

**The Wackenhut Corporation and International Union, Security, Police and Fire Professionals of America (SPFPA).** Case 1–CA–42113

September 29, 2006

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On January 23, 2006, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

The judge found that the Respondent neither discharged nor constructively discharged employee Timothy Charette in violation of Section 8(a)(1) of the Act. We agree.

I. FACTS

The pertinent facts, essentially undisputed by the parties, are as follows. On Wednesday, September 22, 2005, Robert Norton, the Respondent's operations manager at the Pilgrim Nuclear Power Station where Charette was employed, relieved Charette and employee Louis Ottino of their weapons and directed them to clean out their lockers. When Ottino asked Norton, "We're not coming back, Bob?" in Charette's presence, Norton looked down and shook his head.

Norton then escorted Charette and Ottino to an office area where Gary Verseput, a training manager for the Respondent who is based in Chicago but travels to various sites to investigate disciplinary issues, met with Charette and Ottino separately. During the meeting with Charette, Verseput stated that Charette had been accused of threatening and harassing other employees, which Charette denied. At the end of the interview, Verseput told Charette that he was "suspended, pending determination[,] and that a decision would be made by that Friday.

After the meeting, Norton escorted Charette to his personal vehicle and stated: "What these guys are doing to you, Tim, is wrong." Charette responded, "I know, Bob,

<sup>1</sup> In adopting the judge's finding that employee Timothy Charette was not discharged in violation of Sec. 8(a)(1), we do not rely on the judge's discussion of Charette's subjective beliefs about whether he had been discharged.

No exception has been filed to the judge's conclusion that the Respondent violated Sec. 8(a)(1) by suspending Charette.

but what can you do." Charette then shook hands with Norton and left. On his way home, Charette telephoned Norton's office. As Norton was not available, Charette told Cindy Kearney, the facility's office manager: "I want to verbal[ly] tender my resignation, and I will follow with a fax." Charette then drove to a commercial messaging center and faxed to Norton the following message: "Effectively immediately, I am resigning my position with the Wackenhut Corporation."

II. ANALYSIS

In determining whether an employee has been terminated, the Board considers whether the employer's words or actions "would logically lead a prudent person to believe that his [her] tenure has been terminated." *North American Dismantling Corp.*, 331 NLRB 1557, 1557 (2000), *enfd.* in relevant part and remanded 35 Fed. Appx. 132 (6th Cir. 2002) (quoting *Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964)). It is arguable that some of the Respondent's conduct, considered in isolation, would tend to support a finding of discharge. As discussed above, Norton directed Charette and employee Louis Ottino to clean out their lockers.<sup>2</sup> It is undisputed that this direction was consistent with the Respondent's practice of implementing employee terminations and inconsistent with its practice of implementing employee suspensions. In addition, when Ottino asked Norton, "We're not coming back, Bob?" in Charette's presence, Norton looked down and shook his head.

The General Counsel asserts that these actions were sufficient to give Charette the logical impression that he had been terminated. Even assuming that this is the case, however, subsequent statements by Verseput should have reasonably eliminated any such impression. Verseput clarified to Charette that he was being suspended, that a determination regarding Charette's status had not yet been made, and that such a determination would be made within 2 days.<sup>3</sup> Taking these subsequent, unambiguous

<sup>2</sup> Also as discussed above, Norton also relieved Charette and Ottino of their weapons. However, Charette testified that he picked up his weapon at the armory every day. Thus, Norton's conduct in this regard does not support a discharge finding.

<sup>3</sup> In finding a discharge, the dissent relies in part on Verseput's testimony that "he believed Charette would be fired." However, Verseput qualified that testimony by stating, "I don't get to make that decision." In addition, Verseput did not recommend termination, but rather that the Respondent leave Charette's fate in the hands of Entergy, the owner of the power plant where Charette worked. Moreover, the evidence suggests that Entergy would make up its own mind about Charette independently of what Verseput might recommend; Verseput testified that Entergy's security manager told him: "You do what you have to do within Wackenhut . . . and then after that Entergy will take whatever

statements into account—and given Charette’s undisputed hearing testimony that he was aware that employees often were suspended without being terminated—we find that the entire course of the Respondent’s words and actions would not reasonably lead a prudent person in Charette’s position to believe, when he later resigned, that his employment had been terminated.<sup>4</sup>

*MDI Commercial Services*, 325 NLRB 53 (1997), enfd. denied in relevant part 175 F.3d 621 (8th Cir. 1999), cited by the General Counsel and the dissent, is distinguishable from this case. In that case, the employer deprived an employee of tools necessary to perform his job, and the judge discredited the employer’s “feigned” contrary assurances that the employee’s job duties would not change. Specifically, the employer’s plant manager, Lorraine Bunn, told employee Edward Saric that she knew he and his wife were engaged in union organizing and that she would not “tolerate” this “union crap.” Id. at 53. Bunn then told Saric to turn over his keys, which Saric needed to perform his job duties. Id. Bunn claimed that she was concerned about the security and safety of the facility, but the judge rejected that claim as “patently specious.” Id. at 65. Bunn then purported to reassure Saric that his job duties would not change and that he would have access to the keys during working

hours; but the judge discredited these statements in light of Bunn’s “patently specious” asserted security concerns. Id. The Board adopted the judge’s discrediting of Bunn’s “feigned attempts to assure [Saric] that his job responsibilities would remain the same.” Id. at 53. Thus, in *MDI* the credited testimony supported a finding that a prudent person in Saric’s circumstances would have believed that he had been deprived of tools essential to perform his job.

Here, the Respondent did not direct Charette to take any actions that would have precluded him from continuing to perform his job duties. Although Norton disarmed Charette before suspending him, as discussed above, this would not have reasonably indicated to Charette that he was being permanently deprived of the tools necessary to perform his job because Charette disarmed every day. Further, unlike the employer in *MDI Commercial Services*, supra, there is no assertion or basis for finding that Verseput made “patently specious” comments to Charette that would have caused Charette to reasonably disbelieve Verseput’s statement that he was merely being suspended pending a final determination.<sup>5</sup>

Even assuming that the Respondent’s actions could have resulted in Charette’s reasonable belief that he would be terminated, this would not compel a finding that Charette was “discharged” when he resigned. In this connection, in a decision involving an illegal threat to close a facility, the Board held that “no matter how reasonable an employee’s feeling of insecurity may be as a result of an employer’s plant closure threat, it does not permit the employee to elevate, unilaterally, the significance of that unlawful activity” by “convert[ing]” the

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action it needs to take.” In any event, whatever Verseput might have believed, that belief was never shared with Charette.

<sup>4</sup> Disagreeing with our finding in this regard, the dissent points out that Norton said to Charette, *after* Charette’s meeting with Verseput, “What these guys are doing to you . . . [is] wrong.” Contrary to our colleague, we do not find that Norton’s statement to Charette provided a basis for Charette to reasonably conclude that he would be terminated.

First, Norton’s statement is ambiguous. The reference to “these guys” could reasonably be construed as referring to the employees who were accusing Charette of misconduct, rather than to Verseput. We disagree with the dissent’s statement that such an interpretation would be “highly implausible.” In fact, we find it more plausible to interpret “these guys” as referring to Charette’s accusers (plural) rather than to Verseput (singular). Indeed, Charette testified that he interpreted Norton’s statement to mean that Norton did not believe the accusations. Further, contrary to the dissent, we view the other employees’ actions in accusing Charette of misconduct as clearly “doing” something to Charette. Without their accusations, there would have been nothing for Verseput to investigate.

Second, given Charette’s interpretation of Norton’s statement to mean that Norton did not believe the accusations, and the fact that Norton is the second-in-command at the facility, Charette reasonably could have concluded that it was genuinely possible that he would be found innocent of the accusations and returned to work, or that discipline short of discharge would be imposed. We disagree with the dissent’s view that Norton’s statement was an admission of powerlessness to stop Charette’s “imminent discharge.” That view evidently depends on the dissent’s conclusion that Norton was referring to Verseput. As explained above, we disagree with that conclusion.

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<sup>5</sup> The other decisions cited by the dissent—*Dublin Town Ltd.*, 282 NLRB 307, 308 (1986), and *Rapid Armored Truck Corp.*, 281 NLRB 371, 383 (1986)—also are distinguishable from this case. In *Dublin Town Ltd.*, the direction to an employee to clean out his locker followed a respondent official’s statement that he wanted certain other employees “out of here” and the employee’s response that he would not return to work without those other employees. Further, the respondent’s direction to clean out the locker was accompanied by the respondent official’s handing out of the employees’ paychecks, offering to act as a job reference for the employee at issue, and informing the employee that his vacation pay would be mailed to him. In *Rapid Armored Truck Corp.*, one employee who was directed to clean out his locker was simultaneously told that he was no longer working for the respondent and was given the name of another employer where he could seek work. Another employee told to clean out his locker was simultaneously asked for the return of his identification card. Further, the respondent in *Rapid Armored Truck Corp.* made unlawful threats to close the operation and to discharge picketing employees, stating that they would never work for the respondent again. The instant case does not involve remotely similar accompanying statements or actions that would have left Charette with a reasonable belief that he had been discharged.

illegal threat “into an unlawful discharge.” *Groves Truck & Trailer*, 281 NLRB 1194, 1195–1196 (1986).<sup>6</sup> Similarly, in *Dilbert, Bancroft & Ross Co.*, 193 NLRB 553, 564 (1971), the Board declined to find a discharge where a suspended employee quit, notwithstanding that the suspension was discriminatory and that the employee may have believed that he would be discharged the following day. Consistent with this precedent, although the judge here found that Charette’s suspension was illegal (and, as noted, no exceptions were filed to that finding), that did not permit Charette to elevate the significance of that suspension by converting it into an unlawful discharge—regardless of whether he believed he would subsequently be discharged.

Our dissenting colleague mischaracterizes our decision as holding that an employee in Charette’s position “may not take reasonable steps to protect himself from further retaliation.” Not at all. Charette was free to, and did, take the step he deemed warranted to protect himself from a discharge. He quit first. We so find.

We also disagree with the dissent’s statement that our decision “creates a windfall for a culpable employer.” The Respondent has been shown to be culpable for illegally suspending Charette, and we are holding it respon-

sible for that action. There is no basis for finding that the Respondent made a decision to terminate Charette, or that such a decision was imminent. As such, we are simply declining to hold the Respondent culpable for a decision it never made and an action it never took.

For the foregoing reasons, we conclude, as did the judge, that the General Counsel failed to establish that the Respondent in fact terminated Charette. Accordingly, we adopt the judge’s conclusion that the Respondent did not discharge Charette in violation of Section 8(a)(1). Further, we agree with the judge, for the reasons he states, that the General Counsel also failed to establish that the Respondent constructively discharged Charette in violation of Section 8(a)(1).

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, the Wackenhut Corporation, Plymouth, Massachusetts, its officers, agents, successors, and assigns, shall take the actions set forth in the Order.

MEMBER LIEBMAN, dissenting in part.

The Respondent does not contest that it unlawfully suspended employee Timothy Charette. The majority holds, however, that when Charette promptly resigned—rather than wait to be fired—the Respondent bore no responsibility. But the Board’s case law makes clear that we must view the situation “‘through the [employee’s] eyes and not as the employer would have viewed them,’” and that we must hold the employer “‘responsible when its statements or conduct create an uncertain situation for the affected employee[.]’” *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 846 (2001), quoting *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982). As I will explain, here Charette reasonably believed that he had been, or was about to be, unlawfully fired.

#### I.

The facts are essentially undisputed. On the day in question, Charette and Louis Ottino, a fellow guard at the Respondent’s Plymouth site, were met at the end of their shift by Operations Manager Robert Norton. Norton, who was “second-in command” at the facility, relieved them of their weapons and escorted them to the locker room. When they arrived at the locker room, Norton ordered them to clean out their lockers and take all personal belongings with them. It is undisputed that no employee who was merely suspended had ever been directed to clean out his locker, and that only terminated employees were ordered to do that. Charette specifically testified that he was aware that no one, in his 18 years on the job, had been told to clean out his locker without being terminated.

<sup>6</sup> Although *Groves Truck & Trailer* involved the Board’s reversal of a judge’s finding of constructive discharge—rather than actual discharge—that decision is relevant here. The plain wording of the Board’s holding equally applies to actual and constructive discharges. Further, it is well established that an employee’s decision to quit in anticipation of a discharge is not a constructive discharge. See, e.g., *Price’s Pic-Pac Supermarkets*, 256 NLRB 742, 749 (1981), *enfd.* 707 F.2d 236 (6th Cir. 1983). There is no basis in law or logic for finding that an anticipatory quit can constitute an *actual* discharge when it does not even rise to the level of a *constructive* discharge.

Our dissenting colleague seeks to distinguish *Groves Truck & Trailer* on the grounds that the closure threat was not personally aimed at the employee who quit, and that the threatened closing was not “imminent.” We find these grounds of distinction unconvincing. As to the former, regardless of whether the threat was aimed at the individual employee, it certainly would have affected each employee personally. As to the latter, the employer in *Groves* threatened on March 11 to close “shop 2,” and it laid off most of its shop 2 employees *that same month*. Thus, the threatened action, or something very close to it, followed the threat imminently. More importantly, however, the *Groves* Board, in finding a quit instead of a discharge, did not rely on the threatened closure not being imminent. Rather, it relied on the fact that it had not yet happened: “Unless and until an employer *carries out* that threat, employees’ working conditions remain static.” 281 NLRB at 1195 (emphasis added). So also here: unless and until a discharge decision was unambiguously communicated to Charette, his employment status remained unchanged. In addition, *Groves* presented a circumstance that is not even present here: an explicit threat that, carried out, would mean loss of employment. Thus, this case presents an even weaker basis for finding discharge than did *Groves*. Similarly, *Rock-Tenn Co.*, 319 NLRB 1139 (1995), *enfd.* 101 F.3d 1441 (D.C. Cir. 1996), relied on by the dissent, involved an explicit threat of layoff.

After he had cleaned out his locker, Charette asked Norton, “We’re not coming back, Bob?” Norton looked down and shook his head “no.” Norton escorted Charette and Ottino to an office area where Training Manager Gary Verseput was waiting for them.<sup>1</sup> After Verseput interviewed Charette, he advised Charette that he was suspended “pending determination” and that there would be a determination in 2 days.

Norton then escorted Charette to his vehicle, where he told Charette, “What these guys are doing to you, Tim [is] wrong.”

On the drive home, Charette called Norton to submit his resignation, and faxed a resignation shortly afterwards. Charette testified that he believed that the decision to discharge him had been made even before he was brought before Verseput. He thus viewed Verseput’s statement about a “final determination” as a mere formality. Charette further testified that, based on his experience as a shop steward representing other discharged employees, he knew that a discharge would harm his future employment prospects. In an effort to avoid those consequences, Charette tendered his resignation.

## II.

The majority rightly acknowledges that “some of the Respondent’s conduct” (Norton’s order to Charette to clean out his locker, as well as Norton’s affirmative response to the question “We’re not coming back, Bob?”) “would tend to support a finding of discharge.” But the majority concludes that Verseput’s later statements (that Charette was being suspended and that a final determination regarding Charette’s status would be made within 2 days) “should have reasonably eliminated any . . . impression” that Charette was being fired. In reaching that conclusion, the majority fails to see things from the perspective of an employee in Charette’s situation.

To begin, it is established that Charette’s suspension was unlawful. The Respondent has not excepted to that finding. We must presume, then, that a reasonable employee would perceive that the Respondent was acting illegally in pursuing discipline. Under such circumstances, Charette was hardly required (1) to accept Verseput’s statements at face value, (2) to believe that his status would be fairly reviewed, and (3) to conclude that he might keep his job, despite the Respondent’s unlawful hostility toward him.

<sup>1</sup> Verseput, is responsible for traveling to Wackenhut sites across the country to investigate disciplinary issues. It was Verseput who had ordered that Charette and Ottino be directed to clean out their lockers. Verseput admitted at the hearing that he issued that order because he believed that the two employees would be fired.

A reasonable employee, moreover, would balance Verseput’s words against the clear, contrary message conveyed not only by the clean-out-your-locker order,<sup>2</sup> but also by Norton’s statements, including the admission—made *after* the meeting with Verseput—that “What these guys are doing to you . . . [is] wrong.”<sup>3</sup> Even if the Respondent’s message to Charette was merely mixed, the uncertainty created, from an employee’s perspective, was enough to establish a violation of Section 8(a) (1). See *Kolkka Tables*, supra, 335 NLRB at 846–847 (collecting cases). Despite the majority’s asserted focus on the “entire course of the Respondent’s words and actions,” its decision actually rests on Verseput’s words, considered in isolation. That his statements, on their face, may be “unambiguous” is hardly decisive here.

The Board has not hesitated to find a violation in similar circumstances. Contrary to the majority, the Board’s decision in *MDI Commercial Services*, 325 NLRB 53 (1997), is on point. In that case, the employer took away the employee’s keys and told him he could no longer be trusted. In response, the employee immediately resigned, and his resignation was accepted. The Board found that the employer’s actions led the employee to believe that his termination was imminent and therefore had effectively discharged the employee. *Id.* at 54. Here, Charette was disarmed and told to clean out his locker. The message to Charette was the same as the

<sup>2</sup> The Board has repeatedly found that, in similar circumstances, directing an employee to clean out his locker is consistent with discharge. *Dublin Town Ltd.*, 282 NLRB 307, 308 (1986); *Rapid Armored Truck Corp.*, 281 NLRB 371, 383 (1986).

<sup>3</sup> The majority argues that this statement did *not* “provide a basis for Charette to reasonably conclude he would be terminated.”

First, according to the majority, the statement “could reasonably be construed as referring to the employees who were accusing Charette of misconduct, rather than to Verseput.” That interpretation strikes me as highly implausible, given the context. Charette’s accusers were not “doing” anything “to” Charette; Verseput was. Even if the majority had suggested a plausible alternative interpretation, that would not suffice to make Charette’s interpretation unreasonable.

Second, the majority contends that a reasonable employee in Charette’s position could have concluded from Norton’s statement, which suggested that Norton did not believe the accusations, that “there was a possibility that he [Charette] would be found innocent of the charges and returned to work or that discipline short of discharge would be imposed.” This interpretation, too, is highly implausible. There was nothing hopeful in Norton’s message in terms of what lay ahead for Charette (except, perhaps, to a Pollyanna). Norton’s statement was a clear admission that he was powerless to do anything to stop the imminent discharge of Charette. Here, too, the majority’s alternative interpretation does not rule out a contrary one.

message to the discharged employee in *MDI Commercial Services*: you no longer work here.<sup>4</sup>

The majority insists that “[e]ven assuming that the Respondent’s actions could have resulted in Charette’s reasonable belief that he would be terminated, this would not compel a finding that Charette was ‘discharged’ when he resigned.” But the cases relied upon by the majority are easily distinguishable on their facts.<sup>5</sup> Here, as explained, the evidence establishes that Charette could reasonably have believed that he already had been fired or would be fired imminently—not merely that termination was a possibility at some indefinite time in the fu-

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<sup>4</sup> The majority’s attempt to distinguish the earlier case is unpersuasive. The majority insists that the Respondent “did not direct Charette to take any actions that would have precluded him from continuing to perform his job duties.” But he was told to clean out his locker (a clear indication, given past practice, that he was being permanently removed from the facility), and he was disarmed by a high-level manager (which was hardly part of his daily routine, despite the majority’s suggestion). The majority further argues that, in contrast to statements made by the plant manager in *MDI*, Verseput’s statements to Charette were plausible. As explained, however, Charette had good reason to disbelieve them. The Respondent was pursuing unlawful discipline, as one of its officials admitted.

<sup>5</sup> *Groves Truck & Trailer*, 281 NLRB 1194 (1986), involved an employee’s resignation in response to a threat of plant closing, which the Board described there as “only a threat of some future action which may or may not be carried out.” *Id.* at 1195. The threat was not aimed at the employee personally, nor was the closing imminent. Notably, the Board *will* find a violation where an employee resigns in the face of an imminent unlawful termination, even if he is not the individual target of the action. See *Rock-Tenn Co.*, 319 NLRB 1139, 1151–1152 (1995), *enfd.* 101 F.3d 1441 (D.C. Cir. 1996) (employee resigned because of pending mass layoff that violated Sec. 8(a)(5)).

In *Dibert, Bancroft & Ross Co., Ltd.*, 193 NLRB 553 (1971), an employee resigned after being unlawfully suspended for a day, ostensibly for his admitted poor attendance. The Board adopted the administrative law judge’s finding that the employee “quit because of the independent type of person he was; he believed that the suspension was unfair and discriminatory and rather than accept the suspension[,] he quit.” *Id.* at 564. The judge found that the employer “clearly had not discharged” the employee. *Id.* (Emphasis added.) The evidence here, in contrast, does not support a finding either that Charette’s reaction was that of an unreasonably hot-tempered employee or that the Respondent clearly had not discharged him, in effect, before he resigned.

Finally, the majority’s assertion that “it is well established that an employee’s decision to quit in anticipation of a discharge is not a constructive discharge,” is an overstatement. As the exemplary case cited by the majority makes clear, a mere *threat* to discharge an employee will not justify his resignation, particularly where the employer then takes steps to reassure the employee that he has not been, and will not be, discharged. See *Price’s Pic-Pac*, 256 NLRB 742, 749 (1981). A resignation immediately following unlawful discipline, and in reasonable anticipation of imminent discharge, presents a different situation. In such a case, the employer is the wrongdoer, and the burden of any uncertainty as to whether the discharge ultimately would have been effectuated thus is properly resolved against the employer. Put somewhat differently, the employee’s resignation should not create a windfall for a culpable employer.

ture. Indeed, manager Verseput himself testified that he believed Charette would be fired.

### III.

Under the majority’s decision, an employee in Charette’s position, already the victim of unlawful discipline, may not take reasonable steps to protect himself from the adverse consequences of further retaliation. Instead, he must wait for the other shoe to drop. Here, in the face of seemingly imminent discharge, Charette resigned, preventing a discharge from appearing on his employment record and jeopardizing his future employment prospects. Our law recognizes that a resignation in such circumstances should not cause an employee to forfeit his claim to a remedy from the wrongdoing employer.<sup>6</sup>

The employer in this case clearly caused the employee’s resignation, a reaction that it would reasonably have foreseen. It is appropriate, then, to hold the employer responsible for the resignation and liable for remedying the harm suffered by the employee as a result. The majority’s contrary finding serves no clear statutory policy, is contrary to our precedent, and fails to adequately protect the exercise of Section 7 rights. Accordingly, I dissent.

*Avrom J. Herbst, Esq.*, for the General Counsel.

*Marvin Goldstein, Esq.*, of Newark, New Jersey, for the Respondent.

*Desiree Sullivan*, of Plymouth, Massachusetts, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Boston, Massachusetts, on December 12–13, 2005.<sup>1</sup> On September 27, International Union, Security, Police and Fire Professionals of America (SPFPA) filed the charge in Case 1–CA–42113 alleging that The Wackenhut Corporation (the Respondent) had committed certain unfair labor practices under the Act. After administrative investigation of the charge, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent had suspended and discharged employee Timothy Charette in violation of Section 8(a)(1) of the Act. The Respondent duly filed an an-

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<sup>6</sup> See *Winer Motors, Inc.*, 265 NLRB 1457, 1469 (1982) (employee was constructively discharged where he was compelled to quit before he received so many unlawful warnings that his prospects for getting another job were jeopardized).

The majority suggests that Charette was, in fact, free to protect himself by quitting. The catch, however, is that upon doing so, he forfeited his right to seek redress from the Respondent for placing him in that position. Charette’s choice, then, was hardly free.

<sup>1</sup> Unless otherwise indicated, all dates mentioned are in 2005.

swer to the complaint admitting that this matter is properly before the Board but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial, and after oral arguments that counsel made at trial, I enter the following findings of fact and conclusions of law.

#### I. JURISDICTION

As it admits, at all material times the Respondent, a corporation, with offices and places of business in various States of the United States, including a facility that is located at Plymouth, Massachusetts, has been engaged in the business of providing guard and security services to clients including Entergy Nuclear Generation Company, which client operates a nuclear power plant near Plymouth. During 2004, the Respondent, in the course and conduct of said business operations, purchased and received at the Plymouth facility goods valued in excess of \$50,000 directly from suppliers that are located at points outside of Massachusetts. Therefore, at all material times the Respondent has been an employer that is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Facts

The Respondent recognizes the Charging Party as the collective-bargaining representative of guards whom it employs at the Pilgrim Nuclear Power Station (the PNPS) which is owned by Entergy. There was in effect between the Respondent and the Charging Party at all relevant times a contract that provides for grievance and binding arbitration procedures. Alleged discriminatee Charette was, until the events of this case, a long-service bargaining unit employee who had an essentially unblemished disciplinary record.

Edward Neary is the PNPS project manager; Robert Norton is its operations manager who reports to Neary. Gary Verseput, whose office is near Chicago, is a training manager for the Respondent; Verseput's responsibilities include traveling to various sites in the United States to investigate disciplinary issues.

For some time, Entergy has urged the Respondent to establish at the PNPS a system that would test the effectiveness of plant protection methods and procedures. The Respondent created a plan for a Special Operations Group (SOG) for this purpose. The SOG plan called for volunteers to engage in "war game" types of activities that would test security arrangements. Implementation of the SOG plan was (at least initially) opposed by the Union's executive board. (The Union claimed that establishment of the program should be negotiated and that those negotiations could not be held until other outstanding issues were first resolved.) Opposition to the implementation of the SOG program, however, was not universal within the bargaining unit, and there developed "pro-SOG" and "anti-SOG" factions among the employees.

On August 19, the Respondent posted a notice that employee applications for participation in the SOG program were being solicited. On August 22, the Union filed a grievance protesting the implementation of the SOG program as an unlawful unilateral action by the Respondent. (The lawfulness of the implementation of the SOG program is not in issue in this case.)

Three of the employees who opposed the SOG program were Timothy Charette, Louis Ottino, and James Merada. On September 22, the Respondent suspended Charette, Ottino, and Merada. On September 28, the Respondent discharged Ottino, and on September 29 the Respondent discharged Merada. Whether the Respondent discharged Charette about the same time is an issue in this case. Originally, the complaint alleged that the suspensions of Charette, Ottino, and Merada, the (admitted) discharges of Ottino and Merada, and the (disputed) discharge of Charette, violated Section 8(a)(1). Before trial, however, the General Counsel severed from the complaint the allegations that relate to the suspensions and discharges of Merada and Ottino (on the basis that those suspensions and discharges had become the subjects of an arbitration proceeding). Therefore, the remaining allegations before the Board relate only to Charette. The complaint alleges that, as well as being unlawfully suspended, Charette was unlawfully discharged or, in the alternative, constructively discharged. Although the Respondent admits suspending Charette, it denies that it discharged him or constructively discharged him.

Neither Ottino nor Merada testified. Charette testified that at the end of his shift on Wednesday, September 22, he and Ottino were met by Norton who relieved them of their weapons and escorted them to the locker room. Norton told Ottino and Charette to clean out their lockers and take all personal belongings with them. Norton then escorted Ottino and Charette to an office area where Verseput and Norton met with them separately. According to Charette, Verseput identified himself as an investigator for the Respondent. Verseput told Charette that he had been accused of threatening and harassing employees about their volunteering for the SOG program. Verseput then asked Charette if he had ever threatened or intimidated anyone in conversations about the program. Charette answered that he had not. Verseput then asked Charette to tell him about all of his conversations about the SOG program with other employees. Charette asked Verseput to be more specific, but Verseput replied that he could not do so. Charette then told Verseput about two conversations that he had had with other employees, but he denied to Verseput that he had made any threatening or intimidating remarks in either conversation. Verseput took a written statement from Charette in which Charette also denied any threatening or intimidating conduct. Charette further testified that at the end of the interview Verseput told him that "you are suspended, pending determination." Verseput further told Charette that there would be "a determination by Friday" about any further action against Charette. Norton then escorted Charette to his personal vehicle. On the way to the vehicle, further according to Charette, Norton stated that "[w]hat these guys are doing to you, Tim, is wrong."<sup>2</sup> Charette's testimony about these exchanges with Norton and Verseput is undenied, and I found it to be credible. (Verseput testified, but Norton did not.)

Further according to Charette, on his way home on September 22, he called Norton's office. Norton was not available, and

<sup>2</sup> The Tr. at 84, L. 9, is corrected to change "if wrong" to "is wrong."

Charette spoke to Cindy Kearney, the Respondent's office manager at the Plymouth facility. Charette told Kearney, "I want to verbally tender my resignation, and I will follow with a fax." (If Kearney replied, Charette did not so indicate in his testimony.) Charette then drove to a commercial messaging center and faxed to Norton the message that: "Effective immediately, I am resigning my position with The Wackenhut Corporation." When asked on direct examination why he had submitted a resignation, Charette responded:

Because in my mind I was terminated by the Company, I knew the ramifications of termination, I have represented many folks in the past, I had to think about my future, I had to think about supporting my family, and I knew that fighting a termination over a year long period or longer, and is trying to find gainful employment would be difficult. . . .

[I]n past terminations where it was clear that individuals would be terminated, I had negotiated deals where it was imminent these people were going to be terminated, the Company knew it, the project manager knew it, and on several occasions I negotiated a deal where they could voluntarily resign, prior to termination, and their record would be clear.

Charette explained that he was referring to a prior incident in which the Respondent's supervisors had caught another employee sleeping. Charette, on behalf of the Union, was involved in negotiating an agreement whereby the employee was permitted to resign rather than having a discharge in his employment record.

Charette then testified that he had felt, even before his interview with Verseput, that the determination that he was to be discharged had already been made because, in his prior experience, employees were not asked to clean out their lockers unless they were being discharged.

On cross-examination, Charette testified that at the end of his interview with Verseput, Verseput

[I]nformed me that I was—I would be suspended from this point, at the termination of the interview, and that he would—pending the outcome of the investigation, that he would—they would know by Friday.

Charette further acknowledged that he knew that suspensions of other employees had, in the past, occurred without the employees being discharged, and he acknowledged that his resignation came within 1-1/2 hours of his interview with Verseput.

Verseput testified that he came to the PNPS after the Respondent received an employee complaint of racial harassment by other employees. When he arrived, Project Manager Neary told him that, as well, there had been "some possible threats or intimidation or influence over a number of officers who had volunteered" for the SOG program. Verseput took written statements from several employees, only 2 of which name Charette. The statement of employee Christopher Maher relates that Charette had called him a "faggot" and a "cocksucker" because Maher had volunteered for the SOG program. A statement that Verseput secured from employee Thomas Fitzpatrick relates that, while Charette had not done or said anything to Fitzpatrick, Fitzpatrick had seen Charette standing in a threatening

posture when talking to another employee who had volunteered. Fitzpatrick's statement further relates that some unnamed employee had told him that another unnamed employee had told the first unnamed employee that "if this was a real union I [Fitzpatrick] would find myself in the trunk of a car." Verseput testified that, although Fitzpatrick did not so indicate in his written statement, he orally told Verseput that he believed that it was Charette who had made the "trunk" threat. Verseput testified that he believed the written statements of Maher and Fitzpatrick and the oral statement of Fitzpatrick. At trial, Charette denied any such conduct. Neither Maher nor Fitzpatrick testified.

Verseput testified that he had believed that Charette, Merada, and Ottino would be discharged and that he ordered that they be told to clean out their lockers, even before the suspensions, because it would be more expeditious than bringing them back through secured areas later for that purpose.

#### B. Analysis and Conclusions

Charette was suspended because the Respondent's agents believed that, while arguing against employee participation in the SOG program, he had engaged in offensive conduct. The SOG program had been made the subject of a union grievance, and Charette's advocacy activity was an individual action that was the "logical outgrowth of the concerns expressed by the group" in the form of that grievance. *Mike Yurosek & Son*, 306 NLRB 1037 (1992), citing *Salisbury Hotel*, 283 NLRB 685, 687 (1987), and *Every Woman's Place*, 282 NLRB 413 (1986), *enfd. mem.* 833 F.2d 1012 (6th Cir. 1987). Charette's advocacy, itself, was therefore protected concerted activity.

In the seminal case of *NLRB v. Burnup & Simms*, 379 U.S. 21, 22 (1964), the Supreme Court concisely stated:

In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

In this case the Respondent offered only hearsay (and double-hearsay) testimony that Charette had engaged in misconduct while advocating against employee participation in the SOG program. Moreover, Charette was credible in his testimony that he did not engage in the alleged misconduct. Therefore, under *Burnup & Sims*, the Respondent has failed to prove that, in the course of his protected activity of advocacy, Charette exceeded the protection of the Act. Therefore, the suspension of Charette because of alleged, but unproved, misconduct during his course of protected concerted activity violated Section 8(a)(1), as I find and conclude.

The complaint next alleges that the Respondent discharged Charette. Charette freely acknowledged that Verseput told him that he was "suspended" pending final determination of his status, that the determination would be made within 48 hours, and that some other suspensions had failed to result in discharges. Under these circumstances, I find that Charette could not have reasonably concluded that he had been discharged.

Even if it could be argued that, in this case, an employee such as Charette could reasonably have concluded that he had been discharged, I find that Charette did not reach that conclusion. If Charette had felt that he had been discharged, he would not have submitted a resignation. Nor did Charette ask for permission to resign in lieu of discharge, a procedure that he had previously negotiated for another employee. There is a line of cases that indicates that, if an employee is given reason to believe that he had been discharged, his not appearing for work cannot be held to be the logical equivalent of a resignation. Impression-of-discharge theories apply, however, only where an employee's absence is contended to constitute a quitting. Here, the Respondent does not rely on Charette's absences after September 22 as a quitting; it relies on Charette's express resignation. Accordingly, I find and conclude that the Respondent did not discharge Charette, and this allegation of the complaint must be dismissed. The General Counsel is therefore left only with the alternative theory of constructive discharge.

As explained in *Controlled Energy Systems, Inc.*, 331 NLRB 251 (2000), the Board has applied constructive-discharge theories only where employees quit their employment in two situations: (1) where employees are offered a "Hobson's choice" between sacrificing their jobs or their statutory rights,<sup>3</sup> and (2) where in response to an employee's union activities, an employer deliberately makes working conditions so unbearable that the employee is forced to quit.<sup>4</sup> The General Counsel does not contend that Charette's case falls within either of the recognized categories of constructive discharge. Instead, the General Counsel argues that Charette was constructively discharged because he felt that he was going to be discharged. This would be a new, third category which the Board has not recognized and which I have no authority to establish. Accordingly, I shall recommend that the constructive discharge allegation of the complaint also be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, The Wackenhut Corporation, Plymouth, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending employees or otherwise discriminating against its employees because of their protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

<sup>3</sup> See, e.g., *Goodless Electric Co.*, 321 NLRB 64, 67-68 (1996).

<sup>4</sup> See, e.g., *Grocers Supply Co.*, 294 NLRB 438 (1989).

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any references to the September 22, 2005, suspension that it issued to Timothy Charette and within 3 days thereafter notify Charette in writing that this has been done and that the suspension will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facilities in Plymouth, Massachusetts, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2005.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent had taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant To a Judgment of the United States Court Of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT suspend you, or otherwise discriminate against you, because you have engaged in activities that are protected by Federal law.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed to you by Federal law.

WE WILL, within 14 days of the Board's Order, remove from our files any references to the September 22, 2005 suspension that we issued to Timothy Charette, and WE WILL, within 3 days thereafter, notify Charette in writing that this has been done and that the suspension will not be used against him in any way.

THE WACKENHUT CORPORATION