McGeorge Law Review

Volume 14 | Issue 3 Article 13

1-1-1983

Wright Line, A Division of Wright Line, Inc., The Right Answer to the Wrong Question: A Review of Its Impact to Date

Kathleen M. Kelly
Littler, Mendelson, Fastiff & Tichy

Wright Line, A Division of Wright Line, Inc., The Right Answer to the Wrong Question: A Review of Its Impact to Date

KATHLEEN M. KELLY*

I. INTRODUCTION

Section 8(a)(3) of the National Labor Relations Act (hereinafter referred to as the Act)[1] states that it shall be an unfair labor practice for an employer to "encourage or discourage" union activities "by discrimination" regarding terms of employment.[2] Classically, alleged violations of section 8(a)(3) contest the propriety of a discharge or other adverse action that the employer asserts to have been caused by some motive other than an intent to discourage union activity. In *Wright Line, A Division of Wright Line, Inc.*,[3] the National Labor Relations Board (hereinafter referred to as the "Board") adopted a new statement of the analysis to be applied in testing employer motive for adverse action.[4] The Board justified this new statement as (1) more likely to

* B.A., 1973 Yale University; J.D. 1976 George Washington University and Boalt Hall School of Law, University of California. Partner, Littler, Mendelson, Fastiff & Tichy.

1. 29 U.S.C. §158(a)(3) (1976).

2. The text of §8(a)(3) reads, in pertinent part:

> It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

3. 251 N.L.R.B. 1083 (1980).

4. Within *Wright Line* itself, the Board stated that the formulation announced therein would subsequently be applicable to "all cases alleging violation of section 8(a)(3) or violations of

accommodate all litigants' legitimate interests, and (2) necessary to "alleviate intolerable confusion in the 8(a)(3) area"[5] brought about by conflict between the Board and some circuit courts of appeal.

Both labor and management have engaged in significant speculation as to what, if any, impact *Wright Line* will have upon the outcome in unfair labor practice (hereinafter referred to as ULP) cases. After discussing the historical developments leading up to *Wright Line*, this article analyzes those decisions in which *Wright Line* was applied in the eighteen months following its issuance[6] for the purpose of: (1) determining precisely what impact this new formation has had upon the outcome of ULP cases; and (2) measuring *Wright Line's* success in achieving the two objectives summarized above.

Wright Line is found to have fallen short of both its goals because the Board moved too hurriedly towards the statement of a rule which appeared capable of embracing both the Board's own prior standard and competing standards offered by the courts of appeals. Before grasping for uniformity, the Board should have analyzed more exhaustively the competing interests which produced differing formulations in this area and taken more care to assure adequate protection of those interests under its new statement. Upon abandoning its own prior formulation, the Board abandoned important interests sought to be served by the Act which could have been better identified and protected within the

---

section 8(a)(1) turning on employer motivation" 251 N.L.R.B. at 1089. See *infra* text accompanying notes 7-16 for a discussion of distinctions between cases alleging violation of section 8(a)(3) and cases alleging independent violation of section 8(a)(1). Since its promulgation, the rules stated in *Wright Line* have also been applied to cases alleging adverse union action in violation of section 8(b)(1)(A) of the Act (29 U.S.C. §168(b)(1)(A) (1976)) (United Electrical, Radio & Machine Workers of America, Local 1105, 254 N.L.R.B. No. 161 (1981)), and cases alleging adverse union action violative of section 8(b)(2) of the Act (29 U.S.C. §158(b)(2) (1976)) (Freight, Construction, General Drivers, Warehousemen & Helpers, Local 287 IBT, 257 N.L.R.B. No. 168 (1981)). On two occasions, the Board has declined to decide whether the *Wright Line* standards should be applicable to cases alleging employer violation of section 8(a)(4) of the Act (29 U.S.C. §158(a)(4) (1976)), which proscribes discrimination because an employee "has filed charges or given testimony under th[e] Act." *See* American Interstate Freight Lines, 258 N.L.R.B. No. 131 (1980); Royal Development Co., 257 N.L.R.B. No. 149 (1981). In two other contemporaneous cases, a majority of the Board panel has applied the *Wright Line* standards to cases alleging violation of section 8(a)(4). *See* Haynes-Trane Serv. Agency, 259 N.L.R.B. No. 12, slip. op. at 2, n.2 (1981) (Members Fanning and Zimmerman applying *Wright Line* and Member Jenkins finding it inapplicable); Building Material & Dump Truck Drivers, Local No. 420, IBT, 257 N.L.R.B. No. 161, slip op. at 2, n.2 (1981) (Members Fanning, Jenkins and Zimmerman applying *Wright Line* without comment).

5. 251 N.L.R.B. at 1089.

6. The cases studied in order to determine *Wright Line's* impact included the first 169 cases published by the Board which discuss the *Wright Line* formulation or apply it to particular facts. Those cases begin with Behring Int'l, Inc., 252 N.L.R.B. 354 (1980) and conclude with Stop and Shop Co., Medi Mart Div., 259 N.L.R.B. No. 124 (1981). They are believed to encompass all published cases of the type under study reflecting decisions rendered by the Board through December 31, 1981. The decisions under study discuss approximately 226 separate factual situations alleged to have violated sections 8(a)(3) or 8(a)(1). In arriving at this figure allegations regarding separate alleged discriminatees which arise out of the same factual circumstances have been grouped together.

Wright Line framework. This article suggests certain modifications and additions to the *Wright Line* approach designed to accomplish these ends.

II. Developments Leading Up To *Wright Line*

A. Nature of the Cases in Which Motive Has Proved to Be a Problematic Issue

In order to trace the background which leads to *Wright Line*, it is first necessary to distinguish between two types of unfair labor practice cases in which employer motive for adverse action becomes relevant.[7] As noted above, section 8(a)(3) of the Act prohibits discrimination for the purpose of discouraging union activity. These terms obviously raise two topics of inquiry where adverse employer action is claimed to violate section 8(a)(3). First, discrimination must be shown and second, an intent to discourage union activities must be shown.

As to the first issue, discrimination, counsel for the General Counsel (hereinafter referred to as General Counsel) generally begins by establishing that the alleged discriminatee (hereinafter referred to as AD) was selected for adverse action. General Counsel then seeks to satisfy the second element of a section 8(a)(3) violation, intent to discourage union activity, by showing: (1) union activity on the AD's part; (2) knowledge of that activity by the employer; and (3) union animus on the employer's part warranting an inference of a desire to discourage union activity.[8]

The employer generally responds by urging selection of the AD for adverse action to have resulted from uniform application of business policies. This raises an issue regarding the cause for the adverse employer action: Was it caused by the AD's union activity or by the proffered legitimate business reason? Where this issue of cause is resolved against the employer, the second element of a Section 8(a)(3) violation, an intent to discourage union activity, is generally inferred. As stated by the Court of Appeals for the Ninth Circuit:

> [T]he trier of facts may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. . . . If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that,

7. Although the distinction drawn in the text is rudimentary, it is worth drawing carefully. As will be discussed in *infra* text accompanying notes 99-102, the Board and the courts have not consistently borne this rudimentary distinction in mind and this error has sometimes produced unsatisfactory analysis.

8. *See* Gonic Mfg. Co., Div. of Hampshire Willen Co., 141 N.L.R.B. 201, 209 (1963).

> he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.[9]

Section 8(a)(1) of the Act bars any employer conduct which interferes with, restrains or coerces employees in the exercise of rights protected by the Act.[10] The Board has long recognized that violation of any other subpart within section 8(a) has some effect prohibited by section 8(a)(1).[11] Where a violation of section 8(a)(3) is alleged, therefore, a "derivative" violation of section 8(a)(1) is also alleged.

A termination or other adverse employment action may also be independently violative of section 8(a)(1), however, even when the elements of a section 8(a)(3) violation are absent. This generally occurs when a *uniform* application of business policies causes an employee to be disciplined as the direct result of protected activity.[12] Discrimination, a necessary element of any section 8(a)(3) violation, is absent. A coercive effect proscribed by section 8(a)(1), however, is quite present.

The following example illustrates well this category of case. The Board has long held an employee's expression of dissent in grievance meetings to be a protected activity.[13] An employee can exceed the scope of that protection, however, through expression of dissent in an outrageous fashion.[14] On occasion, employers discipline employees for use of vulgarities or defiant speech in grievance meetings. Such discipline might be justified as strictly in keeping with uniform rules calling

---

9. Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966).

10. Section 8(a)(1) provides that, "[i]t 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."

11. 3 N.L.R.B. Ann. Rep. 52 (1939).

12. Terminations have been found independently violative of section 8(a)(1) under two other circumstances not described in the text. The Board has found, with Supreme Court approval, that an independent section 8(a)(1) violation has occurred requiring reinstatement in circumstances when the employee subject to discipline is deprived of the right to union representation during an investigatory interview preceding discipline. NLRB v. J. Winegarten, Inc., 420 U.S. 271 (1975); Tara Corp. Indus., A Division of Tara Corp., 257 N.L.R.B. No. 49 (1981); Southwestern Bell Telephone Co., 251 N.L.R.B. No. 61 (1980), *enforcement denied*, 667 F.2d 470 (5th Cir. 1982). The Board has also found that termination of a supervisor, unprotected by the Act, may bring about an independent violation of section 8(a)(1) requiring reinstatement if implemented as part of a "widespread pattern of misconduct" and effectuated in a manner suggesting to protected employees that they will be dealt with similarly should they engage in union activities. *See, e.g.*, Brothers Three Cabinets, 248 N.L.R.B. 828 (1980). Recent appointments to the Board produced abandonment of the *Brothers Three Cabinets* rationale in Parker-Robb Chevrolet, 262 N.L.R.B. No. 58 (1982). Cases developing the principles stated in *Winegarten* and *Brothers Three Cabinets* are not discussed in the main body of this article since they do not generally pose motivation issues of the sort dealt with in *Wright Line*.

13. *See, e.g.*, Hawaiian Hauling Service, Ltd., 219 N.L.R.B. 765 (1975); Prescot Indus. Prod. Co., 205 N.L.R.B. 51 (1973).

14. *See, e.g.*, Successful Creations, Inc., 202 N.L.R.B. 242 (1973); Charles Myers & Co., 190 N.L.R.B. 448 (1971).

for given discipline upon use of particular words in the work place. If so, discrimination would not be present.

Despite this fact, the Board might find that the conduct at issue was not sufficiently outrageous to remove the employee involved from the Act's protections.[15] If so, the discipline would independently violate section 8(a)(1) by coercing the employee to refrain from further exercise of this protected activity.

Issues of motive also arise in cases involving independent violations of section 8(a)(1). Frequently, the employer argues that some conduct other than that claimed to have been protected was actually the moving force producing discipline.[16] When such a claim is made, the question of cause must be resolved just as it typically is in Section 8(a)(3) cases.

B. The Controversy That Preceded Wright Line

Prior to *Wright Line*, the Board carried on two struggles with the courts of appeals in section 8(a)(3) and section 8(a)(1) cases necessitating an inquiry into motive. Many cases reflected differing approaches by the Board and the courts as to the weight that should be afforded competing evidence of motive. Additionally, significant controversy existed regarding the legal rule which should obtain where review of all the evidence convinces the trier of fact that at least two causes, one legitimate and one illegitimate, played a role in producing the employer action at issue. Such "dual motive" cases raised the question: Does the mere presence of improper motive establish an unfair labor practice or does the law require a showing that the improper motive played some form of significant role in producing the employer action at issue?

---

15. *See, e.g.*, Bob Henry Dodge, Inc., 203 N.L.R.B. 78 (1973).

16. If the employer seeks to establish misconduct allegedly occurring *during* the course of protected activity as the "legitimate" cause for discipline, no issue of motive is posed. This principle was established in NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964). In that case, the employer discharged two employees believed to have made threats against the employer's property while advocating union organization to co-workers. The charge of threats was disproven. Thereafter, the employer sought to defend against the claim that its action violated section 8(a)(1) though asserting that it had been motivated by a good faith belief that misconduct had occurred. The Court found the employer's claim of good faith motivation irrelevant in this context because the interrelationship between the asserted grounds for discharge and protected activity rendered a "deterrent effect" prohibited by section 8(a)(1) quite likely. 379 U.S. at 23. It may be said, therefore, that with regard to disciplinary actions of the sort dealt with in this article, motive is only relevant to independent section 8(a)(1) cases when the employer argues that some conduct *unrelated* to protected activity was actually the moving force producing discipline. The Board and the courts have not developed a uniform view concerning all circumstances under which motive is relevant to other types of alleged section 8(a)(1) violations. For further discussion of this problem, see Christianson & Svanoe, *Motive And Intent In The Commission Of Unfair Labor Practices: The Supreme Court And The Fictive Formality*, 77 YALE L.J. 1269 (1968); Oberer, *The Scienter Factor In Section 8(a)(1) And (3) Of The Labor Act: Of Balancing Hostile Motives, Dogs And Tails*, 52 CORNELL L.Q. 491 (1967).

Prior to *Wright Line*, the Board generally found the presence of improper motive sufficient to establish an unfair labor practice.[17] This approach was referenced as the "in part" test since a finding that a discharge was motivated "in part" by an improper motive produced a further finding that an unfair labor practice had been committed. The courts of appeals, on the other hand, took a wide range of approaches upon answering this question which can be placed into six categories.

A minority of appellate decisions adopted the Board's "in part" test. Several Sixth Circuit decisions applied the "in part" test in cases involving independent violations of section 8(a)(1).[18] The Sixth Circuit insisted, however, upon the use of different tests in cases involving alleged violations of section 8(a)(3). None of the Sixth Circuit's decisions, however, contained any analysis explaining a logical basis for distinction between the motive test to be applied in independent section 8(a)(1) cases and section 8(a)(3) cases.[19]

Decisions of the District of Columbia Circuit also conflicted with one another. In one year, the District of Columbia Circuit made a decision applying the "in part" test[20] and a further decision holding that the Board must, "find an affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one."[21] The Tenth Circuit appeared to adopt the Board's "in part" test more uniformly.[22]

A second group of appellate decisions adopted what may most easily be referred to as the "but for" test. This test required the General Counsel to prove that the discharge or other adverse employment action at issue would not have occurred "but for" the presence of the impermissible cause. The Second Circuit[23] and at least some decisions

17. *See* The Youngstown Osteopathic Hospital Ass'n, 224 N.L.R.B. 574, 575 (1976).

18. *See* NLRB v. Lloyd A. Fry Roofing Co. of Delaware, 651 F.2d 442, 446 (6th Cir. 1981); Vic Tanny Int'l, Inc. v. NLRB, 622 F.2d 237, 241 (6th Cir. 1980); NLRB v. Elias Bros. Restaurants, 496 F.2d 1165, 1167 (6th Cir. 1974). The Sixth Circuit appears to have also applied this test in cases alleging violation of section 8(a)(4) of the Act. *See* NLRB v. Retail Store Employees' Union, Local 876, 570 F.2d 586, 590 (6th Cir. 1978).

19. NLRB v. Lloyd A. Fry Roofing Co. of Delaware, 651 F.2d 442 (6th Cir. 1981), NLRB v. Ogle Protection Serv., 375 F.2d 497 (6th Cir.) *cert. denied*, 389 U.S. 843 (1967) as authority directly contrary to the holding in *Lloyd A. Fry* to the effect that, "[i]n this Circuit, if a discharge is motivated 'in part' by an employee's protected concerted activities the discharge violates Section 8(a)(1) of the Act." 651 F.2d at 446. In matter of fact, the two cases are not directly to the contrary. *NLRB v. Ogle Protection Serv.*, concerned an alleged violation of section 8(a)(3), not an alleged violation of section 8(a)(1). The failure of the panel in *Lloyd A. Fry* to recognize this as a possible basis for distinction clearly suggests that the circuit has not developed any reasoned basis for adhering to different modes of analyzing motive in cases alleging independent violation of section 8(a)(1) and cases alleging violation of section 8(a)(3).

20. Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977).

21. Midwest Regional Joint Bd., Amalgamated Clothing Workers of America v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977) (quoting NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1981)).

22. M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166, 173 (10th Cir. 1977).

23. Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978).

rendered by the Ninth Circuit[24] appear to use this test. Analytically, the "but for" test does not require a showing that the impermissible ground played a greater part in motivating employer action than the permissible ground;[25] it requires only a showing that the impermissible ground was sufficiently present and momentous to have pushed the employer from the point of inaction to the point of action.

Some courts of appeal rejected use of the "but for" test in light of this characteristic and searched for some formulation which would not allow the finding of an unfair labor practice under circumstances where the proper motive played a proportionately greater part in producing employer action than did the improper motive, even though the latter might be characterized as a "but for" cause. The Fifth Circuit fell within this category. In one decision it held that the impermissible ground must be the "moving cause" for employer action.[26] On another occasion it suggested that the improper motive must be "reasonably equal" to the proper motive.[27]

A further category of appellate decisions went one step past the Fifth Circuit's "reasonably equal" formulation and produced what became the majority view among the courts of appeal prior to *Wright Line*. These courts found that the improper cause for adverse employer action must be shown to have been the "dominant motive" in cases of mixed motives. Literally taken, this test requires a greater showing by the General Counsel than does the "but for" test. As noted above, an unfair labor practice may be found under the "but for" test even if the improper motive's part in the employer's decision-making process was proportionately small, so long as that motive was sufficient to make the difference between inaction and action. On the other hand, the "dominant motive" test would appear to require a showing that any improper cause played a proportionately greater part in producing adverse employer action than did contributing proper causes. Interestingly enough, however, several courts of appeal shifted back and forth between use of the "but for" test and the "dominant motive" test without recognition of any apparent inconsistency between them.[28] The First Circuit, which was the first to formulate the "dominant motive" test, made a gradual shift in description transforming its standard into a

24. NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359, 1366-69 (9th Cir. 1981); Ad Art, Inc. v. NLRB, 645 F.2d 669, 678 (9th Cir. 1980).

25. *See* NLRB v. Charles Batchelder Co., 646 F.2d 33, 38 (2nd Cir. 1981).

26. TRW, Inc. v. NLRB, 654 F.2d 307, 310 (5th Cir. 1981).

27. NLRB v. Aero Corp., 581 F.2d 511, 514 (5th Cir. 1978).

28. *Compare* Lippincott Indus., Inc. v. NLRB, 661 F.2d 112, 115 (9th Cir. 1981) (applying the "but for" test) *with* NLRB v. Int'l Medication Systems, Ltd., 640 F.2d 1110, 1113 (9th Cir. 1981); L'eggs Prods., Inc. v. NLRB, 619 F.2d 1337, 1341 (9th Cir. 1980); *and* Western Exterminators Co. v. NRLB, 565 F.2d 1114, 1118 (9th Cir. 1977) (all of which apply the "dominant motive" test).

"but for" test.[29] The Sixth Circuit applied the First Circuit's mixed "dominant motive"/"but for" test rather consistently in cases alleging violation of section 8(a)(3).[30]

A further group of appellate decisions resorted to recitation of generalities when confronted with dual motive cases rather than adopting any of the above summarized formulations. The Third Circuit insisted that the Board must show the impermissible ground to have been the "real motive" for employer action without explaining what "real" means in the context of the dual motive case.[31] Likewise, the Seventh Circuit found that an unfair labor practice has not occurred unless a bad motive contributed in a "significant way" to employer action without ever defining what quantum of motivation reaches "significance."[32]

A last group of appellate decisions stated the governing rule in such a way as to deny the very existence of dual motive cases, thereby avoiding the issue. The following statement by the Fourth Circuit typifies this approach: "But when cause exists, the Board must show an 'affirmative and persuasive reason why the employer rejected the good cause and chose the bad one.' "[33] The First Circuit[34] and on one occasion, as noted above, the District of Columbia Circuit, also resorted to this denial that two motives, one good and one bad, can play a real and tangible part in motivating employer action. In sum, ample evidence existed to substantiate the observation made by the Board in *Wright Line* that, "in an area fundamental to the Act, namely, section 8(a)(3), disagreement and controversy are rampant among the various decisionmaking

29. In NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963), the First Circuit defined the "dominant motive" test as requiring the Board to demonstrate that ". . . the union activity *weighed more heavily* in the decision to fire . . ." than did any proper motive. This definition appears in keeping with the literal meaning of the word "dominant." In NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1315 (1st Cir. 1971), the First Circuit defined "dominant motive" as ". . . the one that in fact brought about the result." This formulation appears to render the "dominant motive" test nearly synonomous with the "but for" test. In Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977), the First Circuit made quite clear that it viewed the "dominant motive" test as synonomous with the "but for" test:

> And we are somewhat concerned that, while the ALJ cited this Circuit's decision in *NLRB v. Fibers Int'l Corp.*, 439 F.2d 1311, 1312 (1st Cir. 1971), in which we held that there had to be a finding of dominant motive, he found that the discharge was motivated 'in substantial part' by union animus. Only because it is so clear from the decision as a whole that the ALJ in fact found that Loppi would not have been fired but for his union activities do we accept the Board's findings.

Id. at 1293.

30. Charge Card Ass'n v. NLRB, 653 F.2d 272 (6th Cir. 1981); NLRB v. Consolidated Freightways Corp., 651 F.2d 436 (6th Cir. 1981); Propak Corp. v. NLRB, 578 F.2d 169 (6th Cir. 1978).

31. NLRB v. Gentithes, 463 F.2d 557, 560 (3d Cir. 1972); NLRB v. Rubber Rolls, Inc., 338 F.2d 71, 74 (3d Cir. 1967).

32. NLRB v. Pfizer, Inc., 629 F.2d 1272, 1275, 1277 (7th Cir. 1980) (per curiam).

33. NLRB v. Burns Motor Freight, Inc., 635 F.2d 312, 314 (4th Cir. 1980) (per curiam).

34. NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968).

bodies."[35]

C. Wright Line*'s Response To This Disarray*[36]

In *Wright Line*, the Board responded to this disarray by adopting a test of causality akin to that used by the Supreme Court in *Mount Healthy City School District Board of Education v. Doyal*.[37] Although *Mount Healthy* dealt with adverse employer action alleged to violate an employee's rights under the first amendment to the United States Constitution, rather than a statutory protection, the facts of the case posed a remarkably clear instance of dual motivation and the Board found the Supreme Court's approach to this dual motive case a useful model.

The Mount Healthy City School District Board of Education declined to renew Doyal's contract for employment as a teacher and clearly cited two reasons in support of its decision. Doyal was informed by letter that he was found unacceptable for future employment because (1) he had communicated directly with a local radio station about a controversy between teachers and the administration over the dress code to be applicable to teachers, and (2) he used obscene gestures to correct students during a cafeteria confrontation.[38] The district court, the Court of Appeals for the Sixth Circuit and the Supreme Court had little difficulty in concluding that the first activity cited by the Board of Education as a basis for denying Doyal further employment was an activity protected by the first amendment.[39] The district court, court of appeals and Supreme Court also presumed the

35. 251 NLRB at 1086. Administrative Law Judges (ALJs) rendering decisions prior to *Wright Line* used a wide range of labels to describe their causation analysis in an effort to satisfy both the Board's prevailing standard and the various standards which might be applied if their decisions were ultimately to be scrutinized by a court of appeals. *See, e.g.*, Herman Bros., Inc., 252 N.L.R.B. 848 (1980) ("chief reason"); Weather Tamer, Inc. & Tuskegee Garment Corp., 253 NLRB 293 (1980) ("substantially, if not solely motivated"); Russ Togs, Inc., 253 N.L.R.B. 767 (1980) ("principally" motivated); Sanitas Cura, Inc., 255 N.L.R.B. 1164 (1981) ("a substantial ground motivating, but perhaps not necessarily sole reason contributing"); Automotive Armature Co., Inc., 256 NLRB 270 (1981) ("substantially, if not solely motivated"); Mark I Tune-Up Centers, Inc., 256 NLRB 898 (1981) ("prominent reason").

36. This textual summary is not intended to exhaustively describe and scrutinize the reasoning of *Wright Line*. It is provided as necessary background for later discussion. Other articles have been written for the purpose of critically analyzing the rule of law stated in *Wright Line*. *See, e.g.*, Coleman, *Wright Line: A Variation On The Old Shell Game—"Now You See It, Now You Don't,"* 40 FED. BAR. NEWS AND J. 208 (1981); Lederer, *"W"right Line or Spurtrack?*, 43 LAB. L.J. 67 (1982); Note, *Wright Line: NLRB Adopts The Mount Healthy Test For Dual Motive Discharge Cases Under the LMRA*, 32 MERCER L. REV. (1981); Note, *Determining A Standard Of Causation For Discriminatory Discharges Under Section 8(a)(3) Of The National Labor Relations Act*, 59 WASH. U.L.Q. 913 (1982). Such is not the purpose of this article. As stated in the introduction, this article seeks to analyze *Wright Line's* practical effect in application and its degree of success in meeting its stated goals, as measured by applications of that formulation to date.

37. 429 U.S. 274 (1977).

38. *Id.* at 283 n.1.

39. *Id.* at 283-85.

second activity cited by the Board of Education as a basis for its dissatisfaction with Doyal to have been unprotected by any constitutional or statutory right.[40] The case posed, therefore, a situation in which two motives, one impermissible and one permissible, concededly played some part in motivating adverse action on an employer's part.

The district court directed Doyal's reinstatement on the grounds that activity protected by the First Amendment played a "substantial part" in the Board of Education's decision not to renew Doyal's employment.[41] The court of appeals affirmed this result in a brief per curiam opinion. The Supreme Court rejected this result, expressing concern that such a rule, "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[42] The court found that, "the constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."[43] The Court remanded the case to the district court finding that it,

> [s]hould have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.[44]

In *Wright Line*, the Board acknowledged the mode of analysis stated in *Mount Healthy* to differ from its own prior "in part" test. As stated by the Board "*Mount Healthy* represents a rejection of an 'in part' test which stops with the establishment of a *prima facie* case or at consideration of an improper motive."[45] The Board also found the court's *Mount Healthy* formulation to differ from the "dominant motive" test then prevalent among the courts of appeals. The Board characterized the "dominant motive" test as requiring the General Counsel to rebut any employer assertion of proper motive "by demonstrating that the discharge would not have taken place in the absence of the employee's protected activities." The Board characterized *Mount Healthy* as requiring the *employer* to demonstrate that it *would* have taken the action at issue in the absence of protected activities rather than requiring the complainant to prove the opposite.[46] In support of this characterization, *Wright Line* noted the phrase, "whether *the Board* had shown

40. *Id.*
41. *Id.* at 283.
42. *Id.* at 285.
43. *Id.*
44. *Id.* at 287.
45. 251 N.L.R.B. at 1087.
46. *Id.*

[emphasis added]" in the *Mount Healthy* holding quoted above and also placed reliance upon further Court comment in a case rendered the same day as *Mount Healthy*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[47]

After discussing brief excerpts from the legislative history of the Act and excerpts from the Supreme Court's hallmark decision concerning the relevance of motive to section 8(a)(3) violations in *NLRB v. Great Dane Trailers, Inc.*[48] the Board concluded that its understanding of the Court's *Mount Healthy* analysis is the most appropriate approach for application in ULP cases turning on employer motivation. It held, therefore, as follows:

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. 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 a protected conduct.[49]

Despite its earlier recognition that the *Mount Healthy* formulation differs from its own "in part" test, the Board concluded its discussion in *Wright Line* by insisting that replacement of the "in part" test should not be considered a "repudiation of the well-established principles and concepts which we have applied in the past." The Board insisted that both tests represent consistent efforts to reach a single goal, namely, thorough and complete analysis of "the justification presented by the employer" in cases of this sort.[50]

III. The Effect *Wright Line* Has Had Upon Resolution Of Unfair Labor Practice Claims

A. Observations Rendered To Date

Since *Wright Line* itself expresses a disinclination on the Board's part to repudiate "the well-established principles and concepts which [the Board has] applied in the past,"[51] most observers expected the test to

47. 429 U.S. 252 (1977).
48. 388 U.S. 26 (1967).
49. 251 N.L.R.B. at 1089. Although the controversy leading up to *Wright Line* concerned only a portion of section 8(a)(3) and section 8(a)(1), cases raising motive as an issue, namely, "dual motive" cases, the Board directed application of its new *Wright Line* test to *all* section 8(a)(3) and section 8(a)(1) cases raising motive. Upon so doing, it intimated that uniform analysis should be sought since the *Wright Line* test would be expected to produce results identical to the prior "in part" test when applied to anything other than a dual motive case. *Id.* at 1089 n.13.
50. *Id.*
51. *Id.*

result in nothing more than new or additional justification for results which the Board would have reached in any event. Most commentators expressing an opinion to date have characterized *Wright Line* as a facelift approach designed to appease the courts of appeals but unlikely to make any tangible difference in the outcome of cases.[52] Such commentators have found no significant statistical variance in the General Counsel's "win rate" before and after *Wright Line*.

An analysis of all cases in which the Board has applied *Wright Line* to Administrative Law Judge (hereinafter referred to as ALJ) decisions rendered under pre-*Wright Line* law gives apparent support to these observations. One would expect these cases to provide a clear indication of the respects, if any, in which *Wright Line* demands a different result from that obtaining under prior law. During the period encompassed by this study, the Board applied *Wright Line* analysis to approximately 23 cases involving approximately 56 ADs in which the ALJ's analysis was premised upon prior law.[53] The Board reversed its ALJ in only three of these cases. None of these reversals, however, appear to be premised upon application of the *Wright Line* formulation to facts considered by the ALJ under the "in part" test. Each reversal appears to have resulted from a difference of opinion between the Board panel and the ALJ as to whether the General counsel had adduced probative evidence establishing a *prima facie* case.[54] In each of the cases, the ALJ found insufficient probative evidence supporting a *prima facie* case. The ALJs did not, therefore, proceed to apply the "in part" test since they found no necessity to separate mixed motives. The Board, upon finding probative evidence of a *prima facie* case, proceeded to apply the *Wright Line* test to additional facts found by the ALJ in each case, ultimately concluding a violation to have been established. These 56

52. *See, e.g.*, Coleman, *supra* note 36, at 209; Lederer, *supra* note 36, at 80.

53. R.P. Scherer (Southeast) Corp., 258 N.L.R.B. 400 (1981); Am. Tool & Eng'g Co., 257 N.L.R.B. 608 (1981); Mark I Tune-up Centers, Inc., 256 N.L.R.B. 898 (1981); Automotive Armature Co., 256 N.L.R.B. 270 (1981); Transp. Management Corp., 256 N.L.R.B. 101 (1981); Bronco Wine Co., 256 N.L.R.B. 53 (1981); Sanitas Cura, Inc., 255 N.L.R.B. 1164 (1981); Associated Milk Producers, 255 N.L.R.B. 750 (1981); Magnetics Int'l, Inc., 254 N.L.R.B. 520 (1981); Clark Manor Nursing Home Corp., 254 N.L.R.B. 455 (1981) (involving 3 AD's); Newport News Shipbuilding & Drydock Co., 254 N.L.R.B. 375 (1981) (involving 2 AD's); Gossen Co., A Division of the United States Gypsum Co., 254 N.L.R.B. 339 (1981) (involving 6 AD's); Overnight Transp. Co., 254 N.L.R.B. 132 (1981) (involving 16 AD's); Red Ball Motor Freight, Inc., 253 N.L.R.B. 871 (1980); United Broadcasting Co., 253 N.L.R.B. 697 (1980); Russ Togs, Inc., 253 N.L.R.B. 767 (1980); Joshua's, Inc., 253 N.L.R.B. 588 (1980); Weather Tamer, Inc., 253 N.L.R.B. 293 (1980); Valley Cabinet & Mfg., Inc., 253 N.L.R.B. 98 (1980); The Motor Convoy, Inc., 252 N.L.R.B. 1253 (1980); United Parcel Serv., Inc., 252 N.L.R.B. 1015 (1980); Herman Bros., Inc., 252 N.L.R.B. 848 (1980); Taylor-Dunn Mfg., 252 N.L.R.B. 799 (1980).

54. Bronco Wine Co., 256 N.L.R.B. 53 (1981); Clark Manor Nursing Home Corp., 254 N.L.R.B. 455 (1981) (regarding AD Fowley); Overnight Transp. Co., 254 N.L.R.B. 132 (1981) (regarding AD Ennix).

fact situations, therefore, considered alone, reflect no consequential difference under the *Wright Line* formulation and prior law.

Neither comparison of the General Counsel's pre-*Wright Line* and post-*Wright Line* "win rates" nor review of post-*Wright Line* Board cases reviewing pre-*Wright Line* ALJ decisions are, however, satisfactory means of testing *Wright Line's* impact for a very simple reason. The Board stated in *Wright Line* that the holding of that case would be applicable in the future to *all* cases involving employer motive. The Board further made clear, however, that the new rule was designed primarily to deal with a specific category of case which had previously been surrounded by controversy, namely, dual motive cases. The Board defined a dual motive case as one in which the "existence of *both* a 'good' and a 'bad' reason for the employer's action requires further inquiry into the role played by each motive."[55] One should not expect *Wright Line* to have any effect in the many cases which do not fall within this category. To examine its actual effect, therefore, it is first necessary to segregate post-*Wright Line* decisions into those which meet this definition and those which do not.

B. Identification Of The Cases Likely To Be Affected

As noted above, *Wright Line* was developed to deal with *dual* motive cases, that is, cases where credible evidence exists that at least two causes, one proper, and one improper, played some role in motivating employer action. *Mount Healthy* provides a rather pure example of a dual motive case. The Board of Education candidly conceded that two activities on Doyal's part precluded his further employment. One of those activities was protected by the first amendment and one was not. Both causes undeniably played some real and tangible role in motivating the Board of Education to refuse renewal of Doyal's employment contract.

In order to segregate post-*Wright Line* Board decisions meeting this definition from others it is helpful to first develop a clear understanding as to what additional categories of section 8(a)(3) and section 8(a)(1) cases placing motive at issue exist.

Wright Line defines two major categories of cases alleging violation of section 8(a)(3) or section 8(a)(1) which place motive at issue. The second major category recognized in *Wright Line* is identified as "pretext" cases and defined to include all cases when,

> [t]he purported rule or circumstance advanced by the employer did not exist, or was not in fact, relied upon. When this occurs, the rea-

55. 251 N.L.R.B. at 1084.

> son advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.[56]

This definition, in fact, embraces two types of cases. The first type of case characterized as "pretextual" by the Board is that in which, "the purported rule or circumstance advanced by the employer did not exist." The second type of case characterized by the Board as "pretextual" is that in which, "the purported rule or circumstance advanced by the employer" can be shown to have existed but, "was not, in fact, relied upon." The former category is far more narrow than the latter, which encompasses all cases in which the Board rejects employer testimony as undeserving of credit or insufficiently probative to meet the General Counsel's *prima facie* case. As acknowledged in *Wright Line*, the Board has generally used the "pretext" label to encompass both cases meeting the narrow definition of pretext and cases encompassing the more broad definition of pretext.

All courts of appeals are not in agreement with the Board's use of the "pretext" label and some have insisted that this label be limited to that more narrow group of cases in which "the purported rule or circumstance advanced by the employer did not exist." For example, in *TRW, Inc. v. NLRB*,[57] the Court of Appeals for the Fifth Circuit opined as follows:

> The very nature of a "pretext" is a false or sham reason. When the employer advances a legitimate reason for the discharge, and *it is not shown that this reason is untrue*, the case cannot be characterized as a pretext case but must be considered a "dual-motive" case.[58]

Given this difference of opinion, the remainder of this article will distinguish between the two categories of pretext cases encompassed by the Board's definition. The label "Pretext I" will be used to refer to cases in which "the purported rule or circumstance advanced by the employer did not exist" and the label "Pretext II" will be used to refer to cases in which the trier of fact is not convinced after review of all the evidence that, "the purported rule or circumstance advanced by the employer . . . was . . ., in fact, relied upon."

Although *Wright Line* itself only references two types of cases alleging violation of section 8(a)(3) or section 8(a)(1) which place motive at issue, many cases may not be properly categorized as *either* pretext cases or dual motive cases. Several other categories must be defined in order to evaluate adequately the decisions rendered since *Wright Line*,

56. *Id.*
57. 654 F.2d 307 (5th Cir. 1981).
58. *Id.* at 310 (emphasis added).

determine the areas in which the *Wright Line* formulation might be expected to have some impact, and test the degree to which *Wright Line* has accomplished its objectives.

Pretext cases, by definition, result in a finding that the Act has been violated because the employer either fails to establish the facts asserted in its defense (Pretext I) or fails to convince the trier of fact that the event or conduct asserted was actually a motivating factor in causing employer action (Pretext II). An analogous category of cases exists which may be seen as the "flip side" to the pretext characterization. In some cases, review of all evidence convinces the trier of fact that the General Counsel has failed to offer probative evidence that discriminatory motive played any part whatsoever in the action contested. In such cases, the trier of fact concludes there to have been a single motive for the contested action, namely, a permissible motive.

Two other categories of "single motive" cases exist. In a minority of cases, almost no evidence is offered by the employer to combat the General Counsel's evidence that the contested action was improperly motivated. In such a case, the trier of fact has no alternative but to conclude that a single, impermissible motive existed for the contested action. Cases alleging independent violations of section 8(a)(1) give rise to a last category of "single motive" cases. In many such cases, no dispute exists as to what event or conduct precipitated employer action. The sole dispute concerns whether that conduct is protected by the NRLA. The remainder of this article will use the labels "Single Motive IG" (meaning single "good" motive), "Single Motive IB" (meaning single "bad" motive), and "Single Motive II," respectively, to reference the three types of single motive cases here described.

In sum, the following categories of cases will be identified and used for purposes of determining *Wright Line's* impact on the resolution of ULP cases and its success in accomplishing its stated goals:

Pretext I Case: The event/conduct allegedly causing legitimate employer action cannot be established factually. In such a case, the Board will infer a discriminatory motive if the record establishes union activity, knowledge of that activity on the employer's part and union animus.

Pretext II Case: The event allegedly causing legitimate employer action *is* established factually, but the record considered as a whole establishes that this event was not an activating factor in producing the contested discipline or other adverse action.

Single Motive IG Case: No convincing evidence of discriminatory motive is found.

Single Motive IB Case: No legitimate employer motive is asserted.

Single Motive II Case: No dispute exists as to what event/conduct

precipitated employer action. The sole dispute concerns whether that conduct is protected by the Act.

Dual Motive Case: The employer was, in fact, influenced by *both* 1) union animus and 2) unprotected conduct which is shown to have taken place in deciding to take the contested action.

C. *The Impact of* Wright Line

As noted above,[59] the body of cases studied for purposes of determining *Wright Line's* impact in this article involved approximately 226 separate allegations of section 8(a)(3) violations and independent section 8(a)(1) violations placing motive at issue. When the facts found and conclusions stated in those cases are analyzed, it becomes clear that only a small number strictly meet the definition for a dual motive case stated above, namely, a case in which two or more motives, at least one proper and one improper, are found to have played a real and tangible role in producing the contested employer action.

Of the cases encompassed in this study, 45 are best characterized as Pretext I cases.[60] In this group of cases the Board concludes that the employer failed to offer probative evidence establishing the event or conduct claimed to have acted as a legitimate cause for action. Given the absence of any legitimate motive in these cases, there is no need for

59. *See supra* note 6.

60. Mount Desert Island Hosp., 259 N.L.R.B. No. 80 (1981); Model A and Model T Motor Car Reproduction Corp., 259 N.L.R.B. No. 77 (1981) (AD Hall); Progressive Supermarkets, Inc., 259 N.L.R.B. No. 74 (1981); L & M Radiator, Inc., 259 N.L.R.B. No. 20 (1981); S.W. Hart & Co., 258 N.L.R.B. No. 192 (1981); American Geri-Care, Inc., 258 N.L.R.B. No. 147 (1981); Lattimer Assoc., 258 N.L.R.B. No. 132 (1981); Am. Interstate Freight Lines, 258 N.L.R.B. No. 131 (1981); Cumberland Farms Dairy, 258 N.L.R.B. No. 120 (1981); Arrow Automotive Indus., 258 N.L.R.B. No. 116 (1981) (ADs Biggs & Smith); Dimensions In Metal, Inc, 258 N.L.R.B. No. 78 (1981) (AD Williams); Valley Plaza, Inc., 258 N.L.R.B. No. 76 (1981) (two groups of ADs); St. John's Constr. Corp., 258 N.L.R.B. No. 67 (1981) (two groups of ADs); Transp. Management Corp., 258 N.L.R.B. No. 61 (1981) (AD Faustrum); Timberline Energy Corp., 258 N.L.R.B. No. 37 (1981); Metropolitan Life Ins. Co., 258 N.L.R.B. No. 8 (1981); George W. Kugler, Inc., 258 N.L.R.B. No. 7 (1981); Thurston Motor Lines, Inc., 257 N.L.R.B. No. 171 (1981) (ADs Long & Johnson); Bldg. Material & Dump Truck Drivers Local 420, 257 N.L.R.B. No. 161 (1981); Rish Equip. Co., 257 N.L.R.B. No. 109 (1981) (ADs Ake, Morris, M. Aldridge, R. Aldridge and Palmer); El Charro Mexican Foods, Inc., 257 N.L.R.B. No. 982 (1981); Builders Distrib. Sand & Gravel, Inc., 257 N.L.R.B. No. 53 (1981); Salem Paint, Inc., 257 N.L.R.B. No. 50 (1981); Welfare, Pension and Vacation Funds, Blasters, Drillrunners and Miners Local 29, 256 N.L.R.B. No. 170 (1981); Heartland Food Warehouse, Division of Purity Supreme Supermarkets, 256 N.L.R.B. No. 145 (1981); Art Steel of California, Inc., 256 N.L.R.B. No. 140 (1981); Southern Alleghenies Disposal Serv., Inc., 256 N.L.R.B. No. 135 (1981); Vee Cee Provision, Inc., 256 N.L.R.B. No. 125 (1981); Pace Oldsmobile, Inc., 256 N.L.R.B. No. 111 (1981) (AD Kennedy); Maryland Shipbuilding & Dry Dock Co., 256 N.L.R.B. No. 69 (1981); Maxwell's Plum, 256 N.L.R.B. No. 36 (1981); Castle Instant Maintenance/Maid, Inc., 256 N.L.R.B. No. 29 (1981); Modesti Bros., Inc., 255 N.L.R.B. No. 126 (1981); Gasko & Meyer, Inc., 255 N.L.R.B. No. 95 (1981) (AD Fulton); Glover Bottled Gas Corp., 255 N.L.R.B. No. 11 (1981); Bond Press, Inc., 254 N.L.R.B. No. 152 (1981); Concord Furniture Indus., 254 N.L.R.B. No. 109 (1981); Clark Manor Nursing Home Corp., 254 N.L.R.B. No. 54 (1981) (AD Shea).

application of the *Wright Line* formula for assessing the effects of mixed motives.

Of the cases under study, 95 can best be characterized as Pretext II cases.[61] In these cases, the employer was able to offer probative evidence of the event or conduct alleged to have legitimately motivated the contested action. A review of all of the evidence, however, convinced the Board that the event or conduct relied upon by the employer

61. Teamsters Local 515, 259 N.L.R.B. No. 94 (1981); Mathews Ready Mix, Inc., 259 N.L.R.B. No. 92 (1981); Model A and Model T Motor Car Reproduction Corp., 259 N.L.R.B. No. 77 (1981) (ADs Rine and Hunt); Brook Shoe Mfg. Co., 259 N.L.R.B. No. 71 (1981); Browning-Ferris Indus., 259 N.L.R.B. No. 21 (1981); Union Oil Co., 258 N.L.R.B. No. 188 (1981); Prentice-Hall, Inc., 258 N.L.R.B. No. 184 (1981); Jackson Dairy Prod., 258 N.L.R.B. No. 172 (1981); Jaybil Steel Prods., 258 N.L.R.B. No. 157 (1981) (ADs Ramis, Pardoll and Rodriguez/Salmon); Ingram Farms, Inc., 258 N.L.R.B. No. 137 (1981); St. Mary's Home, Inc., 258 N.L.R.B. No. 134 (AD Mitchell); Leisure Time Tours, Inc., 258 N.L.R.B. No. 128 (ADs Brunner and Frey); Quebecor Group, 258 N.L.R.B. No. 125 (1981) (ADs Harris, Leventhal and Brennan); Blackstone Co., 258 N.L.R.B. No. 124 (1981) (ADs Nagy and Moffat); Arrow Automotive Indus., 258 N.L.R.B. No. 116 (1981) (AD Wilkie); Rosaver's Supermarkets, Inc., 258 N.L.R.B. No. 111 (1981); McAllen Coca-Cola Bottling Co., 258 N.L.R.B. No. 105 (1981); Lord & Taylor, 258 N.L.R.B. No. 82 (1981); Dimensions In Metal, Inc., 258 N.L.R.B. No. 78 (1981) (ADs Campbell and Boyce-Saulsberry); Webb Ford, Inc., 258 N.L.R.B. No. 62 (1981); Transp. Management Corp., 258 N.L.R.B. No. 61 (1981) (ADs Moore, Johnson and Bassett-Cahill); Thurston Motor Lines, 258 N.L.R.B. No. 48 (1981); Scuba Mfg. Co., 258 N.L.R.B. No. 38 (1981); Thurston Motor Lines, Inc., 257 N.L.R.B. No. 172 (1981); Liberty Homes, Inc., 257 N.L.R.B. No. 169 (1981); Wisdom Indus., 257 N.L.R.B. No. 164 (1981); 15 East 48th Restaurant, 257 N.L.R.B. No. 156 (1981) (ADs Stamatopoulos, Kiropoulos and Marinis); Royal Dev. Co., 257 N.L.R.B. No. 149 (1981); Chem. Fab Corp., 257 N.L.R.B. No. 142; King Soopers, 257 N.L.R.B. No. 138 (1981); RAI Research Corp., 257 N.L.R.B.No. 127 (1981); Addy Mechanical Fabricators & Constructors, Inc., 257 N.L.R.B. No. 111 (1981) (AD Decker); Wellington Hall Nursing Home, Inc., 257 N.L.R.B. No. 106 (1981); Alumina Ceramics, Inc., 257 N.L.R.B. No. 105 (1981); Joseph Magnin Co., 257 N.L.R.B. No. 86 (1981); Am. Tool & Eng'g Co., 257 N.L.R.B. No. 79 (1981) (several ADs); Kawasaki Motors Corp., 257 N.L.R.B. No. 69 (1981) (AD Bennett); Sioux Prods., 257 N.L.R.B. No. 56 (1981) (AD Arroyo); Dining & Kitchen Admin., 257 N.L.R.B. No. 46 (1981); Inland Steel Co., 257 N.L.R.B. No. 13 (1981); Palomar Transp., 256 N.L.R.B. No. 177 (1981); Mark I Tune-Up Centers, 256 N.L.R.B. No. 138 (1981); Polk Bros. Concrete Prods., 256 N.L.R.B. No. 128 (1981) (AD Kimbrel); U.S. Postal Serv., 256 N.L.R.B. No. 121 (1981); Turner Tool & Joint Rebuilders Corp., 256 N.L.R.B. No. 101 (1981); Metropolitan Life Ins., 256 N.L.R.B. No. 100 (1981); Golden Beverage of San Antonio, 256 N.L.R.B. No. 81 (1981) (several ADs); Together We Stand Womens' Guild Day Care Center, 256 N.L.R.B. No. 64 (1981) (AD Stovall); Automotive Armature Co., 256 N.L.R.B. No. 43 (1981); Transp. Management Corp., 256 N.L.R.B. No. 25 (1981); Wean United, Inc., 255 N.L.R.B. No. 134 (1981); Associated Milk Producers, 255 N.L.R.B. No. 104 (1981); Limestone Apparel Corp., 255 N.L.R.B. No. 101 (1981); Doug Hartley, Inc., 255 N.L.R.B. No. 97 (1981); Zurn Indus., 255 N.L.R.B. No. 88 (1981); Guerdon Indus., 255 N.L.R.B. No. 86 (1981) (ADs Merritt, Jones and Kirby/Short); Five Star Air Freight Corp., 255 N.L.R.B. No. 46 (1981); United Electrical, Radio & Machine Workers Local 1105, 254 N.L.R.B. No. 161 (1981) (applying *Wright Line* to an alleged Section 8(b)(1)(A) violation and finding the respondent's proffered motive for failure to pursue a grievance not to have, in fact, been relied upon); Quality Broadcasting Corp., 254 N.L.R.B: No. 118 (1981); Kleinert's, 254 N.L.R.B. No. 107 (1981); Bd. of Trustees of City Hospital, 254 N.L.R.B. No. 97 (1981); Clark Manor Nursing Home Corp., 254 N.L.R.B. No. 54 (1981) (ADs Girard and Fowley); Newport News Shipbuilding & Dry Dock Co., 254 N.L.R.B. No. 43 (1981) (ADs Saunders & Sawyer); Gossen Co., A Division of the United States Gypsum Co., 254 N.L.R.B. No. 41 (1981) (ADs Magee, Parr and White/Lavine); Doral Bldg. Serv., 254 N.L.R.B. No. 23 (1981); Overnite Transp. Co., 254 N.L.R.B. No. 11 (1981) (ADs Brown, Ennix, Wiggington, and Walker); Red Ball Motor Freight, Inc., 253 N.L.R.B. 871 (1980); Russ Toggs, Inc., 253 N.L.R.B. 767 (1980); Joshua's, Inc., 253 N.L.R.B. 588 (1980); Weather Tamer, Inc., 253 N.L.R.B. 293 (1980); Valley Cabinet & Mfg., 253 N.L.R.B. 98 (1980); The Motor Convoy, Inc., 252 N.L.R.B. 1253 (1980); United Parcel Serv., Inc., 252 N.L.R.B. 1015 (1980); Herman Bros., Inc., 252 N.L.R.B. 848 (1980); Taylor-Dunn Mfg., 252 N.L.R.B. 799 (1980); Behring Int'l., Inc., 252 N.L.R.B. 354 (1980).

did not, in fact, play an activating role in motivating the contested employer action. Numerous factors such as evidence that the employer was engaging in surveillance of the AD for the purpose of developing a pretextual reason for discipline,[62] timing destructive of the employer's defense,[63] significant inconsistencies in the defense offered by the employer,[64] statements admitting a true improper reason for discipline,[65] or prior condonation of the misconduct relied upon[66] are noted by the Board in these decisions in support of its conclusion that the legitimate motive proffered by the employer was not an actual motivating factor.

Many commentators are disinclined to distinguish this group of cases from those categorized as true dual motive cases in this discussion.[67] This group of cases must be segregated, however, in order to identify the effect *Wright Line* has had where mixed motivation is proven. Where a single (bad) motive is found operative, the result will be the same no matter what rule is adopted for separating the precise effects of *mixed* motives. If the evidence taken as a whole convinces the Board that the employer's proffered legitimate excuse was not, in fact, relied upon to any degree, then a further finding that the Act has been violated is warranted whether the "in part" test, the "but for" test, the "dominant motive" test, the *Wright Line* formulation or any other test

62. *See, e.g.*, Quebecor Group, 258 N.L.R.B. No. 125 (1981) (Re: AD Brennan); Dimensions In Metal, Inc., 258 N.L.R.B. No. 78 (1981) (Re: AD Campbell); Valley Plaza, Inc., 258 N.L.R.B. No. 76 (1981) (Re: five dinner waitresses); Webb Ford, Inc., 258 N.L.R.B. No. 62 (1981); Red Ball Motor Freight, Inc., 253 N.L.R.B. 871 (1980); United Parcel Serv., Inc., 252 N.L.R.B. 1015 (1980).

63. *See, e.g.*, Browning-Ferris Indus., 259 N.L.R.B. No. 21 (1981); Jackson Dairy Prods. Co., 258 N.L.R.B. No. 172 (1981); Transp. Management Corp., 258 N.L.R.B. No. 61 (1981) (Re: AD Johnson); Chem. Fab Corp., 257 N.L.R.B. No. 142 (1981); Joseph Magnin Co., 257 N.L.R.B. No. 86 (1981); Turner Tool & Joint Rebuilders Corp., 256 N.L.R.B. No. 101 (1981); Together We Stand Womens' Guild Daycare Center, 256 N.L.R.B. No. 64 (1981); (Re: ADs Black and Stovall); Limestone Apparel Corp., 255 N.L.R.B. No. 101 (1981); Guerdon Indus., 255 N.L.R.B. No. 86 (1981) (Re: ADs Kirby and Short); Gossen Co., A Division of the United States Gypsum Co., 254 N.L.R.B. No. 41 (1981) (Re: ADs White and Lavine); Russ Toggs, Inc., 253 N.L.R.B. 767 (1980).

64. *See, e.g.*, Model A & Model T Motor Car Reproduction Corp., 259 N.L.R.B. No. 77 (1981) (Re: AD Rhine); Jackson Dairy Prods., 258 N.L.R.B. No. 172 (1981); Jaybil Steel Prods., 258 N.L.R.B. No. 157 (1981) (Re: AD Ramis); Ingram Farms, Inc., 258 N.L.R.B. No. 137 (1981); Blackstone Co., 258 N.L.R.B. No. 124 (1981) (Re: AD Moffat); Transp. Management Corp., 258 N.L.R.B. No. 61 (1981) (Re: AD Moore); Royal Dev. Co., 257 N.L.R.B. No. 149 (1981); Doug Hartley, Inc., 255 N.L.R.B. No. 97 (1981); Gossen Co., A Division of the United States Gypsum Co., 254 N.L.R.B. No. 41 (1981); Russ Toggs, Inc., 253 N.L.R.B. 767 (1980).

65. *See, e.g.*, Matthews Ready Mix, Inc., 259 N.L.R.B. No. 92 (1981); Jaybil Steel Prods., 258 N.L.R.B. No. 157 (1981) (Re: AD Ramis); Royal Dev. Co., 257 N.L.R.B. No. 149 (1981); King Soopers, A Division of Dillon Companies, 257 N.L.R.B. No. 138 (1981); Joseph Magnin Co., 257 N.L.R.B. No. 86 (1981); U.S. Postal Serv., 256 N.L.R.B. No. 121 (1981); Turner Tool & Joint Rebuilders Corp., 256 N.L.R.B. No. 101 (1981); Wean United, Inc., 255 N.L.R.B. No. 134 (1981); Quality Broadcasting Corp., 254 N.L.R.B. No. 118 (1981); Clark Manor Nursing Home Corp., 254 N.L.R.B. No. 54 (1981) (Re: ADs Gerard and Fowley); Gossen Co., A Division of the United States Gypsum Co., 254 N.L.R.B. No. 41 (1981) (Re: AD Parr).

66. *See, e.g.*, Transp. Management Corp., 258 N.L.R.B. No. 61 (1981) (Re: AD Moore); Mark I Tune-Up Centers, 256 N.L.R.B. No. 138 (1981); Together We Stand Womens' Guild Day Care Center, 256 N.L.R.B. No. 64 (1981) (Re: AD Black); Guerdon Indus., 255 N.L.R.B. No. 86 (1981) (Re: ADs Merrit and Jones).

67. *See* Coleman, *supra* note 36, at 209 n.29.

is applied.[68] To be sure, the Board has differed with various courts of appeals as to the outcome warranted in cases falling within this category. Those differences of opinion, however, revolve around the weight to be afforded competing testimony, *not* the legal rule which should obtain where two motives, one proper and one improper, are found to have both played a contributing role in motivating employer action.

A fairly substantial portion of the cases encompassed by this study fall within one of the single motive categories defined herein. No legitimate employer motive is asserted in 14 cases considered by the Board during this period and those cases are best characterized as Single Motive IB cases.[69] In 46 cases considered as part of this study, the Board found no convincing evidence of a discriminatory motive, thereby requiring it to conclude that a single legitimate motive existed for the employer action originally contested. These cases are best categorized as Single Motive IG cases.[70] Additionally, 12 cases within the study are

68. This fact and the large portion of section 8(a)(3) cases in this category are relied upon by other commentators to support their view that the *Wright Line* formula is an inconsequential restatement unlikely to have any practical effect. The fact that this substantial category of cases will not likely be affected by the *Wright Line* formulation does not, however, preclude a very substantial effect from application of that formulation to true dual motive cases. This is precisely why cases in each category must be segregated in order to test *Wright Line's* actual impact.

69. Townsend & Bottum, Inc., 259 N.L.R.B. No. 27 (1981); Piggly Wiggly, Tuscaloosa Division Commodores, Pt. Terminal Corp., 258 N.L.R.B. No. 142 (1981); Cal-Walts, Inc., 258 N.L.R.B. No. 126 (1981); Presbyterian/St. Luke's Medical Center, 258 N.L.R.B. No. 21 (1981) (AD Hammond); Freight, Constr. General Drivers, Warehousemen & Helpers Local 287, 257 N.L.R.B. No. 168 (1981); Babcock & Wilcox Co., 257 N.L.R.B. No. 104 (1981); Western Marine Elec., 257 N.L.R.B. No. 57 (1981); Burnup & Sims, Inc., 256 N.L.R.B. No. 142 (1981); Together We Stand Women's Guild Day Care Center, 256 N.L.R.B. No. 64 (1981) (AD Henry); Kevah Konner, Inc., 256 N.L.R.B. No. 8 (1981); St. Regis Paper Co., 255 N.L.R.B. No. 72 (1981).

70. Gerson Elec. Constr. Co., 259 N.L.R.B. No. 88 (1981); Model A & Model T Motor Car Reproduction Corp., 259 N.L.R.B. No. 77 (1981) (AD Hadley); Caffe Giovanni, Inc., 259 N.L.R.B. No. 31 (1981) (ADs Krivan & Frisch); Haynes-Trane Serv. Agency, Inc., 259 N.L.R.B. No. 12 (1981); B. H. L. Mfg. Inc., 259 N.L.R.B. No. 3 (1981); Clarklift of St. Louis, Inc., 259 N.L.R.B. No. 2 (1981); Cato Oil & Grease Co., 258 N.L.R.B. No. 153 (1981); St. Mary's Home, Inc., 258 N.L.R.B. No. 131 (1981) (AD Johnson); C.W. Sweeney and Co., 258 N.L.R.B. No. 96 (1981); Laredo Coca-Cola Bottling Co., 258 N.L.R.B. No. 69 (1981) (several ADs); Transp. Management Corp., 258 N.L.R.B. No. 61 (1981) (AD Lennon); Mineola Ford Sales, 258 N.L.R.B. No. 52 (1981); St. Luke's Hospital, 258 N.L.R.B. No. 45 (1981); Presbyterian/St. Luke's Medical Center, 258 N.L.R.B. No. 21 (1981) (AD Neider); The Evening News Ass'n, 258 N.L.R.B. No. 20 (1981); Addy Mechanical Fabricators & Constructors, Inc., 257 N.L.R.B. No. 111 (1981) (ADs who were laid off); Farmers Ins. Group, 257 N.L.R.B. No. 84 (1981); Kawasaki Motors Corp., 257 N.L.R.B. No. 69 (1981) (AD Clare); Plywood Los Angeles, Inc., 257 N.L.R.B. No. 67 (1981); Tell City Chair Co., 257 N.L.R.B. No. 64 (1981); Sioux Prods., 257 N.L.R.B. No. 56 (1981) (AD Andrade); TaraCorp Indus., 257 N.L.R.B. No. 49 (1981); Thom Brown Shoes, Inc., 257 N.L.R.B. No. 27 (1981); The Swingline Co., 256 N.L.R.B. No. 119 (1981); John Blue Co., 256 N.L.R.B. No. 83 (1981); Jacobo Marti & Sons, Inc., 255 N.L.R.B. No. 189 (1981); Fruehauf Corp., 255 N.L.R.B. No. 125 (1981); Mini-Indus., Inc., 255 N.L.R.B. No. 123 (1981); Gasko & Meyer, Inc., 255 N.L.R.B. No. 95 (1981) (AD Peters); Stewart Granite Enter., 255 N.L.R.B. No. 91 (1981); Southwestern Broadcasters, Inc., 255 N.L.R.B. No. 53 (1981); Friendly Ice Cream Corp., 254 N.L.R.B. No. 172 (1981) (AD Dowell); Webb-Centrix Constr., 254 N.L.R.B. No. 159 (1981); Carolina Paper Mills, Inc., 254 N.L.R.B. No. 142 (1981); I.T.O. Corp. of Ameriport, 254 N.L.R.B. No. 18 (1981); Overnite Transp. Co., 254 N.L.R.B. No. 11 (1981) (ADs Cox, Allen, Cotton, Pirkey, Darr, Gause, Hoover, Morris, and Adkins); United Broadcasting Co., 253 N.L.R.B. 697 (1980).

best characterized as Single Motive II cases.[71] Obviously, none of the cases in these categories provide a basis for testing *Wright Line's* effect upon application since none of them posed any need to determine the precise effects of contemporaneously operating motives.

Only 18 of the cases in which the Board had applied *Wright Line* through the end of 1981 are truly dual motive cases, that is, cases in which at least two motives, one proper and one improper, are found to have played a real and tangible part in producing employer action.[72] This might lead one to think that controversy over the appropriate rule to be applied in dual motive cases is nothing more than a tempest in a teapot. It would initially appear that *Wright Line* is unlikely to have significant impact on administration of the Act or effectuation of employee rights no matter what its specific impact, given the small percentage of published Section 8(a)(3) and Section 8(a)(1) decisions affected.

This initial appearance, however, is deceptive. The overwhelming majority of ULP charges filed are resolved without issuance of a complaint, a formal hearing or an ultimate decision by the Board. Recent statistics suggest that no more than approximately 13% of ULP charges result in issuance of a complaint.[73] Local regional offices are able to resolve the remainder through solicitation of withdrawal or dismissal where found to be without merit, or settlement where found meritorious. An additional portion are resolved after issuance of a complaint, thereby precluding any need for issuance of a Board decision.

Obviously, in determining whether to solicit withdrawal or settlement, the Board's local offices are guided by published Board decisions.

---

71. R.P. Scherer (Southeast) Corp., 258 N.L.R.B. No. 51 (1981); G.H. Bass & Co., 258 N.L.R.B. No. 36 (1981); Addy Mechanical Fabricators & Constructors, Inc., 257 N.L.R.B. No. 111 (1981) (AD Fierro); General Elec. Corp., Installation & Serv. Eng'r Div., 256 N.L.R.B., No. 124 (1981); Pace Oldsmobile, Inc., 256 N.L.R.B. No. 111 (1981) (strikers accused of misconduct); Garrett R.R. Car & Equipment, Inc., 255 N.L.R.B. No. 87 (1981); Egar Employment, Inc., 255 N.L.R.B. No. 16 (1981); Friendly Ice Cream Corp., 254 N.L.R.B. No. 172 (1981) (AD Rushton); General Motors Corp., 254 N.L.R.B. No. 148 (1981); McCormick & Co., Inc., Grocery Prods. Div., 254 N.L.R.B. No. 111 (1981); Lummus Indus., Inc., 254 N.L.R.B. No. 79, *enforced*, 679 F.2d 229, 233 n.6 (11th Cir. 1982) (observing absence of need for *Wright Line* analysis in such a circumstance) (1981); Magnetics Int'l, Inc., 254 N.L.R.B. No. 62 (1981).

72. Stop and Shop Cos., Medi Mart Div., 259 N.L.R.B. No. 124 (1981); High Energy Corp., 259 N.L.R.B. No. 97 (1981); Magnesium Casting Co., 259 N.L.R.B. No. 64 (1981); Liberty Men's Formals, Inc., 258 N.L.R.B. No. 179 (1981); Litton Mellonics Systems Div., a Div. of Litton Systems, Inc., 258 N.L.R.B. No. 84 (1981); Transp. Management Corp., 258 N.L.R.B. No. 61 (1981) (AD Sullivan); Consolidated Freightways Corp. of Delaware, 257 N.L.R.B. No. 177 (1981); E.I. DuPont de Nemours & Co., Inc., 257 N.L.R.B. No. 33 (1981); Atlas Minerals, a Div. of Atlas Corp., 256 N.L.R.B. No. 22 (1981); Bronco Wine Co., 256 N.L.R.B. No. 13 (1981); Sanitas Cura, Inc., 255 N.L.R.B. No. 149 (1981); Liberty Pavilion Nursing Home, 254 N.L.R.B. No. 169 (1981), Badische Corp., 254 N.L.R.B. No. 164 (1981); Gossen Co., a Div. of the United States Gypsum Co., 254 N.L.R.B. No. 41 (1981) (ADs Lampada and Beilke); Overnite Transp. Co., 254 N.L.R.B. No. 11 (1981) (ADs Morris and DeBoard); Herman Bros., Inc., 252 N.L.R.B. 848 (1980).

73. *See Forty-Fourth Annual Report of NLRB; Fiscal Year 1979, reprinted in* LABOR RELATIONS YEARBOOK—1981 274-82 (BNA 1981).

Any published decision in which *Wright Line* has had a determinative effect on the outcome, therefore, is likely to produce a similar effect in countless other cases resolved at the regional level.[74] There is ample practical justification for scrutinizing the precise impact *Wright Line* has had in those cases which can properly be defined as dual motive cases.

When the 18 true dual motive cases arising since *Wright Line* are examined, one characteristic becomes apparent immediately. The Board concluded that the Act had not been violated in two-thirds of those cases (12 out of 18).[75] This contrasts with the General Counsel's usual "loss rate" in cases alleging violation of Section 8(a)(3), which has been estimated to run at 20%.[76] This also establishes a marked departure from pre-*Wright Line* law. By definition, a dual motive case is one in which employer action has been shown to have been *partially* motivated by a desire to discourage union activity. Under the prior "in part" test, therefore, the Board would have found a Section 8(a)(3) violation in each and every one of these cases. Further inquiry is clearly warranted to determine what conduct is now permitted which once would have been made the subject of a Board remedial order.

Four of the 12 dual motive cases in which the Board dismissed the claim of discrimination disclose a rather disturbing trend. In each of the four, a management representative did or said something clearly conveying to the AD and co-workers that management *had* intended to retaliate against the AD for union activities. These statements were relied upon to support the finding that a discriminatory motive played some part in producing the employer's action. In each of the four cases, the Board ultimately concluded that no discrimination violative of section 8(a)(3) was present in reliance upon the *Wright Line* test. The Board found that the employer had consistently applied a uniform policy and had not treated the AD disparately. In other words, the

74. In 1979, 17,220 ULP charges were filed alleging unlawful discrimination against employees in violation of section 8(a)(3) of the Act. In this same period, only 5,413 complaints were issued by NLRB regional offices in connection with *all* alleged ULPs made the subject of charges. Clearly, administration of the Act falls, to a large extent, on the Board's regional offices and any effect of *Wright Line* observed in published decisions is bound to have substantial ramifications at that level.

75. Stop and Shop Cos., Medi Mart Div., 259 N.L.R.B. No. 124 (1981); Magnesium Casting Co., 259 N.L.R.B. No. 64 (1981); Liberty Men's Formals, Inc., 258 N.L.R.B. No. 179 (1981); Litton Mellonics Systems Div., a Div. of Litton Systems, Inc., 258 N.L.R.B. No. 84 (1981); Transp. Management Corp., 258 N.L.R.B. No. 61 (1981) (AD Sullivan); Consolidated Freightways Corp. of Delaware, 257 N.L.R.B. No. 177 (1981); E.I. DuPont de Nemours & Co., 257 N.L.R.B. No. 33 (1981); Liberty Pavilion Nursing Home, 254 N.L.R.B. No. 169 (1981); Badische Corp., 254 N.L.R.B. No. 164 (1981); Gossen Co., a Div. of the United States Gypsum Co., 254 N.L.R.B. No. 41 (1981) (ADs Lampada and Beilke); Overnite Transp. Co., 254 N.L.R.B. No. 11 (1981) (AD Morris).

76. *See* Coleman, *supra* note 36, at 209.

employer succeeded in establishing that "the same action would have taken place even in the absence of the protected activity."[77] The Board further concluded that under *Wright Line* its only obligation was to place the AD in "no worse a position than if he had not engaged in [protected] conduct,"[78] a goal accomplished by dismissing the allegation of discrimination.

The scenario evolving in these cases produces one very unacceptable effect. Any employee hearing or gaining knowledge of the employer's statement declaring a retaliatory intent is left with the distinct impression that the employer has punished a union adherent and gotten away with it. While attendance at the ULP hearing and review of the Board's decision might convince such an employee that the AD was not, in fact, dealt with less favorably than would have been the case had he not engaged in union activity, such elucidating events are not, of course, likely to take place. Those who remain in the work force, therefore, are not disabused of the impression that union activity will produce retaliation and the old familiar "chilling effect" is present.

Each of the following cases illustrate this disturbing effect: *Stop and Shop Cos., Medi Mart Division*,[79] *Magnesium Casting Co.*,[80] *Liberty Men's Formals, Inc.*,[81] and *E.I. Dupont de Nemours & Co.*[82] The earliest of these cases, *E.I. Dupont*, concerned placement of an employee on probation. The AD, Thomas, voiced union support in a March 21, 1979[83] meeting. Only three days thereafter, he received an evaluation criticizing his relations with his supervisors. Two months thereafter, he suffered a hernia and a dispute arose as to whether related medical costs would be paid by the company's regular health insurance program. Eventually payment was made, but in the interim Thomas filed a worker's compensation claim which was also eventually resolved in his favor.[84]

While the worker's compensation claim was pending, Thomas received an "unsatisfactory performance contact" (hereinafter referred to as UPC) which criticized him for (1) a September 30 dispute with two supervisors; (2) an October 18 instance of rudeness to a safety representative from another company; and (3) Thomas' failure to sign standard

77. 251 N.L.R.B. at 1089.
78. 251 N.L.R.B. at 1086 (quoting from Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 285-86 (1977)).
79. 259 N.L.R.B. No. 124 (1981).
80. 259 N.L.R.B. No. 64 (1981).
81. 258 N.L.R.B. No. 179 (1981).
82. 257 N.L.R.B. No. 33 (1981).
83. Id. at 143. All dates used hereinafter during the discussion of this case will refer to 1979 unless otherwise specified.
84. *Id.* at 144.

practice and procedure revisions in light of questions he had regarding the revisions.[85]

Shortly after receiving the UPC, at the suggestion of a coworker, Thomas contacted a supervisor (Monroe)[86] whom he knew personally. Monroe reported that, Thomas had been a primary topic of conversation at a meeting involving 13 supervisors. Monroe further reported that Thomas was characterized as a "threat" at this meeting because of his workers' compensation claim and his union activities. Lastly, Monroe reported that when he questioned the company's views regarding Thomas he was told to discuss the matter with one of the two supervisors who had been involved in the September 30 dispute upon which the UPC was partially based and was further accused of being "operator oriented."[87] One may presume that Thomas reported this conversation to the co-worker who originally suggested the discussion with Monroe and possibly to others as well.

Under standard company procedures, follow-up discussions were conducted with Thomas after issuance of the UPC in which he was criticized for "discrediting" supervision and adding comments to posted bulletins. On April 19, 1980, Thomas was placed on probation. The notice placing him on probation cited four grounds for this disciplinary action: (1) an April *1979*, incident in which Thomas required a supervisory trainee to go through his immediate supervisor in order to give certain instructions; (2) a June *1979* claim of rudeness on Thomas' part to a supervisor in a telephone call; (3) Thomas' failure in September *1979* to sign certain job cycles; and (4) an April 1980 incident in which Thomas sarcastically criticized a supervisor for failure to wear required safety equipment.[88] Although three of these four grounds for the probation notice occurred prior to issuance of the UPC, which had been the prior step in progressive discipline, the Board found placement of Thomas on probation to be consistent with the employer's usual disciplinary policies and therefore concluded that Dupont had succeeded in establishing "that the same action would have taken place even in the absence of a protected conduct."[89] In light of this conclusion, under the second step of the analysis required by *Wright Line*, no violation of section 8(a)(3) was found. Any employees learning of Monroe's disclosure that the company intended to deal with the threat posed by Thomas' union and other protected activities were, therefore,

85. *Id.* at 145.
86. *Id.* at 142.
87. *Id.* Although Monroe denied the comments attributed to him in the text, the ALJ discredited this denial and the facts were found to have taken place as summarized in the text.
88. *Id.* at 147.
89. 251 N.L.R.B. at 1089.

left with the impression that such retaliation had been successfully accomplished.[90]

A similar result is reflected even more powerfully in *Liberty Men's Formals*. In that case, employees Angell, Pace and Kpakiwa complained to management about pay they received for working a Memorial Day holiday. The complaint was expressed in a manner which attracted significant attention from coworkers, a fact clearly disapproved by supervision. Employees Pace and Kpakiwa were terminated in the fall of the same year for the stated reason that they were "poor workers." Employee Angell, the AD in this case, testified at an unemployment insurance hearing on behalf of her two former co-workers. She herself was terminated one week after giving this testimony.[91]

The three employees then filed a complaint with the Pennsylvania Human Rights Commission which gave rise to a fact finding conference. At the fact finding conference, the company official responsible for having made the termination decisions clearly commented that he had intended to terminate all three employees after the "Memorial Day incident" but had been unable to do so because of difficulty in finding replacements.[92]

At the ULP trial, the employer justified Angell's termination on the grounds that she was unable to work 40 hours per week, which was asserted to be an absolute requirement for employment. Angell had been working approximately 24 hours per week for two months.[93] The Board found that Angell's employer successfully established a consistent policy requiring all employees to work at least 40 hours per week and therefore concluded that, "the same action would have taken place even in the absence of the protected conduct."[94] Given this answer to the second question posed in *Wright Line*, the Board concluded no violation of section 8(a)(3) to have taken place. This result left all employees who had been in attendance at the Pennsylvania Human Rights Commission fact finding conference and all who learned of supervision's comments there with the clear impression that Liberty Men's Formals had succeeded in retaliating against Angell's protected activities by waiting for a suitable excuse to sever her employment.

---

90. The Board found Monroe's comments to have violated section 8(a)(1) of the Act. As will be discussed in *infra* text accompanying notes 102-109, however, the "remedy" issued as a result of that finding is not likely to have dissipated the impermissible effect described in the text here.

91. *Liberty Men's Formals*, 258 N.L.R.B. at 1304.

92. *Id.* The management representative to whom this statement was attributed denied having testified to that effect before the Pennsylvania Human Rights Commission. His denial, however, was discredited by the ALJ and the facts were found to have taken place as summarized in the text.

93. *Id.*

94. 251 N.L.R.B. at 1089.

A similar pattern is observable in *Magnesium Casting Co.*, and *Stop and Shop Cos.* In the former case, the AD, Thomas, leafletted for a union. Thereafter, he was told by supervision to "keep a low profile regarding union activities."[95] After receiving a desired transfer, he leafletted again and was laid off the very next day. The Board ultimately concluded that this layoff was substantiated by economic facts establishing that, "the same action would have taken place even in the absence of the protected conduct."[96] Given this answer to the second question posed in *Wright Line*, no violation of section 8(a)(3) was found. The timing of this layoff, however, would certainly leave any employee learning of supervision's caution to Thomas to, "keep a low profile regarding union activities" with the impression that Magnesium Casting had successfully retaliated for such activities.[97]

In *Stop and Shop Cos.*, the AD, Goodusky, a pharmacist, was terminated for "being under the influence of alcohol." He contacted a supervisor regarding the reasons for the termination and was essentially told that management had been "out to get him" ever since "the incident."[98] When the supervisor was pressed to explain what he meant by "the incident" he ultimately agreed that his meaning had been "the union."[99] The Board concluded that Goodusky was terminated pursuant to a consistent company policy and that Stop and Shop had therefore succeeded in demonstrating that "the same action would have taken place even in the absence of the protected conduct." Given this answer to the second question posed in *Wright Line*, no violation of Section 8(a)(3) was found. Any employees learning of the disclosures made to Goodusky by supervision were, however, certainly left with the impression that the company had succeeded in retaliating against such activities.

In sum, *Wright Line* clearly has had an impact on the outcome in ULP cases. It has freed some employers, whose representatives have made statements highly likely to discourage future protected activities, from effective remedial action.

---

95. *Magnesium Casting Co.*, 259 N.L.R.B. at 422. The supervisor at issue denied having made the statement attributed to him. The ALJ discredited this denial, however, and the facts were found to have taken place as summarized in the text.

96. *Id.* at 419.

97. The Board found the comments at issue to have violated section 8(a)(1) of the Act. As will be discussed in *infra* text accompanying notes 102-109, however, the "remedy" issued as a result of that finding is not likely to have dissipated the impermissible effect described in the text here.

98. *Stop and Shop Cos.*, 259 N.L.R.B. at 871. A tape was available of the relevant conversation which was relied upon by the ALJ.

99. *Id.*

IV. *WRIGHT LINE*'S SUCCESS IN ACCOMPLISHING ITS STATED GOALS

A. Accommodation of All Litigants' Legitimate Interests

1. The Protection of Employee Rights

The Board offered the *Wright Line* formulation as a test more likely to accommodate all litigants' legitimate interests than the Board's prior "in part" test. One handicap is encountered when one seeks to determine whether the *Wright Line* formulation satisfactorily preserves employee rights protected by the "in part" test: the Board does not identify in *Wright Line* what employee rights the "in part" test was designed to protect. This produces cause for concern because better accommodation of all litigants' legitimate interests should generally not be undertaken without first developing an understanding as to the precise nature of all litigants' legitimate interests.

Since this was not done in *Wright Line*, we must speculate as to the nature of the legitimate employee interests protected under the earlier "in part" test. Obviously, that test protected employees against discrimination, a legitimate protection under section 8(a)(3). The "in part" test, however, did more than that. It also assured the availability of remedial action anytime an employer allowed its desire to retaliate against a union adherent to "show its head" in the course of reaching an employment decision. Was this a legitimate employee interest? One senses that if this retaliatory desire is expressed in a way disclosing an intent to "chill unionism," precluding this effect is a legitimate employee interest sought to be served by the Act.[100]

Wright Line would appear to protect employees against discrimination satisfactorily. A remedy is available unless the employer can show that the AD was treated exactly as he would have been had he not been a union adherent. The second interest, availability of remedial action in response to employer retaliation against union adherents, however, is not equally wellserved. *Wright Line* does nothing to alleviate the chilling effect likely to result when an employer's desire to retaliate against union activity appears to play some part in producing an employment decision. *Stop and Shop Cos.*, *Magnesium Casting Co.*, *Liberty Men's Formals* and *E.I. Dupont* clearly establish this deficiency on *Wright Line's* part.

Is this, in fact, a legitimate employee interest which should have been preserved in *Wright Line*? As noted above, one senses that expression of a retaliatory desire in a manner disclosing an intent to "chill union-

100. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965).

ism," is an evil to which the Act is directed. On the other hand, the chilling effect described here cannot be brought within the literal scope of section 8(a)(3)'s prohibitions because discriminatory conduct is an essential element to a section 8(a)(3) violation. If an employee has not, in fact, been treated differently than a similarly situated person without union sympathies would have been, then discrimination is not shown.

The answer is simple. Upon originally promulgating the "in part" test, the Board intuitively recognized avoidance of this chilling effect to be an interest which the Act seeks to serve. It improperly, however, sought to protect this interest under section 8(a)(3). Now it has just as improperly abandoned that interest altogether. In matter of fact, this is an interest to which section 8(a)(1) is directed and that section should be the basis for affording protection.

In the four cases discussed above, the employer made statements through its agents suggesting that a desire to retaliate played some part in producing an employment decision. Such a statement clearly runs afoul of section 8(a)(1)'s prohibition of any conduct which restrains or coerces employees in the exercise of protected rights.[101] Allegations of such section 8(a)(1) violations in the context of section 8(a)(3) cases have not, however, been particularly prevalent. There was no urgent need to do so under the "in part" test because it allowed a finding that section 8(a)(3) had been violated in such circumstances and assured remedial action sufficient to counteract this ill effect. *Wright Line*, however, removes this assurance of remedial action and leaves a void which to date has not been effectively filled by either the Board[102] or its General Counsel.[103]

This raises a poignant question. Will traditional section 8(a)(1) remedies be sufficient to fill the void left by *Wright Line* and counteract the effects created when an employer leads remaining employees to believe it has taken adverse action in order to retaliate against union activity? Under existing law, such a section 8(a)(1) violation is "remedied" through the posting of a notice informing employees that the employer will not, in the future, make statements disclosing a desire to retaliate.[104] The notice is generally phrased in terms comparable to the state-

101. Modulus Corporation, 236 N.L.R.B. 967, 969 (1978), *cited with approval in* Scooba Mfg. Co., 258 N.L.R.B. No. 38 (1981).

102. Neither *Wright Line* nor any subsequently issued decision of the Board which applies that test cautions the General Counsel and ALJs to be alert for cases of the type described in the text and the need to determine whether conduct violative of section 8(a)(1)'s prohibition has occurred.

103. The General Counsel's memorandum to Regional Directors regarding application of the *Wright Line* decision does not identify the problem discussed here. *See, Memorandum 80-58 November 4, 1980*, LABOR RELATIONS YEARBOOK—1980, at 311 (BNA 1981).

104. Modulus Corporation, 236 N.L.R.B. 967 (1978).

ment alleged.[105]

One cannot reasonably expect this to be an effective remedy under the circumstances discussed. When an employer has disclosed retaliatory intent resulting in a chilling effect, posting a notice of the type described merely assures that no *further* chilling effect will be created through comparable disclosures; it does nothing to dissipate the *existing* impression gained by employees that their employer has succeeded in retaliating in a given situation. The notice in essence says, "I won't further tell you what I'm up to because I've already made that pretty clear." At a minimum, the notice used in these cases should clearly inform employees that their employer will not *retaliate* as suggested in prior comments, not merely that it will cease to make such comments.

In some cases, even more may be required. When employers have terminated supervisors unprotected by the Act in such a manner as to send a clear message to protected employees that a similar fate will befall them should they engage in union activities, the Board has found a section 8(a)(1) violation and required reinstatement of the supervisor as a remedy. This result has obtained even though the most immediate beneficiary, the supervisor, has not been a cognizable victim of any ULP. The Board has reasoned that reinstatement is necessary in such a circumstance in order to effectively assure protected employees that their employer will not succeed in retaliating against them because of union activities.

For example, in *Brothers Three Cabinets*,[106] the Board majority found that the employer terminated a supervisor and thereafter clearly informed remaining workers that this action had been taken in response to the supervisor's union activities. The Board majority further found that the termination occurred amidst a "widespread pattern of misconduct" which was "motivated by a desire to discourage union activities among its employees in general."[107] The Board majority concluded that discharge of the supervisor was effectuated in order to provide an example to employees of their possible fate if they supported a union. The termination was found to have violated section 8(a)(1) and reinstatement was directed. A like result ensued in *Shera-*

105. *See, e.g.*, Magnesium Casting Co., 259 N.L.R.B. No. 64 (1981) (includes the statement, "WE WILL NOT tell you to keep a low profile regarding the exercise of any of the rights described above.").

106. 248 N.L.R.B. 828 (1980). Although this decision was recently overruled, Parker-Robb Chevrolet, 262 N.L.R.B. No. 58 (1982), the rationale stated therein is nonetheless instructive and useful in the analogous situation described in the text.

107. *Id.* at 829.

ton Puerto Rico Corp.[108]

A comparable remedy should be considered in cases where an employer effectuates a termination which does not violate section 8(a)(3) and simultaneously makes declarations that do violate section 8(a)(1) by suggesting to remaining workers that this termination has been the product of a desire to retaliate. In some fact situations it may not be possible to dissipate the resulting chilling effect unless the terminated employee is reinstated so as to assure coworkers that a retaliatory scheme has not succeeded. The four cases discussed in this article[109] do not appear to reach this level on the facts established at hearing. The disclosures of retaliatory intent do not appear to have been as widely and effectively disseminated as were those in *Brothers Three Cabinets* and *Puerto Rico Sheraton*. The extent of dissemination, however, was not really made a topic of inquiry at hearing. In future cases, the General Counsel and the Board should carefully assess whether employer comments regarding discharges ultimately found nondiscriminatory have caused a sufficiently severe violation of section 8(a)(1) to require reinstatement as the only sure means to cure the resulting chilling effect.[110]

---

108. 248 N.L.R.B. 867 (1980).

109. Stop and Shop Cos., Medi Mart Div., 259 N.L.R.B. No. 124 (1981); Magnesium Casting Co., 259 N.L.R.B. No. 64 (1981); Liberty Men's Formals, Inc., 258 N.L.R.B. No. 179 (1981); E.I. DuPont de Nemours & Co., 257 N.L.R.B. No. 33 (1981).

110. Use of the remedy recommended in the text might be opposed in reliance upon section 10(c) of the Act. In 1947 the following provision was added to section 10(c) by amendment:

> No order of the Board shall require the reinstatement of any individual as employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

H.R. 3020, 80th Cong., 1st Sess., 93 CONG. REC. 6494 (1947). Any reliance upon section 10(c) to oppose the recommendation stated in the text is, however, misplaced. The report from the Committee on Education and Labor originally submitted in support of H.R. 3020 makes clear that the amendment to section 10(c) proposed therein was not intended to bar use of reinstatement with backpay as a remedy for combating restraint or coercion which might be found violative of section 8(a)(1). The report provided, in pertinent part,

> The bill will require that the new Board's rulings shall be consistent with what the Supreme Court said in upholding the act, that it [the act]—
>
> > does not interfere with the normal right of the employer to select its employees or to discharge them. . . . The Board is not entitled to make its authority a pretext for interference with the right of discharge *when that right is exercised for other reasons than . . . intimidation and coercion*.
>
> *(Labor Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 45-46). *The Board may not 'infer' an improper motive when the evidence shows cause for discipline or discharge.*

H.R. REP. No. 245, 80th Cong., 1st Sess. 42-43, *Reprinted in* 2 LEG. HIST. 333-34 (1947) (emphasis added). The second sentence emphasized in his excerpt establishes that the amendment to section 10(c) was intended to preclude the Board from inferring a discriminatory motive where the record establishes *the* cause for disciplinary action to have been legitimate. The first portion of this excerpt which has been emphasized illustrates that the amendment to section 10(c) was *not* intended to preclude use of reinstatement with backpay as a remedy in any circumstance where it might be necessary in order to relieve employees from "intimidation and coercion" violative of some portion of the Act. Where the manner in which a termination is effectuated causes a coercive effect violative of section 8(a)(1), therefore, reinstatement with backpay may be utilized as a remedy, if necessary to dissipate the coercive effort. The cases discussed at *supra* note 12 illustrate that the Board has long considered itself to possess such authority, with Supreme Court approval.

2. Protection of Legitimate Employer Interests

The *Wright Line* formulation clearly serves one valid employer interest by providing a framework within which employers may establish that an adverse action would have been taken without regard to an AD's protected activity and thereby avoid a finding that section 8(a)(3) has been violated. Some employer representatives have criticized *Wright Line*, however, on the grounds that it disserves a second legitimate employer interest by partially placing the burden of proof in ULP cases upon the employer in contravention of the limitations stated in section 10(c) of the Act.[111] *Wright Line* provides that once the General Counsel has established protected conduct to have been a motivating factor in the employer's decision, "the burden will shift to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct."[112]

The Board's decision in *Wright Line* does not make clear whether the "burden" which is to be shifted to the employer is the burden of persuasion (i.e., the risk of nonpersuasion) or solely the burden of moving forward with the production of evidence. Rule 301 of the Federal Rules of Evidence clearly distinguishes between these two types of burdens in specifying the effects created by an evidentiary presumption:

> . . . A presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.[113]

If the burden shifted to the employer by the Board in *Wright Line* is merely the burden of production, employers have no valid complaint. Clearly, the employer has an obligation to come forward with something at the conclusion of the General Counsel's prima facie case in order to avoid a finding that a ULP has occurred.[114] If the burden

111. Section 10(c) provides in pertinent part, that the board may find a ULP if established ". . . upon the preponderance of the testimony taken . . . ." 29 U.S.C. § 160(c) (1976).

112. 251 N.L.R.B. at 1089.

113. FED. R. EVID. 301.

114. Assuming that the employer must come forward with something at the conclusion of the General Counsel's *prima facie* case in order to avoid a finding that a ULP has occurred, it is equally clear that this "something" must be at least sufficient to "meet" the probative value of the General Counsel's case. If the evidence offered by the employer is less probative than that offered as part of the General Counsel's *prima facie* case, then the "preponderance of the testimony" will require a finding that the Act has been violated. 29 U.S.C. § 160(c) (1976).

At least one commentator appears to have suggested that the employer's obligation to come forward with "something" at the end of the General Counsel's *prima facie* case should consist solely of the obligation to "articulate" some legitimate cause for the contested action, it then being up to the General Counsel to establish the invalidity of this proferred excuse. *See Lederer, supra* note 36, at 69. This position was taken in reliance upon Furnco v. Constr. Corp. v. Waters, 438 U.S. 567 (1978), McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and related cases arising under Title VII. *McDonnell-Douglas*, however, should not be relied upon as a model for

shifted by the Board in *Wright Line* was intended to be the burden of persuasion, however, section 10(c) does give rise to a potential complaint requiring further inquiry. A determination must be made, therefore, as to which of these burdens the Board referenced in *Wright Line*.[115]

---

formulating rules governing the burdens of proof and production in cases arising under the NRLA. This conclusion is warranted for two reasons. First, the *prima facie* case required under *McDonnell-Douglas* is significantly different from the *prima facie* case required by the NLRB and this difference renders a common form of rebuttal inappropriate. In *McDonnell-Douglas*, the Supreme Court held that a plaintiff could make out a *prima facie* claim by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for 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.

411 U.S. at 802. Such a showing, the Court held, requires the employer to articulate a legitimate reason for the action taken, which the plaintiff must prove to be pretextual in order to succeed. The *prima facie* case required by *McDonnell-Douglas* does not include any showing of prohibited motive, of employer desire to disadvantage the protected group. The Supreme Court was apparently influenced by the fact that evidence of such prohibited motive is not easy to come by in race discrimination cases and it did not wish to bar further inquiry absent such evidence. Given the relatively "weak" nature of the *prima facie* showing required by the Court, however, very little was required from the responding employer in order to place the onus on the plaintiff to prove the claim. By contrast, the NLRB has consistently required its General Counsel to offer some evidence of prohibited motive, of employer desire to disadvantage the protected group, as a part of the *prima facie* case. The General Counsel must show not only that the alleged discriminatee was dealt with adversely in some way, but also that: (1) he engaged in union activity, (2) the employer knew of this activity *and* (3) the employer harbored *animus* toward the union. *Associated Milk Producers*, 259 N.L.R.B. No. 131 (1982); *McCain Foods, Inc.*, 236 N.L.R.B. 447, 453 (1978). When General counsel establishes a *prima facie* case, prohibited motive is shown to be present. The only question remaining is whether it played a sufficient causal role in the action under consideration. Since the *prima facie* showing required of the NLRB's General Counsel is far greater than that required of Title VII plaintiffs by *McDonnell-Douglas*, it is clearly appropriate to require more than simple articulation of a facially legitimate motive to overcome that *prima facie* showing.

Use of the *McDonnell-Douglas* scheme under the NLRA would also pose practical problems. The General Counsel, unlike Title VII plaintiffs, typically does not have the use of pretrial discovery. If the *McDonnell-Douglas* approach were used in NRLA cases, the General Counsel would be required to subpoena extensive data at trial and ferret through it there to determine which information might provide useful evidence bearing upon the sincerity of the employer's proferred legitimate motive. It is far more efficient to, at the very least, impose a burden of production upon the employer to come forward with evidence of past practice or other information helpful in determining whether the employer would have taken the action contested even in the absence of union activity.

115. It should be noted that the dispute at hand, namely, whether the employer should bear the burden of persuasion or merely the burden of production under the *Wright Line* test, affects a fairly small category of cases. The burden of production requires the employer to offer evidence meeting or exceeding the probative value of the General Counsel's *prima facie* case. The burden of persuasion would require the employer to offer evidence exceeding the General Counsel's *prima facie* case in probative value. The sole area of dispute, therefore, concerns what result should obtain in situations where the evidence offered by the employer meets the first of those burdens but not the second, that is, it meets the General Counsel's *prima facie* case in probative value but does not exceed it. Obviously, the probative value of evidence cannot be quantified and the trier of fact must make a somewhat subjective judgment upon characterizing the employer's proof as sufficient to either meet or exceed the General Counsel's *prima facie* case. Since this subjective characterization is within the trier of fact's control, it is unlikely that any difference of formulation in this area will produce different outcomes. It is more likely to simply produce different explanations supporting the same outcome. Since the topic addressed in the text has been the primary focus of employer criticism voiced since issuance of *Wright Line*, however, it is appropriate to determine whether such criticism identifies legitimate interests which have not been successfully accommodated in the *Wright Line* formulation.

Wright Line itself reflects some degree of confusion on this point. On the one hand, the Board notes therein that "the shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence."[116] On the other hand, the decision repeatedly finds that the "employer has to make the proof" with reference to the second question addressed in the *Wright Line* test. One aspect of the decision, however, creates the rather clear impression that the burden shifted to the employer is the burden of proof. The Board states that this shifting burden "requires the employer to make out what is actually an affirmative defense . . . ."[117]

The Board does not discuss in *Wright Line* its understanding of the term "affirmative defense." At common law, the term affirmative defense or "new matter" was used to categorize evidence sufficient to defeat the claim for relief even if all allegations in the complaint were deemed true. As stated by the California Supreme Court in explicating this definition:

> If the answer, either directly or by necessary implication, admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter [or an affirmative defense].[118]

An affirmative defense, therefore, does not defeat the essential allegations of the complaint, but rather asserts new facts which preclude relief despite the presumed truth of the complaint. At common law, the one who pleads an affirmative defense bears the burden of proving it, not merely the burden of moving forward with evidence concerning it.[119] The use of this characterization, therefore, conveys the strong impression that the burden shifted to the employer by the Board in *Wright Line* is the burden of persuasion.[120]

Is this result consonant with the purposes of the Act? The Court of Appeals for the First Circuit reviewed the Board's *Wright Line* decision

116. 251 N.L.R.B. at 1088 n.11.

117. *Id.*

118. Goddard v. Fulton, 21 Cal. 430, 436 (1863).

119. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE §337 (E.W. Cleary 2d ed. 1972).

120. This impression is confirmed by Atlas Minerals, a Div. of Atlas Corp., 256 N.L.R.B. No. 22 (1981). In that case, the ALJ found that, "the evidence at this stage of the analysis [the second question posed in the *Wright Line* test] does not preponderate in favor of either party" 256 N.L.R.B. at 99. A violation was found on the grounds that the "burden" had shifted to the employer. Quite clearly, the ALJ understood the burden which had shifted to the employer to be the burden of persuasion, that is, the risk of non-persuasion in the event competing evidence is found equally probative. The ALJ's findings and conclusions in this regard were adopted by the Board. *Id.* at 91, 99.

upon petition for enforcement and readily concluded that Section 10(c) precludes construing the burden shifted to the employer under the *Wright Line* test as a burden of proof.[121] It held that the burden shifted to the employer should be regarded as solely the burden of production.[122] Close scrutiny establishes that the second question posed in the *Wright Line* test cannot be accurately characterized as an affirmative defense justifying transferance of the burden of persuasion. The second question of the *Wright Line* test seeks a determination as to whether the AD was treated any differently than he would have been had no protected activity taken place. In other words, it seeks a determination as to whether there has been disparate treatment or *discrimination*. Discrimination, of course, is a necessary element of a section 8(a)(3) violation. This question, therefore, cannot be properly characterized as an affirmative defense, a new fact barring relief even if the essential elements of the complaint are proven. It concerns an essential element of the complaint.

By characterizing the second question of the *Wright Line* test as an affirmative defense, the Board disclosed a continuing perspective evident in the "in part" test: it suggested that an evil is present as soon as a desire to retaliate is shown, whether or not that desire to retaliate was the "but for" cause of the contested action. As has already been discussed, the Board is quite correct in its suspicion that some interest sought to be served by the Act is in jeopardy if an employer gives expression to such a retaliatory desire. That interest, however, is protected by section 8(a)(1), not section 8(a)(3).[123] Actual disparity in treatment is required by section 8(a)(3). Given this fact, Section 10(c) and long-standing case law[124] preclude the Board from utilizing the

121. NLRB v. Wright Line, 662 F.2d 899, 904 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1612 (1982).

122. *Id.*

123. *See supra* text accompanying notes 99 and 100.

124. NLRB v. Miami Coca-Cola Bottling Co., 222 F.2d 341 (5th Cir. 1955). As is noted above, *supra* note 110, section 10(c) clearly requires the General Counsel to establish all elements of an alleged ULP "by the preponderence of the testimony taken." In *Wright Line*, the Board sought to partially justify transferring some burden to the employer in reliance upon legislative history of the "discharge for cause" language added to section 10(c) in 1947. See *supra* note 109 for a summary of that language. This is a most tenuous basis for transferring the burden of proof to the employer. The "discharge for cause" language makes no express reference to any burden or its proper allocation. Given this fact, it should not be regarded as an exception to the general rule without compelling legislative history. The legislative history offers anything but compelling support for a shifting burden of proof. The version of this amendment which was originally passed by the House *did* make express reference to the burden of proof. It barred the Board from reinstatement of an AD ". . . unless the weight of the evidence shows that such individual was not suspended or discharged for causes." H.R. 3020, 80th Cong., 1st Sess. 39, *reprinted in* 1 LEG. HIST. 31 (1947). This language appeared to place a peculiar burden upon the General Counsel to prove a negative and it was found objectionable by the Senate. A joint conference produced the current "discharge for cause" language of section 10(c), which is cast in positive rather than negative terms and makes no reference to the "weight of the evidence." It simply bars reinstatement of

affirmative defense label to place the burden of persuasion upon the employer regarding the second question in the *Wright Line* test.

The burden of production may and should be shifted to the employer in connection with that issue. This is not barred by section 10(c); any other result would be totally illogical and unworkable. Once the General Counsel has established a prima facie case, the employer must come forward with some response and *Wright Line's* second question is the logical topic to address. Moreover, since the topic raised by *Wright Line's* second question is the consistent or disparate nature of the action taken, past practice is the focus of attention and such information is certainly more accessible to the employer than to the General Counsel. Thus, the fairness of assigning the burden of production to the employer is quite clear. The Board should, therefore, clarify its *Wright Line* formula by making evident that the burden shifting to the employer is only the burden of production and that the General Counsel retains the risk of nonpersuasion should review of the record as a whole reflect a total balance[125] of probative evidence introduced in connection with *Wright Line's* second question.

B. Uniformity And Elimination Of Confusion

At first blush, *Wright Line* would appear to have succeeded in producing a uniform system of analysis in dual motive cases which is acceptable to both the Board and the courts of appeals. *Wright Line* has been rather warmly received in the courts of appeals. As noted

---

employees if "discharged for cause." The House Conference Committee report explaining this revision clearly advised the members of the House that express reference to the General Counsel's burden of proof was not needed inasmuch as *all* elements of an alleged ULP must always be proven by a preponderance of the evidence: "The conference agreement omits the weight of the evidence language, since the Board, under the general provisions of section 10, must act on a preponderence of evidence. . ." H.R. REP. NO. 510, 80TH CONG., 1ST SESS. 55, *reprinted in* 1 LEG. HIST. 505 (1947). No one can reasonably suppose that House members reviewing this report fancied themselves to be adopting a special rule regarding the burden of proof when the amendment was adopted. The Board relied principally on an exchange between Senators Pepper and Taft which took place on the Senate floor to support a contrary conclusion. That exchange, 93 CONG. REC. 6494, 6518-19, *reprinted in* 2 LEG. HIST. 1565, 1593-95 (1947), arose because Senator Pepper feared any amendment designed to appease the House's desire for inclusion of "discharge for cause" language in the Act would sanction widespread discharge of union adherents whenever the employer was capable of articulating some legitimate cause for termination. Senator Taft sought to allay this fear by repeatedly emphasizing that the conference version was *not* intended to bring about any change in current law. In the course of these assurances, Senator Taft made reference to his understanding of the approach which then prevailed regarding allocation of evidentiary burdens. There is nothing in the colloquy, however, remotely suggesting that the senators gave conscious consideration to the difference between the burden of persuasion and the burden of production and there is certainly nothing in any senators remarks suggesting that the language under consideration was viewed as having some adverse impact on employers with reference to either of these burdens. The general nature of the debate establishes that it should not be relied upon as evidence of Congressional intent to change anything.

125. *See supra* note 114.

above,[126] the Court of Appeals for the First Circuit, previously the Board's strongest critic in connection with dual motive cases, reviewed *Wright Line* itself upon petition for enforcement. The First Circuit quarreled with the Board only insofar as the Board's decision implied transference of a burden of persuasion to the employer. The court granted enforcement, however, finding transference of a burden of production to the employer completely proper.[127]

For a time it appeared that the First Circuit would stand alone it its criticism of the Board over the nature of the burden shifted in *Wright Line*. The Courts of Appeals for the Second,[128] Fifth,[129] Sixth,[130] Seventh[131] and Ninth[132] circuits all readily accepted *Wright Line* as a concession by the Board to prior appellate criticism[133] without expressly considering the burden-shifting issue. The Board received "high marks" for its efforts from these courts of appeals. For example, in *NLRB v. Nevis Indus.*,[134] the Court of Appeals for the Ninth Circuit concluded that:

> The new rule strikes an acceptable balance between protection of employees' rights and preservation of employers' rights to discharge employees for valid business reasons.[135]

In *Herman Brothers, Inc. v. NLRB*,[136] the employer urged the Court of Appeals for the Third Circuit to find that *Wright Line* improperly shifts a burden of persuasion to the employer. The Third Circuit considered this argument and pronounced resounding support for the Board's *Wright Line* approach. It reviewed its own prior cases regard-

126. *See supra* note 120.
127. Wright Line, 662 F.2d 899.
128. NLRB v. Charles Batchelder Co., 646 F.2d 33 (2nd Cir. 1981).
129. Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3933 (1982); NLRB v. Charles H. McCauley Associates, 657 F.2d 685 (5th Cir. 1981) (rejecting without analysis an employer objection to the burden-shifting aspect of *Wright Line*); NLRB v. Robin Am. Corp., 654 F.2d 1022 (5th Cir. 1981).
130. Borel Restaurant Corp. v. NLRB, 676 F.2d 190 (6th Cir. 1982); NLRB v. Lloyd A. Fry Roofing Co. of Delaware, 651 F.2d 442 (6th Cir. 1981); NLRB v. Allen's I.G.A. Foodliner, 651 F.2d 438, 440 (6th Cir. 1981); NLRB v. Consolidated Freightways Corp., 651 F.2d 436 (6th Cir. 1981); Charge Card Ass'n v. NLRB, 653 F.2d 272 (6th Cir. 1981). As discussed above, *supra* note 19, *Lloyd A. Fry* stated that the "in part" test is the controlling rule for cases alleging independent violation of section 8(a)(1) in the Sixth Circuit. It also cites *Wright Line*, however, without acknowledging any conflict between the two, 651 F.2d at 446.
131. NLRB v. Eldorado Mfg. Corp., 660 F.2d 1207, 1213 (7th Cir. 1981); Peavey Co. v. NLRB, 648 F.2d 460, 461 (7th Cir. 1981); Sullair P.T.O., Inc. v. NLRB, 641 F.2d 500, 504 (7th Cir. 1981).
132. NLRB v. Nevis Indus., 647 F.2d 905 (9th Cir. 1981); NLRB v. Int'l Medication Systems, Ltd., 640 F.2d 1110 (9th Cir. 1981).
133. The Court of Appeals for the Fourth Circuit has found no necessity to expressly consider *Wright Line's* appropriateness to date since it has found the required outcome in those cases which have come before it quite clear under any of the competing modes of analysis in dual motive cases. NLRB v. Burns Motor Freight, Inc., 635 F.2d 312 (4th Cir. 1981) (per curiam).
134. 647 F.2d 905 (9th Cir. 1981).
135. *Id.* at 909.
136. 658 F.2d 201 (3rd Cir. 1981).

ing the appropriate method of analysis in dual motive cases and found that its own precedent placed the burden of proving a legitimate reason for contested action to be upon the employer.[137] The court, however, gave no express consideration to the argument that section 10(c) of the Act may render this approach defective.

The Courts of Appeals for the Third and Ninth Circuits, however, belatedly elected to give the burden-shifting issue raised in *Wright Line* closer scrutiny. In *Behring International v. NLRB*,[138] the Third Circuit held that the Board's effort to shift a burden of proof to the employer in section 8(a)(3) cases runs afoul of section 10(c). The court reasoned that an illegitimate motive must be shown to have been the "but for" cause of adverse action before discrimination violative of section 8(a)(3) is established. It concluded that section 10(c) requires the Board's General Counsel to bear the burden of proving this as well as all other essential elements of any alleged unfair labor practice.[139] The Court of Appeals for the Seventh Circuit subsequently agreed.[140] The *Behring Int'l* panel did not acknowledge or discuss the prior decision of that circuit in *Herman Brothers*, which seemingly finds the Board's burden-shifting approach consonant with the prior law of that circuit, and hence the rule prevailing in the Third Circuit is less than clearly established.

The Ninth Circuit took its turn to review the burden-shifting issue in *Zurn Industries v. NLRB*,[141] and upheld the Board's approach. In *Wright Line*, the Board defended its burden-shifting approach in partial reliance upon comments of Senator Taft prior to passage of the "discharge for cause" language added to section 10(c) in 1947.[142] Taft argued in favor of the "discharge for cause" language ultimately passed on the grounds that it left the burden of proving legitimate cause for discharge on the employer, where Taft asserted it had been to that date under Board and court decisions.[143]

---

137. *Id.* at 208.

138. 675 F.2d 83 (3rd Cir. 1982).

139. The court relied upon that portion of section 10(c), 29 U.S.C. § 160(c) (1976), which provides as follows:

> If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

The court also noted that the Board's own regulations interpret this provision to mean that "[t]he Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act." 29 C.F.R. §101.10(b) (1981).

140. NLRB v. Webb Ford, Inc., 689 F.2d 733 (7th Cir. 1982).

141. 680 F.2d 683 (9th Cir. 1982).

142. See *supra* notes 109 and 123 and accompanying text for this author's comments regarding the "discharge for cause" language and the significance of its legislative history.

143. 93 CONG. REC. 6494, 6518-19 (1947), *Reprinted in* 2 LEG. HIST. 1565, 1593-95 (1947).

The Ninth Circuit noted that the First Circuit's *Wright Line* decision had found this legislative history "inconclusive."[144] The *Zurn Industries* court agreed with this characterization after full discussion of the pertinent references, but nonetheless reached a contrary holding, stating that, "[t]his history, although not conclusive, places a sufficient gloss on section 10(c) to sustain the Board's *Wright Line* rule."[145] The court found itself obliged to "accept the Board's *Wright Line* rule if it is a reasonably defensible interpretation of the Act consistent with its purpose."[146] The Court of Appeals for the Eighth Circuit adopted a similar approach.[147]

Increasing polarization of the courts of appeals over this issue ultimately induced the Supreme Court to grant certiorari in *NLRB v. Transportation Management Corporation*,[148] a case in which the First Circuit reiterated its view on the Board's effort to shift a burden of persuasion to the respondent. Thus, resolution of the *Behring International/Zurn Industries* controversy can be expected in the foreseeable future.

Even without resolution of that dispute, however, the fact remains that *Wright Line* has gone a long way toward minimizing disputes with the courts of appeals in those cases which are affected. All courts have expressed praise for *Wright Line's* substantive aspects, despite the burden-shifting issue, which has been characterized as a procedural ques-

144. 680 F.2d at 689.

145. *Id.* at 693.

146. *Id.* at 689 (citing Ford Motor Co. v. NLRB, 441 U.S. 488 (1979) and NLRB v. Local 103 Int'l Ass'n of Iron Workers, 434 U.S. 335 (1978)). The cases cited by the Court of Appeals for the Ninth Circuit support deferral to the Board in cases calling for ". . . its special understanding of the actualities of industrial justice." 441 U.S. at 496. They do not suggest that the Board has any special expertise in assessing legislative history or rules of evidence which would warrant the Ninth Circuit's deferral in this instance. One would hope that federal appellate judges could display equal if not greater skills in these areas. At least one appellate judge has agreed, observing that, ". . .one major purpose underlying court review of administrative agency decisions is that of keeping agency action within statutory bounds laid down by Congress. . . ." NLRB v. Transp. Management Corp., 674 F.2d 130, 133 (1st Cir.), *cert. granted*, A-2 DLR No. 220 (BNA) (November 15, 1982) (No. 82-168).

147. NLRB v. Dixtures Mfg. Corp., 669 F.2d 547, 550 and n.4 (8th Cir. 1982).

148. 674 F.2d 130 (1st Cir.) *cert. granted*, A-2 DLR No. 220 (BNA) (November 15, 1982) (No. 82-168). The Court may also express views impacting upon the burden-shifting aspect of the *Wright Line* test upon deciding Connick v. Myers, (5th Cir. July 23, 1981), *cert. granted*, 50 U.S.L.W. 3715 (U.S. March 8, 1982) (No. 81-1251), a First Amendment case in which the employer alleged that the plaintiff would have been discharged without regard to any arguably protected activity. The petitioner posed the following as one of the questions presented by the case: "Does public employer bear burden of proving that employee was in fact fired for other permissible grounds or is he merely responsible for introduction of evidence that articulated permissible grounds for discharge with employee bearing ultimate burden of proving each element of her case by preponderance of evidence?" 51 U.S.L.W. 3030 (U.S. August 3, 1982) (No. 81-1251). Questions posed by the Justices during oral argument in this matter, however, indicate that the Court may not address the burden-shifting issue since the trial court's findings of fact suggest that the motive for the contested discharge was found without reliance on any notion of shifting burdens of proof. A-9 DLR No. 218 (BNA) (November 10, 1982) (No. 81-1251).

tion. Moreover, the courts have generally acknowledged that the outcome regarding the burden-shifting issue will *not* affect the end result in many, if any, cases. Ironically, while the Board appears to have succeeded in eliminating one source of disharmony between itself and the courts of appeals, it has failed to bring about a uniform system of analysis within the Board itself on this issue. The major dissension expressed to date regarding *Wright Line's* usefulness has been expressed by Board members, not by appellate judges. The controversy which has arisen revolves around *Wright Line's* usefulness in section 8(a)(3) and section 8(a)(1) cases placing motive at issue which cannot properly be defined as dual motive cases.

In *Wright Line* itself, the Board majority held that it would prospectively apply the *Wright Line* test to all section 8(a)(3) and section 8(a)(1) cases requiring a showing of unlawful motivation.[149] The Board suggested that uniformity should be sought in this area since the precise test applied in cases apart from dual motive cases should not be expected to produce any difference in outcome. Member Jenkins issued a separate concurrence in which he expressed some reservations regarding uniform application of the *Wright Line* test.[150] Primarily, he expressed concern regarding cases in which it is difficult to precisely isolate one cause as the "but for" cause for adverse action. Member Jenkins suggested that in such a circumstance, ambiguity must be resolved in favor of the General Counsel rather than the employer, since the employer has "created this situation" in which the precise role of improper motivation cannot be accurately fixed.[151] No opinion was expressed in Member Jenkins' separate concurrence as to the appropriateness of utilizing the *Wright Line* test in those situations which cannot properly be defined as dual motive cases.

Despite *Wright Line's* stated intention to avoid future categorization of section 8(a)(3) and section 8(a)(1) cases requiring a showing of motivation, the Board has subsequently preserved a distinction between dual motive cases and other such cases. In *Concord Furniture Industries, Inc.*,[152] the Board issued a supplemental decision and order which noted the pretextual nature of the case before it. This was a Pretext I case. In *Quality Broadcasting Corp.*,[153] the Board issued a supplemental decision and order, again noting the pretextual nature of the case before it. This was a Pretext II case. In both these cases, however, the

149. 251 NLRB at 1089 n.13.
150. *Id.* at 1091.
151. *Id.*
152. 254 N.L.R.B. No. 109 (1981).
153. 254 N.L.R.B. No. 118 (1981).

Board explained that its ultimate conclusions would be the same whether the *Wright Line* test were utilized or the employer's defenses were simply rejected as pretextual.[154]

Member Jenkins appeared tolerant of the Board's stated intention to use *Wright Line* uniformly until March of 1981, approximately six months after *Wright Line's* issuance. In *The Bond Press, Inc.*,[155] however, the Board's decision included a footnote in which Member Jenkins expressed the view that *Wright Line* need not be applied in cases where the employers defenses were rejected as pretextual.[156] Member Jenkins did not make clear whether this view was held solely with regard to Pretext I cases or both with regard to Pretext I cases and Pretext II cases. The particular case at hand was a Pretext I case.

Liberty Pavilion Nursing Home,[157] contained the next expression of Member Jenkins' views in this general area. This was a Single Motive IG case. The Board's decision included a footnote in which Member Jenkins observed that application of *Wright Line* serves no useful purpose where the legitimate motive proffered by the employer is accepted as the sole cause producing the contested action.[158] Member Jenkins' views in this area were further made clear in *Five Star Air Freight Corp.*,[159] a Pretext II case. Here, for the first time, Member Jenkins expressed the view that application of the *Wright Line* test in Pretext II cases serves no useful purpose.[160]

The increasing appearance of footnotes expressing Member Jenkins' views in this area began to give the appearance that the Board's effort to secure uniform analysis in section 8(a)(1) and section 8(a)(3) cases requiring a showing of motivation was suffering gradual erosion. The Board appeared to temporarily cure this problem in *Limestone Apparel Corp.*[161] In *Limestone*, a Pretext II case, the Board clearly appeared to hold that *Wright Line* need not be applied to any cases in which the employer's defense is rejected as pretextual, whether such case be properly placed in the Pretext I category or the Pretext II category:

> [W]e find it unnecessary to formally set forth [the *Wright Line*] anal-

154. *Concord Furn.*, 254 N.L.R.B. at 921; *Quality Broadcasting*, 254 N.L.R.B.
155. 254 N.L.R.B. 1227 (1981).
156. The footnote stated, in pertinent part, as follows:
> . . . after all the detailed examination of Respondent's reasons for or defenses of the discharges, the upshot is that its reasons must be rejected as untrue, and the case is thus one of 'pretext,' as to which a *Wright Line* analysis adds nothing.

Id. at 1227 n.2.
157. 254 N.L.R.B. 1299 (1981).
158. *Id.* at 1299 n.2.
159. 255 N.L.R.B. 275 (1981).
160. The "legitimate" reasons asserted by the employer in *Five Star* were found "specious." *Id.* at 275 n.1.
161. 255 N.L.R.B. 722 (1981).

> ysis in those cases where an administrative law judge's findings and conclusions fully satisfy the analytical objectives of *Wright Line*. We find that such is the case here. Thus, where an administrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon.
>
> No substantive objective is served by our reiterating and recasting an administrative law judge's finding and conclusions in order to achieve formalistic consistency with *Wright Line* by inserting the term "*prima facie* showing" after the evidence which demonstrates the employer's wrongful motive on the record as a whole and then stating that "the employer did not meet its burden of demonstrating that the same action would have taken place even in the absence of the employee's protected conduct" where the administrative law judge has concluded that the proffered explanation is pretextual. For a finding of pretext necessarily means that the reasons advanced by the employer either did not exist [Pretext I] or were not in fact relied upon [Pretext II], thereby leaving intact the inference of wrongful motive established by the General Counsel.[162]

The appearance of agreement created by *Limestone*, however, was removed only six weeks later by issuance of the Board's decision in *Castle Instant Maintenance/Maid, Inc.*[163] In that case, the Board majority made clear that *Limestone* was not intended to fully adopt Member Jenkins' views in this area.[164] Chairman Fanning and Member Zimmerman clarified that although they would not insist upon ALJ use of *Wright Line* in pretext cases, they saw no objection to the use of *Wright Line* in these cases.[165] In essence, they expressed the opinion that in rejecting employers' defenses as pretextual an ALJ may use or disregard the *Wright Line* test at their discretion. Since the issuance of *Castle Instant Maintenance*, the members of the Board have continued to express their differing views on use of *Wright Line* in cases other than dual motive cases. Footnotes or separate concurring opinions have been included continuously, although not consistently, in Pretext I cases,[166] Pretext II cases,[167] Single Motive IG cases,[168] and Single Mo-

162. *Limestone Apparel*, 255 N.L.R.B. at 722.
163. 256 N.L.R.B. 130 (1981).
164. 256 N.L.R.B. at 130 n.1.
165. *Id.*
166. *Compare* S.W. Hart & Co., 258 N.L.R.B. No. 192 (1981) (including footnote expressing Member Jenkins' view) *with* St. John's Constr. Corp., 258 N.L.R.B. No. 67 (1981) (no reference included).
167. *Compare* Union Oil Co., 258 N.L.R.B. No. 188 (1981) (including footnote expressing Member Jenkins' view) *with* Quebecor Group, Inc., Philadelphia Journal Div., 258 N.L.R.B. No. 125 (1981) (no reference included).

tive IB cases[169] expressing Member Jenkins' view that *Wright Line* need not and should not be applied in such circumstances. Indeed, Member Jenkins has rather vehemently expressed the view that application of *Wright Line* under these circumstances produces needless potential for confusion.[170] Ironically, Member Jenkins has, as yet, not objected to use of *Wright Line* in that category of cases where its application is least served, namely, Single Motive II cases. By definition, a Single Motive II case poses no issue of fact as to what event or conduct precipitated employer action. These cases pose a question of law as to whether the precipitating event or conduct was activity protected by the Act. All of the Single Motive II cases included in this study were reviewed because either the ALJ or the Board made reference to and use of *Wright Line* in those cases. This use, however, clearly served no purpose.

Should any portion of Member Jenkins' views be adopted by the Board in order to better serve its effort to bring about agreement on the analysis to be used in section 8(a)(1) and section 8(a)(3) cases requiring a demonstration of motive? Adoption of Member Jenkins' views in connection with Pretext I and Pretext II cases would likely bring about agreement within the Board and the courts of appeals. As noted above,[171] the courts of appeals are not in agreement with the Board's conclusion that the employer's defense may be rejected as pretextual in *both* Pretext I and Pretext II cases. If the Board were to cease using *Wright Line* in Pretext II cases, the courts of appeals would likely regard this as an effort to circumvent *Wright Line* and the disarray which preceded *Wright Line* would likely be resurrected.[172] Adoption of

168. *Compare* Gerson Elec. Constr. Co., 259 N.L.R.B. No. 88 (1981) (including footnote expressing Member Jenkins' view) *with* Cato Oil & Grease Co., 258 N.L.R.B. No. 153 (1981) (no reference included).

169. *Compare* Cal-Walts, Inc., 258 N.L.R.B. No. 126 (1981) (including footnote expressing Member Jenkins' view) *with* King Trucking Co., 259 N.L.R.B. No. 79 (1981) (no reference included).

170. *See, e.g.*, Blackstone Co., 258 N.L.R.B. No. 124 (1981) (Member Jenkins dissenting, in part).

171. *See supra* note 57.

172. Only one appellate decision rendered to date expresses a view supporting a conclusion contrary to that asserted in the text. In NLRB v. Charles Batchelder Co., 646 F.2d 33 (2nd Cir. 1981), Circuit Judge Newman issued a separate concurring opinion in which he expressed a preference for analysis of pretext cases without use of the *Wright Line* test. Judge Newman noted that the second question posed by the *Wright Line* test necessarily initiates a speculative inquiry: What *would* the employer have done in the absence of any protected activity? In Judge Newman's opinion, however, an effort to determine whether an employer's asserted legitimate cause for action is true or pretextual initiates an inquiry into the facts as they *did* evolve, rather than as they *might* have evolved absent protected activity. 646 F.2d at 43. Judge Newman's observations appear analytically sound. Little practical impact can be expected, however, whether the Board asks the question, "What would the employer have done in the absence of protected activity?" as suggested by *Wright Line* or the question, "Did the employer really rely on the asserted legitimate cause?" as suggested by Judge Newman. In either case, the same factors (evidence of consistent or disparate treatment, presence or absence of evidence reflecting surveillance of the AD, presence or

Member Jenkins' view in connection with Pretext I and Pretext II cases, therefore, would not appear prudent.

It does appear prudent, however, to adopt Member Jenkins' view in connection with Single Motive IG cases, Single Motive IB cases and particularly Single Motive II cases, despite the fact that Member Jenkins himself has not to date expressed objection to use of *Wright Line* with reference to this last category. In cases where there is no necessity whatsoever to weigh competing, credible evidence of motive, *Wright Line* serves no purpose and Member Jenkins' fear that it produces confusion may well be valid. In the interest of minimizing dissension, therefore, the Board should make clear that the *Wright Line* test need not and should not be utilized in Single Motive IG cases, Single Motive IB cases and Single Motive II cases.

V. CONCLUSION

Upon adopting the *Mount Healthy* formula for resolving dual motive cases the Board asked itself, "How can friction with the courts of appeals in this area be eliminated?" *Wright Line* has proved a satisfactory answer to that question. In order to satisfactorily protect the interests sought to be served by the Act, however, the Board should have investigated different questions before tackling the goal of uniformity. Most importantly, it should have inquired as to precisely what legitimate interest[s] the Board's prior "in part" test sought to serve. It further should have asked how much legitimate interests could be protected while striving toward uniformity.

As discussed above, the Board's failure to explore these questions and provide more clear guidance in this area of the law has produced certain undesirable effects. Those effects can be cured and the use of the *Wright Line* formula can be otherwise improved if the following actions are taken:

(1) The board should stand ready to find violations of section 8(a)(1) where an employer's comments or conduct suggests to employees that an AD has in fact been selected for discipline because of protected activities. The Board should further give careful consideration in such cases to whether traditional section 8(a)(1) remedies such as notice posting will satisfactorily remedy any coercive effect which has been experienced by the workforce or whether more significant remedial action such as reinstatement should be required. The General

absence of evidence reflecting animus, timing, consistency or inconsistency of the employer's various statements of position, presence or absence of admissions and the possibility of condonation) will be relied upon to supply the answer to the question posed.

Counsel should, of course, be attentive to these areas in determining whether issuance of complaint is warranted in cases where adverse employer action is challenged.[173]

(2) The Board should make clear that the burden shifted to the employer as part of the *Wright Line* test is solely a burden of production. Characterization of the second question posed within the *Wright Line* test as an "affirmative defense" should be expressly abandoned.

(3) The Board should make clear that *Wright Line* need not and should not be applied in Single Motive IG cases, Single Motive IB cases and Single Motive II cases, as defined in this article.

Adoption of the foregoing recommendations can be expected to produce greater uniformity with greater accommodation of interests sought to be served by the Act than is accomplished under the *Wright Line* test as it has been applied to date.

173. The observations made in this article regarding *Wright Line's* deficiencies might be relied upon to support a more pervasive criticism of that test than suggested by the recommendation in the text. It could be argued that failure to fully analyze the differing requirements of and interests sought to be protected by section 8(a)(1) and section 8(a)(3) caused the Board to improperly adopt the same test for determining motive for use in both types of cases. *Wright Line's* "but for" approach appears consistent with the General Counsel's obligation to prove discrimination, that is, different treatment than otherwise would have ensued in a section 8(a)(3) case. It would appear less justifiable in section 8(a)(1) cases, where the central inquiry should be "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." Cooper Thermometer Co., 154 NLRB 502, 503 n.2 (1965). The bad example created by the four cases made the focus of this article establishes that interference with employee rights may be accomplished even where protected activity is not a "but for" cause of disciplinary action. Given this phenomenon, justification may exist for retaining the "in part" test in independent section 8(a)(1) cases placing motive at issue although abandoning it in section 8(a)(3) cases. In other words, a reasoned basis exists for the approach which has evolved in the Court of Appeals for the Sixth Circuit, *see supra* note 18 and accompanying text, even though the court has never articulated it. This approach is not recommended here for two reasons. First, the focus in determining whether a disciplinary action or its surrounding circumstances violates section 8(a)(1) should not be whether an illegitimate motive was present, but the degree to which this motive has been communicated in a manner likely to coerce the exercise of future rights. The method of analysis recommended in the text places the focus on communication of the illegitimate motive and is, therefore, preferable to use of the "in part" test in independent section 8(a)(1) cases. Secondly, the recommendations stated in the text have been designed to correct deficiencies in the *Wright Line* framework without requiring direct reversal of the Board's current policies in any significant respects. Given the confused history of the law in this area, another about-face seems worth avoiding if such can be accomplished while better accommodating litigants' legitimate interests.