message. And, although Elias did not intend her subsequently added statement alleging sexual harassment to be a joint statement, she testified that she proceeded with her complaint to management not only because she was offended, but because she believed other female employees were offended as well and that filing a complaint might prevent similar conduct in the future. Accordingly, it is clear that Elias' activity had a purpose relating to working conditions at the Respondent's facility. See *Dreis & Krump*, 544 F.2d at 328 fn. 10. That being true, it does not matter that Elias alone apparently was the intended target of the whiteboard incident. Nor does it matter that she did not articulate any mutuality of interest at the time. See *Timekeeping Systems, Inc.*, 323 NLRB 244, 248 (1997); and *Whittaker Corp.*, 289 NLRB at 933.

[18] In *Meyers II*, the Board accepted the principle "that efforts to invoke the protection of statutes benefitting employees are efforts engaged in for the purpose of 'mutual aid or protection,'" although such efforts may not necessarily be concerted. 281 NLRB at 887.

[19] In recent years, the EEOC, and state and local agencies in a work sharing agreement with it, have received over 11,000 sexual harassment allegations yearly. U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997–FY 2011*, *available at*

plained, neither the Act nor Board precedent distinguishes between different types of workplace grievances for purposes of determining whether the "mutual aid or protection" requirement is met. Thus, an employee who receives assistance with a workplace sexual harassment-related complaint today may assist a coworker with a disciplinary matter tomorrow, or any other matter involving other terms and conditions of employment.

Second, the *Holling Press* Board failed to deal adequately with applicable Board precedent. It is settled that the "Board is not at liberty to ignore its own prior decisions, but must instead provide a reasoned justification for departing from precedent." *Goya Foods of Florida*, 356 NLRB 1461, 1463 (2011), quoting *W & M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1346 (D.C. Cir. 2008). The *Holling Press* decision does not meet that standard. As described, the Board's rationale for distinguishing *IBM* was baseless. But more generally, *Holling Press* failed to come to grips with the lesson of the cases embracing the solidarity principle: that the "mutual aid or protection" element is satisfied by the implicit promise of future reciprocation, when one employee answers another's call for assistance, even if that promise is rarely (or never) called upon.

The result is that *Holling Press* is an outlier, having departed from established Board and court precedent without providing a coherent reason for doing so. Indeed, *Holling Press* effectively created an exception from Section 7 for claims of sexual harassment in circumstances where those claims, had they instead concerned discipline, safety, or many other matters similarly affecting working conditions, would have enjoyed the protection of the Act.[20] We thus find that fidelity to precedent and adherence to the principles of the Act will be best served by overruling *Holling Press* to the extent it is inconsistent with our decision today.[21] We hold that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection. This decision applies equally to cases where, as here, an employee seeks to raise that complaint directly to the employer, or, as in *Holling Press*, to an outside entity.

Member Miscimarra charges that in so holding, we are "eliminating the statute's 'mutual aid or protection' language" and broadening its reach to create Section 7 coverage for "every individual employee—regarding every individual complaint implicating any individual non-NLRA right—as soon as the individual seeks the involvement of anyone else who is a statutory employee." But the Board's case law, as we have shown, has long held that an employee who invokes the protection of a *statute benefitting employees* is engaged in an activity for mutual aid or protection (which may, or may not, be concerted, depending on the circumstances). Of course, we do not find Elias' activity protected simply because her complaint implicated *some* statutory right. What matters, rather, is that she approached her coworkers with a concern *implicating the terms and conditions of their employment*, and sought their help in pursuing it.

Contrary to Member Miscimarra's claims, our holding today is squarely in line with established Board precedent. Employees have protections both under the Act and under other federal and state statutes governing the workplace, which address terms and conditions of employment. That an employee's activity in the workplace may also implicate other statutes does not mean that it has somehow lost the protection of the Act. Consistent with Supreme Court and Board precedent, as discussed above, employees are not required to choose between engaging in Section 7 activity and pursuing their other legal or administrative remedies.[22] When Congress en-

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*h*ttp://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Aug. 23, 2013). Many others likely go unreported. See, e.g., Westfall, *The Forgotten Provision: How the Courts Have Misapplied Title VII in Cases of Express Rejection of Sexual Advances*, 81 U. Cin. L. Rev. 269, 280 (2012).

[20] See Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 Berkeley J. Empl. & Lab. L. 23, 39–40 (2006) (observing that "[t]he *Holling Press* majority struggled to distinguish *IBM Corp.* on the ground that sexual harassment allegations lacked a mutual interest for all employees"); Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Pol'y J 221, 226 (2005) (citing *Holling Press* as reflecting a "shriveled understanding of when employees are engaged in 'protected activity'" under Sec. 7 of the Act).

[21] In addition to bringing greater consistency to our precedent regarding the mutual aid or protection clause, overruling *Holling Press* furthers the important federal policy of preventing sexual harassment in the workplace. The Supreme Court has recognized that such harassment is "every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Thus, federal law recognizes that prevention is the best way to eliminate sexual harassment and encourages employers to do so by providing employees with, among other things, effective means to report sexual harassment. See 29 CFR § 1604.11(f) (EEOC regulation); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). We do not agree with our dissenting colleague that our decision will "predictably undermine" employee rights. Rather, we believe that fostering a supportive work culture with high coworker solidarity where employees feel free to address sexual harassment with their coworkers, results in an increased likelihood of reporting and has been linked to lower incidences of harassment in the workplace overall. See Blackstone et al., *Legal Consciousness and Responses to Sexual Harassment*, 43 Law & Society Rev. 631, 635, 646, 654 (2009).

[22] Member Miscimarra's concern that our holding creates "process restrictions" that will detract from the legal protection afforded to employees under other statutes is unfounded. First, the purported problems identified by our colleague are no more than functions of the rights employees already have under the Act. Further, as demonstrated

acted workplace legislation in the decades after the Act was passed, it clearly intended to give employees more rights and more remedies, not to eliminate existing ones.

Accordingly, we find that Elias's solicitation of her colleagues' assistance in complaining to the Respondent about the whiteboard incident was for the purpose of mutual aid or protection.

B. The Respondent did not Violate Section 8(a)(1) by Instructing Elias not to Obtain Additional Statements from her Coworkers

Having found that Elias acted both concertedly and for the purpose of mutual aid and protection, we turn to the allegations that the Respondent violated Section 8(a)(1) by its actions in connection with its investigation into Elias' conduct. The Acting General Counsel has excepted to the judge's finding that the Respondent did not violate Section 8(a)(1) when Manager Jackson instructed Elias not to obtain additional statements from her coworkers related to the sexual harassment complaint. Under the particular facts of this case, we agree with the judge that Jackson's instruction to Elias did not violate the Act.

There is no question that, as a general matter, employees have a Section 7 right to discuss with one another ongoing employer investigations into alleged employee misconduct, including allegations of sexual harassment.[23] Indeed, to prohibit such discussions, an employer bears the burden of showing that it has a legitimate business justification that outweighs employees' Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011). In the particular circumstances of this case, we find that the Respondent made that showing.

It is settled that "an employer is responsible for acts of sexual harassment in the workplace where the employer . . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR § 1604.11(d) (EEOC regulation). Consistent with this principle, the Board has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct, including complaints of harassment. See *Consolidated Diesel Co*., 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). The interest in a full, fair, and accurate resolution of sexual harassment complaints, along with prompt corrective action, is not exclusively the employer's. Employees also have an interest in raising sexual harassment complaints to management and having an effective system in place for addressing such complaints.

Here, as part of her investigation into Elias' sexual harassment complaint, Jackson instructed Elias not to obtain additional statements from her coworkers in connection with that complaint. Jackson's instruction to Elias was narrowly tailored to address the Respondent's need to conduct an impartial and thorough investigation. Elias was specifically told that, in relation to the investigation, she should let Jackson obtain any additional statements. Jackson did not prohibit Elias from discussing the pending investigation with her coworkers, asking them to be witnesses for her, bringing subsequent complaints, or obtaining statements from coworkers in future complaints.[24] Further, as Elias had made additions to the statement after her coworkers had signed it and her coworkers had expressed concern to Jackson over these alterations, Jackson's instruction would reasonably be viewed as seeking to safeguard the integrity of the investigation, not restrict Elias in the exercise of her Section 7 rights. Thus, although instructions limiting employees from discussing or seeking assistance with sexual harassment complaints and investigations may in other contexts violate the Act, we find on these facts that Jackson's narrowly tailored instruction to Elias did not do so. We therefore agree with the judge that the Respondent did not violate Section 8(a)(1) by instructing Elias to refrain from obtaining additional witness statements in connection with the sexual harassment complaint.

C. The Respondent did not Violate Section 8(a)(1) by Questioning Elias about the Whiteboard Incident and her Request to Her Coworkers

The General Counsel also excepts to the judge's finding, made without explanation, that the Respondent did not violate Section 8(a)(1) by virtue of Jackson's questioning of Elias during their August 31 telephone call as to why Elias felt the need to obtain her coworkers' signa-

by our decision below on the specific violations alleged, our holding will not restrict employers' ability to carry out their business operations, to handle complaints, or to conduct investigations as necessary. For similar reasons, we reject Member Johnson's criticism, in his partial dissent, that we somehow regard the Board as an "überagency" or that we apply Sec. 7 to override all other statutory frameworks created by Congress.

[23] See, e.g., *Ellison Media*, 344 NLRB 1112, 1113–1114 (2005); *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (Sec. 7 protects employees' right to discuss sexual harassment complaints), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003); *All American Gourmet*, 292 NLRB 1111, 1130 (1989) (rule precluding employee from discussing sexual harassment complaint with coworkers violated Sec. 8(a)(1)).

[24] We thus view Jackson's instruction as distinguishable from cases involving an employer's blanket prohibition on discussing ongoing investigations of employee misconduct. See, e.g., *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003); *Phoenix Transit System*, 337 NLRB at 510; *Keller Ford*, 336 NLRB 722, 722 (2001), enfd. mem. 69 Fed.Appx. 672 (6th Cir. 2003); and *K Mart Corp.*, 297 NLRB 80, 80 fn. 2 (1989).

tures on the document showing the reproduced whiteboard message. The Act generally prohibits employers from questioning employees about their protected concerted activity, including *why* they chose to engage in that activity.[25] At the same time, the Board has recognized that, as part of a full and fair investigation, it may be appropriate for the employer to question employees about facially valid claims of harassment and threats, even if that conduct took place during the employees' exercise of Section 7 rights.[26] As with the instruction preventing Elias from obtaining additional statements, we find on the particular facts of this case that the Respondent's questioning of Elias was not unlawful.

The record establishes that the Respondent's questioning of Elias was focused on and narrowly tailored to enabling the Respondent to conduct a legitimate investigation into Elias' complaint, as well as her coworkers' complaints against her. As described, Elias' coworkers complained to management about Elias' own conduct in seeking her coworkers' assistance in raising a sexual harassment complaint to management. These matters involved the same operative facts, timeline, actions, and participants. It was therefore reasonable for Jackson to investigate them together and to ask the questions she legitimately believed important before reaching a conclusion. Moreover, although Jackson's question concerned why Elias felt she had to obtain her coworkers' signatures, there is no evidence that Jackson was attempting to delve into Elias' motives or sentiments beyond the narrow facts surrounding the complaints at issue.[27] Instead, a reasonable employee viewing Jackson's actions in context would recognize that she was legitimately trying to gain a full picture of the events as part of her investigation. Finally, in closing the investigation, Jackson assured Elias that the Respondent was committed to protecting her against retaliation of any kind and told her to report any future incidents of harassment or retaliation. Such assurances are relevant to a determination of whether an employer's questioning of an employee about her collective actions is lawful. See generally *Bourne Co. v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (setting forth relevant factors for determining if questioning is coercive).

Based on the foregoing, we find that the Respondent's questioning of Elias did not, under the circumstances presented here, violate Section 8(a)(1). We therefore adopt the judge's recommendation to dismiss the complaint allegation.

AMENDED REMEDY

The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining in its employee handbook, New Hire CD, and on its intranet portal confidentiality provisions prohibiting the discussion of wages, hours, compensation, or working conditions of other employees. No party has excepted to this finding. The standard affirmative remedy for maintenance of unlawful work rules is immediate rescission of the offending rules; this remedy ensures that employees may engage in protected activity without fear of being subjected to the unlawful rule. *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Pursuant to *Guardsmark*, the Respondent may comply with the Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could be costly. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will cover the unlawfully broad rules, until it repub-

[25] See, e.g., *Belle of Sioux City, L.P.*, 333 NLRB 98, 105 (2001) (emphasizing that, just as an employer may not question employees about union activity, it may not question unrepresented employees about their concerted efforts to change or mitigate terms and conditions of employment).

[26] For example, in *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528–529 (2007), the Board found that the employer lawfully questioned a union supporter about alleged vulgar language and threatening behavior when making of prounion remarks. Specifically, the Board found:

> The Respondent had a legitimate basis for investigating [the employee's] misconduct, and its investigation was entirely consistent with its policy. . . . Furthermore, the Respondent made reasonable efforts to circumscribe its questioning to avoid unnecessarily prying into [the employee's] union views, and the limitations on its inquiry were clearly communicated to [him].

To be sure, the Board has found that legitimate managerial concerns regarding the prevention of harassment do not justify policies discouraging Sec. 7 activity "by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." *Consolidated Diesel Co.*, 332 NLRB at 1020. However, this does not preclude a legitimate investigation simply because some aspect of the conduct of one of the parties is protected under Sec. 7.

[27] In *Bridgestone Firestone South Carolina*, 350 NLRB at 528–529, an employee became loud, angry, and used obscenities during a conversation with his coworkers about the union. In response to a complaint from one of the coworkers about the employee's conduct and consistent with its policy against "profane, threatening or indecent language[,]" the employer conducted an investigation into the employee's alleged misconduct, including questioning the employee about his comments. The Board found that the employer's questioning did not violate Sec. 8(a)(1) because it narrowly asked whether the employee made the profane statements attributed to him by his coworkers and expressly emphasized that the substance of the potentially protected discussion in which the profanity was used was not at issue. The Board also found that the employer appropriately circumscribed its questioning to avoid prying into the employee's union views and clearly communicated the limitations on its inquiries.

lishes the handbook either without the unlawful provisions or with lawfully-worded rules in their stead. Any copies of the handbook that are printed with the unlawful rules must include the inserts before being distributed to employees. See *Guardsmark, LLC,* 344 NLRB at 812 fn. 8.

Further, the unlawful provisions have been or are in effect at the Respondent's facilities companywide. "[W]e have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *MasTec Advanced Technologies*, 357 NLRB 103, 109 (2011) (quoting *Guardsmark, LLC*, 344 NLRB at 812). As the D.C. Circuit observed, "only a company-wide remedy extending as far as the company-wide violation can remedy the damage." *Guardsmark, LLC. v. NLRB*, 475 F.3d 369, 381 (D.C. Cir. 2007).

The judge further found that the Respondent violated Section 8(a)(1) of the Act by failing to notify employees of changes in its solicitation and distribution policy (also in place nationwide) made in September 2009 and January 2011. The record reflects, however, that the Respondent's failure has been proven only with respect to the Phoenix, Arizona facility involved in this proceeding.[28] Therefore, our remedy with respect to that violation is limited to the Phoenix facility.

We therefore amend the judge's recommended remedy and modify his recommended Order accordingly, and shall substitute a new notice to conform to the Order as modified.

ORDER

The Respondent, Fresh & Easy Neighborhood Market, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining provisions in the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

(b) Failing to notify employees at its Phoenix, Arizona facility about the September 2009 and January 2011 changes to its solicitation and distribution policy.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their 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, nationwide, the portion of the confidentiality rules described in paragraph 1(a) above.

(b) Furnish all current employees nationwide with inserts for their current employee handbooks that (1) advise that the unlawful confidentiality rules listed in paragraph 1(a) above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to all current employees nationwide revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules. To the extent that these rules, and any characterizations or summaries of the same, are also found on the Respondent's intranet portal or on its New Hire CDs, revise that content so that it (1) does not contain the unlawful rules, or (2) provide lawfully-worded rules.

(c) Notify all employees at its Phoenix, Arizona facility that the solicitation and distribution policy described in 1(b) above was changed in September 2009 and January 2011.

(d) Within 14 days after service by the Region, post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix A" and within that same time period post at all its other facilities, nationwide, copies of the attached notice marked "Appendix B."[29] Copies of the notices, 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 internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of Appendix A to all

[28] The judge appears to have implicitly made this finding, stating that "although Jackson testified that this new rule was to be read to the employees at team huddles, this, apparently, was not done, at least at the facility involved herein." To the extent that the finding was not made explicit, we do so here.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

current employees and former employees employed by the Respondent at that facility any time since March 13, 2011. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of Appendix B to all current employees and former employees employed by the Respondent at such facilities any time since March 13, 2011.

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

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

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, the Board unanimously finds that the Respondent acted lawfully when dealing with three employee complaints. The first employee, Margaret Elias, complained about an offensive defaced whiteboard message that she regarded (with ample justification) as potential sex harassment. The second employee, Krista Yates, complained that she was "bullied" by the first employee, Elias, who insisted repeatedly that Yates sign a piece of paper that reproduced what appeared on the whiteboard.[1] A third employee, Gary Hamner, complained that Elias had said "fuck you" to him. The Respondent conducted an investigation; it concluded that Hamner defaced the whiteboard message, which caused him to be disciplined; Hamner's complaint against Elias was found to be without merit; Elias was advised that the whiteboard message had been inappropriate; and no adverse action was taken against her.

The General Counsel pursued a two-part claim against the Respondent, alleging (1) that Elias engaged in "protected" Section 7 activity[2] by insisting that others sign the piece of paper, and (2) that the Respondent's investigation violated Section 8(a)(1),[3] which makes it unlawful to "interfere with, restrain, or coerce" employees in the exercise of protected activity. Specifically, the General Counsel alleged, first, that an investigating supervisor unlawfully asked Elias "why she felt" she needed the paper signed by others, and second, the supervisor unlawfully asked Elias "not to obtain any further statements" so that the supervisor "could conduct the investigation . . . [and] complete it."[4]

I respectfully dissent from the majority's conclusion that this case involves "protected concerted activity" by Elias. In my view, as noted more fully below, (a) the judge properly concluded that Elias failed to engage in "concerted activity" when she insisted that co-employees sign a statement that merely documented what appeared on a whiteboard; and this conclusion is consistent with the Board decisions in *Meyers Industries*[5] and Section 7 of the Act; (b) the majority decision in *Holling Press*[6]—which my colleagues overrule—correctly interpreted Section 7's additional threshold requirement that protected conduct be undertaken for the "purpose" of "mutual aid or protection"; the judge correctly found that the conduct of Elias was not undertaken for such a purpose; and *Holling Press* utilized an analysis that was more refined than my colleagues describe; and (c) my colleagues' expansive reading of the Act's protection, even though well-intended, will produce adverse consequences in circumstances like those presented here, thereby undermining the interests of employees in regard to sex harassment complaints and other non-NLRA protection that is available to employees.

My colleagues accurately describe most of the relevant facts. As noted above, employee Elias wrote a message on a whiteboard that was defaced in an offensive manner (the word "TIPS" was changed to "TITS," and "a peanut or a worm was drawn" that appeared to be urinating). In response, Elias reproduced the "words from the whiteboard" on a sheet of paper, and Elias repeatedly insisted that three individuals—a supervisor (Anderson)[7] and two

[1] Elias also had the written statement signed by a supervisor, Michael Anderson, and a co-employee, Victoria Giro.

[2] National Labor Relations Act ("NLRA" or "Act") Sec. 7, 29 U.S.C. § 157.

[3] NLRA Sec. 8(a)(1), 29 U.S.C. § 158(a)(1).

[4] There were no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by maintaining an overbroad and discriminatory confidentiality rule in its employee handbook, on its companywide intranet portal, and on its New Hire CDs, and by failing to notify employees at its Phoenix, Arizona facility of changes to its solicitation and distribution rule. Accordingly, those findings are not before the Board for review.

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

[6] 343 NLRB 301 (2004).

[7] Anderson was a statutory supervisor and agent of the Respondent. Elias' insistence that Anderson sign the paper does not necessarily defeat the possibility that Elias engaged in protected concerted activity when demanding that co-employees Yates and Giro sign the document. However, the record reveals that she treated Anderson, Yates and Giro in virtually the same manner, which reinforces the judge's conclusion that Elias' conduct—her insistence that Anderson, Yates and Giro sign the paper—was not undertaken for the "purpose" of "mutual aid or protection" within the meaning of Sec. 7.

co-employees (Yates and Giro)—sign the paper. Other important facts were credited by the judge and are undisturbed by the Board:

- The paper was prepared by Elias because she "could not take a picture of the defaced whiteboard." Thus, the paper—when signed by others—merely contained the "words from the whiteboard."[8]
- The paper "was neither a petition nor a joint complaint of everybody signing." Elias testified that she prepared the paper because she intended to "report" the incident, but she "didn't really have any expectations beyond reporting it."
- Elias was hostile and confrontational when she insisted that her paper be signed by supervisor Anderson and co-employees Yates and Giro. The judge credited their testimony that Elias was "very loud and angry" and "aggravated," and that Elias' requests to Giro were "very heated and uncomfortable." Indeed, as noted previously, co-employee Yates submitted her own complaint against Elias the next day "for 'bullying' [Yates] into signing the statement."
- Nobody signed the paper based on planned future action. Supervisor Anderson signed the statement "only to calm . . . down" Elias and avoid "escalating" the situation. Giro reported that she "felt intimidated into signing" and signed only because the "very heated" discussion "was taking place in front of customers and she wanted to end it." Yates saw Elias "yelling and backing Anderson in to a corner" about signing the statement, and Yates was "freaked out" but signed "because she felt that was the fastest way to end 'the escalating situation.'"
- As the judge found, "Respondent did not take any action against Elias as a result of her actions," and "at the conclusion of [Respondent's] investigation," the co-employee (Hamner) who defaced the whiteboard message "was disciplined for his alteration of the whiteboard, and was warned about any future retaliation" against Elias.

[8] The judge concluded, based on uniform testimony by multiple witnesses, that *after* the paper was signed, Elias added a statement reading, "Someone changed the Board to 'TITS' instead of TIPS and put a worm pissing on my name. I take this as sexual harassment. This has been on the Board since I got here at 2PM."

I. SECTION 7'S REQUIREMENTS—GENERALLY

The threshold issue in this case—whether Elias engaged in "protected concerted activity"—is a shorthand reference to conduct protected under Section 7 of the Act, but the Board's analysis must be based on the language enacted by Congress.[9] In relevant part, Section 7 of the Act states:

> Employees shall have the right to *self-organization, to form, join, or assist labor organizations,* to *bargain collectively* through representatives of their own choosing, and to engage in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*[10]

Section 7 is the cornerstone of the Act, and it unquestionably confers protection regarding a range of activities.[11] However, the statutory language incorporates "words of limitation." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart, J., concurring). Section 7 enumerates three specific types of protection for employees: to engage in "self-organization," to "form, join, or assist labor organizations," and to "bargain collectively through representatives."

Section 7 then enumerates a fourth category, encompassing "other *concerted* activities for the *purpose* of collective bargaining or *other mutual aid or protection*." Statutory language must be construed as a whole, and particular words or phrases are to be understood in relation to associated words and phrases.[12] The language in Section 7 plainly reflects the Act's focus on "collective" actions, "self-organization" and representation, and these terms shed some light on the meaning of "mutual aid or protection."[13] As the Supreme Court observed in *Eastex, Inc. v. NLRB*,[14] Section 7 was designed "to protect concerted activities for the *somewhat* broader purpose of 'mutual aid or protection' as well as for the narrower

[9] As the Supreme Court stated in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982): "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes" (citations omitted).

[10] 29 U.S.C. § 157 (emphasis added).

[11] See, e.g., Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at A General Theory of Section 7 Conduct*, 137 U. Penn. L. Rev. 1673, 1682 (1989) (hereinafter "Morris") (Sec. 7 embodies the "substantive content" of the Act's unfair labor practice provisions).

[12] 2A Norman J. Singer, *Statutes and Statutory Construction (Sutherland Statutory Construction)* Sec. 47.16 (5th ed. 1992).

[13] See, e.g., *Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183, 1191–1192 (D.C. Cir. 2000) ("[T]he canon of *ejusdem generis* . . . counsels against our reading [a] general phrase to include conduct wholly unlike that specified in the immediately preceding list . . .").

[14] 437 U.S. 556 (1978) (emphasis added).

purposes of 'self-organization' and 'collective bargaining.'"

The Act's provisions should be liberally construed, but we must still interpret the Act in a manner consistent with its terms. Section 7 protects employee activities only if they are "concerted," and only if motivated by the "purpose" specified in the statutory language—i.e., the purpose of "collective bargaining or *other mutual aid or protection*." This follows from the statute's plain language[15] in addition to its legislative history.[16]

II. APPLYING SECTION 7 IN THIS CASE

A. Elias did not Engage in "Concerted Activity" Under Section 7 and Relevant Board and Court Decisions

The Board has an eventful history regarding what constitutes "concerted" activity for purposes of Section 7. Early cases readily distinguished between protected conduct involving multiple employees acting in "concert"[17] and unprotected activities by an individual without coordination, planning or authorization involving others.[18] In *Alleluia Cushion Co.*,[19] however, the Board expanded Section 7 by finding that a solitary employee's actions regarding statutory Occupational Safety and Health Act (OSHA) protection could be "concerted" based on the Board's own determination that other employees had an interest in what the person was doing.[20] The *Alleluia Cushion* approach—criticized as a theory of "presumed" or "constructive concerted action"[21] and a "per se" standard of concerted activity[22]—was rejected by several courts of appeals.[23] In *Meyers I*, the Board overruled *Alleluia Cushion* based on the following analysis, which is instructive in the instant case:

> [T]he per se standard of concerted activity, by which the Board determines what *ought to be* of group concern and then artificially presumes that it *is* of group concern, is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." *A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7.*[24]

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[15] In reference to Sec. 7, Professor Charles Morris described the "commonly accepted meaning" of the words "concerted" and "mutual" as follows:

> *Concerted* derives its meaning from *concert* and is generally synonymous with the phrase *in concert*. Those three terms all convey a clear meaning. In reverse order, they mean "together; jointly;" "agreement of two or more individuals in a design or plan; combined action; accord or harmony;" and "contrived or arranged by agreement; planned or devised together; done or performed together or in cooperation." The meaning of *mutual* is equally explicit: "possessed, experienced, performed, etc., by each of two or more with respect to the other; . . . held in common, shared . . . Mutual indicates an exchange of a feeling, obligation, etc., between two or more people, or an interchange of some kind between persons. . . ."

Morris, supra fn. 11, at 1679–1680 (footnotes omitted; emphasis in original).

[16] Sec. 7 of the Act was modeled after Sec. 7(a) of the National Industrial Recovery Act (NIRA), described by the Board as having "the purpose" of giving employees "the opportunity to associate freely with [their] fellow workers for the betterment of working conditions" and creating "rights in organizations of workers." *Meyers I*, 268 NLRB at 493, quoting 79 Cong.Rec. H2332 (daily ed. Feb. 20, 1935) (statement of Rep. Boland), reprinted in 2 Leg. Hist. of the National Labor Relations Act of 1935, at 2431–2432 (1935). The statutory phrase "concerted activities" was previously used in Sec. 2 of the Norris-LaGuardia Act, which declares that "it is necessary that [the individual unorganized worker] shall be free from the interference, restraint or coercion of employers . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102. The primary purpose of the Norris-LaGuardia Act "was to curtail injunctions . . . against what everyone would recognize as organized activity, notably picketing in order to promote unionization or union demands." *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 843 (2d Cir. 1980). Based on this legislative history, the Board in *Meyers I* observed that Congress understood the concept of concerted activity "in terms of *individuals united* in pursuit of a *common goal*." 268 NLRB at 493 (emphasis added).

[17] See, e.g., *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951) (employees conversing about the need for a union were found to be engaged in concerted activity).

[18] See, e.g., *Traylor-Pamco*, 154 NLRB 380, 388 (1965) (two employees who ate lunch together, and apart from other employees, were not engaged in concerted activity absent evidence "that their association in refusing to eat in the tunnel [with others] was anything but accidental"); *Continental Mfg. Corp.*, 155 NLRB 255, 257–258, 261–262 (1965) (no protected concerted activity where a single employee, acting alone, prepared and signed a letter complaining about working conditions, even though the employee undisputedly worked with a co-employee to investigate issues referenced in the complaint, the issues involved other co-employees as well, and the letter stated that "the majority of the other employees" had the same "problem" but were "afraid to speak up").

[19] 221 NLRB 999 (1975).

[20] In *Alleluia Cushion*, the employee reported safety violations to a state OSHA office and accompanied an OSHA inspector on a plant tour, with no other involvement by other employees. Finding no group action, the administrative law judge dismissed the complaint, but the Board reversed, holding that a lone employee's invocation of a statutory right designed for the benefit of all employees will be "deemed" concerted "in the absence of any evidence that fellow employees disavow such representation." 221 NLRB at 1000.

[21] *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980).

[22] *Meyers I*, 268 NLRB at 495.

[23] *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d at 304; *Ontario Knife*, 637 F.2d at 840; *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23 (7th Cir. 1980); *NLRB v. Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977).

[24] 268 NLRB at 496 (emphasis in original and added; footnote omitted).

In *Meyers I*, the Board adopted a more restrictive interpretation of Section 7, and held that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in *with or on the authority of other employees*, and *not* solely by and on behalf of the employee himself."[25] Conversely, the Board held that "*individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove *concert of action*."[26]

In *Meyers II*,[27] the Board reaffirmed this standard and elaborated on the analysis that controlled whether a single employee's conduct constitutes "concerted" activities engaged in for the "purpose of . . . mutual aid or protection."[28] Three main points emerged from the *Meyers II* decision.

First, the Board held that a single employee, though not a "designated spokesman" by other employees, could engage in "concerted" activity if he or she "bring[s] *truly group complaints* to the attention of management."[29] However, such activity could be "concerted," according to the Board, only "[w]hen the record evidence *demonstrates group activities*, whether 'specifically authorized' in a formal agency sense, or otherwise."[30] The Board stated this question was a "factual one based on the totality of the record evidence,"[31] and relevant considerations included, for example: (a) whether other employees authorized or instructed the individual to speak for them;[32] (b) whether other employees "were aware of and supported" the individual's presentation to management;[33] and (c) whether the individual previously discussed a "common . . . complaint" with other employees who, in turn, "refrained from making [their] own . . . complaint."[34]

Second, the Board in *Meyers II* held that a single employee could engage in "concerted" activity by speaking with a co-employee for the purpose of "*seek[ing] to initiate or to induce or to prepare for group action*."[35] Here, the Board quoted with approval the Third Circuit decision in *Mushroom Transportation Co. v. NLRB*,[36] where the court stated:

> It is not questioned that a conversation may constitute a concerted activity, although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in *with the object of initiating or inducing or preparing for group action* or that it *had some relation to group action* in the interest of the employees.[37]

The Third Circuit in *Mushroom Transportation* indicated that the Act's protection was unwarranted "when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to."[38] Thus, the court concluded:

> *Activity which consists of mere talk must, in order to be protected, be talk looking toward group action.* If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is *an individual, not a concerted, activity*, and, *if it looks forward to no action at all, it is more than likely to be mere "griping."*[39]

Third, the Board in *Meyers II* rejected the notion that Section 7 protection might be triggered by "a single employee's invocation of a statute enacted for the protection of employees generally."[40] The Board distinguished cases involving the Section 7 protection afforded an individual employee who seeks to enforce rights under a collective-bargaining agreement.[41] Employees can engage in concerted activity associated with "appeals to legislators" and "administrative and judicial forums,"[42] and the Board in *Meyers II* recognized that, like rights arising under a labor contract, statutory rights could be just as appropriate for "joint employee action."[43] How-

[25] Id. (emphasis added).
[26] Id. at 498 (emphasis in original and added).
[27] 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).
[28] Id. at 885. The Board decision in *Meyers II* resulted from a remand by the Court of Appeals for the D.C. Circuit, although the court did not pass on the merits of the standard adopted by the Board. *Prill v. NLRB*, 755 F.2d 941, 957 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).
[29] Id. at 886–887 (emphasis added).
[30] Id. (emphasis added).
[31] Id.
[32] Id. at 886, describing *Mannington Mills*, 272 NLRB 176 (1984).
[33] Id., describing *Mannington Mills*, supra fn. 32, and *Allied Erecting Co.*, 270 NLRB 277 (1984).
[34] Id., describing *Walter Brucker & Co.*, 273 NLRB 1306 (1984).
[35] Id. at 887 (emphasis added).
[36] 330 F.2d 683 (3d Cir 1964).
[37] Id. at 685 (emphasis added), quoted in *Meyers II*, 281 NLRB at 887, and in *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).
[38] Id.
[39] Id. (emphasis added).
[40] 281 NLRB at 887.
[41] It is well established that Sec. 7 protects an individual's effort to enforce collective-bargaining agreement provisions, which, obviously, resulted from contract negotiations. The individual's activity is therefore considered an extension of the concerted action that produced the agreement. *NLRB v. City Disposal Systems*, 465 U.S. 822, 831–832 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).
[42] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 566 (1978).
[43] 281 NLRB at 888.

ever, the Board stated: "We merely find that invocation of employee contract rights is a continuation of an ongoing process of employee concerted activity, whereas employee *invocation of statutory rights is not*."[44] Of particular import in the instant case is the Board's conclusion in *Meyers II* regarding this issue:

> [A]lthough it is our duty to construe the labor laws so as to accommodate the purposes of other Federal laws . . . , *this is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes.* The Board was not intended to be a forum in which to rectify all the injustices of the workplace. In *Meyers I*, the Board noted that although we may be outraged by a respondent who may have imperiled public safety, *we are not empowered to correct all immorality or illegality arising under all Federal and state laws.* . . .[45]

As a final matter, the Section 7 phrase, "concerted activities," contemplates *more* than the mere presence or involvement of two employees. Thus, as noted above (supra fn. 15), Professor Charles Morris has described the "commonly accepted meaning" of the word "concerted" as follows:

> *Concerted* derives its meaning from *concert* and is generally synonymous with the phrase *in concert.* Those three terms all convey a clear meaning. In reverse order, they mean "*together; jointly*;" "agreement of two or more individuals in *a design or plan; combined action; accord or harmony*;" and "contrived or arranged *by agreement; planned or devised together; done or performed together or in cooperation.*"[46]

If one person is a witness to somebody else's car crash, and if they both have a shared interest in avoiding such accidents, this does not mean they have engaged in "concerted" activity. Rather, our cases establish that "concerted" activity takes place, within the meaning of Section 7, *only* if the conduct involves or contemplates a joint endeavor to be "done or performed together or in cooperation."[47] A conversation between two employees, though it involves "a speaker and a listener," constitutes concerted activity only if "at the very least it was engaged in *with the object of initiating or inducing or preparing for group action or that it had some relation to group action* in the interest of the employees."[48] Thus, activity involving two or more employees consisting of "mere talk" must, in order to have Section 7 protection, "be talk *looking toward group action*."[49]

In the instant case, my colleagues—though acknowledging *Meyers II* and its progeny as controlling law[50]—reverse the judge's finding that Elias, the employee, failed to engage in "concerted" activity within the meaning of *Meyers II*.[51] Like the judge, however, I believe the above principles warrant a conclusion that Elias was *not* engaged in "concerted" activity when she engaged in an angry confrontation (with a supervisor and two other employees) about the paper she insisted that they sign.

As noted previously, the paper on which Elias sought signatures merely contained the "words from the whiteboard." The paper "was neither a petition nor a joint complaint of everybody signing," nor can Elias' actions be reasonably regarded as "bringing truly group complaints to the attention of management."[52] Rather than engaging in conduct "with the object of initiating or inducing or preparing for group action,"[53] Elias testified

[44] Id. (emphasis added).

[45] Id. (emphasis added), citing *Meyers I*, 268 NLRB at 499.

[46] Morris, supra fn. 11, at 1679–1680 (footnotes omitted; emphasis in original).

[47] Id.

[48] *Mushroom Transportation*, supra fn. 36, 330 F.2d at 685 (emphasis added), quoted in *Meyers II*, 281 NLRB at 887, and in *Vought Corp*., 273 NLRB at 1294.

[49] Id. (emphasis added).

[50] Although *Meyers II* remains the governing standard, some recent Board rulings seemingly revive the notion that an employee's mere discussion of certain subjects is protected on the basis that it is "inherently" concerted, *Hoodview Vending Co.*, 359 NLRB 355 (2012), or might "spawn collective action," *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied 81 F.3d 209 (D.C. Cir. 1996). The courts have not been receptive to the approach taken by the Board in these cases. See, e.g., *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 214 (D.C. Cir. 1996) ("We neither understand nor endorse the Board's 'spawning' theory, which, on its face, appears limitless and nonsensical."). See also *Trayco of South Carolina, Inc. v. NLRB*, 927 F.2d 597 (4th Cir. 1991), denying enf. 297 NLRB 630 (1990).

[51] The majority supports its finding that Elias engaged in "concerted" activity by citing *Holling Press*—which they overrule today—for the proposition that an employee's appeal to coworkers "to support her sexual harassment claim" constituted concerted activity. As noted in the text, numerous facts make it unreasonable to characterize Elias' actions as seeking group "support" for her "complaint" to management. Moreover, the instant case is materially different from *Holling Press*, where an employee had a pending state agency sex harassment claim; the employee joined by "union officials" met with the employer regarding the claim; and the employee attempted to arrange for other employees to testify as witnesses in an upcoming agency hearing. *Holling Press*, 343 NLRB at 301, 307–309. Thus, unlike the instant case, the employee's co-employee appeal in *Holling Press* clearly had the "object" of "initiating or inducing or preparing for [future] group action" (i.e., testimony by a co-employee in a future hearing). *Mushroom Transportation Co. v. NLRB*, 330 F.2d at 685. By comparison, neither Elias nor her co-employees in the instant case contemplated any future action of any kind, nor did anyone contemplate any type of group conduct or coordination.

[52] *Meyers II*, 281 NLRB at 886–887.

[53] *Mushroom Transportation*, supra fn. 36, 330 F.2d at 685.

that—even in relation to her individual complaint—she "didn't really have any expectations beyond reporting it." The record is replete with indications that the two co-employees, Yates and Giro, did not regard the paper as having "some relation to group action."[54] Yates signed the paper only to end an "escalating situation" that caused her to be "freaked out," and which prompted Yates to submit her own complaint against Elias for "bullying" Yates into signing the document. Giro likewise stated she "felt intimidated into signing" the paper, and she did so only to end the "very heated" discussion that "was taking place in front of customers." These facts render implausible any suggestion that Elias was acting in "concert" with anyone else, and it is likewise clear that co-employees Yates and Giro were not acting in "concert" with Elias.[55]

Without question, neither Elias nor other employees should have been subjected to an offensive, defaced whiteboard message. But that begs the question of whether Elias engaged in "concerted" activity when insisting that her two co-employees sign a paper that had an extremely limited purpose (i.e., to memorialize what had appeared on the whiteboard), and that pertained only to Elias' individual complaint. As the Board stated in *Meyers II*, our enforcement of the Act "is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices of the workplace."[56]

[54] Id.

[55] I do not agree with the majority's suggestion that my criticisms of their analysis "represent a dispute with existing Board jurisprudence." Here, the majority cite a variety of cases that stand for a proposition that I do not dispute: a finding of concertedness is not defeated merely because solicited employees are uncomfortable with a solicitation, do not share the solicitor's cause, or choose not to join it. To be clear, where an individual employee speaks to a coworker, *and that speech looks toward group action*, the speaker's activity is concerted regardless of how the solicitation is received. My central point is that Elias' conduct—asking Yates and Giro to verify that she had correctly copied what was on the whiteboard—did not look toward group action and therefore was not concerted. My purpose in drawing attention to Yates's and Giro's opposition is to underline how very remote the conduct at issue here is from core Sec. 7 activity—i.e., action that is undisputedly concerted because undertaken "jointly" or in "accord or harmony" or "cooperation." Morris, supra fn. 11, at 1679–1680; see also *Meyers II*, 281 NLRB at 883 ("[I]t is protection for joint employee action that lies at the heart of the Act."). In analyzing an issue on the border of concertedness, it is useful to remind ourselves how far from the heartland we are.

[56] *Meyers II*, 281 NLRB at 888 (citations omitted).

B. Holling Press Correctly Interprets Section 7's "Mutual Aid or Protection" Language, and Elias' Actions Failed to Satisfy this Additional Requirement

For employee actions to be protected under Section 7, they must not only be "concerted," they must also be undertaken for the "purpose" of "collective bargaining or *other mutual aid or protection*." I agree with my colleagues that employees can collectively pursue "mutual aid or protection" in numerous ways. However, the instant case does not involve such an endeavor. Moreover, my colleagues embrace the broader proposition that "when an individual employee effectively invokes statutory protections benefitting employees—here, protections against sexual harassment in the workplace—that employee's efforts are for the purpose of 'mutual aid or protection.'"[57]

There are two problems with my colleagues' suggestion that such activities are inherently protected under the Act. In *Meyers II*, the Board squarely held that invoking "statutory protections" did not even necessarily establish that the conduct involves "concerted" activity as defined in Section 7. More importantly, my colleagues embrace a standard that eliminates the statute's "mutual aid or protection" language.

By holding that any concerted activity regarding a single person's complaint inherently involves "mutual aid and protection" if it implicates a non-NLRA statutory right, my colleagues reinstate a "flip side" of *Alleluia Cushion* that the Board properly rejected in *Holling Press*.[58] In *Alleluia Cushion*, the Board embraced a now-discredited position that a single person's conduct could

[57] The *Meyers II* Board, in the context of explaining its rejection of the *Alleluia Cushion* doctrine, remarked that "efforts to invoke the protection of statutes benefiting employees are efforts engaged in for the purpose of 'mutual aid or protection.'" 281 NLRB at 887. However, this statement appears in a decision that was wholly devoted to articulating a proper understanding of "concerted activity." It cannot be fairly read as categorically holding that such efforts are *invariably* for mutual aid or protection, without regard to the facts of a particular case. Indeed, the *Meyers II* Board followed that statement with a brief discussion of *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), suggesting that, in context, the Board had in mind employees' "'appeals to legislators to protect their interests as employees,'" 281 NLRB at 887 (quoting *Eastex*, 437 U.S. at 566)—not an individual employee's pursuit of a sexual harassment complaint on behalf of her- or himself alone.

[58] *Holling Press*, 343 NLRB at 303, citing *Alleluia Cushion*, 221 NLRB at 1000–1001. I join Member Johnson in finding that the majority's application of its "solidarity principle" is based on an unwarranted extension of Judge Learned Hand's definition of a sympathy strike in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (2d Cir. 1942), and in finding that it cannot survive scrutiny because, as explained below, it presumes what must be proven, i.e., that the conduct at issue was "for the purpose of . . . mutual aid or protection."

be regarded as inherently "concerted."[59] In *Holling Press*, the Board correctly concluded it was equally objectionable to "*presume*" that concerted conduct regarding a single person's complaint can inherently involve "mutual aid and protection."[60]

It bears emphasis that Section 7 states that concerted activities are protected only if undertaken for the "*purpose*" of "collective bargaining or other mutual aid or protection." The term "purpose" refers to intent. We have nearly 80 years of precedent establishing that, in cases that turn on a particular type of intent, motivation must be proven.[61] On its face, Section 7 contemplates a "purpose" that must be shared in some way by the employees involved in the "mutual" aid or protection.[62] The term "mutual" means "entertained, proffered, or exerted by *each* with respect to the other of two or to *each* of the others of a group."[63]

The facts of the instant case do not reflect any evidence that the interaction between Elias and other employees had the "purpose" (i.e., intent) of "mutual aid or protection." Although Elias insisted that co-employees Yates and Giro sign the paper that reproduced the words written in the defaced whiteboard message, the paper "was neither a petition nor a joint complaint of everybody signing." Although Elias sought the signatures of co-employees Yates and Giro, this pertained solely to Elias' individual pursuit of a complaint that she presented on behalf of herself. Regarding her individual complaint, Elias testified that she "didn't really have any expectations beyond reporting it." To say the least, nothing suggests that Elias took action for the "purpose" of aiding or protecting other employees. Nor is there any evidence that any co-employees acted for the "purpose" of giving mutual aid or support to Elias. Indeed, co-employee Yates submitted her own complaint *against* Elias for "bullying" Yates into signing the document. Co-employee Giro likewise signed only to end an angry, public confrontation that took place "in front of customers."

In short, we are left here with a case in which *nobody* acted for the "purpose" of extending "mutual aid or protection" to someone else. My colleagues find, nonetheless, that concerted activities took place for "mutual aid or protection" because Elias, on behalf of herself, wanted to complain about sex harassment. More generally, the Board majority announces a broad holding that "an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint *is acting for the purpose of mutual aid or protection*." They state this holding "applies equally to cases where . . . an employee seeks to raise that complaint directly to the employer, or . . . to an outside entity."

The broad holding announced by my colleagues dispenses with any inquiry about *whether* employee interaction involving a complaint about sex harassment (or, presumably, any other statutory employment right) involves the "purpose" set forth in Section 7 as a prerequisite to the Act's protection—i.e., whether the "purpose" relates to "*mutual* aid or protection." In my view, such a proposition was properly rejected by the Board majority in *Holling Press*, which my colleagues now overrule, and which utilized an analysis that was more refined than my colleagues describe.

In *Holling Press*, an employee, Catherine Fabozzi, asked a co-employee (Garcia) to testify in an outside proceeding in support of an individual sexual harassment claim. Contrary to my colleagues' description, nothing in *Holling Press* created a "special exception for sexual harassment claims" in Section 7. Rather, the Board held that "concerted" employee activities—whether they related to sex harassment or other matters – were all subject to *the same treatment* under Section 7: the Act's protection is available if the evidence establishes, in addition, that the activity occurred for the "purpose" of "collective bargaining or other mutual aid or protection."

The Board majority in *Holling Press* conducted a factual inquiry consistent with Section 7's structure and language. The majority determined that the interaction between Fabozzi and the co-employee was "concert-

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[59] For a discussion of *Alleluia Cushion*, which was overruled in *Meyers I*, see the text accompanying fns. 19–26, supra.

[60] 343 NLRB at 303 (emphasis in original).

[61] The most obvious examples are cases involving antiunion discrimination alleged to violate Sec. 8(a)(3). In this context, we have decades of case law indicating that alleged violations may not rest on the "arguable possibility" that unlawful intent existed, nor is it sufficient to rely on "mere suspicion and conjecture" or "suspicion, surmise, implications, or plainly incredible evidence." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312–313 (1965); *NLRB v. Firestone Tire & Rubber Co. (Foam Div.)*, 539 F.2d 1335, 1339 (4th Cir. 1976); *Independent Gravel Co. v. NLRB*, 566 F.2d 1091, 1094 (8th Cir. 1977).

[62] See, e.g., *Continental Mfg. Corp.*, supra fn. 18, 155 NLRB at 257–258, 261–262, when a single employee gave the employer a letter complaining about working conditions and stating that "the majority of the other employees" had the same "problem" but were "afraid to speak up." Even though the employee undisputedly worked with a co-employee to investigate issues referenced in the letter, which involved other co-employees as well, the Board found there was "no protected concerted activity" because, among other things, the letter was prepared and signed by the employee "acting alone" without any evidence that "the letter was *intended* to enlist the support of other employees." Id. at 257–258 (emphasis added).

[63] *Webster's Third New International Dictionary of the English Language (1981)* 1493. See also Morris, supra fn. 11, at 1679–1680 (commonly accepted meaning of "mutual" is "possessed, experienced, performed, etc., by each of two or more with respect to the other; . . . held in common, shared . . . Mutual indicates an exchange of a feeling, obligation, etc., between two or more people, or an interchange of some kind between persons. . . .").

ed."[64] The majority then evaluated whether the record supported an additional finding that the interaction involved the "purpose" of "mutual aid or protection," and concluded it did not. This was a particularized finding based on the evidence, as described by the *Holling Press* majority:

> [W]ith respect to mutual aid or protection, the record reveals that from the outset, Fabozzi charted a course of action *with only one person in mind—Fabozzi herself*. To begin with, Fabozzi's complaint was individual in nature. . . . Thus, her apparent requests to coworkers to help her out . . . were not made to accomplish a collective goal. Rather, their purpose was to advance her own cause. . . . Further, there is *no evidence that Fabozzi offered or intended to help any employees as a quid pro quo for their support of her personal claim*. Her goal was a purely individual one. In addition, there is *no evidence that any other employee had similar problems—real or perceived—with a coworker or supervisor*. In particular, there is *no evidence Garcia took offense to [the alleged harasser's] comment* . . . or sought Fabozzi's help. *Nor did Garcia show any interest in assisting with Fabozzi's claim*. Indeed, Fabozzi's request that Garcia become a witness was accompanied by the threat that she could force Garcia to testify by "hitting" her with a subpoena. *Garcia's evident lack of concern regarding [the alleged harasser's] comment, her lack of interest in supporting Fabozzi, and Fabozzi's aggressive tactics with Garcia clearly establish the absence of any mutual purpose here*. Thus, even though Fabozzi's exhortation to Garcia to testify on her behalf constitutes concerted activity, *it was not made to benefit the group, but rather to advance Fabozzi's personal case*.[65]

Two other aspects of the Board majority ruling in *Holling Press* are contrary to my colleagues' discussion of that case.

First, the *Holling Press* majority—rather than asserting a philosophical preference—based its decision on the fact that Section 7 requires separate inquiries into whether activities were "concerted" (governed by *Meyers I* and *II*, described above), and whether the activities had the requisite "purpose" involving "mutual aid or protection." The majority noted that Section 7 requires "concert plus mutual aid or protection," and it rejected (as contrary to *Meyers I* and *II*) the notion that "where activity is found to be concerted, the purpose of that activity must, in effect, be *presumed* to be for mutual aid or protection."[66] The *Holling Press* majority properly rejected the notion that "when one employee asks for the assistance of another, there is *always* mutual aid or protection."[67] Referring to then-Member Liebman's dissenting views, the majority explained:

> In the instant case, *we have the element of concert, but not the element of mutual aid or protection.* In our view, our dissenting colleague is simply presuming from the concerted nature of Fabozzi's request to Garcia . . . that Fabozzi's complaint was for the purpose of mutual aid or protection. This is contrary to the teaching of *Meyers I* and *II*, discussed above, which explain that the *concepts of concertedness and mutual aid or protection are analytically distinct and must be analyzed separately*. . . . As explained above, Fabozzi's purpose in filing the charge was to benefit herself alone. The mere fact that Fabozzi subsequently enlisted Garcia to assist her with her complaint *does not somehow expand the scope of the original complaint beyond its intended purpose of benefiting Fabozzi alone*. . . .[68]

Second, the Board majority in *Holling Press* emphasized—as did the Board in *Meyers I* and *II*—that it was *not* finding that all employee conduct regarding sex harassment claims was unprotected under Section 7. Likewise, the majority clearly indicated that an individual's right to freedom from sex harassment and other workplace discrimination—even if outside the scope of Section 7—was clearly worthy of the protection afforded by other employment statutes. Thus, the *Holling Press* majority stated:

> In fact, *we do not "treat sexual harassment at work as merely an individual concern."* Such conduct can be, and often is, of concern to many persons in the workplace. *Where the victims and their supporters protest that conduct, the protest can fall within the ambit of Section 7*. However, where one employee is the alleged victim, that lone employee's protest is not concerted. And, even if the victim seeks support from another employee, and that seeking of support is concerted activity, the "mutual aid or protection" element may be missing. The bare possibility that the second employee may one day suffer similar treatment, and may

[64] Unlike the instant case, the interaction clearly contemplated future group activity (the co-employee's testimony in Fabozzi's upcoming proceeding), so the interaction was "concerted" within the meaning of Sec. 7. See fn. 51, supra.

[65] 343 NLRB at 302 (emphasis added).

[66] Id. at 303.

[67] Id. (emphasis added).

[68] Id. (emphasis added; footnote omitted).

> herself seek help, is far too speculative a basis on which to rest a finding of mutual aid or protection.[69]

The above discussion reveals that, unlike the broad holding announced by my colleagues, the Board majority in *Holling Press* did not categorically exclude individual sex harassment complaints and other statutory employment claims from the scope of Section 7. Rather, the Board majority in *Holling Press* conducted an individualized review of the record, based on the language and structure of Section 7, which supported a finding that the employee's conduct was "concerted," but not for the "purpose" of mutual aid or protection.

For the reasons expressed previously, I believe the record here warrants a conclusion that Elias' conduct was not "concerted" nor did it occur for the "purpose" of mutual aid or protection. For these reasons alone, I would dismiss the complaint allegations that the Respondent violated Section 8(a)(1) in the course of investigating Elias' complaint.

C. Expanding Section 7 Will Undermine Employee Interests Regarding Sex Harassment Claims and Other Types of Statutory Protection

As a final matter, I respectfully disagree with my colleagues' statement that their holding "furthers the important federal policy of preventing sexual harassment in the workplace." I believe it is likely to have the opposite result, which is demonstrated by the allegations asserted against the Respondent, although they are properly being dismissed after years of Board litigation.[70] My colleagues' effort to expand the Act's protection is well-intentioned, but I respectfully submit there are two important shortcomings in their analysis.[71]

First, I believe the majority does not adequately examine the enormous array of federal, state and local statutory rights and obligations that confront employers, employees and unions in workplaces throughout the country. These non-NLRA statutes confer extremely important protection on employees in a work force that, increasingly, is becoming more diverse. My colleagues properly recognize that all women—indeed, all employees regardless of sex—have a right to work without being subjected to unlawful sex harassment or sex discrimination. However, there are other equally important types of statutory protection. Just to name a few, these include: (i) minimum wage and overtime requirements, which spawn additional issues about breaks and meal periods; (ii) occupational safety and health requirements, which address potentially life-threatening hazards and accidents in the workplace; (iii) workers' compensation issues and claims arising from work-related injuries; (iv) unemployment insurance issues and claims that can arise from layoffs, work force reductions and major business changes; (v) complex benefits and tax issues that arise from questions regarding how employees are compensated; and (vi) additional legal protection against discrimination or retaliation based on race, national origin, color, religion, age, disability, veteran status, family leave, citizenship, benefits eligibility, and (in certain jurisdictions) sexual orientation, height, weight, marital status, and a near-innumerable variety of other protected characteristics.

The broad holding announced by my colleagues—though couched in terms pertaining to a "sexual harassment complaint"—appears to have limitless application to every one of these other types of statutory claims. In fact, the General Counsel's more expansive argument, as my colleagues note, is that "when an individual employee effectively invokes *statutory protections* benefitting employees . . . that employee's efforts are for the purpose of 'mutual aid or protection.'" Even under preexisting law, which interpreted Section 7 consistent with its terms, there are many circumstances where the Act has conferred protection on two or more employees who, seeking to enforce statutory rights, engage in "concerted" activities with evidence of a shared "purpose" to afford "mutual aid or protection."[72] Now, my colleagues appear to create Section 7 coverage for every *individual*

[69] Id. at 303–304 (emphasis added; footnote omitted).

[70] Contrary to the majority's suggestion, my concerns regarding "process restrictions" are not allayed by the Board's finding in this case that the Respondent lawfully conducted an investigation into Elias' conduct. My colleagues find Respondent's conduct lawful based on "the particular circumstances" and "particular facts" of this case. One cannot determine what other questions, during a different investigation, will constitute unlawful interference, restraint or coercion. Thus, in dismissing the allegations in *this* case, the majority leaves intact the chilling prospect of impending investigations, prolonged litigation, and potential liability in future similar cases. Such prospects necessarily restrict an employer's range of motion in responding to employee complaints and conducting investigations, regardless of whether the employer is subsequently found, on the particular facts and circumstances of its case, to have acted lawfully under the NLRA.

[71] For the reasons stated by Member Johnson and those set forth below, I agree with Member Johnson that where employee and employer are engaged in parallel investigations—i.e., simultaneously gathering evidence of potential violations of other employment statutes—the burden of proof should be on the General Counsel to show that an employee is *not* interfering with the employer's investigation.

[72] See, e.g., *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940); *Eastex v. NLRB*, 437 U.S. at 565; *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). The Board has also addressed the extent to which employees have a protected right under Sec. 7, and whether employers violate Sec. 8(a)(1) of the Act, regarding various types of "class action" waivers. See, e.g., *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied 737 F.3d 344 (5th Cir. 2013). Nothing in this opinion should be regarded as passing on the merits of such cases.

employee—regarding every *individual* complaint implicating any *individual* non-NLRA right—as soon as the individual seeks the involvement of anyone else who is a statutory employee. Such coverage appears to be unaffected by whether or not the object(s) of the appeal are willing or unwilling to help, whether or not they believe they have a shared interest in the matter, whether (as occurred in the instant case) they file their own complaint against the person who is seeking assistance, and whether or not the individual complaint has merit. I hope these assessments are incorrect. However, I am concerned that the majority's holding may be the source of an unprecedented expansion in Section 7 coverage that nobody can presently anticipate. I respectfully submit that such an expansion in Section 7's coverage would be dramatically at odds with *our* statute, its legislative history, and its underlying policies and purposes, which Congress intentionally limited to "concerted" activities by *multiple* employees who take "collective" action for the "purpose" of "mutual" aid or protection.

My second concern relates to the unintended consequence of my colleagues' holding: rather than advancing the policies associated with statutory requirements like the prohibition against sex harassment, expanding Section 7's coverage will predictably *undermine* the many important non-NLRA statutes and regulations that afford individual protection to employees. The NLRA focuses primarily on the *process* by which employees can decide whether to have union representation and engage in collective bargaining.[73] By comparison, other employment statutes primarily require a desired *outcome*: they mandate safe workplaces with freedom from unlawful discrimination or harassment where employees are treated in compliance with other applicable laws. Every employee affected by my colleagues' holding *already* enjoys non-NLRA statutory protection with *existing* enforcement machinery under the substantive statute(s) implicated in an employee's individual complaint.

By making Section 7 applicable to every situation where one employee appeals to another regarding an individual complaint involving sex harassment or other statutory rights, numerous "process" restrictions under the NLRA become applicable:

- *Unlawful Interrogation*. The NLRA broadly prohibits the questioning of employees regarding "protected" activities.[74] Under my colleagues' holding, the employer, though obligated to conduct an investigation and take remedial action under substantive laws like Title VII of the Civil Rights Act of 1964,[75] is prohibited under the NLRA from questioning employees—including the person who presented the complaint—about the "protected" activity.
- *Unlawful Surveillance*. The NLRA prohibits employer surveillance of "protected" activities, as well as comments or actions that create the impression of surveillance.[76] Yet, employee complaints often involve disputes over what occurred or was communicated by or between employees. Under my colleagues' holding, fact-gathering regarding such disputes will become difficult or impossible, because the NLRA renders unlawful most video or audio surveillance, email system searches, and similar investigative efforts regarding "protected" conduct.
- *The Right to "Refrain From" Protected Activity*. If particular conduct is "protected," Section 7 affirmatively protects the right of employees to "engage in" the conduct *and* to "refrain from" engaging in the conduct. Thus, if an employee's individual complaint involves "protected" conduct, the complaining employee or co-employee witnesses may invoke an NLRA-protected "right" to "refrain from" answering questions and providing relevant information, even if the relevant claim involves a sexual assault associated with a sex harassment complaint, for example, or a

[73] The NLRA focuses on the process governing union representation elections, but employees are responsible for making their own decision regarding representation. See, e.g., NLRA Sec. 9(a), 29 U.S.C. § 159(a) (providing for representatives "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes"); Sec. 7, 29 U.S.C. § 157 (protecting the right of employees to "engage in" and "refrain from" activities protected under the Act). Likewise, employers and unions are responsible for whatever substantive terms result from negotiations, and the Act prohibits the Board from imposing substantive contract terms on any party. See, e.g., NLRA Sec. 8(d), 29 U.S.C. § 158(d) (providing that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession"); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (the Board lacks the authority to impose substantive contract terms on any party).

[74] My colleagues note, correctly, that the Act "generally prohibits employers from questioning employees about their protected concerted activity, including why they chose to engage in that activity."

[75] As the majority acknowledges, under Title VII of the Civil Rights Act of 1964, "an employer is responsible for acts of sexual harassment in the workplace where the employer . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR § 1604.11(d) (EEOC regulation).

[76] See, e.g., *Automotive Plastic Technologies, Inc.*, 313 NLRB 462, 466–467 (1993); *Avondale Industries*, 329 NLRB 1064, 1068 fn. 16 (1999).

work-related injury or fatality implicated in an OSHA complaint.

- *Difficulty Knowing Which Individual Complaints Are "Protected*." Under my colleagues' holding, Section 7 will cover all individual complaints that implicate statutory rights, but only if there is "concerted" activity by two or more employees. Yet, because the NLRA prohibits interrogation about "concerted" activity, employers cannot lawfully make inquiries sufficient to determine which individual complaints are covered by Section 7, and which are not.
- *Large Number of Individual Complaints Affected*. Co-employees predictably will be the most frequent source of information about employment-related complaints, and their involvement may occur in numerous ways and at different times. Therefore, under my colleagues' holding, nearly every investigation involving individual complaints will present difficult questions about whether or when the NLRA process-based restrictions are triggered.
- *Inability to Establish Standard Complaint-Handling Procedures*. Conventional cases involving "protected" activity often give rise to difficult questions about whether the employer has *knowledge* of the activity. Yet, as noted above, the Act prohibits employers from making inquires about "protected" activity, so employers cannot readily ascertain whether or when the NLRA applies to individual complaints, even if they exclusively invoke non-NLRA rights. Therefore, under my colleagues' holding, employers will be unable to adopt a standard process for handling and investigating individual complaints unless they treat *every* individual complaint as being "protected" under the NLRA.

These NLRA "process" restrictions play a vital role when employees engage in conventional types of "protected concerted activity" that have long been protected under Section 7. However, the same "process" restrictions—if expansively applied to nearly every individual complaint implicating *non-NLRA* statutory rights—will clearly detract from the legal protection afforded to employees under such statutes.

This problem is illustrated by the instant case. Because Elias' conduct was alleged to be "protected" (an allegation that my colleagues now embrace), the Respondent has participated in years of litigation based on *two questions* that were asked during the investigation into Elias' individual sex harassment complaint. Moreover, my colleagues find Respondent's conduct lawful only based on "the particular circumstances" and "particular facts" of this case, so one cannot determine what other questions, during a different investigation, will constitute unlawful interference, restraint or coercion regarding "protected" rights in violation of Section 8(a)(1).

Although my colleagues' reasoning leads to the correct outcome, it bears emphasis that their extensive analysis arises from a single person's *individual* complaint, based on Elias' limited interaction with *two employees* (neither of whom wanted to help her), in relation to *two questions* asked during *one interview* conducted on a *single day* by a *single employer* regarding a *single statutory issue* (alleged sex harassment). My colleagues' holding appears to expand Section 7's coverage to *all* individual complaints whenever one employee attempts to involve another statutory employee regarding *all* types of potential employment rights, and *all* employers covered by the Act, affecting *innumerable* interviews and questions asked in workplaces every day throughout the country.

An employer is the only party on the scene, in real time, who can give employees what is required by the numerous employment statutes that focus on "outcome"—i.e., a legally compliant workplace. When an employer receives an "individual" complaint that implicates a non-NLRA statute, employers *already* have a legal obligation to protect employee interests by doing what the non-NLRA statute requires: to ascertain the applicable legal requirements, conduct an immediate investigation, reconcile conflicting evidence, and take strict, prompt remedial action if required. Regarding Elias' individual sex harassment complaint, the Respondent promptly accomplished all of the steps described above. However, based on an expansive interpretation of Section 7—which my colleagues now embrace—*two questions* asked during the Elias interview resulted in years of Board litigation.

I fully support the Act's aggressive enforcement where the evidence proves that two or more employees are engaged in "concerted" activities for "purpose of . . . mutual aid or protection." Absent such evidence, however, it undermines the policies and purposes of *other* important federal, state and local statutes to broadly apply the NLRA's "process" restrictions on top of the non-NLRA substantive and procedural requirements implicated in a single employee's individual complaint. Employers will need to focus on limiting and narrowly tailoring their investigations and discussions with employees, rather than focusing on the substantive legal issues relating to

individual complaints. Employers will need to anticipate—consistent with the Respondent's experience—that one *or two questions may result in years of Board litigation*, separate from the complex non-NLRA laws and procedures that actually govern the employee complaint. Extensive research is not needed to conclude that these problems will delay or obstruct investigations and inhibit the vigor with which they can be carried out. Necessarily, these problems will operate to the detriment of employees.

In this respect, I believe the majority's holding is inconsistent with the Board's statutory duty to accommodate and avoid undermining federal statutes other than the NLRA. As the Supreme Court stated more than 70 years ago:

> *[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.* Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation *without excessive emphasis upon its immediate task.*[77]

All Board members agree there is no room in the modern workplace for unlawful sex harassment and other types of unlawful conduct. However, we enforce a single statute that, on its face, does not afford protection to "individual" action. Moreover, as noted above, the majority's expansion of Section 7—though well-intended—will impair employee rights and hinder the ability of employers to comply with statutes that require prompt, thorough investigations and meaningful corrective actions.

For these reasons, I concur in the majority's determination that the Respondent's actions during its interview with Elias were lawful and did not violate Section 8(a)(1). However, I dissent from the majority's decision to overrule *Holling Press*, and I dissent from their finding that the activities at issue here were "concerted" and took place for the "purpose" of "mutual aid or protection."

MEMBER JOHNSON, concurring in part and dissenting in part.

In this case, we are five Board Members divided by a common language.[1] All of us seemingly agree that the language of Section 7 of the Act states that, in order for us to find the unrepresented employee activity at issue here was protected by that provision, the General Counsel must prove that it was both "concerted" and for the purpose of "mutual aid and protection." All of us seemingly agree that these are discrete and independent elements of proof, and that the principles of *Meyers Industries I and II*[2] should still govern in determining whether the General Counsel has met his evidentiary burden. That, however, is where consensus ends and where significant differences begin as to the application of the common language in this *and* future cases.[3]

[77] *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) (emphasis added). See also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."); *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153 (D.C. Cir. 2003) ("[T]he Board . . . is obligated to defer to other tribunals where its jurisdiction under the Act collides with a statute over which it has no expertise."); *New York Shipping Assn. v. Federal Maritime Comm.*, 854 F.2d 1338, 1367 (D.C. Cir. 1988), cert. denied 488 U.S. 1041 (1989) ("[T]he agency must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute."); *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1501 (2000), supplemented 333 NLRB 963 (2001), enfd. 345 F.3d 1049 (9th Cir. 2003) (Board cannot adopt interpretation "announcing, in effect, that the NLRA trumps all other Federal statutes"). Cf. *Meyers II*, 281 NLRB at 888 ("Although it is our duty to construe the labor laws so as to accommodate the purposes of other Federal laws . . . this is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes" [citations omitted].).

[1] Apologies to George Bernard Shaw.

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

[3] We are unanimous in finding that the Respondent did not violate Sec. 8(a)(1) of the Act when it questioned employee Margaret Elias about why she obtained witness statements from her coworkers and instructed her not to obtain additional statements from her coworkers. Inasmuch as I agree with the majority that Elias had engaged in protected concerted activity, I agree with finding that neither the questions asked nor the instructions not to obtain additional statements would reasonably tend to interfere with that activity. However, I do not join in the majority's analysis to the extent that it suggests employers are narrowly limited in their ability to conduct statutorily mandated investigations of facially valid sexual harassment complaints, or to determine what corrective or preventive actions must be taken to avoid derivative liability, see *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and I do not reach or pass on the merits of *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011). I also do not join the majority's allocation of the burden of proof in this case, although the majority reaches the right result. Here, where other statutes indisputably give the employer the primary responsibility to take action to prevent sexual harassment, see 42 U.S.C. § 2000e-2(a)(1); 29 CFR § 1604.11(f), the majority impermissibly interferes with Congressional will by requiring the employer to justify itself in any statement or comment that might interfere with an employee like Elias' "parallel investigation" of his or her claim. *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942).

I write separately here to state certain points of agreement and disagreement with my colleagues as to whether Margaret Elias engaged in "concerted activity" for "mutual aid or protection" when she requested help from her coworkers to report to management a sexually offensive message visible to other employees in the breakroom. I concur with the majority that the General Counsel has proved both elements required for finding her conduct protected, but I do so based on affirmative proof of actual concert and mutual purpose. I concur in the majority's overruling of *Holling Press, Inc.*, 343 NLRB 301 (2004), but only to the limited extent that it held the "mutual aid or protection" element of protected concerted activity was not proved under the facts in that case and this, where other employees have been exposed to the same conduct that is the basis for an individual's sexual harassment complaint. I join Member Miscimarra in dissenting from the majority's overbroad holding that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is always acting for the purpose of mutual aid or protection. As comprehensively and persuasively stated in that dissent, this holding cannot be reconciled with the principles of *Meyers Industries* that the majority claims to apply here. It also expands the protections of the Act to a point where it undercuts and hinders the ability of employers to fulfill their obligation to protect the rights of its employees under numerous other federal and state labor and employment statutes.

In my view, the fact that Elias solicited coworkers to corroborate evidence of an offensive whiteboard display was sufficient to establish under *Meyers* and *Mushroom Transportation*[4] both that her solicitation was "concerted" and for the purpose of "mutual aid and protection." It was concerted because she sought to induce group action.[5] Admittedly, she was ham-handed and overbearing in her efforts to induce group action, alienating those whom she solicited, but this does not disqualify her activity as a threshold concerted communication looking to group support. Further, her solicitation was for the purpose of "mutual aid and protection," because she intended to bring to management's attention conduct that was personally directed at her but visible and objectively offensive to other female employees. I find irrelevant the fact that Elias did not intend any action *other than* reporting her own hostile work environment claim to management.

The flaw in the majority opinion in *Holling Press*, and the reason that it should be overruled in part here, is that it too narrowly construed the circumstances in which an individual sexual harassment complaint, either to management or an outside authority, could be found to be for the purpose of "mutual aid and protection." That is, the majority too readily perceived such complaints to be purely personal, particularly if coworkers spurned the complainant's solicitation of their support.[6] Thus, contrary to the *Holling Press* majority and dissenting Member Miscimarra, I believe that in certain instances the purpose of aiding or protecting other employees may be proved by an individual's claim of sexual harassment

More troubling still, even though the majority recognizes in other contexts that it is the employer who has the power to levy discipline or discharge, e.g., *Santa Fe Tortilla Co*., 360 NLRB 1139, 1139 fn. 7 (2014) ("Of course, it is the employer who wields the ax in the workplace."), the majority's unfortunate rationale hamstrings the employer in trying to effectively investigate and stop harassment by limiting individual employees' own potentially disruptive "parallel investigations," just as Elias embarked on in this case. The Board here also departs (without any rationale) from its earlier recognition that employers have a bonafide interest in controlling the investigation of an internal harassment complaint. See *Consolidated Diesel Co*., 332 NLRB 1019, 1020 (2002), enfd. 263 F.3d 345 (4th Cir. 2001). In my view, in the circumstances when both employee and employer are simultaneously gathering and assessing evidence of potential violations of other employment statutes, it should be the General Counsel who must show that the employee is *not* interfering with the employer's investigation, in order for the employee's Sec. 7 rights to prevail over the employer's rights and obligations under more directly controlling laws. The Board is interfering with Congressional intent under other statutes by imposing the burden on the employer. See dissent, post, at 12–13.

[4] *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir 1964).

[5] In this respect, I agree with my colleagues in the majority that the concerted nature of Elias' conduct is not materially different from the solicitation conduct of employee Fabozzi which the *Holling Press* majority found was concerted. 343 NLRB at 302. Here, a request for a witness statement concerning potentially unlawful conduct that affected a group of employees is an attempt to initiate group action. Unlike Member Miscimarra, I find it irrelevant that the complainant did not at the time intend to file a lawsuit; I would not find the conduct less concerted because the employee chose to resort to the employer's internal processes, in obedience to the employer's guidance of how employees should pursue grievances. To hold otherwise would frustrate Congress' goal to surface and remedy sexual harassment issues as soon as possible.

[6] The Board has long recognized "it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act" if protection is denied because of "lack of fruition." *Salon/Spa At Boro, Inc.*, 356 NLRB 444, 454 (2010) (quoting *Mushroom Transportation Co.*, above at 685. Thus, the Board in *Holling Press* should *not* have considered "[coworker] Garcia's evident lack of concern regarding Leon's comment, her lack of interest in supporting Fabozzi, and Fabozzi's aggressive tactics" in finding that Fabozzi's request to Garcia to testify before the state agency in support of her sexual harassment complaint against Leon was a "purely individual one" and was not for "mutual aid or purpose." *Holling Press*, 343 NLRB at 302. That is not to say that Fabozzi's aggressive tactics or Garcia's lack of interest and support are irrelevant. They are–but to the question of whether Fabozzi's conduct was removed from the protections of the Act, *not* whether Fabozzi's conduct was for "mutual aid or protection."

conditions to which others are exposed, even if no other employee joins in pressing that claim.

In *Holling Press*, there was nothing speculative about the fact that solicited coworker Garcia was exposed to the same kind of offensive conduct as Fabozzi, even if Garcia was not bothered by Leon's comments. Fabozzi asked Garcia for help *after* Garcia told her about Leon's "tight white pants" comment. In asking Garcia to testify, it is clear that Fabozzi thought Leon's separate comments to Garcia would support her sexual harassment claim against Leon by showing a pattern of conduct. See, e.g., *Jackson v. Quanex Corp.*, 191 F.3d 647, 661 (6th Cir. 1999) (remarks that are generally demeaning to woman even when not demeaning any one woman in particular are considered probative in hostile working environment claim).

The mutual or common hostile working environment implications are even more apparent in this case. Because the Respondent did not permit employees to carry or use cameras at the facility, Elias hand copied an offensive message written by a coworker on the whiteboard in the employees' breakroom. There is disagreement as to what reasons Elias conveyed to her coworkers for asking them to sign her reproduction. At a minimum, however, no one disputes that Elias requested help from her coworkers to corroborate her reproduction of the offensive "TITS" message written on the whiteboard. See, e.g., *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 251–252 (6th Cir. 1998) (employee comments that land adjacent to a Hooters restaurant should be called "Hootersville," "Titsville," or "Twin Peaks" relevant to hostile working environment claim). In these situations, the legal history and framework of the statutory right to work in "an environment free from discriminatory intimidation, ridicule, and insult"[7] strongly support finding that Fabozzi and Elias' actions in pursuing individual sexual harassment claims that implicate a common hostile working environment are for the purpose of "mutual aid or protection" and are protected under the Act.

Essentially, *Holling Press* unfortunately overlooked the fact that some kinds of alleged violations of other statutes affect employees as a group. I will not comprehensively cover them here: but a uniform pay practice affecting a group of employees in the same way, a safety hazard affecting employees in the same way, or a discriminatory practice affecting employees in the same way are classic examples. Another classic example is the employee (or supervisor) who engages in potential harassment that affects a group of other employees, running afoul of Title VII. The quintessential example of that is posed by this case: an employee essentially created a derogatory, demeaning and gender-specific offensive display on a whiteboard. Even though the display directly targeted a single female employee, it existed for all female (and male) employees to see. Elias, who was the direct target, complained, and tried to enlist other employees to her cause by verifying what was written. One of the other female employees (Giro), in fact, testified that she agreed the display was "inappropriate" and that management should be notified about it so that it could be addressed. Those facts should be enough to determine that Elias' request—though it was to support her personal internal complaint—was also for the purpose of mutual aid and protection, i.e., of all female employees who were exposed to the conduct. The objective determination of whether a complaint is made for the purpose of mutual aid or protection thus derives from the objective facts of the underlying conduct at issue, not from the fortuity that only one person complained about it (the *Holling Press* analysis) or from a subjectively-based presumption that "every request for co-employee help is made in solidarity" (the majority's analysis).[8] In terms of Member Miscimarra's "car crash" analogy, therefore, I believe the other female employees were more than mere witnesses. The car also "crashed" directly into them, because they were also exposed to the offensive language. On the other hand, the flaw in my colleagues' opinion overruling *Holling Press* is that it so broadly construes the circumstances in which an individual sexual harassment complaint will be found to be for the purpose of "mutual aid and protection" as to vitiate the requirement of proof for this independent element of the statutory test. The majority's holding that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is always acting for the purpose of mutual aid or protection is, in effect, an irrebuttable presumption. If this is intended to be an irrebuttable presumption particular to claims of sexual harassment, then the majority here commits the same special exception error that it correctly contends was committed by the *Holling Press* majority. However, as Member Miscimarra also notes in his opinion, I do not think my colleagues' rationale can be so cabined, nor do

[7] *Meritor Savings Bank*, 477 U.S. 57, 65 (1986).

[8] In *Holling Press*, more than one employee had been affected by the supervisor's gender-specific potentially offensive conduct. This, indeed, surfaced during the first employee's (Fabozzi's) request for assistance, when the second employee (Garcia) brought up the supervisor's comments directed toward her—specifically, that he was was wearing his "tight white pants" for Garcia. Therefore, I would have found that Fabozzi's request for Garcia's testimony was protected in that case, rather than being solely for Fabozzi's individual benefit, as the *Holling Press* majority held. 343 NLRB at 302.

I think they intend it to be, which makes their holding all the more concerning.

The problem with the majority's approach is that it both defies common sense and also lacks any limiting boundary. As to the first problem, the "solidarity principle" is a useful conceptual notion when two or more individuals actually act together to attempt to accomplish the same thing. However, the majority's belief here is that the mere request from one worker to another, to improve that first worker's individual terms of employment, in some manner *automatically* invokes an implicit offer of reciprocity. See majority opinion, supra (". . . [noting] the lesson of the cases embracing the solidarity principle: that the "mutual aid or protection" element is satisfied by *the implicit promise of future reciprocation, when one employee answers another's call for assistance, even if that promise is rarely (or never) called upon*") (emphasis added). The majority labels this the "solidarity principle," and relies on it to show that Elias' request was for "mutual aid or assistance" under Section 7.

That makes no sense, considering real life experience and human nature. For example, if one employee asks another for a soda, it is highly unlikely, assuming the second employee goes ahead and provides the soda, that the automatic motivation was an unspoken notion that there would be a soda or something else provided in return some day, in some other circumstances. There are half a dozen other reasons that might motivate such an act that have nothing to do with reciprocal expectations, including sheer altruism, convenience, and the excuse to get up and take a break from work. When a much more substantial kind of assistance is requested (such as the witness affirmation here), and granted, it is then even more tenuous to ascribe an unspoken motivation of inchoate reciprocity to the employee(s) providing the assistance. This is especially so when considering the aggregate group of employees who aid other employees in some way with potential lawsuits. It is extremely statistically unlikely that each one of the assistors would have a lawsuit of his or her own in mind when providing the assistance.[9]

Indeed, that is why our main corpus of law governing significant joint endeavors—contract law—looks to objective evidence of actual motive in the first place. Simply stated, the law recognizes the superiority of objective manifestations of intent for determining what the joint endeavor actually was, rather than looking to some subjective, unspoken assumption of one of the parties. Worse here, the majority does not even look to a party's subjective assumption about the purpose of the request for assistance, but simply uses its own assumption about how employees should behave.

Even looking to the particular and serious issue of sexual harassment claims, the majority's factual presumption is empirically unsupportable. Here, an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is not *always* acting for the purpose of mutual aid or protection. Certainly, there are many instances, as demonstrated by the facts of this case and *Holling Press*, where an individual's sexual harassment claim involves conduct that affects the working conditions of more than the complainant. That is more likely to be the case with hostile work environment claims than with quid pro quo harassment claims, but it is possible in either situation. However, it is just as certain that interactions amounting to sexual harassment can be purely on a one-to-one basis and thus that neither the protest nor the outcome are of presumptive significance to the working conditions of any employee *other than* the claimant. A classic example of this is a harassment claim arising in the aftermath of a voluntary but failed office romance, where one former partner now harasses the other.[10] This is a particularly personal one-on-one conflict, and the claim of harassment, whether to management or to a third-party authority, cannot by itself justify a factual presumption that the claimant acts for a purpose that bears an identifiable relationship to "legitimate employee concerns about employment matters" in general[11] or that the "employee action inures to the benefit of all."[12]

As a policy-based presumption, the majority's holding fares even worse. First, it is founded on misapplication of the solidarity doctrine articulated in Judge Learned Hand's definition of a sympathy strike:

[9] The majority here completely misses the point in dismissing *Holling Press* merely by citing statistics showing that many sexual harassment claims occur. The point made by the *Holling Press* opinion is that sexual harassment is a comparatively extremely rare slice of the millions of interactions that occur each day among people in the American workplace. Therefore, there is no empirical basis for the solidarity interest's fundamental assumption of "today I will help you with your sexual harassment complaint, because I know that some day I will have one of my own." The majority does not even attempt to prove the empirical basis behind such an assumption.

[10] See, e.g., *Gerald v. University of Puerto Rico*, 707 F.3d 7 (1st Cir. 2013), and *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642 (5th Cir. 2002). Legal claims arising from or related to workplace romance occur frequently: two examples recently appeared in two separate Daily Labor Report articles on the same day. See "*Employer May Be Liable For Firing Orchestrated By Jilted Co-Worker*" and "*Coach Lacks Bias Claims For Reporting Director's Affair*" Daily Labor Report, No. 102, May 28, 2014.

[11] *Kysor/Cadillac*, 309 NLRB 237, 238 fn. 3 (1992); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978).

[12] *Meyers II*, supra, 281 NLRB at 887.

> *When all the other workmen in a shop make common cause* with a fellow workman over his separate grievance, *and go out on strike in his support*, they engage in a '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 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.[13]

As the italicized phrases clearly demonstrate, the requisite proof of a goal of mutual aid and protection under the *Peter Cailler* solidarity doctrine is demonstrated *by those who in fact join the individual grievant*, not by the mere grievance itself or the grievant's solicitation of support for it.[14] My colleagues stand the solidarity doctrine on its head by reasoning that, whenever an employee solicits coworker support in raising a claim of protection under an individual employment rights statute, they will presume a solidarity-based mutual purpose without requiring any affirmative showing of it. Of course, employees can act in solidarity, but this requires some kind of positive and affirmative action, not merely being the passive listener to a request for action.[15] The majority's presumption finds no support in the precedent they cite, and, as Member Miscimarra correctly states in dissent, is essentially the "flip-side" of the *Alleluia Cushion*[16] doctrine that courts of appeals sharply criticized and the Board correctly overruled in the *Meyers* cases.

The majority's "solidarity principle" ignores this time-honored *Meyers* framework and replaces it with a wholesale legal fiction. The legal fiction turns out to rest upon the majority's own subjective assumptions about worker "solidarity." Thus, this fiction even departs from the very precedent the majority cites, precedent which focuses on "mutual aid or assistance" from an *objective* perspective. The majority's approach impermissibly departs from the text and framework of the Act to engraft an automatic presumption of Section 7 protection for any employee request or demand for assistance with his or her own individual employment issue.

Of course, this brings us to the second problem with the "solidarity" as the majority defines it: it sweeps in way too much. No limiting principle can be discerned in the majority's approach. Any time an employee asks for assistance from another employee with any kind of employment-related problem, this is now Section 7 activity. Drawing from the above-discussed example, if we take the solidarity principle at face value, then one employee asking another to go get a soda is obviously concerted activity for the purpose of mutual aid or assistance, and thus protected Section 7 activity. Every request for assistance, no matter how trivial or how important—and no matter how individual-specific—will now receive statutory protection when the request relates in some way to a condition of work.[17] And, as Member Miscimarra describes in detail, once Section 7 protection has been extended to such employee overtures, an extensive regulatory framework will descend over an employer's ability to respond to them.

I fully concur in Member Miscimarra's policy-based criticism of the majority's presumption in Section II,C of his opinion. The presumption expands Section 7 coverage of individual employee actions far beyond what is permissible under the statutory language and manifest Congressional intent. Just as impermissibly, the majority's extension of Section 7 coverage conflicts with, if not overrides, *all the other statutory frameworks* that Con-

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[13] *NLRB v. Peter Cailler Kohler Swiss Chocolates*, 130 F.2d 503, 505–506 (2d Cir. 1942) (emphasis added).

[14] The Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), is similarly focused on the common role of a union representative, rather than on the individual requesting representation during an employer's investigation, as proof of the mutual aid and protection element. As the Court there stated:

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of s 7 that '(e)mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.' *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (CA7 1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. *The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. 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.* Concerted activity for mutual aid or protection is therefore as present here as it was held to be in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (CA2 1942), cited with approval by this Court in *Houston Contractors Assn. v. NLRB*, 386 U.S. 664, 668–689, 87 S.Ct. 1278, 1280–1281, 18 L.Ed.2d 389 (1967).

420 U.S. 251, at 260–261.

[15] To draw a historical analogy, the transformative Solidarity Movement of the 1980s led by Lech Walesa would have foundered if its only result was a few hundred Gdansk shipyard workers listening to a speech. It was not the fact of listening that overthrew communism; it was the fact of action.

[16] *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

[17] The Supreme Court has affirmed that even such relatively trivial matters as sodas and soda prices can be terms and conditions of employment, so my "soda hypothetical" is not far-fetched. See *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488 (1979) ("in-plant-supplied food and beverages" and their prices are terms and conditions of employment).

gress consciously created to require employers to act where there might be violations of those statutes. In this particular case involving allegations of sexual harassment, Congress requires employers to conduct reasonably prompt and thorough investigations of sexual harassment, to take action to stop actual sexual harassment and even to prevent incipient sexual harassment.[18] Indeed, most employers, responding to this framework, act extremely aggressively to prevent anything that could come close to sexual harassment as defined under the law. This, of course, is one bonafide reason why employers try to regulate workplace civility. All of the foregoing is the framework that Congress intended to create to best protect employees under Title VII, and the majority's blunderbuss approach interferes with those goals. There is no sign, and certainly no justification provided by the majority, that Congress intended to impose the majority's new universe of restrictions on an employer trying to investigate and/or remedy violations under Title VII or any other statute. As I have recently stated in another context, Section 7 of the Act does not confer authority on the Board to act as an "überagency" without due regard for and proper accommodation of the enforcement processes established by these other laws and agencies.[19] Indeed, if searching for some logical policy presumption in this case, it would be best to begin and end with the presumption that Congress and the various states, having populated the field with these laws in spite of the Act's existence, perceived Section 7's substantive rights and the Board's processes as inapplicable to, or at least ill-suited to, effectuating the protections intended by their enactment. Thus, in yet another respect, the Board majority's new rule encroaches on Congressional prerogatives, and deserves no deference from the courts.

I concur in the result, and with a partial overruling of *Holling Press*. In other respects, I respectfully dissent, as described above.

APPENDIX A

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 provisions in the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

WE WILL NOT fail to notify you about the September 2009 and January 2011 changes to our solicitation and distribution policy.

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

WE WILL rescind the portions of the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

WE WILL furnish all of you with inserts for your employee handbook that (1) advise you that the unlawful rules listed above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or WE WILL publish and distribute to all current employees nationwide revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

WE WILL revise the unlawful rules listed above and any characterizations or summaries of those rules found on our intranet portal and on our New Hire CDs so that they (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

WE WILL notify you that the solicitation and distribution policy described above was changed in September 2009 and January 2011.

FRESH & EASY NEIGHBORHOOD MARKET, INC.

The Board's decision can be found at http://www.nlrb.gov/case/28–CA–064411 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National La-

[18] The majority's approach also undermines state law here. Some states seek to prevent harassment independently of the federal restrictions. See, e.g. Cal. Gov't Code sec 12940(h)– (k).

[19] *Plaza Auto Center, Inc.*, 360 NLRB 972, 987 (2014) (Member Johnson dissenting).

bor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

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 provisions in the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

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

WE WILL rescind the portions of the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

WE WILL furnish all of you with inserts for your employee handbook that (1) advise you that the unlawful rules listed above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or WE WILL publish and distribute to all current employees nationwide revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

WE WILL revise the unlawful rules listed above and any characterizations or summaries of those rules found on our intranet portal and on our New Hire CDs so that they (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

FRESH & EASY NEIGHBORHOOD MARKET, INC.

The Board's decision can be found at http://www.nlrb.gov/case/28–CA–064411 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

William Mabry, Esq., for the General Counsel.
Joshua Ditelberg, Esq. (Seyfarth Shaw, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on February 23, 2012, in Phoenix, Arizona. The complaint, which issued on November 30, 2011,[1] and was based upon an unfair labor practice charge and an amended charge filed on September 13 and November 23 by Margaret Elias, an individual, alleges that since about March 13, the Respondent has maintained in its employee handbook, and on its intranet, overly broad and discriminatory rules regarding solicitation and confidential information. The complaint also alleges that on about August 31 the Respondent, by Monyia Jackson, its employee relations manager, and an admitted supervisor and agent of the Respondent, promulgated and maintained an overly broad and discriminatory rule prohibiting employees from obtaining statements from their coworkers regarding allegations of sexual harassment; created an impression among its employees that their concerted activities were under surveillance by the Respondent; threatened employees with unspecified reprisals because they engaged in concerted activities; and interrogated its employees about their concerted activities and the concerted activities of other employees, all in violation of Section 8(a)(1) of National Labor Relations Act (the Act).

I. JURISDICTION

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

II. THE FACTS

There are two distinct allegations here. It is initially alleged that the Respondent maintains overly broad and discriminatory rules regarding solicitations and confidentiality. The Respond-

[1] Unless indicated otherwise, all dates referred to here relate to the year 2011.

ent defends that the confidentiality and solicitation provisions have not been in effect since 2009 and 2011. The other allegation relates to alleged protected concerted activities by Elias and whether the Respondent attempted to unlawfully restrict these activities.

It is alleged that the following rules, maintained in its employee handbook,[2] are overly broad and discriminatory:

> (1) Knowing When Solicitation is OK [at p. 13]
>
> We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation of team members during working time for any purpose.
>
> We also prohibit the distribution of literature during working time or on Company premises for any purpose[3] . . . . And keep in mind that violations of this policy could lead to disciplinary action.
>
> (2) Confidentiality at fresh & easy [at page 19]
>
> KEEP CONFIDENTIAL INFORMATION SECRET!
>
> OUR CUSTOMERS, CONTRACTORS, AND VENDORS PUT A LOT OF TRUST IN US. And we trust our team members to keep information they may learn private. When you work at fresh & easy, you may find out private information about our company, other people, or other companies. If you learn confidential information on the job, you can use it for fresh & easy business purposes—and for no other reason.
>
> WHAT IS CONFIDENTIAL INFORMATION?
>
> Basically, it's any information that isn't generally available to the public. Check our *Complete Confidentiality Policies and Procedures* for a full definition.

It is also alleged that since at least on or about March 13, 2011, the Respondent has maintained on its intranet at its facilities across the United States, the following overly broad and discriminatory rule regarding confidential information:

> What is it?
>
> Just so we're all on the same page, here's the Fresh & Easy definition of "confidential information." Confidential information is information generally not known outside of the company and is about Fresh & Easy, its business, or its business or technical information. Here are some examples:
>
> . . . .
>
> • Information about our team members;
>
> . . . .
>
> When in doubt, you should treat information that meets this general definition as confidential.

Bruce Churley, manager of the facility, and Michael Anderson, team leader at the facility, are admitted supervisors and agents of the Respondent. Each of the witnesses at the hearing testified about these provisions, as well as whether they were aware of any change. Churley, who has been employed by the Respondent since October 2009, testified that he has never been given a copy of the Respondent's employee handbook. If an employee wished to access the Respondent's rules, they can log on to one of the computers at work and access the rules on the intranet, on what is called the portal. When there is a change in the rules, employees are usually notified of the change via "team huddles," where a manager meets with his team to discuss the rule changes. He testified that he does not recall team huddles regarding the Respondent's confidentiality or no distribution rules. Anderson, who has been employed by the Respondent since October 2010, testified that the rules set forth in the employee handbook are really summaries of the Respondent's policies, whereas the full and complete policies are set forth on the portal through the Respondent's intranet. He has seen the rules in the employee handbook, but he doesn't know if the policies set forth there have changed: "I know you can go to the portal and get more information. . . ." When he is informed of policy changes, he usually notifies the employees of the changes in a huddle, but he has not been notified of any policy changes and does not recall any huddles regarding changes of policy in the employee handbook. When employees are hired, they are given new hire CDs, which provide the employees with summaries of its policies, and these new employees are told that they should consult the Respondent's portal for the complete policies.

Victoria Giro, who was employed by the Respondent from April 2010 to December, testified that she is not familiar with the employee handbook because she accessed the information from the portal. Employees can learn of policy changes through huddles, or through the portal or, if they have a question about policies, they can ask their manager. She has never had a huddle concerning the Respondent's no-distribution rule or its confidentiality rule. Krista Yates, who has been employed by the Respondent for 2-1/2 years, testified that the employees are notified of changes in policy through printouts, or more commonly, "updates are online." She does not remember receiving notification of changes in the Respondent's distribution rule, or confidentiality rule, or of having a huddle about a change in these rules. She also testified that the full and complete list of the Respondent's rules, and any changes in these rules, are on the portal, which can be accessed at any time at any of the Respondent's stores.

Elias testified that she was given a copy of the employee handbook in January containing the rules alleged above as unlawful. Since that time she has not been notified that there has been a change in the distribution/solicitation policy or in the confidentiality policy, nor has she participated in a huddle where she was informed of changes in its policies. She understood that a full listing of the Respondent's policies was available online, although, "I don't know how to get to them on the portal." As to whether she knew that if she had a question, or needed a clarification, about a policy, she could call the Respondent's HR hotline, she testified that she tried calling a few times, but could never get through to them. Jackson, a/k/a "MJ," testified that new employees are given the Respondent's New Employee CD, which contains the employee handbook summary of policies, and they are told by their manager that if

[2] The front page of the handbook states: "summary of policies."

[3] This rule was found to violate Sec. 8(a)(1) of the Act in *Fresh & Easy Neighborhood Market*, 356 NLRB 546 (2011). The confidentiality provision, also alleged here as unlawful, was not involved in that case.

they want to access the complete and current rules, they do that through the portal on the Respondent's intranet. In addition, employees with questions about the Respondent's policies can contact the Employee Relations Manager Jackson, directly, or call the HR service center; both telephone numbers should be listed in the breakroom. She testified further that the solicitation policy and the privacy policy were changed in 2009, and the confidentiality policy was changed in January 2011. She identified exhibits that effected the changes in these policies, including a memo, "District Message" from HR entitled: "Solicitation and Distribution—Policy Clarification," dated September 2, 2009, stating:

> We would like to inform our team members on the recent updates we have made to our Solicitation and Distribution Policy. Key changes that are important for you to know include
>
> We have changed the language to clarify our policy and how we apply it. It is important for you to note that distribution of any material is prohibited during working time.
>
> Fresh&easy also prohibits the distribution of literature at any time in any work area for any purpose.
>
> Working time includes that of the employee doing the soliciting and distributing and the employee to whom the soliciting and distributing is directed.
>
> Working time does not include meal periods, break periods, or any other unspecified periods during the workday when employees are properly not engaged in performing work tasks.
>
> To all Store Managers: Please ensure that the updated policies (attached) are posted on your notice board and the key messages covered in your Team Huddles. Additionally, please let your teams know that the Complete policy has been updated for their review online on the fresh&easy intranet.
>
> Once again, as with any policy or process, it is important that you consult with your area Employee Relations Manager and your District Manager. They are here to support you and provide you with builds to help manage issues and concerns fairly and consistently.
>
> Please ensure that your teams follow the process of signing the below acknowledgement that they re aware of the policy change and have been briefed.
>
> Thank you gain for providing your team the information they need to do their job!

Jackson testified that the store managers were to read this to employees during huddles. She also identified a memo dated January 2011 entitled "Solicitation and Distribution Policy" as the Respondent's policy currently in effect. It states, inter alia:

> We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation (solicitation can be any written or verbal request asking for donations, help or support for any cause) for any purpose in any selling areas of the facility during business hours or in working areas when associates are on working time. "Working time" refers to the time of the workday when you are expected to be performing your job duties. If you're a fresh&easy team member, don't solicit when you are supposed to be working and don't solicit someone else who is supposed to be working.
>
> We also prohibit the distribution of literature during working time or at any time in a work area for any purpose.
>
> "Working time" refers to that portion of any work day during which the employee soliciting or distributing and/or the employee being solicited/receiving distributions is supposed to be performing any actual job duties. It does not include other, duty-free periods of time, such as lunch or break periods, or before or after both employees' work.
>
> "Working areas" refers to areas of fresh&easy property where employees normally perform work, or where work is in fact being performed. It does not include, *e.g.*,employee break rooms.
>
> We also do not allow anyone who is not a fresh&easy team member to solicit or distribute literature on any property that we own, lease or use. And keep in mind that violations of this policy could lead to discipline- they could even cost you your job.

She testified that this was to advise the managers of the policy change and was available on the Respondent's portal as of September 2009. Jackson also identified a "Summary Version Confidential Information" and a "Complete Version Confidential Information," which were sent to all of its managers. Each one states it is "Version 1-11" and refers to the Respondent's Confidential Information Policy stating, basically, that it is information not generally known or accessible to the public and includes all information obtained by employees while at work and that the Respondent "expects" this information to be kept confidential. It also states:

> **What is confidential information?**
>
> Basically, it's any information that isn't generally available to the public. (It does not include sharing information about your own wages, hours, compensation, or working conditions with others if you decide to do so.) Check out the Complete Confidential Information Policies and Procedures for a full definition.

Jackson testified that these confidentiality rules have been in effect since January 2011. On cross-examination, she testified that although managers are supposed to post these changes on the bulletin board and to have team huddles and to distribute these new rules to all employees, the Respondent does not require its managers to record these team huddles and the distribution of these rules to all employees.

The other allegation here relates principally to Elias, who has been employed by the Respondent for over 1-1/2 years as a customer assistant; Churley is her supervisor. On about August 24, she asked Churley if she could participate in TIPS training, which is related to the sale of alcoholic beverages in the store, and he told her to write a note on the whiteboard in the employee breakroom to remind him of her request. As per his request, she wrote a note on the whiteboard referring to the TIPS training that they had discussed. When she went to the employee

breakroom on the following day, she saw that her note on the whiteboard had been altered in that the word "TIPS" had been changed to "TITS," and a peanut or a worm was drawn on the board. She testified that she tried not to let it bother her, but soon changed her mind and told Anderson that she wanted to file a harassment claim, but "he didn't say anything." Because electronic equip-ment is not allowed, she could not take a picture of the altered whiteboard, so she copied on a piece of paper what was on the board and made a "statement." She testified that she added on this document; "Someone changed the Board to "TITS" instead of TIPS and put a worm pissing on my name. I take this as sexual harassment. This has been on the Board since I got here at 2PM."[4] She then asked Anderson to sign the statement: "He just signed it. He didn't even read it, He didn't even ask me. He just signed it." She testified that she did not threaten or attempt to intimidate him into signing the statement. Yates was standing next to Anderson and she asked Yates if she wanted to sign as a witness: "I said you don't have to . . . . if you want to, you could, just to what you observed on the board. And so, she signed it." She testified that she did not threaten or scream at Yates. Later that day she saw Giro and she explained the situation to Giro in the same tone of voice and she signed it. Neither Anderson, Yates, nor Giro said that they did not want to sign the statement; "they just asked what it was." She also testified that the sole purpose of it was to be a witness statement; it was neither a petition nor a joint complaint of everybody signing, and she did not make any change to the statement after they signed it. On August 26, Churley told her that the situation had been reported to Jackson. On cross-examination, Elias was asked if she expected that Jackson would conduct an investigation:

> A. Well, at first, I understood that there was going to be an investigation. I honestly don't know the procedures . . .
>
> Q. What was your expectation?
>
> A. My expectation was to report it.
>
> Q. Did you expect that there would then be an investigation?
>
> A. I didn't really have any expectations beyond reporting it.
>
> Q. Did you want there to be an investigation?
>
> A. I didn't want people to write things like that on the board.
>
> Q. Did you want there to be an investigation?
>
> A. I don't know, I don't know. . . that wasn't my purpose, no. My purpose was to report it.
>
> Q. What did you expect would happen after it was reported.
>
> A. That management would do what they were supposed to do.
>
> Q. Which would be to conduct an investigation, correct?
>
> A. If that's what they do, I don't know. I'm not versed on it.

[4] Anderson, Yates, and Giro testified that when Elias asked them to sign her statement, only the words from the whiteboard were on the statement, not any comment of hers.

Churley testified that on August 26, he had a discussion with Elias about her request to participate in the options training program, where the company trains people who have shown the ability to lead and are motivated to become team leaders. Churley told her that he didn't feel that she was ready for the program, and that she had some skills that needed further development. Elias became "very angry, yelling," saying that she felt that she deserved to be in the program and that his predecessor had promised her the position; Giro testified that she overheard Elias yelling at Churley about the options program. Later that day, Churley received a call from Anderson saying that Elias wanted to file a sexual harassment complaint because of the alteration of her note on the whiteboard, and Churley told him to take a picture of the altered note. When he returned to the store he met with Elias and again told her that he was not ready to put her in the options program, and she started yelling again and said that she was too upset to work and wanted to go home, and he told her to go home. He saw the picture of the whiteboard, which stated: "Bruce, Could you please add 4 hours for city meeting. Could you please sign me up for TITS 9/10/11? Maggie Thank You." There was a picture drawn next to her name which resembles something urinating. As there is a video camera in the breakroom, Churley then viewed the video and saw that it was employee Gary Hamner who altered the message on the board, and he reported this to Jackson, and told her that Elias was upset about the situation. He then met with Anderson who told him that Elias obtained statements from him and others at the store, and that she was "very insistent that they sign." Anderson said that he signed her statement as well, but he felt forced to do so. Churley also spoke to Yates and Giro, who both said that they didn't want to sign Elias' statement, but they felt forced to do so, and signed so that the situation would calm down. About a week later, Jackson called the store and told Churley that she wanted to speak to Elias, and he gave Elias the phone and told her that Jackson wanted to speak to her. On August 27, Churley sent an email to Jeff Lang, the district manager, and Jackson, discussing the incident. He stated that Anderson, Yates, and Giro were "confronted" by Elias, who "demanded" that they sign the witness statement involving the whiteboard alteration, and that Yates and Giro felt intimidated into signing something that they did not wish to be a part of. The email continued that later that evening Elias approached him and wanted to continue discussing the options program, and he repeated that he was not ready to include her in the program. She began raising her voice until he was finally able to end the conversation by telling her that she could go home.

Anderson testified that on about August 26, Elias asked him to come into the breakroom to see what somebody had written over her message on the whiteboard and said that she wanted to file a sexual harassment charge and wanted the HR telephone number. Anderson replied, "What for? I don't know where this is coming from" and Elias asked, "What's wrong with you?" and "stormed out of the room angrily." Anderson then called Churley, told him of what occurred and that Elias wanted to file a sexual harassment complaint, and Churley told him to take a picture of the message on the whiteboard. Later that evening, Elias approached him with a drawing that she made of the whiteboard, and asked him to sign it. The document contained

only the two sentences that Elias had initially written on the board, with the alteration and the picture next to it. There was nothing else on the paper when she showed it to him. He testified that he told her that he didn't need to sign the statement because he would not lie about what was on the board, but Elias was very angry and loud, and told him that he had to sign the document, and he signed it with the hope that if he did so she would calm down and not cause a scene in the store. On about August 30, Jackson called him and said that she wanted a statement from him, Yates, and Hamner.

Giro, who was employed by the Respondent from April 2010 to December, testified that Elias was upset about the alteration on the whiteboard, and Giro told her that although she hadn't noticed the wording, she agreed that it was inappropriate, but "I don't think it would have been a big deal if it happened to me, but no, I wouldn't have liked it. But I did feel like management should've been notified so that they could see who did that and take necessary . . . disciplinary action." Elias asked her to sign a paper that duplicated what was written on the whiteboard, but she never told Giro that she wanted to file a complaint about it. She testified that, although Elias did not "force" or "threaten" her to sign the statement, the discussion with Elias was "very heated" and "uncomfortable," and she signed because the discussion was taking place in front of the customers and "I wanted to get out of there." Her purpose in signing the statement was to be a witness as to what was on the whiteboard; she did not view it as a complaint or a petition to the Company. On the following day she told Churley that although the change on the whiteboard was inappropriate, she felt intimidated into signing the statement, and that Elias should have given him an opportunity to handle the situation, rather than making it into such a "big issue."

Yates testified that on about August 26, Elias asked her to sign a statement stating only what was on the whiteboard. Before Elias asked her to sign the statement, she saw Elias asking Anderson to sign: "He was backed into a corner and she was in his face." She was "kind of yelling" and "agitated." Shortly thereafter, Elias asked her to sign the statement, and she said that she was not comfortable being a witness to it, and did not want to sign it. Elias returned later and again asked her to sign, but, again, Yates said that she did not feel comfortable signing it. She eventually signed the statement because: "I was kind of freaked out. She'd been in my face, she was getting more aggravated, more hostile. I felt bullied . . . I figured the fastest way to diffuse the escalating situation was to sign and deal with it later." On the following day she called the Respondent's "hotline" to the HR department, filed a complaint against Elias for "bullying" her into signing the statement, and told Jackson about her confrontation with Elias the prior day and, at Jackson's request, she prepared an affidavit setting forth what occurred between she and Elias. A few days later, Churley asked her if there was anything that she wanted to talk to him about and she said that there was. He asked her about the document that she signed for Elias and whether there was space on that document for Elias to write something else, and Yates said that there was.

As stated above, on about August 31, Churley handed Elias a phone and said that Jackson wanted to speak to her; he told her to take the phone into the breakroom. She testified that Jackson began the conversation by asking if she knew Hamner, and she said she did, that she works with him. Jackson said that Hamner had filed a complaint against her alleging that on August 26, upon arriving at work, she said, "F—k you" to him. Elias said that it was a lie, that she would not use profanity to anyone, and Jackson said that his claim was under investigation. Elias then said that she should view the videotape and she could see that she never said it, and Jackson said, "Don't tell me how to do my job, and I would not be able to see what words were said." Elias told her that, at least, she could see that she did not say anything to Hamner. Jackson then told her that she was wrong in getting statements from employees, that it violated company policy, and Elias responded that she didn't get statements, that she just asked the employees to sign what was on the whiteboard. Jackson then asked Elias to prepare two statements for her: one in response to the complaint that she cursed at Hamner, and the other in regard to her complaint. She only submitted one affidavit, a statement that she submitted that is contained in a September 3 email to Jackson, relating solely to her complaint. On October 13, she received an email from Jackson on the subject of: "sexual based harassment 8/26/2011," stating:

> We are reporting on our investigation of the allegations you raised in your August 26 complaint regarding the white communications board. Our investigation has included reviewing the information provided by you, conducting employee interviews, and reviewing other available information.
>
> Based upon our investigation, we have concluded that inappropriate conduct did occur. As a result, we have taken corrective action that we expect will prevent any further inappropriate conduct. If our expectation proves wrong, it is especially important that you notify us of that immediately. As in this case, we will investigate any additional concerns in a prompt and thorough manner.
>
> The Company is committed to protecting you from retaliation as a result of your report and our investigation. We have informed the person in question and others that any retaliation is absolutely prohibited. Please call immediately if you feel that you are being subjected to retaliation in any form.

Jackson testified that she was copied on the August 27 email from Churley to Lang reciting the events of the prior day, including the incidents where Elias got Anderson, Yates, and Giro to sign her statement. She learned from Churley, that Yates, Anderson, and Hamner would all be working on August 30, which would be the first time that they would be available for interviews. On August 29, she received a complaint from Yates regarding Elias' actions toward her when she requested that Yates sign her statement. She initially interviewed Yates, who told her that Elias was yelling and screaming at her to sign the statement, even though she did not want to participate in it, and she said there was room on the paper for Elias to add something if she wished to do so. Jackson's investigation did not find that Elias threatened Yates. Jackson then interviewed Anderson who told her that Elias demanded that he sign the paper, and he did so only because she was getting louder in her de-

mands and he was concerned that the situation would escalate further. She also spoke to Hamner, whose complaint was found to be without merit, and who was disciplined for altering the words on the board. Giro was on vacation and was unavailable. She next spoke to Elias, first about Hamner's complaint, and then about hers. She asked Elias why she felt that she had to obtain the signatures of the employees to her statement and she said that it was for her own protection. Jackson then testified:

> I asked her not to obtain any further statements so that I could conduct the investigation. And I told her that she could talk to the employees and ask them to be witnesses for her, but in relation to this investigation, to allow me to complete it.

As to the reason for this request, she testified: "Because she made the employees uncomfortable." She did not tell Elias that she had violated any company policy, she did not restrict her right to bring harassment complaints in the future, and Elias was not disciplined, or threatened with discipline, for any of her actions involving the altered whiteboard.

III. ANALYSIS

It is initially alleged that the Respondent's solicitation rule (also referred to as the distribution rule), as well as its confidentiality rule, are overly broad, discriminatory, and violate Section 8(a)(1) of the Act. The Respondent defends that even if they did violate the Act (and the Board has found that the prior solicitation rule did violate Section 8(a)(1) of the Act, and that the revision of the rule was not adequately disseminated to the employees) these rules have been rescinded and new (and lawful) rules have been instituted in their place in September 2009 and January 2011. Jackson identified the memo to district managers dated September 2, 2009, that was to be read to employees in team huddles, as well as the Respondent's new Solicitation and Distribution Policy, as set forth in a memo dated January 2011 that was available to all employees on the Respondent's portal. I found Jackson to be a credible and believable witness, and credit her testimony that the September 2009 memo was to be read to the employees, and the new solicitation rule was posted on the Respondent's portal. I also find that by defining "working time" the Respondent corrected the problem with its prior rule, and that this new rule is a lawful one. However, although Jackson testified that this new rule was to be read to the employees at team huddles, this, apparently, was not done, at least at the facility involved here. There was no testimony that any of the employees, Churley or Anderson was specifically made aware of the changes in these rules in 2009 and 2011, and they all testified that they could not recall any team huddle where the employees were notified of the change in the solicitation rule. Although I have credited Jackson's testimony that the rule has been changed, and that the new rule does not violate the Act, I find that the Respondent's failure to notify its employees of the change violated Section 8(a)(1) of the Act.

I also credit Jackson's testimony that the Respondent changed its confidentiality rule in January 2011. Although the witnesses also testified that they do not recall any team huddles where they were told about this change, I need not decide that because I find that the Respondent's rule change did not fully correct the problem with the rule. While prohibiting sharing of information not generally available to the public, it excepts "sharing information about your own wages, hours, compensation, or working conditions with others if you decide to do so." While, initially, appearing to be a satisfactory change, and one that would allow employees to fully participate in protected concerted activities, a fuller review reveals a significant shortcoming. For employees to be able to truly discuss terms and conditions of employment, they must be able to fully discuss not only their terms and conditions of employment, but the terms of employment of their fellow employees, even those who don't wish to personally discuss it, and Respondent's revised rule appears to prohibit this full discussion, while allowing the employees to discuss their terms of employment. I therefore find that this rule could inhibit employees in the exercise of their Section 7 rights, and therefore violates Section 8(a)(1) of the Act. *Labinal, Inc.*, 340 NLRB 203, 210 (2003); *NLS Group*, 352 NLRB 744, 755 (2008).

The remaining allegations relate to the whiteboard alteration on August 26, and the resulting telephone conversation between Jackson and Elias on August 31. It is alleged that in that conversation, Jackson orally promulgated and maintained an overly broad and discriminatory rule prohibiting employees from obtaining statements from coworkers regarding sexual harassment allegations; created an impression among its employees that their concerted activities were under surveillance by the Respondent; threatened employees with unspecified reprisals because they engaged in concerted activities with other employees; and interrogated its employees about their concerted activities and those of their fellow employees. There is a major credibility conflict between Elias, and Anderson, Yates, and Giro. Elias testified that they did not need any encouragement to sign her statement; they signed it without complaint and, for Anderson, without even reading it. The testimony of Anderson, Yates, and Giro is substantially different. Anderson testified that Elias was very loud and angry when he initially refused to sign, and he signed the statement only to calm her down and prevent the situation in the store from escalating. Giro likewise testified that Elias' requests to her were very heated and uncomfortable, and she also signed because their discussion was taking place in front of customers and she wanted to end it. Yates testified that she saw Elias yelling and backing Anderson into a corner when she asked him to sign the statement, and that she was "in his face." She was getting aggravated and hostile when she asked Yates to sign, and was in her face as well. Yates was "freaked out" and signed because she felt that was the fastest way to end "the escalating situation." This is not a difficult determination. Anderson, Giro, and Yates all appeared to be testifying in a honest and truthful manner and had no reason to lie about the situation. In addition, their testimony is supported by the credible testimony of Churley and Giro that when he told Elias that he didn't feel that she was ready for the options training program, she became angry and yelled at him. Clearly, Elias was an easily excitable person when something unpleasant occurred, or when others did not accede to her requests, and her reaction to Anderson, Giro, and Yates was very similar to her earlier reaction that day to Churley. In addition, I found that, at times, Elias was evasive in her testimony in response to ques-

tions from counsel for the Respondent and, finally, I find it highly unlikely that Anderson, an admitted supervisor, would sign her statement without reading it. Further, based upon their testimony, I find that when they signed her statement, it set forth solely the wording on the whiteboard on August 26 and that after obtaining their signatures Elias added additional comments to the statement. I therefore discredit Elias in this regard, and credit the testimony of Anderson, Giro, and Yates rather than her testimony.

On August 31, Jackson called Elias while she was at the store. Prior to this call, she saw the email from Churley to Lang discussing what occurred when Elias asked Anderson, Giro, and Yates to sign her statement, she received a complaint from Yates about the incident with her, and she interviewed Anderson, Yates, and Hamner; Giro was on vacation. Jackson testified that she told Elias not to obtain any further statements so that she, Jackson, could conduct the investigation, although she could talk to the employees about the incident and ask them to be witnesses for her, but to allow her to complete the investigation. She said this because Elias made the employees uncomfortable. Elias testified that Jackson told her that she was wrong in obtaining statements from employees, that it violated company policy, and asked her to prepare two statements for her: one regarding Hamner's complaint about her, and the other regarding her complaint. Without much difficulty, I credit Jackson's testimony as it comports with the evidence here and is more reasonable and believable than Elias' testimony. At the conclusion of her investigation Jackson determined that inappropriate action did occur (for which Hamner was disciplined) and if there was any further inappropriate conduct or retaliation, Elias was to report it immediately to the Company.

In my view, Jackson's request to Elias not to take any further statements from employees was a reasonable one, and not an unlawful one. Obviously, a bare statement to an employee not to take statements from fellow employees in support of her/his position on a work-related issue, could violate Section 8(a)(1) of the Act. However, I cannot look at the statement in isolation; I must look at the surrounding facts as well. "In determining whether an employer's statement violates Section 8(a)(1), the Board considers the totality of the relevant circumstances." *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003).[5] As obnoxious and puerile as the alteration on the whiteboard was, it appears that the other employees either didn't notice the change or didn't take offense at it. Elias' outrage at the alteration was personal and was not shared by the other employees. When she asked Anderson, Giro, and Yates to sign her statement, none of them wished to do so and each of them signed only because Elias was loud and angry, and to calm her down and prevent a further commotion in the store. Not only was Elias' attempt to get Anderson, Giro, and Yates to sign her statement annoying to them, it was disruptive to the store's operation. In *Five Star Transportation, Inc.*, 349 NLRB 42, 43 (2007), citing *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Salisbury Hotel*, 283 NLRB 685 (1987), the Board stated that concerted activities within the meaning of the Act encompasses conduct "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Holling Press, Inc.*, 343 NLRB 301, 302 (2004), the Board stated: "In order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of 'mutual aid or protection.'" Further, in language that could apply to the facts here, the Board stated that the charging party's "goal was a purely individual one. In addition, there is no evidence that any other employee had similar problems—real or perceived—with a coworker or a supervisor." I find that Elias was not engaged in concerted activities for the purpose of the employees' mutual aid and protection at that time. The Respondent already had a copy of her statement and further statements would not add anything to the investigation. I therefore find that Jackson's request to Elias not to take any further statements from employees so that she (Jackson) could conduct the investigation was not meant to deprive her of her right to engage in concerted activities, as Jackson told her that she could speak to employees about the subject. Rather, it was an attempt to prevent further disruptions at the store. I note that the Respondent did not take any action against Elias as a result of her actions here. In fact, at the conclusion of Jackson's investigation, it was found that Hamner's complaint had no merit, and he was disciplined for his alteration of the whiteboard, and was warned about any future retaliation. I therefore recommend that this allegation paragraph 4(d)(1) be dismissed.

The remaining allegations also relate to Jackson's telephone conversation with Elias on August 31. Stated simply, I can find no merit to any of these allegations and recommend that they (pars. 4(d)(2), (3), and (4)) be dismissed as well.

CONCLUSIONS OF LAW

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

2. The Respondent violated Section 8(1)(1) of the Act by maintaining an overly broad and discriminatory confidentiality rule in its employee handbook, on its portal, and on its New Employee CDs.

3. The Respondent violated Section 8(a)(1) of the Act by failing to properly notify all of its employees of the change in its solicitation/distribution rule since about 2009.

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

THE REMEDY

Having found that the confidentiality provision contained in the employee handbook and the portal violates the Act, I recommend that the Respondent be ordered to rescind this provision and to notify all employees electronically that this provision has been rescinded and will no longer be a part of the employee handbook, the new employee CD, or the Respondent's portal. Although I have found that the Respondent changed its solicitation and distribution policy to a lawful policy, I have also found that the employees were not adequately informed of this change. I therefore recommend that the Respondent be

[5] See *Caesar's Palace*, 336 NLRB 271 (2001), and *Phoenix Transit System*, 337 NLRB 510 (2002), cited in the Respondent and the General Counsel's briefs.

ordered to notify all of its employees, electronically, of the change and to specifically note the change on its portal. I also recommend that Respondent be ordered to post the Board notice at each of its store locations.

[Recommended Order omitted from publication.]