Holling Press, Inc., and Boncraft-Holling Printing Group f/k/a Boncraft, Inc. *and* Catherine M. Fabozzi. Case 3–CA–20229

October 15, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 13, 2000, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an opposing brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, for the reasons set forth below, and to adopt the recommended Order.

The issue before the Board is whether Catherine Fabozzi was engaged in activity encompassed by Section 7 of the Act when she solicited a coworker to be a witness in support of her sexual harassment claim filed with a State agency.[2] We find that Fabozzi's conduct, though concerted, was uniquely designed to advance her own cause, and thus, that it was not engaged in for the purposes of mutual aid or protection. Accordingly, we find that she was not engaged in activity protected by Section 7 and that her termination was lawful.[3]

Background

In early January 1996,[4] Fabozzi, a 3-year employee of the Respondent—Holling Press, Inc., complained to her union steward that Leadman John Leon was sexually harassing her. The Union looked into the accusation and concluded that it was unfounded.[5] Thereafter, in January or February 1996, Fabozzi contacted the New York State Division of Human Rights**,** claiming that she had been subjected to sexual harassment. In a letter dated March 7, the State agency directed Fabozzi to supply specific information so that a complaint could be prepared.[6] In March, before returning from a routine layoff, Fabozzi raised the harassment issue with the production manager, and the Respondent met with her and union officials. Much of the meeting centered on whether Fabozzi had threatened Leon, and although Fabozzi's accusations were not substantiated, then-owner Brian Maher resolved that, to the extent possible, Fabozzi would not have to work alone with Leon. Thereafter, in May, Fabozzi asked employee Susan Garcia to testify before the State agency, saying that she (Garcia) could be "hit" with a subpoena in any event.[7] At the time of Fabozzi's solicitation, Garcia had just informed her that Leon said he was wearing his "tight white pants" for Garcia. The Respondent suspended Fabozzi on June 26, and terminated her on July 2, for purportedly "attempt[ing] to coerce coworkers into corroborating an unsubstantiated charge of sexual harassment against one of [her] supervisors."[8]

The judge found that "although Fabozzi's activities were 'concerted' in that she appealed to other employees for help, they were not 'concerted' within Section 7 because they were not undertaken for the purposes of 'mutual' aid or protection." (Emphasis in original.) In so finding, the judge rejected the Respondent's defense that Fabozzi's conduct was not protected because she threatened her coworkers. The judge dismissed the complaint, and the General Counsel has excepted to the dismissal. We affirm the judge's decisions for the following reasons.

Analysis

Section 7 provides:

> 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.*[9] [Emphasis added.]

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

[2] We express no view on the merits of Fabozzi's sexual harassment claim.

[3] Because we find that Fabozzi's termination was lawful, it is unnecessary to resolve whether Boncraft, Inc., which purchased the Respondent during this proceeding and became Boncraft-Holling Printing Group, is a remedial successor.

[4] All dates refer to 1996 unless otherwise stated.

[5] The judge criticized the Respondent's and the Union's investigations into the matter.

[6] The record does not reflect what action Fabozzi took in response to the letter**,** apart from soliciting one or two coworkers to become witnesses, or the outcome of her efforts before the State agency.

[7] Fabozzi denied soliciting employee Dolores Rodovich to "get in on the action," and a written statement about the incident was rejected by the judge as hearsay. Hence, we do not rely on the incident.

[8] This statement appears in the termination letter given to Fabozzi. Despite the wording of the letter, the parties agreed that the alleged harasser, Leon, is not a statutory supervisor.

[9] Sec. 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights.

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." These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1).

In the *Meyers* cases,[10] which refined the scope of conduct that constitutes concerted activity, the Board discussed and adhered to a longstanding distinction between concerted activity on the one hand and mutual aid or protection on the other. Thus, in *Meyers I* and *II*, the Board noted that earlier Board cases "had, with court approval, distinguished between the two clauses and regarded them as separate tests to be met in establishing Section 7 coverage."[11] The Board reaffirmed that concerted activity included "circumstances in which individual employees seek to initiate or to induce or to prepare for group action,"[12] and "activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization," so long as what is being articulated goes beyond mere griping.[13] Consistent with treating the two elements as separate but indispensable requirements of Section 7, the Board in *Meyers II* then discussed mutual aid or protection separately, noting that "the Supreme Court regarded proof that an employee action inures to the benefit of all simply as proof that the action comes within the 'mutual aid or protection' clause of Section 7."[14] Accordingly, our analysis of Fabozzi's conduct follows this distinction.

Where employees concertedly band together to seek from their employer an improvement in terms and conditions of employment, or protection against an adverse change in the same, they are engaged in Section 7 activity. That is, their activity is concerted, and it is for mutual aid or protection. However, in the instant case, the employee sought to pursue a personal claim before a State agency. When she sought other employees to help her, that conduct was concerted. But, inasmuch as the claim before the State was personal, that conduct was not for mutual aid or protection.

As indicated above, the judge found that Fabozzi was engaged in concerted activity because she appealed to other employees for help. We do not disagree that such a finding could be made on this record. To the extent that Fabozzi exhorted another employee, Garcia, to support her sexual harassment claim, Fabozzi was engaged in concerted activity within the meaning of Section 7 and the parameters of *Mushroom Transportation*, supra, and *Root-Carlin*, supra.

However, with 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. Believing herself to be a victim of sexual harassment, she complained to the State agency. It was the State agency that instructed Fabozzi to provide more information and, presumably, to identify potential witnesses. Thus, her apparent requests to coworkers to help her out with John Leon were not made to accomplish a collective goal. Rather, their purpose was to advance her own cause. Significantly, Fabozzi testified, she asked Garcia to "help *me* follow through with charges [against Leon]." (Emphasis added.) 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 Leon's comment, which she reported to Fabozzi, 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 Leon'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.

Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), is not to the contrary. The employees there sought to gain support for their effort to oppose a "right to work" law and to protest a presidential veto of a minimum wage bill. Obviously, "right to work" vs. union security is an issue that is an important one for all union supporters within the unit. As they see it, the inability to collect dues from "free riders" creates a financial impediment to the union's role as representative for all. Equally obvious,

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

[11] *Meyers I,* 268 NLRB at 494–495, 496; *Meyers II*, 281 NLRB at 884, 885, citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

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

[13] *Meyers II*, 268 NLRB at 887, citing *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951).

[14] 281 NLRB at 887.

minimum wage laws are not personal to any particular employee.[15]

Our dissenting colleague asserts that nothing in the Court's language in *Eastex* implies that a single employee's resort to an administrative forum is protected only if she is not the sole immediate beneficiary of her action. By this, we understand our colleague to mean the *Eastex* does not require that for a single employee's complaint to be protected, the complaint must benefit other employees as well as the complainant herself. We read *Eastex* differently. Simply stated, *Eastex* (and Sec. 7) require concert plus mutual aid or protection. The element of mutual aid or protection was shown by the fact that, as set forth above, the group of employees had a common interest in the subject matter. 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 she assist her with her complaint, 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. Thus, in *Meyers I* and *II*, the Board, declining to find concertedness from the object of the action taken, overruled its decision in *Alleluia Cushion*, 221 NLRB 999 (1975). In that decision, the Board had announced that it would presume that a lone employee's (Henley's) filing of a complaint with the California OSHA office constituted concerted activity because "*it [was] clear from the nature and extent of the safety complaints registered that Henley's object encompassed the well-being of his fellow employees.*" *Alleluia Cushion*, 221 NLRB at 1000–1001 (emphasis added). By her arguments here, our dissenting colleague now asserts, as it were, the "flip side" of the *Alleluia Cushion* analysis: 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. We reject this argument as contrary to *Meyers I* and *II*. 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 to one of benefiting others for mutual aid or protection. Nothing in *Eastex* suggests otherwise.[16]

El Gran Combo de Puerto Rico, 284 NLRB 115 (1987), enfd. 853 F.2d 996 (1st Cir. 1988), is also distinguishable. In that case, the Board discussed only the issue of concert, not the issue of mutual aid or protection. In any event, the element of mutual aid or protection was present. The case involved the joint solicitation by two of the members of a musical group to the other members to oppose a recording arrangement whose benefits were not limited to one employee. Although these two members may have had different immediate objectives (one receiving no payment from the recording and the other some), those differences did not detract from the mutuality of their appeal, as both sought the same ultimate objective of changing the business arrangement by which they were to be compensated.

Circle K Corp., 305 NLRB 932 (1991), enfd. 989 F.2d 498 (6th Cir. 1993), does not support our colleagues' view. The employee there was soliciting the support of fellow employees with respect to the terms and conditions of all of the store employees. The solicited employees did not support the employee and subjectively thought that she was acting in bad faith. But those subjective thoughts of the solicitees did not undermine the Section 7 nature of the solicitor's activities.

In sum, our colleague suggests that, when one employee asks for the assistance of another, there is always mutual aid or protection, for there may come a day when the second employee asks for help. In our view, that approach obliterates the distinction between concert and mutual aid or protection. That is inconsistent with the principle that the two elements are separate and distinct.

Our dissenting colleague overstates our position and then seeks to demolish (through statistics) the straw man that she had created. 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

[15] In *Meyers II*, in determining that Kenneth Prill's contacting various governmental agencies to complain about the safety of his truck was not concerted activity, the Board noted that the NLRB is not intended to be "a forum in which to rectify all the injustices of the workplace." *Meyers II,* 281 NLRB at 888. Here, Fabozzi's termination might have been resolved under the retaliation provisions of the State antidiscrimination statute. *NY Exec. Law*, Chap. 800, art. 15, sec. 296.1.e.

[16] Our dissenting colleague also asserts that even though Fabozzi's motive in filing the complaint may have been to benefit herself alone, the issue to be decided is her purpose in doing so. We do not disagree. As explained above, we find, in agreement with the judge, that Fabozzi's purpose in filing the complaint was solely to benefit herself.

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.[17]

We recognize that, in *IBM Corp.*, 341 NLRB 1288 (2004), the Board said that the activity there was protected. The activity was one employee asking his employer for the assistance of another employee during an investigatory interview of the former, which interview could potentially lead to discipline. A Board majority concluded that the seeking of assistance was protected, although a different Board majority held that the employer did not have to grant the request.

We believe that *IBM* is distinguishable. In an employment context, discipline and the threat thereof are commonplace occurrences. Thus, employees have an interest in a regimen under which any one employee, threatened with discipline, can request the assistance of the another.[18] There is a real possibility that, in the future, other employees will be subjected to an investigatory interview and will seek assistance at that time. By contrast, the claim here (before a State agency) was a private one to remedy alleged sexual harassment. Such claims are not a common everyday occurrence. Although there is a theoretical possibility that the solicited person may herself file a claim or suit some day and ask for assistance at that time, that possibility is far too remote and tenuous to support a conclusion that the request is for mutual aid or protection.

The dissent argues, and we agree, that any workplace grievance can be the basis for Section 7 protection. However, our point is simply that some types of workplace matters are far more likely than others to involve mutual aid or protection. As noted above, it is a common practice for employers to investigate alleged employee misconduct at the workplace, and it is not uncommon for employees to seek the protection of each other during such investigations. By contrast, the filing of private lawsuits or charges outside the workplace is less common, and there is no showing that the plaintiffs in such cases seek mutual aid or protection in the prosecution of such lawsuits or charges.[19]

Finally, we do not think that Leon's comment to Garcia established mutual aid or protection. There are far too many assumptions that one has to make to support such a claim. For example, we would have to assume that Garcia was in fact the victim of sexual harassment and that the Fabozzi lawsuit would offer her protection. With particular respect to the latter point, there is nothing to suggest that Fabozzi's lawsuit would give any relief to Garcia.

Accordingly, we find that the complaint was properly dismissed.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

MEMBER LIEBMAN, dissenting.

The majority concludes that while Catherine Fabozzi's conduct was concerted—she asked another employee, Susan Garcia, to serve as a witness in connection with her sexual harassment complaint against a leadman—Fabozzi acted solely to benefit herself, not other employees as well. On that view, the "mutual aid or protection" element of Section 7 was not satisfied here. The majority sets an arbitrary standard, at odds with what our case law contemplates. It treats sexual harassment at work as merely an individual concern, even when victims seek help from coworkers. That view is simply unacceptable. I would find, then, that Respondent Holling Press violated Section 8(a)(1) by discharging Fabozzi.[1]

It is clear, as the majority acknowledges, that Fabozzi engaged in concerted activity by soliciting Garcia to be a witness. This was a textbook example of "circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Fabozzi's solicitation of Garcia was an exhortation that they *join together* to resolve an unsatisfactory and possibly illegal condition of employment.

The "mutual aid or protection" element was satisfied as well. The Board has "freely acknowledged that efforts to invoke the protection of statutes benefiting employees are efforts engaged in for the purpose of 'mutual aid and protection.'" *Meyers II*, supra, 281 NLRB at 887, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (resort to

[17] Of course, the employee may be protected under other laws.

[18] Of course, this is not to say that the employer had a statutory obligation to *grant* the request. There is no such obligation. See *IBM*, supra, 1297.

[19] The statistics cited by our colleague do not distinguish between individual claims and group claims, and they obviously do not address the question of whether the claimants are aided by others.

[1] I would also find that Respondent Boncraft-Holling Printing Group is responsible for remedying the unfair labor practice committed by its predecessor. I agree with the General Counsel that Boncraft-Holling is liable as a successor, because it acquired and operated the business of Holling in basically unchanged form, under circumstances that charged Boncraft-Holling with notice of the unfair labor practice committed. See generally *Perma Vinyl Corp.*, 164 NLRB 968, 969 (1967), enfd. sub nom. *U.S. Pipe & Foundry v. NLRB*, 398 F.2d 544 (5th Cir. 1968), cited with approval in *Golden State Bottling, Inc. v. NLRB*, 414 U.S. 170, 176 & 181 (1973). Because it finds no violation, the majority is not required to reach the issue of Boncraft-Holling's liability.

administrative and judicial forums).[2] Fabozzi's resort to a State agency that is empowered to investigate and resolve issues of sexual harassment in the workplace falls within the sphere of mutual aid or protection.[3]

The fact that Fabozzi's was the only complaint has no bearing on the element of mutual aid; it goes only to the element of concertedness, which has otherwise been satisfied here by Fabozzi's appeals to a coworker for help. An individual's solicitation of assistance from coworkers, even if for an individual cause, is for mutual aid. See, e.g., *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1005 fn. 4 (1st Cir. 1988), enfg. 284 NLRB 1115 (1987) ("[R]equesting assistance for one's own benefit can fairly be characterized as 'for mutual aid or protection'"; other employees have an interest in helping "because next time it could be one of them that is the victim").[4]

This solidarity principle, which is basic to the Act, is nothing new. It was most recently endorsed by four Board members in *IBM Corp.*, in reiterating the Board's consistent view that an employee's request for a coworker representative in a disciplinary meeting is protected, concerted activity, which cannot be the basis for discipline (even if the employer is free to refuse the request).[5] As Judge Learned Hand explained many years ago, "making common cause with a fellow work[er] over his separate grievance" is the essence of employee solidarity, even if only the one worker "has any immediate stake in the outcome." *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.,* 130 F.2d 503, 505 (2d Cir. 1942). The Supreme Court itself has recognized that a single employee's appeal for help from other employees implicates "mutual aid or protection," "even though the employee alone may have an immediate stake in the outcome," because the employee "seeks 'aid or protection' against a perceived threat to his employment security." *NLRB v. J. Weingarten,* supra, 420 U.S. at 260.

Struggling to distinguish *IBM*, the majority apparently would limit the solidarity principle to seeking help in connection with threatened discipline. Discipline is always a "real possibility," my colleagues say, so "employees have an interest in a regimen under which any one employee, threatened with discipline, can have the assistance of another." In contrast, sexual harassment is uncommon, and it is merely a "theoretical possibility" that another employee may seek a coworker's help to stop harassment in the future. The majority's rationale does not stand up.

Its errors are plain: First, there is no basis in the Act, or in precedent, for distinguishing between different types of workplace grievances—whether based on their frequency or some other ground—in deciding whether the "mutual aid or protection" standard is met. All that matters is that the grievance involve terms and conditions of employment. Employees' reasonableness in engaging in concerted activity, including the reasonableness of thinking that solidarity is likely to be worthwhile, is irrelevant. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962). Second, the solidarity principle does not depend on two coworkers having identical types of grievances. An employee who gets help from a colleague for one type of grievance obviously may give help to a coworker for *another* type of grievance. Finally, it is absurd to claim that sexual harassment, or other unlawful discrimination directed against individual workers, is rare. In fiscal year 2003, for example, the Equal Employment Opportunity Commission (EEOC) received more than 81,000 charges of discrimination, including more than 13,000 sexual harassment charges.[6] These charges must represent only a fraction of the perceived sexual harassment actually occurring in American work-

[2] See also *Washington State Service Employees State Council No. 18*, 188 NLRB 957 (1971) (single employee's protesting racial discrimination with employees of another employer was for mutual aid and protection).

Contrary to the majority's suggestion, nothing in the Court's language in *Eastex* implies that a single employee's resort to an administrative forum is protected only if she is not the sole immediate beneficiary of her action.

[3] My colleagues oddly mischaracterize my position as holding 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" (emphasis in original). As I explain, Fabozzi's conduct was both concerted (she reached out to Garcia) and for mutual aid or protection (given the subject matter). It is the majority's position, not mine, that conflicts with established law.

[4] In *El Gran Combo*, employee Ramos was the only employee who did not receive payments from the recording. In finding that Ramos was unlawfully terminated for soliciting his coworkers for help in the matter, the Board necessarily found that his conduct was for mutual aid or protection, and the court agreed.

The majority attempts to distinguish *El Gran Combo* by mistakenly insisting that only the concertedness requirement was at issue and by arguing that employee Duschesne also stood to benefit from Ramos' complaint—despite the Board's statement that "the only combo member to be an immediate or direct beneficiary of Ramos' complaint was Ramos himself." 284 NLRB at 1117. Notably, the *El Gran Combo* Board cited the case law I rely upon here (below). See id. at 1117 fn. 13, citing *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), and *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942).

[5] *IBM Corp.*, supra, 341 NLRB at 1294 (opinion of Chairman Battista and Member Meisburg), 20 & fn. 13 (dissenting opinion of Member Liebman and Member Walsh) (2004). See *Electrical Workers Local 236*, 339 NLRB 1199, 1200 (2003), citing *E. I. du Pont & Co.*, 289 NLRB 627, 630 fn. 15 (1988).

[6] The cited EEOC enforcement data is available on the Agency's website at www.eeoc.gov/stats/all.html and www.eeoc.gov/stats/harass.html.

places, given the reluctance of victims to speak out.[7] As a recent study observed, "Sexual harassment is a fact of life for many working women, with some studies suggesting that work-related sexual harassment may affect as many as one in two women at some point in their work lives."[8] Why my colleagues think otherwise is a mystery.

The Board has long recognized that alleviating unlawful discrimination in the workplace is in the interest of all employees. See *Tanner Motor Livery, Ltd.*, 148 NLRB 1402, 1404 (1964). The majority does not challenge this proposition. It cannot be gainsaid that sexual harassment at the Respondent's facility inherently affects terms and conditions of employment there, and that its elimination, if it is found to exist, will inure to the benefit of all of the employees.

Finally, the record contains demonstrable proof of a mutual benefit. Fabozzi's solicitation of Garcia was prompted by Garcia's telling Fabozzi that Leon said he was wearing his "tight white pants" for Garcia—a comment that Fabozzi obviously interpreted to be, and which arguably is, sexual in nature. It is irrelevant that Garcia was not offended by the comment. Fabozzi, a possible victim of sexual harassment, asked a coworker, whom she perceived to be another victim of sexual harassment by the same person, to support her claim as a witness. The effect of Fabozzi's State agency claim, if found to have merit, would be to curb Leon's sexual harassment of all women in the workplace, and not of Fabozzi alone.[9]

It may be true that Fabozzi cared more about herself than she did about her coworkers. And Fabozzi may well have aggressively pursued her own interests. But Section 7 requires neither altruism, nor unequivocal solidarity, on the part of an individual employee who seeks help from coworkers with respect to working conditions.[10] My colleagues, I fear, have let their understandable lack of sympathy for some of Fabozzi's behavior lead them to make bad law for all workers. Whatever the reason, the majority's decision today places an arbitrary roadblock in front of employees who join together to resist unlawful discrimination. At bottom, it encourages victims of sexual harassment to remain silent. I dissent.

Ron Scott and *Robert Ringler, Esqs.,* for the General Counsel.
Miles G. Lawlor, Esq., of East Syracuse, New York, for the Respondent.
Catherine M. Fabozzi, pro se, for the Charging Party.

DECISION

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act) was tried before me in Buffalo, New York, on June 13–14, 2000. On August 9, 1996,[1] Catherine M. Fabozzi, an individual, filed the charge in Case 3–CA–20229 alleging that Holling Press, Inc. (the Respondent) had violated Section 8(a)(1) of the Act by suspending her on June 26 and discharging her on July 2. Processing of the charge at the Regional Office level was initially deferred to existing grievance and arbitration procedures under the principles of *Dubo Mfg. Corp.,* 142 NLRB 431 (1963), but on February 2, 2000, the Regional Director set aside her deferral order. On February 24, 2000, on behalf of the General Counsel of the National Labor Relations Board (the Board), the Regional Director issued a complaint that was based on the charge as filed. On May 18, 2000, the General Counsel issued an amended complaint alleging that on November 19, 1999, Boncraft-Holling Printing Group f/k/a Boncraft, Inc. (Boncraft-Holling) purchased the Respondent and was a successor of the Respondent with notice of potential liability for remedy of the Respondent's alleged unfair labor practices. The Respondent duly filed an answer in which it admits that this matter is properly before the Board,[2] but the Respondent

[7] See *Heather Antecol & Deborah Cobb-Clark*, *The Changing Nature of Employment-Related Sexual Harassment: Evidence from the U.S. Federal Government, 1978–1994*, 57 Industrial & Labor Relations Rev. 443, 445 (2004) (observing that "[l]ess than 5% of individuals experiencing sexual harassment ever report their experiences to anyone in authority, and even fewer file formal complaints with employers, institutions, or legal authorities").

[8] Id. at 443. There is "mounting evidence" that sexual harassment "has negative consequences for workers, including increased job turnover, higher absenteeism, reduced job satisfaction, lower productivity, and adverse health outcomes"—in addition, of course, to the fact that "[s]exual harassment also imposes sizable costs on firms." Id. at 445 (footnote omitted). The Federal Government is hardly immune to the problem. See U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace* (1995) (available at www.mspb.gov/studies).

[9] *NY Exec. Law*, Chap. 800, art. 15, sec. 297.4.c. grants the Commissioner for Human Rights the authority to issue cease and desist orders, as well as make-whole remedies similar to those fashioned by the Board.

[10] In *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. 989 F.2d 498 (6th Cir. 1993), for example, the Board found that an employee had engaged in protected, concerted activity, notwithstanding the views of fellow employees that she had "acted in bad faith to protect herself against discharge for poor work." The Board observed that "[e]mployees 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." Id. See *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 499 (2d Cir. 1967). (Even if it were true that [the employee] was acting for his personal benefit, it is doubtful that a selfish motive negates the protection that the Act normally gives to Sec. 7 rights.) See also *Dreis & Krump Mfg. Co., Inc. v. NLRB*, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976) (distinguishing between employee's motive and purpose: "what is crucial is that the purpose of the conduct relate to . . . matters of 'mutual aid or protection'"). Despite the majority's quibbling, these cases clearly are at odds with the rationale of today's decision.

[1] Unless otherwise indicated, all dates are in 1996.

[2] As it admits, the Respondent is a corporation that is located in Buffalo, New York, where it is engaged in the business of printing books, magazines, and other literature. During the year preceding issuance of the complaint, the Respondent purchased and received at its Buffalo

denies that it has committed any unfair labor practices, it denies that Boncraft-Holling had purchased anything other than a minor portion of the Respondent's assets, it denies that Boncraft-Holling is its successor, and it denies that Boncraft-Holling had any knowledge of the Respondent's alleged unfair labor practices at the time of the asset purchase.[3]

Upon the testimony and exhibits entered at trial,[4] and upon my observations of the demeanor of the witnesses,[5] and after consideration of the briefs that have been filed, I make the following

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

On February 25, 2000, the Respondent ceased operations; it had not been dissolved at the time of trial, but its only activity was the sale of remaining assets. Before ceasing operations, the Respondent recognized two unions as the collective-bargaining representatives of its approximately 27 employees; it recognized Local 261 of the Graphic Communications International Union as the representative of its approximately 13 employees in its pressroom, and it recognized Local 17-B of the GCIU as the representative of its approximately 14 employees in its bindery. Beginning in April 2000, Boncraft-Holling hired three of the Respondent's former pressroom employees and six of the Respondent's former bindery employees. Boncraft-Holling further hired Brian Maher who was, and remains, the Respondent's president and principal owner. Maher acknowledged that he currently has the title of executive vice president of Boncraft-Holling, but he admitted to having no more than a sales function with that business entity.

Charging Party Fabozzi was employed continuously by the Respondent from some time in 1993 until her suspension and discharge in 1996. Fabozzi worked in the bindery unit and was represented by Local 17-B; the president of Local 17-B at the time of the events in question was Kenneth Owen; the Union's steward was David Canfield. Fabozzi work different shifts; her foreman on the day shift was Bob Pendryes; a leadman on second shift was John Leon. The General Counsel contends that, in violation of Section 8(a)(1), the Respondent suspended and then discharged Fabozzi because she engaged in the protected concerted activity of soliciting the support of two of her fellow employees for a potential New York State sexual harassment lawsuit against Leon, or the Respondent, or both.[6] The Respondent contends that Fabozzi was discharged solely because of threats that she separately made to Leon and to the two employees whom she solicited. Fabozzi denies making any such threats.

B. The General Counsel's Evidence on the Discrimination Issue

Fabozzi testified that she first contacted the Brooklyn office of the New York State Division of Human Rights, Office of Sexual Harassment Issues (the State agency), in early 1996. The General Counsel introduced a letter to Fabozzi from the State agency dated March 7, inviting her to follow up some previous contact by supplying specific information so that a complaint could be prepared. The General Counsel did not, however, offer any written response that Fabozzi may have made, and whether Fabozzi actually filed a State action against Leon (or against the Respondent, or against both) is not disclosed by the record.

Nadra MacArthur was the Respondent's production manager in 1996. About March 15, at a time when she was on a routine layoff, Fabozzi telephoned MacArthur and told her that she was being sexually harassed by Leon. MacArthur told Fabozzi that she would "look into it." On March 20, Foreman Pendryes telephoned Fabozzi and told her that she was about to be recalled from layoff and that a meeting would be held the next day to discuss her allegations against Leon.

On March 21, such a meeting was conducted in the Respondent's conference room. Present were Fabozzi, Maher, MacArthur, Owen, Canfield, and Leon. Fabozzi testified on direct examination that she stated her sexual harassment allegations against Leon, and she stated that she had already complained about it to the Union. Neither Owen nor Canfield, however, supported Fabozzi; in fact, they took up for Leon. Maher told Fabozzi that she appeared to have a "problem with supervision." MacArthur asked Fabozzi if she had threatened Leon. Fabozzi replied that she had not. Fabozzi was then asked and she testified:

> Q. Continue with what you said to Ms. MacArthur at that time [i.e., at the March 21 meeting].
>
> A. Okay, I told her [MacArthur] that Dave [Canfield] had told me that John Leon's wife was a real lady and this would kill her. And I said, "So let her die. Nobody gives a shit about me."
>
> Q. Did you say anything else along that line to Ms. MacArthur at that time?
>
> A. And I said, you know, "Let his dog die, too, I could care less."
>
> And she said, "What other threats have you made?"
>
> And I said, "I didn't make any threats." And I said, "The only thing I said is let them die. They mean nothing to me."

(The General Counsel did not ask Fabozzi if she explained Canfield's reference to "this" at the March 21 meeting.)

facility goods valued in excess of $50,000 directly from suppliers located at points outside New York. Therefore, at all relevant times the Respondent has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[3] The Respondent's answer to the amended complaint was inadvertently omitted from the formal exhibits file. I have marked the answer as GC Exh. 1(s) and placed it in the file.

[4] Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. When quoting exhibits, I enter some grammar and punctuation corrections rather than mark *meaningless* errors with "(sic)." Bracketed words in quotations have been entered by me.

[5] Credibility resolutions are made on the basis of demeanor and any other factors that I may mention.

[6] Of course, whether Leon actually engaged in sexual harassment of Fabozzi is not an issue before the Board.

Fabozzi testified that the meeting ended without any resolution of her complaints about Leon.

The General Counsel asked Fabozzi if she had actually had an encounter with Canfield such as that which she described in the March 21 meeting. Fabozzi replied that she did, in January or February. (The Respondent's evidence demonstrated that it occurred in February, and I shall refer to the incident as the February encounter between Fabozzi and Canfield.) The General Counsel did not ask Fabozzi to give a start-to-finish account of the February encounter with Canfield; indeed, he asked her only a very few questions about it. The General Counsel asked Fabozzi who initiated the February encounter between her and Canfield; Fabozzi replied that she did. (The General Counsel did not, however, ask Fabozzi why she did so or what she had said to initiate the encounter; therefore, if Fabozzi then told Canfield that she wanted to file a grievance, the fact is not borne out by Fabozzi's testimony.) The General Counsel also asked Fabozzi who else was present during the February encounter with Canfield; Fabozzi replied: "Susan [Garcia] walked by at the end of the conversation and she had heard me say, 'Let them die.'" (Garcia was a fellow employee who testified for the Respondent, as discussed infra.) Fabozzi further testified that the February encounter ended with both Canfield and Garcia laughing at what she had said and walking away.

On cross-examination, Fabozzi testified that during the March 21 meeting MacArthur "said that she had heard that I had said that I wanted John Leon and his wife and his mother and his dog dead. And I said, 'I did not say that.'" Further on cross-examination, when asked if, during the March 21 meeting, she had said that she was proud of threatening Leon's household, Fabozzi replied: "What I said was that I do not feel bad about saying it because they don't care about my family, they don't care what's happening to us." Finally, on cross-examination, Fabozzi denied that during her February encounter with Canfield she stated that "I want" Leon, or his wife, or his son, or his dog, "dead."

Fabozzi was recalled from layoff about 1 or 2 weeks after the March 21 meeting. Fabozzi testified that on May 6, in the lunchroom, on a break, she met jointly with fellow employees Garcia and Dolores Rodovich. According to Fabozzi:

> Susan Garcia had mentioned that Leon told her that he was wearing his tight, white pants for her today, and I had said he hadn't learned anything, he's not trying to help himself, and I had gone to Brooklyn and spoken to a Joan Toshima, and she told me to ask them two, Dolores and Susan, if they would be interested in coming and testifying and helping me out with John Leon. And I said, "It doesn't really matter because they can subpoena you anyway."
>
> And Susan said she could get "convenient amnesia" if she wanted to, but she would get back to me later. And Dolores said that she would just get back to me. Neither one of them answered me.

Fabozzi testified that Toshima was an agent of the State agency, but she did not know if Toshima was a lawyer (who could more readily subpoena witnesses). Fabozzi acknowledged that she did not explain her references to Brooklyn or Toshima to Garcia and Rodovich.

Fabozzi further testified that on June 26 she was summonsed to another meeting in the Respondent's conference room. Present were MacArthur, Canfield, and Pendryes. According to Fabozzi, MacArthur told her that she was being suspended for threatening unnamed employees. Fabozzi testified that she replied to MacArthur that: "I did not threaten anybody. If a threat of being subpoenaed into court is considered a threat, then I did it, but I didn't threaten anybody other than that." Fabozzi testified that MacArthur replied that she would "reinvestigate everything, herself, personally."

By letter dated July 2, MacArthur advised Fabozzi that she was being discharged as of that date because: "[Y]ou have, in fact, attempted to coerce coworkers into corroborating an unsubstantiated charge of sexual harassment against one of your supervisors." (Although MacArthur then referred to Leon as a "supervisor," the parties are in agreement that Leon was not a supervisor within the meaning of Section 2(11) of the Act.)

Conclusion on the Discrimination Case

The General Counsel contends that Fabozzi engaged in protected concerted activity when she solicited fellow employees Garcia and Rodovich to help her with a sexual harassment complaint against Leon (or the Respondent, or both). The General Counsel further contends that the Respondent, in violation of Section 8(a)(1), discharged Fabozzi because she had engaged in those activities. The Respondent admits that it discharged Fabozzi because of her approaches to Garcia and Rodovich, but it contends that Fabozzi's solicitations of Garcia and Rodovich were not acts of concerted activity because Fabozzi's objective was solely to advance her own, personal cause. Alternatively, the Respondent contends that Fabozzi threatened Garcia and Rodovich when she solicited them and that, even if Fabozzi's activity had been "concerted" in some sense, it was not protected by the Act. A part of the Respondent's alternative theory of defense is that the seriousness of Fabozzi's alleged threats to Garcia and Rodovich was magnified by: (1) a February threat by Fabozzi to Canfield that she wanted Leon and his family "dead," and (2) a 1995 threat by Fabozzi to Rodovich that she would slit Rodovich's throat.

Section 8(a)(1) provides that it is an unfair labor practice for an employer: "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Section 7 provides:

> 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."

The question immediately arises: Assuming that Fabozzi's claimed May 6 solicitations of Garcia and Rodovich were concerted, were those solicitations also protected under Section 7 because they were undertaken for "*mutual* aid or protection" from real or perceived sexual harassment, or were the solicitations not statutorily protected activities because Fabozzi under-

took them to protect only herself? I find the latter to be the case.

The General Counsel did not place in evidence any copy of any grievance that Fabozzi may have filed. Because of the *Dubo* deferral mentioned above, Fabozzi apparently filed some grievance at some time, but even if it was filed before her discharge, the record does not reflect that it was on behalf of anyone but herself. At any rate, the General Counsel does not contend that Fabozzi was discriminated against because she filed a grievance. Also, as previously noted, the General Counsel did not place in evidence any complaint in any state sexual harassment law suit that Fabozzi may have filed. Because the General Counsel did not place in evidence any copies of any grievance or lawsuit that Fabozzi may have filed, there is no documentary evidence that Fabozzi ever sought to aid or protect anyone but herself from Leon's alleged sexual harassment (or the Respondent's condonation of that harassment). That is, there is no documentary evidence that Fabozzi ever had any "mutual" objective under the Act (as opposed to individual objective, which is not protected by the Act). There is also no parol testimony that there was ever any mutuality in Fabozzi's objective. The General Counsel asked Fabozzi who initiated her February encounter with Canfield, but the General Counsel did not ask Fabozzi *why* she initiated that encounter (or what she said or did to initiate that encounter). That is, if Fabozzi approached Canfield in an attempt to file a grievance, she did not so testify; more specifically, if Fabozzi approached Canfield to file a grievance *on behalf of employees other than herself*, she did not so testify. More importantly, Fabozzi did not testify that during her allegedly protected solicitations of Garcia and Rodovich she told them that she contemplated filing a lawsuit on behalf of anyone but herself. (In fact, Fabozzi did not testify that she gave Garcia and Rodovich any reason to assist her, other than that they could be subpoenaed if they did not do so voluntarily.) If Fabozzi had asked Garcia, or Rodovich, or both, to assist her in a lawsuit on behalf of any employee in addition to herself, the General Counsel would assuredly have asked her to so testify. However, all that the record contains on this point is Fabozzi's testimony that state agent Toshima: ". . . told me to ask them two, Dolores and Susan, if they would be interested in coming and testifying and helping *me* out with John Leon."

This is not a case in which an employee, acting alone, makes a complaint to a state agency or other governmental body, the resolution of which might benefit the group. Fabozzi was attempting to act in concert when she contacted Garcia and Rodovich; nevertheless, according to her own testimony, she sought to benefit only herself (again, "helping *me* out with John Leon"). Even if resolution of her state complaint might have somehow benefitted other female employees, all theories of "constructive" concerted activities were repudiated by the Board in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB (Prill I)*, 755 F.2d 941 (D.C. Cir. 1985); *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB (Prill II)*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied mem. *Meyers Industries*, 487 U.S. 1205 (1988). Indeed, the General Counsel does not even mention *Meyers* on brief. This case is also to be distinguished from the only cases that are cited by the General Counsel on the point: In *Vought Corp.*, 273 NLRB 1290 (1984), the discriminatee's effort was undertaken for the mutual protection of all employees of the same race. In *Circle K Corp.*, 305 NLRB 932 (1991), the discriminatee engaged in union activities which ultimately could have aided or protected all unit employees, even though his underlying reason was the individual objective of saving his own job.

In summary, although Fabozzi's activities were "concerted" in that she appealed to other employees for help, they were not "concerted" within Section 7 because they were not undertaken for the purposes of "*mutual* aid or protection." Fabozzi's activities were therefore not protected by the Act, and it could not have been a violation of Section 8(a)(1) for the Respondent to have discharged her because of those activities. I shall therefore recommend dismissal of the entire complaint for this reason. For possible purposes of review, however, I shall delineate the evidence that the Respondent adduced in support of its alternate theory of defense, and I shall enter my credibility resolutions that are presented by that defense.

The Respondent's Alternate Defense

The Respondent called Union president Owen who testified that on March 11, by telephone, he and Maher discussed Fabozzi's sexual harassment allegations against Leon. The Respondent also called Union steward Canfield who testified that, on the same day, MacArthur asked him to prepare a statement about Fabozzi's conduct. Canfield identified a written statement ("dated March 11, 1996") that he gave to MacArthur. The statement was essentially consistent with Canfield's trial testimony; to wit:

> She [Fabozzi] had come into work pretty agitated . . . and come up to me and told me that . . . John [Leon] yelled at her the night before on second shift and was banging his hand on the bulletin board and complaining about . . . her leaving a machine or talking about some people or something to that effect. And she walked over to another area right next to the drinking fountain, where Susan Garcia happened to be sitting there, one of the other employees of Holling, and I asked her at that point if she would like to file a grievance. Her response was, "No, I want the fucker dead. I want his family dead, I want his mother dead, I want his dog dead."

The Respondent contends that Fabozzi admitted making this threat during the March 21 meeting. When the Respondent asked Canfield what happened at the March 21 meeting, Canfield replied that all he could remember was that: "At the time, they asked her, you know, why she had said it and she said something to the effect that she does not regret saying it." Canfield did not, however, testify what he meant, in either case, by "it."

Garcia, who never became an employee of Boncraft-Holling, testified that in early 1996 she exited an elevator and saw Fabozzi and Canfield talking. Garcia approached them, as if to join their conversation, and, according to Garcia: "I heard Cathy say to Dave that 'I want John Leon dead, his wife dead, his son dead, and his dog dead.'. . . I left the area."

Garcia further testified that on May 6, on the work floor, at a time that she was working alone, Fabozzi approached her and: "[S]he had told me that I was going to be taking a direct hit, along with Louis Goforth, who was another bindery worker at the time, a direct hit because I was a witness to John's sexual harassment." Garcia testified that on May 8 she reported this incident to MacArthur who took a written statement from Garcia. The statement corroborates Garcia's testimony that the May 6 approach by Fabozzi occurred without anyone else (such as Rodovich) being present. On cross-examination, Garcia admitted that Fabozzi used the "direct hit" expression in a "context of being brought into court."

The Respondent's counsel asked Union President Owen what was said about "threats" at the March 21 meeting. Owen replied that Maher said that threats would not be tolerated. Then counsel asked Owen essentially the same question; Owen repeated that Maher stated that threats would not be tolerated, and Owen added: "That was it, basically." Then the counsel asked Owen if Fabozzi had said something about Leon; Owen replied: "I think she did, and she was saying something that John was kind of sabotaging her machinery, things like that." Then counsel asked Owen if Fabozzi had said something about Leon's "family"; Owen replied:

> There was a statement at the meeting that, Cathy made a statement that she doesn't like anybody, she did not like anybody working in there. I think the question came up, let me just rephrase this. The question was something about people that are working in there, we've got to work together. Cathy did make a statement that 'I don't like working with some of the people in the plant,' and then there was a statement that Cathy made regarding John Leon's name.

When asked what the statement regarding Leon's name was, Owen replied:

> Cathy made the statement and said John was kind of harassing her, okay? And Cathy also made a couple of statements regarding John Leon, okay, that she did not like John Leon, she wanted him dead, she wanted his wife dead, and she wanted his dog dead, and that's how I remember because maybe [in the past] two [actually 4] years I wouldn't have remembered so much if it wasn't a dog and I love dogs, so that's why it stayed in my memory.

MacArthur was the Respondent's production manager until April 1999 (and she has not thereafter worked for Boncraft-Holling). In her testimony, MacArthur did not mention Canfield's March 11 written statement that describes Fabozzi's complaints against Leon and describes Fabozzi's alleged threat to Leon's household (with Garcia present). MacArthur did, however, testify that "around March 16" Fabozzi telephoned her and complained about Leon's conduct toward her. MacArthur testified that she immediately, and separately, contacted all employees whom Fabozzi claimed to be witnesses to the alleged harassment, including Garcia and Rodovich. MacArthur also contacted Leon. MacArthur testified that she could find no corroboration for Fabozzi's allegations against Leon.

MacArthur further testified that during the March 21 meeting Fabozzi admitted threatening Leon. According to MacArthur:

> We talked about what we had found in the investigation and we talked about we would not tolerate sexual harassment. An issue came up with a threat that Cathy Fabozzi had made to John Leon and his family, and Brian [Maher] also said that he would not tolerate a threat to co-workers or employees, and then Cathy said she was proud of that and reiterated it, and we further discussed how the work relationship between John and Cathy would happen from there on out in terms of the fact that it was possible that they would have to work on the same shift. We set up a standard where John would not interact with her without somebody else present, and that they would not speak to each other unless it was work related. That we would try to keep Cathy on first shift unless seniority issues did not allow us to. And we asked both of them if there were any other further instances, to report them immediately, and we would address them.

When asked specifically what Fabozzi had said in the March 21 meeting that she was proud of, MacArthur testified: "That she was proud that she had threatened John and his family, that she wanted them all dead."

MacArthur further testified that on May 8, Garcia came to her, quite upset, and told her "[t]hat Cathy had said something to the effect . . . that she was going to take a "direct hit" in some lawsuit that Cathy had against Holling Press." MacArthur further testified that in June Rodovich came to her, also quite upset, and also complained about Fabozzi's attempts to get her to assist Fabozzi in her lawsuit. Rodovich did not testify. The Respondent introduced, without objection by the General Counsel, a memorandum that MacArthur created; the memorandum is dated June 28, and it purports to reflect the substance of a June 19 conversation between MacArthur and Rodovich. The memorandum states in relevant part:

> You [Rodovich] told me [MacArthur] that while you were working the second shift on June 18, 1996, Catherine Fabozzi approached you and asked you to corroborate allegations of sexual harassment that she was making against The Holling Press and John Leon. She told you that her attorney had told Catherine to tell you that "you could get a piece of the action by speaking up now, or [you could] be subpoenaed and have to tell it all anyway." Catherine further indicated to you that she knew that you and your son could use the money which would be gained from corroborating her allegations against John Leon.
>
> You told us that this conversation with Catherine especially concerned you because of intimidating and threatening comments [that] you have heard Catherine make in the past concerning other employees. The comments made by Catherine [that] you related to me in this regard were: "I'll slit your throat," and "I want his wife dead; I want his son dead; I want his dog dead." Finally, you told me that while taking a pistol permit training class from Catherine's husband, Frank, your boyfriend, Blane Gilson, saw numerous lethal weapons, including firearms, at Catherine's and Frank's home—including a special laser-sighted gun. You told me that you are now concerned for your safety

> because of Catherine's insistence that you cooperate with her with regard to a sexual harassment allegation that you believe to be groundless.

At the end of the memorandum is a signature that MacArthur identified as that of Rodovich. Immediately above the signature is an affirmation that: "The above is an accurate reflection of my meeting with Nadra MacArthur."

MacArthur testified that at the meeting of June 26:

> We sat Cathy down and I told her that Susan Garcia had come to us and told us that Cathy had told her she was going to take a direct hit in this lawsuit, and that subsequently Dolores had told us that Cathy had told her that she should get "a piece of the action" now instead of being subpoenaed later and getting nothing, and that her coworkers felt threatened and intimidated because of her repeated suggestions of this nature, and the fact that they knew that she had firearms in her home and possibly on her person. And that we wanted to know if that was the case or what her side of it was.
>
> . . . .
>
> She would not confirm or deny the allegations. She told us that anything she had done was at the prompting of her lawyer.
>
> . . . .
>
> We told her that, at that point, we were going to suspend her pending an investigation, further investigation into these allegations.

MacArthur further testified that she reported the results of her investigations to Maher, and Maher directed her to send the above-quoted July 2 letter of discharge.

Finally in her direct examination, MacArthur identified timecards of Fabozzi, Garcia, and Rodovich for the week of May 6; they show that Rodovich did not work on May 6 (which, again, is the date that Fabozzi claims that she asked Garcia and Rodovich, jointly, to assist her in her sexual harassment lawsuit).

Maher testified that during the March 21 meeting, after he told Fabozzi that her complaints against Leon had no corroboration and that she and Leon would be kept separate to the extent possible, "We then reviewed the threats that had been reported to us during the investigation." Maher testified that: "She said that she said it and certainly didn't regret saying it." Maher did not, however, testify what the "it" was that Fabozzi agreed that she had said about Leon. On cross-examination, Maher acknowledged that, at least from the time that Garcia reported being approached (and allegedly threatened) by Fabozzi, the Respondent knew that employees were complaining that Fabozzi was "pestering them about a sexual harassment lawsuit."

MacArthur further testified that when Garcia and Rodovich complained to her about Fabozzi's attempts to get them to testify in her sexual harassment suit, Garcia, as well as Rodovich, also reported that Fabozzi had previously threatened to slit Rodovich's throat. MacArthur and Maher testified that the throat-slitting threat was part of the reason for Fabozzi's suspension and discharge. Although Rodovich did not testify, Garcia testified that she was present (apparently in 1995) when Rodovich had sprayed insecticide near an industrial fan; the spray went into Fabozzi's eyes, and Fabozzi had to be taken to a hospital for emergency care. Garcia testified that when the incident occurred, Fabozzi told Rodovich, in apparent seriousness at the time, "I'm going to slit your throat, you dumb bitch." On cross-examination, Garcia acknowledged that a Board agent took a pre-trial affidavit from her, and she acknowledged that the agent asked her about any threats by Fabozzi. Garcia further acknowledged that she made no mention in her affidavit about the alleged 1995 threat by Fabozzi to cut Rodovich's throat.

On cross-examination, Fabozzi testified that (again, apparently in 1995) Rodovich caused insecticide to be sprayed her in the face, but it was possibly by accident and it did not make her angry. Fabozzi denied threatening to slit Rodovich's throat. Fabozzi further testified that she did not recall a conversation with Rodovich on June 18. The General Counsel did not call Fabozzi in rebuttal to explain why she had insisted that she had spoken jointly to Garcia and Rodovich on May 6, about supporting her sexual harassment claim, even though Rodovich's timecards show that she did not work on that date.

Credibility Resolutions for the Respondent's Alternate Defense

Fabozzi's alleged 1995 threat to cut Rodovich's throat

At some point in 1995, either purposely or inadvertently, Rodovich subjected Fabozzi to insecticide. The injury to Fabozzi's eyes was serious enough for her to require emergency treatment at a local hospital. The injury to Fabozzi was necessarily painful, and it was necessarily frightening. Rodovich did not testify, but Garcia testified that she was present at the event, something that Fabozzi was not called in rebuttal to deny. Garcia testified that Fabozzi, in apparent seriousness at the time, told Rodovich: "I'm going to slit your throat, you dumb bitch." The General Counsel did not call Fabozzi in rebuttal to give a full account of the incident; specifically, at no time did the General Counsel ask Fabozzi what, if anything, she did say to Rodovich at the time. On cross-examination, Fabozzi denied threatening to cut Rodovich's throat, but Fabozzi impressed me as the type of person who readily could have made such a statement, in apparent seriousness at the moment, especially when she was in pain and fear. I credit Garcia that, in 1995, when sprayed with insecticide by Rodovich, Fabozzi told Rodovich that she would slit Rodovich's throat. I do not, however, believe that any of the Respondent's management, or Rodovich, or Garcia, took the threat seriously. Nothing was done about it until the next year when Fabozzi was making sexual harassment claims, and Garcia did not even mention it in a pre-trial affidavit, even though she admitted that the Board agent asked her specifically about threats by Fabozzi.

Fabozzi's alleged February threat toward Leon and his family

Garcia and Canfield testified that in February Fabozzi told Canfield that she wanted Leon and his family "dead." A state-

ment that one wishes death for his or her enemy, of course, is not a threat to *do* anything. Nevertheless, on brief, footnote 10, the General Counsel concedes that such a statement by Fabozzi "could be construed as a death threat." The allegation that Fabozzi threatened Leon and his family with death has been the most time-consuming factual issue presented by this case, but at no point at trial did the General Counsel ask Fabozzi to give a full account of the incident, and the General Counsel did not even elicit from Fabozzi a denial that in February she told Canfield that she wanted Leon and his family "dead."[7] The General Counsel did elicit from Fabozzi testimony that, during the March 21 meeting, she *stated* that, in February, Canfield had said to her that "this" (otherwise unexplained) would kill Leon's wife. The General Counsel further elicited from Fabozzi testimony that she *stated* during the March 21 meeting that she had then (in February) replied to Canfield, "Let them die." The General Counsel did not, however, elicit from Fabozzi testimony that what she had *stated* during the March 21 meeting was, in fact, true. The only facts about the February encounter with Canfield that the General Counsel elicited from Fabozzi were: (1) who had started the encounter, and (2) whether anyone else was present. The only other thing for which the General Counsel asked Fabozzi was a general conclusion that she had never threatened any other employee. Nevertheless, I do not credit Canfield's and Garcia's accounts of the February incident.

On March 11, Owen told Maher about Fabozzi's sexual harassment complaint against Leon. Also on March 11, MacArthur secured Canfield's written statement. In the statement, Fabozzi is alleged to have stated that she wanted Leon and his family "dead." If the Respondent had believed Canfield's March 11 statement was true, it would have discharged Fabozzi upon the receipt of the statement. Or, at least, the Respondent would have immediately confronted Fabozzi with Canfield's report. Or, at least, the Respondent would have sought corroboration or refutation from Garcia, the one witness whom Canfield named in his March 11 statement; and then the Respondent would immediately have confronted Fabozzi. None of these things happened (at least before March 21). I believe, and find, that none of these things happened because Canfield's March 11 statement was false and the Respondent knew it.[8] That is, Canfield's March 11 statement, as well as the Respondent's nonreaction to it, demonstrates that Canfield's allegations of Fabozzi's supposedly serious death threat to Leon was false. Necessarily, the trial testimony that tracked that statement (by Garcia, as well as Canfield) was also false. I therefore credit Fabozzi's denial (on cross-examination) that in February she told Canfield that she wanted Leon and his family "dead."

Fabozzi's alleged admission in the March 21 meeting

The Respondent asked Canfield, Owen, MacArthur, and Maher to give accounts of an admission that Fabozzi allegedly made in the March 21 meeting. Canfield testified that Fabozzi said that she did not regret saying "it," but Canfield did not testify what the "it" was. Similarly, Maher testified to no more than that: "She said that she said it and certainly didn't regret saying it." Owen testified that Fabozzi categorically stated that she "wanted" Leon and his family "dead," but, as quoted above, he required repeated questions, and leading, to do so. Only MacArthur testified, without leading, that Fabozzi admitted that "she was proud that she had threatened John and his family, that she wanted them all dead." Again, Fabozzi testified that at the March 21 meeting she told the gathered group, including Leon, that in February Canfield had said that "this" would kill Leon's wife and that she had then responded to Canfield: "Let them die. They mean nothing to me." I do not believe that, on March 21 (or at any other time), with Leon sitting there, Fabozzi admitted that she stated in February that she want Leon and his family "dead." I have found above that Fabozzi did not make the alleged statement in February. But, even if Fabozzi had said such in February, she would not have been able to repeat it to Leon's face without being somehow challenged by Leon, or immediately fired by the Respondent, or both challenged by Leon *and* fired by the Respondent. After all, the Respondent's evidence is that Maher said at the March 21 meeting that threats "will not be tolerated." If Fabozzi had then confirmed a supposedly serious death threat, the Respondent would not have "tolerated" her working there another instant. I find that, on March 21, when Fabozzi was confronted with Canfield's version of the February encounter, she denied it by stating that, in February, she had replied to Canfield: "let them [the whole family, including the dog] die." That is, I find that, on March 21, Fabozzi did not admit that in February she had said that she wanted Leon and his family "dead."[9]

Fabozzi's alleged May 6 threat to Garcia

Garcia testified that on May 6 Fabozzi approached her when she was alone in the work area and told her, "that I was going

[7] On Br. p. 5, counsel for the General Counsel refers to Fabozzi's encounter with Canfield and states that:

> Fabozzi testified that she replied to Canfield:
>
> So let her die. Nobody gives a shit about me. Let his dog die, too, I could care less.

The General Counsel's statement is false. Fabozzi did not so testify. As my above quotation of the actual testimony shows, Fabozzi did not use the "let her die" words while testifying about what she had said to Canfield; she used those words only to recount what she told MacArthur on March 21, that she had previously said to Canfield. The General Counsel statement on brief misrepresents the record by eliminating the predicate questions to Fabozzi; moreover, in the case of the second question, the General Counsel does so without ellipses. Counsel for the General Counsel's false statement and misrepresentation of the record are most disappointing.

[8] It is apparent to me that, when Maher received Owen's March 11 information that Fabozzi was complaining of sexual harassment by Leon, the Respondent rushed to conduct an investigation of Fabozzi, not Leon. Canfield was more than happy to assist the Respondent in this regard; his five-page March 11 statement is a screed of complaints against Fabozzi that contains not one word that indicates that he asked Leon about Fabozzi's complaints against him.

[9] Fabozzi's March 21 account of the February encounter contains a much more logical sequence, and much more probable dialogue, than the accounts of Canfield and Garcia at trial. Nevertheless, as stated above, Fabozzi's testimony of what she said on March 21, is insufficient basis for finding what did, in fact, happen in February. My above finding is therefore only what Fabozzi *did not* say in February.

to be taking a direct hit, along with Louis Goforth, who was another bindery worker at the time, a direct hit because I was a witness to John's sexual harassment." Fabozzi testified that she told Garcia and Rodovich, jointly, that they were going be subpoenaed to support Fabozzi's sexual harassment lawsuit, and she insisted that she did so on May 6. On the point of who was present on May 6, I credit Garcia, especially since the timecards show that Rodovich did not even work on May 6. (The General Counsel argues that Fabozzi may have only had her dates confused, but in absence of any such rebuttal testimony by Fabozzi I shall not indulge in that speculation.) On the other hand, I find that on May 6, Fabozzi told Garcia no more than that she could be subpoenaed to support her sexual harassment lawsuit. Garcia tried to make something more out of it by adding that Fabozzi told her that she was going to take a "direct hit" in the lawsuit because she had been a witness to Leon's conduct. Garcia admitted on cross-examination, however, that Fabozzi's approach to her was done in a "context of being brought into court." Moreover, Garcia did not deny that she replied to Fabozzi that she could get "convenient amnesia." It is clear enough to me, and I find, that Fabozzi did no more than tell Garcia that she could be "hit" with a subpoena to be a witness in her contemplated sexual harassment lawsuit.

Fabozzi's alleged June 18 threat to Rodovich

The complaint, as originally issued, alleged that Fabozzi engaged in protected concerted activity "[o]n or about May 6 and June 18." At the start of trial, however, the General Counsel moved to amend the complaint to delete the reference to June 18. The General Counsel offered no explanation for his motion other than:

> [T]he General Counsel does [not] have a basis to allege that Charging Party engaged in protected concerted activity on one of the two dates that's alleged in the complaint, that is June 18, 1996. In preparation for trial, it became clear to the General Counsel that the Charging Party's testimony would be that she did not, although she had conversations with other employees that we allege are protected, concerted activities, those occurred on the other date that is alleged, May 6th, and we are comfortable with proceeding on that basis. But we have no basis to allege that such activity occurred on June 18th.

On cross-examination Fabozzi denied remembering any conversation with Rodovich on June 18. The Respondent, however, introduced a statement by Rodovich that, on June 19, she told MacArthur that on June 18, Fabozzi had engaged in misconduct toward her. It most assuredly was not by coincidence that the complaint originally alleged protected concerted activity by Fabozzi on June 18, the same date that the Respondent contends Fabozzi engaged in an act of misconduct toward Rodovich. Where did the complaint's June 18 allegation come from in the first place? The General Counsel's above-quoted trial statement gives no clue; however, it is obvious that it came from Fabozzi, the General Counsel's only witness. It further appears to me that Fabozzi was not truthful when she testified that she could recall no conversation with Rodovich on June 18. When Fabozzi was on cross-examination, the Respondent did not ask to see her pretrial affidavit(s) under Board Rule 102.118. The lack of a plausible explanation for the complaint amendment, however, suggests that Fabozzi had originally told the General Counsel during the investigation that she had talked separately with Garcia and Rodovich on May 6 and June 18, respectively.

Nevertheless, there really is no credibility resolution to make on the issue of whether Fabozzi threatened Rodovich on June 18. The Respondent did not call Rodovich to testify (and be subject to cross-examination), and the Respondent offered no explanation for not doing so. The Respondent did offer a statement that Rodovich signed, but, although the General Counsel did not object to its receipt, the statement is not evidence of anything that Fabozzi, in fact, did. Rodovich's statement contains only an affirmation that: "The above is an accurate reflection of my meeting with Nadra MacArthur." That is, even if the Respondent had laid a proper foundation for the admissibility of Rodovich's written statement, the statement is only that she had made a report to MacArthur; it is not an affirmation that the report was true. Even at that, the statement does not contain a claim that Fabozzi threatened Rodovich when Fabozzi appealed to Rodovich to assist her in her lawsuit. At most, it contains evidence of an inducement by Fabozzi to Rodovich to come forward to assist Fabozzi. (Fabozzi, however, denied that any such inducement occurred; as an admission would have brought Fabozzi's case closer to proof of protected concerted activities, Fabozzi's denial would require being credited if there were actually an issue on the point.)

Other Credibility Resolutions and Observations

I further state for possible purpose of review that I would discredit certain testimony that is relevant to the successorship allegation: (1) Raymond Bubar, president of Boncraft-Holling, was most unimpressive in his denial of knowledge of Fabozzi's unfair labor practice charges against Holling Press when Boncraft-Holling purchased that entity. (2) Maher acknowledged that in his pre-trial affidavit he stated: "I am about 90% certain that the pending unfair labor practices against Holling was discussed during the sales transaction." Maher's testimony at trial that he had forgotten Fabozzi's charge when he gave that statement was a palpable lie.

I am further constrained also to state that I do not believe the testimonies of MacArthur and Maher that Fabozzi was discharged because they believed that Fabozzi had threatened Garcia and Rodovich in order to get them to testify for her. Even if they did believe it, the Respondent has failed to prove that Fabozzi, in fact, engaged in such misconduct. That degree of proof would have been required if the General Counsel had presented a prima facie case that Fabozzi was engaged in a course of protected concerted activities when she approached Garcia and Rodovich (either separately or together). *Rubin Bros. Footwear,* 99 NLRB 610, 611 (1952), enf. denied on other grounds 203 F.2d 486 (5th Cir. 1953). Finally, I am also constrained to state that, contrary to certain contentions of the Respondent on brief, if the General Counsel had presented a prima facie case that Fabozzi was engaged in a course of protected concerted activities, he would not have also been required to show that Fabozzi's suspension and discharge were

caused by animus under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *Mast Advertising & Publishing*, 304 NLRB 819 (1991), which holds that motivation is not an issue where it has been found that an employee has been discharged, or otherwise disciplined, for conduct that is found to be part of a course of protected concerted activities; rather, in such circumstances, the employer must show that the employee's conduct was: "so flagrant and egregious as to cost her the Act's protection." Here, nothing of the kind has been shown. Again, the only proof of arguable misconduct by Fabozzi was her 1995 threat to Rodovich; that threat, however, was made when Fabozzi was in pain and fear, as anyone who heard of it would have known, and nothing was done about it until she began soliciting support for a suit that claimed sexual harassment of herself (only).

Nevertheless, the General Counsel did not, in fact, present a prima facie case of protected concerted activities by, and therefore unlawful discrimination against, Fabozzi. I shall therefore issue the following recommended[10]

ORDER

The complaint is dismissed in its entirety.

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