United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 30, 2005

TO : Rosemary Pye, Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Wackenhut Corp.
Case 1-CA-42113

133-9000
506-4001-5000
512-5033-3300
512-7500
512-7550-7000
524-5030-3300
524-6745
524-8387-1500
524-8387-1700
524-8387-1750
524-8387-6500
524-8387-6550
524-8387-9100
524-8387-9150

This case was submitted for advice as to whether the Employer unlawfully discharged three employees, and/or constructively discharged one of those employees, for engaging in Section 7 activity, or whether the Employer lawfully discharged them based on a sufficient concern over legal liability stemming from another employee's complaint about their creation of a hostile work environment. We conclude that the Employer unlawfully discharged all three employees, and in the alternative, unlawfully constructively discharged employee Charette, for engaging in protected Section 7 activity. We further conclude that the Employer has not satisfied its Wright Line[1] burden that regardless of that activity, it would have discharged the employees based on a sufficient concern of legal liability due to a complaint about their purported creation of an alleged hostile work environment.

FACTS

I. Background on the Employer and the Workplace Culture at the Pilgrim Nuclear Power Station (PNPS).

The Wackenhut Corp. (Employer) is an international corporation providing security services. In 2001, Entergy Nuclear Generation Co. (Entergy), a utility provider, awarded the Employer a contract to provide security

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

services at the PNPS facility in Plymouth, Massachusetts. PNPS is owned and operated by Entergy. The Security, Police & Fire Professionals of America, Local 540 (Union) represents Employer security officers at PNPS.

The Employer maintains a Human Resources (HR) Manual containing policies and work rules supplementing the parties' collective-bargaining agreement. HR Policy 520 of the manual entitled "Sexual Harassment/Workplace Harassment Policy" prohibits harassment including "epithets, slurs, negative stereotyping; threatening, intimidating or hostile acts; and written or graphic material that denigrates or shows hostility or aversion toward an individual or group that is placed on the walls or elsewhere in the Employer's premises or circulated in the workplace."[2] Employees who violate the policy are subject to discipline up to and including termination. HR Policy 520 further states that "[a]ll harassment incidents, alleged or actual, must be treated as potential EEOC litigations." The HR Policy also requires a timely investigation by the Employer, as well as possible suspension pending investigation and ultimate termination of the offender.

The use of profanity, but apparently not racial slurs, is prevalent among Employer security guards, and sometimes among Employer management, at PNPS.[3] There is evidence that employees, but not management, have heard security officers including unit employee Merada use such racial terms as the word "nigger" referring to other people. Also, for almost twenty years, unit employee Ottino drew, posted on the Union bulletin board, and distributed to a small group of employees and management representatives, cartoons on subjects ranging from current work events to internal Union politics. Most of the cartoons mocked employees, supervisors, and management representatives, often by name. Other cartoons showed nudity or sexually suggestive situations.[4]

---

[2] Entergy's Harassment Prevention Policy prohibits "any form of harassment … including conduct on the part of non-employees, such as customers, vendors, contractors …" and defines harassment as "any annoying act of persistent action that singles out a worker, to that worker's objection or detriment because of, but not limited to [protected categories]." It also states that a single incident may constitute prohibited harassment.

[3] This profanity includes use of the words "cocksucker," "motherfucker," and "son of a bitch."

[4] For example, one cartoon drawn around five years ago depicted a recently promoted employee with his bare

For several years, swastikas have sometimes been posted in the facility to criticize Employer management. One instance involved a swastika superimposed on a copy of the front cover of the Employer's handbook and posted in the employee breakroom. It is unclear who drew these swastikas. However, employee Merada collects Nazi memorabilia, and one supervisor had seen Merada draw swastikas on his personal gear. Prior to the incidents here, the Employer had never disciplined any employee for the use of profanity or for drawing swastikas or cartoons.

II. **Intraunion strife**

In internal Union elections in both January 2003 and March 2004, Roy Rose, an African-American unit security guard, campaigned against the incumbent Union officers, including Merada. During both campaigns, Rose publicly accused the incumbent Union leadership (hereinafter, the "Old Guard") of stealing from the Union and "fixing" the books. Most of the allegations focused on Merada. Rose and his slate of candidates (hereinafter, the "New Guard") lost the 2003 Union election. Rose continued his accusations against the Old Guard and filed a charge with the Department of Labor. Rose then won the 2004 election.

After winning that election, Rose requested, on Union letterhead bearing a Union logo, that the unseated Union President forward him all Union materials. Around March 29, 2004,[5] a copy of Rose's letter was posted around the facility with a swastika in place of the Union logo. It is unclear who drew and posted the altered letter.

In early April, Rose informed Employer Project Manager Neary and Entergy Security Manager Reginald Rose[6] that another employee had shown him a copy of the swastika-altered letter that had been tacked to a tree near Rose's work station. Rose considered this act to be a personal attack on his African-American race, as it invoked images of lynching. The Employer representatives agreed with Rose that this act was a hate crime. Neary then contacted the

---

buttocks showing, "bending over" for management. Another cartoon depicted an Employer and an International Union representative both shirtless in bed, with the Employer representative smoking a cigarette, suggesting that they had just had sexual relations. Other cartoons depicted employees defecating when scared.

[5] All dates are in 2004 unless otherwise noted.

[6] There is no relation between Roy Rose and Reginald Rose.

Employer Vice President of Labor Relations, who stated it was a hate crime and instructed Neary to "take care of it … and do what he's supposed to do." Neither Neary nor any other Employer representative contacted Rose after that initial meeting with him, and there is no evidence that the Employer further investigated the matter.

In May, the DOL found that Rose's charges of Union corruption were unsubstantiated. Many unit members became angry and felt that Rose won the election by spreading lies and filing false charges. Union Vice President Sullivan sent an open letter to the Union membership apologizing for the false allegations. This letter created a rift both within the New Guard and the unit in general.

III. **Employer SOG Advisory Group Initiative**

On August 19, the Employer began posting a daily notice soliciting applications from employees to volunteer for a group called the Special Operations Group Advisory Team (SOG), which would act as trained adversaries for drills and exercises to test the security in place at PNPS. SOG team members would receive regular hourly wages and would not otherwise be compensated for their additional training. Several employees, including Maher and Fitzpatrick, completed applications to participate in the SOG.

Around this time, Merada told some employees and supervisors, including Supervisor Voegtlin, that it was an unfair labor practice for the Employer to form and solicit volunteers for the SOG without negotiating with the Union. Voegtlin countered that the Employer could form the SOG pursuant to past practice. On August 24, Sullivan told Voegtlin that he would be brought up on charges for individually bargaining with employees by seeking volunteers for the SOG and instructed him to cease-and-desist from such conduct.

On August 25, the Union Executive Board debated the Union's position on the SOG. The New Guard, except for Sullivan, supported formation of the SOG and did not want to insist on additional compensation. Old Guard loyalists felt that the Employer should bargain over the SOG and compensate volunteers for the extra training and hours. The Old Guard also believed that the Union should not bargain at all over the SOG until the Employer agreed to resolve issues stemming from the implementation of a similar SOG group under a prior security contractor. After a contentious meeting, the Old Guard prevailed and the Executive Board took the position that the Union would encourage members not to volunteer for the SOG until the

Employer negotiated terms and conditions of employment. The Employer continued to solicit volunteers for the SOG until around mid-September. The SOG was never formed because employees withdrew their applications.

Thereafter, SOG volunteer Fitzpatrick told Voegtlin that the Union had threatened him with charges because he had "individually bargained" with Voegtlin by participating in the SOG, and also instructed him to withdraw his application. Voegtlin wrote a letter to various Employer and Entergy representatives relating the Union's threats against and demands on Fitzpatrick, which Voegtlin said constituted "harassment and coercion."

On September 2, Rose submitted a written complaint to Neary alleging harassment due to the swastika imagery, about which he had verbally complained in April, as well as the posting of six cartoons about him. These six cartoons depicted:

- Rose defecating, with flies buzzing around his buttocks, after learning that there would be a DOL investigation into an alleged financial deal between the Employer and Union;
- a game of "Jeopardy," with the host alleging various improprieties for an answer under the category "Lying Bastards," and the contestant answering "Who is Roy Rose?"
- unidentified officers alternately naming former United States presidents, and then Rose, as lying presidents;
- a bleeding rose with the phrase "They say every Rose has its Thorn! Too bad we got pricked by ours!";
- two management representatives, one with a hole burned in his buttocks after a meeting with Sullivan, and the other with lipstick prints on his buttocks after meeting with Rose;
- Fitzpatrick's head inside Rose's buttocks, suggesting that Fitzpatrick is a sycophant.

Rose attached the six cartoons and a letter to the complaint. The letter stated, in part:

> The artist has personally targeted me; these drawings represent blatant and malicious harassment … The artist's action of posting these cartoons is causing discontent within the membership and creating a hostile work environment here at Pilgrim's Station … The comments of said attachments are a clear violation of Wackenhut Work Place Harassment Policy involving myself at Pilgrim Station … I am

> requesting that the situation be addressed, and I am also informing you that I have contacted legal counsel and will also be soliciting input from the ACLU and NAACP on this matter. If this situation is not satisfactorily remedied, the next communication you receive from me on this matter will be through an attorney.

On September 8, Employer representatives Neary and Norton met with Rose and Fitzpatrick to discuss the complaint and letter. Rose said he wanted the cartoons and swastikas to stop and that he did not know who drew them. The Employer representatives questioned how they could resolve the issues if Rose did not furnish names, and said they would have to talk to "everyone," which they said would upset a lot of people.

On September 9, Rose received a letter acknowledging Neary's receipt of his complaint and outlining the actions the Employer would take to investigate and correct the problem. The Employer assigned Training Manager Versput to conduct an on-site investigation. Versput interviewed several employees and supervisors between September 14 and 21. Each interviewee completed a written statement at the conclusion of his interview.

During one interview, SOG volunteer Maher said that in the beginning of September, employee Charette asked him about a memorandum that the Employer had posted advising volunteers for the SOG not to be intimidated by other employees. Charette apparently told Maher that if he volunteered he would be brought up on individual bargaining charges. Maher responded that he should not be criticized for volunteering to receive more training and asked Charette why he cared. Maher alleged that Charette then called him a "selfish cocksucker faggot." According to Maher, two Entergy employees were standing nearby and heard this exchange. During another interview, SOG volunteer Fitzpatrick told Versput that he saw Charette menacing employees to discourage SOG activity by placing his hands on his hips, moving into another person's space, and looking down on him in an aggressive stance.

Versput commenced Rose's interview by asking him questions about the SOG Team, such as if he had heard whether people were being harassed about volunteering. At the apparent suggestion of his attorney, Rose informed Versput that he thought, but was not certain, that Ottino was associated with the cartoons and Merada with the swastika. Rose also claimed in a post-interview written statement that Merada is "known for using racial slurs ("N" word) around those he feels comfortable with. Numerous

individuals have relayed this to me; I myself have never heard him, though it is obvious because I am one of the people he refers to with racial pejoratives." Rose continued that "neither Ottino's nor Merada's behavior should be accepted and/or tolerated … Both of these situations are contributing to a hostile work environment [and] [n]o one, regardless of their ethnicity, should be subjected to this type of harassment at their place of work."

IV. **The Suspension and Discharge of the Alleged Discriminatees.**

The Employer suspends, and if necessary discharges, employees pursuant to the following disciplinary procedure. First, the charged employee is relieved of duty by another officer. Second, the charged employee is escorted, usually by a line supervisor, to the armory to return his weapon. Third, the charged employee is escorted to his locker, at which point some employees have changed out of uniform and others have remained in uniform and merely grabbed car keys, cell phones, etc. Fourth, the charged employee is escorted off-site to the administrative building. Fifth, the charged employee is interviewed, informed that he will be placed on administrative leave pending the outcome of the investigation, and escorted to his car. If the investigation results in the termination of the charged employee, the employee is brought back on site, given his final pay, asked to clean out his locker, and given a "full body count," which is a measure of the radiation in his system. The Employer apparently has never required an employee to clean out his or her locker until the employee was finally discharged.

On September 22, the Employer separately brought Ottino, Merada, and Charette to PNPS, and had them clean out their lockers and turn in their weapons, badges, and equipment. The Employer then met with each employee, stated that each was suspended without pay, prohibited their return to PNPS unless coordinated with the Employer, and told them it would get back to them by the end of the week regarding the status of their suspensions.

At his meeting, Ottino admitted he had drawn the six cartoons at issue and several other cartoons. At Charette's meeting, Versput told him about allegations that he contributed to a hostile work environment and asked whether he had engaged in conversations about the SOG with any unit members. Charette said that he had often discussed the SOG, but denied harassing or threatening any employee. After being suspended and leaving PNPS, Charette called the Employer's office and resigned. He later faxed

a resignation letter stating "Effectively immediately, I am resigning my position with Wackenhut." At Merada's meeting, he denied intimidating or harassing anyone, or authoring any of the posted materials.

Also on September 22, Versput sent Employer and Entergy representatives a memorandum entitled "Alleged Hostile Work Environment at Pilgrim" detailing the results of his investigation. He said that the cartoon and swastika postings, and the possible intimidation or threatening behavior toward volunteers for the SOG, were creating a hostile work environment. Versput wrote that he first concentrated on Rose and the volunteers for the SOG, but also branched out to other officers and supervisors as leads developed. He reported that Ottino admitted responsibility for the cartoons about Rose, and that Charette and Merada were identified as "having threatened, harassed, intimidated or otherwise created a hostile work environment for several officers." Versput further reported that the Employer had suspended all three employees without pay and instructed them not to return to PNPS. Versput also indicated that he hoped to obtain three or more additional statements in the next couple of days. He concluded the memorandum by stating:

> [p]lease begin your review with these documents, as I believe the outcome will be the same even with additional statements. Because the three subjects were suspended without pay, I respectfully request an early determination (by Friday 9/24/04?) along the following recommended course of action: 1. Wackenhut should terminate Louis Ottino for his admitted cartoons specifically targeting Mr. Rose. 2. We should wait for Entergy to remove/deny unescorted access for Timothy Charette and James Merada, based on their threatening behavior toward other security officers. Because of their denials and the mostly second-hand nature of the statements against them, I think this is a better course of action than Wackenhut's direct termination.

The Employer decided to fire Ottino on September 23 for violating the Employer's HR Policy 520. Versput interviewed three more employees on September 23. Employee Hightower indicated that Merada called him a "cocksucker" for volunteering for the SOG Team. Supervisor Pollara said that he had seen Merada draw swastikas on his personal gear. Versput forwarded these statements to Employer management with a recommendation to terminate Merada based on Hightower and Maher's accusations of threats and intimidation, and Pollara's statement concerning swastikas.

On October 28 and October 29, the Employer fired Ottino and Merada, respectively. The Employer gave them each their final paychecks, conducted a "full body count" on them, and let Ottino clean out his locker one more time.

ACTION

We conclude that the Employer unlawfully discharged all three employees, and in the alternative, unlawfully constructively discharged employee Charette, for engaging in protected Section 7 activity. We further conclude that the Employer has not satisfied its Wright Line burden that even absent that activity, it would have discharged the employees based on a sufficient concern of legal liability due to a complaint about the employees' purported creation of an alleged hostile work environment.

I. **Background Law**

An employer successfully defends its discipline of an employee under Wright Line based on a fear of liability for a hostile work environment or harassment under anti-discrimination statutes by showing that it was "sufficiently concerned" with such liability that it would have disciplined the employee even absent protected activity.[7] In making this determination, the Board considers factors such as whether the Employer actually believed,[8] or could reasonably believe,[9] that the employee's

[7] Fixtures Mfg. Corp., 332 NLRB 565, 566 n.14 (2000).

[8] See St. Pete Times Forum, 342 NLRB No. 53, slip. op. at 2 (2004), enfd. in part and remanded 411 F.3d 212 (D.C. Cir. 2005) (employer had no reasonable grounds for determining that it had to discharge employee who called another employee a "Yankee bitch" because, among other things, employer representative admitted that she did not believe such conduct involved sexual harassment); Embassy Vacation Resorts, 340 NLRB No. 94, slip. op. at 5 (2003) (Board rejected employer defense that it suspended and discharged employee to prevent Title VII liability where, among other things, several employer representatives either did not believe the claims or thought they were exaggerated).

[9] See PCC Structurals, Inc., 330 NLRB 868, 872 (2000) (employer defense based on fear of harassment liability under the Americans with Disabilities Act rejected where the alleged statements were neither disability-related nor harassment in general; basic parameters of ADA were relevant to whether employer was motivated by the alleged harassment in disciplining the employee).

alleged misconduct would subject it to liability under the relevant statute; whether the employer had previously ignored similar misconduct and/or complaints about that misconduct;[10] whether the discipline was necessary to prevent the misconduct from recurring;[11] and whether the employer promptly addressed the alleged misconduct or waited until the employee engaged in union or protected activity.[12]

II. **The Employer Unlawfully Discharged Ottino for Engaging in Section 7 Activity of Posting and Distributing Cartoons Critical of Union Leadership.**

We initially conclude that Ottino's drawing and distribution of employment cartoons constituted protected activity and were a motivating factor in the Employer's decision to discharge him. There is no dispute that posting materials critical of Union leadership is protected activity where an employer allows the posting of other,

---

[10] See Fixtures Mfg. Corp., 332 NLRB at 566 n.12 (although employer generally tolerated profanity on the work floor, it had neither received nor ignored prior complaints about language similar to that on which discipline at issue was based).

[11] See St. Pete Times Forum, 342 NLRB No. 53, slip. op. at 2 n.8, citing Baskerville v. Culligan Intern. Co., 50 F.3d 428, 432 (7th Cir. 1995). The court in Baskerville concluded that the reasonableness of an employer's steps to discover and rectify sexual harassment between employees is based on a sliding scale, with more care required in order to prevent serious, rather than trivial, forms of harassment; the employer was held not liable for the employee's harassment of co-workers by warning the employee, placing him on probation, and delaying a wage increase); Embassy Vacation Resorts, 340 NLRB No. 94, slip. op. at 5 (because three of the four alleged incidents of sexual harassment only involved comments about third persons and because Title VII does not require an employer to discharge an employee so long as it takes reasonable action to protect the complainant from continued harassment, it was implausible that the employer considered the allegations so serious that they justified immediate suspension, let alone ultimate discharge)

[12] See Phillips Petroleum Co., 339 NLRB 916, 919 (2003) (no discipline for prior incidents of alleged safety infractions until employee engaged in protected activity of trying to obtain FMLA leave).

nonwork-related materials.[13] However, an employee's otherwise protected activity may become unprotected "if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language."[14] In determining whether an employee's publication or posting of written materials loses the Act's protection, the Board considers factors such as whether the language could be considered offensive, and whether the Employer in fact considered it offensive;[15] whether the Employer retaliated only against the offensive or obscene

---

[13] See United Parcel Service, 327 NLRB 317, 317 (1998), enfd. 228 F.3d 772 (6th Cir. 2000) (employer unlawfully restricted employee's distribution of dissident union literature in area where it routinely permitted distribution of other nonwork materials); East Texas Motor Freight, 262 NLRB 868, 868 (1982) (prohibition on posting of dissident union material on bulletin board unlawful where employer allowed posting of various personal notices).

[14] Honda of America Mfg., 334 NLRB 746, 747 (2001), citing American Hospital Association, 230 NLRB 54, 56 (1977). We consider inapposite cases such as Teamsters Local 657 (Texia Productions, Inc.), 342 NLRB No. 59 (2004), which involved an employee outburst at a union meeting. The Board distinguishes cases involving published materials from those involving verbal outbursts. See Honda of America Mfg., 334 NLRB at 748 (placing offensive language in a distributed newsletter "can not be dismissed as impulsive behavior"); Southwest Bell Telephone Co., 200 NLRB 667, 671 (wearing shirts bearing offensive language not impulsive behavior).

[15] Compare Honda of America Mfg., 334 NLRB at 748 (parties stipulated that the phrases "bone us" and "come out of the closet" could be and were construed by the employer as offensive and inappropriate) and Southwest Bell Telephone Co., 200 NLRB at 671 (1972) (absent the stipulation and evidence that "Ma Bell is a Cheap Mother" shirt emblem could be, and was construed as, obscene and offensive, the conclusion that the Employer lawfully prohibited employees from wearing the shirt "might well have been different"), with American Hospital Association, 230 NLRB at 56 (ALJ discredited employer testimony that it considered language likening current managers to others who were "notable failures" to be removed from the protection of the Act).

messages;[16] and whether the employer had previously condoned materials of a similar nature.[17]

Here, we conclude that Ottino's cartoons were neither so offensive nor considered offensive to have lost the protection of the Act. First, unlike in Honda of America Mfg. and Southwest Bell Telephone Co., above, some of the cartoons were not objectively obscene or offensive.[18] Second, the Employer did not view them as such. Although some of the cartoons at issue may have been slightly more graphic than others,[19] none of them was so offensive as to

---

[16] See United Parcel Service, 234 NLRB 223, 227 (1978) (employer unlawfully interfered with the right of a group of employees who started a newspaper to voice employee concerns, often critical of the union and employer; even assuming some materials in the newsletter were sufficiently inflammatory or obscene to lose the Act's protection, those articles were "inextricably commingled" with articles and other material relating the group's protected battle for better working conditions, and the "basic thrust" of the newspaper was for a protected objective). Compare Honda of America Mfg., 334 NLRB at 748 (discharge warning was clearly directed at further use of offensive language, not protected activity, and nothing in the subsequent actual discipline suggested reprisal for protected activity); Southwest Bell Telephone Co., 200 NLRB at 671 (no evidence that the employer exhibited hostility to any activity other than the wearing of the obscene slogan).

[17] See Port East Transfer, Inc., 278 NLRB 890, 895 n.6 (1986) (employer had previously tolerated obscene graffiti); Caterpillar Tractor Co., 276 NLRB 1323, 1326 (1985) (although the display of obscene cartoons and vulgar language may not have been uncommon, employer had not tolerated insulting, obscene, personal attacks).

[18] For example, one cartoon which depicts an unidentified employee stating that Roy Rose's "presidency is based on lie after lie!" does not contain imagery or language that would remove it from the Act's protection. Likewise, a drawing of a bleeding rose stating that "They say every rose has its thorn! Too bad we got pricked by ours!" does not contain offensive or obscene imagery or language.

[19] These cartoons show Fitzpatrick's head stuck in Rose's buttocks, which suggests that Fitzpatrick is a sycophant; Rose's buttocks soiled with excrement and surrounded by flies; and Rose's lip prints on another man's buttocks.

lose the protection of the Act.[20] Indeed, the Employer had permitted not only these types of cartoons for several years, but also others that had been even more offensive.[21] Moreover, as in United Parcel Service, above, the "basic thrust" of the cartoons, which was to criticize Rose's leadership of the Union, was protected. Thus, we find that Ottino's drawing and posting of cartoons critical of Rose's leadership of the Union did not lose the protection of the Act.

The next question is whether, under Wright Line, the Employer has established that it would have discharged Ottino even absent his protected activity. We conclude that the Employer has not satisfied this burden by establishing that it would have discharged Ottino due to a concern over legal liability stemming from Rose's complaint alleging harassment and a hostile work environment.

We reject the Employer's argument that federal and state law required it to discharge Ottino as an appropriate step to prevent workplace harassment. First, Title VII of the federal Civil Rights Act of 1964[22] did not privilege Ottino's discharge, as the cartoons were not "based on" any protected category such as race or sex. Rather, all of the cartoons relate to the intraunion dispute between the two rival factions and Rose's leadership as Union President.

Second, the Massachusetts Fair Employment Practice Act[23] does not privilege the Employer's discharge of Ottino. Sexual harassment under Massachusetts law prohibits any physical or verbal conduct of a sexual nature which is found to unreasonably interfere with an employee's work performance or alter terms and conditions of employment through the creation of a humiliating hostile work

---

[20] Compare Caterpillar Tractor Co., 276 NLRB at 1325-26 (depiction of a supervisor as a grotesque, defecating animal, which also contained several expletives, were "by any reasonable standard … malicious, defamatory … .")

[21] For example, the Employer permitted a cartoon of a employee "bending over" for management showing bare buttocks, and another of an International Union and Employer representative, together in bed shirtless, suggesting they had just had sex.

[22] 42 U.S.C. Sec. 2000e et seq.

[23] Mass. Gen. Laws Ann. ch. 151B, Sec. 4 ("It shall be an unlawful practice … [f]or an employer … because of the race, color … sex, sexual orientation … to discriminate against such individual … .").

environment.[24] This standard requires that the sex-based or sexually demeaning comments or incidents be continuous and pervasive, and not single, isolated or occasional, unless extremely serious.[25] The conduct must also be objectively and subjectively offensive.[26]

Here, we would not characterize these cartoons as "sexual in nature," as they merely symbolized situations involving Rose's leadership of the Union. In fact, Rose has never claimed that he subjectively felt sexually harassed by, or that he could not discharge his duties as a result of, Ottino's cartoons.[27] Nor were the cartoons sufficiently pervasive to constitute a hostile work environment based on sex since, at most, only two cartoons could remotely be considered "sexual."[28]

---

[24] See Melnychenko v. 84 Lumber Co., 676 N.E.2d 45, 48, 424 Mass. 285 (Mass. 1997).

[25] See Tahona Core-Boykin v. Boston Edison Co., 2004 WL 855567, *5 (Mass. Super. Ct. 2004) ("The flaw in a claim based on a single event is that the underlying conduct simply does not rise to the level of conduct so pervasive as to create a 'formidable barrier to full participation … in the workplace'") (citation omitted).

[26] See Muzzy v. Cahillane Motors, Inc., 749 N.E.2d 691, 694-95, 434 Mass. 409, 411-12 (Mass. 2001).

[27] Compare Bowman v. Heller, 1993 WL 761159, *9 (Mass. Super. Ct. July 9, 1993), aff'd in part, vacated in part 420 Mass. 517, cert. denied 516 U.S. 1032 (1995) (during a union election campaign, the defendant superimposed the face of his female opponent onto pornographic photos of women and distributed the composite pictures to co-workers; despite the defendant's attempt to characterize the episode as an isolated incident, his conduct was not only severe, but pervasive because the photos targeted the plaintiff and was an unwelcome appropriation of her person, specifically her sexuality, making her reluctant to work), with Tahona Core- Boykin v. Boston Edison Co., 2004 WL 855567 (Mass. Super. Ct.) (display of clay penis not sexual harassment as, among other things, there was no evidence that the complainant was unable to report to work or discharge her duties).

[28] These are the cartoons showing Rose's lip prints on another man's buttocks and Rose's head stuck in another man's buttocks.

We also conclude that the Employer's imposition of the harshest form of discipline is further evidence that it discharged Ottino as a pretext for his protected activity. The discharge was particularly unnecessary because Rose simply told the Employer that he wanted the purportedly harassing behavior to cease, and was surprised to hear that Ottino was discharged.[29] In these circumstances, we conclude that the Employer was not sufficiently concerned with legal liability under federal or state law, and that it discharged Ottino as a pretext to retaliate against his drawing and distribution of protected cartoons.

III. **The Employer Unlawfully Discharged Merada for Engaging in Protected Activity in Opposition to the SOG and Failed to Satisfy its Wright Line Burden that it would have Discharged him to Avoid Liability for his Alleged Racial Harassment of Rose.**

The Employer has admitted that it discharged Merada, at least in part, for his activity in opposition to the SOG. We conclude that the Employer has failed to adduce sufficient evidence to show that it was sufficiently concerned with legal liability stemming from Rose's internal complaint alleging harassment that it would have taken the same action based on the racially offensive nature of his alleged conduct.

First, as with Ottino, Rose simply wanted the swastikas with their racial overtones when directed at him to cease, and was surprised to hear that Merada was discharged. Second, we find it unlikely that the Employer could have been sufficiently concerned with legal liability under anti-discrimination laws, as the swastika posting was a single incident of purported harassment.[30] Third, the swastika image would not likely fall within the category of race-based harassment. Although Rose believed that the hanging of the swastika image on a tree was a personal race-based attack because it invoked notions of the lynching of African-Americans, the image actually referred

---

[29] See Ferguson-Williams, Inc., 322 NLRB 695, 704 (1996) (complaining employee made it clear to the employer that he did not want the harassing employee fired); see also Embassy Vacation Resorts, 340 NLRB No. 94, slip. op. at 4 (complaining employee did not object to giving harassing employee another chance if he worked on a different shift).

[30] See St. Pete Times Forum, 342 NLRB No. 53, slip. op. at 2 n.8, citing Clarke County Sch. District v. Breeden, 532 U.S. 268, 271 (2001).

to Rose's dictatorial leadership of the Union. It had previously been used to similarly criticize the Employer's management of employees, such as when a swastika had been superimposed on a copy of the employee handbook. Indeed, when Rose originally complained about the swastika posting in April, the Employer did not act in accordance with its own handbook policy, which is to treat all harassment incidents, whether alleged or actual, as potential EEOC litigation. Finally, the mere threat of a letter from Rose's attorney did not give the Employer "sufficient concern" that it would face a lawsuit if it did not *discharge* Merada (or whoever posted the swastika in April), as opposed to making sure the conduct ceased.[31]

We also conclude that the Employer was not sufficiently concerned with legal liability over Merada's purported use of racial slurs like the word "nigger."[32] The month before the start of the investigation, Maher had told Employer representative Voegtlin that he had heard Merada use racial language, yet the Employer failed to conduct any investigation into this alleged conduct at that time. There is also no evidence that Merada directed racial slurs at anyone in particular, including Rose. In fact, Rose indicated in his investigatory interview that he believed Merada used racial slurs only when talking to those with whom he felt comfortable. That group did not include Rose, even if Rose was the subject of some of the slurs, and therefore such conduct is not likely to create a hostile work environment. Based on the above, we conclude that the Employer was not sufficiently concerned with legal liability stemming from Rose's internal complaint and it has not shown that it would have discharged Merada even absent his protected activity.

IV. **Employee Charette**

a. **The Employer Unlawfully Discharged Charette For His SOG Activity.**

---

[31] See Embassy Vacation Resorts, 340 NLRB No. 94, slip. op. at 5 (apprehension of a Title VII lawsuit, even where employer received an actual letter threatening legal action, was a pretext for discharge of three prounion employees).

[32] The Employer also asserts that it discharged Merada for calling an SOG volunteer a "cocksucker." We reject this defense as a pretext because, as with Charette, we conclude that the Employer had long tolerated similar profanity at the PNPS.

We conclude that protected activity was a motivating factor in the Employer's decision to discharge Charette, and the Employer has not established that it would have taken the same action in the absence of that activity. In reaching this conclusion, we agree with the Region that Charette's activity in opposition to the SOG was protected under Section 7. The Act protects union efforts to dissuade unit members from volunteering for work assignments.[33] Because this program was voluntary, we reject the Employer's argument that discouraging fellow employees from performing particular assignments is not protected activity as a breach of the contractual no-strike clause, or otherwise an unlawful interference with employees engaged in their work assignments.[34]

The Employer clearly indicated that it targeted this protected anti-SOG activity. In Versput's September 22 internal memorandum, he said that he "first concentrated on Rose and the SOG volunteers for the SOG Advisory Team."[35] These volunteers included Fitzpatrick, who the Employer viewed as having been "harassed and coerced" even though the Union only lawfully threatened to file individual bargaining charges against him for volunteering. SOG volunteer Maher later identified Charette as having made a similar threat. The Employer would have had no need to specifically interview these SOG volunteers if it did not seek to target this protected anti-SOG activity, since Rose never mentioned this activity in his complaint. The Employer also asserts that Fitzpatrick indicated that he had seen Charette "menacing" employees to discourage SOG participation by placing his hands on his hips, moving into another person's space, and looking down on them in an aggressive stance. A "menacing" manner of speaking and an "aggressive stance" do not remove this otherwise clearly protected anti-SOG conversation by Charette from the

---

[33] See Paperworkers Local 5 and 497 (Int'l Paper Co.), 294 NLRB 1168, 1171 (1989) (if a work assignment is voluntary, then a union can seek, through a threat of or actual internal union discipline, to exercise members' right to choose in a particular way).

[34] See Audubon Health Ctr., 268 NLRB 135, 137 (1983) (refusing to perform certain duties, while willing to perform others, is not protected).

[35] We thus reject the Employer's argument that "in the course of the investigation," coworkers revealed additional acts of harassment, threats, and intimidation beyond those in Rose's complaint. Rather, the Employer sought out information about anti-SOG activity.

protection of the Act.[36] Thus, the evidence shows that protected activity was "a motivating factor" in the Employer's suspension of Charette.

The Employer argues that it would have discharged Charette because of his alleged conduct of calling Maher a "selfish cocksucker faggot" in front of Entergy employees.[37] We conclude that even assuming that Charette's use of the words "cocksucker faggot" removed that particular anti-SOG conversation from the protection of the Act, the Employer's reliance on that conduct is pretextual. The workplace at PNPS was laden with the use of obscenities and Employer management also used profanity. The Employer also could not have been concerned with Rose's threatened lawsuit because Charette's purported use of those words was never a part of Rose's complaint.[38] In sum, the Employer failed to establish that it would have discharged Charette solely because of this conduct in light of Rose's threatened lawsuit.

b. The Employer Discharged Charette, who did not Voluntarily Quit Employment.

We further conclude that the Employer discharged Charette and that he did not voluntarily quit. To determine whether an employee either was discharged or voluntarily quit employment, the Board considers whether the words or actions of the employer "would logically lead

---

[36] See, e.g., Jayar Metal Corp., 297 NLRB 603, 609 (1990) (although employee was angry when protesting vacation benefits, she neither was violent nor threatened violence); Holiday Inn, 274 NLRB 687, 687 n.3 (1985), enfd. 794 F.2d 678 (1986) (employee's approaching supervisor, pointing her finger in his face, and repeatedly inquiring in an agitated manner whether she and her fellow employees were fired were insufficient to remove her from the protection of the Act).

[37] The Employer also asserts that, during the investigation of Rose's complaint, SOG volunteer Fitzpatrick provided secondhand information that Charette threatened to throw him in the trunk of a car because of his participation with the SOG. The Region, however, attributes this comment to Union Vice President Sullivan, who in fact was referring to Rose when she said, "if this were a real union, Roy [Rose] would be thrown in the trunk of his car." Thus, the Employer cannot rely on this comment to show that it lawfully discharged Charette.

[38] In fact, Rose indicated that he did not know where the Employer heard Charette's name with respect to the investigation.

a prudent person to believe his [her] tenure has been terminated."[39] Moreover, "the Board has held that the fact of discharge does not depend on the use of formal words of firing."[40]

Here, we conclude that a "prudent person" would logically believe that he or she was fired. Although the Employer specifically told each of Charette, Merada, and Ottino that they were being suspended without pay, and not discharged, the Employer acted inconsistently with its general disciplinary system. The Employer had them clean out their lockers, which it apparently had never previously required when it suspended employees. Although the Employer neither gave the employees their final paychecks nor conducted a "full body count," we conclude that requiring them to clean out their lockers strongly indicated that they were, in fact, all but formally discharged.[41] Of the three procedures normally followed when the Employer discharges someone, cleaning out the lockers is a more substantive action them the more ministerial issuance of a paycheck and ascertaining bodily levels of radioactivity for record-keeping purposes. More tellingly, cleaning out lockers is done in public view of other employees and can be, as Charette informed the Region, a humiliating experience.

c. In the Alternative, the Employer Constructively Discharged Charette.

In the alternative, even if the Employer's purported suspension of Charette was not in fact a discharge, we conclude that the Employer constructively discharged him. The Board has held that in order for an employer's conduct to amount to a constructive discharge, "[f]irst, the burdens imposed on the employee must cause and be intended to cause, a change in the working conditions so difficult

---

[39] Swardson Painting Co., 340 NLRB No. 24, slip. op. at 2 (2003), citing North American Dismantling Corp., 331 NLRB 1557 (2000), enfd. in part 35 Fed. Appx. 132 (6th[h] Cir. 2002).

[40] Hale Mfg. Co., 228 NLRB 10, 13 (1977), enfd. 570 F.2d 705 (8th Cir. 1978).

[41] Compare Lance Investigation Service, 338 NLRB 1109, 1110 (2003) (no discharge where employer's removal of employee from the schedule and invitation to see a specified management representative were consistent with discipline short of discharge).

or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activity."[42] The General Counsel need not prove that the employer "intended to cause" the employee to resign if the employer reasonably could have foreseen that its action would have resulted in a forced resignation.[43]

Under this standard, a constructive discharge generally is not found where an employer merely suspends an employee pending the outcome of an investigation into the employee's alleged misconduct.[44] However, an employer constructively discharges an employee by creating working conditions so difficult or unpleasant by imposing discipline and engaging in other conduct that it reasonably should foresee would cause an employee to resign.[45]

Here, unlike in Wolkerstorfer, we conclude that the Employer did not merely unlawfully suspend Charette pending

---

[42] Crystal Princeton Refining Co., 222 NLRB 1068, 1069 (1976).

[43] See American Licorice Co., 299 NLRB 145, 148-49 (1990) (when employee informed employer that she needed to transfer to another shift because she could not afford child care, the employer reasonably should have foreseen that refusing to grant the employee's transfer request would force her to resign).

[44] See Wolkerstorfer Co., 305 NLRB 592, 592 n.3 (1991) (no constructive discharge where two employees quit after being suspended where there was no evidence that the employer prolonged its investigation of the employees to force them to resign or engaged in conduct with respect to the suspensions that it reasonably should have foreseen would force them to resign).

[45] See Seville Flexpack Corp., 288 NLRB 518, 518-19, 542 (1988) (constructive discharge where employer arbitrarily issued a warning and, among other things, told the employee that his department was infested with union supporters and that they had already "got the number one man," who had already been discharged, and it looked like he was "the number two man," suggesting he would be discharged); Winer Motors, Inc., 265 NLRB 1457, 1469 (1982) (constructive discharge where employer issued a known prounion employee three warnings pursuant to an unlawful warning system, and employer had indicated that it planned to use that system to build cases against its employees; employee who was constructively discharged felt compelled to quit before his work record was injured by a discharge and he would be unable to obtain gainful employment elsewhere).

the outcome of the investigation, but engaged in other conduct that it reasonably should have foreseen would cause him to resign. As noted above, the Employer required Charette to clean out his locker, an action consistent with the Employer's discharge, and not suspension, procedures and practices. As in Winer Motors, Charette resigned in order to avoid a work record tarnished by a discharge. Thus, the cleaning out of a locker represented a significant step towards the termination of an employee, and we conclude that the Employer, notwithstanding its stated suspension, should reasonably have foreseen that Charette would resign in response to such an action.

In sum, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully discharged all three employees, and in the alternative unlawfully constructively discharged employee Charette, in violation of Section 8(a)(1) for engaging in protected concerted activity.

B.J.K.