STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

LoiDANA MILLER, Complainant, and COLLEGE COMMUNITY SCHOOL DISTRICT, Respondent.	CASE NO. 100719 PROPOSED DECISION AND ORDER

LoiDana Miller filed the above-captioned prohibited practice complaint with the Public Employment Relations Board ("PERB" or "Board") on March 3, 2016, pursuant to Iowa Code section 20.1 and 621 Iowa Administrative Code 3.1. Her complaint alleges that the Respondent, College Community School District ("CCSD" or "District"), committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*a*) when it retaliated against Miller for exercising her rights under Iowa Code section 20.8.

The District denied it committed a prohibited practice and moved to dismiss the complaint and for summary judgment on Miller's claims. Miller subsequently filed an amended complaint alleging CCSD also committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*c*). The parties agreed the District's motion to dismiss and motion for summary judgment as well as the Complainant's resistance to those motions would be construed to apply to Complainant's Iowa Code section 20.10(2)(*a*) and 20.10(2)(*c*) claims as alleged in the amended complaint.

Following oral arguments, both the motion to dismiss and motion for summary judgment were denied. Pursuant to notice, an evidentiary hearing was held in Cedar Rapids, Iowa on July 26 and 27, 2016. Miller was represented by Nate Willems and the District by Brian Gruhn. Both parties submitted post-hearing briefs and reply briefs.

Based upon the entirety of the record, and having considered the arguments in the parties' briefs, I conclude that Miller has failed to establish the District committed a prohibited practice.

FINDINGS OF FACT

The Respondent, College Community School District, located in Cedar Rapids, Iowa, is a public employer as defined by Iowa Code section 20.3(10). At all times relevant to this complaint, the Complainant, LoiDana Miller, was a public employee within the meaning of Iowa Code section 20.3(9).

The District has an early childhood center ("ECC"), which includes early childhood and school age programs. For all relevant periods of time in this case Kathy Schulte was the director and Jenny Pettigrew was the assistant director of the ECC. As the director, Schulte oversaw the preschool teachers and the before and after school program. The District employed a school age coordinator, who supervised the before and after school program, five lead teachers, one for each elementary school building in the district, and numerous assistant teachers. When Miller began with the District, Mitch White served as the school age coordinator. In the fall of 2015, he resigned and Kylee Knop was hired as the school age coordinator.

Prior to working at CCSD, Miller was a certified kindergarten through twelfth grade teacher and taught for 14 years at St. Patrick's Catholic School. She then stayed home with her children before returning to work at various restaurants and schools. Her most recent position prior to CCSD was as a lead teacher for three-year-olds at Asbury Day Care. While working at Asbury Day Care, Miller supervised Brittley Dixon. The two became friends while working together. Both Miller and Dixon left employment at Asbury in the fall of 2014. Miller left her position at Asbury due to pain in her knees that was exacerbated by working with three-year-olds. She began working for CCSD immediately after resigning from Asbury. Dixon began working at CCSD in July 2015, but worked at a different building than Miller.

CCSD's school age coordinator, Mitch White, hired Miller in October 2014 as the lead teacher in the before and after school program at Prairie Hill Elementary School. Miller worked both the before and after school shifts during the school year and had approximately 28 kids in the program. She worked with an assistant teacher. The program took place mainly in the cafeteria, gym, and outside. Her duties as the lead teacher were to provide activities for the kids to help them with problem-solving skills, imagination, creativity, social skills, honesty, and respect. Miller was also hired to work for CCSD for the summer of 2015, mostly giving people breaks and supervising outdoor recess.

Kylee Knop, White's replacement, and Miller had a contentious relationship beginning almost as soon as Knop became school age coordinator in the fall of 2015. Miller did not get along with Knop and had problems with

the way Knop treated her. Part of this was due to Miller's health issues. Miller has degenerative joint disease in her knees, which makes walking difficult. The District had either not required Miller to go on field trips or made some unwritten accommodations for her disability on field trips while White was her supervisor. The topic of field trips had come up with Knop and created tension. This tension continued the rest of Miller's time at CCSD as she continued to be scheduled for field trips.

On November 4, 2015, Miller had a text conversation with Director Schulte in which Miller discussed filing a complaint against Knop. Miller met with Schulte on November 5 to discuss her issues and possibly filing a complaint about Knop. Schulte and Miller discussed the field trip issue and Schulte told Miller she needed to bring in a doctor's note. In that meeting, Miller also asked Schulte why a coworker had seen Miller's employment file on Schulte's desk.

Around the same time, Knop had set up a meeting with Miller, Schulte, Pettigrew, and herself due to some communications and problems that had arisen with Miller since Knop had taken over as the school age coordinator. That meeting occurred later in the day on November 5. The administrators discussed their concerns with Miller including Miller's failure to follow directions in submitting lesson plans on time and as expected, as well as the nature of Miller's communications to Knop. Knop drafted a letter of reprimand, which stated Miller failed to follow directions for the submission of lesson plans as documented on October 26 and October 30. The letter asserted that on

October 30, Miller had responded that she would get Knop a copy of the lesson plans, but Knop did not receive the lesson plans until November 2. The letter also said that Miller had told Knop that ECC was "half-ass." This letter of reprimand included email communications between Miller and Knop in which Miller stated she did not like that Knop treated her like she's stupid and knew Knop had told people that Miller was snippy towards her. The letter of reprimand stated that Miller had been insubordinate and had conducted herself in a manner that could negatively affect students, families, and staff. The letter goes on to state that further violations would result in further disciplinary action up to and including termination.

After the November disciplinary meeting, more issues arose. On Friday, December 18, Miller wrote a behavior incident report ("BIR") concerning a child that was running away from her. A behavior incident report is a short form to document a child's behavior issue, whether other children or staff were involved, and any action plan based on that behavior. On the same day that Miller wrote a BIR, Miller's assistant wrote two BIRs for the same child. Since the incidents occurred late in the day and Miller believed a supervisor would not be able to sign the BIRs that night, Miller gave the child's mother the behavior incident reports to sign, but kept the reports to get a supervisor's signature at a later time. The mother called Knop about the BIRs the following Monday, but Knop had not heard about the incidents yet. According to the District's handbook, Miller was supposed to get the supervisor's signature prior to the parent's signature. In previous staff meetings, the lead teachers had

been instructed that Knop could give authorization over the phone if she could not sign the BIR in person. When Miller discussed the December incident with Knop via text message, Miller agreed to follow the District's policy in the future.

In that same text conversation with Knop, Miller said she had not done an additional BIR for the child, but did an observation card instead because Miller did not feel a BIR would do any good in that instance. Knop said moving forward Miller should do a BIR.

Miller and Knop also had incidents concerning monthly newsletters that Miller was to create and send to parents. In November, Miller completed a newsletter without having it proofed by Knop. All staff were told to have Knop proof the newsletters prior to sending them out to parents. In December, Miller did not do a newsletter. In January, Miller created the newsletter, but printed it prior to giving it to Knop to be proofed. When Knop saw the newsletter she requested that Miller add a few things, but Miller responded that it was already done and she did not have time to redo it as she was already working during her personal time. Miller added that she would send the parents the additional information in a separate note. Knop told Miller that she needed to proof the letter first and if there was a problem getting the newsletter done during planning hours, Miller could request additional paid time to complete the work. However, the staff had been told during staff meetings that there would be consequences for too many "pink sheets" which are used by employees for requesting pay for work done outside of scheduled time or for issues swiping in and out. The staff members were told to fill out pink sheets to get paid for extra

work, but were also told to get everything done during scheduled hours. Miller did not have enough time to complete the newsletter during work time because of the additional tasks Knop required and because she did not have regular access to a computer in her building and generally had to go to a different building to use the computer.

Miller also struggled completing tasks during this time period because she was sick during the fall of 2015. Miller missed two days of work in October, two days in November, and one day in December.

On January 25, 2016, Miller's coworker, Brittley Dixon, approached Director Schulte regarding comments Miller had made to Dixon about the way Miller was treated by the administration at CCSD and the efficacy of ECC's administration. Schulte and Dixon briefly talked on January 25 and Dixon returned on January 26 to further discuss the matter with Schulte. Dixon relayed text messages and other comments Miller had said in their conversations to Director Schulte because Dixon did not know who to trust due to Miller's negative statements about various members of the District's administration. Schulte took notes during this meeting about different comments Miller had made. Dixon told Schulte that Miller called Kylee Knop "Barbie," said not to trust assistant director Jenny Pettigrew, stated Knop and Schulte put Dixon at a certain building because they needed to watch her more, complained about Knop getting the position as school age coordinator, called ECC "half ass," said there's a fire at Prairie Hill Elementary School,

where Miller worked, said Schulte and Knop ambushed her, and told Dixon not to trust Schulte because she would stab her in the back.

Two days after Dixon conveyed this information to Schulte, Miller was called into a meeting with Schulte, Pettigrew, and Knop in which Miller was given a letter recommending her termination. The letter was later given to the human resources department.

The letter stated Miller failed to follow directives. Specifically, the letter provided that Miller was verbally instructed to stop using coloring sheets, but was seen making copies of coloring sheets. Miller was instructed to have Knop proof newsletters, but printed newsletters prior to getting them proofed and failed to include information in the newsletter after being instructed to do so. Miller admitted that she was working on the newsletter during personal time, which is against District policy that was discussed at staff meetings. The letter also discussed Miller's failure to write a BIR for one student stating that she did not feel it would do any good. The letter discussed the December incident when Miller failed to get a supervisor's signature on three BIRs prior to presenting the parent with the reports despite the procedure for BIRs being discussed at several meetings throughout the fall. The letter also indicated that the child who received the three BIRs on December 18 had bumps and bruises, according to his mother, and Miller had not filled out an incident report. However, the letter does not attach any written evidence of this particular incident and Miller never heard about the incident prior to the January 28 letter.

The letter then stated that "[i]nsubordinate behavior is not acceptable." The letter listed comments Miller made to coworkers including:

> -Do not trust administrators
> -Not to trust Kathy [Schulte], she is a backstabber
> -When staff has shared with you that they 'are coming to talk to Kathy or Kylee' [Knop] your comment is "Good luck."
> -That Kylee plays favorites
> -You have shared with other staff that the summer job posting was created to keep you from applying
> -Amy Lyons is helping you find a new job
> -There are favorites picked because you have a write up and that others should be written up.
> -"...Please don't share with Jenny [Pettigrew] anymore about things you and I talk about I'm sure she tells Kathy or Kylee"
> -"there's a fire at Hill, that Kathy and Kylee have just ambushed you." You also stated "Kylee lied about it in front of Kathy."
> -"Did you read the requirements of summer camp, how come all five of these requirements respond to me?"
> -This place is half ass anyway and will never change.
> -E. needs to tone herself down, the reason E. is at Crest is so Kathy and Kylee can watch her
> -Kathy and Kylee placed you at Crest because they need to watch you more.
> Calls Kylee "Barbie"

Miller admits that she made these statements to Dixon, but the conversations did not take place in the presence of children or parents and Miller viewed the statements as confidential.

The letter also quoted a text conversation between Miller and Dixon, which provided, "I was told by a coworker that Kylee told T. when she came to work with me that if I said anything about Kylee[,] T. was to tell her." The letter further added that the text went on to say that Miller was "'ticked she'd [Knop] stoop so low.'" The letter stated the other employee encouraged Miller to talk to

Knop, and Miller replied that "I just wondered if you had heard anything [*sic*] For whatever reason [Knop] has it in for me she might want to be careful'" and Miller didn't "'have a problem with her until she does this.'"[1]

In the letter recommending termination, Schulte, Pettigrew, and Knop concluded that Miller failed to improve after the November 5 discipline. The letter stated that Miller was insubordinate and had conducted herself "in a manner that could negatively affect students, families and staff" and was in violation of district policy. The letter then recommended immediate suspension and termination. The January 28 meeting in which Schulte, Pettigrew, and Knop discussed their termination recommendation with Miller was contentious, although the parties disagree on exactly what was said.

Schulte viewed Miller's conduct, as documented in the recommendation of termination letter, as insubordinate and believed Miller's comments to coworkers criticizing the District's administrators impacted the administration's ability to collaborate and to have relationships with the staff. Ultimately, Schulte recommended Miller's termination to the District's human resources director, Jamie Coquyt.

On January 28, Coquyt sent Miller a letter confirming Schulte's recommendation of Miller's immediate suspension without pay and termination of employment. That letter provided that the District was recommending termination of Miller's employment to the Board of Directors at their February 15, 2016, meeting.

[1] Schulte attached printouts of text messages between Miller and Dixon to the January 28 recommendation of termination letter.

On January 29, Miller sent an email complaint to Coquyt regarding disability accommodations and stating Schulte, Knop, and Pettigrew targeted her, harassed her, and discriminated against her. In the letter, Miller claimed she was singled out due to her age, disability, and educational background. Miller met with Coquyt regarding her complaint on February 5. On February 12, Coquyt responded to Miller's complaint in a letter, stating Miller was terminated for insubordination that had nothing to do with her age, disability, or educational background. He concluded the basis for Miller's termination was repeated incidents of insubordination and unprofessional conduct that had a negative impact on ECC. Miller was ultimately terminated from CCSD.

In her prohibited practice complaint, Miller contends that CCSD retaliated against her and ultimately terminated her for comments she made about the District's administration. Miller claims these comments constituted protected, concerted activity under Iowa Code section 20.8(3).

The comments at issue, as found in the recommendation of termination letter, were from conversations Miller had with coworker, Brittley Dixon, during the 2015-2016 school year prior to Miller's termination. These conversations took place mostly via text messages as Miller and Dixon worked in different buildings. Miller and Dixon were friends. Dixon shared personal things with Miller and asked for Miller's advice about how to handle certain situations. Dixon asked Miller for advice about dealing with certain administrators and Miller would answer.

These conversations generally took place outside of the work environment and Miller viewed the conversations as confidential. Miller did not repeat the things Dixon told her and kept it in the strictest confidence. Miller described the conversations with Dixon as offering advice or "just sharing, venting, getting ideas off each other." When asked about the purpose of the conversations Miller admitted that she and Dixon were "[j]ust venting" and added that she wanted Dixon to be aware of things to do and not to do and the people to interact with.

Dixon perceived these conversations as Miller giving her opinions about the administration, but not necessarily tips about how to deal with the District's administrators. The conversations were mutual discussions in which Miller and Dixon shared their opinions on the administration. Although Dixon agreed with some of Miller's criticisms about the administration and made comments of her own, she also approached the administration at CCSD about her concerns.

Another lead teacher, Mariah Luther, also received Miller's complaints about Knop through text messages with Miller. Luther heard Miller say all of the comments that were in the January 28 recommendation of termination letter and informed the CCSD administration about Miller's comments, but it is unclear what comments Luther reported to the administration and when she reported the comments.

CONCLUSIONS OF LAW

Miller's complaint alleges the District committed a prohibited practice within the meaning of Iowa Code section 20.10(2), paragraphs (*a*) and (*c*), which provide:

> 20.10 Prohibited practices.
>
> . . . .
>
> 2. It shall be a prohibited practice for a public employer or the employer's designated representative to:
>
> *a.* Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.
>
> . . . .
>
> *c.* Encourage or discourage membership in any employee organization, committee or association by discrimination in hiring, tenure, or other terms or conditions of employment.

Miller asserts CCSD suspended and then terminated her employment in retaliation against her for exercising her Iowa Code section 20.8 rights. Section 20.8(3) states:

> 20.8 Public employee rights.
>
> Public employees shall have the right to:
>
> 3. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the state.

When a complainant alleges employment discrimination based on the employer's retaliation against the employee for engaging in protected activities, PERB analyzes the case using the test articulated in *National Labor Relations Board v. Wright Line,* 251 NLRB 1083, 105 LRRM 1169 (1980), which was

upheld by the United States Supreme Court in *National Labor Relations Board v. Transportation Management Corporation*, 462 U.S. 393 (1983). *United Elec., Radio and Mach. Workers of America, Local 1145 and Western Iowa Tech. Cmty. Coll.*, 08 PERB 7252 at 14–15. PERB applies the *Wright Line* dual motive test when both legal and illegal motives for discharge are alleged. *Ross v. Pub. Emp't Relations Bd.*, 417 N.W.2d 475, 477 (Iowa Ct. App. 1987); *AFSCME/Iowa Council 61 and Southern Iowa Reg'l Housing Authority*, 11 H.O. 8167 at 16.

The *Wright Line* test requires the complainant to establish a prima facie case sufficient to support the inference that protected activity was a substantial or motivating factor in the employer's adverse employment decision. *Ross*, 417 N.W.2d at 477; *Rosenthal and City of Dubuque*, 10 H.O. 8027 at 14. The employer can rebut this inference by showing that prohibited motivation played no part in its actions. *Int'l Union of Operating Eng'rs, Local 234 and Worth County*, 11 H.O. 8204 at 10 (quoting *Pub., Prof'l & Maint. Emps., Local 2003 and Black Hawk Cty.*, 04 PERB 6664). If the complainant establishes the prima facie case, then the burden shifts to the employer to demonstrate the employer would have taken the same personnel action for legitimate reasons regardless of the protected activity. *Rosenthal*, 10 H.O. 8027 at 14.

To establish that Miller's protected activity was a substantial or motivating factor in her termination, Miller must demonstrate that she engaged in protected activity under Iowa Code section 20.8. Section 20.8(3) defines protected activity, in part, as the engagement in concerted activities for the

purpose of mutual aid or protection. Iowa's statute is similar in form and content to section 7 of the National Labor Relations Act. *Koehn and Indian Hills Cmty. Coll.*, 03 PERB 6414, App. at 20; *Davenport Educ. Ass'n and Davenport Cmty. Sch. Dist.*, 84 H.O. 2490 at 9. When language in chapter 20 is similar to the NLRA, PERB considers the federal court decisions to be persuasive and instructive, although not conclusive, on the meaning of the Iowa statute. *State of Iowa v. Iowa Pub. Emp't Relations Bd.*, 560 N.W.2d 560, 562 (Iowa 1997) (citing *City of Davenport v. Pub. Emp't Relations Bd.*, 264 N.W.2d 307, 313 (Iowa 1978)). Although the statute does not define "concerted activity," the Supreme Court has established the term describes activities of employees who have joined together to achieve common goals. *Nat'l Labor Relations Bd. v. City Disposal Sys., Inc.*, 465 U.S. 822, 829, 104 S. Ct. 1505, 1511, 79 L. Ed. 2d 839 (1984). While the scope of these activities may be broad, it is not all encompassing. *Pub., Prof'l & Maint. Emps., Local 2003 and Black Hawk Cty.*, 1997 PERB 5399 at 6.

To be protected as a concerted activity, the activity must be undertaken by two or more employees, or by one employee on behalf of others. *Id.* In *Mushroom Transportation Company,* the Third Circuit Court of Appeals discussed whether different types of conversations between employees constituted protected activity. *Mushroom Transp. Co. v. Nat'l Labor Relations Bd.*, 330 F.2d 683 (3d Cir. 1964). The employee in that case talked to other employees and advised them as to their rights on holiday pay, vacations, assignment of trips to drivers outside of the company, and other matters. *Id.* at

684. The court determined the employee's conversations were generally directed to the other employees' legitimate interests in the terms and conditions of employment and the employee at issue was not motivated by personal interest. *Id.* However, the court stated that an employee's conversation merely discussing legitimate interests is not enough to find the activity of the employee is protected under the National Labor Relations Act. *Id.* at 685. The court agreed that a conversation could be concerted activity even when it involves only a speaker and a listener. But to be "concerted activity," the conversation must appear, at the very least, to be engaged in with the purpose of initiating or inducing or preparing for group action. *Id.* at 685. Preliminary discussions may also be concerted activity even when they do not result in organized action or positive steps toward demands, but group action has to be intended, contemplated, or referred to. *Id.*

The court continued that activity which is merely talk, must be talk looking to group action. *Id.* Additionally, if the only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve that employee's status, the activity is individual, not concerted. *Id.* The court added that if no action is intended at all, then the employee is merely griping. *Id.* The court concluded that by privately dispensing advice on legitimate interests to other employees, the employee at issue was merely griping and not engaging in concerted activity. *Id.* at 683, 685.

The National Labor Relations Board ("NLRB") fully embraced the *Mushroom Transportation* ruling in *Meyers I. Meyers Industries, Inc.*, 281 NLRB 882, 887 (1986). The NLRB stated the definition of concerted activity encompasses circumstances where individual employees seek to initiate or to induce or to prepare for group action as well as individual employees bringing group complaints to the attention of management. *Id.*; *see also Alton H. Piester, LLC v. Nat'l Labor Relations Bd.*, 591 F.3d 332, 337 (4th Cir. 2010) (reiterating that a conversation involving a speaker and listener may constitute concerted activity if the conversation was engaged in with the object of initiating, inducing, or preparing for group action or having some relation to group action in the interest of employees).

This agency has also had the opportunity to comment and reflect on the appropriate definition of "concerted activity" for the purpose of mutual aid or protection and has followed the above reasoning. When employees have failed to demonstrate a conversation was intended to initiate, induce, or prepare for group action, PERB has determined the conduct was not concerted and therefore, not protected. *Koehn*, 2003 PERB 6414, at App. 12–14, 21–24 (finding that when an employee brought a list of employees' salaries to work which led to a break room discussion about the list, the employee did not engage in a protected activity as there was no evidence that the discussion was anything other than casual conversation and the employee did not intend to organize or work toward organization); *Int'l Union of Operating Eng'rs, Local 234 and Spencer Mun. Hosp.*, 2007 H.O. 7137, at 5, 7–9 (declaring that an

employee's discussion of a fellow employee's discharge with coworkers was not protected conduct as the discussion did not involve the intention for group action).

Miller claims she engaged in protected activity when she had conversations critical of CCSD's administration with her coworkers, her employer knew of this conduct, and she was terminated for engaging in this protected activity. Miller further argues prospective group action is not a necessary element to determining whether she engaged in protected activity as her conversations related to job security. The District argues Miller's statements should not be considered protected activity under chapter 20 as Miller's statements were merely complaints.

Miller admitted to making the comments that were listed in the January 28 letter recommending her termination. These comments ranged from criticisms of administrators' treatment of her to comments on the ECC program itself. Clearly, the administration knew of these comments as the statements were included in the January 28 letter. Additionally, on January 26, two days prior to Miller's suspension, Dixon told Schulte about comments Miller had made and Schulte took notes in which she wrote down the statements. The administration was aware of the comments Miller had made to Dixon. Miller also had conversations that were critical of the administration with other coworkers, namely Mariah Luther. Luther did not remember when she relayed these conversations to Kylee Knop. Therefore, the record does not establish

that the CCSD administration knew of those conversations prior to recommending termination of Miller's employment.

Although the January 28 letter recommending Miller's termination included a variety of reasons for recommending her termination, it is clear that Miller's conversations with Dixon were a substantial or motivating factor in the administration's decision to terminate her. A list of Miller's comments was included in the recommendation of termination letter so the comments at the very least, contributed to her suspension and termination.

Miller demonstrated that her conversations with Dixon were a substantial or motivating factor in her termination. The remaining question in determining whether Miller established her prima facie *Wright Line* case is whether these conversations she had with Dixon about the administration constitute protected activity. The statements at issue were attached to the January 28 recommendation of termination letter and were listed in the handwritten notes that Schulte took during her January 26 discussion with Dixon.

To determine whether Miller's conversations constitute protected concerted activity for the purpose of mutual aid or protection requires an evaluation of the circumstances in which the comments were made and the intentions of the actors in the conversations. These conversations were a two-way communication between Dixon and Miller. Generally, Dixon initiated the conversations and these conversations took place via text messages as Miller

and Dixon worked in different buildings. Dixon agreed with some of the comments that Miller made in these conversations.

Miller considered Dixon a friend and believed the conversations were private. The conversations took place on personal time and were private conversations that did not occur in front of students or parents. Miller characterized the conversations as "just sharing, venting, getting ideas off each other. I thought she was my friend, and she was a coworker." Miller described the purpose of the conversations as "[j]ust venting" and making Dixon aware of things to do and not to do and which people to interact with. Dixon described these conversations as coworkers sharing opinions.

Under the *Mushroom Transportation Company* rationale that PERB has adopted and followed, these conversations between Miller and Dixon do not amount to concerted activity for mutual aid or protection. The facts in *Mushroom Transportation* are very similar to the circumstances in this case. The employee in *Mushroom Transportation* was privately dispensing advice on legitimate interests to other employees. The court still ruled in that case that the employee did not engage in concerted activity for the purpose of mutual aid or protection as the conversation was not engaged in with the intention of inducing or preparing for group action. *Mushroom Transp. Co.*, 330 F.2d at 683, 685. In the instant situation, Miller was, at best, giving and receiving advice from a coworker; at worst, she was merely venting to a coworker. Neither Miller nor Dixon expressed the intent for group action or to improve the working conditions for other employees. Even if the conversations were to

provide Dixon with advice, Miller needed to intend to initiate, induce, or prepare for group action. Simply arming Dixon with tips on how to handle certain situations does not constitute group action.

Whether Miller's statements were inherently concerted?

Miller contends that even if her conversations were not engaged in with the intent to initiate, induce, or prepare for group action, her conversations should be protected as "inherently concerted" because the conversations concerned job security. Miller cites two NLRB cases for the premise that all employee conversations about job security are inherently concerted and do not require the intent for group action. PERB has not previously addressed this issue.

In *Hoodview Vending Company*, 359 NLRB 355 (2012) (vacated but incorporated as law by *Hoodview Vending Company*, 362 NLRB no. 81 (April 30, 2015)), George, an employee who had previously left work early without permission, was terminated after having a conversation with a coworker, Boros, about possible discharges at the company. *Hoodview Vending Co.*, 359 NLRB at 355–56. The conversation arose after George viewed a job posting that she believed to be listed by her employer. *Id.* at 356. Due to the conversation, Boros believed he was going to be fired and discussed this with the owner and the owner's wife, who also worked at the company. *Id.* George was soon discharged. *Id.* The employees were informed George was terminated for gossiping and telling other employees they were going to be terminated. *Id.* The

main decision before the NLRB was whether the conversation between George and Boros constituted protected concerted activity. *Id.* at 357.

The NLRB opined that in some circumstances contemplation of group action is not required to find that a conversation is protected concerted activity. The NLRB decision stated that some types of discussions, such as discussions on wages, are inherently concerted as the topic of the discussion is a vital term and condition of employment. *Id.* Consequently, the lack of evidence of contemplation of group action is not determinative. *Id.* The NLRB decision declared discussions about job security, meaning "whether and under what circumstances employees will be discharged or laid off, and with what procedural protections" also concern a vital term and condition of employment and are inherently concerted. Therefore, contemplation of group action is not required for job security discussions. *Id.* The NLRB decision concluded the conversation between George and Boros concerned job security as the coworkers were discussing whether a job posting meant an employee was going to be discharged. *Id.* at 358. Thus, the intent for future group action was not a necessary part of the analysis. *Id.*

The same NLRB panel reached the same conclusion in a subsequent decision. *Laurus Technical Institute,* 360 NLRB 1155 (2014). In that case the employee, Henderson, worked as an admissions representative for the school. *Id.* at App. 1158. The admissions department went through significant upheaval with mass firings. *Id.* at App. 1159. Henderson discussed the firings with two new coworkers that were shocked and worried about their own job

security and gave the coworkers a lead on a new job upon one of the coworker's request. *Id.* at App. 1159–60. One of these coworkers later told the CEO that Henderson had talked negatively about management and tried to solicit the coworker to leave the school. *Id.* at App. 1161. Henderson was then terminated. *Id.* The termination letter cited Henderson's willful breach of company policies and counterproductive behavior as the reason for termination. *Id.* at App. 1162. In the analysis, the administrative law judge cited *Hoodview* for the principle that "inducing group action . . . need not be expressed depending on the nature of the conversation" and conversations about job security are inherently concerted. *Id.* at App. 1164–65. The administrative law judge concluded the conversations took place in furtherance of job security and were therefore concerted activities protected by the Act. *Id.* at App. 1164.

Miller alleges that many of her conversations were related to job security and should be found to be inherently concerted. Miller urges PERB to follow the above NLRB case law and find that conversations about job security are inherently concerted and thus do not require the intent to initiate, induce, or prepare for group action. I decline to do so.

I find the dissent in *Hoodview* to be well-reasoned and thorough. The dissent argued that the theory of "inherently concerted" as it relates to discussions of wages or job security is irreconcilable with circuit court cases and other NLRB cases requiring the determination of concerted activity to be a factual determination based on the evidence. *Hoodview*, 362 NLRB at 5 (Miscimarra, dissenting).

> First the notion that conversations about certain *subjects* are inherently concerted is irreconcilable with *Meyers Industries*. There, as noted above, the Board "fully embrac[ed] the view of concertedness exemplified by the *Mushroom Transportation* line of cases . . . . There is no wiggle room in [the *Mushroom Transportation*] language. It does not allow for the possibility of "inherently concerted" activity where there is no evidence of an object of initiating, inducing, or preparing for group action or some relation to group action. Moreover, *Meyers* draws a distinction between conversations that look toward group action and "mere griping." This distinction is erased by the majority's test, which sweeps within the phrase "inherently concerted" *all* conversations regarding wages, work schedules, or job security, even if there is no group-action object and the conversation involves "mere griping" . . . . Clearly, the *Meyers* Board did not contemplate a factual inquiry that would begin and end with the subject of the conversation. Yet under my colleagues' analysis, the fate of a particular case rises or falls on the Board's decision, *as a matter of law*, that the subject discussed is likely to spawn collective action.

Id. (Miscimarra, dissenting) (emphasis in original) (internal citations omitted).

The *Hoodview* dissent continued that circuit courts have "uniformly rejected" the theory of inherently concerted activity as related to wages and work schedules. *Id.* at 5–6 (Miscimarra, dissenting) (citing *Trayco of South Carolina, Inc. v. Nat. Labor Relations Bd.*, 927 F.2d 597 (4th Cir. 1991); *Aroostook Cty. Reg'l Ophthalmology Ctr. v. Nat. Labor Relations Bd.*, 81 F.3d 209, 214 (D.C. Cir. 1996)). Finally, the dissent in *Hoodview* recognized that the cases the majority relies on for its theory of inherent concertedness either do not support the theory, or are otherwise unsound. *Id.* at 6.

The inherent concertedness theory advanced in *Hoodview* and *Laurus* is not supported by federal case law. *See, e.g., Aroostook Cty. Reg'l Ophtalmology Ctr.*, 81 F.3d at 214 (stating "[w]e neither understand nor endorse the Board's 'spawning' theory, which, on its face, appears limitless and nonsensical").

Additionally, finding that conversations are inherently concerted under section 20.8(3) any time the discussion touches on a topic of significance in the employment relationship would lead to an endless list of topics that would automatically be concerted and likely protected, unreasonably broadening section 20.8(3). I reject the rationale that discussions on job security are inherently concerted. In evaluating the facts presented in this instance, Miller did not engage in conversations with the intent to initiate, induce, or prepare for group action, and thus did not engage in protected activity.

Even if I had adopted the rationale that employees' discussions on job security are inherently concerted, the vast majority of Miller's statements were unrelated to job security. The termination letter and a note signed by Dixon lists statements CCSD knew Miller said and provided a basis for her termination. These statements were generally about the administration and the administration's interaction with Miller and with coworkers, but did not express whether or under what circumstances employees would be discharged or any procedural protections. Some of the conversations might constitute a very broad discussion on potential discipline, but did not cross over into a discussion of discharge. Miller said things such as "[d]o not trust administrators" and that the administrators pick favorites. Simply because Miller's comments may have provided a basis for her termination does not transform the comments she made into a discussion about job security. These conversations were about Miller's dislike of some members of the

administration and her disapproval of the way some members of the administration handled certain situations.

Miller also made comments about a job opening with CCSD for summer programs claiming that the job posting was created to keep her from applying. This comment, as known to CCSD at the time of Miller's termination, has to do with a potential job, but makes no allegations about the job security of her current position. In the larger context of this conversation between Dixon and Miller provided during the hearing, Miller asks "Are they going to fire me for asking a question" (presumably about the rationale for the list of requirements in the job posting). The statement in light of the text messages between Dixon and Miller seems to be asked facetiously and does not rise to the level of a discussion about job security.

Only two of Miller's conversations that the District was shown to have any knowledge of at the time of Miller's termination could be construed as potential discussions on job security. The first statement is that "Amy Lyons is helping [Miller] find a new job." This comment in itself is not necessarily about job security. Depending on the larger context it could have been a discussion about job security in which Miller said she was looking for a new job because she was worried about her job security at CCSD. However, that context was not provided and Miller's comment alone about looking for a new job does not concern job security.

The second conversation that could be construed as a discussion on job security occurred in text messages between Miller and Dixon in which Miller

said, "I just wondered if you had heard anything [*sic*] For whatever reason [Knop] has it in for me but she might want to be careful," when discussing whether Knop had asked a coworker to spy on Miller. Again, in the context, this statement is another comment, of many, about Miller's dislike for members of CCSD's administration and her rebuke of the operations of the administration. The overall context of the conversation is not job-security related.

In both *Hoodview* and *Laurus* the coworkers were having discussions about the discharge of past employees and the potential discharge of other employees. Miller was not having these types of discussions. Under Miller's own description of the conversations, she was venting. Even under *Hoodview* and *Laurus*, Miller's conversations were not the type of conversations that would merit protection. Miller was not discussing issues about whether employees or under what circumstances employees would be discharged or the procedural protections available. Therefore, even if PERB were to accept the NLRB's rationale in *Hoodview* and *Laurus*, Miller's conduct would not be protected under chapter 20.

Whether Miller's termination was unlawful due to an allegedly unlawful work policy?

Miller argues CCSD relied on an illegal policy when it terminated her employment. The January 28 letter recommending Miller's termination does refer to the District's policies as a basis for Miller's termination when it states:

> The information gathered indicates that you [Miller] have been insubordinate and conducted yourself in a manner that could negatively affect students, families, and staff. Your actions are in violation of district policy. This type of behavior will not be tolerated in the workplace. It is an expectation that you follow all policies of ECC and College Community School District.

The letter does not provide a specific provision in the policies that the District contends Miller violated. Miller, however, cites to the following passages of the District's policies that she claims are overbroad in its application to her.

> The Board of Directors expects that the entire staff will strive to set the kind of example that will serve them well in their own conduct and behavior, and will contribute toward a school atmosphere that is friendly but well disciplined.
> . . . .
> [A]ll employees of the College Community School District are expected to maintain high standards in their school relationships.

Miller's allegation that CCSD relied on an illegal policy in her termination is outside the scope of the case at hand. Even if CCSD had policies that violated chapter 20, it's unclear that this would or should result in a different outcome for Miller.

Nonetheless, I find that Miller has not shown that the portion of CCSD's policy that Miller finds problematic is in violation of chapter 20. In determining a work rule's lawfulness, the NLRB gives the rule a reasonable reading and does not read phrases in isolation or presume improper interference with employment rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). The NLRB outlines when a work policy would be unlawful. First, the NLRB examines whether the rule explicitly restricts activities protected by

chapter 7. *Id.* If the rule does not contain an explicit prohibition of activity protected under chapter 7, then the determination of a violation depends on showing one of the following: (1) employees would reasonably construe the language to prohibit section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of section 7 rights. *Id.* at 647.

Facially, CCSD's work policy does not explicitly restrict protected activities under chapter 20. There is no allegation that the policy was promulgated in response to union activity or that employees would reasonably construe this language to prohibit protected chapter 20 activity. Miller argues that the rule was applied to restrict her rights. As determined above, Miller did not engage in activity that was protected under chapter 20, so CCSD's use of the policy to terminate Miller did not restrict her chapter 20 rights.

As Miller did not engage in protected activity under chapter 20, she has failed to prove a prima facie case under the *Wright Line* analysis. Although her conversations were a substantial or motivating factor in her termination, her conversations were not protected activity.

I agree with Miller that her conversations with Dixon were private conversations between coworkers and friends. Two coworkers venting or providing advice to each other about their bosses or their workload is a common occurrence in any profession and any workplace. However, these conversations are not protected as concerted activity for mutual aid or protection under section 20.8(3) unless the purpose of the conversation is to

initiate, induce, or prepare for group action. The mere fact that these conversations were private and conducted off campus and away from staff, administration, students, and parents does not provide them greater protection under chapter 20.

This agency's jurisdiction is limited in scope to evaluating whether the District committed a prohibited practice under chapter 20. Ultimately, Miller failed to demonstrate that her conversations took place for the purpose of initiating, inducing, or preparing for group action. Miller's conversations did not constitute concerted activity for mutual aid or protection. As Miller failed to establish a prima facie case under *Wright Line,* Miller failed to prove the District's commission of a prohibited practice.

ORDER

The prohibited practice complaint filed by LoiDana Miller is hereby DISMISSED. The costs of reporting and of the agency-requested transcript in the amount of $1,896.30 are assessed against the Complainant pursuant to PERB rule 621—3.12. A bill of costs will be issued to the Complainant in accordance with PERB subrule 621—3.12(3).

DATED at Des Moines, Iowa, this 20th day of January, 2017.

Amber DeSmet
Administrative Law Judge

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