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Wright Line: The NLRB Adopts the *Mt. Healthy* Test for Dual Motive Discharge Cases Under the LMRA

In *Wright Line*,[1] the National Labor Relations Board (Board) abandoned its standard causation test for mixed motive or dual motive discharge cases arising under sections 8(a)(1) or 8(a)(3) of the Labor-Management Relations Act[2] (Act) and adopted in its stead the test enunciated by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*.[3] In so doing, the Board wrote an elaborate opinion explaining the development of the conflicting tests applied by the Board and the federal courts of appeals, the *Mt. Healthy* test, and the applicability of that test to section 8(a)(3) cases.

Wright Line presented an ideal opportunity to introduce a new causation analysis for dual motive discharge cases in the labor context.[4] The

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1. 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169 (Aug. 27, 1980). The case is also reported in DAILY LAB. REP. No. 178 (BNA) (Sept. 11, 1980) and reviewed in 49 U.S.L.W. 2204 (Sept. 23, 1980).

2. Labor-Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-187 (1976)). The Act amended the National Labor Relations (Wagner) Act, 49 Stat. 449 (1935) and provides, in relevant part:

> § 7. [29 U.S.C. § 157] 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. . . .
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> § 8. [29 U.S.C. § 158](a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]. . . .
>
> (2) . . .
>
> (3) 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 . . . .
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> § 9 . . .
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> § 10. [29 U.S.C. § 160](c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

3. 429 U.S. 274 (1977) (unanimous opinion). *Mt. Healthy*, although factually similar to § 8(a)(3) cases, was decided on first amendment grounds and therefore is not binding on the Board.

4. All facts are from the *Wright Line* opinion, 105 L.R.R.M. at 1175-76.

General Counsel alleged that Wright Line had violated sections 8(a)(1) and 8(a)(3) of the Act by discharging Bernard Lamoureux because of his protected union activities. Wright Line denied this allegation and asserted that Lamoureux had been legitimately discharged for violating a plant rule against "knowingly altering or falsifying production time reports, payroll records, [and] time cards."[5] The Administrative Law Judge ruled in Lamoureux's favor. Wright Line excepted and brought the case before the Board.

In presenting his prima facie case, the General Counsel showed that Lamoureux had become a leading union advocate in 1976 and had been active in soliciting support for the union in the 1976 and 1977 election campaigns. Both sides employed aggressive tactics during the campaigns and the Wright Line management exhibited overt antiunion animus. The management was particularly hostile toward Lamoureux, whom they considered the "union kingpin." Lamoureux's discharge was effected shortly after the union lost the second election in 1977.

At the time of his discharge, Lamoureux had been employed by Wright Line for over ten years and had been an inspector for two years. His employment record during this time was superior. Despite this employment record, Lamoureux's supervisor was directed by the plant superintendent the day before the discharge to "check" on him. He found certain discrepancies on Lamoureux's time sheet the next morning and reported them to the plant superintendent. On request, Lamoureux provided a reasonable explanation, but, nevertheless, was promptly fired for violating the plant rule against altering time records.

The General Counsel also showed that other employees had violated the rule, but only the most severe violators had been discharged. Two employees who had deliberately falsified their time cards were only warned. The evidence established that the discrepancies on Lamoureux's time sheet had no effect on the production control system and had not benefitted him financially. Finally, the General Counsel showed that Lamoureux's final paycheck had been prepared before he had been offered an opportunity to explain the discrepancies. Upon this evidence, the Board held Wright Line in violation of sections 8(a)(1) and 8(a)(3) of the Act.

When faced with previous discharge cases in which it appeared that the employer's reasons for discharging an employee might be both permissible and impermissible, the Board had applied an "in part" causation test.[6] Under this test, if the employee's protected union activities were a

5. *Id.* at 1175.

6. *See,* Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574, 575, 92 L.R.R.M. 1328, 1330, *enforcement denied,* 574 F.2d 891 (6th Cir. 1978).

factor, however slight, in the employer's discharge decision, the discharge was held to violate the Act. This harsh result was sometimes mitigated by requiring the employee to prove that the employer was motivated in "substantial part" by his protected activities.[7] However, this "substantial part" test differed very little from the "in part" test in application and the Board has faced increasing opposition to the tests over the past two decades.[8]

While the Supreme Court has stated that decisions by the Board are to be accorded considerable deference[9] and has designated the "substantial evidence test" as the standard for review of Board decisions,[10] the courts are not required to apply the same causation analysis as the Board. As a result, only the Sixth,[11] Seventh[12] and Tenth[13] Circuits have consistently supported the "in part" test. The others have developed independent, conflicting tests. These various causation tests and their inconsistent application[14] have led to what the Board terms "intolerable confusion in the 8(a)(3) area."[15]

The First Circuit was the earliest and most outspoken critic of the "in part" test, primarily because of the test's inherent partiality toward union activists.[16] After struggling with the test for years, the court rejected it in

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7. *See, e.g.*, Central Casket Co., 225 N.L.R.B. 362, 92 L.R.R.M. 1547, 1548 (1976). *See also* cases cited at 105 L.R.R.M. at 1170.

8. *See* Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293 (1st Cir. 1977); NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1315 (1st Cir. 1971).

9. *See, e.g.*, NLRB v. Truck Driver's Local 449, 353 U.S. 87, 96 (1957).

10. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The test is "[w]hether on the record as a whole there is substantial evidence to support [the] agency findings." *Id.* at 491.

11. The Sixth Circuit has consistently deferred to the Board's causation analysis and has limited its review to the substantial evidence test. *See, e.g.*, NLRB v. Publishers Printing Co., 625 F.2d 746, 749 (6th Cir. 1980); Northern Telecom, Inc. v. NLRB, 618 F.2d 421, 422 (6th Cir. 1980); Hobart Corp. v. NLRB, 600 F.2d 593 (6th Cir. 1979); NLRB v. Youngstown Osteopathic Hosp., 574 F.2d 891 (6th Cir. 1978); Waltz v. NLRB, 566 F.2d 1056 (6th Cir. 1977).

12. *See, e.g.*, NLRB v. Pfizer, Inc., 629 F.2d 1272, 1275 (7th Cir. 1980); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 27 (7th Cir. 1980) (rejecting *Mt. Healthy*); St. Luke's Mem. Hosp., Inc. v. NLRB, 623 F.2d 1173 (7th Cir. 1980); NLRB v. Gogin, 575 F.2d 596, 601 (7th Cir. 1978).

13. *See, e.g.*, NLRB v. First Nat'l Bank, 623 F.2d 686, 692 (10th Cir. 1980); M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166, 174 (10th Cir. 1977).

14. Although not generally subscribing to the "in part" test, the other circuits have applied it, or a facsimile of it, occasionally. *See, e.g.*, Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1082-83 (9th Cir. 1977); Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977); Neptune Water Meter Co. v. NLRB, 551 F.2d 568 (4th Cir. 1977); Singer Co. v. NLRB, 429 F.2d 172, 179 (8th Cir. 1970). *See also* 105 L.R.R.M. at 1170-72.

15. 105 L.R.R.M. at 1174.

16. NLRB v. Lowell Sun Publ. Co., 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring). *See also* 105 L.R.R.M. at 1171.

favor of a "dominant motive" test.[17] This test requires the employee to prove that his protected activity was the "dominant" or "primary" reason for his discharge rather than merely "a factor" or a "substantial factor."[18] While the First Circuit has moved away from the original format of this test,[19] the Ninth Circuit has generally adhered to it.[20] The Fourth[21] and District of Columbia[22] Circuits have also applied a "dominant motive" test, but in a "pretext" format.

This "pretextual approach" is applied by the Third,[23] Fifth[24] and Eighth[25] Circuits. Under this approach, the employee must first present a prima facie case of discriminatory discharge. Then the employer must show that he had legitimate cause for the discharge. In rebuttal, the em-

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17. NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968). The test originated in NLRB v. Lowell Sun Publ. Co., 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring). *Cf.* NLRB v. Whitin Machine Works, 204 F.2d 883, 884-85 (1st Cir. 1953).

18. 320 F.2d at 842. *Cf.* NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1315 (1st Cir. 1971).

19. The court called its approach a "but for" test in Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977) citing *Mt. Healthy* as general support for its stance. The court also made it abundantly clear to the Board that the "in part" test was unwelcome in the circuit. *Id.* at 1293. More recently, the court has adopted the *Mt. Healthy* test. NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666 (1st Cir. 1979). *See* note 43 *infra*, and accompanying text.

20. Stephens Inst. v. NLRB, 620 F.2d 720, 726 (9th Cir.), *cert. denied*, 101 S. Ct. 358 (1980); Polynesian Cultural Center, Inc. v. NLRB, 582 F.2d 467, 473 (9th Cir. 1978); Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1978).

21. *See* NLRB v. Burns Motor Freight, Inc., 635 F.2d 312, 314-15 (4th Cir. 1980); Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976). *See also*, McLean Trucking Co., v. NLRB, 626 F.2d 1168, 1169-70 (4th Cir. 1980); American Mfg. Assocs. v. NLRB, 594 F.2d 30, 36 (4th Cir. 1979); Firestone Tire & Rubber Co. v. NLRB, 583 F.2d 1268, 1273 (4th Cir. 1978).

22. *See* Midwest Regional Joint Bd. v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977).

23. *See* Gould, Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1980); Stein Seal Co. v. NLRB, 605 F.2d 703, 709 (3d Cir. 1979); Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978).

24. *See* Berry Schools v. NLRB, 627 F.2d 692, 704-05 (5th Cir. 1980); Florida Steel Corp. v. NLRB, 587 F.2d 735, 742-44 (5th Cir. 1979); NLRB v. Aero Corp., 581 F.2d 511, 514-15 (5th Cir. 1978); Federal-Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978) (Thornberry, J., concurring); and NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956). However, language in other opinions lends doubt as to the approach actually being applied, *e.g.*, NLRB v. Southern Plasma Corp., 626 F.2d 1287, 1294 (5th Cir. 1980) ("motivating cause" and "but for"); Abilene Sheet Metal, Inc. v. NLRB, 619 F.2d 332, 338-39 (5th Cir. 1980) ("moving cause"); NLRB v. Big Three Indus. Gas & Equip. Co., 579 F.2d 304, 315 (5th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) ("reasonably equal"); NLRB v. Neuhoff Bros. Packers, Inc., 398 F.2d 640, 647 (5th Cir. 1968) ("moving cause"). *See also* Brown & Root, Inc. v. NLRB, 634 F.2d 816, 817 (5th Cir. 1981).

25. *See* NLRB v. Hitchiner Mfg. Co., 634 F.2d 1110, 1112-13 (8th Cir. 1980); Iowa Beef Processors, Inc. v. NLRB, 567 F.2d 791, 797 (8th Cir. 1977); NLRB v. Melrose Processing Co., 351 F.2d 693, 699 (8th Cir. 1965). *See also* Zoll v. Eastern Allamakee Community School Dist., 588 F.2d 246, 251 (8th Cir. 1978).

ployee must prove that the employer's proffered legitimate reasons are a mere pretext for the real, discriminatory reason. Support for this test stems from the nearly analogous Title VII area[26] and generally from dicta in the 1937 Labor Board Cases.[27]

However, as the Board pointed out in *Wright Line,* the "pretextual approach" is conceptually incompatible with the "dual motive" situation.[28] The pretext situation exists when an employer has discharged an employee solely in retaliation for his protected activity and has presented a smokescreen of fictitious legitimate reasons. In the dual motive case, the employer actually bases his decision on both legitimate and illegitimate reasons. When multiple reasons exist, it is unrealistic to apply a test requiring the determination of a single, "real" reason.

Whether this problem is one of conflicting fundamental concepts or simply one of semantics, it is alleviated by the *Mt. Healthy* test. Under this test, the distinction between "pretext" and "dual motive" is immaterial.[29] The test ultimately focuses on the employer's ability to prove that his legitimate business reasons, standing alone, justify the discharge.

The *Mt. Healthy* test consists of two distinct parts. First, the employee must make a prima facie case that he was engaged in protected activity and that this activity was a "substantial factor" or "motivating factor" in the employer's decision to terminate his employment. Once this has been established, the burden shifts to the employer to prove, by a preponderance of the evidence, that he would have reached the same decision even in the absence of the protected activity.[30]

Mt. Healthy was a dual motive discharge case brought on first amendment grounds.[31] Doyle, the plaintiff, was an untenured school teacher whose employment contract was subject to yearly renewal by the board of education. When he was not rehired, Doyle brought an action in federal district court claiming that his discharge was in violation of his first amendment right of free speech. The board contended that the discharge resulted from several incidents at the school and Doyle's "notable lack of tact in handling professional matters."[32]

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26. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804, 807 (1973), and its progeny, *e.g.,* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Albemarle Paper Co. v. Moody, 425 U.S. 405 (1975). *But see* McDonald v. Santa Fe Trans. Co., 427 U.S. 273, 282 (1976).

27. *See particularly,* Associated Press v. NLRB, 301 U.S. 103, 132 (1937) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937).

28. 105 L.R.R.M. at 1170.

29. *See Id.* at 1170 n.4.

30. 429 U.S. at 287; *see also* 105 L.R.R.M. at 1172-73.

31. All facts are from the Supreme Court's opinion, 429 U.S. at 281-83.

32. *Id.* at 282-83. In one instance, an argument between Doyle and another teacher led the other teacher to slap him. Doyle refused to accept an apology and insisted the other

The controversy centered around one incident in particular: The school principal had circulated a memorandum regarding teacher dress and appearance and Doyle had reported it to a local radio station. At trial, the district court held that the telephone call to the radio station was speech protected by the first amendment. Because the speech played a "substantial part" in the school board's decision, the discharge was held to be wrongful. The Sixth Circuit Court of Appeals affirmed without opinion.[33]

The Supreme Court vacated and remanded. In evaluating the district court's analysis, the Court explicitly rejected any causation test focused solely on whether protected conduct had "played a part, 'substantial' or otherwise"[34] in the discharge decision, stating that an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision."[35] The Court stressed that the causation analysis must balance the competing interests of the employee and employer. "[T]he proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."[36] With this foundation, the Court enunciated the new test with its formal, burden shifting procedure and directed that it be applied by the district court on remand.[37]

As justification for adopting this test in *Wright Line*, the Board found that both Congress and the Supreme Court had already implicitly sanctioned the burden shifting procedure of the *Mt. Healthy* test in the context of section 8(a)(3).[38] In the legislative history, Senator Taft, cofounder of the Act, indicated that the procedure was implicit in the 1947 amendment to section 10(c).[39] The Board also noted that the Supreme Court has already used the procedure in the 8(a)(3) area, although not in

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teacher be punished. His persistence prompted the suspension of both teachers, which in turn led to a walkout by other teachers. Other incidents included an argument with school cafeteria employees over the amount of spaghetti served to him; reference to students, in connection with a disciplinary complaint, as "sons of bitches"; and making an obscene gesture to two girls failing to obey his commands as cafeteria supervisor. *Id.* at 281-82.

33. 529 F.2d 524 (6th Cir. 1975).

34. 429 U.S. at 285.

35. *Id.* at 286.

36. *Id.* at 287.

37. *Id. See* text accompanying note 30 *supra.*

38. 105 L.R.R.M. at 1173-74.

39. 93 CONG. REC. 6678, *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1595 (1947). *See* note 2, *supra*, for the text of the amendment to § 10(c).

a dual motive discharge case.[40]

The Board was avowedly attempting to reconcile the various tests prevalent in the circuit courts. Particularly important to the Board in this attempt was the substantial deference that the Supreme Court had stated was due the Board's decisions.[41] Resolution of the conflict among the circuits is dependent not only upon the circuit courts' acceptance of the *Mt. Healthy* test, but also upon a consistent construction and application of the test throughout the circuits. Unfortunately, the *Mt. Healthy* test is subject to varying interpretations. The Board perceived it as essentially the same as the "in part" test coupled with a more equitable procedural framework.[42] However, when the First Circuit adopted the *Mt. Healthy* test in 1979, the court found it harmonious with the "dominant motive" test,[43] while the Second Circuit has applied it as a "but for" test.[44]

In an attempt to convince the appellate courts of a single interpretation of the *Mt. Healthy* test, the Board set forth the reasons for its construction of the test. The Board noted that *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[45] rejected the "dominant motive" test,[46] just as the "substantial part" test was rejected in *Mt. Healthy*. The Board explained that it was abandoning the "in part" language as a means of "clearing the air" for the *Mt. Healthy* test to be applied as formulated by the Supreme Court without incorporating into that test the burdensome phraseology from past Board opinions.[47]

The Board's reliance on *Arlington Heights* to define the parameters of the *Mt. Healthy* test was well placed. The two cases were decided on the same day and the opinions were apparently written concurrently. *Arlington Heights* was an equal protection case concerning an alleged racially discriminatory zoning ordinance. The Court noted that had the plaintiffs carried their burden of proving that a discriminatory purpose was a "motivating factor" in the village's decision to enact the ordinance, the *Mt. Healthy* burden-shifting procedure would have been applied.[48] In turn,

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40. 105 L.R.R.M. at 1174, *citing* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

41. 105 L.R.R.M. at 1173, *citing* NLRB v. Truck Driver's Local 449, 353 U.S. 87, 96 (1957).

42. 105 L.R.R.M. at 1175.

43. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979). *Accord*, Texas Instr. Inc. v. NLRB, 599 F.2d 1067, 1073 (1st Cir. 1979); *See also* Keosaian, Inc. v. NLRB, 630 F.2d 36, 39 (1st Cir. 1980).

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

45. 429 U.S. 252 (1977).

46. *Id.* at 265.

47. *See* 105 L.R.R.M. at 1172, 1175 and cases cited therein.

48. 429 U.S. at 270 & n.21.

the Court cited this language in enunciating the test in *Mt. Healthy*.[49]

The Supreme Court has since referred to the test in other first amendment cases,[50] other equal protection cases[51] and in other areas of constitutional law, including due process[52] and the sixth amendment.[53] Perhaps most notably, the Court has applied the test in the Title VII area.[54] These cases serve to define further the parameters of the test and indicate that the Court views the test as appropriate for analyzing causation in varied contexts. While the Court has refused to rule on the applicability of the test to section 8(a)(3) dual motive discharge cases,[55] its refusal is not necessarily a negative sign. On the contrary, the cumulative effect of the language in *Mt. Healthy* and *Arlington Heights*, the subsequent treatment of the test by the Supreme Court and lower courts,[56] the relevant dicta in earlier Supreme Court opinions and the legislative history of the Act supports the conclusion that the *Mt. Healthy* test will be found to protect organizational rights as well as constitutional rights.[57]

The Board's adoption of the *Mt. Healthy* test in *Wright Line* was a

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49. 429 U.S. at 287 n.2.

50. Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), *rev'g.* Ayers v. Western Line Consol. School Dist., 555 F.2d 1309 (5th Cir. 1977).

51. Branti v. Finkel, 445 U.S. 507 (1980); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 n.54 (1978).

52. Carey v. Piphus, 435 U.S. 247, 260 (1978); Codd v. Velger, 429 U.S. 624, 630 (1977) (Brennan, J., dissenting).

53. Duren v. Missouri, 439 U.S. 357, 368 (1979).

54. International Bhd. of Teamsters v. United States, 431 U.S. 324, 368 (1977). *See also* East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 n.9 (1977).

55. The question was presented in the petition for certiorari following Leak Repairs, Inc. v. NLRB, 622 F.2d 592 (7th Cir. 1980) *enforcing* 241 N.L.R.B. No. 38, 100 L.R.R.M. 1632 (Mar. 20, 1979). *See* 49 U.S.L.W. 3181 (Sept. 23, 1980). The Court denied certiorari. 49 U.S.L.W. 3249 (1980). In the petition for certiorari following Laredo Packing Co. v. NLRB, 625 F.2d 593 (5th Cir. 1980) *enforcing* 241 N.L.R.B. No. 24, 100 L.R.R.M. 1573 (Mar. 19, 1979) the issue presented was whether a "dominant motive" or "but for" test was appropriate. *See* 49 U.S.L.W. 3473 (Jan. 6, 1981). Again the Court denied certiorari. 49 U.S.L.W. 3486 (Jan. 13, 1981).

56. *See, e.g.*, Whiting v. Jackson State Univ., 616 F.2d 116, 122, 124-26 (5th Cir. 1980); Marshall v. Commonwealth Aquarium, 611 F.2d 1, 12 (1st Cir. 1979); Loeb v. Textron, Inc., 600 F.2d 1003, 1019-20 (1st Cir. 1979); NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666, 671 (1st Cir. 1979); Zoll v. Eastern Allamakee Community School Dist., 588 F.2d 246, 251 (8th Cir. 1978); Downes v. Beach, 587 F.2d 469, 471 (10th Cir. 1978); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98-101 (2d Cir. 1978); and United States v. Winston, 558 F.2d 105, 110 (2d Cir. 1977).

57. *See* Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98-99 (2d Cir. 1978). *See also* NLRB v. Porta Systems Corp., 625 F.2d 399, 403-04 (2d Cir. 1980). For an earlier promotion of the *Mt. Healthy* test, *see* DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Board of Education v. Doyle Upon the NLRA*, 66 GEO. L.J. 1109 (1978).

sound move toward the resolution of the "intolerable confusion in the 8(a)(3) area."[58] It is now up to the courts to abandon old tests and terminologies and to follow the Board's lead to accomplish the goal of enforcing the Act uniformly and fairly.[59]

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58. 105 L.R.R.M. at 1174.

59. The First Circuit has set the example. The court expressly approved of the *Wright Line* decision in Statler Indus., Inc. v. NLRB, 106 L.R.R.M. 2799, 2801-02 (1st Cir. 1981).