

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

CAPSTONE LOGISTICS LLC
AND ASSOCIATED WHOLESALE
GROCERS, INC. as joint employers

and

Case No. 15-CA-257443

JOYCE HENSON
An Individual

and

PEGGY COOPER
An Individual

Case No. 15-CA-259712

William T. Hearne, Esq., for the General Counsel.
David I. Klass and Benjamin S. Morris Esqs. (Fisher and Phillips, LLP,
Charlotte, North Carolina), for the Respondent Capstone Logistics.
Martin J. Regimbal and Bart N. Sisk, Esqs. (The Kullman Firm, Memphis,
Tennessee), for Respondent Associated Wholesale Grocers.
Casey R. Denson and Justine Daniel, Esqs. (Casey Denson Law, New Orleans, Louisiana)
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried via Zoom technology from May 10-13, 2021, before Administrative Law Judge Elizabeth M. Tafe. Post-Trial Briefs were filed by the parties on July 1, 2021. Effective April 25, 2022, Judge Tafe transferred to a non-judicial position at the NLRB. On that date I reassigned this case to myself. The parties have agreed to my issuing a decision on the record made before Judge Tafe.

Joyce Henson filed the initial charge in case 15-CA-257443 on March 3, 2020. Peggy Cooper filed the initial charge in case 15-CA-259712 on April 27, 2020. The General Counsel issued a consolidated complaint in these cases on October 5, 2020.

The General Counsel alleges that Respondents, Capstone Logistics and Associated Wholesale Grocers (AWG) violated Section 8(a)(1) of the Act by discharging Joyce Henson on about October 23, 2019, and by discharging Peggy Cooper on about November 1, 2019, because they engaged in protected concerted activity.¹

The General Counsel alleges further that Capstone and AWG were joint employers of the Capstone auditor employees working at AWG's Pearl River, Louisiana facility in 2019 and 2020.

On the entire record, but not including observation of the demeanor of the witnesses,² and after considering the briefs filed by the General Counsel and separately by Respondents Capstone Logistics and Associated Wholesale Grocers, I make the following

FINDINGS OF FACT

I. JURISDICTION

Capstone Logistics is a nationwide company that provides labor to other businesses,³ including Associated Wholesale Grocers at its facilities, including one in Pearl River, Louisiana. Associated Wholesale Grocers (AWG) is also a nationwide company, which distributes groceries. Capstone annually performs services valued in excess of \$50,000 in States other than Louisiana. AWG annually purchases and receives goods valued in excess of \$50,000 directly from points outside of Louisiana. Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Capstone Logistics provides labor to AWG at many sites, including its distribution center in Pearl River, Louisiana, which is also known as AWG's Gulf Coast facility. In late September 2019 Capstone began providing auditors to AWG at Pearl River. Auditors worked a day shift.

Capstone had been providing unloaders and sanitation employees to AWG at Pearl River since 2014.⁴ Unloaders worked exclusively at night, starting at about 1:00 a.m. Unloaders were paid according to their production (piecework) but sanitation workers, whose main job was to scrape ice off a freezer floor were paid an hourly wage. While sanitation workers also worked mainly at night, some worked a day shift, Tr. 386.

¹ The General Counsel also alleges that Tim Casey, Capstone's vice president of operations, made certain statements that violated Section 8(a)(1).

² I have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers*, 296 NLRB 711, fn. 1 (1989).

³ Capstone provides labor to companies other than AWG, such as Family Dollar.

⁴ Capstone was then called LMS Intellibound, Inc.

The auditors' job is to check groceries that have been loaded on pallets with a scan gun to insure that the items on the pallet match the customer's order. The customers are usually grocery chains. AWG employees instruct the Capstone auditors as to which pallets they must audit.

5 The auditor's job requires the employee to lift items weighing up to 80 pounds while
transferring items from one pallet to another. They are generally paid an hourly wage during
training and then earn production pay (i.e., piecework) after training. The Capstone auditors
hired at Pearl River were told they would switch to production pay after training. However, in
the 9 months or so that Capstone provided auditors to AWG at Pearl River, its auditors were paid
10 an hourly wage throughout their employment.

In late September or early October 2019, Capstone hired the Charging Parties, Joyce Henson and Peggy Cooper as audit employees at Pearl River. At about the same time, it hired Valerie Marcel to be an auditor. Afterwards, possibly about October 14, 2019, Capstone hired Kiki Garcia to be an auditor. The new auditors trained together.

When these employees were hired, Capstone's site manager was Shadi Krishnan, who left shortly after they arrived. Prince Wilson, a Capstone manager from Albany, New York, arrived at Pearl River to train the new auditors on about October 5, 2019. During his 2 weeks at Pearl River Wilson trained the new auditors in how to operate the double pallet jack, a type of forklift truck. He did not train them in how to perform the auditing job.

25 For one week or two, Brady Bordelon, a AWG warehouse lead, at the direction of his supervisor, Robert Kelly, trained the Capstone auditors by having them “shadow” auditors who worked for AWG.⁵ On about October 25, Shayne Mora, a lead auditor working for Capstone in Kansas City, arrived at Pearl River to conduct training of the new employees in the auditing function. Prior to Mora’s arrival, the Capstone auditors were managed by AWG personnel, G.C. Exh. 16.

30 *Joyce Henson*

Capstone hired Joyce Henson on or about September 30, 2019. She had worked for Capstone at AWG's Pearl River facility several years earlier. Capstone hired Henson with the intention of making her the lead auditor. As such she would have been compensated via an hourly wage plus being paid per her production. The other auditors were to be paid only per production after completing their training.

On Henson's first day she attended an orientation with several other newly hired auditors, Peggy Cooper and Valerie Marcel. The Capstone site manager sent the new employees' home after orientation because they were not certified to operate the jacks (forklifts). When Prince 40 Wilson arrived; he began their forklift training. This training took place in a room where the

⁵ Capstone's supervisors at Pearl River worked the night shift with the Capstone unloaders. Between the time Wilson left and Shayne Mora arrived, Capstone had nobody with authority supervising or training the day shift.

facility's equipment was charged and stored. Henson complained to Wilson in front of the other new auditors that the area was dangerous and asked if the training could take place elsewhere at the facility.⁶

5 On or about October 9 or 10, Henson had a conversation with Glenn Batiste, the warehouse trainer supervisor for AWG, in the presence of Prince Wilson and auditors Peggy Cooper and Valerie Marcel. Batiste told the new auditors that the equipment at Pearl River was very dangerous and gave them tips on how to avoid injury. Henson questioned why Capstone was doing its training in the equipment room. Batiste replied that he did not understand why they were training there; he trained AWG employees in open areas on the loading dock.⁷

10 On October 11, 2019, Henson filled out an evaluation form, giving Wilson perfect marks as an equipment trainer, G.C. Exh. 4. At trial, she testified that was not her actual opinion of Wilson's training. A few days later, Henson asked Wilson if she could be designated as Capstone's lead auditor. Wilson introduced her as such to AWG personnel. On October 17, 15 2019, Capstone certified Henson to train other employees in the operation of a forklift, and to certify them, G.C. Exh. – 3.

20 The auditors' duties required them to spend some time inside the AWG freezers. AWG employees were provided freezer suits; Capstone auditors were not. Henson asked Wilson for freezer suits. Wilson said there were none for Capstone employees. Capstone submits that the duties of the auditors at Pearl River required them to work only in cold storage areas in which the temperature did not go below 40 degrees Fahrenheit and thus they did not need freezer suits. However, this contention is predicated on the testimony of vice-president Tim Casey, who did 25 not have personal knowledge regarding what the Capstone auditors did at Pearl River. Henson testified that she had to drive into areas in which it was much colder several times per shift, Tr. 96-97. Cooper also testified that she had to work in areas that were very cold, Tr. 247. I credit Henson and Cooper on this point.

30 On October 16, Henson contacted Donnie Rouse a major customer of AWG:

Q Where you upset that you were going to be making 11.75 an hour?

A Yes.

Q And you told Mr. Rouse that you can't continue this job for \$11.75 an hour, correct?

35 A That's correct.

Q So you asked Mr. Rouse -- Rouse for help, for him to put in a call, correct?

⁶ I credit Henson because although Wilson denied that Henson made safety complaints to him, he did so in a very general way. His testimony is not credible in that new auditor Valerie Marcel ran into an electrical box or charging station, during training, which Wilson had to document and report. Henson credibly testified that she and Marcel were required to fill out reports of this event. Wilson initially denied there were any safety issues during the training of the auditors, Tr. 656, until confronted by the Charging Party's counsel about this accident. Peggy Cooper testified that on another occasion she accidentally bumped into an employee with her forklift.

I do not credit Mike Ruder's testimony that he met in person with Henson prior to October 22, 2019. He was not at Pearl River on October 17, when he spoke to Henson over the phone. There is no credible evidence that he was at the facility while Henson was employed before that.

⁷ Henson's testimony about her conversation with Batiste is uncontroverted and thus credited.

A Yes.

Q And you -- you asked him to do that on October 16, 2019?

A Yes.

Q You wanted Mr. Rouse to call AWG to see if your rate of pay could be changed, correct?

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Tr. 192-93.

On or about October 17 or 18, 2019, Henson and the other new auditors accompanied Wilson to a meeting with Chris Griffin, AWG's Director of Distribution at Pearl River (Warehouse Manager) and Ryan Carroll, another AWG senior manager.⁸ According to Wilson, Henson asked Griffin about her pay, not anyone else's. Wilson also testified that she did not complain about safety or anything else. Henson testified that she asked Griffin for freezer suits, and also complained about the safety of the location in which auditors would be working and being paid according to production. Henson testified that the other auditors nodded their heads in agreement. Griffin told her that he would discuss these issues with Capstone.

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Then Henson asked to speak to Griffin and Carroll privately. She complained about her pay and mentioned that she had already contacted Donnie Rouse, the owner of a grocery chain which was a major customer of the AWG Pearl River warehouse, Tr. 109.

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Q Okay. Why did you want to meet with Mr. Griffin and -- and Mr. Carroll privately?

A Because I wanted to talk about my pay rate, what I was going to be paid, what I was going to be making. And I didn't want to discuss that in front of the other coworkers, because I knew they wasn't going to make what I was going to make.

25

Q Okay. And why do you -- why do you say that?

A Because I accepted the position as the lead auditor.

Q Okay. What did you -- I guess, once -- once you were -- once you were alone with Mr. Griffin and Mr. Carroll, how did that meeting get served?

30

A I told them that I had concerns about my pay. I let Mr. Chris Griffin know that I already contacted Mr. Rouse and that's when Chris's eyes got so big, he looked at me and put his hands on the table. He's, like, you know Donnie Rouse?

Rouse is a personal friend of Henson's stepfather. Griffin gave Henson a piece of paper which had the phone numbers of Tim Casey, Capstone's vice president of operations and Mike Ruder, Capstone's director of operations. Griffin told Henson to call them.

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After this meeting Henson went to Capstone's office at the warehouse. Prince Wilson was talking on a speaker phone to Mike Ruder. Ruder spoke to Henson on the speakerphone and told her he would be at Pearl River in a few days and would be discussing her pay privately.

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At about noon on October 22, 2019, Henson and the other three new auditors met with Ruder, Vice President Tim Casey and Andrew Powell, who at the time was Capstone's site manager in Kansas City and was going to succeed Ruder as director of operations for Pearl

⁸ See AWG's Answer to the Complaint, paragraph 5(b). Ryan Carroll was AWG's party representative at this hearing.

River. When the auditors raised concerns about the terms of their employment, Casey responded. He generally dismissed their concerns,

5 In this meeting, which lasted about 10 minutes, Henson raised concerns about the area in which the Capstone auditors were being trained. She stated the training should take place inside the safety corrals, which prevented entry by mobile equipment. Andrew Powell responded that this was a problem at another AWG location and that he had been able to rectify the issue. Henson understood that Powell was offering to do the same at Pearl River, Tr. 154.

10 Henson also told Casey that Prince Wilson was not qualified to train the auditors. Casey disagreed. Henson also testified that she asked that the auditors be provided freezer suits when they had to work in the freezer. She testified that Casey responded that Capstone was only required to provide employees with gloves and vests.

15 Further Henson testified that she asked about the auditors' compensation. She testified that she told Casey that the auditors were told that they would be paid 16 cents for every case they scanned. Casey told her they would be paid 8 or 9 cents per case. According to Henson, Valerie Marcel mentioned her accident and Peggy Cooper complained about Prince Wilson's training.

20 In a private meeting with Casey, Ruder and Powell, that occurred just before or just after the meeting with all the new auditors, Henson told them that Shadi Krishan had told her she would be making \$200 a day, Tr. 116-118, 155-56, 443. Casey told Ruder to find out what a lead auditor is paid by Capstone and that Henson would get that rate + production pay.

25 Casey told Henson that if she had any concerns she should bring them to himself or Mike Ruder. He specifically asked her not to go to AWG with any Capstone related issues or concerns, Tr. 444-45.

30 At 2:43 p.m. on October 22, Henson sent the following text message to AWG's customer Donnie Rouse:

35 This is by far the worse company I have ever worked for. Do you ever come to Slidell? Would you like to have lunch with me, and we talk about everything, and I'll treat you!! I really need your opinion and feedback. I'm trying to stick it out. Today at 12:00 pm we had a meeting with Capstone management. They told my auditors that they was misinformed and they will only make \$0.09 per case not \$0.16. I have not been given a amount that I will make. As of right now I'm making 10.00 hr and This is week 3.

40 I would love to talk anytime [phone number] and answer any questions you might have. The guy that runs things for AWG is Chris Griffin and Ryan Carroll their number is.....

45 R. Exh. 55.

I infer that after learning of this text and getting a call from Rouse, AWG's Chris Griffin approached Henson on the loading dock. Tr. 187-88.⁹ According to Henson, Griffin asked Henson how her meeting with Casey, Ruder and Powell went. She replied that the meeting went well and then both returned to their workstations. Henson testified she did not make any
 5 complaints about wages or other working conditions to Griffin. I find there is no reliable evidence in this record as to what transpired between Griffin and Henson on the afternoon of October 22. However, I conclude that more likely than not, whatever occurred led to Henson's termination by Capstone the next day.

10 I also infer that Chris Griffin almost immediately texted Casey after talking to Henson. He asked Casey to call him, R. Exh. 38.¹⁰ A few minutes later Griffin and Casey had a one-minute telephone conversation. There is no reliable evidence as to what was said by either one. Griffin did not testify in this proceeding. The testimony regarding what transpired between
 15 Griffin and Henson that day is hearsay and I decline to credit it. While Casey's account of what Griffin said is not hearsay as to what he heard Griffin say, it is too self-serving in the context of this record to be credible. Casey testified that after talking to Griffin, he decided to terminate Henson. I credit Casey insofar as he testified that he decided to terminate Henson after talking to Griffin on the afternoon of October 22 and/or the morning of October 23.

20 The next day, October 23, 2019, VP Tim Casey called Henson at home. In a brief conversation Casey informed Henson that Capstone was terminating her employment. Casey told Henson she was being terminated due to what transpired the day before and for disrupting Capstone's relationship with its business partner AWG, Tr. 120, 201, 475.¹¹ He did not ask
 25 Henson for her explanation of what transpired before terminating her. Henson was completely surprised by her termination, Tr. 120.

30 On October 24, Henson went to the Pearl River facility and was able to enter because her badge had not been deactivated. She tried to talk to Tim Casey, but he had left the facility. On November 6, 2019, Casey provided Henson the following explanation for her termination in a voice mail message:

My apologies nobody's gotten back to you yet
 on, uh, reason for termination but, uh, I think it's pretty clear [unintelligible] at the end of
 the day it was disruption of business. Even after we had spoke, uh, day before, um, and

⁹ In her affidavit to the Board, Henson stated she spoke to Griffin several hours after her meeting with Casey, Ruder and Powell. At trial, she testified that the encounter occurred almost immediately after that meeting.

¹⁰ Griffin apparently texted Casey at 2:58 Central time (3:58 Eastern time) asking Casey to call him. Casey called Griffin at 2:59 and spoke to him for one minute at 3:01, shortly after Henson's text to Rouse, Tr. 453-62, R. Exhs. 38, 47.

¹¹ Henson testified that Casey told her she was being terminated due to what occurred at the October 22 meeting with Capstone management. Casey testified that if he was specific about anything it was the October 22 interaction between Henson and Griffin that caused him to terminate Henson. I do not credit Henson's testimony that Casey said her termination was related to her meeting with Capstone managers on October 22. According to Henson's testimony nothing occurred at that meeting that would have led Capstone to fire her.

had an agreement with how we were going to go forward, you came in questioning the partner and...and, uh, which was disrupted business on things we already talked about and I had told you that if you had any questions or issues, to come to me so I thought it best to separate ways.

5 G.C. Exh. 8(b) (transcript of a voice mail left by Casey on Henson's phone).

Capstone did not provide Henson with any documentation regarding her termination nor any other explanation than the ones set forth above.

10 *Peggy Cooper*

Capstone also hired Peggy Cooper as an auditor on or about September 30, 2019. During her training in the AWG equipment or maintenance area, Cooper was concerned that the area was not big enough to train on the operation of forklifts. She discussed her concerns with her fellow auditors, Henson, Kiki Garcia and Valerie Marcel and with Prince Wilson. She was also part of a conversation in front of Wilson with AWG supervisor Glenn Batiste. As a result of that conversation the Capstone auditors began to train on forklifts on the dry goods side of the loading dock. Cooper remained concerned with the safety of training in this area and shared those concerns with Wilson.

For about 4 days, an AWG employee trained Cooper on how to audit the products on the pallets. At some point the auditors began to work in the cold side of the loading dock. Cooper asked Brady Bordelon of AWG whether the Capstone auditors could get freezer suits. Bordelon told her that she would have to ask Capstone.

After Capstone trainer Shayne Mora arrived at Pearl River on October 25, Cooper was told that she would eventually be switched to production pay. This meant that what she earned depended on how fast she worked. Cooper testified to concerns she raised to Mora about the manner in which Mora was conducting the training. I find she did so but also find that the record does not establish that these concerns were concerted, as opposed to Cooper's concerns as to whether she could do the job in the manner Mora was telling her it was to be done.¹² Moreover, the record does not establish a connection between Cooper's complaints to Mora and her termination.

A few days later, on or about October 31, 2019, Cooper was called into a meeting with Capstone Vice President Casey. Casey told her that Capstone did not think she could work fast enough to perform the auditor's job successfully. Cooper acknowledged to Casey that the auditing job might be too much for her, Tr. 291-92. Casey told her that he would see if he could find her another job with AWG.¹³ Then he told her she could go home. Cooper complained to Casey that the auditors' training was inconsistent.

¹² Even if Cooper's complaints were concerted, there is no evidence that Mora knew they were concerted. This is an element in proving a PCA discharge, *Amelio's*, 301 NLRB 182 (1991)

¹³ On the evening of October 31, Mora sent Casey a text. R. Exh. 39 & 40, which reads in pertinent part: "But Ms. Peggy says she doesn't want to come in if she's not gonna stay in audit. When would she be moved to another positions?" I infer that the word not in this message is an inadvertent error. The message only makes sense if Mora was communicating that Cooper wanted to continue working ONLY if

The next day, Cooper reported for work. Casey told her that he checked with AWG and that AWG did not have a job for her. Cooper did not tell Casey she wanted to return to work as an auditor. Cooper left and did not hear from Capstone again. Casey decided to terminate Cooper's employment on about November 1, 2019, G.C. Exh. 15.

ANALYSIS

Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging or otherwise discriminating against employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...* (Emphasis added)"

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."

To establish an 8(a)(1) violation based on an adverse employment action where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line*, 251 NLRB 1083 (1980). The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity that is sufficient to create an inference that the employee's protected activity was a motivating factor in his or her discharge. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.¹⁴

The legal principles applied to this case

Joyce Henson

Protected Activity

Joyce Henson engaged in protected concerted activity. She concertedly complained about the safety of the area in which new auditors were trained. I credit her testimony that she

she was given a non-auditing position. This reading is consistent with Cooper's behavior on November 1. When Casey told her he did not have another job for her, she did not ask him to resume working as an auditor. This reading is also consistent with Mora's testimony at Tr. 662, 664.

¹⁴ In cases in which the employer's motive for allegedly discriminatory discipline is at issue, the *Wright Line* test applies regardless of whether the employee was engaged in union activity or other protected concerted activity, *Hoodview Vending Co.*, 362 NLRB 690 (2015); 359 NLRB 355 (2012).

raised concerted concerns regarding the production or piecework rate at which the new auditors were to be paid after completing their training.

Employer Knowledge of Henson's protected activity

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Capstone, by Prince Wilson, was aware of Henson's safety and compensation complaints.

Animus

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There is no evidence of animus towards Henson's protected activities prior to October 22 and 23. Moreover, while there is evidence of animus towards Henson on October 22 and 23 by Capstone and AWG, I find that the General Counsel has not established that this animus was due to her protected activities.¹⁵ The record is equally consistent with animus confined to her unprotected activities. Those activities being her efforts to secure better compensation merely for herself, not other employees. That Henson was primarily concerned with her own pay and not that of others is established by her testimony at Tr. 109 quoted earlier and her October 22 text message to Donnie Rouse, a major customer of AWG.

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It is clear that something transpired between Henson and AWG's Chris Griffin on October 22, that led Griffin to call Tim Casey to tell him Henson was not to be allowed back in the Pearl River facility. Since Griffin did not testify, the record does not fully establish what was said by either. Also, Griffin may have been reacting to a communication from Donnie Rouse. Henson's text of October 22, suggests that she was seeking his support in getting better wages at Pearl River.¹⁶

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The record also does not establish any animus towards Henson's protected activities prior to October 22. Up until that date, the record establishes that Capstone had continued to designate Henson as the lead auditor with greater compensation than the other newly hired auditors.¹⁷ Henson's surprise at her termination also indicates it was the result of something to which she was not privy, i.e., the conversation between Griffin and Casey the day before.

Causal Connection between Henson's protected activities and her discharge

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The General Counsel has not established a sufficient causal connection between Henson's protected activities and her discharge. While her discharge is clearly connected to her interaction with Chris Griffin on October 22, the General Counsel has not established that this

¹⁵ With regard to Henson's complaints about the safety of Capstone training in the maintenance area, the fact that Capstone moved the auditor training to the loading dock without significant delay, suggests it did not bear animus towards Henson (or Cooper) due to these complaints.

¹⁶ Casey testified that on at least one occasion, Griffin discussed Henson's relationship with Rouse with him, Tr. 438.

¹⁷ If the record established that Henson went to Griffin about protected matters, that Griffin excluded her from the property and that Capstone fired her as a result, I may well have found that both AWG and Capstone violated the Act and that they were joint employers. Concerted complaints to third parties about working conditions are protected, *Eastex v. NLRB*, 437 U.S. 556 (1978). Beyond this, AWG was clearly a joint employer while its employees trained and supervised the Capstone auditors, but not necessarily afterwards.

communication concerned her protected activities as opposed to her desire to put pressure on both Respondents to increase her own compensation. The timing between Henson's meeting with Capstone and Henson's discharge might otherwise suggest discriminatory motivation. However, it does not do so necessarily in this case given the lack of evidence of animus towards Henson's protected activity, and the intervening event, i.e., Henson's interaction with Griffin.

Peggy Cooper

The record establishes that Peggy Cooper engaged in protected concerted activity by complaining about safety issues and the compensation of all the new auditors. The record also establishes that Capstone knew of those complaints and their protected nature. However, the record does not establish that either AWG or Capstone bore animus towards Cooper as a result of those protected activities. Similarly, the record does not establish a nexus between Cooper's protected activities and the termination of her employment.

By her own admission, Cooper was having trouble keeping up with the demands of the auditor position. On November 1, 2019, when she learned that Capstone had not found another position for her, Cooper did not ask to return to work as an auditor. Capstone was not under any obligation to find another position for her in the absence of a discriminatory motive. There is no evidence that it did not find Cooper another job due to animus towards Cooper as a result of her protected complaints. Cooper, as Capstone argues, abandoned her job and then Capstone terminated her employment as a result.

VP Casey's alleged Section 8(a)(1) statements

The General Counsel alleges that VP Tim Casey violated Section 8(a)(1) in telling Joyce Henson on October 23, 2019, that she was terminated for engaging in protected activities and on November 6, by stating the same reason for her termination. On October 23, Casey told Henson that she was being terminated due to what transpired the day before and for disrupting Capstone's relationship with its business partner AWG. Henson engaged in both protected and unprotected activity on October 22.

Henson engaged in protected concerted activity in the group meeting with Capstone supervisors and unprotected conduct in her private meeting with them. There is no evidence that she engaged in protected activity on October 22 in her encounter with Griffin. Thus, I conclude from an objective or subjective standpoint, Casey's statement does not mean he was terminating her for protected activity.

I reach the same conclusion with regard to Casey's November 6, 2019, voicemail message. That message clearly relates to Henson's encounter with Griffin on October 22. The record does not show that Henson engaged in protected concerted activity in this encounter. I therefore dismiss both allegations regarding Casey's statements.

CONCLUSION OF LAW

Neither AWG nor Capstone Logistics violated the Act in terminating the employment of Joyce Henson and Peggy Cooper. Capstone, by Tim Casey, did not violate the Act in telling Joyce Henson the reason she was being terminated.¹⁸

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 10, 2022



Arthur J. Amchan
Administrative Law Judge

¹⁸ While the record contains evidence that would otherwise support a finding of pretext (lack of investigation, departure from normal practices, disparate treatment, etc.), the General Counsel failed to meet its initial burden of persuasion. Thus that evidence is irrelevant.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.