

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

E.I. DuPONT de NEMOURS & CO., INC.

and

Case 03-CA-090637

UNITED STEELWORKERS, LOCAL 6992

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

I. PROCEDURAL HISTORY

Administrative Law Judge Steven Davis (“ALJ”), heard this matter on April 15, 2013. The complaint alleged that E.I. DuPont De Nemours & Co., Inc. (“Respondent”) violated Section 8(a)(1) of the Act by denying the request of its employee Joel Smith to be represented by United Steelworkers, Local 6992 (“Union”) during an interview which began on May 24, 2012, and continued on June 1, 2012. The complaint alleged that Smith had reasonable cause to believe that the interview would result in disciplinary action being taken against him. The complaint further alleged that Respondent proceeded with the interview of Smith even though Respondent denied Smith’s request for union representation. Lastly, the complaint alleged that Respondent terminated Smith for conduct he engaged in during the interview. In addition to the traditional remedy of a notice posting, the complaint sought a make-whole remedy for Smith because Smith was terminated for conduct he engaged in during the unlawful interview.

On August 26, 2013 the ALJ issued a Decision and Recommended Order (“ALJD”) finding that Respondent violated Section 8(a)(1) of the Act, as alleged. The ALJ determined that a cease and desist order was the appropriate remedy for the violation. (ALJD at 16). The ALJ denied the Acting General Counsel’s request for a make-whole remedy for Smith. (ALJD at 15).

II. PRELIMINARY STATEMENT

The Acting General Counsel excepts to the ALJ's determination that Smith is not entitled to a make-whole remedy as a result of Respondent's violations of Section 8(a)(1) of the Act. In failing to grant a make whole-remedy to Smith, the ALJ misapplied legal precedent and refused to accord any weight to advice memoranda that provided valuable guidance in the absence of the Board's prior consideration of the issues raised in the instant proceeding. Had the ALJ appropriately applied legal precedent and other instructive guidance, he would have concluded that Smith was entitled to a make-whole remedy as a result of Respondent's violations of Section 8(a)(1) of the Act.

III. FACTS

Respondent operates a factory in Tonawanda, New York ("Yerkes Plant") where it produces Tedlar film and Corian countertops. (Tr. 155, GC Ex. 1[c, d]). The Union represents the production and maintenance employees employed at the Yerkes Plant. (Tr. 17).

Joel Smith was hired by Respondent as a production employee in September 2005, and worked primarily as an operator in the Tedlar special products division (hereinafter "SP") until his termination in 2012. (Tr. 53, 96). As an operator in SP, Smith processed a liquid mix into film. During the process, the mix is subjected to numerous temperature changes, and then dried by being run through a series of wipers and treated with a chemical (DMAC). This produces a film which is run through an oven and then stretched out. Upon exiting the oven, the film enters the wind up area, where typically three or four operators usher the film through a series of rollers, knives and wipers that are used to complete the production process. The operators are responsible for dropping knives that trim the sides of the film. The removed trim is often wet after going through the heating process. An operator stands in a "trim pit," located underneath

the area where the trim is removed from the film, to ensure that the wet pieces of trim are properly sucked into a vacuum tube. There are two sets of three stairs located on either side of the trim pit. (Tr. 25-30).

There are occasions where the production process does not run smoothly and the film snaps or breaks. This can result from oil drips, improper temperatures, excess condensation on the film, or film wrapping around chains on the production line. Operator error is rarely, if ever, the cause of malfunctions in the production process. When the film breaks, an audible alarm is triggered. When that occurs, operators at both ends of the wind up area “hustle” to the location of the break to remedy the problem. (Tr. 30-32, 35).

Smith’s 2011 Injury

In May 2011, Smith slipped on a wet floor at work, injuring his chest and knee. He reported the injury, and Respondent’s safety specialist Cheri Park interviewed him. Smith did not request union representation. Smith was subsequently issued a discipline as a result of this incident. (Tr. 50-53; 125-127, 222-223, GC Ex. 2).

Smith’s 2012 injury

In September 2011, Smith was loaned from SP to work on the Tedlar oriented line as a wind-up operator. The job functions of a wind up operator are entirely different from the job functions of an SP operator. Smith completed a three-to-four month training to learn the skills necessary to be a wind-up operator. Following the training, Smith was transferred back to SP. Outside of training, Smith served as a wind-up operator on only two or three occasions for no more than 45 minutes at a time. (Tr. 54-55, 96-97).

Despite receiving no additional training, Smith was reassigned to work as a wind-up operator on the oriented line. His first shift began at 7:30 p.m. on May 23, 2012. Smith

expressed concerns to supervisor Michael Szymanski about working the line without further training . Those concerns were ignored. (Tr. 56-59, 106-107, 161).

The record reflects, and the ALJ found, that May 23, 2012 was a difficult night on the line, with the film snapping an inordinate number of times, which required Smith to descend into the trim pit on numerous occasions to inspect the film. (ALJD at 3). At about midnight, while Smith was in the pit, the film snapped. Smith quickly attempted to ascend the stairs to attend to the problem. The ALJ found that Smith slipped on the first step, threw his hands forward to break his fall, and hit his knee on the stair. (ALJD at 3). Smith continued to work, and soon noticed blood coming from a small cut on his arm. After using gloves he was wearing to wipe off the blood, Smith went to Szymanski's office. Szymanski was not there, so Smith went to the break room and placed a band aid over the cut. After speaking with co-workers Dave Reister and Tim Eberle about his injury, Smith returned to Szymanski's office. By this point, his knee was hurting. Smith saw Szymanski, and told him that he had hurt his knee, and that it was swollen and throbbing. Szymanski noted the band aid on Smith's arm. Szymanski inspected Smith's knee, saw no swelling, and retrieved an icepack for his injured subordinate. As Smith applied the icepack, for the first time, he felt severe pain in his shoulder. He moved the icepack from his knee to his shoulder and told Szymanski that his arm hurt more than his knee. Szymanski asked Smith if he wanted to go to the hospital. Smith initially declined, but thirty minutes later, as the pain in his shoulder increased, Smith opted to go to the hospital. (Tr. 64-67, 69-70, 100-101, 103-105, 163-166; CP Ex. 2).

Immediately after Smith left for the hospital, Szymanski investigated the cause of Smith's injury. He inspected the stairs where Smith fell for blood or a slippery substance, and found none. Szymanski also telephoned his boss, Area Superintendant Barb Pilmore, and

informed her of the accident, the nature of Smith's injuries, and that Smith had gone to the hospital. Pilmore, who did not testify at the hearing, testified at Smith's Workers' Compensation hearing that Smith's injury "was suspicious to me because it was exactly the way he described an injury that happened to him a year before, so I immediately was suspicious about it just because of the way the injury was described to me." The record reflects that both Pilmore and Dominic Cavaretta, Smith's former supervisor, expressed suspicions about Smith's injury to Szymanski. (Tr. 167-169, 203-204; GC Ex.4, Day Two, p. 25, 27).

Smith, still in severe pain, returned from the hospital at about 5:00 a.m. Szymanski picked him up at the front gate of the plant, and the two discussed how the injury occurred. Szymanski's notes of that conversation indicate that Smith said he was injured when he slipped on the stairs when responding to an alarm. The notes further indicate that Smith stated that he was working with the vacuum roll when the alarm went off, and that he slipped on the stairs because he was standing on wet film. The ALJ appropriately determined that this conversation was part of Respondent's investigation into the incident. (ALJD 4; Tr. 73, 108-109, 170; CP Ex. 2).

Szymanski directed Smith to report to the medical office at the Yerkes Plant. There, he spoke with the receptionist, Shannon Thomas,¹ and the nurse on duty, Charlene Hanson. Hanson asked Smith about his shoulder, and performed various range of motion exercises to determine the extent of the injury. During the course of the conversation, Smith was asked how he had fallen, and if the floor where he fell was wet. Smith replied that he did not recall what had occurred. Smith did state that throughout that difficult shift, there were times that trim with

¹ At Smith's workers compensation hearing, Thomas testified that it is Respondent's policy that all employee injuries are "alleged until proven." (Tr. 270; GC Ex. 4, Day Two, p. 6).

DMAC may have been on the floor.² Hanson then had Smith call the orthopedic surgeon.³ After that phone call, Hanson told Smith that Respondent's safety specialist Cheri Park wanted to meet with him.⁴ The record gives no indication that Smith was informed of the subject matter of the meeting. (Tr. 76-77, 111-113, 128, 132).

The record reflects that Szymanski also spoke with both Reister and Eberle about their recollections of Smith's accident. Reister confirmed that it had been a difficult night on the line, and did not recall whether Smith was in the trip pit with him. Eberle told Szymanski that he had talked to Smith, and that Smith had told him that he had bad knees. (Tr. 194).

The initial unlawful interrogation

At approximately 7:30 a.m., after more than 12 hours of work, an exhausted Smith reported to a conference room for, what he was told, was a meeting with just safety specialist Park. Smith wanted to get home.⁵ When Smith entered the room, Park, Szymanski and Area Superintendent Pilmore were present. Smith was immediately uncomfortable because he felt ganged up on, and because he had previously been disciplined as a result of a meeting with Park. (Tr. 75-77).

The ALJ correctly found that Smith immediately requested the presence of a union representative. (ALJD at 12). The ALJ further found that despite this request, the interview continued without the presence of a union representative. (ALJD at 12). Park asked Smith

² The record contains notes purportedly taken by both Thomas and Hanson regarding their conversations with Smith. Thomas' notes indicate Smith stated that "the place was soaked" and that "water was everywhere." Hanson's notes provide no indication that Smith made any such statement, or that there was even any discussion about whether the floor was wet. Neither Thomas nor Hanson testified at the hearing. (CP Ex. 3).

³ Less than a week after the injury to his shoulder, Smith visited the orthopedic surgeon, who, after conducting an MRI, recommended surgery. The surgeon further told Smith that he should not work. Smith has yet to schedule that surgery because the Employer is denying his workers compensation claim. (Tr. 83-84).

⁴ Park learned about the accident from Pilmore the morning of May 24 at approximately 7:00 a.m. (Tr. 224).

⁵ Smith is a diabetic, and as such has to take medication every morning between 6:00 a.m. and 8:00 a.m. Failure to take the medication results in Smith feeling uncomfortable, shaky and antsy. Smith was unable to take his medication prior to this investigatory meeting. (Tr. 78).

numerous questions, in rapid-fire fashion, about the circumstances surrounding his injury, including: how the line was running, where the injury occurred, what he was doing when the injury occurred, if anyone had seen him fall, if he was wearing appropriate protective gear, whether the floor was wet, whether the floor was dry, if he had slipped on film, whether his shoes were wet, and if he had used the hand rails.⁶ On several occasions, Park asked the same question to Smith in various ways, a tactic which Smith believed was designed to trick him. Smith answered each question the best he could, but expressed frustration because he felt as though he was answering the same question repeatedly. After Smith answered each question, Park wrote the answer on a flip chart. Smith also observed Park taking notes. Shortly after the questioning began, Smith stated that his shoulder was pounding, that he was in a lot of pain, and wanted to go home. In response, the interrogators told him that he was getting paid for his time. Park claimed that the interviewers were wholly unaware that Smith had suffered an injury, and that Smith never complained about any pain or discomfort, despite the fact that the record clearly reflects that Smith had just suffered a serious shoulder injury. The lengthy interrogation session lasted until about 9:00 a.m. Smith was not offered a break at any time during the interrogation. (Tr. 77-82, 115-118, 173-176, 240, 244; R. Ex. 2).

The flip chart notes taken by Park during the session were condensed into a summary document by Respondent's safety, health and environmental manager Sharon Laskowski, and the notes were then thrown out. The summary document does not reflect any of the questions that were asked by Respondent's representatives during the interrogation session. Rather, the summary document merely contains a summary of Smith's answers to the questions. The summary document illustrates that, during this initial interrogation, Respondent learned from

⁶ According to Szymanski and Park, Pilmore asked most of the questions and Park wrote the answers on a flip chart. According to Park, the only questions she asked were for purposes of clarification. (Tr. 174, 234).

Smith that there had been numerous breaks leading up to Smith's injury; that Smith helped change the wipers; when leaving the trim pit Smith slipped; that there was possible wetness from the trim on Smith's shoe; the floor was dry but that wet film may have been on the floor;⁷ that Smith used his arms to catch himself; that after the injury Smith noticed blood on the film dripping from his arm; that he reported the incident and the pain in his knee to his supervisor; that he showed his supervisor his knee, which was throbbing; that he placed ice on his knee initially, and then moved it to his shoulder; and that he experienced pain in his shoulder right after he received ice for his knee. The summary document further indicates there was some discussion regarding the relative newness of Smith's shoes. (Tr. 228-231; CP Ex. 3, R. Ex. 2).

Smith's pain had not subsided by the end of the meeting. When he left the meeting, he went straight home, took his diabetes medication, and went to bed.⁸ He returned to work on light duty his next scheduled shift that evening.⁹ (Tr. 83).

Respondent continues its investigation

At 5:08 p.m. on May 24, Laskowski e-mailed Park and Pilmore, stating that she had reviewed the summary notes of the May 24 interview, Szymanski's notes of his interactions with Smith after the injury, and Thomas' and Hanson's notes of Smith's visit to the plant medical office. Based on that review, Laskowski suggested "follow up" interviews with Smith and the members of his shift crew. Laskowski wanted to know from Smith the following: why he did not report the incident sooner, where he got the band aids from, information on his shoes, if he used the hand rails, and whether Smith was wearing appropriate protective gear. Laskowski wanted to learn the following from the crew members: surface conditions at the time of the

⁷ Smith testified that he told the interrogators that at times during the night the floor was wet, but was unsure if it was wet at the time he suffered his injury. (Tr. 117).

⁸ The record contains video evidence illustrating that Smith left the facility at 9:00 a.m. (Tr. 145; CP Ex. 1).

⁹ As a result of his injuries, Smith simply sat in the break room for that shift and every shift thereafter until he was terminated. (Tr. 83, 85)

accident, whether Smith was wearing a band aid at the start of his shift, and if there were any witnesses to the accident. (CP. Ex. 3).

At approximately 7:30 p.m. on May 24, Pilmore and Park interviewed Eberle, Reister and Craig Moeller about Smith's accident. Reister was asked about the condition of the floor at the time Smith fell, about the presence of any puddles or tripping hazards, about whether there was wet trim on the floor, if he had seen Smith fall, if he had seen bleeding from Smith's arm, if he saw Smith show his knee to Szymanski, if Smith had left the work area at any time, and whether Reister had observed anything else. The notes taken by Respondent illustrate that Reister confirmed almost every aspect of Smith's recollection of events (with the lone caveat that Reister did not see Smith fall). Reister said that it was a "brutal" night on the line, and that, throughout the night, there was wet trim on the floor of the trim pit. He noted that Smith was having a "hard time," was sweaty and exhausted, and as a result, Reister provided him with a lot of assistance, and, in fact, believed that Smith was not qualified to perform the work he was doing. After midnight, when the line started back up, and shortly thereafter, he saw Smith standing in the doorway catching his breath, and Smith told him that his knee felt like it was five times the size it should be, and that he could not find Szymanski. Reister did not see evidence of injury at that time, but Respondent's notes of the interview provide no indication that Reister inspected Smith's injury. (Tr. 68, 232, 236, 244-245; GC Ex. 7).

Neither Eberle nor Moeller provided much information. Eberle informed Park and Pilmore that he witnessed Smith limping, and that Smith told him that he had a bad knee. Moeller confirmed that he assisted Smith with a wiper change prior to the injury for about five minutes. (GC Ex. 7).

At some point after May 24, Laskowski typed up the flip chart notes from the Smith, Reister, Eberle and Moeller interviews. After reviewing those summaries, Laskowski was “concerned” about the tread on Smith’s shoes, Smith’s bleeding, and generally wanted a more detailed summary of what had occurred the night of the accident. Laskowski called Pilmore and requested a meeting with Smith. (Tr. 261-262).

The second unlawful interrogation

On June 1, Respondent called Smith into a second investigatory meeting attended by Laskowski and Pilmore. The ALJ correctly determined that the June 1 meeting was a continuation of the May 24 meeting. (ALJD at 13). Smith chose not to request a union representative for this meeting because he had been denied a representative at the previous meeting, and he did not think Respondent would allow him one at this session either. Respondent did not offer Smith the opportunity to have a union representative present at the meeting. (Tr. 84-86, 120, 129, 261, 265).

Laskowski asked the majority of the questions for Respondent at the meeting. At the outset of the meeting, Laskowski stated (untruthfully) that she had not talked to Park about the incident. Laskowski asked Smith many of the same questions he had already been asked by Park regarding the circumstances of Smith’s injury. However, unlike Park, Laskowski also asked Smith numerous questions about the glove Smith had used to wipe blood off of the film. Laskowski questioned Smith’s handling of the bloody glove. She asked him if he knew he should have placed the glove in a biohazard bag, why he had not placed the glove in a biohazard bag, and where he had put the glove after removing it. Laskowski asked these questions several times, using different phraseology each time. Smith answered each question the best he could. In sum, Smith told Laskowski that once he realized he was hurt, he was not thinking about the

proper procedure for disposing of the bloody glove. Laskowski also asked Smith specifics about the personal protective equipment that he was wearing. The interview lasted about an hour. (Tr. 86-88, 121-122, 264, 266).

Toward the end of the interview, Szymanski entered the room and was told to go look for Smith's butyl sleeve that he had discarded and to look at the shoes worn by Smith at the time of his injury. While Szymanski was able to find a sleeve with a tear similar to that described by Smith where Smith had discarded his sleeve, Respondent concluded that it was not Smith's sleeve. Szymanski found the shoes in Smith's locker. Though Szymanski testified that the shoes were new, and did not appear to be "slippery," he acknowledged that if Smith's shoes had been wet or damp from DMAC, the chemical released as a result of the film breaks on May 24, his shoes would have dried by June 1. (Tr. 179, 190-191, 209-210, 263-265).

Shortly after the interview, Laskowski wrote an e-mail to Respondent's human resources manager Anthony Casinelli and Pilmore purporting to summarize the meeting. Laskowski indicated that she had asked Smith about whether he knew there were hand rails in the trim pit (Smith did not recall), if he had used the hand rails when he had fallen (Smith said that he probably had not), and if anyone had seen him fall (Smith did not know).¹⁰ Laskowski further indicated that she asked Smith to describe how he had fallen (Smith stated that his foot was probably wet from standing on wet film), and asked if he had landed on his shoulder (Smith did not recall). Laskowski pointed out that "Joel confirmed the floor was not wet from the water. I asked him several times...Joel indicated he was sweating profusely but water was not on the floor." Laskowski also noted that "Joel did not offer that his arms were extended when he fell...or that he caught himself." Laskowski then indicated that the two then discussed the report

¹⁰ This is consistent with Smith's testimony that he did not know if anyone else was in the trim pit when he fell. (Tr. 98).

of blood. Laskowski wrote that Smith said that he had been cut through his sleeve, and that he did not know where the sleeve was because he had ripped it off after coming out of the trim pit. Laskowski further wrote that Smith said that he saw blood on the film and he used his glove to wipe it off. Smith indicated that he probably threw that glove out. Laskowski asked Smith why he did not report the incident right away, and that Smith said that after he cleaned the blood, he tried to find Szymanski right away and was unsuccessful, so he went to get band aids. (GC Ex. 9).

Notably, Pilmore quickly responded to that e-mail in order to “highlight a couple of oddities” regarding her perception of the interview. Pilmore noted that Smith never previously mentioned that he had worn butyl sleeves, or that the sleeve had torn during his fall. She also noted that Smith’s recollection of the task he was performing at the time of the fall (pulling bad film off a good roll) had changed from his the initial meeting (removing wrap from a vacuum roll). She concluded the e-mail by stating that the inconsistencies were “nothing big” but that they represented “a couple more things that just don’t make sense.” It was evident to Laskowski, after reading Pilmore’s e-mail, that Pilmore had some concerns about the information provided by Smith at both the May 24 and June 1 meetings. (Tr. 268; GC Ex. 9).

The third investigatory meeting

Respondent called Smith into a third investigatory meeting on June 11. Present for Respondent were Szymanski and Manager Paul Szulist.¹¹ Also present was union representative Mark Khoury. (Tr. 89-90, 125).

Szulist took the lead for Respondent during the meeting. He immediately started comparing Smith’s answers from the May 24 and June 1 meetings, and pointing out alleged

¹¹ Szulist did not testify at the hearing. Szymanski testified that he played no role in the preparations for the meeting. (Tr. 191).

discrepancies in his answers. Szulist's notes of the meeting reflect that Respondent confronted Smith with nine groupings of questions, several of which clearly question the validity of several of Smith's statements made during the May 24 and June 1 interrogations. (Tr. 90-91, 181-182; GC Ex. 6).

Szulist questioned Smith about whether he had band aids on prior to the accident, and compared Smith's explanation from the June 1 investigatory meeting (that he applied a band aid after the fall) to other witness statements. Using the information Smith provided to Respondent during the May 24 and June 1 interrogations, Szulist questioned Smith about how he initially discovered that he was bleeding on his arm, and his actions after seeing the blood on the film. Szulist questioned Smith about alleged inconsistent statements regarding what he was doing at the time of the accident.¹² (GC Ex. 6).

Szulist asked Smith about the time lapse between the time he saw the blood on the film and the time he notified Szymanski. Smith had already provided these explanations during both the May 24 and June 1 interviews. Szulist asked Smith about his use of handrails at the time of his fall, a question Smith had specifically responded to during the June 1 interview. Szulist further questioned Smith about the condition of the floor at the time of the accident. Smith had provided this information to Respondent during both the May 24 and June 1 sessions. (GC Ex. 6).

The notes of the meeting end with a "conclusion" which states, in part, "[w]hen challenged with discrepancies of previous statement [*sic*] made during initial investigations, [Smith] stated that he was unsure of which statement was the correct one." (emphasis added). (GC Ex. 6).

¹² Question #5 on the notes specifically reads "Initially, you stated that you were pulling film off of the vacuum roll. Later you stated that you were moving bad film from a good roll. What were you really doing at the time of the incident?" (GC Ex. 6).

The ALJ failed to note in the ALJD that during the meeting, Khoury took notes and took an active role in questioning Szulist as to why the band aid issue was so important. (Tr. 90-91).

Smith is terminated

After the June 11 meeting, Pilmore contacted employee relations superintendant Conni Krysiak and recommended that Smith be terminated due to a “serious act of misconduct.” Pilmore produced a written presentation, called a “staff review,” intended to support her recommendation.¹³ The staff review states that the primary reason for the termination recommendation was “[d]uring the investigation, there were multiple inconsistencies, both Joel’s own description of the event and based on information from his coworkers and supervisor.” The staff review further states that the information relied upon was collected from the initial interview with Smith on May 24, the two follow-up interviews conducted on June 1 and June 11, and additional interviews with other parties. The staff review lists seven alleged inconsistencies, many of which Respondent learned from questioning Smith at both the May 24 and June 1 investigatory interviews, including: which gloves Smith used to wipe the blood away and what he did with those gloves; inconsistencies regarding whether there was anyone with Smith in the trim pit at the time of his fall; inconsistencies regarding what roll of film Smith was working with at the time of the accident; whether Smith was standing on wet film or whether the floor was wet; and the manner in which Smith fell. (Tr. 280-285, 301-302; CP Ex. 2, R. Ex 2, GC Ex. 9).¹⁴

¹³ Krysiak proofread the staff review, but had no input as to its content. Further, Krysiak did not attend either the May 24 or June 1 Smith interviews, and had no knowledge of the content of those interviews beyond the alleged summaries of those meetings created by Respondent. Krysiak did not know the specific sources Pilmore consulted in creating the staff review. Pilmore, who would presumably have definitive knowledge as to what sources she utilized in making her recommendation, did not testify at the hearing. (Tr. 301-305).

¹⁴ In a June 22, 2012 response to a Union information request, Krysiak stated that the discrepancies included: Smith’s statement that he cut his arm during the fall and applied band-aids he had in his lunchbox, the alleged injury and swelling in Smith’s knee, the alleged bleeding and Smith’s response, Smith’s statements about who he was with and what he was doing at the time of the alleged incident, Smith’s statements about how the fall occurred, and the

Pilmore's termination recommendation was adopted by Respondent. Krysiak testified that Smith was terminated because "there were so many discrepancies in his story that [Respondent] couldn't figure out what happened or if anything happened." (Tr. 284, 294).

Within a day or two of the June 11 meeting, Krysiak informed Smith, without explanation, that he was not to report to work until further notice. A few days later, Smith was informed by Pilmore and Krysiak that he was terminated for falsification of documents. Krysiak testified that Smith was terminated because "he didn't give complete information or he gave false information, because there were so many discrepancies in his story that [Respondent] couldn't figure out what had happened or if anything had happened...The falsification of company records is his recount of the events." Importantly, the ALJ appropriately determined that Smith was terminated as a result of inconsistent responses to questions posed to him during the investigative process. (ALJD at 13; Tr. 91-93; GC Ex. 3).

Smith subsequently filed a workers' compensation claim, which Respondent denied. A hearing ensued, and the workers' compensation judge credited Smith's version of events at the hearing. Smith was deemed to have a temporary partial disability as a result of his injury, was awarded \$457.32 per week and the surgery on his shoulder, as recommended by the orthopedic surgeon, was authorized. (Tr. 91-93; GC Ex. 5).

conditions of the floor at the time of the alleged incident. In Respondent's position statement provided to the Board during the investigation, it pointed out additional discrepancies: whether and how much Smith was bleeding after the fall, the type of gloves he was wearing at the time of the accident, how the machine that Smith was operating was running, and how many breaks Smith took during his shift. (GC Ex. 8, GC Ex. 9).

IV. ARGUMENT

The ALJ correctly determined that Smith requested union representation at the May 24 meeting and that Respondent denied that request. The ALJ also correctly found that the June 1 meeting was a continuation of the May 24 meeting, and he credited Smith's testimony that he did not request a union representative at that meeting because he believed it would be futile to do so. The ALJ thus correctly opined that Smith reasonably believed that the May 24 and June 1 interviews could lead to discipline and that Respondent violated Section 8(a)(1) of the Act by not providing Smith with union representation at the May 24 and June 1 interviews upon his request, and by failing to discontinue the interviews or providing Smith the option of either continuing the interview unrepresented or not having the interview at all. United States Postal Service, 241 NLRB 141, 141 (1979). (ALJD 12-13).

However, the ALJ improperly determined that Smith was entitled to neither backpay nor reinstatement as a result of Respondent's violations. (ALJD 13-15) The standard remedy for a Weingarten violation is a cease and desist order, and the affected employee is traditionally not entitled to a make-whole remedy because Section 10(c) of the Act bars awards of reinstatement and backpay for employees suspended and discharged "for cause." Taracorp Inc., 273 NLRB 221, 221 (1984). However, both Board precedent and guidance from the Division of Advice illustrate that an employee, such as Smith, discharged for misconduct that occurred during an unlawful Weingarten interview is entitled a make-whole remedy.

The Board has never considered a specific fact pattern where an employee was discharged for misconduct that occurred during an unlawful Weingarten interview. However, the Division of Advice recently considered that very scenario in Birds Eye Foods, Case 03-CA-

26833, Advice Memorandum dated February 3, 2010.¹⁵ In that case, the employer learned through lawful video surveillance that an employee had thrown coffee into a supervisor's office. The employer advised the union of the video evidence, but in violation of the employee's Weingarten rights, denied the union representative's request to speak with the employee prior to the interview. During questioning, the employee first denied the incident, but later admitted to it after being informed of the video evidence. The employee was terminated based on the incident and his dishonesty during questioning. In recommending that the Region issue complaint seeking back pay and reinstatement, Advice noted that had the employer honored the union representative's request for a private meeting with the employee, the union would have informed him as to the existence of the video evidence and counseled him to be honest in his answers. Advice found that as a result of the denied consultation "the [employee] was at a disadvantage in responding to the Employer's questioning." Id. Therefore, Advice determined that "[t]he employer's Weingarten violation was...a proximate cause of the Charging Party's misconduct during the interview." Id. The case settled prior to hearing.

Clearly, in Birds Eye Foods, the employee was terminated as a result of his conduct (his dishonesty) during the unlawful interrogation. Similarly, in the instant matter, the record reflects that Smith was terminated because of his conduct (inconsistent recall) during the unlawful interrogations. The ALJ wholly ignored the Birds Eye Foods Advice memorandum in his decision despite the obvious similarities between the two fact patterns. Further, the ALJ ignored two additional memoranda from the Division of Advice, both of which determined that an employee terminated, even in part, for misconduct that occurred during an unlawful Weingarten interview is entitled to backpay and reinstatement unless the employer can show that the employee would have been terminated independent of his or her conduct at the interview. *See*

¹⁵ Available on the Board's public website at www.nlr.gov.

National Rehabilitation Hospital, Case 05-CA-24870 Advice Memorandum dated February 28, 1995 and Cinevue Inc. d/b/a The Lusty Lady, Case 19-CA-26979, Advice Memorandum dated September 8, 2000. Advice authorized complaint in both National Rehabilitation Hospital and Cinevue, which apparently were resolved prior to Board consideration of the cases.¹⁶

In refusing to rely on the Advice memoranda, the ALJ stated that such memoranda “are not Board decisions and have no precedential weight. (ALJD 14). However, the ALJ failed to recognize that administrative law judges have relied on advice memoranda for the reasoning contained therein. See, e.g., Town Development, Inc., 2012 WL 983244, fn. 9 (“they [advice memoranda] are of persuasive weight to the extent that the reasoning is persuasive.”). In Southwest Regional Council of Carpenters, 356 NLRB No. 88 (February 3, 2012), slip op. at 37, the administrative law judge noted that advice memoranda, among other documents that have no precedential value, “are still certainly useful, and worthy of consideration at least as to the way other authorities viewed similar issues. This is especially true where the Board itself has not yet ruled on the . . . question.”)

In addition to ignoring guidance from the Division of Advice, the ALJ misapplied Board precedent. The Board has acknowledged that employers are not simply free to discipline an employee where the employer’s unlawful actions are causally related to the discipline. The determining factor is “whether the employees’ actions would have been wrongful or would have merited the discipline imposed – that is, whether the employees’ actions would have constituted ‘cause’ for discipline – if the employer had not committed unfair labor practices.” Anheuser Busch, 351 NLRB 644, 649 (2007).

The Board applied this theory in Supershuttle of Orange County, 339 NLRB 1 (2003). In that case, an employee under investigation provided misleading information regarding his

¹⁶ The Advice memoranda in both cases are available on the Board’s public website at www.nlr.gov.

whereabouts during a work day during the employer's unlawfully-motivated investigation. As a result of those false statements, the employer terminated the employee. The Board ultimately granted reinstatement and back pay to the affected employee.

The ALJ incorrectly found that the Board's sole determination in Supershuttle was that the employer's actions were unlawful because they were motivated by antiunion animus. (ALJD at 14). Such an analysis fails to capture the totality of the Board's decision. In fact, the Board's determination in Supershuttle also focused on the fact that "the discharge...was not based on misconduct *uncovered* by the investigation, but rather on misconduct that was triggered by and elicited during the investigation." *Id.* at 3 (emphasis added). Citing Kolkka Tables & Finnish American Saunas, 335 NLRB 844 (2001) and Business Products –Division of Kidde, Inc., 294 NLRB 840 (1989), the Board also determined that "employers should not be permitted to take advantage of their unlawful actions, even if employees may have been engaged in conduct that – in other circumstances – might justify discipline." Supershuttle of Orange County, 339 NLRB at 3.

In the instant matter, the ALJ appropriately determined that "Smith was discharged for dishonesty because he allegedly gave inconsistent responses to questions asked at his various interviews during the investigative process." (ALJD 14) Had Respondent acted lawfully and either provided a union representative or stopped the interview, Smith might very well be employed today but, as noted by the ALJ, "[s]ince union representation was not provided, we cannot know the answer." (ALJD 15) Thus, like the employer in Supershuttle, Respondent should not be permitted to benefit from its unlawful refusal to grant Smith his Weingarten rights. Therefore, consistent with the Board's determination in Supershuttle, and also with the advice

memoranda discussed above, Smith is entitled to a make-whole remedy because he was terminated as a result of conduct that he engaged in during the course of an unlawful interview.

V. CONCLUSION

The evidence establishes, and the ALJ appropriately determined, that Respondent violated Section 8(a)(1) of the Act, by denying the request of its employee Joel Smith to be represented by the Union during an interview which began on May 24, 2012, and continued on June 1, 2012 and then continuing with the interview. The ALJ further appropriately determined that Smith was terminated as a result of conduct that he engaged in during the unlawful interviews. However, the ALJ erroneously concluded that Smith was not entitled to either backpay or reinstatement as a result of Respondent's actions. Thus, Counsel for the Acting General Counsel respectfully requests that the ALJ's remedial findings be modified as reflected in the Exceptions, and that the recommended remedy and order be modified to include a make whole remedy and any other remedy as deemed appropriate by the Board.

Counsel for the Acting General Counsel respectfully submits that, for all the reasons set forth above, Smith is entitled to backpay and reinstatement as a result of Respondent's violations of Section 8(a)(1) of the Act.

DATED at Buffalo, New York, this 19th day of September, 2013.

Respectfully submitted,

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