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Wright Line: An End to the Duel over Dual Motivation?

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WRIGHT LINE: AN END TO THE DUEL OVER DUAL MOTIVATION?

The National Labor Relations Board and the courts have employed various tests to determine alleged violations of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act when an employer's disciplinary action was motivated by both the employee's participation in protected activities and the employer's legitimate business reasons. In an attempt to achieve "substantive consistency," the Board established a new causation test in Wright Line, A Division of Wright Line, Inc. *This Note surveys the various modes of analysis for examining causation which prompted the Board's action. The Note then discusses* Wright Line's *potential to alleviate the confusion existing at many levels of the decisional process. Finally, the Note concludes that due to unresolved questions concerning the appropriate burden placed on the employer and the uncertain range of cases to which* Wright Line *will apply, the Board may be thwarted in its attempt to achieve a uniform analytical framework.*

INTRODUCTION

SECTION 8 of the National Labor Relations Act (NLRA)[1] provides significant safeguards to employees engaged in union activities. Generally, section 8(a)(1) prohibits employer interference with employees' section 7 rights[2] and section 8(a)(3) prohibits discrimination based on union activity in the hiring or tenure of employees.[3] Whether a violation of either of these sections is present often depends on the employer's dual motivations.

A dual motivation case arises when employee discipline is motivated by discriminatory considerations, as well as by justifiable

1. NLRA § 8, 29 U.S.C. § 158 (1976).

2. Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." *Id.* § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976). Section 7 describes permissible employee labor activities:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id. § 7, 29 U.S.C. § 157 (1976). For a discussion analyzing the scope of § 7 rights, see Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967).

3. Section 8(a)(3) provides: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization . . . ." NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).

business reasons.[4] Traditionally, the National Labor Relations Board (the Board) has distinguished dual motivation cases from pretext cases.[5] In a pretext case, an employer's asserted good cause acts merely as a smokescreen for the employee's discriminatory discharge.[6] Where alleged unlawful conduct involving a section 8(a)(1) or 8(a)(3) violation turns on an employers' dual motivations,[7] the Board has applied the "in part" test.[8] This test provides that a discharge motivated in part by the employee's protected activities[9] violates the NLRA, notwithstanding the employer's legitimate business justification.[10]

Congress charged the federal circuit courts of appeals with the responsibility of reviewing the Board's administration of the NLRA.[11] The circuits have failed, however, to agree on a uniform standard of review. While almost half of the circuits have followed the Board's in part test,[12] the remainder of the circuits traditionally have required that the employer's anti-union animus be the "dominant motive," or the "but for" cause of the discharge.[13] Additionally, three circuits have applied both the dominant mo-

4. For an indication of the type of conduct which may be considered just cause for discharge, see F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 652-66 (3d ed. 1973) (listing absenteeism, insubordination, fighting, falsifying company records, theft, incompetence, use of intoxicants, obscene and immoral conduct).

5. *Compare* Calandra Photo, Inc., 151 N.L.R.B. 660 (1965) (assumed that a smoking violation is a valid ground for discharge, but held that the employer violated the NLRA because the discharge was motivated partially by the employee's union solicitation activity) *with* Wellington Mill Div. W. Point Mfg. Co., 141 N.L.R.B. 819 (1963) (while employer claimed that the employee abused his privilege of leaving the work area, the employer's knowledge of the employee's union activities, the severe nature of the punishment, and the timing of the discharge led the Board to classify the employer's reason as pretextual).

6. *See, e.g.*, Wellington Mill Div. W. Point Mfg. Co., 141 N.L.R.B. at 821.

7. If an employer punishes an employee for engaging in activity protected by § 7, it violates § 8(a)(1), and if union activity is involved, § 8(a)(3) also is violated. Getman, *supra* note 2, at 1198. *See supra* notes 3-4.

8. *See, e.g.*, Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574 (1976).

9. For a detailed discussion of employees protected activities, see Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

10. Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. at 575.

11. Section 10(e) provides in part:

> The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order and for appropriate temporary relief or restraining order . . . . Upon *the filing of such* petition, the court . . . shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

NLRA § 10(e), 29 U.S.C. § 160(e) (1976).

12. *See infra* note 48 and accompanying text.

13. *See infra* note 50 and accompanying text.

tive and the in part test.[14]

Critical of the Board's in part test, the First Circuit,[15] joined by the Second Circuit,[16] recently viewed the Supreme Court's decision in *Mt. Healthy City School Board of Education v. Doyle*[17] as an affirmation of its but for analysis. In *Mt. Healthy*, the Court held that once a constitutionally impermissible consideration is shown to be a substantial factor in the school board's decision to terminate an employee, the school board must be given an opportunity to establish that it would have reached the same decision absent the protected conduct.[18] The First Circuit's interpretation of *Mt. Healthy*, as applied to employee discharge cases covered by the NLRA, requires that "once the Board has shown a 'significant' improper motivation, the burden is on the employer to prove that it had a good reason, sufficient in itself, to produce the discharge."[19]

On August 27, 1980, the Board in *Wright Line, A Division of Wright Line, Inc.*,[20] articulated a causation test in an effort to alleviate the intolerable confusion surrounding the mixed motive analysis. The Board's approach, based on *Mt. Healthy*,[21] provides that once the General Counsel[22] establishes a prima facie case of unlawful motive, the burden shifts to the employer to show that the discharge would have occurred irrespective of anti-union ani-

14. *See infra* notes 51-59 and accompanying text.

15. NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666, 671 (1st Cir. 1979); Liberty Mut. Ins. Co. v. NLRB, 592 F.2d 595, 606 (1st Cir. 1979) (Aldrich, J., concurring); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293 (1st Cir. 1977).

16. Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 99 (2d Cir. 1978). *See also* NLRB v. Garry Mfg. Co., 630 F.2d 934, 949 (3d Cir. 1980) (Weis, J., dissenting) (citing *Mt. Healthy* in support of the proposition that partial improper motivation is insufficient to establish a violation).

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

18. *Id.* at 287.

19. NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d at 671 (quoting Mt. Healthy City School Bd. of Educ. v. Doyle, 429 U.S. at 287).

20. 251 N.L.R.B. 1083 (1980).

21. *Id.*

22. Once an unfair labor practice charge is filed in a field office, a field examiner investigates the incident and makes a recommendation that the regional director either issue a complaint or dismiss the charge. If the regional director decides to dismiss a charge, the charging party may appeal to the Office of Appeals within the General Counsel's office in Washington. If the regional director issues a complaint, the prosecutory apparatus of the statute is activated. If the respondent refuses to settle the case, a formal hearing is scheduled before an administrative law judge. The General Counsel is represented by a lawyer who presents the case against the respondent. The General Counsel has the burden of proof in all cases, which means that he or she must establish by reliable and sufficient evidence that an unfair labor practice has been committed. F. MCCULLOCH & T. BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD 85-87 (1974).

mus.[23] The Board believes this mode of analysis is consistent with congressional intent,[24] Supreme Court precedent,[25] and established Board processes.[26]

After years of disagreement over the proper analysis in mixed motive cases, the First Circuit endorsed the Board's *Wright Line* decision in *Statler Industries, Inc. v. NLRB*.[27] The court abandoned its traditional but for test and stated that "the Board and we now seem to be on the same analytical track . . . ."[28] Notwithstanding *Statler*, the First Circuit, considering *Wright Line* on appeal,[29] further refined the Board's analysis to require the employer only to come forward "with credible evidence to rebut or meet the General Counsel's prima facie case."[30] Thus, under the First Circuit's view, the employer need only meet the burden of production to escape initially an unfair labor practice finding. The ultimate burden of persuasion remains with the General Counsel, and the employer is not required to establish that an unfair labor practice has not occurred.

In contrast, the Ninth Circuit, in *NLRB v. Nevis Industries, Inc.*,[31] accepted the Board's test unaltered. In support of its decision, the court noted that proof of motivation is most accessible to the employer and that the NLRA's legislative history reflects congressional intent to require employers to show just cause for employee discharge.[32]

This Note explores the controversy over mixed motive analysis. First, it attempts to categorize the circuits prior to *Wright Line* according to the tests applied and the respective burdens of proof placed on the parties under each test.[33] Next, the Note discusses criticism of the in part test and the evolution of the *Mt. Healthy*

23. 251 N.L.R.B. at 1087-88.

24. *See infra* text accompanying notes 111-14.

25. *Id.*

26. *See infra* notes 196-97 and accompanying text.

27. 644 F.2d 902 (1st Cir. 1981).

28. *Id.* at 906.

29. 662 F.2d 899 (1st Cir. 1981).

30. *Id.* at 904.

31. 647 F.2d 905 (9th Cir. 1981). As of the date of publication, two other circuits have adopted the Board's test unaltered. *See* NLRB v. Charles H. McCauley Assoc., Inc., 657 F.2d 685, 688 (5th Cir. 1981); Peavey Co. v. NLRB, 648 F.2d 460, 461 (7th Cir. 1981). Other circuits faced with the possibility of adopting the Board's test have neither approved, rejected, or modified the analysis. *See* Charge Card Ass'n v. NLRB, 653 F.2d 272, 275 (6th Cir. 1981); NLRB v. Permanent Label Corp., 106 L.R.R.M. 2211, 2216 (3d Cir. 1981); NLRB v. Burns Motor Freight, Inc., 635 F.2d 312, 315 (4th Cir. 1980).

32. *See infra* note 113 and accompanying text.

33. *See infra* notes 44-50 and accompanying text.

test as interpreted by the circuit courts.[34] The Note then examines the *Wright Line* decision in light of the NLRA's legislative history and Supreme Court precedent.[35] Specifically, the Note focuses on the contention that the First Circuit's traditional dominant motive test is the appropriate analysis.[36] Finally, the Note discusses the scope of *Wright Line* and its potential analytical implications.[37] Although the case decided the dual motivation issue, its applicability to pretext cases and sections of the NLRA, other than section 8(a)(3), remains unclear. The Note concludes with a discussion of the *Wright Line* progeny, contrasting pre-*Wright Line* decisions with the analysis undertaken by the Board utilizing the *Mt. Healthy* test.[38]

I. THE UNDERLYING CONTROVERSY

For several years, the Board applied the in part test when determining whether the NLRA had been violated in a dual motivation case. In *Consolidated Services*,[39] the Board reviewed the discharge of a probationary employee who was a union adherent. A fellow employee testified that the foreman said, in reference to the discharge, that the employer "fired your buddy . . . because he was head of the Union and a troublemaker."[40] The Board held that "a discharge motivated in part by an employee's exercise of Section 7 rights is a violation of the Act even though another valid cause may be present."[41] The in part language has been modified, however, in other cases and includes "the motivating factor,"[42] "the substantial, contributing factor,"[43] the "substantial cause,"[44] and "in substantial part."[45] While the Board maintains that the underlying concept has remained intact,[46] the variations in language have created conflicts between the Board and the circuit courts, and confusion within some circuits.[47]

34. *See infra* notes 64-88 & 202-06 and accompanying text.
35. *See infra* notes 111-21 and accompanying text.
36. *See infra* notes 115-21 and accompanying text.
37. *See infra* notes 124-47 and accompanying text.
38. *See infra* notes 148-94 and accompanying text.
39. 223 N.L.R.B. 845 (1976).
40. *Id.* at 845.
41. *Id.* at 845-46.
42. Tursair Fueling, Inc., 151 N.L.R.B. 270, 271 n.2 (1965).
43. Erie Sands S.S. Co., 188 N.L.R.B. 63, 63 n.1 (1971).
44. Broyhill Co., 210 N.L.R.B. 288, 296 (1974).
45. Central Casket Co., 225 N.L.R.B. 362, 362 (1976).
46. Wright Line, A Div. of Wright Line, Inc., 251 N.L.R.B. at 1085.
47. *See infra* notes 49-59 and accompanying text.

In reviewing Board rulings, five courts of appeals consistently have utilized the in part analysis or a variation thereof.[48] The remaining six circuits, led by the First Circuit,[49] traditionally have applied a dominant motive or but for test.[50] Three of the circuits which have applied the dominant motive or but for test also have applied the in part test.[51] Under the in part test, the General Counsel has the burden of establishing that discriminatory considerations played a part in the decision to discharge the employee. Only if the employer rebuts the *total* inference of unlawful motive will the discharge stand.[52] In contrast, the dominant motive and but for tests cast a much heavier burden on the General Counsel. The dominant motive test requires the General Counsel to prove that anti-union animus was the affirmative and persuasive reason behind the employer's decision to discharge an employee. The but for test places the burden on the General Counsel to establish that, but for the employer's anti-union animus, the employee would not have been discharged.[53] Thus, in addition to the split in the circuits concerning the appropriate analysis in mixed motive cases, the confusion in the area has been manifested by the application of different tests within the same circuit.

The Fifth Circuit undoubtedly qualifies as the most flagrant example of the reigning confusion. In addition to the dominant mo-

48. *See* Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 (6th Cir. 1980): "if the discharge was motivated in part by protected activity, then a violation of section 8(a)(1) has occurred"; Nacker Packing Co. v. NLRB, 615 F.2d 456, 463 (7th Cir. 1980): "suspension or discharge is unlawful under the Act if it is motivated, even in part, by a desire to discourage union activity"; Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978): "[i]f two or more motives are behind a discharge, the action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity"; MSP Indus., Inc. v. NLRB, 568 F.2d 166, 174 (10th Cir. 1977) (violation of the Act depends on "whether there was improper motivation in whole or material part"); Singer Co. v. NLRB, 429 F.2d 172, 179 (8th Cir. 1970): "discriminatory treatment of employees by their employer, motivated in whole or in part by their union or protected activities, violates § 8(a)(3) and (1) . . . ."

49. *See infra* notes 61-86 and accompanying text.

50. *See* Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978): "The magnitude of the impermissible ground is immaterial . . . as long as it was the 'but for' cause of the discharge . . . ."; Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976): "The burden which is on the Board is . . . to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one." (quoting NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968)).

51. *See infra* notes 54-59 and accompanying text.

52. Under *Wright Line*, once the General Counsel has established a prima facie case of unlawful motive, the burden shifts to the employer to show that the same decision would have been reached absent the protected conduct. *See infra* note 107 and accompanying text.

53. For cases discussing the dominant motive and but for tests, see *supra* note 50.

tive analysis, the court has articulated tests similar to the but for or in part tests. In 1967, the court held that "the anti-union motive *need not be dominant* . . . . [A]ll that need be shown by the Board is that the employee would not have been fired *but for* the anti-union animus of the employer."[54] In 1978, the court ruled: "[T]he threshold for illegality is crossed if the force of invidious purpose is 'reasonably equal' to the lawful motive prompting conduct."[55] The court then added in a footnote: "In fact the threshold for illegal motive may not require a 'reasonable equality,' but may, according to some cases be met if invidious purpose is *part of* the decision at issue."[56] One year later, responding to the employer's evidence establishing just cause for the disputed discharge, the court stated: "When this proof was made by the Company, the burden shifted to the General Counsel to prove that anti-union animus was *the motivating cause* of his discharge."[57] The District of Columbia[58] and the Ninth Circuits[59] also have applied both the in part and dominant motive analyses.

The Board's in part test has met with considerable criticism. The test's most ardent critic, the First Circuit, has argued that under the Board's analysis there is a danger that the employer's known desire to discharge an employee because of his or her union activity "will be confused with, and substituted for, actuating motive."[60] The court also has argued that the in part analysis

54. NLRB v. Whitfield Pickle Co., 374 F.2d 576, 582 (5th Cir. 1967) (emphasis added).

55. NLRB v. Big Three Indus. Gas & Equip. Co., 579 F.2d 304, 315 (5th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (quoting Cramco, Inc. v. NLRB, 399 F.2d 1, 6 (5th Cir. 1968)).

56. *Id.* at n.15 (citing NLRB v. O.A. Fuller Super Mkts., Inc., 374 F.2d 197, 200 (5th Cir. 1967); NLRB v. American Mfg. Co., 351 F.2d 74, 79 (5th Cir. 1965)) (emphasis added).

57. Florida Steel Corp. v. NLRB, 587 F.2d 735, 742 (5th Cir. 1979) (emphasis added).

58. *Compare* Allen v. NLRB, 429 F.2d 976, 982 (D.C. Cir. 1977) (discharge is unlawful if motivated in part by anti-union animus) *with* Amalgamated Clothing Workers v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977) (unless the Board can show by affirmative and persuasive evidence that an improper motive was the reason, management's decision must stand) (quoting NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968)).

59. *Compare* L'Eggs Prods., Inc. v. NLRB, 619 F.2d 1337, 1341 (9th Cir. 1980) (test, in dual motivation cases, is which motivation is the moving cause behind the discharge) *with* Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1082-83 (9th Cir. 1977) (existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity).

60. NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring). *But see* Klate Holt Co., 161 N.L.R.B. 1606, 1612 (1976) (recognition that the mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge).

ignores the employer's legitimate business reason, allowing the militant union activist to behave as he or she chooses once anti-union animus has been established.[61] Finally, the court has stated that the NLRA was not passed to encourage union activity—a likely result if the employee's position is improved because of union activities.[62]

While consistently criticizing the Board's analysis, the First Circuit has modified its approach considerably in the past ten years. In the early 1970's, the court applied the dominant motive test.[63] In 1977, the court viewed its traditional analysis in combination with the Supreme Court's decision in *Mt. Healthy City School Board of Education v. Doyle*[64] and adopted the but for test.[65] In *Mt. Healthy*, Doyle, an untenured teacher, challenged the school board's refusal to renew his contract and award him tenure.[66] The school board's decision was influenced by Doyle's lack of tact in handling professional matters.[67] The court of appeals, in affirming the trial court, held that because Doyle's constitutionally protected conduct played a substantial part in the school board's decision not to renew Doyle's contract, the discharge was unlawful.[68] The Supreme Court remanded the case, stating that once it was shown that an unlawful consideration was a substantial factor in the school board's decision, the school board must be given an opportunity to establish that it would have reached the same decision even in the absence of protected conduct.[69] In reaching its decision, the Court reasoned that a rule of causation which focuses solely on whether protected conduct

61. 320 F.2d at 842.

62. Liberty Mut. Ins. Co. v. NLRB, 592 F.2d 595, 602 (1st Cir. 1979). *But cf.* American Ship Bldg. v. NLRB, 380 U.S. 300, 316 (1964) (to redress the perceived imbalance of economic power between labor and management, the NLRA conferred certain affirmative rights on employees). It could be argued, however, that the NLRA, not the Board, places employees in a better position by conferring these affirmative rights.

63. *See, e.g.*, NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312 (1st Cir. 1971) (Board has burden of showing that the employer's dominant motive was anti-union animus).

64. 429 U.S. 274 (1977).

65. Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1294 (1st Cir. 1977) (the employer must show that the discharge would not have occurred but for the improper reason).

66. 429 U.S. at 276.

67. *Id.* at 282-83. The court offered the following two incidents as illustrations: Doyle made an obscene gesture toward two female students and called a radio station to announce the high school's new dress code. *Id.* The court, however, accepted the district court's finding that the phone call was protected by the first and fourteenth amendments since there was no evidence that Doyle violated any established school board policy. *Id.* at 284.

68. Doyle v. Mt. Healthy City School Dist. Bd. of Educ., 529 F.2d 524 (6th Cir. 1975).

69. 429 U.S. at 287.

played a part in the decision not to rehire could place an employee in a better position as a result of the exercise of protected conduct than if he or she had done nothing.[70] The Court also observed:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[71]

While the Court's reasoning bears some correlation to the First Circuit's criticism of the in part test,[72] the First Circuit's dominant motive and but for analyses differ significantly from the test in *Mt. Healthy*. Under the dominant motive framework, the General Counsel must: (1) make a clear showing that the employer's dominant motive was anti-union animus;[73] and (2) rebut the employer's asserted business justification by establishing that the discharge would not have taken place in the absence of the employee's protected activity.[74] Under the but for standard, the General Counsel must establish that the discharge would not have occurred but for the anti-union animus.[75] The test enunciated in *Mt. Healthy* requires the General Counsel to establish that an unlawful consideration was a substantial or motivating factor in the employer's decision to discharge the employee.[76] Once this proof is established, the burden shifts to the employer to demonstrate that it would have reached the same decision absent protected conduct.[77]

At first glance, the substantial or motivating factor requirement in *Mt. Healthy* implies a standard similar to the dominant motive test.[78] A companion case, however, suggests that the Court

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70. *Id.* at 285.

71. *Id.* at 286.

72. *See supra* notes 60-62 and accompanying text.

73. NLRB v. Fibers Int'l Corp., 439 F.2d at 1312.

74. *Id.* at 1312 n.1.

75. Coletti's Furniture, Inc. v. NLRB, 550 F.2d at 1294. The Board has criticized the but for test because of the difficulty in singling out one individual cause; the Board warns that the only logical way to apply a but for standard is to focus on the most recent event or motive. Wright Line, A Div. of Wright Line, Inc., 251 N.L.R.B. at 1091 n.2 (citing W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 249-51 (1972); W. PROSSER, LAW OF TORTS 238-39 (4th ed. 1971)).

76. 429 U.S. at 287.

77. *Id.*

78. *But cf.* Commissioner v. Kelley, 293 F.2d 904 (5th Cir. 1961). The court in *Kelley*,

intended to rely on a partial motive standard. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[79] the Court considered a challenge to a village's refusal to rezone an area for multiple-family housing.[80] Plaintiffs charged that the village board of trustees' decision was motivated partially by the race of the potential tenants in the proposed multiple-family dwellings.[81] The Court rejected the village's suggestion that the trustees' action would only be questionable if it were based solely on a discriminatory purpose.[82] The Court noted: "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."[83] Furthermore, in articulating the test in *Mt. Healthy*,[84] the Court referred to *Arlington Heights* for its definition of motivating factor:

> Proof that the decision by the Village was motivated *in part* by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminating purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.[85]

Thus, the *Mt. Healthy* requirement of a substantial or motivating factor, as defined in *Arlington Heights*, appears only to require a showing of partially unlawful motivation.

In 1979, the First Circuit further modified its approach by reinterpreting *Mt. Healthy's* application to sections 8(a)(1) and 8(a)(3) of the NLRA. Despite the Supreme Court's apparent reliance on a partial motive standard in *Mt. Healthy* and *Arlington*

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in defining substantial part under § 117(m)(2)(A) of the 1939 Internal Revenue Code, stated that there may be two or more substantial parts. *Kelley* held that one-third of the total net income to be derived from the property constituted "a substantial part." *Id.* at 912-14.

79. 429 U.S. 252 (1977).

80. *Id.* at 254.

81. *Id.* at 268-71.

82. *Id.* at 265.

83. *Id.*

84. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 287.

85. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 270-71 n.21 (emphasis added), *cited in* 429 U.S. at 287.

Heights, the First Circuit required the General Counsel to show "a significant improper motivation"[86] before shifting the burden to the employer "to prove that it had a good reason, sufficient in itself, to produce the discharge."[87] One month later, the court remanded a case to the Board with instructions that if the employer "can demonstrate a substantial non-pretextual reason to justify its conduct, then the Board has the burden of establishing that . . . [the employer] would not have withheld vacation benefits but for improper motivation."[88] Consequently, the court appeared to place the ultimate burden of proof back on the General Counsel in contrast to its earlier interpretation of *Mt. Healthy*.

In addition to the controversy between the circuits concerning the proper analysis in dual motive cases, disagreement exists regarding the compatability of *Mt. Healthy* with the objectives of the NLRA. The second circuit[89] has emphasized that the *Mt. Healthy* but for test is needed to prevent action violative of the NLRA.[90] The court stated that unless the but for test is utilized, an employee may be placed in a more favorable position as a result of his or her organizational efforts since, under the in part test, the activist is placed in an almost impregnable position once anti-union animus is established.[91] Such a result violates the NLRA by encouraging pro-union activity.[92] While this argument has merit, the court fails to recognize the shifting burden of proof element in the *Mt. Healthy* test. Under the second circuit's analysis, the General Counsel must prove that but for the employer's anti-

86. NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666, 671 (1st Cir. 1979).

87. *Id.*

88. NLRB v. Borden Inc., 600 F.2d 313, 321 (1st Cir. 1979).

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

90. *Id.* at 99. *See also* NLRB v. Garry Mfg. Co., 630 F.2d 934, 949 (3d Cir. 1980) (Weis, J., dissenting) (citing *Mt. Healthy* in support of the proposition that partial improper motivation is insufficient to establish a violation).

Although the second circuit characterized the *Mt. Healthy* approach as a but for test, a more accurate description is the "shifting burden" test. There are two distinct burdens of proof under *Mt. Healthy*. Initially, the plaintiff has the burden of establishing that his or her protected activities were a substantial or motivating factor in the defendant's decision. Once plaintiff meets this burden of proof, the burden shifts to the defendant to prove that the same decision would have been reached absent the protected conduct. Arguably, the defendant's burden is equivalent to a but for requirement. Labeling the entire analysis a but for test, however, ignores the plaintiff's initial burden of proof. *See generally* Wolly, *What Hath* Mt. Healthy *Wrought?*, 41 OHIO ST. L.J. 385, 392-93 (1980). Wolly argues that the but for test is directed at the injury, not the violation: "The causation test is only to determine whether the proven violation 'justif[ies] remedial action.' "

91. 587 F.2d at 99 (quoting Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. at 285-86).

92. *Id.*

union animus, the employee would not have been discharged.[93] Arguably, under *Mt. Healthy*, the employer must prove that the discharge would not have taken place but for a legitimate business reason.[94]

In contrast, the Fifth Circuit is skeptical of the compatibility of *Mt. Healthy* with the purpose of the NLRA.[95] The court noted that Congress, by passing labor laws, already established a balance which favors the employee.[96] The *Mt. Healthy* standard would restrike significantly the balance in favor of the employer by allowing an employer to discharge an employee for discriminatory reasons if the employer could establish that the same action would have taken place absent the employee's protected conduct. Such a test is contrary to congressional policy.[97]

A review of the circuits illustrates the substantive inconsistencies which prompted the Board to articulate a unifying test.[98] The Third, Sixth, Seventh, Eighth, and Tenth circuits have followed the Board's in part analysis.[99] The Second and Fourth Circuits have adopted the but for and dominant motive tests respectively.[100] The First Circuit has followed the dominant motive, but for,[101] and slightly modified, *Mt. Healthy* tests.[102] The District of Columbia and Ninth Circuits have utilized both the dominant motive and in part tests.[103] Finally, the Fifth Circuit has applied the in part, dominant motive, and but for tests.[104]

II. THE NLRB CAUSATION TEST

Against the backdrop of controversy and confusion, the Board in *Wright Line, A Division of Wright Line, Inc.*[105] announced that it will apply the *Mt. Healthy* test in cases involving section 8(a)(1) or 8(a)(3) violations based on employer motivation.[106] The

93. *Id.* at 98.
94. *See supra* note 90 and accompanying text.
95. Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1265 (5th Cir. 1978) (Thornberry, J., concurring).
96. *Id.*
97. *Id.*
98. 251 N.L.R.B. at 1085-86.
99. *See supra* note 48 and accompanying text.
100. *See supra* note 50 and accompanying text.
101. *See supra* notes 63-65 and accompanying text.
102. *See supra* notes 86-88 and accompanying text.
103. *See supra* notes 58-59 and accompanying text.
104. *See supra* notes 54-57 and accompanying text.
105. 251 N.L.R.B. 1083 (1980).
106. *Id.*

Board's causation test states:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[107]

In *Wright Line*, an employee, a leading union advocate, was discharged two months after an election allegedly for violating a plant rule against knowingly altering or falsifying production time reports, payroll records, or time cards.[108] The employee, known by the employer's supervisors as the "union kingpin," had actively solicited support for the union during two election campaigns. During the second campaign, he was reprimanded by management, allegedly for pressuring another employee to vote for the union. The employer's anti-union animus was further manifested by its anti-union campaign, which cast undesirable aspersions on the union's sister locals and voiced concern about the company's survival in the event of unionization. Moreover, the General Counsel established that the employer had never discharged any other employee under similar circumstances. The only employees discharged for violating the rule embezzled and deliberately forged records in the collection of fraudulent sales commissions.[109]

The Board held that the General Counsel established a prima facie case based on the employer's hostility toward the employee, the timing of the discharge, and the absence of prior consistent discipline. The Board also found that the employer failed to sustain its burden of proving that the discharge would have occurred absent the employee's union activity. The Board noted that the supervisor directed a "check" on the employee, although he had

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107. *Id.* at 1089.

Notably, the burden of proof shifts to the employer once the General Counsel has established a prima facie case. The employer's burden is to establish that the discharge would have occurred regardless of the anti-union animus. The Board suggests viewing the employer's asserted justification as an affirmative defense. *Id.* at 1084 n.5. Under the in part test, the burden of proving unlawful motivation is on the General Counsel. The employer's successful defense, however, is predicated on rebutting the total inference of unlawful motivation. *See* Adams Delivery Serv., Inc., 237 N.L.R.B. 1411, 1420 (1978) (existence of valid grounds for discharge is no defense, unless such action was predicated solely on such grounds and not by a desire to discourage protected activities).

108. 251 N.L.R.B. at 1090. Although the case is not specific, the factual setting indicates a representation election.

109. *Id.*

no reason to suspect that the employee was untrustworthy. These circumstances suggested a predetermined plan to discover a reason for discharging the "union kingpin."[110]

The Board's decision was supported by the NLRA's legislative history and the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc.*[111] Citing the 1947 amendment in section 10(c) of the NLRA,[112] the Board marshalled support for the shifting burden test from the amendment's legislative history: "The original House provision . . . 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."[113] The Board also noted that the Supreme Court had placed the burden of establishing "cause" on the employer. In *Great Dane*, the Court stated that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is on the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."[114]

Contrary to the Board's conclusion, it can be argued that *Mt. Healthy* and the legislative history of the 1947 amendments to the NLRA establish the validity of the first circuit's dominant motive test.[115] In support of this argument, reference can be made to a passage from the Report of the House Labor Committee which concluded that "[t]he Board may not 'infer' an improper motive when the evidence shows cause for discipline or discharge."[116] This passage, however, equally supports the Board's in part test. Under the in part test, once the General Counsel establishes evidence sufficient to support the inference that anti-union animus

110. *Id.*

111. 388 U.S. 26 (1967).

112. Section 10(c) provides in part: "No order of the Board shall require the reinstatement of any individual or employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." NLRA § 10(c), 29 U.S.C. § 160(c) (1976).

113. 93 CONG. REC. 6678 (1947), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1595 (1948).

114. 388 U.S. at 34 (emphasis supplied).

115. DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of* Mt. Healthy Board of Education v. Doyle *upon the NLRA*, 66 GEO. L.J. 1109, 1120-26 (1978). *But see supra* notes 73-74 and accompanying text.

116. DuRoss, *supra* note 115, at 1123 (quoting H.R. REP. No. 245, 80th Cong., 1st Sess. 43 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 334 (1948)).

was a factor in the employer's decision to discharge the employee, the inquiry then focuses on the employer's asserted business justification.[117] If the employer establishes the requisite defense—that the discharge was motivated solely by legitimate business reasons—the discharge stands.[118]

Further support for the validity of the dominant motive test can be derived from the House report's change in the evidentiary standard.[119] The new standard requires the Board to utilize a "preponderance of the testimony" standard rather than the "all of the testimony" standard.[120] While this amendment reveals an effort to counter the Board's practice of substituting expert inferences for evidence, the amendment does not establish the validity of the dominant motive test. Rather, the thrust of the report indicates that the amendment was intended to encourage the Board to articulate its decisions with greater clarity:

> [T]he Board decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurably increased respect for the decisions of the Board should result from this provision.[121]

The Board believes the *Mt. Healthy* test accommodates the parties' competing interests while effectuating the policies and objectives of the NLRA.[122] Under the *Mt. Healthy* test, the employee is protected because the prima facie case only requires a showing of partially unlawful motivation. On the other hand, the employer is protected by a formal framework within which to establish legitimate business reasons for discharging the employee.[123]

III. *WRIGHT LINE*'S ANALYTICAL IMPLICATIONS

The Board's causation test may quell much of the criticism di-

117. 251 N.L.R.B. at 1088.

118. *See supra* note 107.

119. *See* DuRoss, *supra* note 115, at 1123-24.

120. H.R. REP. No. 510, 80th Cong., 1st Sess. 53-54 (1947), *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1135, 1162.

121. *Id.* at 54.

122. 251 N.L.R.B. at 1089.

123. *Id.* While the employer clearly favors the dominant motive test due to the heavy burden shouldered by the General Counsel, *Wright Line* also would be preferred over the in part test because the employer does not have to rebut totally the unlawful motive inference. *See supra* note 107.

rected toward the in part test.[124] A major objection to the in part analysis centered on its failure to recognize employers' legitimate business justifications.[125] Prior to *Wright Line*, once the General Counsel established that anti-union animus played a part in the decision to discharge an employee, the employer was forced to rebut the total inference of unlawful motive.[126] This burden necessarily required the employer to establish its exclusive reliance on a legitimate business purpose. Thus, under the Board's traditional analysis, even if anti-union animus played only a minuscule part in the employer's decision, because a legitimate business purpose was the major determinant, the discharge nonetheless would have resulted in a violation of the NLRA.[127]

Under *Wright Line*, notwithstanding the General Counsel's prima facie case of unlawful motive, the discharge is lawful if the employer shows that the decision would have been the same absent protected conduct. The employer need not rebut the total inference of unlawful motive. Accordingly, a discharge motivated by anti-union animus may withstand Board scrutiny once the employer establishes that similar action would have taken place irrespective of the employee's union activities.

An additional criticism of the in part test was its propensity to encourage union activity by placing the employee in a better position as a result of union activities.[128] This criticism loses much of its vitality under the *Wright Line* approach. While protecting the interests of employees engaged in concerted activity, *Wright Line* provides the employer with a formal framework within which to assert its business justification.[129] The employee, therefore, is not placed in an unassailable position.[130]

The employer's burden of establishing that the same action would have occurred in the absence of protected conduct[131] suggests that the employer's strongest case would be one which rests

124. *See supra* notes 60-62 and accompanying text.

125. *See supra* note 61 and accompanying text.

126. *See supra* note 107.

127. *See* address by John C. Truesdale, 1980 Labor Law and Labor Management Relations Conference, [1980] 4 LAB. L. REP. (CCH) ¶ 9239, at 16,104: "[U]nion activities, even if only the 'straw that broke the camel's back,' should not operate to deny employment to even a marginal employee."

128. *See supra* notes 61-62 and accompanying text.

129. *See supra* note 123 and accompanying text. Under the in part test, once anti-union animus is established, the employer's asserted business justification is ignored. *See supra* text accompanying notes 125-27.

130. *See supra* note 61 and accompanying text.

131. *See supra* note 107 and accompanying text.

on evidence of prior consistent discipline in similar circumstances.[132] In application, however, this standard may be susceptible to potential problems.[133] One such problem may arise if the employer attempts to use established disciplinary practice as a pretext for an unlawful discharge.[134]

In a pretext case, the only genuine motive is anti-union animus. The inquiry ends once an unlawful discharge is established by the General Counsel's prima facie case. The Board, by considering the pretextual reason in the formal framework provided by *Wright Line* for the employer's asserted business justification, may give undue credence to a fabricated motive. There is a danger that by continually considering the employer's asserted pretextual justifications, the employer's fabricated reasons may begin to carry weight as a legitimate justification.

Another potential problem arises when an employer's decision cannot be viewed in light of past disciplinary practice.[135] One solution would be to modify the second prong of *Wright Line*[136] and evaluate the employer's action under the construct of a "reasonable employer."[137] Under this analysis, once the General Counsel has established a prima facie case, the employer must prove that it

132. If the employer's actions exhibit disparate treatment of employees, these distinctions must be justified. *See* F. ELKOURI & E. ELKOURI, *supra* note 4, at 643-44. "[A]ll employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment . . . ."

133. *See* 251 N.L.R.B. at 1083 (Jenkins, concurring). Member Jenkins voiced his concern that the shifting burden analysis may prove to be inadequate in application, thus requiring modification. Jenkins' concurring opinion, however, did not explicate the potential problem areas.

134. Although the Board indicated that the *Mt. Healthy* test will apply to pretext cases, *Wright Line* concerned only the dual motivation issue. 251 N.L.R.B. at 1083. The Board suggests viewing the employer's asserted justification as an affirmative defense. In the Board's view, a pretext case is one in which the employer's affirmative defense is wholly without merit. A dual motivation case arises when the affirmative defense has some merit. The issue then becomes one of sufficiency of proof. *Id.* at 1084. The Board concludes that under the *Mt. Healthy* test, there is no need to distinguish between pretext and dual motive cases. *Id.* at 1089.

135. This problem could arise when an employer is a relatively new concern without an established pattern of discipline or nondiscipline.

136. The basic inquiry would remain the same: whether the employer's decision would have been the same absent protected conduct. Instead of evaluating the decision in light of past practice, however, the focus would be on whether a *reasonable* employer's decision would have been the same absent protected conduct.

137. *Cf.* Note, *Can Negligent Representation Be Fair Representation? An Alternative Approach to Gross Negligence Analysis*, 30 CASE W. RES. L. REV. 537 (1980) (union's duty of fair representation should be evaluated under the construct of a reasonable union with respect to procedural functions, such as filing grievances and notifying employees of any action taken).

acted as any reasonable employer would have acted under similar circumstances. Presumably, the employer would present evidence of disciplinary practices taken by other employers similarly situated.[138] Cases of gross misconduct, such as physical assault, are impermissible in any employment situation and are evaluated with relative ease. Problems may arise, however, where the employer typically expends significant time and financial resources in training an employee. Depending on production strategy, one employer may be willing to overlook noncompliance with plant rules to protect his or her investment in the employee. Alternatively, an employer whose production strategy depends on highly efficient employees may demand strict compliance with plant rules. Evaluating the latter employer's action in light of the former's past practice may yield an inconsistent result.

Wright Line's focus on employers' prior consistent behavior may alert employers to the importance of promulgating a precise disciplinary system and informing the employees of the system. In the event of a challenged discharge, the employer could introduce evidence of its disciplinary policy and the means by which the employees had access to such policy.[139] The employer then would establish that the rules had been applied consistently in the past. By encouraging an environment in which employees are aware of the employment ground rules, *Wright Line* may alleviate problems arising from the lack of employer/employee communication, thereby improving employer/employee relations.

Although the *Wright Line* analysis applies to sections 8(a)(1) and 8(a)(3),[140] a lingering question remains concerning the Board's position on the applicability of the test to other NLRA sections. On November 4, 1980, the General Counsel issued a memorandum which attempted to clarify the scope of *Wright Line*'s application.[141] The memorandum lists two categories of cases in which *Wright Line* would not apply. Both categories in-

138. Some factors which may be considered in determining whether employers are similarly situated include their line of business, amount of training on the job, ease or difficulty in finding and retaining competent employees, financial resources, and fringe benefits.

139. Posting a set of rules in conspicuous areas of the plant is the most reliable means of employee access. *See, e.g.*, Sanford Dress Corp., 123 N.L.R.B. 1106, 1108 (1959) (Board ordered employer to post cease and desist notices in conspicuous places). *Cf.* Section 711(a) of the Civil Rights Act of 1964: "Every employer . . . shall post and keep posted in conspicuous places upon its premises where notices to employees . . . are customarily posted . . . the pertinent provisions of this subchapter and information pertinent to the filing of a complaint." 42 U.S.C. § 2000e-10 (1976).

140. 251 N.L.R.B. at 1083.

141. *Memorandum on NLRB's Dual-Motivation Case*, [1980] 4 LAB. L. REP. ¶ 9242, at

volve situations where violations are established notwithstanding the employers' motive. Employer conduct "inherently destructive of important employee rights" is an example of such a situation.[142] Another example is where the employer refuses to reinstate a striker when an open position is available.[143]

The memorandum proceeds to name three areas involving a motive analysis which the regional offices are instructed to submit to the Division of Advice[144] and concludes with a discussion of the evidentiary standard to be utilized in determining whether the employer has satisfied its burden of proof. The General Counsel suggests that only when the employer "clearly establishes" its defense will the charge be dismissed.[145] Arguably, this observation recognizes that employers no longer have to rebut the total inference of unlawful motive.[146] Rather, employers must establish clearly that the same decision would have been reached absent protected conduct.[147]

To summarize, *Wright Line* seems to represent a significant pro-management decision. Employers motivated by anti-union animus are insulated from liability if they can prove that their actions would have been the same absent protected conduct. The decision appears to place primary emphasis on the employer's right to rely on a system of consistent disciplinary practices. In effect, the employer's past behavior in similar circumstances may be determinative in evaluating a discharge. Several areas remain, however, in which the applicability of *Wright Line* is uncertain.

16,119 (Gen. Counsel Memo. 80-58, Nov. 4, 1980) [hereinafter cited as *Memorandum on NLRB's Dual-Motivation Case*].

142. *Id.* at 16,120. *See* NLRB v. Great Dane Trailers, Inc. 388 U.S. 26, 34 (1967). *See, e.g.*, A.S. Abell Co., 234 N.L.R.B. 802 (1978).

143. *Memorandum on NLRB's Dual Motivation Case*, *supra* note 141, at 16,120. *See, e.g.*, Poultry Packers, Inc., 237 N.L.R.B. 250 (1978).

144. *Memorandum on NLRB's Dual Motivation Case*, *supra* note 141, at 16,120-21.

"A Division of Advice provides guidance to regional offices in cases concerning new or unusually complex issues." E. MCCULLOUGH & T. BORNSTEIN, *supra* note 22, at 80. The first area involves § 8(a)(4) cases which turn on motive. The General Counsel noted that because there are special considerations which apply to these cases, the applicability of *Wright Line* is unclear. The second area concerns §§ 8(a)(1)(A) and 8(a)(2) cases where a union, with mixed motivations, causes an employer to take action against an employee. The General Counsel requires these cases to be submitted to the Division of Advice when there is evidence supporting both a prima facie case and the employer's asserted justification. Similarly, in fair representation cases in which a prima facie case is established, but in which there also is evidence supportive of the employer's asserted justification, the General Counsel requires the case to be submitted to the Division of Advice.

145. *Memorandum on NLRB's Dual Motivation Case*, *supra* note 141, at 16,121.

146. *See supra* note 107.

147. *Id.*

IV. *WRIGHT LINE*'S PROGENY

The relative paucity of decisions since *Wright Line* makes it difficult to forecast the decision's practical effect on subsequent Board rulings,[148] the opinions of administrative law judges,[149] and court of appeals decisions.[150] Since the post-*Wright Line* cases fail to offer an in-depth analysis under the new framework,[151] this Note analyzes pre-*Wright Line* Board decisions under the new test and compares the hypothesized results with the post-*Wright Line* decisions.

A. *Retroactive* Wright Line

The following cases highlight the potential differences between the in part and *Wright Line* analyses. In *Calandra Photo, Inc.*,[152] the dischargee was caught smoking after several warnings that it was against the rules and that he might be fired as a result. The employee also was involved in union soliciting of which the employer was aware. The employer alleged that the discharge was based on the smoking violation.[153] The Board affirmed the administrative law judge's finding that even assuming the smoking violation constituted valid grounds for discharging the employee, it was no defense to a violation of sections 8(a)(1) and 8(a)(3), unless the discharge was predicated solely on that ground.[154] This statement is no longer valid under a *Wright Line* analysis. Under

148. One may hypothesize, however, that more decisions will be rendered in favor of the employer since the employer's burden is less stringent than under the in part test. *See supra* notes 125-29 and accompanying text.

149. Administrative law judges are officers appointed by the Board to preside over unfair labor proceedings and make recommendations of law and fact to the Board. E. McCULLOUGH & T. BORNSTEIN, *supra* note 22, at 84.

150. *See* Sullair P.T.O., Inc. v. NLRB, 641 F.2d 500, 504 (7th Cir. 1981): "In our view, the above cited authorities [Boaz Spinning Co. v. NLRB, 395 F.2d 512 (5th Cir. 1968)] control the disposition of this case . . . . See *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 287 . . .; *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (August 27, 1980)." *See also* NLRB v. Permanent Label Corp., 106 L.R.R.M. 2211, 2216 (3d Cir. 1981) (in affirming the administrative law judge's finding that the employee's reason was pretextual, the court cited *Wright Line*); NLRB v. Burns Motor Freight, Inc., 635 F.2d 312, 315 (4th Cir. 1980) (court refused to consider whether *Wright Line* was the appropriate test).

151. Herman Bros., 252 N.L.R.B. 849 (1980); Taylor-Dunn Mfg. Co., 252 N.L.R.B. No. 118 (Sept. 30, 1980), [1980] 5 LAB. L. REP. (CCH) ¶ 17,474; Behring Int'l, Inc. 252 N.L.R.B. No. 55 (Sept. 30, 1980), [1980] 5 LAB. L. REP. (CCH) ¶ 17,447.

152. 151 N.L.R.B. 660 (1965).

153. *Id.* at 664.

154. *Id.* at 665.

Wright Line, the discharge would stand, even if it were motivated partially by anti-union animus, as long as the employer could establish that the discharge would have occurred notwithstanding the employee's protected conduct.[155] The employer's case would be weakened by evidence indicating that the no smoking rule was not strictly enforced and that no measures were taken against other violating employees.[156]

In *Wood Transformers, Inc.*, the dischargee led the union's organizational movement.[157] After being disciplined for her tardiness, she continued to report late and was absent twice.[158] The employer requested an explanation of her attendance record which she failed to provide. Although the employer knew of the employee's union activities, some disciplinary action was taken before the employer became aware of those activities. The Board approved the administrative law judge's finding that the employee was discharged for her union leadership role and failure to report to the employer concerning tardiness. The discharge was held unlawful since it was motivated in part by anti-union animus.[159] Applying *Wright Line*, the employer's case could be strengthened with evidence that other employees had been discharged for gross insubordination.[160] Moreover, the employer might sustain its burden of proof under *Wright Line* with evidence showing the employee's continued poor attendance and her refusal to heed repeated warnings. In addition, the employer's case would be strengthened by proof that disciplinary procedures were begun before the employer became aware of the employee's union activities.

In *Wellington Mill Division West Point Manufacturing Co.*,[161] the dischargee, a model employee with nineteen years seniority, was attempting to organize a union.[162] Within one month, the employer reprimanded the employee for allegedly failing to inspect cloth. Later, the employee was fired for abusing the privi-

155. *See supra* notes 126-30 and accompanying text.

156. 151 N.L.R.B. at 665. The absence of prior consistent disciplinary action by the employer could be fatal to this case. *See supra* notes 33-35 and accompanying text.

157. 226 N.L.R.B. 1112 (1976).

158. *Id.* at 1116.

159. *Id.*

160. *Id. See, e.g.*, American Can Co., 57 Lab. Arb. 1063, 1064 (1971) (employee's repeated refusals to report to the employer's office without the union representative held to be grounds for a two-week suspension based on the employee's gross insubordination).

161. 141 N.L.R.B. 819 (1963).

162. *Id.* at 834.

lege of leaving his loom without permission.[163] The Board classified the employer's rationale for discharging the employee as pretextual[164] for the following reasons: (1) the employer's knowledge of the employee's union activities;[165] (2) the timing of the discharge;[166] (3) the severe nature of the punishment;[167] (4) the supervisor's admission that he had orders to dismiss the employee;[168] and (5) the fact that no employee had been discharged for similar offenses.[169]

Even under *Wright Line*, it is unlikely that an employer would prevail based on the factors cited in *Wellington*. The General Counsel's strong prima facie case would require the employer to establish an equally strong case based on genuine, non-pretextual, reasons for the discharge.

This brief retrospective analysis suggests that the *Wright Line* test may yield different results than the Board's previous in part analysis. Under *Wright Line*, the employee no longer occupies an "almost impregnable position" once anti-union animus is established[170] because the employer need not rebut the total inference of unlawful motive. The discharge, therefore, will stand if the employer demonstrates that the same action would have resulted irrespective of anti-union animus.[171]

B. *Post*-Wright Line

The following cases illustrate the Board's application of the *Wright Line* analysis. In *Russ Togs, Inc.*,[172] two employees filed grievances stating that they were not receiving the wage rate established in their collective bargaining agreement and urged other employees to file grievances. After learning of their action, the employer began harassing the two employees. Shortly after wages were increased to the contract level, the employees were laid off.[173]

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163. *Id.*

164. *Id.* at 821. *Wright Line* may eliminate the distinction between dual motive and pretext cases. *See supra* notes 133-36 and accompanying text.

165. 141 N.L.R.B. at 835.

166. *Id.*

167. *Id.* at 836.

168. *Id.* at 835.

169. *Id.* at 836.

170. *See supra* note 61 and accompanying text.

171. *See supra* notes 126-39 and accompanying text.

172. 253 N.L.R.B. 767 (1980).

173. *Id.*

The General Counsel's prima facie case was based on the employer's harassment and surveillance of the employees who had filed grievances.[174] The employer's justification alleged that the two employees were urging other employees to engage in a slowdown.[175] The Board relied on two factors in determining that the employer failed to meet its burden of demonstrating that the same action would have taken place even in the absence of the protected conduct. First, the employees were not laid off until after the employer raised the wages in accordance with the contract.[176] Second, the employer gave shifting reasons for the layoffs.[177] The employer initially justified the layoff because of lack of work. The employer later claimed that the two employees had intimidated another worker. Finally, the reason asserted was the employees' attempt to initiate a slowdown.[178]

In *Red Ball Motor Freight, Inc.*,[179] the dischargee complained about the forced use of vacation time and the manner in which laid off employees were recalled, and thus, urged other employees not to start work early.[180] The Board held that the General Counsel established a prima facie case by showing that the employer relied on the employee's protected conduct as a ground for its action.[181] Although the employer alleged that the discharge was based on the employee's tardiness and poor attitude, the Board found that the employer failed to meet its burden of proof under *Wright Line*.[182] The Board based its finding on three factors: (1) the employer's statement that the employee's conduct was part of a "chain of events" which brought her under surveillance; (2) the employer's testimony that while he watched the employee's allegedly disruptive behavior, he made no attempt to stop her; and (3) the fact that an earlier, more disruptive incident caused by another employee resulted in only a one day suspension.[183]

In *Overnite Transportation Co.*,[184] the administrative law judge

174. *Id.* at 768.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. 253 N.L.R.B. 871 (1980).
180. *Id.* at 872.
181. *Id.* The complaints were protected activity since the employee had "the welfare of her co-workers in mind." *Id.* at 871.
182. *Id.* at 872.
183. *Id.*
184. 254 N.L.R.B. No. 11 (Jan. 14, 1981), [1981] 5 LAB. L. REP. (CCH) ¶ 17,777 at 28,658.

found the discharge of four employees unlawful.[185] The Board affirmed three of the violations because the employer failed to demonstrate any legitimate justifications to support the discharges. The administrative law judge found that the violation of the safety rule by the fourth dischargee was a legitimate basis for disciplinary action. The judge concluded, however, that but for the employee's union activity the employer would not have discharged him.[186] The Board affirmed, stating that the administrative law judge's analysis "is in harmony with the analytical objectives of *Wright Line*."[187]

Another employee was discharged for allegedly punching the timecard of a friend and fellow employee.[188] The Board found that the employer knew of their friendship as well as their support for the union.[189] The Board concluded that the discharge was unlawfully motivated by anti-union animus based on the following evidence: (1) the employer did not have a policy of discharging employees for a first time offense of punching another's timecard;[190] (2) no employee had ever been discharged for such an offense;[191] (3) employees regularly punched time cards for fellow workers;[192] and (4) the discharge occurred only three weeks after the union began its organizational drive.[193]

While these three cases fail to exhibit any startling revelations, they are instructive. The cases suggest that the Board will continue to scrutinize rigorously the employer's asserted justification. The employer's knowledge of protected activity, the timing of the discharge, past practice with regard to disciplinary action, and employer conduct preceding the discharge continue to weigh heavily in the Board's analysis of dual motivation cases. Finally, the *Wright Line* progeny does not indicate a shift toward favoring the employer in such cases.[194]

185. *Id.* at 28,662.

186. *Id.*

187. *Id.* at 28,665 n.6. Presumably, since the employee's union activities were the but for cause of the discharge, the employer failed to establish that the same decision would have resulted absent the protected conduct. *See supra* notes 89-94 and accompanying text.

188. [1981] 5 LAB. L. REP. at 28,661.

189. *Id.*

190. *Id.* at 25,663.

191. *Id.* at 25,664.

192. *Id.* at 25,663.

193. *Id.* at 25,664.

194. *See supra* notes 125-33 and accompanying text.

C. *So What's All the Fuss About?*

Although, theoretically, *Wright Line* represents a significant pro-management decision,[195] a strong argument may be made that in practice, the balance maintained by the in part test will remain unchanged. The Board noted in *Wright Line* that "while the Board's process has not been couched in the language of *Mt. Healthy*, the two methods of analysis are essentially the same."[196] In addition, former Board Member Truesdale made the following comments in a speech before the 1980 Labor Law and Labor-Management Relations Conference:

> Some readers of the Board's opinion in *Wright Line* will wonder what all the fuss is about. The case does not change the Board's traditional allocation of the burden of proof, nor is it likely to alter the standards by which the Board determines whether a litigant has carried its burden of proof. The major contribution of the case, we hope, 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' respective burdens have been carried.[197]

The fuss, however, may concern the judicial interpretation of a recent Supreme Court decision which arguably undercuts the shifting burden analysis as articulated in *Wright Line*. In *Texas Department of Community Affairs v. Burdine*,[198] the Court held that in Title VII cases, "when the plaintiff has proved a *prima facie* case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions."[199] Under *Burdine*, "the defendant need not persuade the court that it was actually motivated by the proffered reasons,"[200] whereas under *Wright Line* the employer must explain the nondiscriminatory reasons for the discharge and establish that the decision would have been the same absent the unlawful considerations. The employer's burden under *Wright Line* implicitly requires the employer to persuade the trier of fact that it actually was motivated by legitimate business reasons.

It is arguable, however, that in a Title VII case, the plaintiff has a lighter burden of establishing a prima facie case than under *Wright Line*. Under Title VII, the plaintiff must show:

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195. *See supra* notes 24-34 and accompanying text.
196. 251 N.L.R.B. 1083, 1088.
197. Address by John C. Truesdale, *supra* note 126, at 16,105.
198. 49 U.S.L.W. 4214 (March 3, 1981).
199. *Id.* at 4217.
200. *Id.* at 4216.

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[201]

The plaintiff is not required to establish subjectively that the defendant was discriminatorily motivated. Since the burden on the plaintiff in a Title VII case is lighter than the burden on the General Counsel under *Wright Line*, the corresponding burden on the defendant is necessarily lighter under Title VII.

Consistent with *Burdine*, the First Circuit, on appellate review of *Wright Line*, clarified the Board's shifting burden analysis. In *NLRB v. Wright Line, A Division of Wright Line, Inc.*,[202] the court endorsed the test articulated by the Board but limited the employer's burden to a "burden of going forward to meet a prima facie case, not a burden of persuasion on the ultimate issue of the existence of a violation."[203] The court distinguished *Mt. Healthy* by noting that in that case, the employer conceded an improper discharge of plaintiff for exercising constitutionally protected rights. Unlike the typical labor case, the employer in *Mt. Healthy* raised an affirmative defense which went to the propriety of the remedy rather than to the existence of a violation. In the typical labor case, the employer vigorously disputes the alleged reason for the discharge. The employer's claim, however, is not an affirmative defense.[204] Rather, the General Counsel's prima facie case establishes a presumption that the employer committed an unfair labor practice. While the employer must meet the burden of producing evidence of a legitimate reason for the discharge, the burden of persuasion remains with the General Counsel on the issue of causation based on the alleged improper motive.

In contrast to the First Circuit, the Ninth Circuit, in *NLRB v. Nevis Industries, Inc.*,[205] accepted the Board's *Wright Line* test without alteration. Although the question of production or persuasion burdens was not a focus of the Ninth Circuit opinion, the court marshalled support for the *Wright Line* test by noting the legislative history, which manifests an intent to require the em-

201. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

202. 662 F.2d 899 (1st Cir. 1981).

203. *Id.* at 905.

204. *See supra* note 107.

205. 647 F.2d 905 (9th Cir. 1981). *See* NLRB v. Charles H. McCauley Assoc., 657 F.2d 685, 688 (5th Cir. 1981); Peavey Co. v. NLRB, 648 F.2d 460, 461 (7th Cir. 1981).

ployer to show just cause for employee discharges,[206] and by further acknowledging that proof of motivation is most accessible to the employer. These justifications could be viewed as a recognition that the employer shoulders the burden of persuasion in establishing a legitimate business reason for the discharge. The fuss, therefore, may concern the circuit courts of appeals' interpretation of *Wright Line*.

In distinguishing between the burdens of production and persuasion, it must be noted that the production burden placed on the employer by the First Circuit significantly favors the employer's case. Under the in part test, once the General Counsel showed that the employer's decision to discharge was motivated in part by anti-union animus, the employer lost unless it could establish that the only reason for the discharge was a legitimate business purpose.[207] Under the Board's new test, the employer need not rebut the total inference of unlawful motive, but must show that the discharge would have occurred irrespective of anti-union animus. It could be argued that since the employer now has a less onerous case to establish, the employer should be required to meet the burden of persuasion in establishing reasons sufficient for discharging an employee. Otherwise, any reasonable evidence of a possible legitimate business purpose might ultimately defeat the General Counsel's case.

In contrast, the post-*Wright Line* Board cases have not indicated a shift in balance favoring the employer.[208] If, in fact, the courts choose to deviate from the Board and strike the balance in favor of the employer, then the question becomes whether the Board's test as applied by the courts is consistent with congressional policy. The primary purpose of the NLRA was to redress

206. 647 F.2d at 909.

207. *See supra* notes 126-27 and accompanying text.

208. In none of the post-*Wright Line* decisions in which the General Counsel has established a prima facie case has the employer been successful in meeting its burden. *See* Overnite Transportation Co., 254 N.L.R.B. No. 11 (Jan. 30, 1981), [1980] 5 LAB. L. REP. (CCH) ¶ 17,777; Red Ball Motor Freight, Inc., 253 N.L.R.B. No. 111 (Jan. 9, 1981), [1980] 5 LAB. L. REP. (CCH) ¶ 17,728; Russ Togs, Inc., 253 N.L.R.B. No. 99 (Jan. 9, 1981), [1980] 5 LAB. L. REP. (CCH) ¶ 17,726; Joshua's, Inc., 253 N.L.R.B. No. 82 (Dec. 31, 1980), [1980] 5 LAB. L. REP. ¶ 17,712; Weather Tamer, Inc., 253 N.L.R.B. No. 36 (Dec. 12, 1980), [1980] 5 LAB. L. REP. (CCH) ¶ 17,672; Valley Cabinet & Mfg., Inc., 253 N.L.R.B. No. 8 (Nov. 7, 1980), [1980] 5 LAB. L. REP. (CCH) ¶ 17,517; Motor Convoy, Inc., 252 N.L.R.B. No. 175 (Nov. 21, 1980), [1980] 5 LAB. L. REP. (CCH) ¶ 17,619; Taylor-Dunn Mfg. Co., 252 N.L.R.B. No. 118 (Oct. 31, 1980), [1980] 5 LAB. L. REP. (CCH) ¶ 17,474; Herman Bros., 252 N.L.R.B. No. 121 (Nov. 14, 1980), [1980] 5 LAB. L. REP. (CCH) ¶ 17,593; Behring Int'l Inc., 252 N.L.R.B. No. 55, (Oct. 17, 1980), [1980] 5 LAB. L. REP. (CCH) ¶ 17,447.

the perceived imbalance of economic power between labor and management.[209] Congress achieved redress by granting affirmative rights to employees and placing certain enumerated restrictions on employers' activities.[210] The NLRA prohibits acts which interfere with, restrain, or coerce employees in the exercise of their rights to organize a union, bargain collectively, and strike. A judicial gloss sanctioning employer conduct violative of the NLRA unequivocally contradicts congressional intent.[211]

V. CONCLUSION

The controversy surrounding the mixed motive analysis may be quelled to a certain extent by the *Wright Line* decision. The perceived extremes represented by the dominant motive and in part tests appear in equilibrium with the adoption of the *Mt. Healthy* analysis. Differing interpretations concerning the precise burden placed on the employer,[212] in addition to the uncertain range of cases in which the test will apply, however, may create yet another point of contention between the Board and the circuits.

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209. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965).
210. *Id.*
211. *See also supra* notes 89-97 and accompanying text.
212. *See supra* notes 27-28 & 202 and accompanying text.