

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

CONTEMPORARY CARS, INC.
d/b/a MERCEDES-BENZ OF ORLANDO
and AUTONATION, INC.
SINGLE AND JOINT EMPLOYERS

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO

CASES 12-CA-26126
12-CA-26233
12-CA-26306
12-CA-26354
12-CA-26386
12-CA-26552

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

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I. PRELIMINARY STATEMENT

On March 18, 2011, Administrative Law Judge George Carson II (the ALJ) issued his Decision (ALJD) in these cases reported at JD(ATL)-06-11. The ALJ found that Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando (Respondent MBO) and AutoNation, Inc. (Respondent AutoNation), referred to collectively herein as Respondents, violated Section 8(a)(1), (3) and (5) of the Act in various respects, during and after a successful campaign by International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) to organize the service technicians employed by Respondent MBO.

On May 16, 2011, the Acting General Counsel filed cross-exceptions to certain findings and conclusions of the ALJ and a brief in support of cross-exceptions. On June 7, 2011, Respondents filed an answering brief to the Acting General Counsel's cross-exceptions. This reply brief is limited to Section VI of Respondents' answering brief concerning the issue of whether Respondents violated Section 8(a)(1) and (3) of the Act by issuing a documented coaching to service technician Dean Catalano on October 13, 2009 because he engaged in protected concerted activities and union activities. The arguments made in Sections II through V of Respondents' answering brief are fully addressed in the Acting General Counsel's brief in support of cross-exceptions and therefore are not addressed further in this reply brief.

II. THE ALJ DECISION

In September 2009, Catalano, one of the Union's stewards [ALJD p.29, line 5; TR 545, 1143], and other service technicians discussed the fact that employee health was jeopardized because there was an employee who was using the workplace bathroom and then, without first washing his hands, used the ice and soda machines at Respondents' facility. Catalano and technician Santos contacted the Orange County Health Department about the problem and Catalano referred Respondents' manager Maia Menendez to the Health Department. [ALJD p.29, lines 5-10; TR 381-382, 553-555] Menendez then arranged for a speaker from the Health Department to address the employees, and that occurred on October 2, 2009. The speaker

gave a presentation that focused on the H1N1 flu virus, but did not specifically discuss the issue raised by Catalano and the other employees. [ALJD p.29, lines 19-20]

At the close of the presentation, the representative asked for questions. Catalano complained to the representative that she had not addressed the problem that had been raised in September, leaving the restroom without washing hands, and “that was my problem [a]nd your presentation didn’t bring up anything [about] disease caused by people not . . . using proper cleanliness after using the bathroom.” He stated that this was “not the meeting we were looking to have.” The representative suggested that Catalano raise his concern with management. Catalano responded that he had and “this is what” he got.

[ALJD p.29, lines 20-27].

On October 13, 2009, Respondents issued Catalano the documented coaching. Respondents’ counsel contends that because Catalano made his comment to a speaker from the Health Department, a third party, he forfeited the protection of the Act. Even though Catalano’s protected concerted activities formed the res gestae of Respondents’ rationale for disciplining him, the ALJ suggested, without citing any authority, that *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979) does not apply because Catalano made the comment to the Health Department speaker, rather than Respondents’ management, and his “response was neither courteous, polite, nor protected.” [ALJD p.29, line 47]

III. RESPONDENTS VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY ISSUING A DOCUMENTED COACHING TO DEAN CATALANO BECAUSE OF HIS UNION ACTIVITIES AND OTHER PROTECTED CONCERTED ACTIVITIES.

A. Dean Catalano’s conduct in discussing the personal hygiene issue with co-workers, manager Menendez and the Orange County Health Department speaker constituted protected concerted and union activity.

Catalano’s complaint to the Health Department speaker was the logical outgrowth of his earlier protected concerted complaints about health conditions on the job, which Catalano discussed with other employees, and made together with other employees to the Orange County Health Department and then related to Respondent MBO manager Menendez. *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006); *Every Woman’s Place*, 282 NLRB 413 (1986),

and cases cited therein; see also *Midland Hilton and Towers*, 324 NLRB 1141 (1997); and *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995). The Board's decisions in *Compuware Corporation*, 320 NLRB 101, 102-103 (1995), *Amelio's*, 301 NLRB 182, fn. 4 (1991) and *Salisbury Hotel*, 283 NLRB 685, 687 (1987) also support the conclusion that Catalano's comments to the Health Department official about the content of the meeting of employees were a logical outgrowth of earlier concerted complaints by him and other employees to management. The Health Department official, whose appearance had been arranged by Respondents' management to address the concerted complaints of Catalano and other employees, and who spoke to the employees at Respondents' facility, failed to address the central personal hygiene issue raised by the employees. Catalano merely complained to all present, including not only the speaker, but also his co-workers, that the presentation failed to address the personal hygiene problem. By stating that he had raised the employees' concern with management and "this is what" he got, Catalano voiced his opinion that Respondents' handling of the employees' health concerns was inadequate. His statements also constituted union activity in view of his role as one of the Union's stewards.

Respondents inaccurately assert, with respect to Catalano's comment at the October 2, 2009 group meeting, that "there was nothing about it that even remotely suggested that he was speaking on behalf of or acting in concert with anyone but himself." See Respondents' answering brief at page 41. However, the record clearly contradicts Respondents' mischaracterization of the evidence. As the ALJ found at the October 2, 2009, meeting Catalano complained to the Health Department representative that she had not addressed the problem that had been raised in September, leaving the restroom without washing hands, and Catalano then told the representative that this was "not the meeting **we** were looking to have." [emphasis added] [ALJD p. 29, ln. 21-25] Thus, Catalano made evident that he was speaking on behalf of a group of Respondents' employees and was engaged in concerted activity.

Moreover, the fact that Catalano's complaints were made at the meeting of employees called by Respondents to address health concerns that affected not only himself, but the other employees, further establishes that Catalano's statements at the meeting constituted concerted and protected activity. *Talsol Corporation*, 317 NLRB 290, 317 (1995), *enfd.* 155 F.3d 785 (6th Cir. 1998). In *Whittaker Corp.*, 289 NLRB 933 (1988), the Board explained that concerted activity can be inferred from the circumstances. In that case, the employer held group meetings to announce that employees would not receive annual wage increases. *See Id.* at 933. During one of the meetings, an employee, who had not consulted with other employees prior to the meeting, complained about the employer's decision. *Id.* In its decision finding the employee's complaints to be concerted protected activity, the Board explained that a concerted objective can be inferred from the circumstances, and noted that the employee had phrased his complaint in terms of "we" and "us." *Id.* at 934. The Board found that the employee's statement was the initiation of group action and concluded that the employee was engaged in concerted activity. *Id.* *citing Meyers //*, 281 NLRB 882 (1986); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964). Similarly, in this case, as found by the ALJ, Catalano voiced his complaint in terms of "we" and it constituted protected concerted activity.

B. Dean Catalano did not lose the protection of the Act by addressing his comments to a speaker from the Orange County Health Department, a third party.

Despite Respondents' assertion, Catalano did not lose the protection of the Act by protesting directly to the Health Department official. The Board has repeatedly held that employees may, with the protection of Section 7, communicate with third parties about matters relating to an ongoing labor dispute. *Kentucky Electric Steel Acquisitions*, 346 NLRB 185, 188 (2005); *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). *See also Sacramento Union*, 291 NLRB 540 (1988), and cases cited therein, particularly including *Emarco, Inc.*, 284 NLRB 832 (1987), and *Mitchell Manuals, Inc.*, 280 NLRB 230 (1986). The caveat in these cases is that the communication not be so disloyal, reckless or maliciously false as to remove the employees from the protection of the Act. The record here

establishes that Catalano's communication was not false, nor was it reckless or so disloyal as to remove it from the protection of the Act.¹

Moreover, the Board, with court approval, has long recognized the right of employees to express disagreement with their employer's views during captive audience meetings, as long as the conduct does not involve either "violent conduct, improper motive, or bad faith," or a "planned course of misconduct to disrupt the captive audience speeches in an attempt to turn the meetings into a union forum." See *F W. Woolworth*, 251 NLRB 1111, 1114 (1980), *enfd.* 655 F.2d 151 (8th Cir. 1991), *cert. denied* 455 U.S. 989 (1982), *citing J.P. Stevens & Co.*, 219 NLRB 850 (1975), *enfd.* 574 F.2d 792 (4th Cir. 1976); *AMC Air Conditioning*, 232 NLRB 283 (1977); *Farah Manufacturing Company, Inc.*, 202 NLRB 666 (1973). No such misconduct is present in this case.

Respondents also argue that "Catalano was expressing his personal frustrations over the extent of the information provided" at the meeting and that "[i]t was for that outburst alone that he received his coaching." See Respondents' answering brief at page 41. However, service manager Menendez wrote, in the last paragraph of GC Ex 141, "[i]t certainly was not appropriate of him [Catalano] to treat the presenter in such a hostile manner, and **at the same time attempt to belittle my efforts in providing an opportunity to discuss hygiene concerns.**" [emphasis added] Hence, Menendez made it clear that at least part of the basis for Catalano's coaching stemmed from his criticism of her (Respondents') failure to properly address the employees' health concerns.

Finally, there is no evidence that Respondents had a work rule that requires employees to be courteous, respectful or polite to all associates, managers, customers and guests of the dealership, or prohibiting the reduction of harmony and compatibility on the team – the basis for

¹ After the October 2, 2009 group meeting held at Respondent MBO's facility, Catalano wrote a letter, dated October 13, 2009, to the Health Department explaining the personal hygiene problems employees were experiencing at the workplace and the reason why he spoke up at the group meeting. Catalano noted in the letter that, after the group meeting, Respondents were seeking to reprimand him for trying to make the work environment a safer place. [GC Ex 171] Respondents' counsel mischaracterizes Catalano's letter to the Health Department as a letter of apology. However, nowhere in Catalano's letter does he apologize, nor was there any need for him to apologize for his conduct at the group meeting.

issuance of the disciplinary coaching to Catalano. See ALJD p. 29, ln. 29-33; GC Ex 93. If Respondents had such a rule, it would be overly broad because it would prohibit protected concerted complaints about wages, hours of work or other terms and conditions of employment that might be viewed as reducing harmony and/or compatibility. *Ridgeview Industries, Inc.*, 353 NLRB 1096, 1111-1112, fn. 69 (2009) (rule prohibiting employees from engaging in behavior designed to create discord or lack of harmony is overly broad); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (rule prohibiting “derogatory attacks” is overly broad).

C. The documented coaching was not *de minimis* and constituted discipline.

Respondents’ counsel contends that the coaching discipline that Respondents issued to Catalano on October 13, 2009 was *de minimis* because, as the ALJ noted, “[t]he coaching states that it will not be a part of the employee’s permanent record...” However, the ALJ also found that the documented coaching further points out that it “will be retained in a local file by the service manager.” [ALJD, p. 29, ln. 31-33; GC Ex 93] Respondents’ counsel then argues that, because of the alleged *de minimis* nature of the documented coaching issued to Catalano, it does not constitute discipline. In this regard, paragraph 42(b) of the Consolidated Complaint alleges that “[o]n or about October 13, 2009, Respondents issued a ‘documented coaching’ **discipline** to their employee, Dean Catalano.” [emphasis added] [GC Ex 1(uu)] In their Answer to that Complaint allegation, Respondents admitted that Catalano was issued a “documented coaching” on October 13, 2009, and did not deny that it constituted discipline. [GC Ex 1(kkk) and GC Ex 1(jjj)]

Premised on the argument that Respondents’ issuance of a documented coaching to Catalano did not constitute discipline, Respondents’ counsel further asserts that Respondents’ action cannot give rise to liability under Section 8(a)(1) and (3) of the Act. In support of that contention, Respondents’ counsel cites *Lancaster Fairfield Community Hosp.*, 311 NLRB 401, 403-404 (1993) (finding that a “warning” issued to an employee was not “formal discipline,” and thus did not affect “any term or condition of employment” within the meaning of the Act) and *Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB No. 96 (2010) (verbal directions did

not constitute disciplinary action sufficient to support a violation because they were excluded from the employer's progressive disciplinary system).

Board law is clear that verbal counselings or warnings constitute disciplinary action sufficient to support a violation of Section 8(a)(1) and/or (3) where they “are part of a disciplinary process in that they lay ‘a foundation for future disciplinary action against [the employee].” *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), *enfd. in rel. part* 206 Fed.Appx. 405 (6th Cir. 2006), *cert. denied* 127 S.Ct. 2033 (2007). The Board has also held that a documented coaching reflecting an employee’s violation of important company policies, and his counseling therefor, can have an adverse consequence or effect on the employee's terms and conditions of employment and “may be a foundation for future disciplinary action.” *Trover Clinic*, 280 NLRB 6, 16 (1986) (Board determined that an oral reprimand served as the foundation for future disciplinary action). See also *Funk Mfg. Co.*, 301 NLRB 111 (1991), where a manager had given an employee who was observed distributing union literature while off duty in a non-work area entranceway a “casual reminder” and told the employee a second offense would result in an “oral reprimand and something for the file,” and the Board determined that the verbal warning fell within the company's formal disciplinary program.

The evidence in the instant case shows that part of Respondents’ progressive disciplinary process includes documented coachings. In particular, R Ex 54 contains several disciplinary notices issued to Respondents’ employees, including “corrective action records” and “documented coachings.” Indeed, the last five documents of R Ex 54 are three documented coachings and two corrective action records issued to employees. On January 21, 2010, Respondents issued a documented coaching to Lynn Goetz, warranty administrator, Russ Kuchenbrod, service administrator and Emile Shaw, booker/flagger. Each of those documented coachings state that “[t]here has been a breakdown in communication and negativity within your department. You have been counseled on this issue and it has continued to happen.” The documented coachings further state that “[f]ailure to improve your level of professionalism will

lead to disciplinary action up to and including termination.” Thus, Respondents use documented coachings as a basis for more severe forms of discipline.

Also on January 21, 2010, Respondents issued a written warning to Shaw and Erica Stephenson, cashier. All of Respondents’ corrective action records contain a question, in section 5, which asks “Has associate been counseled previously?” That same section also contains an area for Respondents to note the last three dates on which the employee had received counseling and by whom. Stephenson’s written warning of January 21, 2010 shows that she had received a recent counseling on January 8, 2010, which logically served as a predicate for the written warning of January 21, 2010. Although Respondents contend that documented coachings may be purged or expunged from the employee’s record after about a year, the record shows that counselings issued well over a year earlier may also serve as a predicate for future disciplinary action. In particular, GC Ex 183 reveals that, on February 18, 2008, Respondents issued a “final warning/suspension option” discipline to Alex Aviles after having counseled him on three prior occasions dating as far back as June 8, 2006. Hence, Respondents’ counselings, which include documented coachings, reasonably lay a foundation for future disciplinary action against its employees.

The facts of this case are distinguishable from both of the cases cited by Respondents. Here, the documented coaching issued to Catalano corresponds to the initial step of Respondents’ formal disciplinary process. Unlike the facts in *Lancaster* and *Altercare*, where there was no evidence that the warning issued by the employer was “part of the [employer’s] formal disciplinary procedure or ... even a preliminary step in the progressive disciplinary system,” 311 NLRB at 403-404, here record evidence supports the finding that, as in *Trover Clinic*, Respondents’ documented coachings form the “foundation for future disciplinary action.” Accordingly, Respondents cannot escape the conclusion that the documented coaching they issued to Catalano on October 13, 2009 constituted discipline and laid a foundation for future discipline against Catalano.

IV. CONCLUSION

Counsel for the Acting General Counsel submits that for the above reasons, and for the reasons discussed at pages 38 to 44 of Acting General Counsel's Brief in Support of Cross Exceptions, including the *Atlantic Steel* analysis discussed at pages 42 to 44 of that brief, Respondents' issuance of a documented coaching to Catalano violated Section 8(a)(1) and (3) of the Act. Thus, the ALJ erred by recommending dismissal of the allegation that Respondents violated Section 8(a)(1) and (3) of the Act by issuing a documented coaching to Dean Catalano because of his union and protected concerted activities.

For the reasons set forth in this brief and the Brief in Support of Cross Exceptions, Counsel for the Acting General Counsel respectfully requests that the Board grant the Acting General Counsel's cross-exceptions and modify the ALJ's findings of fact, conclusions of law, recommended remedy and Order accordingly.

DATED at Tampa, Florida this 21st day of June, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that **ACTING GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** in Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando and AutoNation, Inc., Cases 12-CA-26126, 12-CA-26233, 12-CA-26306, 12-CA-26354, 12-CA-26386 and 12-CA-26552, was electronically filed and served by electronic mail as set forth below on the 21st day of June 2011.

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