United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 19, 2021

TO: William B. Cowen, Regional Director
Region 21

FROM: Richard A. Bock, Associate General Counsel
Division of Advice

SUBJECT: Kaiser Permanente Bernard J. Tyson School of Medicine
Case 21-CA-273372

506-0170-0000-0000
506-2001-5000-0000
506-4033-1700-0000
506-4033-5500-0000
506-6080-0800-0000
506-6090-4500-0000
512-5036-6720-2000
512-5036-6720-7500

This case was submitted for advice as to whether the Charging Party, a medical school professor, engaged in protected concerted activity and whether the medical school's decision to suspend the Charging Party and later fail to renew [redacted] employment contract was due to that activity, in violation of Section 8(a)(1). We conclude: (1) the Charging Party's classroom conversation on [redacted] 2020 was inherently concerted because it discussed issues of race faced by Black faculty and students as well as systemic racism in medicine, and that conversation was for mutual aid or protection; (2) the Charging Party's [redacted] and [redacted] 2020 tweets were protected concerted activity on their own as well as being a logical outgrowth of the [redacted] discussion; and (3) the Employer suspended the Charging Party and terminated [redacted] contract for [redacted] protected concerted activity, and the reasons the Employer gave for its actions were pretextual. Accordingly, absent settlement, the Region should issue complaint.

FACTS

The Kaiser Permanente Bernard J. Tyson School of Medicine ("Employer") was initially formed in 2016 and welcomed its inaugural class of students in July 2020. The Charging Party is a [redacted] physician who was offered an appointment by the Employer as a "Member of the Faculty," effective [redacted] 2020. The Charging Party's duties included instruction and serving as a [redacted] The Charging Party reported to the [redacted] ("Chair"). As a

condition of [redacted] employment, the Charging Party needed to join the Permanente Medical Group ("Medical Group") as a physician. [redacted] began work in [redacted]

Around March, due to the COVID-19 pandemic, the Charging Party and much of the Employer's faculty and staff began working almost exclusively from home.

On May 18, the Charging Party submitted the required material for [redacted] annual faculty appointment renewal to the Chair. On June 10, the Chair told the Charging Party that [redacted] would recommend [redacted] receive an increase in academic rank, which would give [redacted] a [redacted] employment contract.

In the summer, despite the ongoing pandemic, the Employer decided to move forward with in-person teaching, and the students began in-person classes in July. In June and July, the Charging Party advocated on behalf of [redacted] and other faculty about the Employer's plans to open in the midst of a pandemic. Specifically: [redacted] sent emails raising concerns about reopening plans, personal protective equipment, screening processes, and remote teaching; asked the Employer to be flexible in allowing faculty and staff to work from home during the pandemic; and, on [redacted] emailed the [redacted], while copying several staff and faculty, again asking that the Employer be flexible in allowing faculty and staff to work from home. [redacted] then forwarded the email to several of [redacted] colleagues, encouraging them to similarly voice their concerns to the Employer.

As the Employer's fall academic semester was beginning in July, there were ongoing national protests over police violence and the killing of Black people and people of color by police. On August 15, a Black male was shot and killed by police a few blocks from the Employer's campus.

On [redacted] the Employer's Dean sent an email to faculty, staff, and students addressing the recent shooting. On [redacted] the Charging Party and other faculty discussed by phone the Dean's email, saying that it was triggering, tone deaf, and showed the Dean's implicit racial bias. The group discussed sending a joint email to the Dean expressing their concerns. However, a member of the group had already planned to send a similar email to the Dean, so the group decided that individual would send the email and request a meeting to discuss what they felt was the Employer's toxic work culture. The individual sent the email but the Charging Party was not copied and did not attend the meeting that ultimately took place. However, the employee who met with the Dean encouraged the Dean to speak with [redacted] Black faculty members. Later on [redacted] the Employer's [redacted], including the Charging Party, received an email from the Employer instructing them to discuss, at their next

[1] All dates hereinafter are in 2020 unless otherwise stated.

small group meetings with students, legacies of power structures and institutionalized racism that result in gender bias and race bias in medicine.

On (b) (6), (b) (7)(C) the Charging Party met with (b) (6), (b) small group of (b) (6) students and a fellow faculty member who was also an (b) (6), (b) (7)(C) of the group (the "(b) (6), (b) (7)(C)"). For the session, the Charging Party wore a t-shirt that said, "I can't breathe"[2] and an (b) (6), (b) (7)(C) print garment to represent (b) (6), (b) (7)(C) as a (b) (6), (b) (7)(C) and a physician. Per the Employer's instructions, the Charging Party facilitated a discussion on how racial bias causes poor health outcomes. Part of the discussion concerned the Dean's (b) (6), (b) (7)(C) email, and the Charging Party allowed students to specifically comment on the email. The Charging Party also introduced topics such as representation in medicine, how the medical field is not shielded from what happens in society, and the history of how the medical field has perpetrated race and gender discrimination. Further, the Charging Party shared personal experiences to help give the group a better understanding of bias in medicine. The group also talked about the ongoing COVID-19 pandemic and how its intersection with race affects health outcomes. At times the class was emotional, and a (b) (6), (b) (7)(C) student became particularly upset. During the class, the Charging Party recommended that students read the book "White Fragility: Why It's So Hard for White People to Talk About Racism," by Robin DiAngelo, which is a book on the Employer's cultural competence reading list. Upon hearing the reference to the book, the (b) (6), (b) (7)(C) interrupted the Charging Party's discussion with the students, raised [redacted] voice, and said that although the Charging Party's statements were factually correct, it was inappropriate for (b) (6), (b) to talk about white fragility and overrepresentation in medicine, noting that the (b) (6), (b) (7)(C) student was upset. The conversation then moved to other topics. However, immediately after the session ended, the (b) (6), (b) (7)(C) reported to the Employer's leadership team on what was discussed during the classroom session.

On the evening of (b) (6), (b) (7)(C) the Charging Party received a phone call from the Employer informing the Charging Party that (b) (6), (b) teaching privileges had been revoked pending an investigation of what happened during the (b) (6), (b) (7)(C) classroom discussion. The Employer also told the Charging Party that (b) (6), (b) was not to reach out to the faculty and that (b) (6), (b) could not come to campus while (b) (6), (b) was suspended. On (b) (6), (b) (7)(C), the Charging Party was also suspended by the Medical Group, though the Medical Group could not provide the Charging Party with a clear answer as to why (b) (6), (b) was being suspended and implied that the suspension was a result of the Employer's suspension. On (b) (6), (b) (7)(C) the Charging Party emailed the Employer seeking a specific reason for the suspension, which the Employer responded was due to a complaint about certain classroom activities on (b) (6), (b) (7)(C)

[2] "I can't breathe" is a reference to words spoken by Eric Garner and George Floyd, Black men who were killed by police officers.

Beginning (b) (6), (b) (7)(C) the Employer and Medical Group conducted a joint investigation of the Charging Party. During meetings with the Charging Party, the investigators asked about the (b) (6), (b) (7)(C) classroom discussion, but also delved into topics such as the Charging Party encouraging faculty to email leadership with their concerns about COVID-19 protocols, (b) (6), (b) interactions with other faculty (suggesting that the Charging Party had negative interactions or bullied other faculty members), and issues surrounding discrepancies in (b) (6), (b) CV that had been previously corrected. On (b) (6), (b) (7)(C) the Charging Party was told that the investigation had concluded and the investigators would be submitting their report in the next few days. The Charging Party never received a copy of the report.

On (b) (6), (b) (7)(C) the Medical Group reinstated the Charging Party, saying (b) (6), (b) had done nothing wrong. However, the Employer claimed the investigation was ongoing.

The Charging Party then hired an attorney to speak with the Employer on (b) (6), (b) behalf. On (b) (6), (b) (7)(C) the Employer offered the Charging Party a short-term renewal of (b) (6), (b) contract through (b) (6), (b) (7)(C) because, otherwise, (b) (6), (b) contract was set to expire in (b) (6), (b) (7)(C) and, according to the Employer, its investigation was ongoing. The Charging Party accepted the short-term renewal. Around (b) (6), (b) (7)(C) the Employer again claimed it was still investigating the Charging Party and asked for a (b) (6), (b) (7)(C) contract extension to (b) (6), (b) (7)(C) 2021, which the Charging Party accepted.

On (b) (6), (b) (7)(C) the Charging Party posted the following tweet thread to (b) (6), (b) personal Twitter account:

> My pastoral counselor reminded me that "people don't know the weight of their own stories." So here is part of mine. On (b) (6), (b) (7)(C) I had the most profound moment in my career as an educator. (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) I was asked by my Institution to incorporate the topics of bias and racial health disparities in my (b) (6), (b) (7)(C) class. I made the decision to show up fully as a (b) (6), (b) (7) in medicine. We had a candid discussion on racism in society, acknowledging what the day [r]epresented and how that shows up in medicine: under and conversely over representation, poor health outcomes (Black maternal health, extrajudicial murder by police) and ultimately [h]oping that my students understood that we carry the weight of medicine's history of racism and bias with us regardless of their individual backgrounds. Medicine cannot be compartmentalized from what is happening in society. It was an incredible and emotional conversation. After class I felt at odds. I'd never been so vulnerable and open with students and immediately had a #panicattack[. Two] of my colleagues helped me through it and I went home early to rest. Later (b) (6), (b) (7)(C) after

> hearing of (b) (6), (b) (7)(C), I was told that I was suspended[.] Can you still call yourself an educator and a physician if you have no students or patients? I knew I'd be a doctor in 5th grade and by 11th grade that I'd teach. At (b) (6), both were taken from me, but I learned that I am a physician and educator at heart. No one can take that. In October, my physician role was reestablished and in my naïveté thought, I would be returning to the school. Their investigation is ongoing and tomorrow will make it 15 weeks. I wouldn't change what I said in class. #(b) (6), (b) (7)(C) have earned (b) (6), (b) voices and (b) (6), (b) stories! #MedTwitter you're training in the midst of a pandemic and a new awakening of racism in America. Compartmentalization of what you and your patients experience in society cannot be separated from the clinical experience. Find mentors who will help you realize all you want to be. There is so much that can be done outside of Medicine. Use your voices to augment the marginalized. Start an antiracism journey. End racism in medicine. Thank you for sharing my story. I moved from (b) (6), (b) (7)(C) for this position and it's been a nightmare. Please retweet and augment my voice. Thank you for sharing my story.[3]

After the Charging Party issued (b) (6), (b) (7)(C) tweet, (b) (6), (b) received a notification that the Employer's (b) (6), (b) (7)(C) had begun following (b) (6), (b) Twitter profile.

On (b) (6), (b) (7)(C) the Employer's attorney told the Charging Party's attorney that it was interested in having the Charging Party return to (b) (6), (b) teaching role, but it would be subject to the Charging Party's willingness to engage in a reconciliation process with the Employer. Then, on (b) (6), (b) (7)(C) the Charging Party emailed the Employer's (b) (6), (b) (7)(C) outlining the issues (b) (6), (b) was facing at the Employer, including a toxic work culture and lack of transparency. On (b) (6), (b) (7)(C) the Employer asked the Charging Party if (b) (6), (b) would agree to another (b) (6), (b) (7)(C) contract extension, claiming the investigation was ongoing. In response, the Charging Party's attorney suggested the Employer extend the Charging Party's contract for (b) (6), days, which the Employer said it would consider.

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[3] The Charging Party's Twitter message was originally split into ten parts to fit within Twitter's character limit for individual posts. For clarity, the posts are presented here as a continuous thread without numbers denoting each post in the thread.

On (b) (6), (b) (7)(C) the Charging Party posted the following tweet thread to [redacted] personal Twitter account:

> Two weeks ago I was told "they want you back. You can teach (b) (6), (b) (7)(C) (b) " My lawyer was so excited. A week later I was asked if I would leave "voluntarily." One week ago there was [a] tentative agreement on a truth and reconciliation style process[.] ([S]omething similar was requested in October.) But in that process I should be prepared to "own" being considered "aggressive" and it needed to be done THIS week. (I don't think that's how any of this works[.]) A week ago I sent an email to (b) (6), (b) (7) (C) asking if they condoned my suspension without due process. The next day I got my hand slapped for upsetting people. Then I received a mysterious message. In essence, you aren't the first! We stand behind you. Fight for justice. Y'all I got my very own Deep Throat (Watergate Reference)! I just want to teach. I want to talk about nephrons and Starling forces and NK Cells. That's all I wanted. I don't want to be here. -Fin-

On (b) (6), (b) (7)(C) the Employer's attorney told the Charging Party's attorney that the Charging Party's (b) (6), (b) (7)(C) tweet was a problem for the Employer and that the Employer would not be renewing [redacted] contract. According to the Employer, (b) (6), (b) (7)(C) [redacted] was the last day it could give the Charging Party the required [redacted]-day notice that [redacted] contract, which was set to expire on (b) (6), (b) (7)(C) 2021, would not be renewed. The Employer also issued a letter notifying the Charging Party that it would not be renewing [redacted] contract. The letter claims that its reasons for terminating [redacted] contract were for multiple issues related to [redacted] job performance and conduct that had been previously raised directly with the Charging Party or through the Charging Party's attorney, including events that occurred prior to the Employer's investigation. The letter also claims that the decision was not the result of the Charging Party's (b) (6), (b) (7)(C) [redacted] classroom discussion about racism or [redacted] experience as a (b) (6), (b) (7) (b) (6), (b) (7)(C) in medicine.

ACTION

We conclude that the Employer violated Section 8(a)(1) because the Charging Party's (b) (6), (b) (7)(C) classroom discussion about issues of race faced by Black faculty and students, as well as systemic racism in medicine, was inherently concerted and was for mutual aid or protection. Further, the Charging Party's tweets were protected concerted activity because they discussed terms and conditions of employment regarding racial disparities in medicine faced by medical professionals, sought the assistance of others to improve working conditions in medicine, and encouraged others to fight for racial equality and justice in the workplace. These tweets were also the logical outgrowth of the (b) (6), (b) (7)(C) classroom discussion. The above protected concerted activity was a substantial and motivating factor that led the Employer to

suspend and ultimately terminate the Charging Party. The Employer will not be able to meet its rebuttal burden under *Wright Line*, because its reasons for terminating the Charging Party's contract were pretextual.

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and "for the purpose of . . . mutual aid or protection."[4] The manner in which an employee's actions are linked to those of (b) (6), (b) coworkers determines whether the employee's activity is concerted, with no particular combination necessary to find the conduct protected.[5] Core concerted activity is that which is "engaged in with or on the authority of other employees,"[6] and peripheral to core group action, but also retaining protection, is individual conduct both in the form of preliminary discussions[7] and where such conduct is the logical outgrowth of earlier collective activity or discussions.[8] It is well-established that concerted activity includes statements by a lone employee addressing (b) (6), (b) coworkers that seek to initiate, induce, or prepare for group action, or statements directed to management communicating a truly group complaint.[9] Protected preliminary communications to coworkers include statements made to elicit support from fellow likeminded coworkers for a personally

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[4] *See, e.g.*, *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014).

[5] *Meyers Indus.*, 281 NLRB 882, 884–85 (1986) (*Meyers II*) (citing *NLRB v. City Disposal Sys.,* 465 U.S. 822, 831 (1984)), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

[6] *Meyers Indus.*, 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); *Meyers II*, 281 NLRB at 887.

[7] *See, e.g., Fresh & Easy*, 361 NLRB at 153 ("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" and "almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals").

[8] *See, e.g.*, *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038–39 (1992) (individuals' uncoordinated refusals to work overtime were logical outgrowth of earlier concerted protest over hour reductions), *enforced*, 53 F.3d 261 (9th Cir. 1995).

[9] *See, e.g.*, *Timekeeping Sys.*, 323 NLRB 244, 244, 248 (1997) (employee's unilateral company-wide email to coworkers in response to employer's email about vacation plan changes constituted concerted activity).

held view about a working condition.[10] However, fellow employees need not agree with the message or join the employee's cause for there to be concert.[11] Protection will attach even to communications between employees that do not directly call for group action if they involve "inherently concerted" discussions about vital categories of workplace life.[12]

The mutual aid or protection element "focuses on the *goal* of concerted activity," specifically, "whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'"[13] The mutual aid or protection clause covers employees' efforts to improve their lot as employees "through channels outside the immediate employee-employer relationship," and activities "in support of employees of employers other than their own."[14] The mutual aid or protection prong also has been satisfied when an employee solicits other employees for support, "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."[15]

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[10] *See, e.g.*, *Morton Int'l*, 315 NLRB 564, 566 (1994) (finding that employee engaged in concerted activity by writing contradictory statements on memo that proposed smoke-free workplace, and posting memo in lunchroom, because the conduct induced support from fellow smokers); *Whittaker Corp.*, 289 NLRB 933, 933 (1988) ("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" (quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969))).

[11] *See Desert Cab Inc., d/b/a ODS Chauffeured Transp.*, 367 NLRB No. 87, slip op. at 13 (2019).

[12] *Meyers I*, 268 NLRB at 494 (even a statement that "in its inception involves only a speaker and a listener" may be protected because it is "an indispensable preliminary step to employee self-organization" (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951))).

[13] *Fresh & Easy*, 361 NLRB at 153 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

[14] *Eastex, Inc.*, 437 U.S. at 567–68.

[15] *Fresh & Easy*, 361 NLRB at 155–56 & n.18 (employee's solicitation of support from other employees to support her workplace sexual harassment claim was for mutual aid or protect because, inter alia, it inured to the benefit of all employees (citing *Meyers II*, 281 NLRB at 887)).

A. The (b) (6), (b) (7)(C) Classroom Discussion was Protected Concerted Activity

(b) (7)(A) The inherently-concerted doctrine emerged in *Trayco of South Carolina, Inc.*,[17] where the Board held that an employee's discussions with her co-workers about higher wages constituted concerted activity even though the discussions did not contemplate group action. In reaching that decision, the Board observed that the object of inducing group action need not be expressed but can instead be implied from the subject matter of discussion. Because higher wages are a "frequent objective of organizational activity," the Board reasoned that the employee's discussions about that subject impliedly were concerted.[18] The doctrine was enlarged in *Aroostook County Regional Ophthalmology Center*,[19] where the Board decided that discussions about changes in work schedules were inherently concerted activity despite the absence of any talk about the initiation of group action. Like wages, the Board concluded that work schedules are a "vital term and condition of employment" that is "likely to spawn collective action."[20] Lastly, in *Hoodview Vending Co.*,[21] the Board added the subject of "job security" to the list of vital terms and conditions of employment that, when discussed between two or more employees, will be regarded as inherently concerted activity. Such discussions concern "the very existence of the employment relationship and [will] quickly ripple through, and resonate with, the work force."[22] The inclusion of racism among the subjects of workplace discussions

16 (b) (7)(A) (b) (7)(A)

17 297 NLRB 630 (1990), *enforcement denied*, 927 F.2d 597 (4th Cir. 1991).

18 *Id.* at 634; *accord Automatic Screw Prods.*, 306 NLRB 1072, 1072 (1992), *enforced mem.*, 977 F.2d 582 (6th Cir. 1992).

19 317 NLRB 218 (1995), *enforcement denied in part on other grounds*, 81 F.3d 209 (D.C. Cir. 1996).

20 *Id.* at 220.

21 359 NLRB 355 (2014), *vacated*, 2014 WL 2929781 (Jun. 27, 2014), *reconsidered & affirmed*, 362 NLRB 690 (2015).

22 *Id.* at 357.

deemed to be inherently concerted activity is a logical and necessary extension of the inherently concerted doctrine.[23]

In the instant case, the Charging Party's (b) (6), (b) (7)(C) classroom discussion involved issues of race in medicine broadly while also specifically addressing the Dean's recent email that the Charging Party and other employees felt was tone deaf, indicated [redacted] implicit racial bias, and otherwise did not adequately address the issues of race faced by Black faculty and students. Critically, the (b) (6), (b) (7)(C) was a fellow employee who was present for the discussion, which satisfies the Board's current requirement that inherently concerted communications must involve a discussion between at least two employees.[24] Although the (b) (6), (b) (7)(C) found some of the Charging Party's statements about race in medicine inappropriate, that is immaterial because fellow employees need not agree with the message or join the employee's cause for there to be concert. Further, because working to end systemic racism, including its impact at the Employer, inures to the benefit of all employees, the (b) (6), (b) (7)(C) discussion was for mutual aid or protection. Accordingly, the Charging Party's statements during the (b) (6), (b) (7)(C) class discussion were protected concerted activity.

B. The (b) (6), (b) (7)(C) Tweets Were Protected Concerted Activity

The (b) (6), (b) (7)(C) tweet from the Charging Party was concerted because it discussed the overall issues of race and racism in medicine, which, as discussed above, is inherently concerted activity, and the tweet also asked people to use their voices to "augment the marginalized" and "[e]nd racism in medicine." Critically, it asked people to retweet the Charging Party's message and augment [redacted] own voice, therefore inducing others to group action. It is immaterial that there is no evidence that any of the Charging Party's co-workers interacted with the tweet because statutory employees engaging in concerted activity "include any employee, and shall not be

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[23] (b) (7)(A)

[24] *Hoodview Vending Co.*, 359 NLRB 355, 358 n.16 (2012) ("Inherently concerted activity involves a conversation between two or more individuals."), *incorporated by reference*, 362 NLRB 690 (2015). (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

limited to the employees of a particular employer."[25] Thus, the Board has held that statutory employees employed by different employers may join together to engage in concerted activity.[26] Here, the (b) (6), (b) (7)(C) tweet received considerable attention from statutory employees, with over 4,300 likes, over 2,100 retweets, and hundreds of replies to the Charging Party's tweet thread. Although not every individual who interacted with the tweet may necessarily be a statutory employee, the volume of interaction by third parties, many of whom undoubtedly are statutory employees, provides further evidence that the (b) (6), (b) (7)(C) tweet was concerted. Alternatively, the (b) (6), (b) (7)(C) tweet is concerted activity because it is a logical outgrowth of the (b) (6), (b) (7)(C) discussion insofar as it highlights the issues of racial discrimination in medicine, which was the centerpiece of the (b) (6), (b) (7)(C) classroom discussion.[27]

The (b) (6), (b) (7)(C) tweet was also for mutual aid or protection because it sought to improve terms and conditions of employment that would inure to the benefit of other employees, i.e., by battling the impact of racism at the Employer and in the field of medicine generally. Accordingly, the (b) (6), (b) (7)(C) tweet was protected concerted activity.

Similarly, the (b) (6), (b) (7)(C) tweet was concerted activity for mutual aid or protection. The tweet notes that an individual affiliated with the Employer contacted the Charging Party asking (b) (6), (b) to continue to fight for justice and that others were standing behind (b) (6), (b) in support. Thus, by sharing this with the larger Twitter community, the Charging Party signaled others that they should also fight for justice and therefore was implicitly inducing others to group action.[28] Although there is no evidence that any of the Charging Party's co-workers interacted with the tweet, the (b) (6), (b) (7)(C) tweet garnered over 270 likes, 23 retweets, and received several replies to the tweet thread, which included statutory employees. The (b) (6), (b) (7)(C) tweet was also for mutual aid or protection under the "solidarity" principle discussed in *Fresh &*

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[25] *North West Rural Elec. Coop.*, Case 18-CA-150605, Advice Memorandum dated September 21, 2015, at 7 (quoting *Eastex, Inc.*, 437 U.S. at 564).

[26] *Id.* (citing cases).

[27] *Wolters Kluwer*, Case 18-CA-064873, Advice Memorandum dated Nov. 28, 2011, at 3 ("individual activities that are the 'logical outgrowth of concerns expressed by the employees collectively' are considered concerted" (quoting *Five Star Transp., Inc.*, 349 NLRB 42, 43–44, 59 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008)).

[28] *See White Oak Manor*, 353 NLRB 795, 795 n.2, 798–99 (2009) (employee taking pictures with her cell phone and showing them to other employees was inducement to group action), *reaff'd and incorporated by reference*, 355 NLRB 1280 (2010), *enforced mem.*, 452 F. App'x 374 (4th Cir. 2011).

Easy. The Charging Party's call to fight for justice was, in effect, asking other employees to assist with [redacted] employment dispute and thereby remedy the issue so as to prevent other employees from facing a similar situation in the future.[29] Accordingly, the [redacted] tweet was protected concerted activity.[30]

Although the Charging Party's tweets discussed [redacted] individual investigation and suspension by the Employer, they were not "mere griping" because they contemplated future group action.[31] First, the [redacted] tweet asked employees to use their voices to help end racism in medicine while also augmenting the Charging Party's voice. Second, the Charging Party's [redacted] tweet implicitly induced others to also fight for justice. Both tweets looked forward to group action by offering and soliciting advice on combatting racism in medicine, seeking others to aid the Charging Party in [redacted] dispute, and paved the way so others may avoid finding themselves in a similar situation in the future. Accordingly, the tweets were more than mere griping and, instead, were concerted activity.[32]

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[29] *See Fresh & Easy*, 361 NLRB at 155–56 (soliciting employee support for help with charging party's individual sexual harassment claim sought to improve terms and conditions for all employees and therefore was for mutual aid or protection).

[30] In making the argument that the Charging Party engaged in various forms of concerted activity for mutual aid or protection, the Region should urge the Board to revisit *Alstate Maint., LLC*, 367 NLRB No. 68 (2019) and *Quicken Loans, Inc.*, 367 NLRB No. 112 (2019) in which the Board improperly narrowed what it construes as concerted activity and what constitutes mutual aid or protection within the meaning of Section 8(a)(1). [redacted]

[31] *See Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) ("Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'").

[32] *Butler Med. Transp., LLC*, 365 NLRB No. 112, slip op. at 2–3 (2017) (rejecting dissent's characterization that employee's Facebook post seeking advice was mere griping and noting that Board has long held that employee discussions where advice on future action is sought or offered is concerted activity (citing *UniQue Pers. Consultants*, 364 NLRB No. 112, slip op. at 3 (2016))); *Fresh & Easy*, 361 NLRB at 153 (employee's mere act of approaching employees to seek support for her efforts regarding workplace sexual harassment constitutes concerted activity under *Meyers II* and its progeny).

C. *Wright Line* Analysis

When an employer's motive for disciplining or discharging an employee is disputed, *Wright Line*[33] controls the analysis of whether the adverse action was an unfair labor practice. To prove such a violation, the General Counsel must make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the activity was a substantial or motivating reason for the employer's adverse employment actions—i.e., employer animus.[34] If the General Counsel satisfies the initial showing, the burden shifts to the employer to prove it would have taken the same action even in the absence of the Section 7 activity.[35] If the employer's proffered reasons are pretextual—i.e., either false or not in fact relied upon—the employer cannot show that it would have taken the same action absent the employee's Section 7 activity, and, by definition, the employer fails to meet its rebuttal burden under *Wright Line*.[36]

Here, as discussed above, the Charging Party's (b) (6), (b) (7)(C) classroom discussion and (b) (6), (b) (7)(C) tweets were protected concerted activity. Also, the evidence clearly shows the Employer knew about this Section 7 activity because: (1) the Employer specifically stated the Charging Party was being suspended due to (b) (6), (b) (7)(C) classroom discussion, the details of which had been reported by the (b) (6), (b) (7)(C) (2) the Charging Party received a notification after (b) (6), (b) (7)(C) tweet that an (b) (6), (b) (7)(C) had begun following (b) (6), (b) Twitter profile; and (3) the Employer's attorney told the Charging Party's attorney that the Employer saw (b) (6), (b) (7)(C) tweet. Finally, there is strong evidence of Employer animus toward the Charging Party's Section 7 activity and there is a causal nexus between the Employer's animus and its adverse employment actions.[37] Thus, the Employer notified the Charging

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[33] 251 NLRB 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *approved in NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983).

[34] *Manor Care Health Servs.–Easton*, 356 NLRB 202, 204, 225–26 (2010), *enforced per curiam*, 661 F.3d 1139 (D.C. Cir. 2011) (citations omitted).

[35] *Id.* at 225.

[36] *Metro. Transp. Servs.*, 351 NLRB 657, 659 (2007).

[37] *See Tschiggfrie Props., Ltd.*, 368 NLRB No. 120, slip op. at 3–4 (2019) (general animus on part of an employer is not sufficient to satisfy *Wright Line* test; need to prove nexus between animus and the adverse action). Here, the General Counsel can meet her *Wright Line* burden as interpreted in *Tschiggfrie*, but she disagrees with the Board's decision in *Tschiggfrie* and will urge the Board to revisit that decision in

Party [redacted] was being suspended due to [redacted] classroom discussion; likewise, the Employer's attorney stated that the [redacted] tweet was the reason the Employer decided to not renew the Charging Party's employment contract.[38] Accordingly, the General Counsel will be able to present a strong prima facie case of unlawful discrimination because of the Charging Party's Section 7 activities.

The Employer will not be able to meet its *Wright Line* rebuttal burden because its stated reasons for terminating the Charging Party are pretextual.[39] In a [redacted] letter, the Chair claimed the Charging Party's contract was not being renewed because of multiple issues related to [redacted] job performance and conduct that, according to the letter, had been previously raised directly with the Charging Party or through the Charging Party's attorney. However, according to the Charging Party, the Employer never raised any performance or behavior issues prior to its suspension of [redacted] Further, the investigation brought on by the [redacted] classroom discussion went well beyond its scope by inquiring of the Charging Party's relationship with other faculty, suggesting for the first time that the Charging Party may have bullied colleagues, and highlighting discrepancies in the Charging Party's CV that had previously been corrected. Significantly, on [redacted] after [redacted] was hired, the Chair told the Charging Party [redacted] would recommend [redacted] receive an increase in academic rank along with a [redacted] employment contract. Further, the Charging Party's attorney and the Employer discussed in [redacted] bringing the Charging Party back if [redacted] agreed to a truth and reconciliation process. The Chair's [redacted] communication and the Employer's conditional offer to renew the Charging Party's contract as late as [redacted] belie the Employer's claims that it declined to renew [redacted] contract for poor performance.

The [redacted] letter also claims that the decision was not the result of the Charging Party's [redacted] classroom discussion about racism, including [redacted] own experience as a [redacted] in medicine. However, the evidence shows that the suspension and investigation that ultimately led to the Charging Party's termination

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appropriate cases. [redacted]

[38] The Employer's animus against the Charging Party's Section 7 activity can also be inferred from the pretextual nature of the alleged reasons for terminating the Charging Party, described below.

[39] In making this argument, the Region should urge the Board to revisit *Electrolux Home Prods.*, 368 NLRB No. 34 (2019), in which the Board improperly diminished the importance of pretext evidence. [redacted]

were a direct result of [redacted] classroom discussion about race, which the [redacted] abruptly ended and then reported to the Employer. Indeed, the Employer sent an email to the Charging Party on [redacted] specifically stating that [redacted] suspension was the result of the classroom discussion on [redacted]

Finally, the Employer's attorney admitted to the Charging Party's attorney that the [redacted] tweet was a problem for the Employer and the Employer would not be renewing [redacted] contract. Therefore, the reasons given by the Employer for terminating the Charging Party's contract—multiple issues related to job performance and conduct—are not the real reasons for [redacted] termination, and the Employer will fail to meet its rebuttal burden.

Accordingly, for the foregoing reasons, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully suspended and terminated the Charging Party in violation of Section 8(a)(1).

/s/
R.A.B.

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