Climbing Mt. Healthy: In Search of the "Wright Line" on Mixed-Motive Discharges Under Section 8(a)(3)*

Robert Remart†

The Board and the courts have long sparred over the proper standard for proof of discriminatory intent in mixed-motive discharge cases. The author explores the various standards espoused—the "partial motive" test, the "dominant motive" test, and the "but for" test—as well as problems of allocation of proof. The Board's burden-shifting Wright Line test, drawing on the Supreme Court's first amendment Mt. Healthy decision, the author argues, is the appropriate standard. Finally, the author discusses the reactions of the circuit courts of appeals to the Board's position in Wright Line.

I

INTRODUCTION

For many years, the circuit courts of appeals and the National Labor Relations Board (the Board or NLRB) have clashed over the proper treatment of discriminatory discharge cases under section 8(a)(3) of the National Labor Relations Act (NLRA or the Act). This section defines unlawful discrimination as any employer action "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(3) does not expressly require a showing of employer unlawful motive to interfere in union or concerted employee activity. Nevertheless, it is well established that a discriminatory dis-

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† J.D. University of California (Berkeley) 1981.
4. Thus, some commentators note that the Board and the Supreme Court, in their early applications of section 8(a)(3), "regarded motive as an evidentiary tool rather than a statutory requirement." Christensen & Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 YALE L.J. 1269, 1276 (1968) (arguing that Congress would have used motive language in section 8(a)(3) were that the legislative intent). See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945) (despite lack of antiunion ani-
charge claim will be sustained only upon proof that a discriminatory purpose was behind the discharge. The scope of section 8(a)(3) is significantly limited not only by the motive requirement but also by section 10(c) of the Act, which protects the employer's common law right to discharge or discipline an employee for "just cause." The tension between the employee's organizational rights and the employer's managerial rights becomes acute in so-called "mixed motive" or "dual motive" cases under section 8(a)(3). In dual motive cases, the record presents evidence that both antiunion animus and legitimate business reasons entered into the employer's decision to discharge a worker. Where the evidence suggests both lawful and unlawful employer motives, the Board and circuit courts of appeals have differed over the proper legal causation test for determining if section 8(a)(3) has been violated.

The debate concerning the appropriate causation test under section 8(a)(3) must be viewed in the context of the circuit courts' relationship to the Board. The Act empowers the circuit courts to enforce Board decisions. However, in exercising their power of review, the circuit courts must defer to the Board's decision where it is supported by substantial evidence. In Universal Camera Corp. v. NLRB, the "no-solicitation" rules invalid under section 8(a)(3) when applied to union; Eureka Vacuum Cleaner Co., 69 N.L.R.B. 878, 879, 18 L.R.R.M. 1263, 1263 (1946), quoting NLRB v. Hudson Motor Car Co., 128 F.2d 528, 533 (6th Cir. 1942) ("We may not inquire into his motives," even where it is shown that the employer 'has not wilfully violated' the Act. . ."); Peyton Packing Co., 49 N.L.R.B. 828, 843, 12 L.R.R.M. 183, 183, amended, 50 N.L.R.B. 355 (1943), aff'd, 142 F.2d 1009 (5th Cir.), cert. denied, 323 U.S. 730 (1944). See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); Radio Officers' Union v. NLRB, 347 U.S. 17, 44-46 (1954). In Great Dane, the Supreme Court promulgated an important exception to the motive requirement when an employer's conduct is "'inherently destructive' of important employee rights." 388 U.S. at 34. However, the Court retained the motive requirement for cases where the employer's action has a "comparatively slight" effect on employee rights. Id. It is well settled that individual discharge cases fall into the "comparatively slight" category and thus proof of unlawful motive continues to be the touchstone of section 8(a)(3) violations. See note 67 infra. 6. 29 U.S.C. § 160(c) (1976). This section provides: "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." 7. The Act is silent as to the definition of "just cause." Nevertheless, the concept "is understood to refer to work-related justifications for discipline which would ordinarily be accepted as such under general industrial usages." R. GORMAN, BASIC TEXT ON LABOR LAW 139 (1976). 8. Employee organizational rights are codified in section 7 of the Act, 29 U.S.C. § 157 (1976). 9. Such cases should be distinguished from so-called "pretext" cases where the employer's asserted business reasons are deemed nonexistent or in fact not relied on. See Wright Line, Inc., 251 N.L.R.B. 1083, 1083-84, 105 L.R.R.M. 1169, 1170-71 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), for a discussion of this distinction. See also text accompanying notes 217-24 infra. 10. Section 10(e), 29 U.S.C. § 160(e) (1976). This section deems the Board's findings of fact conclusive "if supported by substantial evidence on the record considered as a whole. . ." 11. Id. 12. 340 U.S. 474 (1951).
Supreme Court held that the substantial-evidence standard precludes the courts from displacing "the Board's choice between two fairly conflicting views. . ." Because this judicial deference applies only to the Board's findings of fact, however, many courts have rejected the Board's legal approach to dual-motive section 8(a)(3) cases and have imposed their own formulas.

This article will explore the historic division and confusion between and among the circuit courts of appeals and the Board in dual-motive discharge cases under section 8(a)(3). Particular attention will be paid to the competing approaches the Board and the courts use to determine the "real" motives behind or the legal cause of an employer's decision to discharge. The article will also evaluate problems concerning the proper allocation of the burden of proof in section 8(a)(3) discrimination cases.

Although the Supreme Court has not put forth a dispositive opinion on dual-motive section 8(a)(3) cases, some courts have found guidance in a related first amendment public employment case, Mt. Healthy Board of Education v. Doyle. Finding some circuit courts' analysis of that case in error, this article argues that the Board's recent opinion in Wright Line, Division of Wright Line, Inc. correctly interpreted and applied the Mt. Healthy test to dual-motive cases under section 8(a)(3), thus taking an important step toward eliminating the uncertainty over the proper test.

In Wright Line, the Board adopted a "burden-shifting" approach in which the General Counsel must first establish a prima facie case that antiunion animus was a "motivating factor" in the employer's decision to discharge or discipline. Once a prima facie case is established, the burden of persuasion then shifts to the employer. This means that the employer must show that it would have taken the same action against the employee even absent an unlawful motive. Compared to the alternatives proposed by the circuit courts, the Board's new approach to dual-motive cases best furthers the Act's fundamental policy of accommodating employee organizational rights and employer managerial prerogatives. Despite some criticism, recent circuit court decisions indicate that the Board's new approach may become the much needed uniform standard for adjudicating dual-motive discharge cases.

13. Id. at 488. See also NLRB v. Walton Mfg. Co., 369 U.S. 404, 407 (1962) (per curiam) (courts must sustain Board's credibility findings where supported by the evidence).
II

THE BOARD'S "IN PART" MOTIVE TEST

Historically, the Board has shied away from using formulas to evaluate mixed-motive discharge cases. Rather, it has preferred to consider the particular facts of each case, carefully weighing the evidence that suggests employer motivation. Generally speaking, the Board infers antiunion animus from a number of factors, such as employer knowledge of a discharged employee's protected activities,\(^\text{16}\) employer expression of general antiunion animus,\(^\text{17}\) coincidental timing of the employee's protected activities and the discharge,\(^\text{18}\) departure from the employer's past discharge practices,\(^\text{19}\) variance from the employer's stated employment policies,\(^\text{20}\) disparate treatment of union adherents,\(^\text{21}\) findings of other unfair labor practices\(^\text{22}\) and implausible or unsupported justifications for the discharge.\(^\text{23}\) No single factor alone will support a finding of illegal motive; the Board looks to the totality of the circumstances. Indeed, given the sophistication of contemporary labor relations, direct evidence of animus is rarely present. The Board is often forced to rely solely on inferences to support its findings.\(^\text{24}\)

Although reluctant to promulgate rigid rules, the Board and its administrative law judges (ALJs) have penned various phrases to articulate the agency's causation standard in mixed-motive cases.\(^\text{25}\) Unfortunately, these various formulations have not always clearly and consistently set forth a definitive agency position.\(^\text{26}\) Nevertheless, until recently the Board generally applied a so-called "in part" or "partial motive" test in dual-motive discharge cases. Under this "in part" test, the employer violates section 8(a)(3) when the record shows that the decision to discharge was to any extent motivated by the employee's

\(^\text{16}\) A showing of employer knowledge of protected activities on the part of the discharged employee is an analytical prerequisite to proof of antiunion animus. See, e.g., Head Ski Div. AMF, Inc., 222 N.L.R.B. 161, 171 (1976), enforced in part, 564 F.2d 434 (D.C. Cir. 1977).


\(^\text{18}\) Id.


\(^\text{21}\) See, e.g., Tama Meat Packing Corp., 230 N.L.R.B. at 126.


\(^\text{24}\) See, e.g., Big Three Indus., Inc., 201 N.L.R.B. 700, 82 L.R.R.M. 1454 (1973). The Supreme Court has noted: "Specific evidence of intent to encourage or discourage [union activity] is not an indispensable element of proof of violation of Section 8(a)(3)." Radio Officers' Union v. NLRB, 347 U.S. 17, 44 (1954).


\(^\text{26}\) See note 48 infra and accompanying text.
union or protected concerted activities, regardless of the degree or weight of legitimate business reasons for the discharge also present.

The decision in *Youngstown Osteopathic Hospital Association*\(^\text{27}\) illustrates how the Board's "in part" test worked. In that case, the employee, Yacoub, was discharged from her duties as a welfare billing clerk. Yacoub had a consistently poor work record, and had fallen considerably behind in billing her accounts. The controller of the Association had already discussed the problem with her when the executive director learned that Yacoub had accumulated a backlog of 300 to 400 welfare accounts. The director ordered the controller to fire her. For some reason, however, Yacoub was not fired immediately. Two days later she drafted a petition protesting the discharge of another employee. That same day, the executive director learned of the petition and told the controller about it. Within the hour the controller fired Yacoub, explaining to her, "we have already discussed your being behind in your work" and adding, "besides we heard you circulated a petition. . ."\(^\text{28}\)

The Board found that Yacoub's protest petition was protected concerted activity under the Act. Moreover, the Board found that the mention of the protected activity during the termination interview, the timing of the discharge and the absence of prior warnings when a greater backlog of work was known by management supported a finding that the protected activity was at least part of the reason for Yacoub's discharge. However, the record also established that lawful business considerations also played a role in the decision to discharge. Faced with a mixed-motive situation, the Board therefore invoked its "in part" causation test and held the employer had violated the Act:\(^\text{29}\)

Under Board precedent if part of the reason for terminating an employee is unlawful, the discharge violates the Act. As the Board and the courts have so often indicated, the issue is not whether there existed


\(\text{\[28\] 224 N.L.R.B. at 574, 92 L.R.R.M. at 1329-30.}

\(\text{\[29\] Because the complaint in this case alleged that Yacoub's discharge violated section 8(a)(1) without invoking section 8(a)(3), the Board held that section 8(a)(1) was violated. Id. at 575. Nevertheless, the Board's discussion applies equally to cases filed under section 8(a)(3). Later decisions have cited *Youngstown Osteopathic Hospital Association* as a controlling mixed-motive case under section 8(a)(3). See, e.g., East Bay Newspapers, Inc., 228 N.L.R.B. 692, 703, 96 L.R.R.M. 1019, 1022 (1977).

Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1976). The Supreme Court has held that sections 8(a)(1) and 8(a)(3) require the same proof of discriminatory motive where employer action affects continued employment, as in discharge cases. See NLRB v. Fleetwood Trailers Co., 389 U.S. 375 (1967); NLRB v. Brown, 380 U.S. 278 (1965).}
grounds for discharge apart from union or protected concerted activities. That the employer has ample reason for discharging an employee is of no moment. An employer may discharge an employee for any reason, good or bad, so long as it is not for union or protected concerted activity. Even if the discharge is based on other reasons as well, if the discharge is partly in reprisal for protected concerted activity, it is unlawful.\(^3\)

The Sixth Circuit denied enforcement of the Board's decision.\(^3\)
Without questioning the correctness of the "in part" test, the court found that the decision to fire was made, though not implemented, before the protected activity occurred, thus negating any inference that an unlawful motive played a part in the discharge. Along with the Sixth Circuit, most courts at some time have applied, with little comment, the Board's "in part" test in mixed-motive discharge cases.\(^3\)

But in the last decade, many circuit courts have found the "in part" test inadequate for resolving the tension between employee organizational rights and managerial prerogatives presented by dual-motive cases. Consequently these courts have fashioned some alternative approaches.\(^3\)

III

JUDICIAL DEFERENCE TO THE NLRB AND "SUBSTANTIAL EVIDENCE" REVIEW

Although the Board's legal analysis in dual-motive cases has drawn considerable criticism in recent years, many courts chose to retain the "in part" test up to the Board's decision in *Wright Line*.\(^3\)

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30. 224 N.L.R.B. at 575, 92 L.R.R.M. at 1330.
32. See, e.g., NLRB v. George J. Roberts & Sons, Inc., 451 F.2d 941, 945 (2d Cir. 1971) (even if "ample grounds to fire," discharge "partially motivated" by union activity was violative); NLRB v. Eagle Material Handling, Inc., 558 F.2d 160, 169-70 (3d Cir. 1977) (antiunion animus was "at least partial motivation" for layoffs and thus unlawful); NLRB v. Big Three Indus., Inc., 497 F.2d 43, 49 (5th Cir. 1974) ("although justifiable grounds may abound," discharge unlawful if partially motivated by protected conduct); NLRB v. Adam Loos Boiler Works Co., 435 F.2d 707, 707 (6th Cir. 1970) (discharge "motivated in part" by animus is unlawful); Jay Foods, Inc. v. NLRB, 573 F.2d 438, 443 (7th Cir.), cert. denied, 439 U.S. 859 (1978) (lawful motive must be the sole basis of the discharge); Crenlo, Div. GF Business Equip., Inc. v. NLRB, 529 F.2d 201, 205 (8th Cir. 1976) (no defense that discharge had another valid ground); NLRB v. Central Press, 527 F.2d 1156, 1158 (9th Cir. 1975) (firing unlawful because "anti-union sentiment . . . partially motivated the discharge"); M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166, 173-74 (10th Cir. 1977) ("If . . . union affairs was [sic] a partial motive for a discharge," violation); Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977) (discharge unlawful "if motivated even in part by anti-union animus").
33. See Sections IV-VI infra.
34. See, e.g., Pelton-Casteel, Inc. v. NLRB, 627 F.2d 23, 30 (7th Cir. 1980) (alternate tests specifically rejected despite trend); Vic Tanny Int'l, Inc. v. NLRB, 622 F.2d 237, 241 (6th Cir. 1980); Chromalloy Mining & Minerals Div. v. NLRB, 620 F.2d 1120, 1124 (5th Cir. 1980); U.S. Soil Conditioning v. NLRB, 606 F.2d 940 (10th Cir. 1979).
These courts, mostly notably the Tenth Circuit, felt obliged to follow a policy of judicial deference to Board findings. This policy is codified in section 10(e) of the Act, which requires the reviewing court to treat the Board’s findings of fact as conclusive, if supported by substantial evidence. The Supreme Court in *Universal Camera Corp. v. NLRB* interpreted section 10(e) to mandate strict deference to the Board’s factual inferences. The Court warned the circuit courts against displacing “the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” Relying on these principles, courts affirming the Board’s “partial motive” or “in part” test argued that all inferences regarding an employer’s motives must be adopted if they are supported by substantial evidence. Many circuits therefore deferred to the Board’s factual conclusion that antiunion animus motivated an employer to discharge. In so doing, some courts also extended judicial deference to the legal analysis used by the Board to determine whether, given the facts, section 8(a)(3) has been violated. Thus, the Tenth Circuit in one case affirmed, with classic deferential language, the “partial motive” test because it was deemed “proper and not unreasonable.”

The courts are correct in deferring to the Board’s findings of fact under the substantial evidence standard of review. They are not compelled, however, to extend the substantial evidence standard to cover

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38. In addition, the Tenth Circuit has held that “an inference other than the one drawn from a particular fact or set of facts does not mean the agency’s conclusion is not supported by substantial evidence.” *Head Div., AMF, Inc. v. NLRB*, 593 F.2d 972, 982 n.20 (10th Cir. 1979). Thus, this circuit affirmed the Board’s inferences of discriminatory motive, even when the evidence gave rise to the opposite inference. *See, e.g.*, U.S. Soil Conditioning v. NLRB, 606 F.2d 940, 944 (10th Cir. 1979).

Other courts consider *Universal Camera* less confining with respect to judicial review. At least one court expressly refused to defer to Board findings. *NLRB v. Patrick Plaza Dodge, Inc.*, 522 F.2d 804 (4th Cir. 1975) (Aldrich, J., of the First Circuit, sitting by designation). There the Board unsuccessfully petitioned the court to modify its opinion by striking the following: “Evidence . . . which gives equal support to inconsistent inferences is not enough” to satisfy the substantial evidence standard. *Id.* at 809. The court, however, did concede that where two inferences can be drawn, the court exceeds its power of review under section 10(e) of the Act in finding the Board’s choice the less reasonable one. Nevertheless, the court pointed out that evidence pointing “equally in two directions points in neither.” *Id.* This is certainly correct if, as the court stated, the Board could not point to “something affirmative” to support its own inference. However, *Universal Camera* expressly requires the courts to respect Board findings if based on tangible evidence, even though such evidence may produce “fairly conflicting views.” 340 U.S. at 488.
the Board's legal test of causation. The formula for determining whether section 8(a)(3) has been breached is a matter of law, not of fact. It is therefore not necessarily subject to the more constrained substantial evidence standard.\textsuperscript{40} The difficulty arises, however, because conclusions of law and findings of fact may overlap whenever the ultimate issue is whether sufficient discrimination exists to violate the Act. As one court explained the problem in the context of discrimination cases under Title VII of the Civil Rights Act of 1964:\textsuperscript{41}

The statement that discrimination exists for purposes of establishing liability . . . is as much a conclusion of law as a finding of fact. A distinction must be drawn between subsidiary facts to which [judicial deference] applies, and the ultimate fact of discrimination necessary to trigger a statutory or constitutional violation, which is the decisive issue to be determined in this litigation.\textsuperscript{42}

That court, accordingly, conducted an “independent examination” of whether the record presented, as a matter of law, employment practices violative of Title VII, while still deferring to the trial court’s findings of fact.

Similarly, in section 8(a)(3) cases, a reviewing court may properly refuse (and some, in fact, have refused) to defer to the Board’s legal analysis and resulting conclusion of discrimination without violating \textit{Universal Camera}, provided that the court defer to the Board’s findings of fact when they are supported by substantial evidence. In fact, \textit{Universal Camera} itself encourages the circuit courts to “assume more responsibility for the reasonableness and fairness of Labor Board decisions. . . .”\textsuperscript{43} Thus, while a court \textit{may} affirm \textit{pro forma} the Board’s legal analysis if the court finds the Board’s approach consistent with general labor law principles and “not unreasonable,”\textsuperscript{44} it is not required to do so.

Confidence in the Board’s special expertise undoubtedly underlies some courts’ expanded deference.\textsuperscript{45} But, neither confidence in the

\textsuperscript{40} The Supreme Court has held that Board “rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations.” NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

\textsuperscript{41} 42 U.S.C. §§ 2000e-2000e-17 (1976). A comparable body of law regarding problems of proof in race and sex discrimination claims has evolved under Title VII. See note 239 and text accompanying notes 135-40 \textit{infra} for a discussion of the relevance of Title VII caselaw to problems of allocating the burden of proof.


\textsuperscript{43} 340 U.S. at 490.

\textsuperscript{44} \textit{See} note 39 \textit{supra}.

\textsuperscript{45} The Supreme Court has stated that deference should be given to the Board’s balancing of conflicting interests between employer and employee in areas of special Board expertise. \textit{See}, \textit{e.g.},
Board’s expertise nor deference to its legal analysis is universal. The First Circuit in particular has repeatedly questioned the Board’s expertise in discharge cases. In *NLRB v. Eastern Smelting Corp.*, the court complained:

In one of the cases at bar the Board has reached the ultimate: the employer is criticized for making a judgmental decision which in a case we heard the month before the employer was criticized for not making. . . .

It is difficult to accept such an approach as “expertise.”

The court in *Eastern Smelting* also noted with dismay that the Board had failed to fashion a uniform approach to mixed-motive discharge cases and that “the correctness of the approach seems to depend upon the choice of Administrative Law Judges.”

Other courts have questioned the Board’s impartiality, accusing it of anti-employer bias. These courts not only deem the “in part” test hostile to the employer’s legitimate economic or “just cause” defense but also believe that the Board is overzealous, or perhaps result-oriented, in finding employer violations. Thus, for diverse reasons, some courts of appeals, recognizing that they are not compelled to adhere to the Board’s legal analysis, have fashioned their own liability tests.

### IV

**The “Dominant Motive” Test**

Under the “in part” motive test, as illustrated in *Youngstown Osteopathic Hospital Association*, an employer violates the Act when anti-union animus or other unlawful reasons play any part in the decision to discharge. Many courts have argued that the “in part” test fails to take sufficient account of the causal relationship, if any, between the employer’s alleged business justifications and its action against the em-

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46. 598 F.2d 666 (1st Cir. 1979).

47. Id. at 671 (citation omitted).

48. Id. at 672. The court would have been correct in adding that the Board itself has inexplicably utilized diverse approaches which are irreconcilable with its more popular “in part” test. The Board, on its own or by adopting the opinions of its ALJs, has applied to dual-motive discharge cases the more rigorous “but for” test, see, e.g., *Waterbury Community Antenna, Inc.*, 233 N.L.R.B. 1312, 1313, 97 L.R.R.M. 1057, 1058 (1977); *Princeton Inn Co.*, 174 N.L.R.B. 1193, 1198 (1969), and the so-called “dominant motive” test, see, e.g., *Production Stamping, Inc.*, 239 N.L.R.B. 1183, 1189 (1979); *Jenks Cartage Co.*, 219 N.L.R.B. 368, 369-70 (1975). For a discussion of these more demanding standards, see Sections IV and V infra.

49. See, e.g., *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 442 (5th Cir. 1978) (finding the Board’s analysis exhibits a “purpose to adjudge the employer guilty of violating § 8(a)(3) of the Act”); *NLRB v. Fibers Int’l Corp.*, 439 F.2d 1311, 1314 (1st Cir. 1971) (describing the Board’s decision as “a classic Board rationalization case”); *NLRB v. Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968) (Board’s analysis of facts “shows lack of impartiality”).

ployee. In rejecting the "in part" test, these courts have formulated alternative tests designed to better balance the competing interests of employee organizational rights and managerial control over the work force. The first of these alternate tests, the "dominant motive" test, was promulgated as early as 1953 by the First Circuit in NLRB v. Whitin Machine Works. There the court held that where an employer has two motives for discharging an employee, one permissible and the other impermissible, the discharge is discriminatory "if other circumstances reasonably indicate that the union activity weighed more heavily in the decision to fire him than did dissatisfaction with his performance."

In repeated applications of this test, the First Circuit has enunciated its virtues relative to the "in part" test as follows:

[T]here is a danger that knowledge that something will have a pleasing result [for the employer] will be confused with, and substituted for, actuating motive... This is a particular danger in labor cases because once an anti-union animus has been shown it is always easy, no matter how valid a proper cause for discharge may have existed, to say that "one" of the motives was the animus. This would lead to what we believe occurred here, that a militant union man would feel that he could safely behave as he chose.

To resolve this problem, the First Circuit consistently held that the unlawful motive must be shown to have been the dominant one.

A good illustration of how the "dominant motive" test disposes of mixed-motive discharge cases can be found in Western Exterminator Co. v. NLRB, decided by the Ninth Circuit. In that case, the complaining employee, Macias, was interviewed and hired as a termite inspector by the senior inspector, Hoffman. A few weeks later, Macias, a union member, attended a contract ratification meeting at which Hoffman presided as union president. During the meeting, a union member challenged Hoffman's dual position as union president and company supervisor. Upon inquiry, Hoffman later learned that Macias had disclosed this information to others. At the same time, the company was experiencing an unusually severe seasonal decline. Hoffman and the branch manager determined that a reduction in the work force was re-

51. 204 F.2d 883 (1st Cir. 1953).
52. Id. at 885 (emphasis added).
53. See, e.g., NLRB v. South Shore Hosp., 571 F.2d 677, 684 (1st Cir. 1978); Stone & Webster Eng't Corp. v. NLRB, 536 F.2d 461, 466-67 n.8 (1st Cir. 1976); NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968); NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963); Simmons, Inc. v. NLRB, 315 F.2d 143 (1st Cir. 1963); NLRB v. Whitelight Prods. Div., 298 F.2d 12, 16 (1st Cir.), cert. denied, 369 U.S. 887 (1962).
54. NLRB v. Lowell Sun Publishing Co., 320 F.2d at 842 (citations omitted).
55. 565 F.2d 1114 (9th Cir. 1977). See also Hambre Hombre Enterprises, Inc. v. NLRB, 581 F.2d 204, 207 n.4 (9th Cir. 1978); Famet, Inc. v. NLRB, 490 F.2d 293, 296 (9th Cir. 1973); NLRB v. Local 38, Plumbers & Pipefitters, 388 F.2d 679, 680 (9th Cir. 1968).
quired. A few days later, and roughly four weeks after the union meeting incident, Macias became the first and only employee laid off by the company. At his termination interview, Macias was assured he would be recalled when work increased. When Macias inquired some weeks later about his possible recall, however, Hoffman informed him that he had no intention of calling him back to work due to his poor work performance.56

The Board held that Macias' discharge violated sections 8(a)(3) and 8(b)(2) of the Act.57 The Board found that Macias' disclosure of Hoffman's double identity at the union meeting constituted protected activity under the Act. In addition, the Board found that Hoffman had recommended to the branch manager that Macias be the employee laid off. Because Hoffman was both the object of Macias' protected disclosure and actively involved in Macias' discharge, the Board concluded that the discharge was "at least in part" illegally motivated.58

The Ninth Circuit ruled that substantial evidence supported all of the Board's findings except the ultimate conclusion of a violation. Conceding that Hoffman was significantly involved in the decision to discharge and was partially motivated by Macias' protected activity against him, the court noted that "multiple factors," including lawful economic ones, motivated the discharge. Thus, the question for the court was the "quantum of animus necessary for a section 8(a)(3) violation."59 The Ninth Circuit held that where both legitimate business considerations and protected activity motivated a discharge, "the test is whether the business reason or the protected union activity is the moving cause behind the discharge." Or, as the court alternatively stated, "the improper motive must be shown to have been the dominant one."60 Applying the "dominant motive" test to the facts as determined by the Board, the court concluded that "proper business considerations constituted the dominant and moving cause of Macias' discharge."61 In so finding, the Ninth Circuit expressly stated it differed with the Board's conclusion solely because each used a different test:

We do not believe our analysis of the facts is necessarily different from that of the Board. Indeed, the Board never found that the domi-

56. 565 F.2d at 1117-18.
57. Section 8(b)(2), 29 U.S.C. § 160(b)(2) (1976), prohibits a labor organization or its agents from causing or attempting "to cause an employer to discriminate against an employee in violation of" section 8(a)(3). Because of Hoffman's dual role as managerial supervisor and union president, the complaint in Western Exterminator alleged unlawful discrimination by both the employer and the local union.
58. 565 F.2d at 1117.
59. Id. at 1118 n.3.
60. Id. at 1118.
61. Id.
nant motive of Hoffman's actions was antiunion animus. The Board merely concluded that "Hoffman's illegal motivation was at least part of the basis for Macias' layoff." This, of course, is not the dispositive test.62

The Western Exterminator court acknowledged the sharp division among the circuits on the issue of the degree of antiunion animus necessary to sustain a section 8(a)(3) charge.63 Reviewing the Supreme Court opinions concerning section 8(a)(3),64 the court concluded that its "dominant motive" test was the better rule. The court noted that even where unlawful motive is presumed to exist, as in cases where conduct is "inherently destructive" of employee rights,65 the Board and courts must still balance the competing interests and need not find a violation.66 Thus, where an employer's conduct is not "inherently destructive" of employee rights and motivation must be proved, as in most mixed-motive discharge cases,67 the Board and courts "are not compelled to find a section 8(a)(3) violation where the antiunion animus is but one of multiple motivating factors."68 With this argument, the court apparently contended that Supreme Court caselaw mandates use of the "dominant motive" test in dual-motive cases under section 8(a)(3). However, Western Exterminator merely demonstrates that the "dominant motive" test is not contrary to Supreme Court precedent. The court failed to show affirmatively why its approach is the better one for furthering the Act's basic policy of equitably balancing employer and employee interests.

Other circuits, equally unhappy with the "in part" test, have not been persuaded that the "dominant motive" test offers the best alterna-

62. Id. at 1119.
63. Id. at 1118 n.3.
64. See, e.g., NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); NLRB v. Brown, 380 U.S. 278, 287 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 45 (1954). None of these cases discuss the issue of the quantum of animus necessary for a violation of section 8(a)(3).
65. See note 5 supra.
66. In support of this proposition the Ninth Circuit quoted Erie Resistor:
[Inherently destructive employer conduct] present[s] a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.
Western Exterminator, 565 F.2d at 1118 n.3, quoting 373 U.S. at 228-29 (footnotes omitted).
67. The Board has never applied an "inherently destructive" analysis to individual discharge cases. Moreover, the Second and Ninth Circuits have specifically held that single employee discharges are never "inherently destructive" of employee rights. Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 97 (2d Cir. 1978); Western Exterminator, 565 F.2d at 1117 n.2. Both courts argue that presuming motive would result in legal favoritism for union adherents.
68. Id. at 1118 n.3.
tive. In fact, "dominant motive" analysis has been used only in the First and Ninth Circuits. Other courts have devised a conceptually distinct and less demanding alternative to the "in part" test by applying "but for" analysis.

V

THE "BUT FOR" TEST

The language of the "dominant motive" test represents the most dissonant alternative to the traditional "in part" test. Perhaps for this reason, it has failed to attract adherents outside the First and Ninth Circuits. However, other courts, equally dissatisfied with the "in part" test, promulgated a conceptually less extreme alternative. These courts, primarily from the Fourth and Fifth Circuits, employed a type of "but for" causation test, borrowed from tort and criminal law. With this approach, a discrimination claim is sustained only upon a showing that the employee would not have been fired but for his or her protected activity.

The Board's decision in East Bay Newspapers, Inc. demonstrates with clarity the conceptual as well as practical differences between its "in part" and the courts' "but for" tests. In that case, employee Swanson received a written reprimand three days before his discharge for alleged violation of the company's lawful no-distribution rules. The reprimand admonished Swanson for posting a notice of a union meeting on the mailroom bulletin board and for wearing a union jacket at work. The reprimand threatened immediate termination for any further violation of the company's no-distribution policy. Despite such warning, Swanson was observed three days later attempting to distribute union literature before a work shift. Supervisor Gipp confronted Swanson and asked him if he remembered the written warning. When Swanson said he did, he was immediately discharged.

At the unfair labor practice hearing, Supervisor Gipp testified that he discharged Swanson for distributing union literature on company time as well as for the previous conduct for which he was reprimanded. The ALJ found Swanson's previous conduct to be both protected activity under the Act and a factor in the decision to discharge Swanson. The ALJ also found that the employer had good cause to discharge

72. The ALJ held that only the wearing of a union jacket was protected activity but the Board held, in addition, that the posting of a union meeting notice was also protected under the Act. Id. at 692 n.4, 96 L.R.R.M. at 1020 n.4.
Swanson because of his flagrant breach of a valid no-distribution rule despite prior warning.

Faced with a mixed-motive situation, the ALJ noted that many courts employ a “but for” analysis in such cases, but explicitly stated that he was not prepared to find that but for Swanson’s having worn a union jacket he would not have been discharged. The ALJ did find that since there was no evidence of other similar violations in which the employer was more tolerant, the breach of the no-distribution rule was not a mere pretext for discharging Swanson. Notwithstanding these findings, the ALJ felt “constrained” to conclude that under the Board’s “in part” test, since protected activity was a factor in the discharge though admittedly not a “but for” cause the employer violated section 8(a)(3). The Board affirmed that the “in part” test had been satisfied without commenting on whether the record also established “but for” causation between the protected activity and the discharge.

In discussing the courts’ use of “but for” analysis, the Board cited a Fifth Circuit case, NLRB v. Whitfield Pickle Co. There, for the first time, that circuit expressly rejected the “dominant motive” test. Instead, the Fifth Circuit applied a simple “but for” causation test which, unlike the other tests, avoids unwieldy measuring and comparative weighing of the employer’s mixed motives. The “but for” test, as developed by other Fifth Circuit panels, requires the Board to establish “a reasonable inference of causal connection between the employer’s antiunion motivation and the employee’s discharge.” The Board can satisfy this burden by showing that the employer treated the discharged worker differently from the way it would have treated a non-union employee or an employee who had not engaged in protected conduct. If disparate treatment cannot be shown, the court will conclude that the discharged employee was not “deprived of any right because of union activities.” With this approach, the Fifth Circuit seeks to balance employer and employee rights more equitably than under the “in part” or

73. In reaching this conclusion, the ALJ cited Youngstown Osteopathic Hospital Association as controlling authority for resolving mixed motive cases. Id. at 703.
74. Id. at 692. Member Walther dissented, taking the position that while the “in part” test governed the case, the record established that the only motive for the discharge was Swanson’s unprotected violation of the lawful no-distribution rule. Id. at 694, 96 L.R.R.M. at 1022.
75. 374 F.2d 576 (5th Cir. 1967).
76. Id. at 582. Cf. Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617, 621 (5th Cir. 1961), for a prior occasion where the Fifth Circuit used “but for” analysis, but without distinguishing it from “dominant motive” analysis.
77. NLRB v. Mueller Brass Co., 509 F.2d 704, 711 (5th Cir. 1975) and cases cited therein.
78. The Fifth Circuit has repeatedly stated that “[t]he essence of discrimination in violation of Section 8(a)(3) of the Act is in treating like cases differently.” Mueller Brass Co. v. NLRB, 544 F.2d 815, 819 (5th Cir. 1977). Accord, NLRB v. Mueller Brass Co., 509 F.2d at 712; NLRB v. Whitfield Pickle Co., 374 F.2d at 580; Frosty Morn Meats, Inc. v. NLRB, 296 F.2d at 621.
79. Id. See also NLRB v. Florida Steel Corp., 586 F.2d 436, 450 (5th Cir. 1978).
“dominant motive” tests. Although many Fifth Circuit panels repeatedly have used the “but for” test, others have analyzed mixed-motive cases in terms of the relative magnitudes of lawful and unlawful motives. Still other Fifth Circuit panels continue to rely on the “in part” test.

The Fourth Circuit has also used a “but for” test in mixed-motive cases, but not without ambiguity. In older Fourth Circuit decisions, the courts used a test that required that when there is evidence of “supportable cause” for a discharge the Board must identify “an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one.” In *Neptune Water Meter Co. v. NLRB*, however, the court adopted the language of the “but for” test, writing:

> In the end after weighing all the relevant factors including particularly the gravity of the offense, an unfair labor practice may be found only if there is a basis in the record for finding that the employee would not have been discharged, though he may have been subjected to a milder form of punishment for the offense, except for the fact of his union activity.

In *Neptune* and some subsequent decisions, Fourth Circuit panels have used these two tests interchangeably. The two standards, however, are not conceptually congruent. Considerable ambiguity has resulted from the circuit’s failure to successfully reconcile them. The requirement that the Board show “why the employer rejected the good cause and chose the bad one” was initially promulgated by the First Circuit in *NLRB v. Billen Shoe Co.* to expound its “dominant motive” test. The rule in *Billen* corresponds well to the “dominant motive” test, for it too sets up a dichotomy of dominant and subservient motives for evaluating employer action. The motive that the employer “chooses” is

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80. See, e.g., Mueller Brass Co. v. NLRB, 544 F.2d at 819-20; Sweeney & Co. v. NLRB, 437 F.2d 1127, 1133 (5th Cir. 1971); Southwest Latex Corp. v. NLRB, 426 F.2d 50, 54-55 (5th Cir. 1970); Nix v. NLRB, 418 F.2d 1001, 1005 (5th Cir. 1969).

81. There appears to be a recent trend in the Fifth Circuit leading away from straight “but for” analysis and toward the weighing of conflicting motives. In *NLRB v. Aero Corp.*, the court held that a mixed-motive case presents a violation “if substantial evidence shows that the force of anti-union purpose was ‘reasonably equal’ to the lawful motive prompting conduct.” 581 F.2d 511, 514-15 (5th Cir. 1978). See also NLRB v. Big Three Indus. Gas & Equip. Co., 579 F.2d 304, 315-16 (5th Cir. 1978), cert. denied, 440 U.S. 960 (1979); Cramco, Inc. v. NLRB, 399 F.2d 1127, 1133 (5th Cir. 1971); NLRB v. Longhorn Transfer Serv., Inc., 346 F.2d 1003, 1006 (5th Cir. 1965).

82. See, e.g., Chromalloy Mining & Minerals Div. v. NLRB, 620 F.2d 1120, 1127 (5th Cir. 1980).


84. 551 F.2d 568 (4th Cir. 1977).

85. Id. at 570.

86. Id. at 568-70. See also NLRB v. Kiawah Island Co., 650 F.2d 485, 490 (4th Cir. 1981); American Thread Co. v. NLRB, 631 F.2d 316, 320-21 (4th Cir. 1980).

87. 397 F.2d 801, 803 (1st Cir. 1968).
dominant; the one it "rejects" is subservient, at best. Such an approach, however, is incompatible with "but for" analysis. Where the employer asserts a "good" cause along with a "bad" one in deciding to discharge an employee, the "but for" test merely asks whether the unlawful motive was among the many possible causes of the employer's action. It does not ask whether motive was dominant or subservient, chosen or rejected. There is no need to erect a dichotomy between asserted motives when using the "but for" test and to do so creates a standard as conceptually rigorous as the "dominant motive" test for finding discrimination. But while the Fourth Circuit has used the Billen rule, it has never employed or endorsed "dominant motive" language.

In Neptune Water, a divided Fourth Circuit panel attempted to resolve the inherent tension between "but for" analysis and the Billen rule by recasting the latter. The majority explained that the rule requiring the Board to show "why the employer rejected the good cause and chose a bad one...":

is not to be read to mean that there is a dichotomy between good and bad reasons. It does not change the rule in this circuit that discriminatory motivation need be only a factor in the discharge.

This qualification of the Billen rule, perhaps because it is not particularly persuasive, has not received unanimous support from other panels in the circuit. Consequently, although "but for" analysis continues to be used, the ambiguity in the Fourth Circuit caselaw on section 8(a)(3) has persisted even beyond the Wright Line decision.

The Fourth Circuit's failure to resolve the tension between the Billen rule and the "but for" test makes it difficult to surmise what the courts thought was the proper standard for deciding mixed-motive discharge cases. Both the Fourth Circuit and the Third Circuit created additional ambiguity by articulating their "but for" tests in terms confusingly similar to "in part" motive language. The Fourth Circuit stated in Neptune Water that "[i]t is settled in this circuit, and most of the others, that 'it is enough [to find a violation] that a discriminatory motive was a factor in the employer's decision.'" As authority for

88. 551 F.2d 568 (4th Cir. 1977).
89. Id. at 569 (emphasis in original).
90. See NLRB v. Appletree Chevrolet, Inc., 608 F.2d 988, 993 (4th Cir. 1979). There the court reiterated the Billen rule without referring to the modifications made in Neptune Water.
91. In NLRB v. Kiawah Island Co., a recent Fourth Circuit case, the majority attempted to reconcile the tension between the "but for" analysis and the Billen rule. 650 F.2d 485, 490-91 (4th Cir. 1981). The dissent expressly adopted the Neptune Water revision of the Billen rule in finding a discriminatory discharge based on a "but for" disparate treatment theory. Id. at 493 (Winter, J., dissenting).
92. 551 F.2d at 569 (footnote omitted).
this proposition, the court cited cases applying the “in part” test.\textsuperscript{93} Similarly, the Third Circuit, in adopting for the first time a “but for” analysis, explained:

If two or more motives are behind a discharge, the action is an unfair labor practice if it is \textit{partly motivated} by reaction to the employee’s protected activity. On the other hand, if the employee \textit{would have been fired for cause} irrespective of the employer’s attitude toward the Union, the real reason for the discharge is nondiscriminatory. In that situation there is no causal connection of any anti-union bias and the loss of the job. Thus, if the employer puts forward a justifiable cause for discharge, the Board must find that the reason was a pretext, and that the anti-union sentiment \textit{played a part} in the decision to terminate the employee’s job.\textsuperscript{94}

It is of course appropriate for courts that use “but for” analysis to borrow concepts from the “in part” test. Indeed, considerable overlap exists between these two approaches. Under both tests unlawful motive need only be a factor in the employer’s decision to trigger a violation of section 8(a)(3). The “but for” test, however, further requires that this factor be an indispensable link in the causal chain that results in the employee’s dismissal. Thus, the Third and Fourth Circuits use the “in part” test as a building block for “but for” analysis. Unfortunately, the courts fail to discuss the conceptual overlap of and differences between the two tests. By simply presenting side by side concepts from “in part” and “but for” analysis, these courts have created unnecessary confusion. As a result panels from the Fifth\textsuperscript{95} and Ninth\textsuperscript{96} Circuits misinterpreted cases employing “but for” analysis as supporting use of the “in part” test.

VI

THE “DOMINANT MOTIVE” TEST REVISED

In adopting the “but for” test, the Fifth Circuit in \textit{NLRB v. Whitfield Pickle Co.}\textsuperscript{97} expressly rejected an approach which attempts to quantify and then weigh various employer motives for determining legal causation under section 8(a)(3):

\textsuperscript{93} The court cited cases from the Second, Fifth, and Tenth Circuits which had used the traditional “in part” test, \textit{id.} at 569 n.1: NLRB v. Southeastern Stages, Inc., 423 F.2d 878 (5th Cir. 1980); Betts Baking Co. v. NLRB, 380 F.2d 199 (10th Cir. 1967); NLRB v. Great E. Color Lithographic Corp., 309 F.2d 352 (2d Cir. 1962).


\textsuperscript{95} \textit{See} Chromalloy Mining & Minerals Div. v. NLRB, 620 F.2d 1120, 1124 (5th Cir. 1980).

\textsuperscript{96} \textit{See} NLRB v. Central Press, 527 F.2d 1156, 1158 (9th Cir. 1975).

\textsuperscript{97} 374 F.2d 576 (5th Cir. 1967).
A company can have dominant motives, mixed motives, equal motives, concurrent motives, and bewildering combinations of these, but "It must be remembered that the statute prohibits discrimination, and that the focus on dominant [or any other like adjective] motivation is only a test to reveal whether discrimination has occurred." To invoke § 8(a)(3), the anti-union motive need not be dominant (i.e., larger in size than other motives); in some cases it may be so small as the last straw which breaks the camel’s back. We reiterate that all that need be shown by the Board is that the employee would not have been fired but for the anti-union animus of the employer. We therefore do not hold that in this case the general counsel must have shown “dominant” motive.

_Whitfield Pickle_ clearly reveals the distinction between the “dominant motive” and “but for” tests. The case also exposes the inherent defect in the “dominant motive” test: it fails to consider that more than one among many motives may be a “moving” or proximate cause of a discharge without necessarily being the dominant one. Thus, it is at least conceptually possible that the “dominant motive” test could exonerate an employer whose antiunion animus played an indispensible though subservient part in (i.e., a “but for” cause of) the decision to discharge. For this reason, many circuits, like the Fifth, have chosen “but for” analysis over the “dominant motive” test as a proper alternative to the “in part” test.

The First and Ninth Circuits, proponents of the “dominant motive” test, have taken heed of such criticism. In _NLRB v. Fibers International Corp._ the First Circuit announced that its “dominant motive” test articulates no greater requirement for finding a violation of the Act than does the “but for” test put forward in _Whitfield Pickle_. In _Fibers_, the First Circuit responded to the Board’s Petition for Rehearing which sought to delete the word “dominant” from the court’s analysis of mixed-motive cases. The Board relied on _Whitfield Pickle_, along with other cases to support its claim that antiunion animus need not be dominant for a violation of section 8(a)(3). The First Cir-

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88. _Id._ at 582 (bracket in original) (emphasis added). _See also_ Sweeny & Co. v. _NLRB_, 437 F.2d at 1133 (expressly rejecting “dominant motive” language). _But see_ NLRB v. _Aero Corp._, 581 F.2d at 514-15 (unlawful motive must be “relatively equal” in force to lawful motive for violation).

89. _See_ Section V _supra_ and cases discussed therein.

90. 439 F.2d 1311 (1st Cir. 1971).

91. In support of its petition the Board cited fifteen cases which either applied the “in part” test, e.g., S.A. Healy Co. v. _NLRB_, 435 F.2d 314 (10th Cir. 1970); _NLRB v. Princeton Inn Co._, 424 F.2d 264 (3d Cir. 1970), or employed alternate language without requiring the unlawful motive to be “dominant,” e.g., _NLRB v. Stemun Mfg. Co._, 423 F.2d 737, 741 (6th Cir. 1970) (“the actual impelling motive”); _Hugh H. Wilson Corp._, v. _NLRB_, 414 F.2d 1345, 1352 (3d Cir. 1969), _cert. denied_, 397 U.S. 935 (“the ‘real’ stimulus”); _NLRB v. Melco, Inc._, 388 F.2d 133, 138 (2d Cir. 1968) (“the true reason”). 439 F.2d at 1315. These latter formulations are not helpful in dealing with mixed-motive cases. Stating that a violation lies when antiunion animus was the “true reason,” “real stimulus” or “actual impelling motive” merely begs the question: what were the actual mo-
cuit rejected the Board’s request, holding that “[n]o case cited by the Board [including Whitfield Pickle] articulates a lesser requirement for finding a discharge to be an unfair labor practice.” 102

To be sure, the Fibers court in its original opinion formulated its “dominant motive” test in terms of “but for” analysis:

So that there may be no misunderstanding about what we mean by dominant motive, we state it again. Regardless of the fact that enforcing the penalty may have given the employer satisfaction because of the employee’s union activities, the burden is on the Board to establish that the penalty would not have been imposed, or would have been milder, if the employee’s union activity, or a union animus, had not existed. 103

But in the addendum opinion denying the Board’s Petition for Rehearing, the court formulated the “dominant motive” test in language conceptually incongruent with a “but for” approach:

To dominate means to control. The “dominant” motive is the controlling or effective motive. We use this particular word because of its insistent quality, to remind the Board that its burden is to find that the improper motive was the one that in fact brought about the result. 104

No doubt a “but for” cause of an employer’s action will always be “one that in fact brought about the result.” On the other hand, there can be many “but for” causes, some more significant, “controlling,” or “dominant” than others. Where an illegal motive is one of the “but for” causes, but is not the controlling or effective motive, the Fibers test would clearly reach a result different from the one a classic “but for” test would yield.

The ambiguity in Fibers affected subsequent decisions of the First and Ninth Circuits. In these circuits, parallel caselaw evolved in which some decisions espoused a pure 105 “dominant motive” test 106 while

102. Id. In the court’s view, even though other circuits do not require that the unlawful motive be “dominant” for a violation, formulations such as the “true reason” are indistinguishable from the “dominant motive” test. The court also found that certain other cases, cited by the Board, which adhered to the “in part” test, “proceeded, in discussing the evidence, to apply a standard not significantly different from [that courts use].” Id.

103. 439 F.2d at 1312 n.1. Here the First Circuit first mentioned the “but for” analysis.

104. Id. at 1315 (emphasis supplied).

105. In such cases, the “dominant motive” test is applied with no mention of “but for” analysis. For further discussion see Section IV supra.

106. See, e.g., Hambre Hombre Enterprises, Inc. v. NLRB, 581 F.2d 204, 207 n.4 (9th Cir. 1978); NLRB v. South Shore Hosp., 571 F.2d 677, 684 (1st Cir. 1978); Western Exterminator, 565 F.2d at 1118.
others applied a "but for" test without weighing the magnitudes of unlawful and lawful motives. Still other cases employed the "but for" and "dominant motive" tests interchangeably. Yet at least one Ninth Circuit opinion considered the two tests to be divergent. Another Ninth Circuit panel stretched the "dominant motive" test to its conceptual limit, holding that the Board had satisfied the "dominant motive" test when it had found that the employer's action was motivated "in large part" or "in large measure" by unlawful animus.

To add further confusion, certain Ninth Circuit decisions suggest another approach to mixed-motive cases. These cases applied neither "dominant motive" nor "but for" language, but instead required that the unlawful motive be "the moving cause." Noting this trend, one Ninth Circuit panel ventured to characterize this test as "a different, and possibly more demanding, standard than the but-for approach. . ." However, a later decision described the two standards as "equivalent." And another opinion equated "moving cause" with "dominant cause."

The First and Ninth Circuits' attempts to make the "dominant motive" test conform to "but for" analysis has indeed produced much confusion. These circuits may have believed all along that conceptual differences between the "dominant motive" and "but for" tests lack operative significance in all dual-motive cases. If so, they may be right, for a rigorous application of a "dominant motive" test, requiring a weighing of the relative magnitudes of legal and illegal motives, is al-

107. See, e.g., Liberty Mutual Ins. Co. v. NLRB, 592 F.2d 595, 604 (1st Cir. 1979); NLRB v. Klaue, 523 F.2d 410, 413 (9th Cir. 1975); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 49 (9th Cir. 1970).

108. See, e.g., Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251, 1255 (1st Cir. 1978); NLRB v. Rick's Plymouth, Inc., 578 F.2d 880, 886-87 (1st Cir. 1978); Mead v. Retail Clerks, 523 F.2d 1371, 1372 (9th Cir. 1975). Although Mead did not involve section 8(a)(3), the court relied on section 8(a)(3) caselaw to resolve an analogous mixed-motive problem under an otherwise unrelated section of the Act. Reviewing the approaches various courts had taken to adjudicate mixed-motive section 8(a)(3) cases, the Mead court held that despite differences in language, "[a]ll the formulations contemplate that the proscribed motive must play a substantial role in the termination decision." Id. at 1377 n.7.

109. In L'Eggs Products, Inc. v. NLRB, the court noted that "[i]n this circuit, the test for determining whether a discharge violates section 8(a)(3) has changed over the last several years." 619 F.2d 1337, 1341 (9th Cir. 1980). Comparing the "but for" with the "dominant motive" approach, the court held that since the latest Ninth Circuit decisions applied the "dominant motive" test, it would also do so. Id. at 1342. It went on to find that the "dominant cause" behind the discharge was the employee's poor performance and thus refused to enforce the Board's finding of a section 8(a)(3) violation. Id. at 1345.

110. NLRB v. Ad Art, Inc., 645 F.2d 669, 672 (9th Cir. 1980).

111. See, e.g., NLRB v. West Coast Casket Co., 469 F.2d 871, 874 (9th Cir. 1972); NLRB v. Security Plating Co., 356 F.2d 725, 728 (9th Cir. 1966).

112. Polynesian Cultural Center, Inc. v. NLRB, 582 F.2d 467, 473 (9th Cir. 1978).

113. Stephenson v. NLRB, 614 F.2d 1210, 1213 (9th Cir. 1980).

114. L'Eggs Prods., Inc. v. NLRB, 619 F.2d at 1345.
most inconceivable. Given the Board's reliance on inferences and circumstantial evidence in establishing motive,\(^{115}\) it would be virtually impossible to quantify and compare with any precision an employer's various motives. Indeed, it is difficult to determine whether the cases using a "dominant motive" standard were actually decided on a specific finding of the relative assigned weights of lawful and unlawful motive. The difficulty lies primarily in the courts' historic refusal to recognize and discuss the conceptual differences which exist between the "dominant motive" and "but for" tests. This explains why some courts seem to apply "but for" analysis while retaining conceptually incongruent "dominant motive" language.

VII

_Mt. Healthy_

The confusion and discord between and among the circuit courts and NLRB developed in the absence of a dispositive Supreme Court decision on the proper test for mixed-motive section 8(a)(3) cases. Some courts and most recently the Board, however, have found guidance in the Supreme Court's decision in _Mt. Healthy City School District of Education v. Doyle_.\(^{116}\) There the Court promulgated its approach to mixed-motive discharge cases in the related context of public employment.\(^{117}\)

The case arose out of the school board's refusal to renew complainant Doyle's teaching contract. A month before his termination, Doyle had telephoned a local radio station to complain about the school's new dress code. The station publicized the adoption of the dress code during its news broadcast. In the termination letter, the school board listed several reasons for its decision, including Doyle's telephone call to the radio station.\(^{118}\)

The district court found that the school board had sufficient cause to terminate Doyle,\(^{119}\) apart from the telephone call to the radio station. Nevertheless, the court concluded that the telephone call was protected by the first amendment and that, because the call played a "substantial part" in the board's decision, Doyle was entitled to reinstatement.\(^{120}\) The Sixth Circuit affirmed in a memorandum opinion.\(^{121}\)

115. See notes 17-24 supra and accompanying text.
118. 429 U.S. at 282-83.
119. The school board could have lawfully terminated Doyle for his unprofessional behavior in using obscene language before students. _Id._ at 283, 285.
120. The district court applied the following causation test:
The Supreme Court reversed. Writing for a unanimous Court, Justice Rehnquist rejected the lower court's view that a public employee must be reinstated whenever constitutionally protected conduct significantly contributed to the decision to discharge. The Court reasoned that such a rule would require reinstatement of employees whom the public employer would have dismissed even absent the constitutionally protected conduct. In the Court's view, this would "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." Thus, the Court formulated a type of "but for" test of causality:

Initially, in this case, the burden was properly placed upon respondent [employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should 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.

The Mt. Healthy test has two prongs. The employee must first establish that his or her protected conduct significantly motivated the employer in its decision to discharge. Then the burden of proof shifts onto the employer, requiring it to establish that it would have discharged the employee even absent the protected activity.

In the companion case to Mt. Healthy, Village of Arlington Heights v. Metropolitan Housing Development Corp., the Supreme Court further explained its Mt. Healthy test. The question before the Court in Arlington Heights concerned the nature of a prima facie case of racial discrimination under the equal protection clause of the fourteenth amendment. In that case plaintiffs challenged the Village's refusal to grant a zoning variance for construction of racially integrated low-income housing. The suit for injunctive and declaratory relief alleged that the Village's decision produced a discriminatory impact on the

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If a nonpermissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew [Doyle's contract]—even in the face of other permissible grounds—the decision may not stand.

Id. at 284 (citations omitted). This formulation is virtually identical to the "in part" test used in section 8(a)(3) cases. See notes 27-30 supra and accompanying text.

121. 529 F.2d 524 (6th Cir. 1975).
122. 429 U.S. at 285.
123. Id. at 287.
124. 429 U.S. 252 (1977). Arlington Heights and Mt. Healthy should be read together. Not only were they decided on the same day, but each opinion's discussion of burden of proof includes significant cross-references to the other. See Arlington Heights, 429 U.S. at 270-71 n.21; Mt. Healthy, 429 U.S. at 286-87.
community in violation of the Constitution. The Supreme Court held that the plaintiffs did not make out a constitutional violation since they had failed to show "that discriminatory purpose was a motivating factor in the Village's decision."\textsuperscript{125} The Court went on to explain both the nature of a prima facie case of discrimination and the requirements for a successful defense. Applying its rule in \textit{Mt. Healthy}, the Court stated that plaintiffs need only establish that "the decision by the Village was motivated \textit{in part} by a racially discriminatory purpose . . ."\textsuperscript{126} This would make out a prima facie case, thus shifting to the Village "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."\textsuperscript{127}

Significantly, the \textit{Arlington Heights} opinion specifically rejected an approach requiring proof of "dominant" or "primary" motive in mixed-motive cases. The Court stated that a plaintiff is not required to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.\textsuperscript{128}

At least in the context presented by \textit{Arlington Heights}, the Supreme Court disapproves of any causation or motive test which attempts to quantify conflicting lawful and unlawful motives.

\section*{VIII}

\textbf{The Allocation of the Burden of Proof}

The burden-shifting approach of \textit{Mt. Healthy} interjects a new issue in mixed-motive section 8(a)(3) cases—the proper allocation of the burden of proof. Of course, a mixed-motive case, by definition, involves some burden-shifting since it is the employer's assertion of legitimate business justifications that gives rise to problems of causation. However, \textit{Mt. Healthy} raises the question of the exact nature of the

\textsuperscript{125} \textit{Id.} at 270.

\textsuperscript{126} \textit{Id.} at 270-71 n.21 (emphasis added). At first glance it may appear that a prima facie case under \textit{Arlington Heights} differs from that under \textit{Mt. Healthy}. \textit{Arlington Heights} requires the plaintiff to show that an unlawful motive was an "in part" cause of the challenged action, whereas \textit{Mt. Healthy} seems to require greater proof in demanding that the unlawful motive be a "substantial or motivating factor." However, elsewhere in the opinion, \textit{Arlington Heights} refers to proof of a "motivating factor." \textit{Id.} at 265. Thus, \textit{Mt. Healthy} and \textit{Arlington Heights} are on the same analytical track. Read together, the two opinions place on the plaintiff the burden of establishing that the unlawful motive was a "substantial factor," though possibly only a partial one, in the challenged decision.

\textsuperscript{127} \textit{Id.} at 270-71 n.21.

\textsuperscript{128} \textit{Id.} at 265. \textit{See also} Givhan v. Western Line Consolid. School Dist., 439 U.S. 411 (1979). The Supreme Court remarked that case in light of \textit{Mt. Healthy}, reasoning that the trial court did not find that plaintiff would have been rehired but for her first amendment activity, even though it did find that such activity was the "primary" reason for her termination. \textit{Id.} at 417.
employer's burden under section 8(a)(3). In allocating the employer's burden of proof after a prima facie case of discrimination has been made, two options are possible. The employer may either carry 1) a burden of persuasion, as under Mt. Healthy, or 2) a lighter burden of production of evidence, as required in most circuit court mixed-motive discharge cases.

The difference between the two burdens is significant. A burden of production of evidence requires that the employer merely come forward with some evidence of a legitimate business justification. The ultimate burden of proof remains with the Board. On the other hand, a burden of persuasion requires that the employer, in addition to producing exculpatory evidence, persuade the decisionmaking body by a preponderance of the evidence that its business justification is in fact a motive sufficient to overcome a prima facie case of unlawful discrimination. Moreover, a burden of persuasion, unlike one of mere production of evidence, places the risk of non-persuasion on the employer as to the legal cause of its action. If, for example, the record evidence defies a determination of which among lawful and unlawful motives triggered the employer's action, the party with the burden of persuasion would lose. Thus, the allocation of an employer's burden of proof in the face of a prima facie case of illegal motivation may be dispositive in close cases.129

Despite the importance of the issue, courts formulating alternate approaches have rarely, if ever, explained the reason or authority for their allocation of the burden of proof in section 8(a)(3) cases. In practice these courts seem to shift only the burden of production. This means that the Board has the initial burden to produce sufficient evidence to support an inference of unlawful employer motivation. The burden then shifts to the employer to produce evidence of a legitimate business justification for its action. At this point, it is often said that the inference of unlawful motive is "rendered unreasonable by the employer's excuse or justification. . . . so that more evidence must be produced to establish the alleged discrimination."130 The additional evidence required of the Board has been expressed in terms of establishing the "dominant motive,"131 "moving cause,"132 "but for" cause133 or "a persuasive reason why the employer rejected the good

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130. NLRB v. Whitin Machine Works, 204 F.2d 883, 885 (1st Cir. 1953) (citations omitted) (invoking "dominant motive" test for the first time).
131. See, e.g., Stone & Webster Eng'r Corp. v. NLRB, 536 F.2d 461, 466 (1st Cir. 1976).
132. See, e.g., NLRB v. West Coast Casket Co., 469 F.2d 871, 874 (9th Cir. 1972).
133. See, e.g., NLRB v. Florida Steel Corp., 586 F.2d 436, 447 (5th Cir. 1978).
cause and chose a bad one.” Thus, courts applying the “dominant motive” or “but for” tests place upon the employer a burden of production of evidence, while the Board retains the burden of persuasion on all issues.

Although these courts have failed to discuss adequately this methodology of proof in light of Supreme Court precedent and the Act’s legislative history, or in terms of the balance it strikes between competing employer and employee interests, the methodology is in fact similar to the Supreme Court’s approach in analogous cases brought under Title VII of the Civil Rights Act of 1964. In *McDonnell Douglas Corp. v. Green*, the Supreme Court set forth a methodology for proving race and sex discrimination claims under Title VII. According to that decision, once an individual plaintiff establishes a prima facie case of discrimination, the defendant employer need only “articulate some legitimate, nondiscriminatory reason” for its adverse action regarding the plaintiff. To prevail, the plaintiff ultimately must prove that the reason given was a pretext for discrimination. Later Supreme Court decisions clarified *McDonnell Douglas*, holding that the defendant employer bears only a burden of production, not proof, and that the burden of persuasion remains at all times with the plaintiff.

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136. 411 U.S. 792 (1973). There, a black mechanic, laid off for one year by the company, charged that the company refused to rehire him in violation of Title VII. Green alleged racial discrimination and retaliation for his civil rights activities against McDonnell Douglas. While on lay-off, Green participated in a “stall-in,” involving blocking access to the company plant. He was arrested and fined for traffic violations. McDonnell Douglas argued that it had denied Green reemployment because of his illegal conduct. From these facts, the Supreme Court developed its three-tier methodology of proof in individual discrimination cases under Title VII.
137. *McDonnell Douglas* held that a plaintiff makes out a prima facie case 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. *Id.* at 802 (citations omitted). Note that the prima facie case under Title VII does not involve an element of unlawful employer motivation, unlike cases under the Constitution, *Mt. Healthy,* and under the Act, NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967). See note 239 infra.
138. 411 U.S. at 802.

While words such as “articulate,” “show,” and “prove,” may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely “articulat[ing] some legitimate, nondiscriminatory reason” and “prov[ing] absence of discriminatory motive.” By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco Construction Co. v. Waters*, supra, we made it clear that the former will suffice to meet the employee’s prima facie case of discrimination.

439 U.S. at 25.
The relevance of McDonnell Douglas and its progeny to labor relations cases is clear. If race, sex and protected concerted activism are treated as various forms of unlawful criteria for discharge or discipline, then the primary question under Title VII and section 8(a)(3) is the same: did the employer rely on unlawful criteria for its adverse action against the plaintiff-employee? In light of this close analogy, it is somewhat perplexing that courts looking for authority for their methodology of proof in mixed-motive section 8(a)(3) cases do not refer to Title VII caselaw.\textsuperscript{140}

It is also difficult to understand why the courts and the Board have not discussed, except on rare occasions, relevant Supreme Court pronouncements on the proper allocation of proof under section 8(a)(3). In NLRB v. Great Dane Trailers, Inc.,\textsuperscript{141} the Court set forth a methodology of proof for section 8(a)(3) cases that involve inquiry into employer motives. Unfortunately, the allocation of the burden of proof in Great Dane is not as clear as in Mt. Healthy, which of course was not decided under the NLRA. In Great Dane, the Supreme Court held that certain employer conduct which is "inherently destructive" of employee statutory rights may violate section 8(a)(3) without proof of antiunion or other unlawful motivation. However, where employer conduct may cause "comparatively slight" harm to employee rights, as in individual discharge cases,\textsuperscript{142} the Court would require proof of unlawful motivation. For such cases, the Supreme Court enunciated the following methodology of proof:

\begin{quote}
Where the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus . . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.\textsuperscript{143}
\end{quote}

Although Great Dane clearly shifts some burden of proof onto the employer, the exact nature of that burden is obscure. The decision consequently has been interpreted in conflicting ways.

Some courts using "dominant motive" or "but for" tests have read

\textsuperscript{140} It is particularly difficult to understand considering the Supreme Court's common reliance on NLRA experience in its interpretation of Title VII. \textit{See}, e.g., Teamsters v. United States, 431 U.S. 324, 366-67 (1976). Very recently, some courts have begun to use the Title VII analogy in section 8(a)(3) cases. \textit{See} note 239 infra.

\textsuperscript{141} 388 U.S. 26 (1967).

\textsuperscript{142} It is well settled that individual discharge cases fall in the "comparatively slight" category. \textit{See} notes 5 & 67 supra.

\textsuperscript{143} 388 U.S. at 34 (emphasis in original).
Great Dane, on the rare occasions when it is mentioned, as assigning the employer only a burden of production of evidence. The First Circuit stated that under Great Dane, "although the employer would have the burden of coming forward with a substantial and legitimate business justification once the Board has shown a harmful effect, the burden would remain on the Board [to make] an affirmative showing that it was not the business purpose that caused the employer's action."\textsuperscript{144}

In NLRB v. Garry Manufacturing Co.,\textsuperscript{145} however, a divided Third Circuit panel interpreted Great Dane as placing on the employer a burden of persuasion. There the court held that an inference of partial unlawful motive behind an employer's action constituted a prima facie case of discrimination.\textsuperscript{146} Relying heavily on Great Dane, the court continued: "[w]hen the record establishes a prima facie case that 'the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives.'\textsuperscript{147} In this regard, the court referred to an earlier opinion\textsuperscript{148} which espoused a "but for" analysis for mixed-motive cases. Thus, it seems that the Garry court shifted to the employer a burden of proving, i.e., persuading the decisionmaker, that it would have made the same decision absent the unlawful reason. This approach, expressly based on Great Dane, is identical to that in Mt. Healthy. The court majority, however, did not mention Mt. Healthy.\textsuperscript{149}

That courts would disagree on the meaning of Great Dane's shifting burden of proof is not surprising. The language of the decision

\textsuperscript{144} NLRB v. Gotham Indus., Inc., 406 F.2d 1306, 1309 n.5 (1st Cir. 1969).
\textsuperscript{145} 630 F.2d 934 (3d Cir. 1980).
\textsuperscript{146} Id. at 945.
\textsuperscript{147} Id., quoting Great Dane, 388 U.S. at 34 (emphasis in original).
\textsuperscript{148} The majority in Garry cited without discussion Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978) as authority for the proposition that the employee has the burden of showing that the employee would have been fired regardless of his protected activity. 630 F.2d at 945. However, the dissent indicated that Edgewood Nursing Center places the burden on the General Counsel, not the employer, to prove "but for" causation. According to the dissent, the majority had improperly modified the Third Circuit's traditional position.

The dissent's interpretation of Edgewood Nursing Center is correct. In applying the "but for" test, the Edgewood court relied on authority from the Fourth and Fifth Circuits, such as Neptune Water Meter Co. v. NLRB, 551 F.2d 568 (4th Cir. 1977) and Mueller Brass Co. v. NLRB, 544 F.2d 815 (5th Cir. 1977). These cases place the burden of proof on the Board. There is good reason to conclude that the Edgewood Nursing Center court intended to adopt the allocation of the burden in Edgewood's "but for" test as well. Therefore, as the dissent intimated, Garry creates new law with its burden-shifting approach. Subsequent Third Circuit decisions have adopted the Garry approach. See, e.g., United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980).

\textsuperscript{149} The dissent inappropriately cited Mt. Healthy, including it in a string of citations supporting the following proposition: "[P]artial motivation is not enough; the Board must find that the permissible reason offered by the employer was merely a pretext, and the real motive was anti-union animus." 630 F.2d at 949.
seems to point in both directions at once. In one sentence the Court required only that the employer "come forward with evidence" of business justification, albeit "legitimate and substantial" justification.\textsuperscript{150} In the next sentence the Court, seemingly reiterating what it just stated, required that the employer "establish that he was motivated by legitimate objectives. . ."\textsuperscript{151} To require the employer to "establish" motive certainly is a different and greater burden than to require the employer merely to come forward with evidence of business justification.\textsuperscript{152}

However ambiguous the language of \textit{Great Dane}, as noted above, the Court in \textit{Mt. Healthy} clearly promulgated an approach shifting the burden of persuasion which is adaptable to mixed-motive discharge cases.\textsuperscript{153} Despite the clarity of \textit{Mt. Healthy}, however, circuit courts that have cited it have misapplied its allocation of the burden of proof.

\section*{IX

\textbf{APPLICATION OF \textit{MT. HEALTHY} TO THE NLRA PRIOR TO }\textit{WRIGHT LINE}}

Because \textit{Mt. Healthy} concerns discrimination against the exercise of first amendment rights, it does not control cases involving section 8(a)(3). For this reason, few courts chose to apply \textit{Mt. Healthy} to section 8(a)(3) cases until after the Board did so.\textsuperscript{154} However, some courts quickly seized on \textit{Mt. Healthy} hoping to establish once and for all that the "but for" test is the proper rule for mixed-motive cases under section 8(a)(3). Some of these courts, unfortunately, misinterpreted \textit{Mt. Healthy}'s methodology of proof.

\textit{Mt. Healthy} had its most dramatic effect in the Second Circuit. In \textit{Waterbury Community Antenna, Inc. v. NLRB},\textsuperscript{155} the court withdrew its traditional support for the "partial motive" test and opted for the "but for" standard, relying on the authority of \textit{Mt. Healthy}. Noting that \textit{Mt. Healthy} is a first amendment case, the Second Circuit questioned "whether a test which is adequate to protect First Amendment rights would prove inadequate to protect organizational rights" under

\textsuperscript{150} Great Dane, 388 U.S. at 34 (emphasis added). \textit{See also} the dissenting opinion of Justice Harlan, which Justice Stewart joined. Justice Harlan argued that requiring "legitimate and substantial" justification itself may unduly shift the burden of proof onto the employer. \textit{Id.} at 37-39.

\textsuperscript{151} \textit{Id.} at 34 (emphasis added).

\textsuperscript{152} \textit{See} Janofsky, \textit{New Concepts in Interference and Discrimination under the NLRA: the Legacy of American Ship Building and Great Dane Trailers}, 70 Colum. L. Rev. 81, 99 (1970), calling on the Supreme Court to resolve the ambiguity it created regarding the allocation of the burden of proof.

\textsuperscript{153} \textit{See} text accompanying notes 123-27 supra.

\textsuperscript{154} \textit{After} \textit{Wright Line}, discussion of \textit{Mt. Healthy}'s relevance to section 8(a)(3) cases became more common. \textit{See} Sections XI-XII infra.

\textsuperscript{155} 587 F.2d 90 (2d Cir. 1978).
the NLRA.\textsuperscript{156} In addition, the court concluded that the "but for" test best promotes the federal labor policy of neutrality by not encouraging pro-union activity as a means for an employee to obtain special job security. The court, however, misapplied the \textit{Mt. Healthy} test by placing the burden of establishing the "but for" causation on the Board or its General Counsel\textsuperscript{157} rather than require, as the Supreme Court did in \textit{Mt. Healthy}, that the employer show it would have discharged the employee even absent his or her protected conduct.\textsuperscript{158} The court did properly point out, however, that the magnitude of the impermissible motive is irrelevant to the inquiry, so long as it is the "but for" cause of the discharge.\textsuperscript{159}

The First Circuit first injected \textit{Mt. Healthy} into the labor context in \textit{Colletti's Furniture, Inc. v. NLRB}.\textsuperscript{160} In that case, however, that circuit erroneously equated \textit{Mt. Healthy} with its "revised 'dominant motive'" test,\textsuperscript{161} stating:

\begin{quote}
Now that the Supreme Court in [\textit{Mt. Healthy}], in the analogous first amendment area, has held that an improper consideration is not "substantial" if the discharge would have occurred in any event, marrying [\textit{Mt. Healthy}] to our previous cases, there can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule. Where there are both proper and allegedly improper grounds for the discharge, its burden is to find affirmatively that the discharge would not have occurred but for the improper reason.\textsuperscript{162}
\end{quote}

Two years later, in \textit{NLRB v. Eastern Smelting & Refining Corp.},\textsuperscript{163} the First Circuit interpreted and applied \textit{Mt. Healthy} correctly. Using \textit{Mt. Healthy}, the court held that "once the Board has shown a 'significant' improper motivation, the burden is on the employer to prove that it had a good reason, sufficient in itself, to produce the discharge."\textsuperscript{164} The court, however, asserted incorrectly that it has always applied the \textit{Mt. Healthy} approach.\textsuperscript{165} Adding further confusion, the court in \textit{NLRB v. Borden, Inc., Borden Chemical Division} relied on \textit{Eastern Smelting} to require that the Board carry the burden of showing that the

\begin{footnotesize}
\begin{enumerate}
\item[156.] \textit{Id.} at 99.
\item[157.] \textit{Id.} at 98.
\item[158.] \textit{See} notes 123-27 \textit{supra} and accompanying text.
\item[159.] 587 F.2d at 98.
\item[160.] 550 F.2d 1292 (1st Cir. 1977).
\item[161.] \textit{See} Section VI \textit{supra}.
\item[162.] 550 F.2d at 1293 (emphasis added).
\item[163.] 598 F.2d 666 (1st Cir. 1979).
\item[164.] \textit{Id.} at 671.
\item[165.] \textit{Id.} at 671 & n.10. The very cases the court cited for support reveal the error in this claim. \textit{See}, e.g., Liberty Mutual Ins. Co. v. NLRB, 592 F.2d 595 (1st Cir. 1979); Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251, 1255 (1st Cir. 1978); NLRB v. Rich's of Plymouth, Inc., 578 F.2d 880, 887 (1st Cir. 1978). These cases expressly place on the Board the burden of showing that the employer would not have discharged, absent the unlawful reason.
\end{enumerate}
\end{footnotesize}
discharge would not have occurred but for the improper reason.\textsuperscript{166} 

In \textit{Federal-Mogul Corp. v. NLRB}, a Fifth Circuit majority implicitly declined to decide whether \textit{Mt. Healthy} applies to section 8(a)(3) cases.\textsuperscript{167} Judge Thornberry, however, in his concurring opinion, specifically declared the \textit{Mt. Healthy} approach inappropriate in the labor context. He argued that in passing the Act Congress clearly balanced competing interests in favor of the employee to compensate for the employer's economic advantage. Judge Thornberry found that the "but for" test "significantly restricks this balance in favor of the employer, and such a test is contrary to Congressional policy."\textsuperscript{168} His concerns arose from a misconception of the \textit{Mt. Healthy} approach. Judge Thornberry expressed some fear that under \textit{Mt. Healthy}, "an employer filled to the brim with union animus can nonetheless fire an employee who is a union activist if that employee would have been fired anyway."\textsuperscript{169} Under a proper application of \textit{Mt. Healthy}, however, this inequity would unlikely occur. To meet the burden of proving that it would have fired the employee anyway, the employer must persuade the decisionmaking body that its business justification is not a pretext.\textsuperscript{170} In Judge Thornberry's hypothetical where the employer is "filled to the brim" with animus, it would be extremely difficult for the employer to prove that such animus was not an indispensible cause behind its action. In any event, despite the clarity of \textit{Mt. Healthy}, its application by the courts to section 8(a)(3) only exacerbated the controversy and confusion surrounding the adjudication of mixed-motive cases.

**X**

\textbf{WRIGHT LINE: THE BOARD ADOPTS THE \textit{MT. HEALTHY} TEST.}

In recent years the Board has been subjected to biting criticism from certain courts, most notably the First Circuit,\textsuperscript{171} for refusing to apply the courts' more stringent causation analysis in section 8(a)(3) discharge cases. Although these courts formulated somewhat divergent

\begin{itemize}
\item\textsuperscript{166} 600 F.2d 313, 321 (1st Cir. 1979).
\item\textsuperscript{167} 566 F.2d 1245 (5th Cir. 1978). The majority in \textit{Federal-Mogul} never mentioned \textit{Mt. Healthy}.
\item\textsuperscript{168} \textit{Id.} at 1265 (Thornberry, J., concurring).
\item\textsuperscript{169} \textit{Id.}
\item\textsuperscript{170} \textit{See} notes 9 \textit{supra} and 217-24 and accompanying text \textit{infra}.
\item\textsuperscript{171} \textit{Before} \textit{Mt. Healthy}, the First Circuit had repeatedly admonished the Board for its tenacious adherence to the "in part" test in the face of court criticism. \textit{See, e.g.}, \textit{NLRB v. Gotham Indus., Inc.}, 406 F.2d 1306, 1309 (1st Cir. 1969). Upon the issuance of \textit{Mt. Healthy}, the First Circuit found Supreme Court support for its approach, leading the court to pronounce, "there can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule." Colletti's Furniture, Inc. v. \textit{NLRB}, 550 F.2d 1292, 1293 (1st Cir. 1977).
\end{itemize}
alternatives to the Board's "in part" test, all agreed that the "in part" test virtually ignored the employer's defense of legitimate business justification. The courts argued that because of this omission, the Board's traditional approach to mixed-motive cases unduly favored employee rights over those of the employer, contravening the Board's duty to equitably balance these conflicting interests. After the Mt. Healthy decision, the cry that the Board fall in line became more insistent. Faced with a judicial rebellion, the Board sought to quell the growing controversy by adopting the Mt. Healthy test in Wright Line, Division of Wright Line, Inc. The Board's critics may have been surprised by the Board's Wright Line opinion, however, since the Board's interpretation of Mt. Healthy was quite different from their own.

The lengthy Wright Line opinion commences with a brief survey of the divergent approaches employed by the courts. Rather than engage in the difficult task of making sense of the confusion and controversy engendered by the cases, the Board treated all approaches contrary to its "in part" test under the general heading of "dominant motive test." Thus for purposes of the decision, the Board characterized the "dominant motive" test as providing: "that when both a 'good' and 'bad' reason for discharge exist [sic], the burden is upon the General Counsel to establish that, in the absence of protected activities, the

172. In NLRB v. Truck Drivers Local 449, the Supreme Court stated that in unfair labor practice cases:

"[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.
353 U.S. 87, 96 (1957).

173. See, e.g., NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979). There the First Circuit expressed exasperation over the Board's failure to mention Mt. Healthy, "let alone explain . . . why it should be thought less serious to violate the First Amendment than the Labor Act." Id. at 671 (footnote omitted). It is not mere coincidence that Wright Line arose in the First Circuit. Clearly the Board intended Wright Line to be, among other things, a direct response to the First Circuit's open criticism.


175. For a discussion of how some courts interpreted Mt. Healthy and applied it to the labor context, see Section IX supra.

176. The Board did not expressly find that the various motive tests fashioned by the courts were synonymous. In its review, the Board discussed "[t]ests which have been applied in other circuit courts [that] fit neatly into neither the 'in part' nor 'dominant motive' category." 251 N.L.R.B. at 1085, 105 L.R.R.M. at 1172. One such test was the straight "but for" approach explicated in Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978). 251 N.L.R.B. at 1085, 105 L.R.R.M. at 1172. For a discussion of the subtle differences among the various tests, see Sections IV-VI supra.

It seems that the Board chose to group the full panoply of tests rivalling its own under the "dominant motive" test primarily for expediency. By doing so, the Board avoided the cumbersome task of sorting out subtle differences among its judicial critics. In addition, this strategy permitted the Board to answer all critics in one stroke.
The Board then reviewed the Mt. Healthy opinion and concluded that in it the Supreme Court rejected a "partial motive" test nearly identical to that of the Board. In addition, the Board found that Mt. Healthy also discarded a "dominant motive" approach to mixed-motive cases. So as to resolve all doubts, the Board distinguished the Mt. Healthy test from the "dominant motive" test and its variations on three grounds. First, the Board noted that after the General Counsel makes out a prima facie case of employer reliance on protected activity, under the Mt. Healthy approach the burden shifts to the employer to show that it would have made the same decision absent the protected activity. In contrast, under the "dominant motive" test, according to the Board, the burden to establish that antiunion animus was a "but for" cause remains on the General Counsel. Second, the Board discussed Mt. Healthy's companion case, Arlington Heights, where the Supreme Court recognized the futility of seeking to determine what is the "dominant" or "primary" motive in mixed-motive cases. "Finally," the Board stated, "the shifting burden analysis set forth in Mt. Healthy and Arlington Heights represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation."

In the Board's opinion, this final distinguishing feature of the Mt. Healthy test made it particularly appropriate for mixed-motivation cases under section 8(a)(3), which are often plagued by problems of proof. The Board also found this burden-shifting approach consistent with the Act's legislative history as well as prior Supreme Court decisions which suggest that the employer must establish proof once significant antiunion animus is shown. But the most important

177. Id. at 1084, 105 L.R.R.M. at 1171.  
178. Id. at 1087, 105 L.R.R.M. at 1173. See text accompanying note 122 supra.  
179. Cf. Coletti's Furniture, Inc. v. NLRB, 551 F.2d 1292, 1293 (1st Cir. 1977) (equating Mt. Healthy with the "dominant motive" test); 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) (arguing that Mt. Healthy indicates Supreme Court affirmation of the "dominant motive" test).  
180. 251 N.L.R.B. at 1087, 105 L.R.R.M. at 1173. Cf. Section IX supra for cases relying on Mt. Healthy without shifting the burden of proof on the employer.  
182. See note 128 supra and accompanying text.  
183. 251 N.L.R.B. at 1087-88, 105 L.R.R.M. at 1173.  
184. Id. at 1088, 105 L.R.R.M. at 1174. The Board pointed to Senator Taft's comments on the amendment of section 10(c), which prohibits the Board from ordering reinstatement of an employee discharged for cause. Senator Taft stated: "Under provision of the conference report, the employer has to make the proof" that just cause existed apart from the protected conduct. 93 Cong. Rec. 6519 (1947), reprinted in II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1595 (1947).  
185. 251 N.L.R.B. at 1088-89, 105 L.R.R.M. at 1174. The Board specifically relied on the
consideration for the Board was its finding that the *Mt. Healthy* test best accommodates the conflicting interests of employer control over its workforce and employee organizing rights. For, the Board explained, under the *Mt. Healthy* test, "the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer’s decision."\(^{186}\) The test protects the employer’s interests by providing it with a “formal framework” within which to vindicate its legitimate business judgments.\(^ {187}\)

In sum, *Wright Line* holds that the Board will henceforth use the following causation test in *all* cases under section 8(a)(3), as well as section 8(a)(1),\(^ {188}\) where mixed motivation exists:

First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.\(^ {189}\)

The Board continued:

In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees’ protected activities are causally related to the employer action which is the basis of the complaint. Whether that “cause” was the straw that broke the camel’s back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.\(^ {190}\)

Applying this analysis to the facts before it, the Board held that the employer had violated section 8(a)(3) by unlawfully discharging employee Lamoureux because of his union activities.\(^ {191}\) The employer alleged that Lamoureux was discharged for violating a plant rule against “knowingly altering, or falsifying production time reports, payroll records, time cards.” In particular, the employer discovered certain discrepancies in Lamoureux’s timesheet. Lamoureux had conceded that he did not properly indicate on his timesheet the actual times he performed various tasks. He maintained, however, that he did perform the work and that the employer never questioned him in this regard.

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\(^ {186}\) 251 N.L.R.B. at 1089, 105 L.R.R.M. at 1174.

\(^ {187}\) *Id.*

\(^ {188}\) The relationship of section 8(a)(1) to section 8(a)(3) in discriminatory discharge cases is discussed at note 29 *supra*.

\(^ {189}\) 251 N.L.R.B. at 1089, 105 L.R.R.M. at 1175.

\(^ {190}\) *Id.* at 1189-90 n.14, 105 L.R.R.M. at 1175 n.14.

\(^ {191}\) *Id.* at 1089, 105 L.R.R.M. at 1175.
Nevertheless, Lamoureux was discharged for breach of the plant rules.192

In attempting to show a discriminatory motive for the discharge, the General Counsel established that the employer had known Lamoureux was a leading union activist.193 In addition the employer had manifested antiunion animus during two recent union campaigns in which Lamoureux was a visible participant. The record also revealed that the employer had never before discharged an employee under similar circumstances; such discrepancies in timesheets were commonplace and did not affect accuracy in reporting completed work.194

From this evidence, the Board found that a prima facie case had been made, showing that Lamoureux’s union activity was a “motivating factor” in the employer’s decision to discharge him. Then, the Board found that the employer had failed to carry its burden of showing it would have made the same decision absent Lamoureux’s union activities. To support this conclusion, the Board noted that the timesheet discrepancies were discovered pursuant to a supervisor’s order to “check” on Lamoureux for no apparent reason. This suggested to the Board that the employer had a predetermined plan to find a reason to fire Lamoureux. Finally, the Board pointed to the evidence of disparate treatment, as noted above, contradicting the employer’s defense.195

Member Jenkins filed a separate concurrence in *Wright Line.*196 Although he endorsed the majority’s “shifting burden-of-proof standard,” he sought to clarify how it should be applied in what he considered a small “residue” of particularly difficult cases. He hypothesized a situation in which mixed motives are “so interlocked that it is not possible to point to one of them as the cause.”197 In such cases, Jenkins argued, it is impossible to apply a “but for” standard “except to fasten upon the most recent event or motive.”198 But he considered this result inadequate because by definition the situation presents multiple “but for” causes, each indispensible to the employer’s decision. Consequently, Jenkins argued that where it is impossible to point to a single event or motive behind an employer’s action, the unlawful motive should be deemed to be a part of the cause and the employer’s action

192. *Id.*
193. The record revealed that during a union organizing campaign the employer’s supervisors had on occasion directed “gratuitous” remarks concerning the union toward Lamoureux, once calling him the “union kingpin.” *Id.* at 1090, 105 L.R.R.M. at 1175.
194. *Id.*, 105 L.R.R.M. at 1176.
195. *Id.* at 1090-91, 105 L.R.R.M. at 1176.
196. *Id.* at 1091, 105 L.R.R.M. at 1176-77.
197. *Id.*, 105 L.R.R.M. at 1176.
198. *Id.* at 1091 n.21, 105 L.R.R.M. at 1176 n.21.
held unlawful. Acknowledging that his analysis of such cases relies on the “in part” test as expressly distinguished from the “but for” and “dominant motive” tests, Jenkins opined that this is the only way to effectuate the purposes of the Act. Moreover, he found it only fair that “the party [the employer] who created this situation, in which isolation of a single cause is impossible, bear the burden created by his venture into an area prohibited by the Act.”

Member Jenkins’ concurring opinion, though cogent, underestimates the efficacy of the Mt. Healthy test in the labor context. The situation Jenkins suggested, where mixed motives are inextricably intermeshed, presents no difficulty for the Mt. Healthy test as articulated in Wright Line. It does however highlight the analytical consistency of the Mt. Healthy and “in part” tests in balancing employer and employee interests in such “close call” cases. Under both approaches, a prima facie case of discrimination would be made since the situation involves some unlawful motive within the bewildering mix of employer motives. As Jenkins would have it, the inquiry under the “in part” test would be complete and a violation found. The Mt. Healthy test, however, would not end its analysis there, but would eventually render the same judgment against the employer simply because the employer could not carry its burden of proof (i.e., that it would have made the same decision absent the unlawful purpose) where the evidence defies any attempt at unraveling lawful and unlawful motives. Therefore, in such murky mixed-motive cases, the burden-shifting approach of Mt. Healthy would strike the same balance between employer and employee rights as would the “in part” test, though by way of a different analysis. And, in Jenkins’ hypothetical problem, both approaches would promote the policy that “the party [the employer] who created this situation, in which the isolation of a single cause is impossible, bear the burden created by his venture into an area prohibited by the Act.”

Contrary to Jenkins’ concerns, the Mt. Healthy test can adequately deal with the most perplexing combination of employer motives and consequently dispenses with the need for the “in part” test in any section 8(a)(3) case.

The Board’s opinion in Wright Line is a masterpiece of compromise and accommodation. It cleverly wrests the Board from the hot seat of controversy by seizing a middle ground between the “in part”

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199. Id. at 1091, 105 L.R.R.M. at 1176.
200. Id.
201. It indeed would have been unfortunate if, just when the Board attempted to accommodate all concerns voiced in the long debate over mixed-motive cases and to fashion a uniform approach, it in the same breath had carved out an exception to Wright Line for the use of its “in part” test. In such an event, the opportunity for further controversy would still be available, sabotaging the Board’s commendable efforts in Wright Line.
test and the courts' alternate approaches. The *Mt. Healthy-Wright Line* approach successfully accommodates what once seemed to be irreconcilable policies underlying the "in part" test and the rival "dominant motive" test in its various forms. As the Board noted, the employee gains protection because a mere showing of partial unlawful motivation will constitute a prima facie case. And, the employer gains similar protection by permitting it to show its action would have occurred absent protected activities, and thus allowing it to avoid liability. The *Mt. Healthy-Wright Line* approach contains features of the two polar tests, instilling equity into the adjudication of mixed-motive section 8(a)(3) cases.

In one stroke, the Board in *Wright Line* complied with the call to adopt *Mt. Healthy* while distinguishing and thus rejecting the courts' more rigorous standards of proof, which the Board considers inappropriate under the Act. Moreover, the Board achieved this with amazingly little recantation of its traditional "in part" approach. *Wright Line* does not change the nature of a prima facie case of discrimination under Board precedent. The General Counsel, representing the employee, still need only show that an unlawful motive contributed *in part* to the employer's decision.

XI

TOEING THE WRIGHT LINE

*Wright Line*’s full impact on the circuit courts undoubtedly will not be felt for some time. However, those circuits long at the forefront of the dispute over the proper causation test for section 8(a)(3) discharge cases have quickly responded to this extraordinary Board opinion. Other circuits have, to date, conspicuously ignored both *Wright Line* and the Supreme Court’s *Mt. Healthy* opinion, though their influence on these circuits can nevertheless be detected.

Not surprisingly, panels of the Sixth and Seventh Circuits, previously loyal to the Board’s "in part" test, recently adopted and applied *Wright Line*’s burden-shifting "but for" analysis. In *NLRB v. Lloyd A. Fry Roofing Co.*, a Sixth Circuit panel held that substantial evidence supported the Board’s finding that the employer had failed to establish it would have discharged an employee absent his protected concerted

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203. The Board expressly stated in *Wright Line* that its abandonment of the "in part" test or such characteristic phraseology "should not be viewed as a repudiation of the well-established principles and concepts which [it] applied in the past." Id., 105 L.R.R.M. at 1175.
204. See *Mt. Healthy*, 429 U.S. at 286-87. *Cf.* Arlington Heights, 429 U.S. at 270-71, 270 n.21 (a prima facie case exists if developer shows zoning is motivated in part by racial discrimination). *See also* notes 123-27 supra and accompanying text.
205. 651 F.2d 442 (6th Cir. 1981).
activities, despite its claim that the employee was discharged for careless driving, tardy departures and deliveries, and repeated failures to properly stack and secure loading pallets onto his truck. In *Peavey Co. v. NLRB*, a panel of the Seventh Circuit expressly adopted "the *Mt. Healthy/Wright Line* test in 'dual motive' cases in this Circuit." The court noted with approval that this test disposes of "quantitative labels such as 'in part' or 'dominant motive,'" focusing instead on whether a causal relationship between the discharge and the employee's protected conduct exists to justify liability under section 8(a)(3). However, the court in that case rejected the Board's finding that the employer's reasons for the discharge were a pretext, and held that the employer met its *Wright Line* burden by demonstrating that the employee's discharge was triggered by her refusal to insert notices of new wage scales into paycheck envelopes, followed a few days later by an additional refusal to retype poorly typed letters.

The Ninth Circuit, previously a proponent of the so-called "dominant motive" test, has endorsed *Wright Line*. In *NLRB v. Revis Industries, Inc.*, a panel of the Ninth Circuit pronounced: "[t]he rule articulated by the Board in *Wright Line* is a reasonably defensible interpretation of the Act, and is entitled to acceptance by this court." The court applied *Wright Line* and enforced the Board's finding that the new owner of a hotel violated section 8(a)(3) by refusing to retain five union engineers to avoid incurring a duty to bargain with their union.

In several other post-*Wright Line* cases, the circuit courts have expressly reserved judgment on the Board's new rule. In *NLRB v. Burns Motor Freight, Inc.*, a Fourth Circuit panel retained its traditional position that the Board must affirmatively show "why the employer rejected the good cause and chose a bad one." The court stated it was unnecessary to decide whether the burden-shifting approach in *Wright Line* was better than its own, since the evidence favored the employer under either test. Six months later, a divided Fourth Circuit panel failed altogether to mention *Wright Line* in dealing with a dual-motive...
case under section 8(a)(3). Similarly, Third Circuit panels have ignored Wright Line. In any event, the Third Circuit already had adopted a burden-shifting approach similar to Wright Line before Wright Line was published.

In NLRB v. Charles Batchelder Co., a Second Circuit panel found it unnecessary to rule on Wright Line since the Board had treated the instant case as one of "pretext" rather than "dual motives." The court, therefore, declined to engage in "but for" analysis in any form, instead inquiring whether the employer's asserted lawful reasons were, in fact, pretextual. The court held that the employer's lawful motives were legitimate and denied enforcement of the Board's decision, finding that it had "used speculation, rather than substantial evidence" in concluding the discharges were motivated by antiunion animus.

Concurring in the majority's conclusions, Judge Newman went on to "clarify analysis of employer motivation cases" in the aftermath of Wright Line. He took issue with the majority's refusal to engage in "but for" analysis, pointing out that in finding the employer's asserted lawful motives were not pretextual, the court merely transformed what was otherwise a "pretext" case into a dual-motive case, thus necessitating the use of "but for" analysis. The concurrence argued that the Mt. Healthy/Wright Line analysis can serve as the sole analytical model for all cases without necessarily eliminating the distinction between "pretext" and "but for" analysis. With impeccable logic, Judge Newman reasoned:

In every case, the Board can ask, "Would the employer have taken the

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213. NLRB v. Kiawah Island Co., 650 F.2d 485 (4th Cir. 1981). The court's view of Wright Line may, nevertheless, be detected in this opinion. In a seemingly indirect response to the Board's new burden-shifting approach, the court announced for the first time that "[[language in our cases indicates a 'shifting' burden of proof]." Id. at 490. However, the court's explication of Fourth Circuit methodology in section 8(a)(3) cases reveals that its so-called "'shifting' burden of proof" is actually a shifting burden of production in which the Board retains throughout the burden of proof and persuasion. Id. at 490-91. This, of course, involves very little "shifting." See text accompanying note 129 supra. The court may have indicated its unwillingness to place on the employer a greater burden than already exists under Fourth Circuit law. If so, then Kiawah Island stands for a complete rejection of Wright Line.


215. United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1061 (3d Cir. 1980); Garry, 630 F.2d at 945. See notes 145-49 supra and accompanying text.

216. 646 F.2d 33 (2d Cir. 1981).

217. Id. at 39.

218. Before Wright Line, the Second Circuit had adopted a "but for" causation approach. See Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98-99 (2d Cir. 1978), relying on Mt. Healthy. However, as already noted, the court misread Mt. Healthy and erroneously placed on the Board the burden of proving "but for" causation. See text accompanying notes 155-59 supra. NLRB v. Charles Batchelder Co. does not correct this misapplication of Mt. Healthy.

219. 646 F.2d at 41.

220. Id.
same action if only the valid ground had existed?” If the answer is no, the employer loses, and in that event the Board need not determine whether the employer really did rely on the valid ground in the actual case, or whether the employer really would have relied on the valid ground in the hypothetical case where only the valid ground existed. If the answer to the “but for” inquiry is yes, the employer wins, but in order to answer yes, the Board must have concluded that in the hypothetical case where only the valid ground existed, the employer really would have relied on it, and this conclusion will be reached only if the Board concludes that in the actual case the employer really did rely on the valid ground. Thus, to answer the “but for” question in the employer’s favor, the Board will have to have made a “pretext” analysis and found in the employer’s favor.221

The concurrence concluded that all cases under section 8(a)(3) should be subject to both “pretext” and “but for” analysis, in an order best suited to each case.

Courts should take careful note of Judge Newman’s observations. In essence, his concurring opinion reveals that the Mt. Healthy/Wright Line test actually shifts onto the employer the burden of proving two separate issues: 1) that its asserted lawful reasons for its actions are not pretextual; and 2) that, in the absence of the employee’s protected activities, the employer would have made the same decision against the employee solely on the basis of its non-pretextual lawful reasons. “Pretext” analysis can, of course, be subsumed in “but for” analysis, as Judge Newman made clear.222 Nevertheless, the Board and circuit courts should make a conscious effort to separate the two when analyzing an employer’s motives under section 8(a)(3). If not, there is the danger that an employer may persuade the Board or reviewing court that it has satisfied its Wright Line burden without clearly showing that it actually relied on its asserted valid reasons. For example, an employer could, and in many cases does, come forward with concrete evidence of the complaining employee’s misconduct or poor work performance, or of general economic conditions which may justify the employee’s discharge.223 Such evidence, especially if well documented

221. Id. at 43.
222. Id.
223. This danger is inherent more in the nature of the evidence presented in typical section 8(a)(3) cases than in any flaw in “but for” analysis. In most cases, the General Counsel will be able to present only circumstantial evidence and inferences of unlawful motivation since direct evidence of another’s motives is seldom available. See Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1264 (5th Cir. 1978) (Thornberry, J., concurring). On the other hand, the employer can readily muster direct concrete evidence to support its contention of economic necessity or “just cause” discharge. (If this were not so, there would be little problem in finding discrimination.) Thus, in the typical case circumstantial evidence and inferences of discrimination confront direct evidence seeking to justify the employer’s action. In weighing such evidence, the Board or reviewing court may readily find the employer has met its burden of proving “but for” causation, i.e., it would have made the same decision, absent any existence of unlawful motives.
CLIMBING MT. HEALTHY

...and substantial, might convince a reviewer that the employer would have discharged the employee even absent union activity. Evidence of substantial business justification, however, shows merely that the employer could have legitimately discharged the employee, not that the employer would have definitely done so. Wright Line requires the latter, not the former. Engaging in “pretext” analysis as a part of the Wright Line test, then, insures that any reason put forward by the employer was an actual motive in the decision to discharge, and not an after-the-fact justification.

XII

THE FIRST CIRCUIT TWISTS WRIGHT LINE

Ironically, the Board’s Wright Line opinion suffered its only serious setback when it was recently “enforced” by a panel of the First Circuit, traditionally the most vociferous critic of the Board’s approach to dual-motive cases arising under section 8(a)(3). In NLRB v. Wright Line, a Division of Wright Line, Inc., the First Circuit decided to enforce the Board’s reinstatement order, but then went on to modify the Board’s test. The court held that, once the General Counsel has established a prima facie case, the employer carries a mere burden of production, not a burden of persuasion. For the court, then, the employer need only forward with evidence that it would have taken the same action even had the protected activity not occurred.

224 This point becomes more compelling when one considers that pretext may include a lawful ground that exists but was not relied on in the instant case. See NLRB v. Charles Batchelder Co., 646 F.2d at 42 n.1; Wright Line, 251 N.L.R.B. at 1084, 105 L.R.R.M. at 1170-71.

225 662 F.2d 899 (1st Cir. 1981).

226 The court’s holding is somewhat surprising. Only a few months before, the First Circuit had adopted the Board’s Wright Line test without any alterations. In Statler Industries, Inc. v. NLRB, 644 F.2d at 902 (1st Cir. 1981), the First Circuit found “no difference in formulation between its test in Eastern Smelting and that in Wright Line.” Id. at 905. In a footnote to this statement, the court pointed out some differences in the language of each test, but properly considered them insignificant. Each test engages in a two-step burden-shifting “but for” analysis. Under Eastern Smelting, however, the first step involving the prima facie case of discrimination is established by showing a “significant” improper motivation” for a discharge, 598 F.2d at 671, whereas the Board’s Wright Line test requires that the unlawful reason be a “motivating factor,” 251 N.L.R.B. at 1089, 105 L.R.R.M. at 1175. The court disposed of this difference by noting that Wright Line adopts the term “motivating factor” from “language in Mt. Healthy equating ‘substantial factor’ and ‘motivating factor.’ 429 U.S. at 287. ...” Statler Indus., Inc. v. NLRB, 644 F.2d at 905 n.3. Moreover, the Board has, on its own, equated “significant cause” with “motivating factor” in prior cases. See Wright Line, 251 N.L.R.B. at 1084, 105 L.R.R.M. at 1170-71 and cases cited therein. The panel’s discussion of First Circuit law renders this otherwise dubious comparison self-evident.

Until Statler Industries, it was unclear whether Eastern Smelting placed on the Board or the employer the burden of proving “but for” causation. As noted in Section IX supra, though Eastern Smelting clearly shifted this burden onto the employer, it erroneously equated its approach with the First Circuit’s traditional “dominant motive” test which places the burden of proof on the Board rather than the employer. See Wright Line, 251 N.L.R.B. at 1085 n.7, 105 L.R.R.M. at
The court started its discussion by observing that the Board's "new rule seems better than its old one." It agreed that the Mt. Healthy "but for" test is the correct substantive standard for judging the propriety of reinstatement orders in labor cases and that some burden should shift to the employer once a prima facie case is established. The court disagreed with the Board only on the "narrow issue of defining the exact nature of the burden which the employer thus acquires."

The court reasoned that, since section 10(c) of the Act and the Board's own regulations squarely place the burden of proof on the General Counsel in unfair labor practice cases, "the only burden which may be acceptably placed on the employer is a 'burden of production.'" According to the court, all the establishment of a prima facie case accomplished is the creation of a rebuttable presumption that an unfair labor practice has been committed. At that point, the court said, the employer risks losing its case only if it fails to rebut the presumption by producing evidence of its own. And, as Rule 301 of the Federal Rules of Evidence declares, the party seeking to rebut a presumption in a civil case carries only "the burden of going forward with evidence to rebut or meet the presumption." The court went on to point out that Rule 301 also states that that party definitely does not carry "the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Therefore, the court held that in section 8(a)(3) trials where a prima facie case has been established, the employer "has no more than the limited duty of producing evidence to balance, not to outweigh, the burden of proof."
The First Circuit's reliance on interpretation of section 10(c) and the Board's own regulations is unpersuasive. That the General Counsel carries the initial burden of proof in unfair labor practice cases does not necessarily mean that the burden may never shift during the proceedings. And, as the court itself admitted, "the legislative history as well as the statutory language [is] inconclusive on the question of burden of proof."\(^\text{235}\)

More important, the court's conclusion is simply inconsistent with Mt. Healthy, which explicitly shifts the burden of persuasion to the employer once the prima facie case is established, even though the alleged discriminatee presumably carries the initial burden of proof.

The First Circuit tried to distinguish Mt. Healthy by pointing out that, in that case, there was no doubt that the employer had violated the employee's constitutional rights. The employer had admitted that it had fired the employee for speech which was later found protected by the first amendment. For the court the only remaining issue was the appropriateness of the rehiring order. Therefore, according to the First Circuit, the employer's claim that the teacher would have been fired anyway even if the teacher had not engaged in protected speech was not an effort to deny the existence of discriminatory conduct, but rather a "true affirmative defense"\(^\text{236}\) going to the appropriateness of the remedy, for which the employer justifiably carries the burden of persuasion. To the contrary, the court reasoned, in most labor cases, the existence of the violation is still at issue, an issue over which the General Counsel always carries the burden of persuasion.

This sleight-of-hand distinction flies in the face of the Supreme Court's own application of Mt. Healthy. In Arlington Heights,\(^\text{237}\) the Court remanded the case with instructions that the court use the Mt. Healthy test to properly determine whether the Village's decision to bar construction of a racially integrated housing project actually violated the fourteenth amendment. The Court described the process for finding the existence of a constitutional violation as follows:

Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissable [sic] purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury com-
plained of to improper consideration of a discriminatory purpose.\textsuperscript{238} In other words, under \textit{Arlington Heights}, a defendant who successfully meets its burden of proof under \textit{Mt. Healthy} essentially breaks whatever chain of causation between unlawful motive and the challenged action which the plaintiff may have established in the prima facie case. Clearly, the Court designed and applied the \textit{Mt. Healthy} test to determine the existence of a violation as well as the appropriateness of a remedial court order.

Moreover, the First Circuit's dubious distinction in \textit{Wright Line} failed to recognize that establishment of the prima facie case in section 8(a)(3) proceedings brings the litigation to exactly the same point as that faced by the Supreme Court in \textit{Mt. Healthy}. To meet the initial burden of proving a prima facie case, the General Counsel must show that the protected conduct was a "motivating factor" in the decision to discharge. Whether or not this burden is met by the employer's own admission, as in \textit{Mt. Healthy}, is irrelevant. Once it is demonstrated that protected conduct—first amendment speech or section 7-protected activity—is a motivating factor in the discharge, the employer's decision will be overturned under \textit{Mt. Healthy} unless the employer can "establish" that the same decision would have resulted even disregarding the purpose already proven illegal.

The distinction drawn by the First Circuit is based on a misunderstanding of the nature of a prima facie case. \textit{Mt. Healthy} is distinguishable from the bulk of section 8(a)(3) cases only in that the employer in \textit{Mt. Healthy} left a "smoking gun" (the letter advising the teacher that one of the reasons for his discharge was his first amendment activity), making the plaintiff's initial task easier. That the prima facie case was easy to establish in \textit{Mt. Healthy} does not justify a lesser degree of burden-shifting because the employer puts up a fight at the prima facie stage.\textsuperscript{239}

XIII

\textbf{Conclusion}

The law on mixed-motive discharge cases under section 8(a)(3) has been plagued by confusion and discord among the Board and circuit courts. As a result, judicial enforcement of Board orders seemed to

\textsuperscript{238} \textit{Id.} at 270-71 n.21.

\textsuperscript{239} The First Circuit also tried to draw an analogy to Title VII, where the burden of persuasion on the issue of discriminatory intent remains always with the plaintiff. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Title VII analogy however is inappropriate because in a Title VII case the plaintiff need not prove discriminatory motive to make out a prima facie case. The burden of proof on Title VII plaintiffs therefore is much lighter than that borne by constitutional or NLRA plaintiffs. It is easy to see why the burden of persuasion should not shift to the defendant when the plaintiff bears such a light initial burden.
depend on which circuit court had jurisdiction over the case. The controversy was due, in part, to the absence of a dispositive Supreme Court decision. In *Mt. Healthy*, however, the Supreme Court enunciated with considerable detail the proper approach to mixed-motive discharges in the related context of public employment law. Under *Mt. Healthy*, once the employee proves that unlawful motive was a "substantial factor" in the employer's action, the burden of persuasion shifts to the employer. The employer must then establish that it would have made the same decision absent the unlawful reason.

*Mt. Healthy* exacerbated a crisis of credibility endured for some time by the Board. Embarrassingly many courts were refusing enforcement of the Board's reinstatement orders and criticism of the Board's traditional "in part" test had become acute. In a noble move toward reconciliation, the Board in *Wright Line* took up the charge to adopt *Mt. Healthy*. The outcome undoubtedly surprised Board critics who believed that *Mt. Healthy* supported their own alternate tests. In *Wright Line*, the Board convincingly demonstrated that the *Mt. Healthy* test best balances the conflicting interests of employer and employee. In establishing the middle ground, *Wright Line* answered Board critics with little repudiation of its traditional approach.

Not all of the circuit courts have spoken on *Wright Line* and those that have are represented only by one, perhaps two, panels. Thus, it is still too early to assess *Wright Line*’s full impact. To date, however, indications are that *Wright Line* has been generally accepted as the long-needed uniform standard for section 8(a)(3) cases. Indeed, *Wright Line* has converted the Ninth Circuit, once one of the Board's most ardent foes in this area of labor law, into an ally.

Unfortunately, the First Circuit has recanted its initial acceptance of the *Mt. Healthy/Wright Line* burden-shifting approach. In *NLRB v. Wright Line*, a panel of the First Circuit held that only a burden of production of evidence rather than a burden of persuasion should be shifted onto the employer. This may portend continuing controversy, undermining the change *Wright Line* creates for a national uniform standard under section 8(a)(3). Such a result certainly eclipses the possible advantages to the First Circuit's modification of *Wright Line*. It is sincerely hoped that other courts, perhaps even other panels of the First Circuit, will recognize the far-reaching benefits of adopting *Wright Line* in toto, without piecemeal qualification and equivocation. Ultimately, *Wright Line*’s acceptance may well depend on whether the courts will find it, as a First Circuit panel once did, a successful "effort to reduce the confusion and discord in dealing with mixed motive cases."

240. Statler Indus., Inc., 644 F.2d 902, 905 (1st Cir. 1981).