NOTES

DETERMINING A STANDARD OF CAUSATION FOR DISCRIMINATORY DISCHARGES UNDER SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT

I. INTRODUCTION

Section 8(a)(3)[1] of the National Labor Relations Act (NLRA)[2] prohibits discrimination[3] in employment decisions on the basis of union membership or activity, encouraging employees to freely exercise their right to join unions without imperiling their livelihood.[4] The Act, however, does not interfere with management's right to discharge employees for legitimate business reasons.[5]

The most recurrent problem[6] presented to the National Labor Relations Board is determining whether an employer's discharge decision is motivated by valid business reasons or anti-union animus.[7] Resolution

1. 29 U.S.C. § 158(a)(3) (1976) provides in pertinent part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

2. 29 U.S.C. §§ 151-168 (1976).

3. Neither the NLRA nor its legislative history contains a definition of "discrimination." The Supreme Court has not defined the word in the context of § 8(a)(3) unfair labor practices either. For an excellent analysis of the meaning of "discrimination" in the NLRA, see Shieber, *Section 8(a)(3) of the National Labor Relations Act; A Rationale: Part I. Discrimination*, 29 LA. L. REV. 46 (1968). *See also* note 20 *infra*.

4. Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 96 (2d Cir. 1978); NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162, 1163 (2d Cir. 1976).

5. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 347 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 96 (2d Cir. 1978); NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 464 (2d Cir. 1973); NLRB v. Dorn's Transp. Co., 405 F.2d 706, 712 (2d Cir. 1969).

6. "We receive far too many discriminatory discharge cases—well over half of all charges filed against employers—and charges against employers constitute over two-thirds of all charges filed." 52 N.Y.S.B.J. 184 (April 1980) (address by NLRB Chairman John H. Fanning). In 1980, the Board's caseload approached the 50,000 mark. *Id.* Consistently, nearly two-thirds of all charges against employers, totalling approximately 22,000 cases in 1980, involve allegations of discriminatory discharges. 42 NLRB ANN. REP. 11 (1977); 41 NLRB ANN. REP. 11 (1976); 40 NLRB ANN. REP. 9 (1975); 34 NLRB ANN. REP. 199 (1969).

7. *See* Shieber & Moore, *Section 8(a)(3) of the National Labor Relations Act: A Rationale,*

of such cases turns on proof of discriminatory intent or motivation.[8] The Board must determine whether there is a causal relationship when an employee who engaged in union or other protected activities is subjected to employer action that detrimentally affects the employee's job.[9] The employer commits an unfair labor practice under the Act if the General Counsel[10] demonstrates that the actuating motive was reprisal for the employee's union membership or activity.[11]

Although the General Counsel is not required to show that union activities were the sole actuating cause for the discharge or lesser discipline,[12] broad disagreement exists over the quantum of employer animus necessary to find an unfair labor practice.[13] Consequently, courts and the Board have employed various "tests" when deciding dual motive cases.[14] Some courts find a violation if employer discipline was precipitated "in part" by the employee's union activity, even though the action was taken "in part" for significant business reasons.[15] Other

Part II, 33 LA. L. REV. 1, 37-42 (1972), in which the authors suggest definitions of motive that can be used in two distinct senses to clarify the significance of employer anti-union animus in § 8(a)(3) cases.

8. Apparently the terms "motive" and "intent," although distinguishable under some circumstances, are used synonymously by both the NLRB and the courts. *See* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices*, 77 YALE L.J. 1269, 1271 n.4 (1968). *But see* Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491 (1967) (motive and intent each stand for distinguishable concepts and should be employed as such).

9. *See* Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083, 1083 (1980) [hereinafter cited as Wright Line].

10. The General Counsel's office was established to handle the Board's unfair labor practice prosecutorial functions. The General Counsel, appointed by the President and approved by the Senate, is responsible for representing the NLRB in the courts. Because the General Counsel's discretion is unreviewable, many believe him to be the most powerful individual in the labor relations field. For the statutory authority of the General Counsel, see 29 U.S.C. § 153(d) (1976).

11. *See* R. GORMAN, LABOR LAW 137 (1977).

12. *Id.* at 138.

13. *Compare, e.g.,* NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312 (1st Cir. 1971) (improper motive must be dominant) *with* S.A. Healy Co. v. NLRB, 435 F.2d 314, 316 (10th Cir. 1970) (improper motive must have contributed in some part) *and* NLRB v. United Brass Works, Inc., 287 F.2d 689, 693-94 (4th Cir. 1961) (there must be a reasonable explanation for the discriminatory motive).

14. *See, e.g.,* Wright Line, 251 N.L.R.B. 1083 (1980). These causation tests are analyzed in § IV *infra*.

15. "In part" language has been employed by every circuit court of appeals except the first and the ninth. *See, e.g.,* Second Circuit: NLRB v. Midtown Service Co., 425 F.2d 665, 670 (2d Cir. 1970); Third Circuit: NLRB v. Eagle Material Handling, Inc., 558 F.2d 160, 169 (3d Cir. 1977); Fourth Circuit: Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 569 (4th Cir. 1977); Fifth Circuit: Sweeney & Co. v. NLRB, 437 F.2d 1127, 1133 (5th Cir. 1971); Sixth Circuit: NLRB

courts require the improper motive to be "dominant."[16]

This Note contends that the motive test announced by the Supreme Court in *Mt. Healthy Board of Education v. Doyle*,[17] a related first amendment case,[18] provides the proper balance between the employer's management prerogatives and the employee's right to protection from discrimination attributable to organizational activity. The Note argues that the *Mt. Healthy* test is mandated by the legislative history of the NLRA, as well as pertinent Supreme Court decisions. Finally, this Note concludes that a shifting burden of proof must be applied in dual motive cases to insure that the competing interests inherent in dual motivation cases are resolved in accord with the policies and objectives of NLRA section 8(a)(3).

II. Statutory Provisions and Elements of the Prima Facie Case

Section 8(a)(3) of the National Labor Relations Act provides that it is an unfair labor practice for an employer to encourage or discourage membership in a labor organization through discrimination pertaining to hire or tenure of employment.[19] A basic violation of this section consists of three elements: the employer's action must constitute "discrimination,"[20] it must occur in the area of "hire, tenure of employment

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v. Adam Loos Boiler Works Co., 435 F.2d 707, 707 (6th Cir. 1970); Seventh Circuit: Nacker Packing Co. v. NLRB, 615 F.2d 456, 459-60 (7th Cir. 1980); Eighth Circuit: Singer Co. v. NLRB, 429 F.2d 172, 179 (8th Cir. 1970); Tenth Circuit: M.S.P. Indus. v. NLRB, 568 F.2d 166, 168 (10th Cir. 1977); District of Columbia Circuit: Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977). *See also* Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574, 92 L.R.R.M. 1328, 1329 (1976).

16. *See, e.g.*, Colletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293 (1st Cir. 1977); Famet, Inc. v. NLRB, 490 F.2d 293, 296 (9th Cir. 1973).

17. 429 U.S. 274 (1977).

18. The plaintiff in *Mt. Healthy* alleged that his discharge from employment as a public school teacher was discriminatorily motivated in violation of the first and fourteenth amendments. *See* notes 112-20 *infra* and accompanying text.

19. 29 U.S.C. § 158(a)(3) (1976). In a complementary restriction, § 8(b)(2) forbids a union "to cause or attempt to cause" an employer to violate § 8(a)(3) or to discriminate against an employee whose nonmembership results from any factor other than failure to pay dues and initiation fees. 29 U.S.C. § 158(b)(2) (1976). Section 7 of the Act guarantees employees the right to participate in labor organizations and "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1976). This "declaration of employee rights" is enforced through the unfair labor practices in § 8.

20. Much uncertainty exists about the meaning of the word "discrimination" for purposes of finding an unfair labor practice under § 8(a)(3). *See* note 3 *supra*. The word is sometimes used to refer to an employer's adverse treatment of employees, whether or not caused by employee exercise of rights protected under § 7 of the Act. Some authorities, however, hold that only treatment

or any term or condition of employment,"[21] and it must be "to encourage or discourage membership in any labor organization."[22]

Congress had two reasons for enacting section 8(a)(3).[23] First, Congress wanted to prevent employers from interfering with employees' rights to organize and choose representatives. Second, it wanted to avoid undue restriction of employers' control over their enterprises.[24] Thus, the Act does not affect the right of an employer to discharge an employee without reason or for nondiscriminatory reasons.[25] Only those discharges having the purpose and effect of encouraging or discouraging union membership or activity are unlawful.[26]

The NLRB has primary responsibility to strike a proper balance between an employer's asserted business justifications and invasion of employee rights.[27] Distinguishing dual motive cases from "pretext"

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caused by exercise of § 7 rights is "discrimination." A finding of discrimination sometimes requires employers to differentiate their treatment of employees or base their conduct on arbitrary reasons involving exercise of § 7 rights. *See* Shieber, *supra* note 3, at 48, 51-52. Shieber believes that discrimination is any change in employment conditions caused by the exercise by employees of § 7 rights. Further, Shieber concludes that employer treatment of employees need not be differential. Therefore, Shieber would allow a finding of § 8(a)(3) discrimination even if the employer treats all employees identically, as long as the employer's conduct is prompted by the exercise of § 7 rights. *Id.* at 54-55, 76-77.

21. 29 U.S.C. § 158(a)(3) (1976).

22. *Id.*

23. *See* discussion of § 8(a)(3) in H.R. REP. No. 1147, 74th Cong., 1st Sess. 19 (1935), *reprinted in* II LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 3046, 3069 (1949) [hereinafter cited as LEGISLATIVE HISTORY]. The House Report states:

> Nothing in this subsection prohibits [*sic*, permits?] interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination.

Id.

24. *See, e.g.,* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965), in which the Supreme Court stated that "[W]e have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership." *Id.* at 311. This construction of § 8(a)(3) is essential if the employer's right to manage his enterprise is accorded protection. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965).

25. Typically, courts of appeals state that "management is free to discharge employees for good cause, bad cause, or no cause at all." *See, e.g.,* NLRB v. Computed Time Corp., 587 F.2d 790, 795 (5th Cir. 1979).

26. *See, e.g.,* American Thread Co. v. NLRB, 631 F.2d 316, 320 (4th Cir. 1980); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 96 (2d Cir. 1978).

27. NLRB v. Fleetwood Trailer Co., Inc., 389 U.S. 375, 378 (1967), *quoting* NLRB v. Great

cases is an important part of this task. Dual motive cases occur when the discipline decision involves legitimate business reasons as well as discriminatory considerations.[28] In pretext cases, by contrast, the employer fails to set forth legitimate business reasons for disciplining an employee.[29] Because no valid justification for the discipline exists, there is no dual motive.[30] Inferences[31] of unlawful employer motivation must, however, be supported by substantial evidence.[32]

When establishing a prima facie 8(a)(3) case, the most important factual component the General Counsel must prove is employer knowledge of the disciplined employee's union activities.[33] Knowledge provides the basis from which unlawful intent may be inferred.[34] Be-

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Dane Trailers, 388 U.S. 26, 33-34 (1967). *See also* Texas Instruments, Inc. v. NLRB, 599 F.2d 1067, 1073 (1st Cir. 1979).

28. Address by former NLRB member John C. Truesdale, October 3, 1980, at Columbia, Missouri, 105 LAB. REL. REP. (BNA) 146 (October 20, 1980) [hereinafter cited as Truesdale address].

29. In modern day labor relations an employer will rarely, if ever, baldly assert that it has disciplined an employee because of disdain for protected activities. Instead, the employer will advance what it considers a legitimate business reason for its action. The evidence may reveal, however, that the asserted justification is a sham because the purported rule or circumstance advanced by the employer did not exist or was not relied on. When this occurs, the employer's reason is pretextual. *See* Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 97-98 (2d Cir. 1978); NLRB v. Lizdale Knitting Mills, Inc., 523 F.2d 978, 980 (2d Cir. 1975); NLRB v. Teamsters Local 294, 470 F.2d 57, 62 (2d Cir. 1972). *See also* notes 76, 133 *infra*.

30. Wright Line, 251 N.L.R.B. 1083, 1083-84 & n.5 (1980).

31. Because direct evidence of an employer's improper motive is difficult to establish, the Board may infer intent from the surrounding circumstances. Liberty Mut. Ins. Co. v. NLRB, 592 F.2d 595, 603 (1st Cir. 1979); NLRB v. South Shore Hosp., 571 F.2d 677, 682 (1st Cir. 1978). *See generally* Annot., 83 A.L.R.2d 532, 540 (1962).

32. The Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619-20 (1966), *quoting* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Substantial evidence must have rational probative force; it requires more than a scintilla of evidence and must do more than create a suspicion of the existence of the fact to be established. An unlawful purpose is not lightly inferred. Substantial evidence is not satisfied by evidence that gives equal weight to inconsistent inferences. *See* American Thread Co. v. NLRB, 631 F.2d 316, 321 (4th Cir. 1980); Sioux Quality Packers v. NLRB, 581 F.2d 153, 157 (8th Cir. 1978); Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1256-60 (5th Cir. 1978); Independent Gravel Co. v. NLRB, 566 F.2d 1091, 1094 (8th Cir. 1977). *See generally* Sahm, *The Discharge for Union Activities*, 12 LAB. L.J. 325, 328-29 (1961).

33. Knowledge of lack of union activities may also be important when the employer is illegally encouraging participation in a company favored union.

34. Obviously, if the employer is without knowledge of union activity, he presumably must have taken the alleged action against the employee for some other reason. *See* NLRB v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300, 309 (5th Cir. 1961). *See also* NLRB v. Whitin Mach. Works, 204 F.2d 883 (1st Cir. 1953). The knowledge requirement was directly addressed in Bulk

cause the prohibition against discharge proscribes only terminations that are performed with the specific purpose and intent,[35] an employer does not commit an unfair labor practice unless hostility toward union activity is proven.[36] The Board has found that the following factors show an intent to encourage or discourage union membership or activity: Discharge immediately after discovery of union activity;[37] violent

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Haulers, Inc., 200 N.L.R.B. 389 (1972), in which the Board dismissed the complaint. The employer had previously demonstrated anti-union animus and knew that an organizational campaign was underway. A truck driver who was an active union organizer was allegedly fired for his habitual tardiness in making liquor pickups. Without reaching the employer's proffered business justification, the Trial Examiner stated, with the Board's subsequent approval, that the General Counsel's failure to prove by a preponderance of the evidence that the employer was aware of the employee's union activity failed to make out a prima facie case. It was therefore unnecessary to evaluate whether the discharge was for good cause. *Id.* at 11.

35. *See* notes 1, 23-24 *supra* and accompanying text.

36. Proof of hostile motivation can be inferred as well. *See* note 31 *supra*. The burden of proof in § 8(a)(3) cases is on the moving party, i.e., the General Counsel. *See* American Thread Co. v. NLRB, 631 F.2d 316, 320-21 (4th Cir. 1980); McLean Trucking Co. v. NLRB, 626 F.2d 1168, 1169-70 (4th Cir. 1980); NLRB v. Adams Delivery Service, Inc., 623 F.2d 96, 98-99 (9th Cir. 1980); L'Eggs Products, Inc. v. NLRB, 619 F.2d 1337, 1341 (9th Cir. 1980); Liberty Mut. Ins. Co. v. NLRB, 592 F.2d 595, 601 (1st Cir. 1979); Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337-38 (4th Cir. 1976).

The quantum of proof required is that unfair labor practice findings be based on a "preponderance of the testimony" standard, as required by the amendment to § 10(c). Labor Management Relations Act of 1947, § 10(c) (amending National Labor Relations Act § 10(c)), 29 U.S.C. § 160(c) (1976). Under the Wagner Act, the Board's findings could be based on the virtually unreviewable "weight of the evidence" standard. The amendment requires the Board to identify the evidence relied on, instead of simply resting its decision on all the evidence presented. "Expert inferences" drawn by the Board will no longer be upheld unless supported by a preponderance of the testimony. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 56 (1947), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (LMRA) OF 1947, at 505, 557-60 (1947) [hereinafter cited as 1947 LEGISLATIVE HISTORY]. The § 10(c) requirement that unfair labor practice findings be supported by a preponderance of the testimony was reinforced by Congress' simultaneous amendment of § 10(e) substituting the more stringent "substantial evidence" review standard for the existing "supported by evidence" standard. LABOR MANAGEMENT RELATIONS ACT OF 1947, § 10(e) (amending NATIONAL LABOR RELATIONS ACT § 10(c)), 29 U.S.C. § 160(e) (1976). The amendment to § 10(e) was enacted to give courts "a real power of review" to insure that Board decisions are reached in accord with the stiffer burden of proof. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 56 (1947), *reprinted in* 1947 LEGISLATIVE HISTORY at 505, 560. *See also* DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Bd. of Education Upon the NLRA*, 66 GEO. L.J. 1109, 1124 (1978).

37. Advance Watch Co., 248 N.L.R.B. 1002 (1980) (discharge of employee immediately after he asked employer why company was without a union unlawful); Saloon, Inc., 247 N.L.R.B. No. 156 (Feb. 14, 1980) (discharge of bartender shortly after showing of union support unlawful); Hansen Cakes, 242 N.L.R.B. 472 (1979) (discharge of cake decorator one day after union organizational meeting unlawful); Huttig Sash & Door Co., 239 N.L.R.B. 571 (1978) (employer unlawfully discharged leading union adherent three days after receiving a letter from a union claiming a majority and demanding recognition); Galar Indus. Inc., 239 N.L.R.B. 28 (1978) (abrupt discharge

anti-union background as evidenced by past history of employer interference, restraint, and coercion;[38] disregard of seniority;[39] threats of disciplinary action or shutdown if unionization develops;[40] surveillance of union activities prior to discharge;[41] expressed satisfaction with work of discharged union members;[42] and shutdown of operations or subcontracting of work.[43]

Although an employer has knowledge of a worker's union activity,

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of union activists after union campaign undertaken unlawful); Lighting Systems Co., 238 N.L.R.B. 108 (1978) (employer unlawfully discharged three employees for signing union cards and meeting with union representatives on first work day after employees met with union representatives); Midland Glass Co., 213 N.L.R.B. 547 (1974) (discharge of employee one hour after supervisor of union job unlawful); Sam & Margaret Foods, Inc., 212 N.L.R.B. 423 (1974) (discharge of union activists on same day as organizational meeting unlawful); Reeve Brothers, Inc., Eagle & Phenix Division, 207 N.L.R.B. 51 (1978) (discharge of union adherent 24 hours after posting union leaflet unlawful).

38. Agri-Seeds, Inc., 237 N.L.R.B. 911 (1978) (employer's statement showed anti-union animus caused discharge); Florida Steel Corp., 221 N.L.R.B. 371 (1975), *enforced in pertinent part*, 80 Lab. Cas. ¶ 11,865 (4th Cir. 1977) (employer had discharge background of hostility to pro union blacks); Act Tool Engineering, Inc., 207 N.L.R.B. 104 (1974) (background of union hostility showed discriminatory motivation); McElrath Poultry Co., Inc., 206 N.L.R.B. 354 (1973) (animus shown by questions and timing of discharges).

39. Intercontinental Mfg. Co., Inc., 201 N.L.R.B. 694 (1973) (company manipulation of seniority showed employee discharged unlawfully); Sachs & Sons, 135 N.L.R.B. 1199 (1962) (discharge of union employee recently involved in union incidents while employees with less seniority retained was unfair labor practice).

40. C & O Motors, Inc., 203 N.L.R.B. 1160 (1973) (discharges following unlawful threats and interrogation held unlawful); Mid-South Towing Co., 177 N.L.R.B. 964 (1969) (discriminatory motive for discharge evidenced by employer threat to discharge employee because of union activity), *enforced per curiam,* 436 F.2d 393 (8th Cir. 1971); Iowa Mold Tooling Co., 173 N.L.R.B. 1011 (1968) (employer's statement that he was going to get union out of plant and would run over anyone who got in way showed discriminatory motive for discharge).

41. NLRB v. Citizens Hotel Co., 313 F.2d 708 (5th Cir. 1963) (employer guilty of unlawful discrimination by sending spy to union meeting and later discharging employees who revealed an interest in union activity); Bakersfield Foods Co., Inc., 123 N.L.R.B. 1130 (1959) (same).

42. Wadco Co., 234 N.L.R.B. 207 (1978) (discharge for insubordination unlawful because pretextual); J.D.B., Inc. 223 N.L.R.B. 1163 (1976) (unionist with good work record discriminatorily fired); Skaggs Pay Less Drug Stores, 188 N.L.R.B. 784 (1971), *enforced*, 466 F.2d 971 (9th Cir. 1972) (precipitous discharge after overhearing employee's remark unlawful).

43. Tucker Enterprises, Inc., 238 N.L.R.B. 1188 (1978) (employer engaged in unlawful discrimination when it closes its stores and discharges all employees for union activities); Bedford Cut Stone Co., Inc., 235 N.L.R.B. 629 (1978) (refusal to reemploy two employees upon reopening plant because of union membership and protected activity unlawful); Mobile Home Expo, Inc., 198 N.L.R.B. 1188 (1972) (illegal discharge of employees prior to employer commencement of subcontracting directly followed union petition); Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961) (employer unlawfully discharged employees by shutting down plant and moving operations to remote locality when done in order to force bargaining concessions from union), *enforced sub. nom.* Garment Workers, Philadelphia Dress Joint Bd. v. NLRB, 305 F.2d 811 (3d Cir. 1962).

he does not violate the Act by discharging an employee unless there is proof that the employer had an opportunity to and did in fact discriminate.[44] Excluding several well-defined exceptions,[45] a number of employer actions—discharging a union member for wearing union insignia,[46] leaving work to attend a union meeting,[47] or expressing dissatisfaction with negotiations[48]—are routinely pronounced unfair labor practices.

In most cases involving claims of discriminatory discharge, employers offer the defense that business considerations prompted the termination.[49] Although employers retain the basic right to discharge an employee for just cause or no cause at all,[50] proof of a nondiscriminatory motive for discharge is necessary to dispel an inference that the discharge was actually motivated by anti-union sentiment.[51] Valid grounds for discharging an employee include a decline in business,[52]

44. NLRB v. Collier, 553 F.2d 425, 428 (5th Cir. 1977).

45. For example, an employer may lawfully discharge employees for circulating handbills attacking his products, even though the purpose of engaging in the activity is to enforce the union's bargaining demands. NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953).

46. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (discharges for wearing union insignia improper); NLRB v. Mayrath Co., 317 F.2d 424 (7th Cir. 1963) (employer guilty of unlawful discrimination if he discharges or lays off employee for wearing union insignia); NLRB v. Puerto Rico Rayon Mills, Inc., 293 F.2d 941 (1st Cir. 1961) (discharge for participation in organizational activities unlawful); NLRB v. Howell Chevrolet Co., 204 F.2d 79 (9th Cir. 1953) (discharge of shop steward who wore special union button unlawful); Knickerbocker Plastics Co., 96 N.L.R.B. 586 (1951) (discharge of union adherent who wore union button in plant on day following NLRB election was discriminatory).

47. NLRB v. Cambria Clay Prods. Co., 215 F.2d 48 (6th Cir. 1954) (employees improperly discharged for attending union meeting); Greif Bros. Corp., 238 N.L.R.B. 240 (1978) (cannot fire employee for attending union conference without permission).

48. United States Metals Co., 218 N.L.R.B. 841 (1975) (employer unlawfully discharged employee for trying to distribute a leaflet urging workers to reject a contract proposed by the union and employer); United States Aluminum Corp., 141 N.L.R.B. 1079 (1963) (cannot discharge employee for trying to get union to take firmer stand with employer in contract negotiations).

49. *See* [1977] 4 LAB. L. REP. (CCH) ¶ 4065.

50. NLRB v. MaGahey, 233 F.2d 406, 413 (5th Cir. 1956); Klate Holt Co., 161 N.L.R.B. 1606, 1612 (1966).

51. For example, an employer can prove nondiscriminatory motive by proving discharges took place due to a slack period of production. *See* [1977] 4 LAB. L. REP. (CCH) ¶ 4095.

52. Leonardo Truck Lines, Inc., 237 N.L.R.B. 1221 (1978) (truck driver lawfully laid off because of slow work and not because of demonstrated union sympathies); Charles Edwin Laffey, 223 N.L.R.B. 845 (1976) (95% reduction in employer's work justified layoff of workers during union campaign); Successful Creation, Inc., 218 N.L.R.B. 561 (1975) (employee lawfully terminated as part of company layoff due to declining business, not for wearing union buttons); Zim Textile Corp., 218 N.L.R.B. 269 (1975) (layoff after decline in employer's business justified), *enforced*, 535 F.2d 1242 (2d Cir. 1976); Monzia, Ltd., 197 N.L.R.B. 697 (1972) (layoffs motivated by

employee misconduct,[53] poor workmanship,[54] dishonesty,[55] absenteeism,[56] and breach of company rules.[57]

III. SECTION 8(a)(3), MOTIVE, AND THE SUPREME COURT

Although motivation of an employer is not specifically mentioned in section 8(a)(3),[58] courts have attached considerable significance to what prompts employer action.

The Supreme Court recognized the necessity for anti-union animus in finding a section 8(a)(3) violation shortly after the NLRA became law. In *NLRB v. Jones & Laughlin Steel Corp.*[59] and *NLRB v. Mackay*

50% decline in employer's business, not by union recognition request seven hours prior to layoff); Tower Paint Investments, Inc., 195 N.L.R.B. 823 (1972) (discharges necessary to decrease expenditures; not motivated by union activity); Comet Rice Mills Div., Early Cal. Indus., Inc., 195 N.L.R.B. 671 (1972) (discharge of non-senior organizer due to business decline).

53. Neptune Waterbeds, 249 N.L.R.B. 1122 (1980) (employee fired for fighting and threatening co-workers, not for union activity); Kenai Air Service, Inc., 235 N.L.R.B. 931 (1978) (permissible to fire employee who threatened to aid employer's competitor during a strike when employee was disloyal to employer in the past); Liberty Mut. Ins. Co., 194 N.L.R.B. 1043 (1972) (adverse comments to policyholder and other incidents justified firing).

54. Moody Nursing Home, Inc., 251 N.L.R.B. 147 (1980) (negligence with patients was grounds for discharge; discharge not based on union activism); K & B Mounting, Inc., 248 N.L.R.B. 570 (1980) (fourth vehicle accident in five months made discharge of union activist during union campaign lawful); Potlatch Corp., 236 N.L.R.B. 707 (1978) (employer justified in firing employee for carelessly driving fork lift truck).

55. West Pak, Inc., 248 N.L.R.B. 1072 (1980) (discharge of union supporter for falsifying cause of collision lawful); Diebold, Inc., 210 N.L.R.B. 816 (1974) (discharge for fabricating expense receipts and misappropriating company resources lawful despite fact that employee was union activist); Allstate Ins. Co., 209 N.L.R.B. 565 (1974) (discharge of insurance adjuster who made false claim on own policy lawful despite minimal union activity), *enforced per curiam*, 76 Lab. Cas. ¶ 10,714 (2d Cir. 1975); Mission Clay Products Corp., 206 N.L.R.B. 280 (1973) (discharge of union adherent for taking kick-backs on credit card purchases lawful).

56. Dixie Machine Rebuilders, Inc., 248 N.L.R.B. 881 (1980) (employer lawfully discharged unionist employee for excessive absences); Proler Int'l Corp., 242 N.L.R.B. 676 (1979) (gross absence justifies firing despite union activity); International Baking Co., 240 N.L.R.B. 230 (1979) (same); Maryland Baking Co., 229 N.L.R.B. 1087 (1977) (employee legally discharged due to excessive absenteeism caused by pregnancy).

57. Fikse Bros., Inc., 236 N.L.R.B. 1351 (1978) (discharge for violation of no-smoking rule held lawful), *petition for review denied sub nom.* Stephenson v. NLRB, 614 F.2d 1210 (9th Cir. 1980); Ryder Truck Lines, Inc., 234 N.L.R.B. 218 (1978) (employee lawfully discharged pursuant to anti-nepotism rule); Speed Queen, 192 N.L.R.B. 995 (1971) (employee lawfully fired for not wearing safety glasses) *enforced in pertinent part*, 469 F.2d 189 (8th Cir. 1972).

58. The Act itself forbids only discrimination "to encourage or discourage" union membership. *See, e.g.,* Note, *Employer Motivation Under Section 8(a)(3) of the National Labor Relations Act*, 43 NOTRE DAME LAW. 202, 203 (1968). *See also* notes 1, 23-24 *supra* and accompanying text.

59. 301 U.S. 1 (1937).

Radio & Telegraph Co.[60] the Court discarded reliance on a discriminatory impact analysis, emphasizing instead the importance of "anti-union motivation" in finding a violation.[61] In *Mackay* the employer hired permanent replacements for striking employees. The Supreme Court agreed with the Board's finding of unlawful discrimination,[62] but held that employer decisions based on legitimate business reasons do not violate the Act even though such conduct constitutes discrimination that discourages union activity.[63] Since *Mackay*, courts and the NLRB have fluctuated as to which elements must be proven, the burden of proof, and the type of evidence required to establish a section 8(a)(3) violation.

In *Radio Officers' Union v. NLRB*[64] the Court took a more expansive view, holding that motive need not be specifically proven in every case, but instead can be inferred from the nature of certain kinds of inherently discriminatory conduct.[65] Notably absent, however, were guide-

60. 304 U.S. 333 (1938).

61. In *Jones & Laughlin* the Court said:

> The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts.

301 U.S. 1, 45-46 (1937). This statement has since been interpreted as requiring the Board to find "anti-union motivation." In a companion case decided on the same date, Associated Press v. NLRB, 301 U.S. 103 (1937), the Court again found a violation of § 8(a)(3) to have been established because the "actual reason" for the employee's discharge was union activity. *Id.* at 132.

62. NLRB v. Mackay Radio & Tel. Co., 304 U.S. at 345-46.

63. *Id.* Hiring permanent replacements for economic strikers is not an unfair labor practice if it is done for legitimate business reasons. The Court stated that:

> [I]t does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

Id. (footnote omitted). The Court thus sanctioned a practice that is surely discrimination that discourages union activity, dealing a severe blow to pro-union activity.

64. 347 U.S. 17 (1954).

65. Specific evidence of intent to encourage or discourage union membership or activity is not an indispensable element of proof of a § 8(a)(3) violation. The Court said that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership. The Court justified this approach by referring to it as an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct. *Id.* at 45. A

lines for determining when there is an occurrence of conduct that foreseeably or inherently discourages union activity.[66]

Teamster Local 357 v. NLRB[67] presented the question whether a union hiring hall agreement[68] is violative of section 8(a)(3) through its discriminatory effect on casual employees. While noting that exclusive hiring halls have a natural tendency to discourage union membership, the Court held that the "true purpose" or "real motive" in hiring and firing constitutes the test.[69] The encouragement or discouragement must flow from employer discrimination, which is not inferred unless disparate treatment of employees is based on their union membership or activities.[70]

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presumption of unlawful intent was allowed where the employer's conduct inherently encouraged or discouraged protected activity. *Id.* at 44-46. This presumption was apparently rebuttable. When differential treatment was clearly based on union adherence, however, rebuttal seems improbable. *Id.* at 55-57 (Frankfurter, J., concurring).

66. Consequently, *Radio Officers* has been cited both for the proposition that improper motive is necessary under § 8(a)(3) and for the proposition that it is not. *See* Comment, *Proving an 8(a)(3) Violation: The Changing Standard*, 114 U. PA. L. REV. 866, 872 (1966), *citing* Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 745 (1965).

67. 365 U.S. 667 (1961).

68. Union operated hiring halls act as a job referral service that receives requests from employers and provides workers who are qualified and available. Hiring halls permit job hunters to avoid time-wasting and duplicative job searches and provide employers flexibility into and out of the product market by relieving them of the responsibility of maintaining a permanent work force.

The union and employer may make the hiring hall "nonexclusive," allowing the employer to reject persons referred by the union in favor of personnel from other sources. Alternatively, the hiring hall may be the "exclusive" method of recruitment.

Union control over the referral process provides an opportunity to discriminate invidiously in favor of union members against non-members. However, exclusive referral by a union hall is not necessarily an unfair labor practice. "The key issue is whether the hiring hall arrangement, as written or implemented in practice, works a union induced discrimination which encourages union membership" in violation of § 8(a)(3) or § 8(b)(2). *See* R. GORMAN, *supra* note 11, at 664-65; D. LESLIE, LABOR LAW 341 (1979).

69. Teamster Local 357 v. NLRB, 365 U.S. 667, 675 (1961). The Court first examined the legislative history to see if Congress had prohibited hiring halls. Finding no such declaration, the Court reasoned that exclusive hiring halls could not judicially be declared a per se unfair labor practice. *Id.* at 673-74. Thus, an inherently discriminatory motive could not be attributed to an employer for merely setting up such an arrangement. This denied the Board the use of the presumption announced in *Radio Officers*, which it had applied. *See* Comment, *supra* note 66, at 872-73.

70. This recognizes that no amount of encouragement or discouragement could turn a nondiscriminatory action into a violation of the section. However, differentiation of treatment without sufficient reason will constitute discrimination. *See, e.g.,* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945).

The landmark case of *NLRB v. Great Dane Trailers, Inc.*[71] established a revised test for determining section 8(a)(3) violations. *Great Dane*, which is controlling today, concerned denial of vacation pay to strikers who, because of the strike, failed to work the requisite number of hours to receive extra benefits. Distilling separate types of employer conduct from prior cases, Chief Justice Warren established a two-tier analysis for proving motive. The first category consists of conduct that is "inherently destructive" of employee section 7[72] rights to organize. In this instance the Board may find an unfair labor practice regardless of evidence that the employer was motivated by business considerations.[73]

The second category consists of conduct that has only a "comparatively slight" effect on employee rights.[74] Initially the General Counsel must show "that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent."[75] The burden of proof then shifts to the employer to come forward with "legitimate and substantial" business justifications, because "proof of motivation is most accessible to him."[76] If the employer satisfies this

71. 388 U.S. 26 (1967).

72. Section 7 of the NLRA grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1976). Section 8 of the NLRA declares illegal certain employer acts, such as restraint, interference or coercion of employees in the exercise of their § 7 rights; domination of unions; and discrimination in employment so as to discourage union membership.

73. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967). If an employer's conduct falls in the inherently destructive category, illegal motivation is inferred from the nature of the discriminatory conduct itself. The inference arises automatically once the prima facie case is established. This rule is based on the principle that "some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" *Id.* at 33, *quoting* NLRB v. Erie Resistor Corp., 373 U.S. 221, 228, 231 (1963). If there is no proof of anti-union motivation, the Board is to exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in accord with the Act and its policy. 388 U.S. at 33-34. An unfair labor practice is found if the harm to employee rights outweighs the purported justifications set forth by the employer. Because employer conduct is characterized as "inherently destructive" of employee rights, a violation can be found without specific reference to intent. Further, even though an employer complies with his affirmative duty to present business justification for his acts, it would be exceedingly difficult to present a justification sufficiently important to outweigh the harm to employees. *See* Comment, *Employer Discrimination Under Section 8(a)(3)*, 5 U. TOL. L. REV. 722, 729-30 (1974).

74. NLRB v. Great Dane Trailers, Inc., 388 U.S. at 33-34, *quoting* NLRB v. Brown, 380 U.S. 278, 289 (1965).

75. *Id.* at 34.

76. *Id.* The asserted business justification may not be merely a "pretext" masking the real

burden, the General Counsel must then prove that the employer was actually motivated by anti-union animus in order to establish a violation.[77]

Significantly, the Court provided no criteria for determining whether employer conduct was "inherently destructive" or had only a "comparatively slight" impact on employee rights. Nor did the Court address how the Board should weigh the employer's "legitimate and substantial" reasons against the severity of impact on union activities in "comparatively slight" cases.

In the same year *Great Dane* was decided, the Supreme Court had an opportunity to resolve these questions in *NLRB v. Fleetwood Trailer Co.*[78] Following the conclusion of a strike, Fleetwood hired new em-

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reason for encouragement or discouragement of union activity. If the Board rules that the employer's explanation or justification is not "legitimate and substantial," it may find a § 8(a)(3) violation without proceeding further—without categorizing the conduct or requiring proof of illegal intent. *See* note 29 *supra*.

Significantly, the shifting burden of proof analysis mandated by the Supreme Court in *Great Dane* mirrors Congress' intent that the employer must make the proof. This point was clearly illuminated by Senator Taft during the floor debate of the LMRA, when in commenting on amendment of § 10(c) he stated:

> The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board. The Board will have to determine—and it always has—whether the discharge was for cause or for union activity, and the preponderance of the evidence will determine that question.

93 CONG. REC. 6678 (1947) (remarks of Sen. Taft), *reprinted in* 1947 LEGISLATIVE HISTORY, *supra* note 36, at 1595.

Shifting the burden of proof to the employer after a prima facie case is made puts the burden on the party most able to produce the desired information. NLRB v. Great Dane Trailers, Inc., 388 U.S. at 34. *See also* 7 ALA. L. REV. 183, 186-87 (1955):

> A more reasonable solution would be to allow the injured employee . . . to establish a prima facie case by proving that the acts of the employer tended to encourage or discourage union membership. The burden of proof would then shift to the employer to show that his acts were justified by a bona fide and legitimate motive . . . . The difficult burden of proving the motive would then be on the employer who is, of course, in a better position to do so.

Id.

77. After business justification is presented, illegal intent may be shown affirmatively by direct or circumstantial evidence. *See* notes 31, 36 *supra* and accompanying text. For methods to establish and rebut evidence of hostile motive, *see* notes 33-57 *supra* and accompanying text. *See also* Comment, *supra* note 73, at 778.

78. 389 U.S. 375 (1967).

ployees instead of reinstating economic strikers.[79] The Supreme Court stated that the employer had the burden of showing "legitimate and substantial" justifications, as under both *Great Dane* categories.[80] The employer's contention that no jobs were available when the strikers applied for reinstatement was held not to provide a legitimate and substantial business justification.[81] Consequently, the Court failed to specify which category of *Great Dane* was applied. Ambiguous language in the opinion seemingly dispenses with the need to characterize employer conduct as either "inherently destructive" or "comparatively slight."[82] Moreover, the Court once again failed to specify what consti-

79. A work stoppage is an "economic strike" when striking employees seek improved working conditions or terms of employment (i.e. higher wages or fringe benefits). An "unfair labor practice strike" occurs when employees protest an unfair labor practice the employer is accused of committing. Economic strikers who are replaced during the pendency of a strike are required to be reinstated only after vacancies occur in their former positions or job classification. In contrast, unfair labor practice strikers are normally entitled to immediate reinstatement at the termination of the strike, even though the employer hired replacements. *See* Comment, *supra* note 73, at 736 n.60.

80. Under the "inherently destructive" category of *Great Dane*, the employer is permitted to offer evidence that his conduct was motivated by business considerations, which is balanced against the harm to employee organizational rights. *See* note 73 *supra* and accompanying text. Similarly, employers whose conduct falls within the "comparatively slight" category have the burden to show legitimate and substantial business justifications once a prima facie case is established. *See* notes 74-76 *supra* and accompanying text. "[U]nless the employer . . . can show that his action was due to 'legitimate and substantial business justification' " an unfair labor practice under § 8(a)(3) is committed. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967), *quoting* NLRB v. Great Dane Trailers, Inc., 388 U.S. at 34.

81. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380-81 (1967). The Court indicated that a legitimate and substantial justification might exist if economic strikers are replaced *during* a strike or if changing business conditions or methods of operation necessitate a change in personnel. However, neither possible justification existed because the strikers were replaced after the strike and no change in conditions or methods occurred. Because the employer failed to show a legitimate and substantial business justification, the Court found an unfair labor practice without reference to intent. *Id.* at 380.

82. *Great Dane* clearly indicated that the Board is to balance the parties' interests when employer conduct is labeled "inherently destructive." 388 U.S. at 33. *Fleetwood Trailer* reiterated the principle stated in *Great Dane*, 388 U.S. at 33-34, that the Board is to balance business justifications against the invasion of employee rights to determine whether the employer's justifications are legitimate and substantial. 389 U.S. at 378. *Great Dane* did not, however, authorize use of a balancing test when employer conduct was labeled "comparatively slight," nor did it preclude balancing in these cases. 388 U.S. at 34. A careful reading of *Fleetwood Trailer* indicates the Court was referring to the "inherently destructive" category when it discussed use of a balancing test. Nevertheless, courts and commentators have cited this language as eliminating the need to characterize employer conduct as either "comparatively slight" or "inherently destructive," suggesting no real difference exists between the categories. *See* NLRB v. Alamo Express, Inc., 430 F.2d 1032, 1036 (5th Cir. 1970); NLRB v. Hudson Transit Lines, Inc., 429 F.2d 1223 (3d Cir. 1970); Lane v. NLRB, 418 F.2d 1208, 1211 (D.C. Cir. 1969); Shieber & Moore, *supra* note 7, at 14;

tutes "legitimate and substantial business justifications" in the burden of proof formulation. In short, a cloud was cast over the proper application of the *Great Dane* test.

Without a definitive statement from the Supreme Court, courts of appeals and the Board have grappled with ill-defined standards and competing theories of motivation that have spawned, at the very least, less than uniform terminology. Enunciation of a causation test that reconciles agency experience in drawing inferences with Congressional intent in dual motive cases remains an important concern in federal labor litigation.

IV. COMPETING STANDARDS OF CAUSATION

A. *The "In Part" Test*

The "in part" test provides that if a discharge is motivated in part by an employee's protected activities, the discharge violates the Act despite the presence of a legitimate business reason.[83] The "in part" analysis has taken various forms, utilizing dissimilar terminology while maintaining the underlying concept.[84] Courts have used the following terms in dual motivation cases: The "motivating or moving cause";[85] the "motivating factor";[86] a "substantial cause";[87] "in substantial part";[88] and "motivated principally."[89]

Under this test, the General Counsel must make an initial showing of unlawful motive[90] by presenting substantial evidence that the discharge

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Comment, *Employer Motive and 8(a)(3) Violations*, 48 B.U. L. REV. 142, 147 (1968). In fact, the Court's careful distinction between the two categories indicates that balancing is not to occur in "comparatively slight" cases, highlighting an important difference between the two categories of employer conduct. *See* notes 160-70 *infra* and accompanying text.

83. Wright Line, 251 N.L.R.B. 1083, 1084 (1980).

84. Much of the confusion among the circuit courts of appeals is caused by their use of inconsistent terminology. Courts often employ terminology that does not accurately describe the causation test implemented. For example, use of the term "a substantial cause," *see* note 87 *infra*, does not clearly indicate that the court is applying the "in part" test. Elimination of the terminology described in notes 85-89 *infra* was urged by the NLRB in *Wright Line*. *See generally* notes 131-33 *infra* and accompanying text.

85. Bankers Warehouse Co., 146 N.L.R.B. 1197 (1964).

86. Tursair Fueling, Inc., 151 N.L.R.B. 270, 271 n.2 (1965).

87. Broyhill Co., 210 N.L.R.B. 288, 296 (1974).

88. Central Casket Co., 225 N.L.R.B. 362, 362 (1976).

89. P.P.G. Indus., Inc., 229 N.L.R.B. 713, 717 (1977).

90. The burden of making a prima facie case is always on the General Counsel. *See* notes 33-36 *supra* and accompanying text.

was partly motivated by union activity.[91] Noncoercive expressions of union hostility,[92] commission of other unfair labor practices,[93] postdischarge declarations,[94] inconsistent application of employment policies,[95] and several explanations for discharge[96] often serve in various combinations to create an irrebuttable basis for finding a partially discriminatory motive.[97] The Board can easily find an unfair labor practice unless the employer has little or no knowledge of the dischargee's

91. *See* note 36 *supra* for a discussion of the § 10(c) amendment to the LMRA implementing the substantial evidence standard of review.

Speaking on the Senate floor, Senator Taft argued that the amendment was necessary because the "supported by evidence" standard practically precluded reviewing courts from reversing Board decisions. He contended that the amendment did not give courts of appeals review powers coextensive with powers to review district court opinions, but nevertheless gave them greater opportunity to reverse "obviously unjust" Board decisions. 93 CONG. REC. 3839 (1947) (remarks of Sen. Taft).

92. *See, e.g.,* Metal Cutting Tools, Inc., 191 N.L.R.B. 536, 539, 542 (1971) (unlawful discharge associated with employer's lawful anti-union letters to employees); Bob White Target Co., 189 N.L.R.B. 913, 917 (1971) (noncoercive expressions of anti-union animus significant in determining employer's motivations), *enforcement denied sub. nom.* Cannady v. NLRB, 466 F.2d. 583 (10th Cir. 1972). The Board's continued use of noncoercive statements of union hostility is surprising in light of § 8(c) of the NLRA, which expressly prohibits use of such statements as evidence of unfair labor practices. 29 U.S.C. § 158(c) (1976); *see* H.R. REP. No. 245, 80th Cong., 1st Sess. 45 (1947), *reprinted in* 1947 LEGISLATIVE HISTORY, *supra* note 36, at 292, 299.

93. *See, e.g.,* Leon Ferenbach, Inc., 213 N.L.R.B. 373 (1974) (anti-union animus with respect to discharge substantiated by contemporaneous § 8(a)(1) violations); Ace Tool Eng'r Co., 207 N.L.R.B. 104, 105-06 (1973) (employer's previous unfair labor practices considered relevant in determining motivation underlying discharge). Each discriminatory discharge allegation, however, requires an independent showing of motive. Unless coercive conduct is directed specifically at the employee alleging discrimination, other violations are indicative of unlawful conduct but not unlawful motive. *See* NLRB v. MaGahey, 233 F.2d 406, 410 (5th Cir. 1956) (finding of coincidental § 8(a)(1) violation does not, without more, make a discharge unlawful or supply a motive).

94. *See, e.g.,* Fred Stark, 213 N.L.R.B. 209, 212 (1974) (statement of employer, four days after discharge, that employees were discharged because they had joined union relevant to identification of employer motivation); Loray Corp., 184 N.L.R.B. 557, 575 (1970) (employer's statement to union members on day following discharge that there were "less people in here today than was in here yesterday" considered indicative of animus with respect to discharge).

95. *See, e.g.,* Sinclair & Valentine Co., 223 N.L.R.B. 1043, 1045 (1976) (reasons for discharges termed pretextual when employer claimed discharge effected for failure to report to work; evidence showed that company had policy of permitting four days off without explanation), *enforcement denied*, 549 F.2d 1183 (8th Cir. 1977); Maple City Stamping Co., 200 N.L.R.B. 743, 743 (1972) (employer's claim that discharges were based on lack of work considered pretext because employer usually assigned employees to maintenance work during slack periods).

96. *See, e.g.,* Warren Chateau Hall, Inc., 214 N.L.R.B. 351, 352 (1974) (employer's explanation that employees reported to work when unauthorized discounted because supervisor signed time cards; explanation that part-time help not wanted discredited because part-time employee subsequently hired).

97. *See* DuRoss, *supra* note 36, at 1128-30 & nn.93-98.

pro-union activity[98] or no evidence of anti-union animus can be shown.

The "in part" test strikes a balance in favor of the employees' right to participate in protected activities free from adverse repercussions. This advantage is premised on the ground that Congress, in recognizing the superior bargaining power of the employer, enacted federal labor law with a balance in favor of the employee.[99] Consequently, criticism of the "in part" test focuses on its alleged inability to accommodate the legitimate competing interests.[100] For once hostility toward protected rights is found, the "in part" analysis is satisfied, and the employer's plea of legitimate justification is of no consequence.

Recently, the National Labor Relations Board rejected the partial motive standard in section 8(a)(3) dual motive cases.[101] The "in part" test, however, is currently applied by many circuit courts of appeals.[102]

B. *The "Dominant Motive" Test*

The "dominant motive" test provides that when both a proper and improper motive for discharge are alleged, the General Counsel must establish that but for the involvement in protected activity the discharge would not have occurred.[103] Under this test, section 8(a)(3) is not violated unless anti-union animus is the dominant factor in the employer's motivation, even if the employer is partially motivated by hostile intent.[104]

The earliest advocate of the "dominant motive" test was the First Circuit. This court originally disagreed with the Board's "in part"

98. *See, e.g.,* Diana Shops, 170 N.L.R.B. 698 (1968); Ottaway Newspapers-Radio, Inc., 169 N.L.R.B. 1129 (1968); Atlantic Metal Prods. Inc., 161 N.L.R.B. 919 (1966); Klate Holt Co., 161 N.L.R.B. 1606 (1966).

99. Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1265 (5th Cir. 1978) (Thornberry, J., concurring). *See* notes 139-143 *infra* and accompanying text.

100. *See, e.g.,* Wright Line, 251 N.L.R.B. 1083, 1084 (1980).

101. Wright Line, 251 N.L.R.B. 1083 (1980), represented an important change in Board policy, abandoning the "in part" test in favor of a causation test based on Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). *See* notes 112-24, 145 *infra* and accompanying text.

102. *See, e.g.,* Nacker Packing Co. v. NLRB, 615 F.2d 456, 459-60 (7th Cir. 1980); Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363 (3d Cir. 1978); NLRB v. Gogin, 575 F.2d 596 (7th Cir. 1978); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 569 (4th Cir. 1977); Sweeney & Co. v. NLRB, 437 F.2d 1127, 1133 (5th Cir. 1971); NLRB v. Adam Loos Boiler Works Co., 435 F.2d 707 (6th Cir. 1970); NLRB v. Midtown Serv. Co., 425 F.2d 665, 670 (2d Cir. 1970).

103. Wright Line, 251 N.L.R.B. 1083, 1085 (1980).

104. *See* Wolly, "*What Hath* Mt. Healthy *Wrought?*", 41 OHIO ST. L.J. 385, 396-97 & n.82 (1980).

analysis in *NLRB v. Whitten Machine Works*[105] and, in 1963, formally initiated the "dominant motive," or "but for," test in *NLRB v. Lowell Sun Publishing Co.*[106] Fundamental to the court's rejection was the view that the "in part" test ignored the legitimate business reason of the employer and placed union activists in an unassailable position once anti-union animus had been established.[107] To redress this imbalance, the "dominant motive" test requires that when good cause for discharge appears, the burden is on the Board not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose an impermissible one.[108] The mere existence of anti-union animus is not enough.

The "dominant motive" test strikes a balance in favor of employers' rights to maintain control over their work force. This preference is based on Congress' purported desire to impinge on management control only when discriminatory employment practices are *intended* to re-

105. 204 F.2d 883 (1st Cir. 1953).

106. 320 F.2d 835, 842 (1st Cir. 1963).

107. Wright Line, 251 N.L.R.B. 1083, 1084 (1980). The First Circuit's refusal to employ the partial motive test has led to a conflict throughout the circuits over which test to apply in dual motive cases. Joining the First Circuit is the Ninth Circuit. *See* NLRB v. Sacramento Clinical Laboratory, Inc., 623 F.2d 110, 113 (9th Cir. 1980) (when there are two motives for the employer's action, the better rule is that the improper motive must be shown to have been the dominant one). *Accord*, NLRB v. Adams Delivery Serv., Inc., 623 F.2d 96, 99 (9th Cir. 1980); L'Eggs Prod. Inc. v. NLRB, 619 F.2d 1337, 1341-42 (9th Cir. 1980); Stephenson v. NLRB, 614 F.2d 1210, 1213 (9th Cir. 1980). The Second, Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits apply the "in part" test. *See* Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 27 (7th Cir. 1980) (court explicitly rejects "dominant motive" test in favor of "in part" test); Chromalloy Mining & Minerals v. NLRB, 620 F.2d 1120, 1127 (5th Cir. 1980) (discharge is unlawful even if partially motivated by employee protected activity); Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 (6th Cir. 1980) (violation occurs if discharge motivated in part by protected activity); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 97 (2d Cir. 1978) (it must be shown that discharge was motivated at least partially by anti-union considerations); Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978) (when two or more motives behind discharge, unfair labor practice committed if action partially motivated by protected activity); M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166, 173-74 (10th Cir. 1977); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 570 (4th Cir. 1977) (circuit applies in part test). The District of Columbia Circuit applies both the "dominant motive" and "in part" tests. *Compare* Midwest Regional Joint Bd. v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977) *with* Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977). The Eighth Circuit does not characterize dual motive discharges as such and has taken varying approaches to discriminatory discharge cases. *See, e.g.*, Iowa Beef Processors, Inc. v. NLRB, 567 F.2d 791, 799 (8th Cir. 1977); NLRB v. Melrose Processing Co., 351 F.2d 693, 698-99 (8th Cir. 1965); NLRB v. Des Moines Foods, Inc., 296 F.2d 285, 289 (8th Cir. 1961).

108. Liberty Mut. Ins. Co. v. NLRB, 592 F.2d 595, 602 (1st Cir. 1979). *See generally* DuRoss, *supra* note 36.

ward or penalize organizational activity,[109] regardless of the actual *effect* of management's exercise of control.

The "dominant motive" test is criticized for conflicting with Congress' specified process of shifting the burden of proof to the employer after evidence of discriminatory intent is shown.[110] Requiring the General Counsel to show that the employer's dominant purpose was discriminatory is an unrealistic burden, as the employer is more capable of producing evidence regarding intent.[111]

C. *The* Mt. Healthy *Test*

As the two preceding sections demonstrate, analysis of which causation test is proper for adjudicating dual motive cases finds the "in part" test standing at one extreme and the "dominant motive" test at the other. The Supreme Court has not attempted to formulate standards of review for dual motive discharges since *Great Dane* in 1967. While the questions left unanswered in *Great Dane* will not be definitively resolved until the Court decides a section 8(a)(3) dual motive case, the causation test propounded in *Mt. Healthy Board of Education v. Doyle*[112] may accurately foreshadow the Court's resolution of this schism.

The *Mt. Healthy* case arose when Doyle, an untenured teacher, brought suit against the Mt. Healthy School Board alleging discrimination in the refusal to renew his contract.[113] Doyle, upon request, received a termination letter that set forth two reasons for the decision.[114] First, the board claimed Doyle used obscene language and gestures in the school cafeteria.[115] Second, the board cited Doyle's disclosure of a change in the school's dress code to a local radio station.[116] Doyle's suit alleged that the refusal to renew his contract violated his rights

109. *See* DuRoss, *supra* note 36, at 1116.

110. *See* Wright Line, 251 N.L.R.B. 1083, 1087 (1980); note 76 *supra* and accompanying text.

111. Wright Line, 251 N.L.R.B. 1083, 1087 (1980). *But see* DuRoss, *supra* note 36, at 1126-28 (shifting burden of proof applied in *Great Dane* should have no application to most dual-motive discharges: to redress the inequalities of in part test, burden of proving anti-union motive should be part of Board's threshold showing, and the *Board* must show the motive was dominant to establish a statutory violation).

112. 429 U.S. 274 (1977).

113. *Id.* at 276.

114. *Id.* at 282-83.

115. *Id.*

116. *Id.* Doyle asserted that his telephone call to the radio station was clearly protected conduct under the First Amendment.

under the first and fourteenth amendments.[117] The district court found in Doyle's favor, holding that protected activity played a "substantial part" in the school board's decision.[118] The United States Court of Appeals for the Sixth Circuit affirmed, stating that "substantial evidence" supported the trial court's finding that the school board was motivated "at least in part" by Doyle's activity.[119]

The Supreme Court unanimously reversed. The Court agreed that Doyle's conduct was protected, but rejected both the district court's substantial motive test and the Sixth Circuit's partial motive test.[120] The Court stated that even if protected conduct played a part, "substantial" or otherwise, in the decision to discipline or discharge, a constitutional violation could be avoided only if the same decision would have been reached absent an occurrence of protected activity.[121] A decision not to rehire should not "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[122] Further, an employer should be able to evaluate an employee's performance and decide not to rehire on the basis of the work record, despite the presence of protected conduct that reinforces the employer's decision.[123]

The Court then set forth a two-part test applicable in dual motive contexts. Initially, the employee must establish that the protected conduct is a "substantial" or "motivating" factor. If this is shown, the burden shifts to the employer to demonstrate that he would have reached the same decision absent the protected conduct.[124]

Although *Mt. Healthy* does not specify the extent to which an employer must be influenced by protected activity before an employment decision is rendered invalid, a companion case sheds light on the issue. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[125] decided the same day as *Mt. Healthy*, the Court considered a race-based challenge under the Fair Housing Act to a village's denial of

117. *Id.* at 276.
118. *Id.* at 283.
119. *Id.* at 276.
120. *Id.* at 284.
121. *Id.* at 287.
122. *Id.* at 285.
123. *Id.* at 286.
124. *Id.* at 287 (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)).
125. 429 U.S. 252 (1977).

a rezoning proposal that would have permitted multiple family housing.[126] The majority opinion by Justice Powell ruled that plaintiffs did not carry their burden of proving that discrimination was a motivating factor in the Village's decision.[127] Relying on the *Mt. Healthy* test, the Court stated that if the Village was partially motivated by a racially discriminatory purpose the decision would not have been invalidated. Instead such proof would have shifted to the Village the burden of establishing that the same decision would have resulted even if the impermissible purpose was not considered.[128] Finally, the Court recognized that efforts to determine the "dominant" or primary motive in dual motive situations are usually unavailing.[129]

V. APPLICABILITY OF *MT. HEALTHY* TO THE NLRA

The National Labor Relations Board has recently indicated that the *Mt. Healthy* case is consistent with the NLRB decision-making process, which traditionally inquires whether protected activity played a role in an employer's decision and whether the employer could assert a legitimate business reason to negate the showing of prohibited motivation. In *Wright Line, A Division of Wright Line, Inc.*[130] the Board adopted the *Mt. Healthy* analysis to relieve some of the confusion associated with dual motive cases.[131] Emphasizing a desire to set forth explicitly the method to be used in drawing inferences and conclusions from the evidence presented, the Board announced its abandonment of the "in part" terminology.[132] Instead, the Board applied a precise analytical framework to determine whether a prima facie case was established and, if so, whether the respondent carried its burden to establish that its decision was not affected by the protected conduct.[133]

126. *Id.* at 254.
127. *Id.* at 270.
128. *Id.* at 270-71 n.21.
129. *Id.* at 265.
130. 251 N.L.R.B. 1083 (1980).
131. *Id.* at 1083. *See* notes 13-16, 102 *supra*.
132. Wright Line, 251 N.L.R.B. 1083, 1083, 1087 (1980). *See* Herman Bros., Inc., 252 N.L.R.B. No. 121, 105 L.R.R.M. 1374 (Sept. 30, 1980).
133. In the Board's opinion, the major contribution of *Wright Line* is that it will set forth more clearly the burden on each party and provide the Board with an analytical framework within which to discuss the extent to which the parties have carried their respective burdens. It is also hoped that the case will lay to rest the Board's critics' concerns over perceived ambiguity in their analytical capability. Finally, it is hoped that the *Wright Line* test will impose greater intellectual rigor on the Board's analysis so that litigants and courts of appeals will have greater confidence

The two-part *Wright Line* analysis requires that the General Counsel initially establish a prima facie case by showing that the protected conduct was a "motivating" or "substantial" factor in the employer's decision.[134] The burden then shifts to the employer to demonstrate as an affirmative defense that his decision would have been the same absent any protected conduct.[135] If the employer fails to establish this by a preponderance of the evidence[136] the General Counsel will prevail, regardless of the quantum of unlawful motivation involved.[137] If the employer establishes an affirmative defense, no unfair labor practice is committed.[138]

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and understanding of the process utilized by the Board in adjudicating unfair labor practice cases. *See* Truesdale address, *supra* note 28, at 148-49.

134. The General Counsel must seek to establish a prima facie case of discrimination in both pretext and dual motivation cases. The "absence of any legitimate basis" for the employer's action or a showing of disparate treatment regarding the action may form part of the General Counsel's affirmative case. *See* text of Memorandum #80-58 by NLRB General Counsel William A. Lubbers, Nov. 4, 1980, [1980] 105 LAB. REL. REP. (BNA) 245, 246 [hereinafter cited as Memorandum]. *See also* Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466 (9th Cir. 1966).

135. It is important to note that the employer must show that the same decision *would have been made* in the absence of protected activity. A showing that the same decision *would have been justified* or *could have been made* will not be sufficient to establish the affirmative defense. Memorandum, *supra* note 134, at 246 n.5.

The shifting burden requirement is the most apparent distinction between the *Mt. Healthy-Wright Line* test and the "dominant motive" test, which requires the *General Counsel* to show that the employer's action would not have taken place absent the protected activity. *Id.* at 246 n.2. However, "the shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence." Wright Line, 251 N.L.R.B. 1083, 1088 n.11 (1980). The shifting burden requires the employer to establish an affirmative defense to overcome the prima facie case. This requirement does not shift the ultimate burden. *Id.*

136. *See* note 91 *supra*.

137. Memorandum, *supra* note 134, at 246.

138. Interpreting the Board's decision in *Wright Line* for the regional offices, the General Counsel indicates that an opportunity exists to rebut the affirmative defense with further evidence of unlawful motivation. Memorandum, *supra* note 134, at 246. The Board's decision did not provide for such rebuttal. *See* notes 175-76 *infra* and accompanying text.

Following *Wright Line* the Board has meticulously adhered to these standards. *See* Red Ball Motor Freight, Inc., 253 N.L.R.B. No. 111, 106 L.R.R.M. 1033, 1034 (Dec. 19, 1980) (*Wright Line* applied; after prima facie case made out, burden shifted to employer to show discharge would have occurred even in absence of concerted protected activities); United Broadcasting Co., 253 N.L.R.B. No. 102, 106 L.R.R.M. 1005 (Dec. 10, 1980) (under *Wright Line*, no unfair labor practice when General Counsel fails to make prima facie showing that protected conduct was a motivating factor in discharge decision); Russ Togs, Inc., 253 N.L.R.B. No. 99, 106 L.R.R.M. 1067 (Dec. 15, 1980) (layoff of two employees violated § 8(a)(3) under *Wright Line* analysis); Joshua's, Inc., 253 N.L.R.B. No. 82, 106 L.R.R.M. 1035 (Dec. 5, 1980) (finding of unfair labor practice by Administrative Law Judge upheld because employer failed to demonstrate it would have taken same action in absence of opposition to the union); Weather Tamer, Inc., 253 N.L.R.B. No. 36, 105

Because the *Mt. Healthy* test was pronounced in a first amendment case, some critics believe it inapplicable to section 8(a)(3) cases. Circuit Judge Thornberry, concurring in *Federal-Mogul Corp. v. NLRB*,[139] argued that the judiciary has greater freedom to balance competing interests in a constitutional context than under the NLRA, in which Congress has struck a balance favoring employees.[140] This analysis is inapposite for three reasons. First, the Act was not passed to encourage pro-union activity. While Congress did intend to equalize the negotiating capabilities of employees and employers, it did so by protecting the collective bargaining process, which is furthered by section 8(a)(3).[141] Second, the *Mt. Healthy* test does not strike a balance favoring employers. Rather, it is designed to preclude employees from obtaining relief to which they otherwise are not entitled simply because organizational activity was involved.[142] Finally, a test that is adequate to protect first amendment rights is undoubtedly adequate to protect organizational rights.[143]

VI. Critical Analysis

Assuming that the *Mt. Healthy* test is applicable to dual motive discharges under section 8(a)(3), it follows that the "in part" test, which is

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L.R.R.M. 1569 (Nov. 14, 1980) (fact that employer waged vigorous campaign against union and decided to close plant after union won election undermined employer's explanation that he would have taken same action in absence of union activity); Valley Cabinet & Mfg., Inc., 253 N.L.R.B. No. 8, 105 L.R.R.M. 1467 (Oct. 21, 1980) (employer violates § 8(a)(3) by laying off employee); Motor Convoy, Inc., 252 N.L.R.B. No. 175, 105 L.R.R.M. 1519 (Sept. 30, 1980) (motivating factor behind employee discharge was filing of numerous grievances, not accident in which cargo damaged); United Parcel Serv., Inc. 252 N.L.R.B. No. 145, 105 L.R.R.M. 1484 (Sept. 30, 1980) (employer failed to rebut showing of General Counsel that discharge unlawfully motivated due to abrupt and harsh discipline); Herman Bros., Inc., 252 N.L.R.B. No. 121, 105 L.R.R.M. 1374 (Sept. 30, 1980) (unfair labor practice upheld where employer did not present persuasive evidence that discharge would not occur in absence of protected activity).

Since *Wright Line* was announced in August, 1980, it has been recognized by the Third and Fourth Circuits. *See* NLRB v. Permanent Label Corp., No. 80-1617 (3d Cir. 1981); NLRB v. Burns Motor Freight, Inc., 635 F.2d 312 (4th Cir. 1980).

139. 566 F.2d 1245, 1264-65 (5th Cir. 1978) (Thornberry, J., concurring).

140. *Id.* at 1265. Judge Thornberry believes this balance was struck in recognition of the superior bargaining position of the employer. *Id.*

141. *See* DuRoss, *supra* note 36, at 115-16.

142. *Id. See* Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977) (constitutional right sufficiently vindicated if "an employee is placed in no worse a position than if he had not engaged in the [protected] conduct").

143. Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 99 (2d Cir. 1978).

satisfied by a showing of improper motive, is rejected.[144] The "in part" test is conceptually at odds with the principle that management, as the master of its own business affairs, can discharge employees for good cause or no cause at all,[145] provided such action is not based on anti-union animus. The conflict exists because the employer's legitimate justification is ignored when an improper reason for discharge exists. The employer's recognized right to enforce company rules should not be rendered inconsequential because it conflicts with an employee's right to participate in protected activities without adverse repercussions.[146] Thus, an "in part" test, while accurate to a certain degree, is incomplete, for it fails to provide employers with a fair opportunity to assert discharge for cause when union activists are terminated.

The "dominant motive" test should also be rejected in light of *Mt. Healthy*, despite their apparent similarity.[147] While both *Mt. Healthy* and the "dominant motive" test reject an "in part" analysis and require proof of how the employer would have acted in the absence of protected activity, the tests place the burden of proof on different parties.[148] Under the "dominant motive" test, the General Counsel must make a prima facie showing of unlawful motive, as well as rebut an employer asserted defense by demonstrating that the discharge would not have taken place but for the employees' protected activities.[149] Under the *Mt. Healthy* test, however, once the General Counsel establishes a prima facie case of employer reliance on protected activity, the burden shifts to the employer to demonstrate that the same decision would have been made in the absence of protected activity.[150] This distinction is crucial, as allocation of the burden of proof can be

144. Wright Line, 251 N.L.R.B. 1083, 1087 (1980).

145. *See, e.g.,* NLRB v. Computed Time Corp., 587 F.2d 790, 795 (5th Cir. 1979); NLRB v. Nabors, 196 F.2d 272, 275 (5th Cir.), *cert. denied,* 344 U.S. 865 (1952).

146. *See* note 99 *supra* and accompanying text.

147. Wright Line, 251 N.L.R.B. 1083, 1087-88 (1980).

148. *Id. See* notes 110-11, 135 *supra* and accompanying text.

149. The First Circuit may have recently modified its view, retreating from its "but for" terminology. In Texas Instruments, Inc. v. NLRB, 599 F.2d 1067, 1073 (1st Cir. 1979), and NLRB v. Eastern Smelting and Ref. Corp., 598 F.2d 666, 671 (1st Cir. 1979), the First Circuit stated that once some improper motivation is shown, the burden is on the employer to prove that it had a good reason for the discharge and that the discharge, would have occurred in the absence of the improper reason. This formulation, like the Board's, puts the burden of proving the employer's motives on the employer and removes much of the controversy between the Board and that circuit.

150. *See* notes 76, 124, 135 *supra* and accompanying text.

determinative.[151]

Keeping the burden on the General Counsel is inconsistent with the Supreme Court's holding in *Great Dane*[152] and places the employer in an inordinately advantageous position. Instead, the Board should require employers to supply proof of motive, affording them the opportunity to justify their business decision. Requiring the employer to justify his business decision best advances the fundamental objectives articulated by Congress, as the employer is the party with best access to proof of motivation.[153]

The "dominant motive" test is further undermined by the *Arlington Heights* decision.[154] The Court explicitly eschewed the dominant motive analysis, stating it is practically impossible to examine a dual motive decision and definitively ascertain the "dominant" or "primary" purpose.[155]

In reconciling the *Mt. Healthy* test with established labor law principles, it is important to note that neither *Mt. Healthy* nor *Wright Line* makes reference to the two prong analysis of *Great Dane. Mt. Healthy* and *Wright Line* are nevertheless consistent with *Great Dane* and represent a refinement of the method for adjudicating dual motive discharges under the NLRA.

Great Dane established "inherently destructive" and "comparatively slight" categories of employer conduct without describing how to make the classification.[156] Under the first category, "inherently destructive" conduct supports the finding of an unfair labor practice without specific reference to intent.[157] Although the employer is afforded the opportunity to present a business justification for his conduct, the Board may balance this justification against the harm to employee rights and still find an unfair labor practice.[158]

The *Mt. Healthy-Wright Line* analysis should not apply to "inherently destructive" cases. First, resolution of these cases does not turn

151. Wright Line, 251 N.L.R.B. 1083, 1087 (1980).

152. *See* notes 76, 135 *supra* and accompanying text.

153. *Id.*

154. *See* notes 125-29 *supra* and accompanying text.

155. *See* note 129 *supra* and accompanying text.

156. Apparently, categorization of employer conduct according to the fact pattern is accomplished through policy determinations made by the Board on a case-by-case basis. *See* Comment, *supra* note 73, at 777.

157. *See* notes 73, 81 *supra* and accompanying text.

158. *Id.*

on motive.[159] The impact on organizational activity may be so severe that no employer justification could outweigh the employee harm.[160] Second, *Wright Line* is not a balancing test. The essence of the *Wright Line* test is its precise analytical framework, which is not susceptible to loose application.[161] *Wright Line* does not provide the flexibility allowed by the Supreme Court under the "inherently destructive" category.[162]

Under the second category, when employer conduct causes "comparatively slight" harm to organizational activity, the General Counsel is required to establish a prima facie case by showing the employer's discriminatory conduct could have had an adverse affect on employee rights to *some* extent.[163] Once a prima facie case is established, the burden of proof shifts to the employer to show that the discharge was motivated by "legitimate and substantial" business justifications.[164] If the employer successfully rebuts the inference of illegal motivation, the burden shifts back to the General Counsel, who must affirmatively prove anti-union motivation through additional evidence.[165]

The *Mt. Healthy-Wright Line* analysis applies to "comparatively slight" cases, which comprise the overwhelming majority of section

159. *See* Memorandum, *supra* note 134, at 247. Again, an unfair labor practice may be found under the inherently destructive category without regard to intent. *See* note 157 *supra* and accompanying text.

160. *See* note 73 *supra*.

161. Wright Line, 251 N.L.R.B. 1083, 1089 (1980). *See* note 133 *supra* and accompanying text.

162. The Supreme Court expressly indicated that balancing occurs under the inherently destructive category. *See* notes 73, 80 *supra*. The Court reserved the possibility of holding that a business justification offered in this category might substantiate employer conduct despite its inherently destructive nature. *See* note 73 *supra*. If a balancing test is also applied when employer conduct is comparatively slight (the *Wright Line* analysis applies to these cases—*see* note 166 *infra* and accompanying text), the *Great Dane* Court's careful distinction between the two categories of employer conduct becomes a distinction without a difference because the rules applicable to the two categories become identical. In both cases a balancing test would apply to determine the legitimacy and substantiality of the employer's interest against the interference with employee rights. For the distinction to be meaningful, balancing should occur only when employer conduct is inherently destructive. Otherwise, the Board should look solely at the employer's business justifications without reference to the amount of interference with employee rights to see if the justifications are legitimate and substantial. A balancing process should not be allowed to blur the precise burdens of proof and steps of analysis required to fairly adjudicate "comparatively slight" cases. *Wright Line*'s formal framework provides the clarity that § 8(a)(3) dual motive cases demand. *See* Shieber & Moore, *supra* note 7, at 13; Comment, *supra* note 82, at 147-48.

163. *See* notes 33-48, 75 *supra* and accompanying text.

164. *See* notes 73, 76, 80-82 *supra* and accompanying text.

165. *See* notes 76-77 *supra* and accompanying text.

8(a)(3) discriminatory discharges.[166] The *Mt. Healthy* test embraced in *Wright Line* accomplishes the "delicate task"[167] of providing a procedure through which the interests of employees in concerted activity can be "compared" to the interests of the employer in operating his business consistent with Supreme Court decisions and the policy of the NLRA. The employee's rights are safeguarded because, initially, the General Counsel is required to show only that protected activities were a factor, "substantial" or "motivating," in the employer's decision to engage in discriminatory conduct.[168] Consistent with *Great Dane*, if the General Counsel is unable to meet this minimal requirement, no unfair labor practice is found.[169]

If a prima facie case is established, the burden of proof shifts to the employer to show that absent the protected conduct, he would have reached the same decision.[170] This is the "legitimate and substantial" business justification requirement of *Great Dane*, articulated as a clear, practical test. Under *Great Dane*, no unfair labor practice is committed if, despite knowledge by the employer of protected conduct[171] and action by the employer that discourages union activity,[172] the employer was motivated by "legitimate objectives."[173] Simply stated, *Wright Line* requires an employer to prove that the same decision would have been reached "anyway."[174] It is irrelevant that protected activity is a "dominant or primary" factor or that illegal motivation is "a part" of the decision. If the employer fails to establish the affirmative defense, the General Counsel prevails, regardless of the quantum of unlawful

166. Only two cases appear to follow the "inherently destructive" language of *Great Dane*. *See* NLRB v. Midwest Hangers Co. & Liberty Eng'r Corp., 474 F.2d 1155, 1158 (8th Cir.) (discharge of large number of employees including union organizers during organizational campaign held "inherently destructive of employee interests," thus putting burden on employer to justify its actions), *cert. denied*, 414 U.S. 823 (1973); NLRB v. Entwhistle Mfg. Co., 120 F.2d 532, 536 (4th Cir. 1941) (discriminatory discharge of employee because of union affiliation goes to the "very heart of the Act").

167. NLRB v. Erie Resistor, 373 U.S. 221, 229 (1963).

168. *See* note 134 *supra* and accompanying text.

169. *See* notes 33-48, 75 *supra* and accompanying text.

170. *See* note 135 *supra* and accompanying text.

171. Knowledge is inferred through either direct or substantial evidence. *See* notes 31, 33-34, 36 *supra* and accompanying text.

172. *See* notes 37-48, 63 *supra* and accompanying text.

173. *See* notes 49-57, 73, 80-81 *supra* and accompanying text.

174. Former NLRB member Truesdale characterized the *Mt. Healthy-Wright Line* test as an "anyway" test in comparison to the First Circuit's "but for" test. *See* Truesdale address, *supra* note 28, at 148.

motivation involved.[175] If the employer establishes the defense, an unfair labor practice has not been committed.[176]

VII. CONCLUSION

The applicability of the *Mt. Healthy* test to the NLRA depends on its compatibility with Congressional intent and established labor law principles and the extent to which the test accommodates management employment prerogatives and union organizing rights.[177] Section 8(a)(3) should not prevent an employer from discharging an employee who lacks skill or ability, nor should it require hiring an incompetent employee; the section, however, should prevent an employer from making discharge decisions on the basis of union activity or membership.[178] It is therefore necessary that the General Counsel be required to establish anti-union animus as the motivating factor for the employer's conduct in order to prove a violation.[179]

Congress intended motive to be the critical factor and placed the responsibility of evaluating the competing interests on the Labor Board. It is therefore proper that the forum closest to the dispute in both expe-

175. *See* note 137 *supra* and accompanying text. An affirmative defense is not established unless the employer has a legitimate and substantial business justification.

176. *See* note 138 *supra* and accompanying text. This step of the *Wright Line* analysis is poorly defined. Prior to shifting the burden of proof back to the General Counsel, the employer must successfully establish his affirmative defense. This entails proving a legitimate and substantial business justification or, as stated in note 174 *supra*, that the employer would have reached the same decision "anyway." The General Counsel, in his memorandum to regional offices, indicated that "it would appear" the General Counsel presenting the case has an opportunity to rebut the affirmative defense through additional evidence of hostile motivation. *See* Memorandum, *supra* note 134, at 246. However, the Board in *Wright Line* made no provision for such rebuttal. The General Counsel's assertion that rebuttal is available implies that a legitimate and substantial business justification can co-exist with a high quantum of unlawful motivation. Rather than require the Board subjectively to decide what amount of unlawful motivation outweighs the employer's legitimate business decision through an imprecise balancing process, establishing the affirmative defense should conclusively exonerate an employer from the unfair labor practice charge.

177. *Buf cf.* DuRoss, *supra* note 36, at 1117, 1128 (recognizing importance of both management prerogatives and union organizing rights, but implying that exercise of management discretion is far more important).

178. 78 CONG. REC. 10560 (1934) (remarks of Sen. Walsh).

179. Congressional debate on § 8(a)(3) emphasized that it was necessary to establish anti-union animus as the motivating factor for the employer's conduct in order to prove a violation. *See* 79 CONG. REC. 2333 (1935), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 2433. Put another way, it is the purpose of the National Labor Relations Act to guarantee that business decisions not be the product of anti-union motivation. Liberty Mut. Ins. Co. v. NLRB, 592 F.2d 595, 603 (1st Cir. 1979).

rience and expertise administer a uniform test that provides a precise framework for analyzing the complex circumstances that characterize dual motive discharges. The Supreme Court should formally recognize the *Mt. Healthy-Wright Line* test as the correct standard to apply in adjudicating discriminatory discharge claims. This approach should then be adopted uniformly by the circuit courts of appeals, ending the confusion that currently exists on this point of law.

Mark S. Hochman