

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

WEGMANS FOOD MARKETS, INC.

and

Case 5-CA-33228

EDWIN R. MELHORN, An Individual

*James C. Panousos, Esq., and Anne K. Yereniuk, Esq.,*  
for the General Counsel.  
*R. Michael Smith, Esq.,* of Baltimore, MD, for Respondent.

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge and amended charge filed by Edwin R. Melhorn on September 13 and December 12, 2006, respectively, the Regional Director for Region 5, National Labor Relations Board (the Board), issued a complaint on December 22, 2006, alleging that Wegmans Food Markets, Inc. (Respondent), had committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Baltimore, Maryland, on March 15, 16, 19 and April 3, 2007, at which the parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the parties have been given due consideration.<sup>1</sup> Upon the entire record and from my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

At all times material, Respondent has been a New York corporation with its principal office and place of business in Rochester, New York, engaged in the operation of retail grocery stores at various locations, including one in Hunt Valley, Maryland, the only facility involved in this proceeding. During the 12-month period preceding December 22, 2006, Respondent in the conduct of its business operations derived gross revenues in excess of \$500,000 and purchased and received at its Hunt Valley facility, products, goods, and materials valued in excess of \$5,000 directly from points outside the State of Maryland. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7)

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<sup>1</sup> The unopposed post-hearing motion by counsel for the General Counsel, to remove certain exhibits that were not admitted into evidence but were inadvertently included with the official hearing transcript, is hereby granted. Those exhibits have been given no consideration.

of the Act. The parties have stipulated, and I find, that United Food and Commercial Workers Union, Local 27 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

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## II. Alleged Unfair Labor Practices

The complaint alleges that Charging Party Edwin R. Melhorn was unlawfully terminated by Respondent because he engaged in concerted activity protected by the Act and because it mistakenly believed that he was involved in activity in support of a union. It also alleges that Melhorn was unlawfully interrogated by supervisors concerning his union and protected concerted activities.

Melhorn was employed by Respondent at its Hunt Valley store from August 2005 until August 28, 2006. Melhorn, who is in his early eighties, is a college graduate and had served as a naval officer during World War II. Prior to his employment with the Respondent, he had a 30-year career as a manager with IBM Corporation and had also worked for approximately 13 years in several capacities for the United Methodist Church.

Melhorn was hired as an entry-level employee and began working cleaning and assembling shelves before the store opened to the public in October 2005. Once the store opened, he was assigned to the customer service desk where he worked until December 2005. In early November 2005, Melhorn met with area manager Douglas Porter, employee representative Laurie Katerle,<sup>2</sup> and his immediate supervisor JoAnne Handy-Sims to discuss alleged deficiencies in his job performance at the customer service desk. During the meeting, Melhorn criticized Handy-Sims as “unapproachable,” said he was “not one of her favorites,” that she treated every mistake he made as a “federal offense,” and he said that he had not been properly trained to do his job. It was agreed that they would meet again in two weeks to see if there was any improvement.

On November 25, 2005, Melhorn had an argument with an African-American employee at the customer service desk. When front end manager Andrew Kujawa attempted to interview Melhorn about what had occurred, Melhorn said that he did not want to discuss it because in Baltimore, in situations involving blacks and whites, the blacks always come out on top. He also said that he knew he would be found to be at fault because the other employee was black and blacks always come out on top when a white attacks them in the workplace. Kujawa responded that he considered Melhorn’s comments to be inappropriate and sent him home for the day. Melhorn did not deny making these comments to Kujawa when he met with Porter and Katerle to discuss the incident. He did, however, accuse Kujawa of misrepresenting what had occurred, criticized his handling of the matter, and asked that Kujawa be reprimanded. On December 1, 2005, Melhorn was given a written warning for his comments to Kujawa which were considered to have violated Respondent’s “non-harassment policy” and to have shown a lack of respect for fellow employees.

When Melhorn’s performance at the customer service desk did not improve, he was reassigned to work as a cashier. Porter testified that this was done because Melhorn’s

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<sup>2</sup> An employee representative is an employee of Respondent’s Human Resources Department whose duties include acting as an employee advocate in meetings with management concerning employee performance issues. They are supervisors and agents of the employer within the meaning of the Act.

performance at the customer service desk was substandard, that he had been trained to operate a cash register as a part of his customer service duties, that he was unhappy working under Handy-Sims, and that the cashier position involved fewer tasks than the customer service desk. Melhorn was not happy about this reassignment and complained about it in a letter to Katerle, dated December 5, 2005. The letter accused Kujawa of defaming and lying about Melhorn, accused Respondent of retaliating against him because he had reported being discriminated against by his supervisor at the customer service desk, and stated if the matter was not resolved to his satisfaction he was "prepared to take appropriate steps to correct this injustice." On December 10, Melhorn sent a letter to store manager Wendy Webster requesting a meeting with her and company CEO Danny Wegman to discuss the list of complaints he outlined therein. This was followed by another letter to Webster, dated December 16, repeating his complaints and stating that if she did not respond by December 19, he was going to contact Danny Wegman.

On December 21, Melhorn met with Webster and employee representative Karin Flanagan. Webster told Melhorn he was a valuable employee and she wanted to see him continue working at the store. They eventually agreed that Melhorn might be happier in a job which involved demonstrating products in the cheese shop section of the store. He was then assigned to reshopping (putting items back on the shelves), until March 2006,<sup>3</sup> when he began working in the cheese shop.

During the approximately six months that he worked in the cheese shop, Melhorn received a number of counselings, two warnings, and a suspension for violating work rules. Before starting in the cheese shop, Melhorn had to complete a computer-based training program on food safety. Among the areas included in these instructions is Respondent's "glove rule" which requires that anytime employees touch something that could potentially contaminate the food they are demonstrating, they must wash their hands and put on new plastic gloves. On several occasions, Melhorn violated the glove rule or other parts of the food safety policy. The violations included wearing his gloves out of his work area, failing to change his gloves after eating a piece of cheese and after blowing his nose, failing to sanitize a knife he had dropped on the floor, wearing a mesh protective glove while eating in the break room and while entering a restroom, and attempting to reuse food that had been thrown in the trash. As a result, Melhorn ended up taking the food safety course a total of three times. He also violated Respondent's time clock rule by making a purchase in the store while on the clock instead of while off the clock or during a break period. On August 5, Melhorn was suspended for three days for going into the bakery and taking a cookie from a sample bin with his bare hand which required that the remaining cookies in the bin be destroyed. He had previously been told by a bakery supervisor that he had to use a glove when removing cookies from the bin. Cheese shop supervisors Monika Thompson and Erin MacMillan and service area manager Shawn MacKay, all of whom had counseled Melhorn about glove rule violations, credibly testified that Melhorn often made sarcastic comments and/or engaged in conduct they considered mocking and disrespectful by waving his gloved hands or mentioning the number of gloves he had used during a shift.

On August 7, Melhorn sent a letter to Respondent's CEO Wegman complaining about the management of the Hunt Valley store. He asserted that morale is slipping badly, in part, because "Wegmans does not provide an independent third-party review of labor relations decisions or a fair process for appealing disciplinary actions," and he requested a personal meeting with Wegman to discuss his experiences at the store. Store manager Wendy Webster

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<sup>3</sup> Hereinafter, all dates are in 2006.

was instructed by Senior Vice President Mark Ferrera and HR Manager Kevin Stickles to meet with Melhorn and to address his concerns, which is Respondent's usual procedure when an employee contacts the CEO. On August 24, Webster and Flanagan met with Melhorn in Webster's office. What occurred at that meeting is in some dispute; however, it is what led to Melhorn's termination.<sup>4</sup>

Melhorn testified that when he arrived at the meeting he was surprised to find Flanagan present because she had not told him she would be there when she arranged the meeting. Flanagan offered to leave but he told her to stay. Webster said she wanted to discuss his letter to Wegman and that he could meet with her or meet with Ferrera and Stickles, but not both, and he agreed to talk to Webster. Webster began by saying she didn't know how to satisfy him. Melhorn responded that she should treat him like every other employee and Webster said she could not treat 800 employees the same. Melhorn said that he wanted to discuss his letter, that he had been treated unfairly, that he had been accused of stealing time, that he had been followed around the store on three occasions, and that he had been falsely accused of food safety rule violations. He also said that there were morale problems in the cheese shop, that the employees were frustrated, and "the place is ready to explode." He said that there were morale problems in his old department customer service. Melhorn next said that he felt Wegmans needed an independent representative in labor relations decisions and a fair process for appealing disciplinary actions. At that point Webster threw up her arms and said: "you're talking union, aren't you? That's what you're talking about. You're talking about the union. We don't need a union here. Have you been soliciting employees?" Melhorn said he had not, but that employees had come to him, referring to morale problems in the cheese shop and customer service desk. Webster concluded by saying she would try to set up a meeting for him with either Ferrera or the Human Resources representative. When asked if he had anything else to say, Melhorn responded that he had noticed a startling parallel between his treatment at the store -- being followed and under constant surveillance which made him afraid to walk around in the store -- and "the Gestapo-like tactics of Nazi Germany." Webster responded that he would hear from them and he left the office.

Webster testified that at the start of the meeting she told Melhorn that she wanted to discuss his letter to Wegman and asked how she could help him. She said that Melhorn seemed unhappy and angry that the company CEO had not come from Rochester to Hunt Valley to meet with him and that his demeanor during the meeting was "aggressive and disrespectful." Melhorn complained about things that had happened to him including his suspension, about morale at the cheese shop, and criticized the manager. Although she said it was difficult to get Melhorn to focus on his letter to Wegman, he did say that "an independent third-party was needed to review Wegmans' labor relations decisions." She told Melhorn that the company had avenues available to pursue complaints such as the "You First" line (an anonymous complaint line operated by an outside consultant) and "Ask Jack" (an internal line to the senior vice president of operations). She denied telling Melhorn that his comments sounded like "union talk," or accusing him of stirring up trouble among the employees. Melhorn told her "more than once" during the meeting that she "did not want to hear the truth about the store" and that "she ran a Nazi-like environment."

Flanagan testified that at the meeting Melhorn was upset that the CEO was not there and that he was disrespectful, confrontational, and hostile. He said he was concerned that the company had accused him of stealing time and it was trying to build a case against him, that he

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<sup>4</sup> Respondent asserts that this meeting was on August 22 but the evidence as a whole indicates it was on August 24.

was intimidated by his suspension, and that people were following him around. He said that morale was bad in the cheese shop and that the manager was a “manipulative and nasty young woman.” He told Webster that “the company was a Nazi-like environment” and said “the truth hurts, doesn’t it?” Melhorn said that an independent third party was needed to review Wegmans’ labor relations decisions and Webster referred him to the “You First” and “Ask Jack” programs. She said she did not know what Melhorn meant by “an independent third party,” that Melhorn did not say what he meant by his references in his letter to a third party review of labor relations decisions or a fair process for appealing disciplinary actions, and that he was not asked any questions about either subject. Melhorn did not make any comments about the need for a union at Wegmans and did not indicate that he was active on behalf of a union. He was not asked any questions about his union activities or sympathies or whether he was attempting to organize or unionize the employees.

Melhorn was told to meet again with Webster on the following day at 9:00 a.m. Following the meeting and again the next morning, Webster discussed what had occurred with Ferrera and Stickles. They discussed Melhorn’s work history, the previous incident involving his disrespect toward other employees, and his multiple problems in the cheese shop and concluded that he should be terminated. When Melhorn arrived at her office the next morning, Webster was on the telephone and, at approximately 9:20, Melhorn left the store. Around 11:00 a.m., Webster telephoned Melhorn and told him that he was being terminated “due to disrespect.” Melhorn asked for a copy of the termination notice but Webster declined to provide it to him. A memorandum in Respondent files prepared by Webster states that Melhorn was terminated for numerous work rule violations and for his disrespectful comments to Webster that the store was a “Nazi-like environment,” “you don’t want to hear the truth” and “the truth hurts doesn’t it.”

Counsel for the General Counsel asserts that Melhorn was terminated in retaliation for his union and other protected concerted activity. The evidence shows that on April 6, Melhorn went to the Towson office of Local 27 and met with organizer Timothy Goins. Melhorn inquired about attempting to organize Respondent’s Hunt Valley store. Goins talked to him about Local 27’s policies and procedures and explained what an organizing effort at a large store would involve. Goins gave Melhorn some union literature and a single union authorization card. He suggested that Melhorn set up a meeting with a small group of interested employees. No such meeting was ever arranged. Melhorn did not sign a union authorization card, he did not solicit cards from other employees, and he never talked to any other employees about getting a union at the store. There is evidence that Local 27 representatives passed out union literature at the Hunt Valley store on June 22 as part of a handbilling effort or “blitz” at Wegmans stores throughout the East Coast. There is no evidence that Melhorn had any involvement in that handbilling effort.

Melhorn testified that shortly after he began working in the cheese shop in March, he spoke with some co-workers, whose full names he did not know, about conditions there because some of them did not appear to him to be happy. He said that one employee named Donna told him that morale in the department was poor, that they were frustrated, and that the place was ready to explode. Donna did not say what she meant by this and he did ask her. Melhorn testified that a week or so later he spoke to Flanagan and informed her as to what he had been told about the morale problems in the cheese shop, the employees’ frustration, and it being about to explode. He told Flanagan that the employees had taken their concerns to Human Resources but that nothing had been done and told her that this made him wonder “if third party representation is needed in a matter such as this.” Flanagan did not ask him what he meant by “third party representation,” but told him there was no need for it. Melhorn testified that he again raised the need for “an independent third party representative” during a meeting

with Flanagan on June 10 in which he was reprimanded following a customer complaint about a glove rule violation. Flanagan did not ask him what he meant and he did not explain but she said she did not agree with him. In a follow-up meeting several days later with Flanagan and Katerle, Melhorn told them they were not true employee representatives which were needed in the store and said he was talking about “an independent third party representative.” Katerle asked him if he didn’t like the way things were done at the store why he didn’t leave. He responded that he needed the job and that he wanted to be an agent of change.

In her testimony, Flanagan denied that these conversations about an independent third party representative ever took place, saying, that Melhorn had never come to talk to her about morale in the cheese shop, never said that the cheese shop was ready to explode, and, prior to August 22, had never said anything to her about the need for third party review. Katerle testified that she met with Melhorn in June, after he asked to see his personnel file, and that Flanagan was present. They discussed his concerns about the store management and Melhorn said that people were following him and watching his every move. She asked why he chose to work there if he was so unhappy and he responded that he was 80 years old and that this job was his last resort. Melhorn said that he wanted to see things changed. She told him to jot down what he would like to see changed and they would meet again to discuss what they could do to make the changes happen. The conversation ended after Melhorn said he did not need to see his personnel file but he never followed up with her about the changes he wanted to see. Katerle denied that Melhorn said anything about morale in the cheese shop or the store or that he said anything about the need for employee representation by an independent third party at the store.

#### Analysis and Conclusions

In cases where an employer’s motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enf’d 662 F. 2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must persuade the Board that animus toward protected activity on the part of employees was a substantial or motivating factor in the employer’s decision. Once that has been done, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the part of the employees. *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996). The General Counsel’s initial burden is met by proof of protected activity on the employee’s part, employer knowledge of that activity, and employer animus toward it. *W.R. Case Cutlery Co.*, 307 NLRB 1457, 1463 (1992).

It is clear that Melhorn did not engage in any activity in support of the Union beyond a single visit to its Towson office in April. He did not sign an authorization card and he took no action to follow up on the Union representative’s suggestion that he arrange a meeting of employees to discuss representation. He admits that he did not talk to any other employees about the Union or solicit any support for it. He had no involvement in the Union’s “blitz” at the Hunt Valley store on June 22 in which Union literature was distributed. There is no evidence that any of Respondent’s supervisors was aware of Melhorn’s contact with the Union and I find that no disciplinary action was taken against him as a result of that contact.

Counsel for the General Counsel contends that Melhorn was engaged in protected, concerted activity when he sent his letter to CEO Wegman and when he discussed it with Webster on August 22. I do not agree. The standard for determining whether an employee’s activity is concerted is found in the Board’s decision in *Meyers Industries*, 281 NLRB 882 (1986), where on remand, it reaffirmed the definition set forth in its prior decision in the case, *Meyers Industries*, 268 NLRB 493, 497 (1984), that it must “be engaged in with or on the

authority of other employees, and not solely by and on behalf of the employee himself.” The only evidence in the record of Melhorn’s alleged concerted activity consists only of his own self-serving testimony.

5 I found Melhorn to be a singularly unreliable witness who appeared to be unable to admit  
any failings or accept personal responsibility for his actions. The record shows that when he  
was criticized or reprimanded for ineptness or work rules violations, he consistently claimed that  
he did not commit any violations, that he was not properly trained, and/or he was the victim of a  
10 plot by management to build a case against him. The evidence shows that although  
Respondent made special arrangements to permit him to take a food safety training program  
three times, he repeatedly violated Respondent’s glove rule that was a part of that training.  
Melhorn admittedly deliberately lied on the employment application he submitted to Respondent  
(omitting the fact that he was a college graduate) because he had “been advised” that if he  
15 indicated that he was a college graduate he would probably be considered “over-qualified” for  
the entry level job he was seeking. In an affidavit Melhorn gave the Board in which he was  
asked to describe the meeting with Webster and Flanagan on August 22, during which he made  
comments that led to his termination, he omitted any reference to accusing Webster of running  
a “Nazi-like environment” or saying that she “didn’t want to hear the truth.” He now admits  
20 saying those things but testified that he did not think they were “important.” Melhorn told  
Maryland Unemployment Insurance adjudicator Robert Marker that his remarks were not  
disrespectful and that he felt justified in accusing management of being “Nazis” because that is  
what they were. He also told Marker that he had become enraged during the August 24  
meeting with Webster.

25 I do not credit Melhorn’s testimony about his purported conversations with other  
employees of the cheese shop about problems there. No other the cheese shop employee  
corroborated his testimony and his claims about the employees’ unhappiness were refuted by  
the credible testimony of MacMillan, Webster, and Flanagan. However, even taking Melhorn’s  
30 testimony at face value, it fails to establish that he did anything “with or on the authority of other  
employees” or even sufficiently identify who those employees might be. According to his vague,  
generalized testimony, Melhorn talked to some employees shortly after he began working at the  
cheese shop because some of them looked unhappy. An employee named “Donna” told him  
that morale in the cheese shop was bad, that the employees were frustrated, and the place was  
35 ready “to explode.” Although Donna did not say what she meant by any of this (and Melhorn did  
not ask her), it was the alleged basis for his actions in contacting management. There is no  
evidence that Melhorn discussed taking any action about perceived problems in the cheese  
shop with any other employee or that any other employee was aware that he was going to  
40 contact Human Resources about those problems or write a letter about them to the CEO of the  
company. There is also no evidence that any other employee authorized Melhorn to speak on  
his or her behalf.

In his letter to Wegman, Melhorn offered his view of the Hunt Valley store and stated,  
“my enthusiasm has been diminished by my personal experience of discrimination, retaliation,  
45 mendacity, intimidation, and lack of respect by . . . management.” He also stated, “I would like  
to meet with you to discuss the details of my experiences at Wegmans Hunt Valley.” His only  
arguable reference in the letter to anyone other than himself is his statement that “morale is  
slipping badly,” an apparent reference to the entire store, not just the cheese shop. Similarly, at  
the August 24 meeting with Webster, he mentioned morale in the cheese shop but the focus of  
50 his remarks was the alleged mistreatment of himself as an individual. Webster testified that she  
believed that Melhorn was speaking on his own behalf when he met with her on August 24 and  
that she never had the impression that he was acting or speaking on behalf of other employees.  
I find the evidence fails to establish that Melhorn was engaged in concerted activity when he

sent his letter to Wegman, nor when he met with Webster on August 24 to discuss his letter.

5 Counsel for the General Counsel contends that, even if Melhorn did not actually engage in any union activity or in any concerted activity, Respondent thought that he did and that is why it terminated him. I did not believe Melhorn's testimony that he repeatedly voiced his concern that independent third party employee "representation" was needed at the store to Human Resources personnel, based on his overall lack of credibility, the complete absence of any corroborating evidence, and the credible denials by both Flanagan and Katerle that he ever mentioned it to them. In his August 7 letter to Wegman, which was discussed at the August 24 meeting that resulted in his discharge, Melhorn stated that morale at the store was slipping because of "onerous conduct on the part of Hunt Valley management and also the fact that Wegmans does not provide an independent third-party review of labor relations decisions or a fair process for appealing disciplinary actions." This, it is argued, led Respondent to believe Melhorn was advocating that there be union representation of employees at the store and that was the motivation behind and the real reason for his discharge.

20 The only support for this argument is Melhorn's self-serving testimony that at the August 24 meeting with Flanagan and Webster, when he said that Wegmans needed "independent third party representation in labor relations decisions" and "a fair process for appealing disciplinary actions," Webster threw up her arms and said: "You're talking union, aren't you. That's what you're talking about. You're talking about the union. We don't need a union here. Have you been soliciting employees?" I did not believe his testimony. First, both Flanagan and Webster credibly denied that Webster made any reference to a union during the meeting.<sup>5</sup> Their mutually corroborative testimony described a meeting in which, at the outset, Melhorn became irate when he learned that the CEO of the company had not come to Hunt Valley from Rochester to meet with him. He was hostile and argumentative throughout the meeting. He stated his belief that he was being followed around and that management was building a case against him. He complained about being suspended and about his supervisor MacMillan whom he admittedly asserted was "an asshole" and "a nasty, manipulative young woman," although he said he was just repeating what other employees had told him.<sup>6</sup> While Melhorn told them that morale in the cheese shop was bad, both Webster and Flanagan testified they believed that the opposite was true since employee turnover there was low and they had heard no other complaints.

35 In his letter to Wegman and in a statement he prepared sometime after his meeting with Webster, Melhorn referred to the need for independent third party "review" of labor relations decisions, not "representation" and he did not elaborate on what he meant by such review. The difference is significant. While it might reasonably be argued that "independent third party representation" means union representation, this cannot be said of "independent third party review" which suggests a disinterested, neutral arbiter. A union presumably serves as an advocate for the employees it represents, not as a neutral party. I find it unlikely that any employer would consider having its employees' collective bargaining representative review its labor relations decisions or disciplinary actions; consequently, I do not believe Melhorn's claim

45 <sup>5</sup> I find counsel for the General Counsel's attacks on the credibility of Webster and Flanagan are not persuasive and find no basis for crediting Melhorn over them. Moreover, I find Melhorn's failure to mention Webster's alleged "union" comments to Marker, the unemployment adjudicator on his claim, suggests they were not made.

50 <sup>6</sup> While counsel for the General Counsel argues this is evidence that he was speaking on the behalf of other employees, I find it another example of his inability to take responsibility for his own words and actions.



that Webster concluded from his statement, that Wegmans needed such reviews by an independent third party, that he was “talking union.”

5 As noted, I did not believe Melhorn’s testimony that Webster accused him of talking union nor that she asked him if he had been soliciting employees at the August 24 meeting. There is no other evidence casting any doubt on the credible testimony of Webster and Flanagan that this never happened. Accordingly, I find that the allegation that Melhorn was subjected to an unlawful interrogation has not been proved.

10 The General Counsel has presented evidence of union animus on Respondent’s part, consisting of an anti-union video shown to new employees, which is not alleged to be unlawful. E.g. *Ross Stores, Inc.*, 329 NLRB 573, 576 (1999); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999). However, I find that the evidence fails to establish any nexus between this animus and Melhorn’s discharge which is essential to establish a violation. *Teletech Holdings, Inc.*, 333  
15 NLRB 402 fn. 2 (2001). Nothing in the video suggests that Respondent’s hostility towards unions was such that it would be willing to violate the law by discriminating against employees to keep unions out. *Rayse-IDE, Inc.*, 284 NLRB 879, 880 (1987); *Fibrican Corp.*, 259 NLRB 161, 171-172 (1981).

20 The timing of disciplinary action can be indicative of an unlawful motivation. *Masland Industries*, 311 NLRB 184, 197 (1993), *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981). That is not the case here. In fact, even if all Melhorn’s testimony were to be believed, and he spoke about third party “representation” at the August 24 meeting, it would have been no  
25 different than what he had already told Human Resources personnel several times months before. What is different is that he had not previously accused Respondent of operating a “Nazi-like” environment or told the store manager that “the truth hurts.” I find that the timing of Melhorn’s discharge is explained by these comments at the August 24 meeting, not by any revelation that he was “talking union.”

30 Counsel for the General Counsel contends that Melhorn’s comments to store manager Webster at the August 24 meeting were not so egregious as to lose the protection of the Act. It is clear that his comments were insubordinate and disrespectful and that Respondent considered them so. Since Melhorn was not engaged in protected activity when he said them, they were not protected by the Act. I find that by any objective standard accusing one’s  
35 employer of operating a Nazi-like work environment constitutes the kind of disrespect Respondent’s policies and work rules prohibit.

40 In summary, the evidence concerning Melhorn shows him to be a marginal employee who failed to adequately perform the duties of three different positions, customer service, cashier, and food demonstrator in the cheese shop. While in each case Respondent attempted to make accommodations for him, his response was to deny any responsibility for his actions and accuse it of being out to get him. At his final assignment in the cheese shop, he repeatedly ignored its food safety rules, denied doing anything wrong despite numerous disciplines, and often taunted the supervisors who called him to task. He had previously been warned about  
45 making disrespectful comments and had consistently shown a dismissive attitude about the many disciplinary actions taken against him. Based on the foregoing findings, I conclude that Melhorn did not engage in any union or concerted activity protected by the Act. The evidence fails to establish that Respondent had any knowledge that he had or that it any reason to believe that he had engaged in such activity. It also fails to establish that it had a mistaken  
50 belief that he had done so, which led it to terminate him. Accordingly, I find that the General Counsel has not established that union or other concerted protected activity on Melhorn’s part was a motivating factor in his termination and, therefore, has not met his initial burden under

