

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**FRESENIUS USA MANUFACTURING, INC.,
Respondent,**

Case No. 2-CA-39518

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 445,
Charging Party.**

**COUNSEL FOR ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION**

**Dated at New York, New York
This 13th of October, 2010**

**Julie Y. Rivchin
Counsel for the Acting General Counsel
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278**

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I. STATEMENT OF THE CASE

On October 5, 2009, Teamsters Local 445 (the “Union”), filed a charge alleging that Fresenius USA Manufacturing, Inc. (“Respondent” or the “Employer”) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the “Act”). (GC Ex. 1a).¹ On December 16, 2009, the Union filed an amended charge alleging that Respondent violated Sections 8(a)(1), (3), and (5) of the Act. (GC Ex. 1c). On February 4, 2010, the Regional Director for Region 2 issued a Complaint alleging that Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Kevin “Dale” Grosso because he engaged in union and concerted protected activities and by other conduct. (GC Ex. 1e).

A hearing in this matter was held on May 4-6 and May 24-25, 2010, before Administrative Law Judge Margaret Guill Brakebusch. The ALJ’s decision issued on August 19, 2010 (hereinafter, the “ALJD”). In the ALJD, the ALJ found that Respondent violated Section 8(a)(1) of the Act when it instructed Grosso not to discuss a pending disciplinary investigation with his coworkers. However, the ALJ found that Respondent did not violate Section 8(a)(3) of the Act when it discharged Grosso, nor did Respondent violate Section 8(a)(1) of the Act when it interrogated Grosso and investigated his involvement in union activity.

II. ISSUES PRESENTED

1. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) of the Act when it investigated writing on Union newsletters?
2. Did the ALJ err in failing to find that Respondent violated Section 8(a)(1) of the Act when it interrogated employee Dale Grosso about the writing on Union newsletters?
3. Did the ALJ err in failing to find that Respondent violated Sections 8(a)(3) and 8(a)(1) of the Act when it discharged Grosso for dishonesty during an unlawful interrogation?

¹ All references herein to General Counsel’s Exhibits will be identified as “GC Ex. ___”; references to Respondent’s Exhibits as “Resp. Ex. ___”, references to the hearing transcript as “Tr., ___”, and references to the ALJ Decision as “ALJD ___”.

4. Did the ALJ err in failing to find that Respondent violated Sections 8(a)(3) and 8(a)(1) of the Act when it discharged Grosso for writing comments on Union newsletters concerning an upcoming decertification election?

III. STATEMENT OF THE FACTS

A. Background

This case arises in the context of a lengthy union organizing campaign in Respondent's Chester, New York distribution center (the "Chester facility"), which is engaged in the distribution of kidney dialysis equipment. On September 5, 2006, the Union filed a Certification Petition with the NLRB seeking to represent all drivers, warehousemen, and dispatchers at the Chester facility. (GC Ex. 17a). During the months leading up to the election, company representatives visited the facility on a near-weekly basis to speak to employees about the election, and during those fifteen or so meetings, communicated that they did not believe the employees needed a union. (Tr., 941:18-24, 943:2, 950:20-951:4). Nonetheless, the employees, who had been divided into two units composed of drivers (unit A) and warehouse employees (unit B), voted to certify the Union as the representative of both units in a November 3, 2006 election. (GC Ex. 17d).

The Employer filed objections to the election results, and on May 25, 2007, an Administrative Law Judge issued a Decision recommending that all of the Employer's objections be dismissed, and on May 30, 2008, the Board issued a decision concluding that the Judge had erred in overruling certain of the Employer's objections, and directed a second election. (GC Ex. 17d). *See also Fresenius USA Mfg., Inc.*, 352 NLRB 679 (2008). In the second election on June 30, 2008, the employees in both units again voted to certify the Union as their representative. (GC Exs. 17b and 17c). On July 8, 2008 – more than twenty-two months after the Petition was filed – the Union was certified as the representative of the employees in both units. (GC Exs. 17e and 17f).

Following certification, the Union and Employer began negotiating a collective bargaining agreement, and at the time of the hearing – twenty-two months after certification – they had not yet reached agreement. (Tr., 255:19-24). Meanwhile, on July 9, 2009 (one day after the certification year expired), employee Janet Buxbaum filed a petition to decertify the Union as representative of the warehouse employees. (GC Ex. 18a). On August 19, 2009, a decertification election was directed and scheduled to take place on September 23, 2009.² (GC Ex. 18b, 18c).

B. Grosso's Protected Activity

In the midst of these events – more than a year after the Union was certified, still without a contract and now with a decertification vote pending – Union supporter and negotiating-committee member Dale Grosso engaged in protected activity trying to rally the warehouse workers to continue supporting the cause the employees had been working toward for those past three years.

On September 10, 2009,³ Grosso and coworker Mark Huertas were in the employee break room prior to starting their runs.⁴ (Tr., 259:24-260:9). They noticed Union newsletters on the break room table and commented to each other their belief that the warehouse employees would not read the newsletters.⁵ (Tr., 260:19-20). Grosso believed that the warehouse employees were “backing down” from supporting the Union and “starting to feel frightened.”⁶

² The warehouse employees voted to decertify and a certificate of results issued on October 9, 2009. (GC Ex. 18d).

³ All dates hereinafter refer to 2009.

⁴ The employee break room is used for “the breaks of employees” and can also be used “for training sessions, meetings, [and] drivers at the end of the day typically . . . use the break room to do their paperwork.” (Tr., 1219:14-18. *See also* Tr., 1049:4-6 (breakroom used for breaks and lunches)).

⁵ Indeed, the female employees testified that they do not generally read the Union newsletters that are periodically left in the break room. (Tr., 700:5-12 (Moscatelli); 895:16-19 (Buxbaum)).

⁶ Grosso's concerns proved to be well-founded: the warehouse employees voted to decertify the Union. (GC Exs. 18c, 18d).

(Tr., 258: 23-259:2). Grosso then wrote on the newspapers in an effort to get the warehouse employees' attention. (Tr., 261:4; 339:7-13).

Grosso testified that, in writing the comments to the warehouse workers, "the main thing is I wanted them to read the paper" because there was "an important thing in there for them to read." (Tr., 262:16-18). In particular, Grosso explained that he wanted them to read an article entitled, "Supporting Free Choice for Non-Union Employees," which described a meeting attended by Fresenius employees, union staff, and local politicians. (Tr., 265:21-265:11; GC Ex. 13). The article described the ongoing campaign at the Chester facility, stating that employee Kevin Farrell told the meeting attendees of the employees' "three year struggle to win a decent contract" in the face of the company having "spent hundreds of thousands of dollars to keep 38 low paid workers from getting ahead." (GC Ex. 13). The article went on to describe Teamster official Adrian Huff's presentation:

The Teamsters distributed a copy of an article in an employment journal written by the company's labor lawyer that outlined his successful effort to force a second election. "What he didn't write was that we won that second election, at great expense of the company," said Huff. He told the crowd "Soon we may need your help" in mounting a nationwide boycott of Fresenius if a contract cannot be negotiated.

Huff distributed a news article from the company's corporate headquarters in Germany reporting \$214 million in profit in the fourth quarter of 2008, on sales of \$2.7 billion. "Meanwhile, Fresenius employees are paid much less than the area average, have too much deducted from their paychecks for medical, are allowed little time off, and have no pension or workplace rights or protections," said Huff. "Their attorney won't even guarantee an eight hour day or due process before they are fired. He has actually proposed that the starting drivers' rates should be lower than they are now." The Union is presently beginning a "stockholder divestiture campaign" at Fresenius, contacting individual stockholders and asking them to dump their Fresenius stock in support of the struggle for justice.

(GC Ex. 13). Grosso testified in the hearing that he wanted the warehouse employees to see the article because it described the support of local politicians for the Fresenius workers' campaign, and he wanted his coworkers to see that "there is hope out there if they just keep the faith" and

“stay strong”. (Tr., 264:21-265:4. *See also* GC Ex. 13 (“Congressman Hall . . . referr[ed] to Fresenius and Acme as ‘reasons why we need the Employee Free Choice Act,’ . . . [and] Congressman Hinchey . . . praised the Fresenius and Acme participants”)).

On the top of the first page of one newsletter, Grosso wrote the words, “Dear Pussies, Please Read.” (Tr., 261:15; GC Ex. 12A). Grosso testified that he used the word “pussies”, which he understood to be “a way of getting someone to man up a little bit”, because he thought the warehouse workers were “spineless” and “backing down,” and intended his comments as “a way of showing them that they could be stronger with the Union”. (Tr., 261:18-20; 262:22-263:4). Grosso testified that while he understood that the word could have a “double meaning”, he meant the word as a synonym of “wimp” and did not intend any other meaning.⁷ (Tr., 407:6; 429:13-25).

On the second newsletter, Grosso wrote, “Hey Cat Food Lovers, How’s your income doing?” (Tr. 266:2-8; GC Ex. 6B). He explained that the reference to “cat food lovers” was “a play on words” referring back to the word “pussies” on the first newsletter. (Tr., 266:9-12). The phrase “how’s your income doing?” was a way of telling the warehouse employees “that their income doesn’t have to be the way it is” because if they elected not to decertify and instead “[brought] the Union in, . . . [t]hey’d be able to organize and get something better for themselves” since they “work hard” and “don’t get as much as they should.” (Tr., 266:23-24, 267:4-8).

On the third newsletter, Grosso wrote, “Warehouse Workers, R.I.P.” (Tr., 267:9-14; GC Ex. 6C). Grosso explained that he wrote these words, referring non-literally to the end of the warehouse employees bargaining unit, in an effort to point out to the warehouse employees “in a

⁷ Indeed, this was the only sense in which, according to testimony of other witnesses, Chester facility drivers used the term in their common use of the word “pussy”. (Tr., 1403:2-6, 1404:18-19, 1411:24-1412:2).

funny way that this is what's going to happen. You're going to settle." (Tr., 268:1-2). Concerned about the decertification election, he chose the words as a way of saying, "see ya. I'm sorry, I hope it doesn't go the way I think it's going to go." (Tr., 269:23-270:2).

Grosso admitted that he chose words "a little bit more flower[y] than [he] should have," but explained that he impulsively wrote the words in "seconds" after spending only "half a second" thinking about the words he chose prior to writing them. (Tr. 262:6-7; 272:6-10). Moreover, the record is clear that Grosso's schedule had very little overlap with warehouse employees and allowed him little opportunity for longer, more thoughtful communications with warehouse employees. (Tr., 271:4-14, 271:4-14, 271:24-272:2. *See also* Tr., 643:22-644:10; 787:12-24). Grosso testified that on those rare occasions when his schedule allowed him time to talk to warehouse employees about the Union, he was aware that he was "on company time" and thus any conversations were "just in passing." (Tr., 272:2-5).

The ALJ credited Grosso's testimony about his activities, concluding:

After hearing Grosso's testimony and observing his demeanor in the hearing, I do not believe that he took the action that he did with the intention of offending or frightening the employees in the warehouse unit. Based upon the overall testimony, it is apparent that he wrote the comments with the intent of discouraging employees from abandoning their support for the Union. As his testimony reflects, he hastily wrote the comments without any thought as to effect of his words. I believe he genuinely meant to ill-will to any other employees.

(ALJD p. 20, ln 34-40). The ALJ's findings of fact adequately set forth the further sequence of events (except as set forth herein), including Respondent's subsequent investigation of the newsletters comments (ALJD p. 7, ln 44 - p. 8, ln 15), Respondent's interrogation of Grosso concerning his involvement in writing the comments (ALJD p. 8, ln 19 - p. 9, ln 7), and finally, Respondent's suspension and discharge of Grosso for having written the comments (ALJD p. 10, ln 29-41).

As memorialized in the September 25 termination letter, Respondent terminated Grosso for writing the comments on Union newsletters and for lying about having done so when company representatives questioned him.⁸ (Tr., 77:21-78:25; GC Ex. 5). The decision was made solely by manager Jason Tyler, purportedly based on particular documents and limited statements provided to him by other supervisors.⁹ (ALJD p. 10, ln 29-41). Tyler clearly testified, consistent with Respondent's termination letter sent to Grosso, that the harassment and EEO policies were the only two policy violations on which the company relied in terminating Grosso.¹⁰ (GC Ex. 5; Tr., 77:21-78:25).

IV. ARGUMENT

A. The ALJ Erred in Not Finding that Grosso's Activity was Protected Union Activity (Exception 3)

The ALJ correctly found that Grosso's activity was protected concerted activity. (ALJD p.13, ln 16-18). Nonetheless, her decision was too narrow: it is clear that Grosso's activity was also protected union activity, based on the undisputed record evidence and the ALJ's own finding of fact that the comments "were written on union newsletters addressing the warehouse employees who would be voting in a decertification election within two weeks and including an issue involving their pay." (ALJD p. 13, ln 14-16).

The fundamental nature of the protected activity in this case cannot be understated. As the ALJ found, "it is apparent that [Grosso] wrote the comments with the intent of discouraging employees from abandoning their support for the Union." (ALJD p. 20, ln 37-38). In other

⁸ The ALJ appears not to have made any explicit findings about Respondent's purported reasons for discharging Grosso. She notes that "Respondent asserts that Grosso was terminated because his writing the comments violated the company EEO and harassment policies and because he lied to management during an investigation." (ALJD p. 11, ln 12-14). Except as noted herein, General Counsel does not dispute that these were Respondent's purported reasons for discharging Grosso.

⁹ For this reason, out of court statements made to other supervisors and not relied upon by Tyler were irrelevant and inadmissible hearsay. (Exception 2).

¹⁰ The ALJ's reliance on Respondent's sexual harassment policy was therefore in error. (Exception 55).

words, Grosso wrote comments in support of the Union in a pure exercise of his Section 7 “right to . . . self-organization [and to] assist labor organizations.” 29 U.S.C. § 157. Courts have “long accepted” that this Section 7 right of employees “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. N.L.R.B.*, 437 U.S. 483, 491-492 (1978).

Moreover, the record is clear that Respondent was aware from the outset that the newsletter comments were related to the Union and the decertification election. (*See, e.g.*, Tr., 114:25-115:3 (Tyler was aware comments were written on a Union newsletter); 1325:23-5, 1326:20-1327:4 (Healy sought advice of counsel precisely because he understood comments raised issues concerning “the upcoming election”)). In addition, the employee witnesses who complained about the comments understood that the comments related to the election. (Tr., 752:10-20, 859:12-25, 823:5-9, 903:13-904:1). Based on the record evidence and the ALJ’s own findings of fact, there is no dispute that Grosso’s conduct was protected union activity under the Act and that Respondent was well-aware of that fact.

B. The ALJ Erred in Failing to Find that Respondent Violated Section 8(a)(1) of the Act Through its Unlawful Investigation (Exception 10)

The ALJ’s finding that Respondent’s investigation into whether Grosso had authored the comments on the newsletters did not violate Section 8(a)(1) is reversible error of both law and fact. (ALJD p. 25, ln 33-35). Although the ALJ erroneously found that Respondent had a “duty to investigate a harassment complaint”, the record is clear that the sole purpose for Respondent’s investigation was whether Grosso wrote the comments; Respondent already had the newsletters in its possession and thus knew the full extent of the conduct at issue without need for further investigation. (ALJD p. 25, ln 16).

Such scrutiny of employees engaged in protected activity threatens to interfere with their rights to engage in that activity, and accordingly, constitutes an independent violation of Section 8(a)(1). As stated above, the record supports a finding that it was immediately apparent to Respondent that the comments reflected protected conduct, and as set forth in Section IV.D.2.a. below, the comments retained protection under the Act. Thus, the company's effort to identify which of its employees was engaged in protected activity constitutes impermissible investigation of employees engaged in protected activity. The Supreme Court has held that an employer violated the Act where it employed detectives in order to "*investigate* the activities of their employees in behalf of the [union]." *Consolidated Edison v. N.L.R.B.*, 305 U.S. 197, 231 n.8 (1941) (emphasis added). Such a conclusion only makes sense within the overall scheme of the law: it is unlawful for employers to surveil employees while they are engaged in protected activity, regardless of whether employees are aware of such surveillance, *see, e.g., Id.* ; unlawful to question employees about the protected activities of themselves and others after the fact, *see* Section IV.C., *infra*; and unlawful to encourage employees to inform the employer about the protected activities of their coworkers, *see Tawas Indus., Inc.*, 336 NLRB 318, 322-23 (2001) (Tr., 674:21-675:10). In short, the exercise of Section 7 rights is not available for inspection by the Employer, and thus, Respondent's investigation into the protected activity here was unlawful. The ALJ's failure to find that the investigation violated Section 8(a)(1) of the Act constitutes reversible error.

C. The ALJ Erred in Failing to Find that Respondent Violated Section 8(a)(1) of the Act Through its Unlawful Interrogation of Mr. Grosso (Exceptions 4-9)

In finding that Respondent's interrogation of Grosso about whether he wrote the newsletter comments did not violate Section 8(a)(1) of the Act, the ALJ's assertion that during the interrogation, "[t]here was no discussion of the upcoming election or anything in any way

related to the Union” defies credulity. (ALJD p. 23, ln 3-4). Such an assertion simply cannot square with the ALJ’s own findings that “there is no dispute that King, Healy, and Maloney . . . questioned Grosso about his involvement in writing the comments on the newsletters,” comments which the ALJ herself found “were written on union newsletters addressing the warehouse employees who would be voting in a decertification election within two weeks.” (ALJD p. 23, ln 5-6; p. 13, ln 16-18). In other words, a conversation about the newsletter comments is by definition a conversation about the union and upcoming election.

Beyond this fundamental error, the ALJ erred in various other respects in her analysis of the legality of Respondent’s interrogation of Grosso. An employer’s interrogation of an employee violates Section 8(a)(1) of the Act when, Board determines “whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Scheid Electric*, 355 NLRB No. 27 (2010). In undertaking this analysis, the Board considers what are known as the “the *Bourne* factors”:

- (1) The background, *i.e.*, is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, *e.g.*, did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, *i.e.*, how high was he in the company hierarchy?
- (4) Place and method of interrogation, *e.g.*, was employee called from work to the boss’s office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.

Westwood Health Care Center, 330 NLRB 935, 939 (2000) (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). *See also Scheid Electric*, 355 NLRB No. 27 (2010) (citing *Bourne* factors). The Board has explained that “these and other relevant factors are not to be mechanically applied in each case.” *Westwood*, 330 NLRB at 939.

First, the background of the questioning shows that it took place two days before the decertification election and after a three-year union battle, on a day when King was present at the

facility to conduct a captive audience meeting with employees about the election. (ALJD p. 7, ln 10-16).

Second, King's questioning clearly appeared to be seeking information on which to base disciplinary action against Grosso. King informed Grosso that several employees had complained to management about the comments and then asked Grosso if he had written them, all without offering any "assurance against reprisal". *Hertz Corp.*, 316 NLRB 672, 684 (1995); (ALJD p. 8, ln 44-46, 50; Tr. 1339:20-22; 275:19-24). At that point, there can be no doubt that the meeting concerned not only protected activity, but could also lead to possible disciplinary action. Moreover, unlike in cases where verbal or physical contact occurred outside of the employer's vision or hearing and required further investigation by the employer simply to learn the facts of the conduct, in this case Respondent already possessed the newsletters with the handwritten comments and thus had no purpose for interrogation other than seeking information on which to base disciplinary action against Grosso. *Cf. Firestone South Carolina*, 350 NLRB 526 (2008); *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005). Indeed, Respondent offered no other explanation for the purpose of this interview, and once Grosso had admitted to writing the comments, Respondent, in fact, disciplined him. (ALJD p. 9, ln 41-42; p. 10, ln 42).

The third *Bourne* factor considers the questioner's place in the company hierarchy. Here, the questioner was Kevin King, a company executive visiting the Chester facility from company headquarters, who was at least two steps above Grosso's direct supervisor in the company hierarchy. (ALJD p. 3, ln 1-4). The ALJ does not appear to have explicitly considered the third factor, but she did find that King as well as the other questioners were "upper level managers." (ALJD p. 24, ln 4).

Fourth, and as the ALJ correctly found, the interrogation took place in the company conference room, after Grosso was called into “a command meeting for Grosso and attended by only Grosso and upper level managers.” (ALJD p. 24, ln 4). Finally, as the ALJ also correctly found, the fact that Grosso did not respond truthfully only makes more apparent the coerciveness of the interrogation because Grosso “realized the severity” of the tone the meeting had taken and was concerned that honesty would result in disciplinary action. (ALJD p. 24, ln 9-13; Tr., 276:5-10).

Thus, Grosso could “reasonably perceive that the Respondent had only one objective in questioning [him] – to identify who had engaged in the [protected activity].” *United Svcs. Auto. Ass’n*, 340 NLRB 784, 786 (2003). Given the totality of the circumstances, such direct and formal questioning about an employee’s protected activity – prefaced by the fact that other employees had complained about the conduct – “would reasonably tend to interfere with or deter the exercise of employees’ Section 7 rights.” *Hertz Corp.*, 316 NLRB at 684. Therefore, Respondent’s September 21 questioning of Grosso constituted an unlawful interrogation in violation of the Act, and the ALJ’s conclusion that the interrogation was not unlawful constitutes reversible error.

D. The ALJ Erred in Failing to Find that Respondent Violated the Act By Discharging Grosso

As a factual matter, it is undisputed that Respondent discharged Grosso for dishonesty during an investigation and for writing the three comments on the Union newsletters. (GC Ex. 5; Tr., 77:21-78:250). Thus, this case essentially presents only the legal question of whether discharge on these grounds is unlawful, and for the reasons set forth below, the clear answer to that question is that such discharge indeed violates the Act, and the ALJ’s conclusion that the discharge was lawful constitutes reversible error.

1. The ALJ Erred in Failing to Find that Respondent Violated the Act for Lying During an Unlawful Interrogation (Exceptions 53, 54)

One of the grounds on which Respondent relies for its discharge of Grosso was that he lied during an investigation. In particular, during the September 21 interrogation, Grosso stated that he did not write the comments on the newsletters. As discussed above (See Section IV.C.), this interrogation was unlawful and Grosso was within his rights not to respond truthfully.

Board law is clear that an employer may not lawfully terminate an employer for lying during an unlawful interrogation. When an interrogation is unlawful, an employee is “under no obligation to respond to the questions in any particular manner” and thus the employee’s “dishonesty about her protected concerted activity [does] not constitute a lawful reason to discharge her.” *United Svcs. Auto. Ass’n*, 340 NLRB at 786. *See also Onyx Environmental Services, L.L.C.*, 336 NLRB 902, 907 (2001) (discipline for dishonesty unlawful where employee’s “untruth did not relate to the performance of his job or the Respondent’s business, but to a protected right guaranteed by the Act, which he was not obligated to disclose”); *Spartan Plastics*, 269 NLRB 546, 552 (1984) (discharge for dishonesty during unlawful interrogation is, itself, unlawful). Therefore, Respondent’s assertion that Grosso was terminated, in part, for dishonesty during the company’s unlawful interrogation is no defense and discharge on those grounds violates the Act, and the ALJ’s failure to so find is reversible error.

2. Respondent Violated the Act by Terminating Grosso for the Comments on the Newsletters

a) Grosso Did Not Lose Protection of the Act Under *Atlantic Steel* and the Fundamental Principles of the Act on which it is Based (Exceptions 11-44)

As set forth above in Section IV.A., it is undisputed that Grosso was engaged in protected union and concerted activity when he wrote the comments on the newsletters. The law is well-settled that when “an employee is discharged for conduct that is part of the *res gestae* of

protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act.” *Stanford Hotel*, 344 NLRB 558, 558 (2005). The Board has established that the proper analysis in such cases is based on *Atlantic Steel* and its progeny. *Atlantic Steel Co.*, 245 NLRB 814 (1979). Under that test, whether an employee otherwise engaged in protected conduct loses the protection of the Act is determined by considering four factors: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.” *Felix Industries, Inc.*, 339 NLRB 195 (2003) (hereinafter “*Felix II*”) (citing *Atlantic Steel*).

While the *Atlantic Steel* analysis is the controlling Board law in cases where an employer does not dispute that it discharged the employee for protected conduct, the facts here do not fit comfortably into the four-factor *Atlantic Steel* test. The *Atlantic Steel* analysis developed to deal with cases in which employees are discharged for (1) a verbal outburst (2) directed toward a supervisor (3) during the protected activity of discussing a grievance or other protected discussions with an employer. In contrast, in this case Grosso was discharged for (1) written comments (2) directed toward his coworkers (3) during the protected activity of urging his coworkers to support the Union.¹¹

Therefore, it is helpful to consider the larger concerns and principles underlying each factor of the fact-bound *Atlantic Steel* inquiry. A close review of the *Atlantic Steel* factors, as

¹¹ Cases dealing with similar facts to the instant case have either tried to fit their facts into the *Atlantic Steel* analysis, applied another analytic framework such as *Burnup & Sims*, or have been unclear about precisely which analytic framework they are applying. *Beverly Health and Rehabilitation Servs.*, 346 NLRB 1319, 1323 (2006) (applying *Atlantic Steel* analysis where employee told coworker to “mind [her] f—king business” in the course of discussing a grievance); *AT&T Broadband*, 335 NLRB 63 (2001) (affirming ALJ decision applying *Burnup & Sims* to find discharge unlawful where union supporter called coworker a “marked man”); *Twilight Haven, Inc.*, 235 NLRB 1337 (1978) (where employee appealed to another employee not to vote against the union in action later construed as “harassment”, Board affirmed ALJ finding that discharge was unlawful based on *Burnup & Sims*, because discharge was pretextual “vehicle . . . for disposing of a union proponent”, and because a listener’s subjective reaction cannot deprive employee of the Act’s protection).

applied in the typical *Atlantic Steel* case, illustrates that these four factors are most fundamentally a tool for balancing the degree to which the employee's exercise of his Section 7 rights interferes with the employer's managerial concerns in maintaining discipline, control, and authority in its workplace. As will be set forth in more detail below, the first and third factors, location and nature of the outburst, consider the strength of the employer's managerial interest in maintaining order in the workplace and maintaining supervisory authority in the eyes of employees. The second factor, subject matter, considers the strength of the protected Section 7 rights at stake for the employee, while the fourth factor, provocation by the employer, prevents the employer from benefiting from its own unlawful conduct based on an employee's reaction to that conduct. Viewed in this manner, it is clear that both Board law and the fundamental principles of the Act require the conclusion that Respondent violated the Act in suspending and discharging Grosso.

(1) Factor One: Location of the Conduct (Exceptions 11-16)

Under the *Atlantic Steel* test, the Board first examines the location of the conduct in order to consider the "disruptive effect" of the conduct based on the employer's interest in "maintaining order in the workplace". *Trus Joist MacMillion*, 341 NLRB 369, 370 (2004) (this factor analyzes whether the location "exacerbate[s] the insubordinate nature of [the employee's] offensive outbursts" and "thus accentuate[s] and exacerbate[s] the disruptive effect of [the] outburst."). *See also Alcoa, Inc.*, 352 NLRB 1222, 1226 (2008) (2-member Bd.) (conduct did not take place in work area and thus "was not disruptive of the work process"). This factor may also take into consideration whether an outburst against a supervisor takes place in front of other employees thus "affect[ing] workplace discipline by undermining the authority of the supervisor." *DaimlerChrysler Corp.*, 344 NLRB at 1329.

Where the conduct at issue occurs in a non-work area, this factor weighs in favor of protection because it does not disrupt order in the workplace or impact workplace discipline. *See Datwyler Rubber and Plastics, Inc.*, 350 NLRB 669, 670 (2007) (conduct took place “in the employees’ breakroom, a location that would not disrupt the Respondent’s work process”); *Felix Industries, Inc.*, 331 NLRB 144 (2000) (hereinafter “*Felix I*”), *enforcement denied on other grounds*, 251 F.3d 1051 (comments made over the phone were not observed by other employees and not made at work, and thus “did not have any direct impact on workplace discipline”). This is particularly true where conduct occurs in an employee breakroom, typically the one space in an employer’s facility that is designated for employees to use while not engaged in work activities. *See, e.g., Beverly Health & Rehab. Services, Inc.*, 346 NLRB 1319 (“we would not find that the location and the nature of the breakroom exchange between two employees . . . should cause this conduct to lose the Act’s protection [An alternative] approach would effectively ban any employee discussion about grievances that might lead to increased tension in the work environment regardless of where that discussion took place, and is in conflict with the general standards for regulating union solicitations”).

Here, Grosso’s comments in no way interfered with management’s rights. The comments were made in a non-work area, did not undermine a supervisor’s authority, and accordingly did not have any disruptive effect on the workplace. Importantly, the conduct took place in the employee breakroom, a designated space for employees and not a work area. (ALJD p. 4, ln 8-10; p. 14, ln. 12-15; Tr. 1219:14-18, 1094:4-6). The comments were written on newsletters that employees could choose to look at or not, and in fact, the newsletters were removed early that morning before most employees saw them. (Tr., 892:10-11, 894:16-22, 900:7-901:6). It is undisputed that his comments were not insubordinate or directed toward a supervisor, and thus

regardless of the location they would not tend to affect workplace discipline or undermine supervisors' authority. Therefore, the location of Grosso's conduct weighs in favor of protection.

Not only was the ALJ's conclusion that this factor weighed against protection a clear error, but her conclusion was based on reasoning that was unsupported by case law, record evidence, and the most fundamental principles of the Act. First, the ALJ essentially found that written comments are less deserving of protection than spoken ones, based on the logic that employees here were unable to "ascertain [the] origin" of the comments, "evaluate the pervasiveness of the sentiment", or "ascertain the likelihood of future comments."¹² (ALJD p. 14, ln 16-22). Such concerns have no place in the *Atlantic Steel* analysis and undermine the protection that should be afforded to written comments. *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974) ("freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB") (emphasis added). The record evidence here clearly established that Grosso's schedule had little overlap with the warehouse employees, and essentially left no opportunity for Grosso to exercise his protected right to encourage his coworkers to support the Union. (Tr., 271:4-14, 271:4-14, 271:24-272:5, 643:22-644:10, 787:12-24). Thus, Grosso's only means of communicating with his coworkers about the decertification election was through written comments, and there is no basis for weighing this fact against protection.

Second, the ALJ explicitly reasoned that the fact that the conduct took place in the employee breakroom – an undisputedly nonwork area – weighs against protection because the written comments were "easily visible" to employees and thus "caused a greater impact" and had

¹² This conclusion may have relied on her improper assumption that Grosso's comments constituted a "threat[]" (ALJD p. 14, ln 22), an assumption that has no place in the *Atlantic Steel* factor one analysis, and which was patently incorrect, as described below.

a more “disruptive effect”. (ALJD p. 14, ln 12-16, 25-26). This conclusion is unrooted in caselaw or logic, and severely undermines the protections of the Act. The ALJ correctly found that Grosso’s conduct was initially protected, but then appears to improperly assume that it was unprotected (the comments were “threats” (ALJD p. 14, ln 22)) in her determination of whether he retained protection. However, assuming that the comments were protected, at least as an initial matter (and as the ALJ found), other employees have the right to hear those comments. The ALJ improperly weighed against Grosso the fact that he effectively communicated his protected comments to other employees. *See, e.g., Beth Israel Hosp.*, 437 U.S. at 491-492 (Section 7 “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite”) (emphasis added). A conclusion that conduct occurring in an employee breakroom weighs against protection essentially leaves employees with no place where they can be permitted to effectively communicate with each other in exercise of their Section 7 rights. Thus, the ALJ’s conclusion that the breakroom location of the comments weighs against protection because it was an effective place to communicate defies any proper application of the Act.

Therefore, the ALJ’s conclusion that the first factor of the *Atlantic Steel* test weighed against protection is reversible error.

(2) *Factor Two: Subject Matter (Exception 17)*

The second *Atlantic Steel* factor, the subject matter of the discussion, essentially revisits the initial inquiry into whether the conduct was protected in the first place, and thus, by definition almost always weighs in favor of finding protection. Nonetheless, where employees are engaged in activities which go to the heart of protected activity, this factor weighs most heavily in favor of protection. Here, the ALJ found that, that “Grosso’s purpose in writing the comments can be seen in the comments themselves. The comments were written on union

newsletters addressing the warehouse employees who would be voting in a decertification election within 2 weeks and including an issue involving their pay.” (ALJD p. 15, ln 1; p. 13, ln 13-16). The ALJ correctly found¹³ that this factor weighed in favor of protection.

The Supreme Court has long observed that “[b]asic to the right guaranteed to employees in § 7 to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection” and, therefore, the “[v]igorous exercise of this right ‘to persuade other employees to join’ must not be stifled... .” *Letter Carriers*, 418 U.S. at 277. See also *Verizon Wireless*, 349 NLRB at 642 (this factor weighs in favor of protection where an employee was “exercising his Section 7 right to engage in self-organization” by “encouraging [coworkers] to support the Union”). Therefore, Grosso’s communication here involved the exercise of a core Section 7 right and this factor weighs heavily in favor of protection.

(3) Factor Three: Nature of the Employee’s Outburst (Exceptions 18-28, 32-37)

Next, the third *Atlantic Steel* factor examines the “nature of the employee’s outburst.” *Felix II*, 339 NLRB at 196. The Board has observed that “it is well established that the Act allows employees some leeway in the use of intemperate language where such language is part of the ‘res gestae’ of their concerted activity.” *Beverly Health and Rehab. Services, Inc.*, 346 NLRB at 1323 (citing *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964)). Further, the Board has concluded that “a line ‘is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which misconduct is so violent or of such a character as to render the employee unfit for further service.’” *Kiewit Power*

¹³ To the extent that the ALJ’s conclusion appeared to be somewhat equivocal and did not find that this factor weighed *strongly* in favor of protection, General Counsel excepts to her narrow finding.

Constructors Co., 355 NLRB No. 150, p. 3 (Aug. 27, 2010) (citing *Prescott Indus. Prods. Co.*, 205 NLRB 51, 51-52 (1973)).

The Board has held that “inherently ambiguous” statements¹⁴, “colloquialism[s]”¹⁵, and “idiomatic expression[s]”¹⁶ do not, without more, lose protection. In determining whether such an idiomatic expression is actually a threat of violence or physical harm which loses protection, the Board considers several factors, including whether the employee making the statement had a history of violence or making threats of violence¹⁷, whether the statement was accompanied by physical contact or an explicit threat of physical harm¹⁸, and whether the alleged statements are consistent with language used in the facility and workplace culture.¹⁹ Finally, in determining whether an ambiguous statement is a threat, the Board does not consider subjective reactions to the statement.²⁰

The Board has repeatedly held that removal of protection was unwarranted where the statement at issue was “a colloquialism that standing alone does not convey a threat of actual physical harm;” or an “oblique” and “inherently ambiguous” statement. *Leasco, Inc.*, 289 NLRB 549, 549 n.1 (1988) (employee’s statement to supervisor that “If you take my truck, I’m kicking your ass right now” did not lose protection); *Fairfax Hospital*, 310 NLRB 299, 3000 (1993) (employee’s statement that supervisor could expect “retaliation” was an “inherently ambiguous . . . oblique statement” which did not lose protection). Recently, the Board held that an

¹⁴ *Fairfax Hospital*, 310 NLRB 299, 3000 (1993).

¹⁵ *Leasco, Inc.*, 289 NLRB 549, 549 n.1 (1988).

¹⁶ *AT&T Broadband*, 335 NLRB 63, 69 (2001).

¹⁷ *Contempora Fabrics, Inc.*, 344 NLRB 851 (2005) (over Liebman dissent, finding discharge lawful where employee had prior criminal record for assault and a prior record of assault in the workplace).

¹⁸ *Datwyler*, 350 NLRB at 670; *Beverly Health*, 346 NLRB at 1322-23.

¹⁹ *Plaza Auto Ctr., Inc.*, 355 NLRB No. 85 (Aug. 16, 2010) (discharge unlawful where “the record shows that profane language was not outside the range of conduct at the Respondent’s facility”). See also *Twilight Haven, Inc.*, 235 NLRB at 1342 (employee did not engage in misconduct while encouraging coworker to support union by, among other things, sitting in coworker’s lap because “lap-sitting was a common practice among Respondent’s employees”).

²⁰ See, e.g., *McCarty Foods, Inc.*, 321 NLRB 218, n.6 (1996)

employee's statement to his boss that "things could get ugly" and he had "better bring [his] boxing gloves" did not lose protection. *Kiewit Power Constructors Co.*, 355 NLRB No. 150, p. 3 (2010). The Board explained that such a statement "is more likely to have been a figure of speech ... rather than a literal invitation to engage in physical combat" and therefore "fall[s] short of the kind of unambiguous physical threat that would render [the employee] unfit for service." *Id.*

Likewise, under the circumstances here, a reasonable person would not construe Grosso's statements as a threat and the nature of Grosso's conduct weighs heavily in favor of retaining the Act's protection. First, the RIP comment was far from an "unambiguous physical threat", *Kiewit*, and instead was a non-literal description of the end of the workplace employees' bargaining unit and an end of their fight for the Union. This conclusion is reinforced by the ALJ's finding, based on Grosso's testimony and demeanor, that Grosso did not write the comments "with the intention of offending or frightening the employees in the warehouse unit" and "he genuinely meant to ill-will to other employees." (ALJD p. 20, ln 34-40). Thus, not only was the R.I.P. comment "more likely to have been a figure of speech" *Kiewit*, the ALJ's own findings of fact require the conclusion that it was in fact a figure of speech not even meant in a colloquial way as a threat but as a colloquial figure of speech regarding the warehouse employees' figurative death as a unit struggling for union representation. That Grosso intended the R.I.P. comment this way was understood by Respondents. Respondent's witnesses admitted that the term usually connotes reverence for the dead; for example, when Grosso used the term "Red Sox R.I.P." to describe the Red Sox season, Respondent's witnesses completely understood that it was meant in a non-literal sense referring to the end of the Red Sox season and in no way was a threat to the baseball players. (Tr., 88:11-21, 175:3-18, 704:17-705:22).

This is consistent with Board precedent holding that use of the term “R.I.P.” was not a threat. In the picket context, the Board rejected an employer’s argument that signs saying “R.I.P.” along with the name of a company executive and the company name were “in the nature of a death threat.” *Wilkie Co.*, 333 NLRB 603, 618 (2001). Instead, the Board concluded that the signs were a metaphorical commentary on the labor dispute, representing “the survival of the Union and the Company in their struggle to prevail in the labor dispute.” *Id.*

Further, a reasonable person would not have found the term “pussies” to be intended in an egregiously offensive manner. To the extent that use of “pussies” can be construed to have a double meaning where one is particularly offensive, that fact alone should not weigh against protection here. The ALJ stated that “the word may also refer to a woman’s vagina. At the time that [Grosso] wrote the comments, he was aware that there were five women in the warehouse who were eligible to vote in the decertification election.” (ALJD p. 19, ln 37-39). This statement appears to presume that a reasonable person could have construed the comments to have been directed at the women in the facility using this second meaning of “pussy” “refer[ring] to a woman’s vagina.” (*Id.*). However, such a conclusion is inconsistent with the ALJ’s own conclusion that Grosso, in fact, did not use the term “with the intention of offending” his coworkers. (ALJD p. 20, ln 36). Moreover, Respondent’s own witnesses conceded that they understood the word “pussy” to refer to a “wimp” or “weak willed” person. (Tr., 823:10-15, 71:7-9, 905:20-24). Further, the Board has previously found discharge for use of the word “pussy” unlawful. *See, e.g., General Chemical Corp.*, 290 NLRB 76, 81 (1988).²¹

²¹ Cases finding lawful discharge of employees for, in part, using the word “pussy” are distinguishable because they were decided under *Wright Line*, the word was not used as part of the *res gestae* of protected activity, and the use of that word was combined with other conduct. *See, e.g., Neptco, Inc.*, 346 NLRB 18, n.5 (2005); *Metal Container Corp.*, 331 NLRB 575, 585 (2000).

Such ambiguous comments do not lose protection where they are not accompanied by “physical contact or threat of physical harm.” *Datwyler*, 350 NLRB at 670. *See also Beverly Health and Rehab.*, 346 NLRB at 1322-23 (where employee told coworker “in a loud voice to “mind [her] f—king business,”” factor weighed in favor of protection because conduct “consisted of a brief, verbal outburst of profane language and was unaccompanied by insubordination, physical contact, or threat of physical harm”) (internal citation omitted). Here, there was no accompanying threat of physical violence since the comments were written, not made verbally by Grosso in connection with any gestures or other physical indicators of intimidation or threat. Moreover, the comments were not insubordinate, offensive to management, or even directed to a supervisor.

By the standards of this workplace, Grosso’s conduct was by no means unusual. The ALJ’s conclusion to the contrary was a clear error because she failed to make credibility findings, disregarded record evidence of Respondent’s witnesses contradicting each other and being caught in lies in their testimony about the use of profanity, disregarded extensive record evidence of profanity in the workplace and, finally, confused the relevant *Atlantic Steel* analysis of workplace culture with the *Wright Line* analysis of comparable discipline.²² (Exceptions 32-37).

First, the ALJ failed to make credibility determinations about any witnesses other than employee Lou Rathbun and other than resolving contradictory testimony concerning a single incident of profanity. Her finding that the “the reality lies somewhere in the middle” is not rooted in the record because she did not discredit General Counsel’s witnesses Grosso and Kevin Farrell, she discredited Mr. Rathbun concerning only one incident, and did not make any

²² Moreover, the ALJ’s sweeping conclusions about the way that Grosso’s comments “would reasonably be viewed by an employee” “in today’s work environment” (ALJD p. 20, ln 43-48) are not supported by any record evidence and are not facts of which a judge may take judicial notice. Fed. R. Evid. 201(b). (Exception 42).

findings about the credibility of Respondent's witnesses. Witnesses Grosso and Farrell both testified that profanity was used extensively.²³ In particular, Farrell testified that he had used the word "pussy" in conversations with other drivers, including Grosso, sometimes "on a daily basis", and gave detailed testimony about those instances. (Tr., 1402:2, 1403:17-1404: 21). Farrell testified that in each of those conversations, he used the term to mean "weak-minded, . . . wimps or crybabies", but never meant the term in a sexual way. (Tr., 1403:2-6, 1404:18-19). Similarly, when he heard the word "pussy" used by others in the warehouse, they also used the term to mean "weak-minded, soft and no guts" and not in any other sense (including as a woman's vagina). (Tr., 1411:24-1412:2). Further, Farrell testified that he had heard "[a]lmost every one" of the drivers use profanity in the warehouse. (Tr., 1427:2-12). Grosso corroborated Farrell's testimony with examples of profanity he had heard and used in the workplace. (Tr., 289:23, 290:5, 291:1). Overall, the record contains detailed testimony about many instances of profanity used by both male and female employees in the workplace, and offered by witnesses for both General Counsel and Respondent. (Tr., 1407:11-19, 1408:1-4, 1421:19-24, 1422:1-5, 1423:6-8, 1424:23-25, 1425:16-1426:4, 289:23, 290:5, 291:1, 1027:19-1029:22, 1077:16-1078:4, 1084:3-1, 1084:14-25, 1101:6-8, 1085:1-13).

Further, employee Barbara Moscatelli's testimony that she never heard or used profanity in the workplace (Tr., 685:5-687:6; Tr., 760:25-761:1) was directly contradicted by the testimony of supervisors Geoff Rogers and Frank Petliski that they had reprimanded and disciplined her for using the words "bullshit" and "bastards". (Tr., 1027:19-1029:22, 1084:14-25, 1101:6-8). The

²³ As noted, the ALJ did not make any determinations about Kevin Farrell's credibility. However, as he was a current employee at the time of the trial, Farrell's testimony – under subpoena and adverse to Respondent – should be considered "particularly reliable." *Advocate South Suburban Hospital*, 346 NLRB 209, n.1 (2006) (quoting *Flexsteel Industries*, 316 NLRB 745 (1995), aff'd, 83 F.3d 419 (5th Cir. 1996) (current employees are "likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests")); *American Wire Products, Inc.*, 313 NLRB 989, 993 (1994) (current employee providing testimony adverse to his employer is at risk of reprisal and thus is likely testifying truthfully).

ALJ failed to consider this evidence or make an explicit credibility finding regarding Moscatelli. Nonetheless, the record is clear that not is Moscatelli's testimony incredible, but the record establishes that Moscatelli herself used profanity. Similarly, employee Virginia Germino was caught in an outright lie on cross-examination, in which she testified that she had never used the word "bitch" inside or outside of the workplace and would be offended if anyone ever called her a "bitch." (Tr., 826:1-5, 826:19-22). She later admitted that she had posted a message on Facebook stating, "I never understood why being called a bitch offends some women. I say thanks for noticing. It took me 30-plus years to get this good at it" because she "thought it was funny" and did not find it offensive. (Tr., 840:3-23; 841:15-25, 846:6-13). Again, the ALJ failed to consider this evidence or make an explicit credibility finding regarding Germino, but the record is clear that Germino's testimony about profanity cannot be credited and Germino herself used profanity.

Moreover, as to the single incident about which the ALJ did make credibility findings, her own resolution of the factual dispute establishes that an employee attached a sticker that said "Don't be a dick" to a piece of equipment which was seen not only by his coworkers but also brought into customer's facilities and homes. (ALJD p. 17, ln 20-39). For purposes of the *Atlantic Steel* analysis, the ALJ's finding that the employee was reprimanded for using the sticker simply serves to affirmatively establish that such language was indeed used.²⁴

Finally, the Board has made clear that the question of whether protected comments are egregious may not be measured subjectively or based on the listener's reactions. Despite her

²⁴ Accordingly, for purposes of the *Atlantic Steel* analysis, the ALJ's conclusion that there was no evidence that "any manager observed [the sticker] and allowed it to remain on the jack without comment" and therefore, Grosso's language "went beyond what was . . . tolerated," is not relevant and was in error. *In Re Plaza Auto Ctr., Inc.*, 355 NLRB No. 85, p. 4 n.10 (in contrast to the relevance of employer's past issuance of discipline for similar conduct in *Wright Line* analysis, for purposes of *Atlantic Steel* analysis "even if discharge [of another employee] indicates that the Respondent did not tolerate obscene language on that occasion, the fact remains that such language was used in the Respondent's workplace").

reference to this well-settled principle, the ALJ improperly applied a subjective standard throughout her decision. (See Exceptions 1, 20, 23, 38, 39, 40). See *Twilight Haven, Inc.*, 235 NLRB 1337, 1342 (1978) (“it would be improper to deprive an employee of the Act’s protection solely on the basis of a listener’s reaction. So long as the appeal is protected, the reaction of those who hear it is immaterial”); *McCarty Foods, Inc.*, 321 NLRB 218, 218 n.6 (1996) (discharge for “harassment” unlawful where employer disciplined the pro-union employee for “‘subjective offensive activity’ without regard to whether or not the activity was protected by the Act”) (citing *Almet, Inc.*, 305 NLRB 626, 628 (1991)). Thus, where, as here, an employer claims that an employee was properly disciplined under its harassment policies, such discipline cannot stand where the policy requires a subjective determination of harassment. The Board has held that where “the harassment charges directly relate to and implicate the employees’ exercise of their Section 7 right to distribute union materials, the Respondent cannot apply its [harassment] policy without reference to Board law. The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity.” *Consol. Diesel Co.*, 332 NLRB 1019 (2000), *enfd.* 263 F.3d 345 (4th Cir. 2001). Thus, subjective responses to Grosso’s conduct cannot change the objective evidence based on the nature of the language Grosso used, Board law, and the weight of the record evidence demonstrating that Grosso’s conduct was not so opprobrious as to lose protection.

Therefore, for all of the foregoing reasons, the nature of Grosso’s conduct was not sufficiently egregious to weigh against protection under the Act and the ALJ erred as a matter of fact and law in concluding otherwise.

(4) *Factor Four: Provocation (Exceptions 29-31)*

Finally, the fourth factor prevents the employer from seizing on a reaction to its own unfair labor practices as a means of discharging an employee against whom it harbors animus, and in this way the Board seeks to prevent employers from benefitting from their own unlawful conduct. For example, where the appellate court denied enforcement because it found that the employee's outburst was "obscene, personally-denigrating, and insubordinate," the Board found that the conduct remained protected where the employer had illegally threatened the employee before his outburst because "substantial weight must be given to the circumstances that provoked [the employee's] outburst." *Felix II*, 339 NLRB at 196. Nonetheless, where conduct is not directed toward an employer, this factor weighs neither for nor against protection. *Beverly Health & Rehab.*, 346 NLRB at 1322 n. 20.

Thus, while the record here does not contain evidence of any such unfair labor practice, the issue of provocation is not relevant here. This factor is based on considering whether an employee's arguably-egregious outburst directed at a supervisor was provoked by that supervisor; here, Grosso did not have an outburst and his comments were not directed at a supervisor. Thus, this factor weighs neither for nor against protection.

The ALJ's conclusion that this factor weighs against protection is based on a series of conclusions that are both irrelevant as a matter of law and, in any event, unsupported by record evidence. As a legal matter, the ALJ erred in concluding that this factor weighed against protection because the "wording [of the comments] suggested that the source was apparently displeased with the warehouse employees for having initiated a decertification election and the possible removal of the Union as the bargaining representative," a finding which only reinforces the protected subject matter of the comments. (ALJD p. 16, ln 1-5). As a factual matter, she erred in concluding that this factor weighed against protection because the "comments came

without warning from an unknown source,” a conclusion which is inconsistent with her own factual findings. The comments were not “without warning” because they were made within two weeks of a scheduled decertification election in which the warehouse workers would be voting, and the warehouse employees who saw the comments understood them to be encouraging them to vote for the Union in the decertification election. (ALJD p. 13, ln 14-16; p. 5, ln 27). Further, the comments were not “from an unknown source” because, as the ALJ found, employee Moscatelli knew who had written the comments because she recognized Grosso’s handwriting, and stated in a meeting of all warehouse employees that the comments were written by a driver and she recognized the handwriting. (ALJD p.6, ln 35-36; p. 8, ln 2-7).

Moreover, the ALJ’s implicit assumption that in order to be protected, employees must publicly announce themselves is not only unsupported in case law but also contrary to the fundamental principle that employees do not have to publicly identify themselves as union supporters. *See* Section IV.C., *supra*. Thus, the ALJ’s finding that the fourth factor weighed against protection constitutes reversible error as a matter of both fact and law.

(5) *Conclusions from Atlantic Steel Analysis (Exceptions 38-44)*

The Board does not mechanically apply the four factors of the *Atlantic Steel* test, and no one single factor is consistently determinative. *See, e.g., Felix II*, 339 NLRB 195 (on remand for the sole purpose of considering whether “obscene, personally-denigrating, [and] insubordinate” nature of outburst requires loss of protection, holding that, even giving this factor “considerable weight”, “this one factor is insufficient to overcome the other factors weighing against [employee] losing the Act’s protection”). As set forth above, the first, second, and third factors weigh heavily in favor of protection and the fourth factor weighs neither for nor against protection. Therefore, an analysis of the *Atlantic Steel* factors demonstrates that Grosso’s

conduct maintained the protection of the Act and his discharge for engaging in protected activity violated the Act.

Moreover, a consideration of the broader principles underlying the *Atlantic Steel* test even more clearly demonstrates that Grosso's conduct remained protected and his discharge was unlawful. Understanding these broader principles makes clear that, beyond a fact-bound, mechanical application of the traditional *Atlantic Steel* analysis, the Board's inquiry should attempt to strike the proper balance of Grosso's Section 7 rights with the Respondent's managerial rights at stake here.

First, Grosso's communication with coworkers about self-organization represents a core Section 7 right. "Implicit in the statutory guarantee of section 7 is an expressive right: the right to discuss the advantages of organizing. . . . An environment where employees were prevented from discussing such a subject would be the antithesis of the workplace contemplated by the Act." *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 354 (4th Cir. 2001). Moreover, while the ALJ found that Grosso's message was "clumsily worded" and did not convey the protected, pro-union message which she found he had genuinely intended to communicate, the Act does not reserve Section 7 rights to erudite, eloquent spokesmen of the union cause but instead, gives *all* employees the right to communicate freely about self-organization and other protected matters. The Supreme Court has long recognized that under the principles of the Act, "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers*, 418 U.S. at 272. *See also Honda of America Manufacturing, Inc.*, 334 NLRB 751, 752 (2001) (even "the most repulsive speech enjoys immunity [under the Act] provided it falls short of a deliberate or reckless untruth") (citing *Linn v. Plant Guards Local 114*, 383 U.S. 53, 63 (1966)); *American Steel Erectors, Inc.*, 339 NLRB 1315, 1317 (2003)

(Liebman, dissenting) (the “Act envisions ‘uninhibited, robust, and wide-open debate,’ not polite circumspection”) (citing *Letter Carriers*). Accordingly, the Section 7 right at stake here goes to the very heart of the most fundamental principles of the Act.

In contrast, there are no managerial interests which were disturbed by Grosso’s conduct and require protection here. Grosso’s conduct involved written words on three newspapers in a non-work area, and thus did not disrupt the workplace during worktime. Further, his words were in no manner insubordinate, and thus did not undermine management’s authority or impede the future relationship between Grosso and his supervisors. The record evidence and the ALJ’s decision contain no facts which would support a finding that Grosso’s conduct in any way interfered with Respondent’s interests.

Affirming the ALJ’s decision would render meaningless the statutory guarantee of Section 7 of the Act: “There would be nothing left of § 7 rights if every time employees exercised them in a way that was somehow offensive to someone, they were subject to coercive proceedings with the potential for expulsion.” *Consolidated Diesel Co.*, 263 F.3d at 354. The Board has consistently held that “[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.” *Consumers Power Co.*, 282 NLRB 130, 132 (1986). Allowing a “heckler’s veto” to render unprotected the expression of these heightened emotions would leave employees with no means of predicting beforehand whether their conduct will be protected, and such an outcome would do nothing short of “eviscerate[] . . . the statutory guarantee of section 7.” *Consolidated Diesel Co.*, 263 F.3d at 354.

Therefore, balancing the rights of Grosso and Respondent that are implicated in this case vividly illustrates that Grosso's exercise of core Section 7 rights had little or no impact on the company's managerial concerns, and his conduct must remain protected under the Act. Thus, Respondent's suspension and discharge of Grosso violated the Act, and the ALJ's finding that the suspension and discharge were lawful constitutes reversible error.

b) Respondent Violated the Act Even if it Believed that Grosso's Conduct Violated its Policies (Exception 60)

Even if Respondent's managers believed that Grosso's comments were intended as a threat or meant to offend, the overwhelming evidence in the record and the ALJ's own factual and credibility findings demonstrate that this belief was wrong and therefore, such a belief is no defense. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964) (the Act "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 a case with similar facts, the Board found that where a union supporter called a decertification supporter a "marked man," his discharge was unlawful under *Burnup* because the phrase was, by any objective measure, "not a threat of death or bodily harm," and moreover, there was no record evidence that the employer had any reason to believe that the longtime employee would engage in violent behavior. *AT&T Broadband*, 335 NLRB at 63 n.1. The Board affirmed the judge's finding that the company "did nothing consistent with the perceived threat" and gave the comment an "unreasonable, out-of-context meaning" in order to "rid itself of . . . a formidable protagonist of the union cause." *Id.*, 335 NLRB at 67-68. *See also Twilight Haven*, 235 NLRB 1337 (discharge based on alleged harassment of coworker was unlawful

where employee “was terminated for engaging in protected activity in a manner which did not involve any misconduct”).

It is undisputed here that Grosso was engaged in protected activity and Respondent knew it was such. (ALJD p. 11, ln 10-12 (“There is no dispute that Grosso wrote the comments on the union newsletters and there is no issue concerning Respondent knowledge”). Under the *Burnup* framework, even if Respondent genuinely believed that Grosso engaged in misconduct in the course of this protected activity, the discharge is still unlawful because Grosso “was not, in fact, guilty of that misconduct.” *Burnup & Sims, Inc.*, 379 U.S. at 23. According to the ALJ’s own findings, Grosso was not, in fact, threatening nor attempting to offend his coworkers with the newsletter comments:

After hearing Grosso’s testimony and observing his demeanor in the hearing, I do not believe that he took the action that he did with the intention of offending or frightening the employees in the warehouse unit. Based upon the overall testimony, it is apparent that he wrote the comments with the intent of discouraging employees from abandoning their support for the Union. As his testimony reflects, he hastily wrote the comments without any thought as to effect of his words. I believe he genuinely meant to ill-will to any other employees.

(ALJD p. 20, ln 34-40). Thus, Respondent was simply incorrect in concluding that Grosso had intended to threaten and offend his coworkers because according to the ALJ’s credibility findings, Grosso had no “intention of offending or frightening” his coworkers and “genuinely meant to ill-will to any other employees”, intending only to “discourage[] employees from abandoning their support for the Union.” (*Id.*). Where an employer is incorrect about whether an employee engaged in protected activity has committed misconduct, the employer’s genuine belief is no defense to an unlawful discharge.

The ALJ's failure to consider *Burnup* constitutes reversible error. Considering her own factual and credibility findings under this legal framework compels the conclusion that under *Burnup*, Respondent's discharge of Grosso was unlawful under the Act.

3. In the Alternative, Grosso's Discharge was Unlawful Under *Wright Line* (Exceptions 45-59)

Because there is no dispute as to the reasons for Grosso's discharge, this case should be analyzed under *Atlantic Steel* and the principles on which that case is based, not under *Wright Line*, 251 NLRB 1083 (1980). *Felix I*, 331 NLRB at 146 ("where the conduct for which the Respondent claims to have discharged [the employee] was protected activity, the *Wright Line* analysis is not appropriate"). Nonetheless, even if this case is analyzed under *Wright Line*, Grosso's discharge is unlawful.

It is clear that but for Grosso's protected union activity, he would not have been discharged.²⁵ In this case, the record evidence establishes that Grosso had no history of violence, that he had never received a negative performance evaluation, and he called out sick only twice during his tenure. (Tr., 304:20-305:15). The record does not support a finding that Respondent would have investigated the newsletters, much less discharged Grosso, had the newsletters not encouraged employees to vote for the Union in the upcoming election.

The record in this case is replete with evidence of animus. First, animus may be inferred from the 8(a)(1) violations which the ALJ erred in not finding: that Respondent unlawfully interrogated and investigated the newsletter comments. Second, animus may also be inferred from the timing of the discharge. *Heritage Hall*, 333 NLRB 458, 461 (2001) (timing of discharge two days before election supports a finding of animus); *McClain of Georgia, Inc.*, 322 NLRB 367, 383 (1996) (discharge one day before election was a "dramatic way to impress on

²⁵ There is no evidence in the record that dishonesty was an independent ground for discharge, but even so, that was also an unlawful basis for discharge, as set forth in Section IV.D.1.

employees that [employer] was not playing games”). Here, the undisputed evidence is that Respondent suspended Grosso on September 22, the day before the decertification election and eleven days after it first learned about the comments. (ALJD p. 22, ln 24-2). There is no reasonable explanation for why Respondent waited eleven days to suspend Grosso pending investigation – employee Moscatelli informed her supervisors on September 10 that she recognized the handwriting, but Respondent waited until the eve of the decertification election to take action. The timing of Grosso’s suspension one day before the decertification election suggests that Respondent waited to remove Grosso until the eve of the election when it would have maximum impact on voting employees.

Third, the record evidence establishes that Respondent failed to meet its burden of demonstrating that it had disciplined employees in similar circumstances. Respondent cited only three other investigations nationwide involving threats or improper language, and only one case resulting in discharge – in that case, an employee admitted that he had made threats to “kill” coworkers. (Tr., 103:10-13, 105:12-18). While the company’s progressive discipline policy allows employees to be discharged on a first offense for serious misconduct, Respondent could cite only a single example where that had occurred, which involved employees terminated for dishonesty during an investigation into at least \$250,000 in kickbacks. (Tr., 68:14-69:5, 72:6-8, 192:9).

Moreover, there is evidence in the record that Respondent has failed to discipline a Chester employee under similar circumstances, despite the ALJ’s unsupported conclusion to the contrary. (ALJD p.22, ln 43-45). In particular, the ALJ found that Respondent did not discipline employee Mark Huertas after he failed to remove a sticker that said “Don’t be a dick” from a piece of equipment. Huertas was not disciplined in any way despite the additional facts that the

sticker was visible on a piece of equipment he brought into customer's facilities and homes, and he had disobeyed his supervisor's previous direction to remove the sticker. (ALJD p. 17, ln 20-39). Thus, even where the offensive language was visible to Respondent's customers, and even where the conduct involved insubordination, Respondent did not discipline Huertas in any way – let alone suspend or discharge him for this use of offensive language. The record evidence similarly establishes that when employee Barbara Moscatelli cursed in front of a supervisor, she received a warning but was not suspended or discharged.

Fourth, Respondent failed to satisfy its burden of showing that it discharged Grosso based on concerns of potential Title VII liability, and the ALJ erred in finding that it did. The Board has made clear that, in order to satisfy its burden under *Wright Line*, an employer must “establish[] that it had reasonable grounds for determining that it had to remove or discipline [the discharged employee] in order to avoid liability under Title VII.” *St. Pete Times Forum*, 342 NLRB 578, 579 (2004) (discharge unlawful under *Wright Line* where record established that employer's asserted Title VII concerns were pretextual).

Here, the record contains not even a scintilla of evidence that Respondent had any legitimate concerns of liability stemming from the comments or that any such concern required the company to discharge Grosso. Respondent introduced no evidence, for example, that employee witnesses considered legal action or that Tyler or anyone else considered such risks in deciding to terminate Grosso. The ALJ's implied reference to such concerns disregards the fact that there is no record evidence that the employer discharged Grosso based on any concerns, reasonable or otherwise, that to not remove Grosso would subject Respondent to Title VII liability. The sole reference to any such concerns was Healy's testimony – notably, in response to a question from the Judge, not in Respondent's case in chief – that he sought advice of counsel

in responding to the newsletters because it was “a catch 22 situation” since “[y]ou have [a] harassment EEO issue at the same time you have the upcoming election.”²⁶ (Tr., 1325:23-5, 1326:20-1327:4). Therefore, the ALJ’s finding that Respondent satisfied its obligation under *Wright Line* because “[t]o have condoned or ignored Grosso’s conduct would have disregarded not only the provisions of the employee handbook, but also the concerns of the female warehouse employees” was a clear error where Board law requires employers to make the much stronger showing that it had “reasonable grounds for determining that it had to remove or discipline [the discharged employee] in order to avoid liability under Title VII.” *St. Pete Times Forum*, 342 NLRB at 579.

Fifth, close scrutiny of the record evidence establishes that Respondent’s invocation of its harassment and EEO policies to justify Grosso’s discharge were simply pretextual justifications. As in *AT&T Broadband*, Respondent here “did nothing consistent with the perceived threat”. 335 NLRB at 67-68. Respondent’s assertions that the comments represented a threat to warehouse employees are contradicted by record evidence – which the ALJ failed to consider – showing a marked lack of urgency and seriousness in Respondent’s response to the comments. For example, while supervisor Shane Healy admitted that while he contacted security companies to get information about the type of services they provided, neither he nor anyone else solicited bids or engaged any of those companies or engaged any other kind of security services. (Tr., 1301:10-24). No one contacted the company safety department until eleven days later, or contacted law enforcement at any time. (Tr., 189:2-10, 130:5-17). The company did not hold any meetings with the drivers about the impropriety of the conduct, despite having ample reason

²⁶ The ALJ held that Respondent had not waived the attorney-client privilege as to these conversations with counsel, and Respondent may not now attempt to argue that these discussions somehow constituted the legal justification for Grosso’s discharge. *See U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d. Cir. 1991) (“the attorney-client privilege cannot at once be used as a shield and a sword”).

to believe that it was a driver who had engaged in the purportedly impermissible conduct. (Tr., 1302:21-1303:2; 602:17-25). Further, the company did not conduct any employee training on workplace violence, EEO policies, or harassment, nor did any manager recommend any training in response to the newsletters. (Tr., 1315:3-25; 185:6-186:2).

Further, the steps Healy purports to have taken immediately in response – contacting security firms, staying late in the facility, and informing employees they could park within view of security cameras – did nothing to change security in the facility. The notion that employee safety would be increased by parking in a different spot is undermined by the uncontradicted evidence that roughly 85% of the spaces in the lot are captured by video and thus, employees were most likely already parking in spots captured on video. (Tr., 716:2-9). Further, while Moscatelli testified that after finding the newsletters she “made sure [she] was not in the building alone”, she admitted in the next breath that she had *never* been in the building alone previously. (Tr., 717:11-24). If Respondents genuinely believed that the comments represented a threat of violence to the warehouse employees, it would be expected that they would attempt to identify the individual who posed such a threat rather than allow that individual to continue working alongside the warehouse employees. However, the steps Respondent took prior to September 21 did nothing to further this goal, as Healy conceded. (Tr., 1282:14-21, 1295:15-25).

King insisted that the investigation did not start earlier because “until September 21st no employee had made a complaint to me about those comments.” (Tr., 204:20-205:1). According to King, the first “complaints” received by the company were in the September 21 meeting: even though he was aware that employees gave the documents to management on September 10, he testified that those communications did not qualify as complaints. (Tr. 158:20-159:23). This explanation strains credulity because according to the record, Moscatelli, Buxbaum, and

Germino made essentially identical statements to management on September 10 and September 21. (*Compare* Tr., 1227:8-20 *with* 1229:8-13, 1229:24-1230:9) Respondent did not attempt to explain this inconsistency, and there is no plausible reason why a statement made on one day does not qualify as a “complaint” but an identical statement made eleven days later becomes a “complaint”.

King further explained that he had not begun investigating at any time prior to September 21 because he had no “tip” or “lead” as to who had written the comments. (Tr., 205:7-11, 223:16). When confronted with his earlier testimony that he reviewed handwriting samples of all twenty drivers on September 21, King said that on September 10, he “didn’t even know at that time that they were written by an employee”, stating that in the past, Union organizer Jerry Ebert had left documents in the break room. (Tr., 224:3-225:14). However, King admitted that Ebert had always signed those documents, and then retreated completely, saying he was “not suggesting” that Ebert had left the documents, only that he “had no way of knowing who had written them.” (*Id.*).

Not only is King’s testimony illogical and evasive, but it is flatly contradicted by the extensive and consistent testimony that Moscatelli informed management on September 10 that she recognized the handwriting as one of the driver’s. (Tr. 1224:2-3, 1227:8-10, 1282:4-8 (Healy); 777:1-20, 711:18-712:11, 660:12-15, 666:15-19 (Moscatelli); 879:3-6 (Buxbaum)). Healy’s explanation for why he did not follow up with Moscatelli conflicts with King’s assertions that he had no “lead” or “tip”: Healy testified, instead, that he did not pursue the lead provided by Moscatelli because he first wanted to seek legal advice about the situation. (Tr., 1325:23-5, 1326:20-1327:4). Even assuming Healy wanted legal advice before questioning Moscatelli about who she believed authored the comments, there is no explanation in the record

for why it took eleven days to obtain advice and begin an investigation about a purportedly serious threat of violence. On the whole, the record demonstrates a remarkable lack of urgency in Respondent's response to the newsletters – a lack of urgency so pronounced as to be in complete conflict with any claim that Respondent construed the “R.I.P.” comment as a threat of violence.

Moreover, once the investigation purportedly began on September 21, there are further suggestions that the investigation itself was a pretextual cover-up of a discriminatory discharge. In his testimony, King stated that he did not view Grosso as a “prime suspect” even after reviewing the newsletters and drivers' logs provided by Moscatelli and after discovering similarities between the newsletters and samples of Grosso's handwriting on the morning of September 21. (Tr., 163:21-165:18). Nonetheless, in the memo to file King created “immediately after the meeting” with the warehouse employees earlier that morning – before reviewing the handwriting samples and thus purportedly before even viewing Grosso as a suspect – King identified the subject of the memo as “Kevin ‘Dale’ Grosso”. (166:7-8; 168:10-11; Resp. Ex. 13). Respondents did not attempt to offer any explanation for this inconsistency, and there is no evidence in the record that King typed the document or added the subject line at a later time. Further, when Respondents later provided the results of their investigation to Tyler, the record evidence establishes that they did not give him any information about events occurring prior to September 21, including the initial discovery of and complaints about the newsletters. (Tr., 1364:12-1366:9, 1244:8-15).

In short, the testimony of Respondent's witnesses concerning their response to the comments on the newsletters is riddled with inconsistencies and inherently implausible

assertions undermining its assertion that Grosso's comments constituted a threat.²⁷ Based on this evidence, it is clear that Respondent's assertion that it disciplined Grosso for violations of the harassment and EEO policies was a pretext which may in turn support a finding of animus. *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003) (holding that a finding that an employer's stated reason for taking disciplinary action is a pretext supports an inference that the real motive was unlawful). *See also Whirlpool Corp.*, 337 NLRB 726, 727, 741 (2002) (discharge unlawful under *Wright Line* where employer attempted to "use harassment and intimidation as mere shibboleths to justify interference with rights guaranteed under the Act"); *Faurecia Exhaust Systems, Inc.*, 355 NLRB No. 124, p. 2 (Aug. 26, 2010) (where Respondent failed to show that the employee "violated its harassment/sexual harassment policy . . . rather than rebut the General Counsel's prima facie showing . . . the Respondent's proffer of pretextual reasons for the discipline constitutes additional proof that his discipline was unlawful").

Therefore, the foregoing evidence – separately and taken in combination – demonstrates proof of animus. Animus may be inferred from (1) the 8(a)(1) violations of unlawful investigation and interrogation which the ALJ erred in not finding, (2) the timing of Grosso's suspension and discharge, (3) the evidence that Respondent did not discipline employees for similar conduct in the past, (4) Respondent's failure to make its legally-required showing that it was concerned about Title VII liability, and (5) the evidence showing that Respondent's proffered reasons for discharging Grosso were pretextual. Therefore, the ALJ erred in finding that there was no evidence of animus in the record, and accordingly erred in failing to conclude that Grosso's discharge was unlawful under *Wright Line*.

²⁷ While General Counsel asserts that the clear record evidence permits such a finding, to the extent that such a conclusion requires a credibility determination, General Counsel notes that the ALJ abdicated her duty to make such credibility resolutions about this testimony and these facts.

V. REMEDY

1. General Counsel Asks for an Intranet Posting (Exception 61)

The Board has indicated its willingness to consider the merits of a proposed modification to its standard notice posting requirement in a particular case where the General Counsel: (1) adduces evidence demonstrating that the employer regularly communicates with its employees electronically; and (2) proposes such modification to the Judge in the unfair labor practice proceeding. *Nordstroms, Inc.*, 347 NLRB 294 (2006). *Accord Valley Hospital Medical Center, Inc.*, 351 NLRB No. 88, fn. 1 (2007) (denying electronic posting where evidence was insufficient to show that employer customarily communicates with employees electronically).

In the instant case, the record is replete with evidence that Fresenius communicated important information to its employees through its company intranet. (Tr., 58:8-17, (benefits, policies, and news updates on intranet); 60:3-13, 60:19-25, 63:12-18, 64:15-19, 65:24-66:3 (personnel policies on which Grosso's discharge based available to employees only on intranet); 908:6-25 (Buxbaum gives employees password to access intranet when they start work)). Therefore, General Counsel respectfully requests that the Board include in the remedy that Fresenius post on its intranet a posting available to all employees in the Chester facility.

2. Interest On The Monetary Award Should Be Compounded On A Quarterly Basis (Exception 62)

Counsel for the General Counsel urges that the current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest on a quarterly basis. Only the compounding of interest can make adjudged discriminatees fully whole for their losses, and both IRS practice and precedent from other areas

of labor and employment law provide ample legal authority for assessing compound interest to remedy unfair labor practices.²⁸

VI. CONCLUSION

For the reasons set forth above, the undersigned respectfully requests that the Board reverse the ALJ on these limited findings and conclusions, issue a broad order including an intranet posting, compound interest, and any and all other appropriate remedies, and adopt the other portions of the ALJD.

Dated: October 13, 2010
New York, New York

Respectfully submitted,



Julie Y. Rivchin
Counsel for the Acting General Counsel

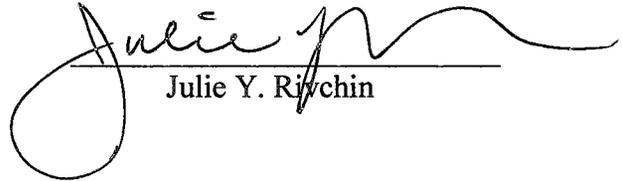
²⁸ The Board's policy of assessing interest on monetary remedies has, from the start, been linked to the practices followed by the IRS. *Isis Plumbing & Heating, Co.*, 138 NLRB 716, 720-721 (1962). For the past quarter century, the IRS has compounded interest on the overpayment and underpayment of taxes, 26 U.S.C. § 6622(a), based on the rationale that calculating simple interest did not conform to commercial practice and that, without compounding interest, "neither the United States nor taxpayers are adequately compensated for the value of money owing to them under the tax laws." S. Rep. No. 97-494(I), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047. Moreover, federal courts routinely award compound interest on backpay awards in Title VII cases, 42 U.S.C. §§ 2000e to 2000e-17 (2000). *See, e.g., Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993) ("[g]iven that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded").

CERTIFICATE OF SERVICE

This is to certify that on October 13, 2010, I caused the foregoing Counsel for the Acting General Counsel's Statement of Exceptions and Brief in Support of Exceptions to be served, via electronic mail, addressed as follows:

Thomas G. Servodidio
Duane Morris LLP
By email: TGServodidio@duanemorris.com
Counsel for Respondent

Daniel E. Clifton
Lewis, Clifton, and Nikolaidis, PC
By email: dclifton@lcnlaw.com
Counsel for the Charging Party


Julie Y. Rivchin

Dated this 13th of October, 2010