

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

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S.A.M.

TO: William B. Cowen, Acting Regional Director
Region 14

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

SUBJECT: Renewal by Andersen LLC KC
Case 14-CA-262563

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The Region submitted this case for advice as to whether *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*,¹ concerning an employer's right to control the use of its email system, precludes finding that the Employer repeatedly violated Section 8(a)(1) by restricting the Charging Party, through its actions and statements, from engaging in Section 7 activity on a work group chat maintained by the Employer on a third-party messaging application and accessed from personal equipment. Initially, we conclude that the Charging Party engaged in protected concerted activity by posting (b) (6), (b) message on the work group chat. We then conclude that *Caesars Entertainment* does not apply here because the Employer does not have a property interest in the third-party application or group chat that would justify it restricting employee use of the chat for Section 7 purposes during nonworking time. Thus, the Employer violated Section 8(a)(1) by removing the Charging Party from the group chat because of (b) (6), (b) Section 7 activity and making statements that restrained (b) (6), (b) from using the chat for that purpose. Finally, we conclude that the Employer violated Section 8(a)(1) by constructively discharging the Charging Party by requiring (b) (6), (b) to choose between continued employment or exercising (b) (6), (b) statutory rights. Accordingly, the Region should issue complaint, absent settlement, on each of these meritorious allegations.

¹ 368 NLRB No. 143 (Dec. 16, 2019).

FACTS

I. Background

Renewal by Andersen LLC KC (“Employer”) is a national corporation that sells replacement windows and doors to homeowners. The Charging Party was a retail promoter who sold the products by soliciting home-owning customers as they shopped at Ace Hardware stores in the Kansas City area.

As a condition of employment, the Employer requires employees in this type of position to download GroupMe, a mobile group messaging application available to the public at no cost, to their personal cell phones. Employees use the application to check in and out of shifts, communicate daily sales statistics, communicate leave-related messages, and view the Employer’s announcements and scheduling of meetings. Only the Employer’s managers can invite or remove group members. Neither employees nor the Employer pay any fees for using GroupMe.

II. The Charging Party’s post and comment in the group chat

Following a three-month long pandemic-related furlough, the Charging Party, who had previously worked for the Employer as (b) (6), (b) (7)(C), returned to work in (b) (6), (b) (7)(C) new capacity as (b) (6), (b) (7)(C). On (b) (6), (b) (7)(C), 2020,² after (b) (6), (b) (7)(C) first two shifts back at work post-furlough, (b) (6), (b) (7)(C) observed unmasked customers not following federal social distancing guidelines. Consequently, in the GroupMe group chat, the Charging Party posted a local newspaper article about a recent spike in area COVID-19 cases and commented, “[i]n the last three weeks, our case count has spiked, in parallel timing with the last Phase of reopening.” Two employees “liked” the article, and a third responded that lockdowns, masks, and chemicals are ineffective, the Charging Party should stay home if (b) (6), (b) (7)(C) was worried, and the pandemic was particularly challenging for (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) prayed it would be over soon. The Charging Party responded that (b) (6), (b) (7)(C) agreed staying home is more effective than masks and sympathized with the third employee’s allergy to synthetic cleaners. The Charging Party’s supervisor responded that if anyone felt uncomfortable working a shift that week, they should let (b) (6), (b) (7)(C) know so (b) (6), (b) (7)(C) could remove them from the schedule.

The Charging Party then privately messaged the supervisor saying (b) (6), (b) (7)(C) post was not personal and (b) (6), (b) (7)(C) knew (b) (6), (b) (7)(C) was a “nice (b) (6), (b) (7)(C) doing (b) (6), (b) (7)(C) job.” The supervisor responded, “I don’t tolerate negativity in my chat. Keep that stuff to yourself. We clear?” and in response to the Charging Party’s question “What did you find negative” (b) (6), (b) (7)(C) stated, “What you posted. People are very aware of the issues with

² All dates are in 2020, unless otherwise noted.

COVID. It's not your job to remind us of precautions. It's unnecessary to post stuff like that in the chat. We have a job to do and if you're uncomfortable performing that job as a part of this team, let me know so we can take the steps necessary to alleviate your discrepancies."

III. The Employer removes the Charging Party from the group chat

The supervisor removed the Charging Party from the group chat that evening. The next day, June 29, after discovering the removal, the Charging Party emailed Human Resources ("HR") describing the situation. An HR official responded that [REDACTED] would be added back to the group chat and further stated, "I want to stress that if you have any issues with your working conditions please bring them to myself or the (b) (6), (b) (7)(C) personally." The Charging Party responded that [REDACTED] was concerned for the safety of employees because they could not protect themselves against customer and/or Ace employee non-compliance with distancing and mask-wearing in the midst of a spike in positive cases, and that [REDACTED] believed [REDACTED] was stifled from discussing the matter with coworkers and management when removed from the group chat. The supervisor restored the Charging Party to the group chat the following day, telling [REDACTED] the removal was a "time-out."

IV. Subsequent communications from management restricting what the Charging Party could post on the group chat

On [REDACTED] in a phone conversation, the supervisor informed the Charging Party that the group chat was not an open forum, [REDACTED] post was not work-related, [REDACTED] should not post negative items, [REDACTED] would be removed from the chat if [REDACTED] continued to post pandemic-related information, and that it was not [REDACTED] place to share information with [REDACTED] coworkers about workplace conditions.

The following day, [REDACTED], HR repeated to the Charging Party during a video meeting that [REDACTED] could not post COVID-19-related information on the group chat without prior management approval, noting that "coworkers are not allowed to share workplace condition information without permission from [their] supervisor first." HR also stated that removing [REDACTED] from the chat for [REDACTED] actions was permissible, as the Employer did not want [REDACTED] to "heighten people's senses" and cause employees to stop working en masse. HR informed [REDACTED] [REDACTED] could message employees privately.

The Charging Party emailed [REDACTED] supervisor and HR the same day to state that the imminent threat to safety caused by the recent spike in area COVID-19 cases, the Employer's inaction in mitigating the threat, and the inability to discuss these dangers with [REDACTED] coworkers prohibited [REDACTED] from "perform[ing] in good faith." [REDACTED] did not appear for [REDACTED] next scheduled shift on [REDACTED]. On [REDACTED] the Employer emailed [REDACTED] stating they were sad to hear [REDACTED] resigned and processed the

resignation effective (b) (6), (b) (7)(C). The Charging Party responded that (b) (6), (b) (7)(C) did not resign but rather the Employer terminated (b) (6), (b) (7)(C) by refusing to provide a safe working environment and allow (b) (6), (b) (7)(C) to exercise (b) (6), (b) (7)(C) right to communicate with (b) (6), (b) (7)(C) coworkers.

ACTION

We conclude that the Charging Party engaged in protected concerted activity by posting (b) (6), (b) (7)(C) message on the work group chat. We then conclude that *Caesars Entertainment* does not apply here because the Employer does not have a property interest in the third-party application and group chat that would justify it restricting employee use of the chat for Section 7 purposes during nonworking time. Thus, the Employer repeatedly violated Section 8(a)(1) by removing the Charging Party from the group chat because of (b) (6), (b) (7)(C) Section 7 activity and making statements that restrained (b) (6), (b) (7)(C) from using the chat for that purpose. Finally, we conclude that the Employer violated Section 8(a)(1) by constructively discharging the Charging Party.

I. The Charging Party engaged in protected concerted activity by posting (b) (6), (b) (7)(C) message on the group chat or, in the alternative, the Employer believed that (b) (6), (b) (7)(C) engaged in Section 7 activity

First, we find that the Charging Party engaged in protected concerted activity when (b) (6), (b) (7)(C) posted the news article in the group chat and commented on it. To be protected under Section 7 of the Act, employee conduct must be both “concerted” and “for the purpose of . . . mutual aid or protection.”³ The manner in which an employee’s actions are linked to those of (b) (6), (b) (7)(C) coworkers determines whether the employee’s activity is concerted, with no particular combination necessary to find the conduct protected.⁴ Core concerted activity is that which is

³ See, e.g., *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 2 (Jan. 11, 2019). The analysis here focuses on whether the Charging Party’s post on the group chat constituted concerted activity. Her posting satisfied the mutual aid or protection requirement because she sought to have the Employer address work-related health and safety conditions. *Id.*, slip op. at 8-9 (stating that employee activity is for mutual aid or protection if the employee seeks “to improve terms and conditions of employment” or otherwise improve the lot of employees).

⁴ *Meyers Industries*, 281 NLRB 882, 884-85 (1986) (*Meyers II*) (citing *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984)), *aff’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

“engaged in with or on the authority of other employees,”⁵ and peripheral to core group action, but also retaining protection, is individual conduct both in the form of preliminary discussions⁶ and where such conduct is the logical outgrowth of earlier collective discussions.⁷ It is well-established that concerted activity includes statements by a lone employee addressing (b) (6), (b) coworkers that seek to initiate, induce, or prepare for group action or, or statements directed to management communicating a truly group complaint.⁸ Protected preliminary communications to coworkers include statements made to elicit support from fellow likeminded coworkers for a personally held view about a working condition.⁹ In addition, protection will even attach to certain conduct falling short of the employee interchange that occurred here, i.e., a direct dialogue with coworkers, if it involves

⁵ *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries (Meyers II)*, 281 NLRB at 887.

⁶ See, e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014) (“The requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7” and “almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals”).

⁷ See, e.g., *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038-39 (1992) (individuals’ uncoordinated refusals to work overtime were logical outgrowth of earlier concerted protest over hour reductions), enforced 53 F.3d 261 (9th Cir. 1995). As there is no evidence of prior or contemporaneous discussion, we are concerned only with preliminary discussions here.

⁸ See *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 3 (quoting *Meyers Industries (Meyers II)*, 281 NLRB at 887; see, e.g., *Timekeeping Systems*, 323 NLRB 244, 244, 248 (1997) (employee’s unilateral company-wide email to coworkers in response to employer’s email about vacation plan changes constituted concerted activity).

⁹ See, e.g., *Morton International*, 315 NLRB 564, 566 (1994) (finding that employee engaged in concerted activity by writing contradictory statements on memo that proposed smoke-free workplace, and posting memo in lunchroom, because the conduct induced support from fellow smokers); *Whittaker Corp.*, 289 NLRB 933, 933 (1988) (“the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity”) (quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)).

“inherently concerted” discussions about vital categories of workplace life such as wages or job security.¹⁰

Based on these principles, the Charging Party’s post and comments constituted a protected preliminary discussion with the object of initiating, inducing, or preparing for group action.¹¹ Initially, the Charging Party’s post was a written message to [REDACTED] entire working group that sought to elicit support for a safety concern over working around the public and hardware store employees while the COVID-19 infection rate in the area had spiked. This is clearly a subject that had an impact on all the employees. Two coworkers “liked” [REDACTED] post, indicating that they shared [REDACTED] concern, and a third coworker replied that staying home was the only effective way to avoid getting the virus. Regardless of the responses, this exploratory discussion is exactly the type of inchoate activity that precedes group action for the purpose of improving working conditions and must be covered by Section 7 because “almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals,” and to deny protection “because of lack of fruition” would nullify bedrock Section 7 rights.¹² Moreover, as discussed below, the Employer’s own unlawful actions throttled any group action that would have logically unfolded following the protected preliminary discussion.

¹⁰ *Meyers I*, 268 NLRB at 494 (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951)) (even a statement that “in its inception involves only a speaker and a listener” may be protected because it is “an indispensable preliminary step to employee self-organization”). *See also Alternative Energy Applications*, 361 NLRB 1203, 1206 n.10 (2014) (stating “employee wage discussions are ‘inherently concerted,’ and as such are protected, regardless of whether they are engaged in with the express object of inducing group action”); *Hoodview Vending Co.*, 359 NLRB 355, 357 (2012) (stating “employee conversations about job security are inherently concerted”), *incorporated by reference*, 362 NLRB 690, 690 n.1 (2015).

¹¹ We need not reach the question of whether a concerted objective may be inferred from the circumstances, e.g., where an employee protests or challenges a change announced in a group meeting initiated by the employer. *See Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 4, 6, 7 (citing *Chromalloy Gas Turbine*, 331 NLRB 858, 863 (2000) (employee protested change rather than merely inquiring for clarification), *enforced sub nom. NLRB v. Caval Tool Div.*, 262 F.3d 184 (2d Cir. 2001), and *Whittaker Corp.*, 289 NLRB at 934 (employee raised complaint at employer-initiated group meeting)).

¹² *See Fresh & Easy Neighborhood Market*, 361 NLRB at 153 (finding employee who asked three coworkers to be witnesses for her workplace sexual harassment complaint engaged in concerted activity); *Morton International*, 315 NLRB at 566.

In addition to the unambiguously incipient nature of the communications here, the Region should argue in the alternative that the conduct was inherently concerted because it raised a “vital element” concerning one of the most basic and essential aspects of employment—an employee’s right to working conditions that do not pose a risk of serious harm, and the employer’s concomitant responsibility to provide a safe workplace.¹³ Indeed, the Board has observed that “health and safety matters regarding unit employees’ workplaces are of vital interest to employees”¹⁴ because “[f]ew matters can be of greater legitimate concern to individuals in the workplace . . . than exposure to conditions potentially threatening their health, well-being, or their very lives.”¹⁵ The fact that health and safety issues often serve as a precursor to organizing or other actions for mutual aid and protection is particularly persuasive for finding inherent concert in the context of this case, where the Employer repeatedly subverted the Charging Party’s persistent attempts to engage in protected discussions with (b) (6), (b) coworkers.¹⁶ As discussed above, the Charging Party’s comments concerned the employees’ basic health and safety in light of their geographic region’s recent spike in COVID-19 cases, data which prompted all but a few states to restrict in-person interactions to an unprecedented and extraordinary degree. The Charging Party’s working group had just days earlier resumed in-person work at the direction of the Employer following a three-

¹³ *Aroostook Cty. Reg’l Ophthalmology Ctr.*, 317 NLRB 218, 220 (1995) (finding that employee discussions regarding wages and work schedules are inherently concerted because they are both vital elements of employment), *enforcement denied in part on other grounds*, 81 F.3d 209 (D.C. Cir. 1996).

¹⁴ *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995) (confirming relevancy of union’s request for information addressing health and safety issues).

¹⁵ *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982) (finding that employer was required to comply with union request for certain health and safety information), *enforced sub nom.*, *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 248 (D.C. Cir. 1983).

¹⁶ *See, e.g., Crossing Rehabilitation Services*, 347 NLRB 228, 231 (2006) (employees wanted union in order to negotiate over “concerns about safety at work, employment benefits, and job security”); *Snowshoe Co.*, 217 NLRB 1056, 1058 (1975) (employee unionization efforts began for the purpose of “improving working conditions, particularly safety measures, and wages”), *enforced mem.*, 530 F.2d 969 (4th Cir. 1975); *Systems with Reliability, Inc.*, 322 NLRB 757, 757-60 (1996) (employees talked among themselves about safety concerns before confronting employer and threatening to contact OSHA if employer did not correct safety issues); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (employees’ spontaneous walkout to protest intolerably cold working conditions was protected concerted activity).

month furlough, and the Charging Party's post and comments were in response to (b) (6), (b) observations that same day, (b) (6), (b) first shift back, that customers and Ace Hardware employees were not complying with federal mask and social distancing guidelines. In the unusual context of the pandemic, the Charging Party's concerns associated with working closely indoors for prolonged periods while exposed to several other people moving and speaking freely were of the utmost legitimacy.¹⁷ The facts of the present case affirm that, like concerns about wages or job security, workplace safety issues have the propensity to "quickly ripple through, and resonate with, the work force," as confirmed by quick responses of three employees here.¹⁸ Thus, the Charging Party's conduct was inherently concerted.

Further, even assuming the Charging Party's conduct did not constitute protected concerted activity, the Region should argue in the alternative that the evidence showed the Employer removed (b) (6), (b) from the group chat and directed (b) (6), (b) not to make similar postings based on its belief that (b) (6), (b) had engaged in such activity. Actions taken against an employee based on an employer's belief that the employee engaged in Section 7 activities are unlawful, regardless of whether the employee did, in fact, engage in those activities.¹⁹ Here, HR first "stressed" to the Charging Party after (b) (6), (b) posted (b) (6), (b) message that (b) (6), (b) should bring concerns with (b) (6), (b) working conditions directly to management, in contrast to involving coworkers as (b) (6), (b) had just done. HR then told the Charging Party (b) (6), (b) could not share working condition information because the Employer "wanted to avoid heightening people's senses," and the information could panic employees, causing them to collectively stop working. The Employer's statements show that regardless of whether the Charging Party's actions were in fact concerted, the Employer was motivated to

¹⁷ See "CDC updates, expands list of people at risk of severe COVID-19 illness," dated June 25, 2020, available at <https://www.cdc.gov/media/releases/2020/p0625-update-expands-covid-19.html> (discussing the efficacy and necessity of prevention strategies such as social distancing and wearing masks, and stressing that every "activity that involves contact with others" is risky).

¹⁸ *Hoodview Vending Co.*, 359 NLRB at 357.

¹⁹ See, e.g., *Parexel Int'l.*, 356 NLRB 516, 517 (2011) (discharge of employee to prevent her from discussing protected topics with other employees unlawful; regardless of whether employee's initial conversations were protected, her discharge was "a pre-emptive strike to prevent her from engaging in activity protected by the Act"); *Dayton Hudson Dep't. Store Co.*, 324 NLRB 33, 35 (1997) (it is "immaterial that the employee was not in fact engaging in union activity as long as that was the employer's perception and the employer was motivated to act based on that perception").

preemptively strike what it perceived to be nascent collective conduct over unsafe working conditions.²⁰

II. *Caesars Entertainment* does not apply here because the Employer lacks a property right in the free, third-party messaging application used by employees on their personal cell phones

In *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*,²¹ the Board overruled *Purple Communications*²² and returned to the standard announced in *Register Guard*²³ that employers' property rights allow them to restrict employee use of their equipment for Section 7 purposes, including IT resources.²⁴ The Board derived its conclusion from precedent affirming that employees lack a statutory right to use employer-owned equipment, as long as restrictions on the use of that property are not enforced discriminatorily.²⁵ In finding that an employer's email system is its property, the Board relied on the rationale in *Register Guard*,²⁶ which likened email systems to other employer-owned equipment constituting property on the premises that employers purchase for use in operating their businesses, and the

²⁰ See, e.g., *Lou's Transport, Inc.*, 361 NLRB 1446, 1446-47 (2014) (unlawful discharge for displaying signs in truck with safety complaints because employer believed employee was engaging in concerted activity based on employer's statements that employee was "stirring up the crowd"), *enforced* 644 F. App'x 690 (6th Cir. 2016); *U.S. Service Industries*, 314 NLRB 30, 30-31 (1994) (finding discharge unlawful where employer believed employee's complaints to her supervisor in the presence of other employees were "stirring up the other workers"), *enforced* 80 F.3d 558 (D.C. Cir. 1996) (table decision).

²¹ 368 NLRB No. 143 (Dec. 16, 2019).

²² 361 NLRB 1050, 1063 (2014).

²³ 351 NLRB 1110, 1114-15 (2007), *enforced in part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

²⁴ *Caesars*, 368 NLRB No. 143, slip op. at 1 & 8.

²⁵ *Id.*, slip op. at 4 n.17; *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (television in break room); *Eaton Technologies*, 322 NLRB 848, 853 (1997) (bulletin board); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987) (company telephone).

²⁶ *Id.*, slip op. at 5-6; see also *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983) (an employer has a "basic property right" to "regulate and restrict employee use of company property"); *Register Guard*, 351 NLRB at 1114-15.

investment creates a legitimate business interest in maintaining the system's efficient operation by, e.g., preserving server space and protecting against computer viruses.²⁷

Here, to the contrary, the Employer does not have a sufficient property interest in the GroupMe app to have a right to restrict its employees from using it for Section 7 purposes.²⁸ It is undisputed that the messaging system is free to the public, each employee individually downloads the application to (b) (6), (b) personal cell phone, and the Employer pays no fees in exchange for its use. No other physical equipment that could be labeled as Employer-owned property is involved. None of the legitimate business concerns related to an employer's need to maintain and protect its investment may reasonably be invoked. Although the Employer's managers create the group within the platform and control access to the group, having this ability to close the group to the public alone fails to confer on the Employer a property interest that justifies infringing on the statutory right of its employees to engage in Section 7 activity.

As a result, we conclude that the Employer could not prohibit employees from using the GroupMe group chat for Section 7 purposes during nonworking time absent a showing that a restriction was necessary to maintain production or discipline. Pursuant to *Republic Aviation*, bans on solicitation during nonworking time in work areas are presumptively unlawful unless the employer can demonstrate that the restrictions are necessary to maintain production or discipline.²⁹ The Employer raised no legitimate concern that Section 7 discussions during nonworking time on the group chat would prevent employees from doing their jobs or cause a disciplinary issue. In contending that the Charging Party's post and comments would have heightened (b) (6), (b) coworkers' senses about the pandemic and possibly cause them to collectively decide not to work, the Employer

²⁷ *Register Guard*, 351 NLRB at 1114.

²⁸ We note that in, e.g., nonemployee access cases, the burden of establishing an exclusionary property right that justifies denying access is on the employer. *See, e.g., Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997) (employer has threshold burden of establishing an interest entitling it to exclude persons from the property), *enforced sub nom. NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999).

²⁹ 324 U.S. 793, 803 & n.10 (1945) (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enforced* 142 F.2d 1009 (5th Cir. 1944) (restrictions on oral solicitation during nonworking time are presumptively unlawful)); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 620-21 (1962) (restrictions on distribution on nonworking time in nonwork areas are presumptively unlawful).

improperly focuses on a potential legitimate outcome of Section 7 activity,³⁰ which it cannot lawfully prohibit, rather than the means by which its employees engage in such activity, which it can only prohibit under special circumstances. But again, those circumstances are not present here where the Charging Party's informational post and straightforward comment did not cause any operational disruption or constitute unprotected insubordination.

Finally, because the Employer does not have a valid property right to GroupMe or the communications sent over it, there is no need to reach the issue of whether the employees lacked adequate avenues of communication to meaningfully exercise their Section 7 rights outside of the third-party messaging system.³¹ *Caesars Entertainment* makes clear that this issue should be addressed only if the employer has a sufficient property interest that causes its employees' Section 7 rights to yield.³² Again, the Employer does not have any relevant property rights here.

III. The Employer violated Section 8(a)(1) by removing the Charging Party from the group chat and making statements that restrained (b) (6), (b) (7) from using the chat to engage in Section 7 activity

Based on the preceding analysis, the Employer was not privileged under *Caesars Entertainment* to prohibit employee use of the group chat for Section 7 activities during nonworking times. By engaging in the following actions, the Employer repeatedly restrained employees from using the group chat lawfully by

³⁰ A concerted work stoppage of this nature may arguably be protected, but we do not address the issue as no stoppage or disruption occurred.

³¹ *Caesars*, 368 NLRB No. 143, slip op. at 7 & n.56, 8 (employer property rights may be required to yield to organizational rights where employees are deprived of adequate avenues of communication to engage in protected communication). However, we note that the Employer's workforce is scattered by nature and that the pandemic imposed extraordinary constraints on in-person, inter-employee communications.

³² *Id.*, slip op. at 7-8. Even assuming, arguendo, that *Caesars Entertainment* did apply, the Region should argue that the Employer applied its restriction against the Charging Party discriminatorily when it did not remove from the group chat the third employee who posted a responsive comment, or either of the employees who "liked" the Charging Party's post. See, e.g., *Shamrock Foods Co.*, 366 NLRB No. 107, slip op. at 1, n.1 (2018) (unlawful disparate treatment where employer disciplined only one employee despite others engaging in the same alleged misconduct).

discussing protected topics. Initially, the Employer's act of removing the Charging Party from the group chat after (b) (6), (b) posted the COVID-19-related news article and comment violated Section 8(a)(1).³³ Every employee in the Charging Party's work group could see that the Employer removed (b) (6), (b) just hours after (b) (6), (b) posted (b) (6), (b) safety concern, sending the message that engaging in protected conduct of this nature would not be tolerated and chilling employees from either responding to the Charging Party's bid for group action or engaging in other protected discussions about employment-related pandemic risks.³⁴

Moreover, the Employer violated Section 8(a)(1) because several of its officials made statements that prohibited the Charging Party from either using the group chat for Section 7 purposes or otherwise engaging in protected concerted activity. The test of whether an employer's statement unlawfully interferes with the right of employees to engage in Section 7 activity is objective and looks to whether the words could reasonably be construed as coercive.³⁵ Based on this standard, we first conclude that the supervisor violated Section 8(a)(1) by telling the Charging Party, first in a June 28 text and then during a (b) (6), (b) (7)(C) phone call, that (b) (6), (b) would not "tolerate negativity in (b) (6), (b) chat" and that (b) (6), (b) was not to post negative things in the group chat because it is not an open forum. The supervisor made these statements in direct response to (b) (6), (b) protected post, and (b) (6), (b) repeated reference to that post as "negative" unambiguously instructed (b) (6), (b) not to exercise the Section 7 right to discuss employment-related safety concerns with (b) (6), (b) coworkers.³⁶

³³ Absent additional evidence of the effect of the approximately one-day removal from the group chat on the Charging Party's employment status, we do not view the act as an adverse employment action; the Employer told the Charging Party the temporary removal was a "time-out."

³⁴ *Cf., e.g., Brockton Hosp.*, 333 NLRB 1367, 1369 (2001) (finding Section 8(a)(1) violation where employer removed handwritten notice of upcoming union meeting posted by employee on her locker), *enforcement denied on other grounds* 294 F.3d 100, 107-08 (D.C. Cir. 2003); *J.J. Newberry Co.*, 202 NLRB 420, 429 (1973) (finding Section 8(a)(1) violation where employer asked known union supporter to leave meeting employer called to discuss unionization with employees).

³⁵ *See, e.g., Double D Constr. Group, Inc.*, 339 NLRB 303, 303-04 (2003).

³⁶ *See, e.g., Intercon I (Zercom)*, 333 NLRB 223, 223-24 (2001) (finding employer's characterization of employee's attitude as "negative" found to be a euphemism for protected concerted activity); *Perry Brothers Trucking, Inc.*, 364 NLRB No. 10, slip op. at 2-3 (2016) (finding supervisor's statement to employees not to discuss terms and conditions of employment violated Section 8(a)(1)).

Second, we find that the supervisor's June 28 text to the Charging Party included an implicit threat of discharge in response to (b) (6), (b) protected concerted activity. The supervisor wrote, "[w]e have a job to do and if you're uncomfortable performing that job as a part of this team, let me know so we can take the steps necessary to alleviate your discrepancies." Again, the supervisor made this statement in direct response to the Charging Party's protected group chat post to which (b) (6), (b) earlier had replied on the chat that if anyone felt uncomfortable working, (b) (6), (b) could remove them from the schedule. In this context, the Charging Party would reasonably construe the supervisor's text to indicate that continuing to have work-related safety concerns would be incompatible with continued employment.³⁷

Finally, Employer officials repeatedly violated Section 8(a)(1) by telling the Charging Party either that (b) (6), (b) should not share workplace concerns on the group chat or should bring (b) (6), (b) concerns directly to management. After the Charging Party contacted HR about being removed from the group chat, HR responded on June 29 by email stressing that (b) (6), (b) should take issues with (b) (6), (b) working conditions to management. Then the Charging Party's supervisor, during their (b) (6), (b) phone conversation, said it was not (b) (6), (b) place to share information about workplace conditions with (b) (6), (b) coworkers and that if (b) (6), (b) made a similar post in the group chat (b) (6), (b) would again remove (b) (6), (b) from it. HR then reiterated during the (b) (6), (b) (7)(C) video meeting with the Charging Party that (b) (6), (b) should obtain management approval before posting similar information in the group chat, and that "coworkers are not allowed to share workplace condition information without permission from [their] supervisor first."³⁸ The Charging Party would reasonably construe each of the

³⁷ See, e.g., *Equipment Trucking Co.*, 336 NLRB 277, 277 (2001) (finding vice-president implicitly threatened discharge by stating that employer's president would run the company "any way she wanted, and if [he] didn't like it, find another job," in response to employee making statement in support of union and that withdrawal of recognition would hurt his retirement); *Stoody Co.*, 312 NLRB 1175, 1181-82 (1993) (finding personnel manager implicitly threatened discharge by telling union organizer that if in response to detrimental unilateral changes the employees were "so nitpicking, maybe this wasn't the place for [them]").

³⁸ Although we find that the statement in HR's (b) (6), (b) (7)(C) email violated Section 8(a)(1) for the reasons set forth above, we do not find it to be the promulgation of an overbroad work rule because the statement was made to a single employee. See, e.g., *Shamrock Foods Co.*, 369 NLRB No. 5, slip op. at 4 (Jan. 7, 2020) ("[T]he Board has repeatedly held that a statement made to a single employee is not the promulgation of a rule for the entire work force."); *Costco Wholesale Corp.*, 366 NLRB No. 9, slip op. at 1 n.3 (Feb. 2, 2018) (instruction to one employee not to discuss investigation of alleged misconduct was unlawful, but was not the promulgation of an unlawful rule).

foregoing statements as prohibiting (b) (6), (b) from engaging in the Section 7 right to discuss concerns about working conditions with (b) (6), (b) coworkers, either on the group chat or otherwise.³⁹

IV. The Employer violated Section 8(a)(1) by constructively discharging the Charging Party⁴⁰

We further conclude the Employer constructively discharged the Charging Party by presenting (b) (6), (b) with a Hobson's Choice. "A constructive discharge is not a

³⁹ See, e.g., *Perry Brothers Trucking, Inc.*, 364 NLRB No. 10, slip op. at 2-3; *Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1222-23 (2004) (stating employer violates Section 8(a)(1) when it sets up a "roadblock" to protected activities or takes action designed to prevent employees from exercising their right to speak for and represent others); *Alexis Painting Co.*, 342 NLRB 1065, 1070 (2004) (finding threat not to create "problems on the job" by discussing protected topics unlawful); see also *The Exchange Bank*, 264 NLRB 822, 822 n.4, 830 (1982) (insistence that employees speak to employer individually was found to be designed to prevent collective action), *enforced*, 732 F.2d 60 (6th Cir. 1984).

⁴⁰ (b) (5) We conclude that the constructive discharge allegation involves the same legal theory and arises from the same factual situation and sequence of events as the Section 8(a)(1) allegations of unlawful group chat removal and threat thereof, and maintenance of unlawful work rules. It is therefore closely related to those allegations. See *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), as clarified in *Carney Hospital*, 350 NLRB 627, 630 (2007). The constructive discharge and removal/threat of removal from the group chat are two sides of the same coin. They both involve the Employer's alleged retaliation for the Charging Party's protected activity in posting employment-related content on the group chat. Both allegations occurred within days of the other and are causally connected by the Employer's overall object of shutting down the Charging Party's initiation of protected discussions. Removing the Charging Party from the group chat, and continuing to threaten removal, form the very basis for the constructive discharge theory of violation, and are thus inextricably linked to the unalleged violation. The Employer's defense will likely overlap with that of the original allegations insofar as it may argue that its actions were not motivated by a desire to retaliate against protected concerted activity. The fact that its defense may additionally assert that the Charging Party did not need access to the group chat to complete the job, a defense not related to the timely charge allegations, does not disqualify the close relation for Section 10(b) purposes. See *Carney Hospital*, 350 NLRB 627 at 628 n.8 (stating that the third-prong of the *Redd-I* test, allowing consideration of whether the employer would raise the same or similar defenses to both allegations, is not mandatory to the "closely related" analysis).

discharge at all but a quit which the Board treats as a discharge because of the circumstances which surround it. Such situations may arise when an employer confronts an employee with the Hobson's Choice of either continuing to work or foregoing rights protected by the Act."⁴¹ The choice between continuing employment and forfeiting statutory rights must be clear and unequivocal.⁴² A constructive discharge finding is appropriate where the employee quits rather than comply with the condition.⁴³ An employee does not have to wait for a formal ultimatum to reasonably interpret an employer's words to mean that ongoing Section 7 activity will result in their discharge.⁴⁴

Here, the Employer made clear to the Charging Party that continuation of Section 7 activity was incompatible with retaining [REDACTED] job. The Charging Party sought collective support via the group chat by posting [REDACTED] safety concern. It is undisputed that the Employer removed the Charging Party from the group chat because of that post, an action that deprived [REDACTED] not only of the ability to communicate with [REDACTED] coworkers collectively, but also prohibited [REDACTED] from performing essential job-related actions, such as clocking in and out, communicating basic scheduling and sales information, and receiving employment-related updates from the Employer. By email on June 29, the Charging Party expressed concern directly to HR about being removed from the group chat in retaliation for sharing work-related health and safety concerns with [REDACTED] coworkers, also noting that [REDACTED] and [REDACTED] coworkers were not safe working in hardware stores because store employees and patrons regularly failed to wear masks and social distance, and the Employer's employees could not enforce those critical safety measures. HR then stressed that [REDACTED] should take [REDACTED] concerns with working conditions directly to management. Two days later, the Charging Party's supervisor told [REDACTED] that the group chat was not an open forum and if [REDACTED] continued to post messages about workplace conditions, [REDACTED] would be removed from the group chat indefinitely.⁴⁵ [REDACTED] HR told [REDACTED] could not post COVID-19

⁴¹ *Intercon I (Zercom)*, 333 NLRB 223, 223 (2001).

⁴² *Chartwells, Compass Grp.*, 342 NLRB 1155, 1157 n.15 (2004); *ComGeneral Corp.*, 251 NLRB 653, 657-58 (1980).

⁴³ *Intercon I (Zercom)*, 333 NLRB at 223.

⁴⁴ *Id.* at 224.

⁴⁵ Although the Employer contended that the Charging Party could perform [REDACTED] job without having access to the group chat, there is no evidence that any employee ever did so. The Charging Party maintained that access to the group chat is essential to performing the job, *see* Recording of [REDACTED] telephone conversation with

information without prior management approval, and that the Employer could remove [REDACTED] from the chat. Thus, the Employer repeatedly communicated to the Charging Party that [REDACTED] access to the group chat, which [REDACTED] needed to complete basic job functions, would be conditioned on [REDACTED] silence as to protected topics on the group chat. By requiring the Charging Party to choose between continued employment or exercising statutory rights, the Employer constructively discharged [REDACTED].⁴⁶

In sum, the Region should issue a complaint, absent settlement, on the meritorious charge allegations discussed above.

/s/
R.A.B.

ADV.14-CA-262563.Response.RenewalByAndersen.[REDACTED]

supervisor at 26:48-28:58, and that employees are required to download GroupMe upon hire.

⁴⁶ See, e.g., *Titus Elec. Contracting, Inc.*, 355 NLRB 1357, 1357-58 (2010) (finding constructive discharge where employer sent employee home for the day after refusing to remove shirt with union insignia).