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

BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE STEVEN DAVIS

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INTRODUCTION

Respondent E. I. du Pont de Nemours and Company (hereinafter "DuPont" or the "Company") submits this brief in support of its Cross-Exceptions to Administrative Law Judge Steven Davis' decision dated and filed on August 26, 2013 Decision.

STATEMENT OF THE CASE

The ALJ's decision correctly recognized and rejected the Region's unfounded attempt to "expand the remedies for Weingarten violations to include a make-whole order" in contravention of well-settled Board law. (ALJD, 14.) It was and is not disputed that DuPont discharged Joel Smith for cause, or more specifically, dishonesty related to DuPont's non-disciplinary accident investigation program. Under well-settled Board law, make whole relief is not available here. (See ALJD, 14, citing Anheuser-Busch, Inc., 351 NLRB 644, 647 (2007)).

The ALJ, however, incorrectly determined that Smith was discharged based on information obtained during two allegedly unlawful interviews. (ALJD, 14.) DuPont obtained all information regarding the inconsistencies underlying the decision to discharge from undisputedly lawful sources (including Smith's conversations with supervision, plant medical and his co-workers before he requested any union representation whatsoever). Smith merely repeated the inconsistencies in two allegedly unlawful interviews. Smith's repetition therein cannot establish any causal link between his discharge and the allegedly unlawful interviews. See Houston Coca Cola Bottling Co., 265 NLRB 1488 (1982); Radisson Muehlbach Hotel, 273 NLRB 1464 (1985); Pacific Telephone and Telegraph Co., 262 NLRB 1034 (1982). The ALJ thus erred by denying the Region's prayer for make-whole relief on this additional basis.

As a threshold matter, the Complaint should be dismissed because Smith was never entitled to Weingarten[1] protections during either of the two allegedly unlawful interviews. The evidence demonstrates that Smith never reasonably believed that discipline would result from either of the two interviews. Smith was disciplined for late reporting of an injury and dishonesty which related to an accident he had approximately a year before the accident investigation at issue. (GC-2.) However, there were no late reporting issues involved in either of the accident interviews at issue, as Smith reported the accident within minutes. (100:13-20; 101:3-24; 102:15-25; 119:3-5.) Any other basis that Smith may have had for anticipating discipline was purely subjective, as he and other employees understood the non-disciplinary accident investigation program and have almost always participated without requesting union representation. (96:13-21; 122:14-19; 125:17-20; 222:1-13; 226:4-14; 232:18-233:8, 234:2-5; 236:3-14; 257:16-258:13, 278:19-279:4-7.) Moreover, there is no evidence that Smith had any reasonable belief that he would not be provided with union representation at the second accident interview if he had asked for it. Smith simply failed to ask.

The ALJ's determination that Smith was entitled to Weingarten protections at either or both accident interview(s) was erroneous. The evidence thus establishes that the Region's complaint should be dismissed in its entirety.

FACTS

A. Smith's Employment and Training.

At the time of his discharge, Smith was a wind operator on D shift in the Tedlar® area of DuPont's Yerkes site located in Tonawanda, New York. (56:18-57:2.)[2] On the evening of May 23-24, 2012, Smith worked on the "wind up" end of the Tedlar® process, where film is

[1] NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).
[2] The parenthetical references refer to pages and lines of the hearing transcript from the April 15, 2013 hearing.

turned into a sheet, the wet trim is cut from the sheet, pulled off by a wind operator in the trim pit and placed in a vacuum tube for recycling. (28:1-14, 47:19-24, 56:18-57:2.) The trim pit is underneath the area where the trim is cut and accessed by three grated steps with openings. (28:15-29:12, 98:17-20, 104:5-7.) There is a north and south entrance to the trim pit, which is about 4 feet wide. (29:14-4; 98:8-10.) The north and south side wind operators could access the pit by the respective stairs on each side at the same time. (97:24-98:2.) A plastic mat was located at the bottom of the trim pit. (103:19-104:3.)

Smith was scheduled to work from 7:30 p.m. on May 23, 2012 to 7:30 a.m. on May 24, 2012. (157:25-158:4.) Smith's schedule at the time was four consecutive days on and four consecutive days off. (158:5-15.) May 23-24, 2012 was the first of Smith's four consecutive days on for the new rotation and his first day returning to the wind up operation. (119:22-120:7.) Smith previously completed 3 to 4 months of training for the wind up operator position in late 2011, although the normal training period is just seven weeks. (54:8-25, 157:16-22.) During his wind operator training, Smith was trained for 12 hours each day, or for all of each shift he worked. (97:2-7.)

B. Smith's Alleged Accident on May 24, 2012.

On May 23-24, Smith was the north side wind operator, Dave Riester was the south side wind operator and Tim Eberle was the chipper and reliever. (97:12-23.) At about 10:00 p.m. on May 23, Szymanski met with Smith, Riester and Eberle to review the status of production. (101:13-21, 159:3-12.) Smith insisted at the hearing that he was not wearing any Band-Aids when he arrived at work that night or when he met with Szymanski, Riester and Eberle at the beginning of his shift. (101:3-24.) Eberle and Riester – Smith's fellow Union members – both testified under oath before the Workers' Compensation Board, that Smith had bandages on his arms during the meeting. (101:25-102:5, GC-4, pp. 38, 39, 53.) Szymanski testified that Smith

wore two skin colored Band-Aids at the meeting and was even playing around with one of them. (159:12-160:6.) At the Workers' Compensation hearing, Eberle testified that he noticed to Band-Aids because Smith was playing with them during the meeting. (GC-4, p. 56.)

It is undisputed that the May 23-24 shift was challenging for the Tedlar® line operators. There were more breaks in product than usual that evening. (160:16-18.) However, wind operators receive four breaks per shift varying in length from 30 to 45 minutes each and Smith had already taken two breaks by midnight. (99:25-100:7.)

Smith testified that he was involved in an incident which took place shortly after midnight on May 24. (99:8-10.) Smith testified that he stepped up with his right foot, which slipped off of the steps while his left foot was on the ground. (104:7-14.) Smith initially testified that he did not know if anyone was in the pit with him when he was allegedly injured, but then stated that Dave Riester may have also been in the pit. (98:3-7.) After he allegedly fell, Smith righted himself and briefly attended to the emergency he was responding to when he allegedly fell. (100:8-12.)

Smith testified that he sought Szymanski out "just a couple of minutes" after the alleged accident when he noticed blood on the Tedlar® sheet, but Szymanski was not in his office. (100:13-20.) Smith testified that he then went to put on a single Band-Aid which he had in his lunch pail. (101:3-24.) Smith then went to get some air and shortly thereafter returned to Szymanski's office and found him there with Dave Meredith. (102:15-25.) Smith testified that 10-15 minutes had passed before Smith actually saw Szymanski. (119:3-5.)

C. Smith's First Discussion With Szymanski Before the May 24 Accident Interview.[3]

Szymanski testified that Smith reported an injury to him at about 12:45 a.m. (162:15-17.) It is undisputed that Smith did not request any union representation when he met with Szymanski, that Smith twice actively sought out Szymanski on his own and that Smith freely discussed the incident with Szymanski when Smith found him. (100:8-20, 108:8-16.)

Smith testified that he pulled his Nomex suit down to show Szymanski his knee. (103:2-13.) Smith testified that he wore shorts under his Nomex suit, so Szymanski and Meredith could see everything below his knee. (Id.) Smith testified that he told Szymanski that he slipped going up the steps from the trim pit, landed on his knee and threw his arms out to break his fall. (103:14-18.) Smith testified that he also explained to Szymanski that he stepped up with his right foot, which slipped off of the steps while his left foot was on the ground. (104:7-15.) Smith testified that he told Szymanski that he noticed his arm was cut when he noticed blood on the film. (104:17-20.) Szymanski testified that Smith said he put Band-Aids on after the incident. (187:4-8.)

Szymanski testified that Smith stated his knee hurt bad and was swollen. (163:9-11, 164:20-24.) Szymanski observed Smith's knee from about 10 ft. away and did not notice any redness or swelling. (165:2-18.) At the Workers' Compensation hearing, Riester testified that he spoke with Smith while Smith was getting air in the door way, and Smith stated that his knee was five times normal size. (GC-4, p. 43.) However, Riester saw Smith soon thereafter in

[3] The term "May 24 Accident Interview" as used herein refers to the meeting attended by Joel Smith, Cheri Park, Barbara Pilmore and Michael Szymanski at approximately 8:30 p.m. on at Respondent's Yerkes plant on May 24, 2012.

The term "June 1 Accident Interview" as used herein refers to the meeting attended by Joel Smith, Barbara Pilmore, Sharon Laskowski and Michael Szymanski at Respondent's Yerkes plant on June 1, 2012 .

The term "May 24 and June 1 Accident Interviews" as used herein refers collectively to the May 24 Accident Interview and the June 1 Accident Interview, as those terms are defined herein.

Szymanski's office and viewed Smith's knee, which "just looked pretty much normal." (GC-4, p. 43.)

Smith and Szymanski testified that Szymanski gave him an ice pack to put on his knee and Smith soon thereafter moved the pack to his shoulder. (104:24-105:3, 163:14-16.) Szymanski testified that he retrieved another ice pack for Smith's knee. (163:15-17.) According to Smith, Szymanski did not give him any additional ice packs. (10510:12.) Smith testified that he initially refused Szymanski's offer to go to the emergency room, but returned to Szymanski's office, on his own accord, about a half-hour later and accepted the offer. (105:19-22.) Szymanski called a cab for Smith and drove Smith to the site gate. (105:23-25.)

The line was down when Szymanski returned from escorting Smith to his cab. (167:9-11.) Szymanski testified that he looked at the steps and the matted area at the bottom of the pit with Riester. (167:11-15.) He and Riester looked but did not see any liquid of any nature and Szymanski put his foot on the stairs and did not find them to be slippery. (167:14-16.) Per Company protocol, Szymanski called his supervisor, Barbara Pilmore, and informed her of the situation. (168:14-169:3) Szymanski told Pilmore that Smith said he was in the pit, fell, hurt himself, that Smith was at the hospital and that Szymanski was waiting for Smith to come back. (188:18-24.)

D. Smith's Second Discussion With Szymanski Before the May 24 Accident Interview.

Smith could not recall when he arrived at the Kenmore Mercy Hospital emergency room. (106:1-4.) Smith testified that he was still wearing his shoes and Nomex suit when he arrived at the emergency room. (106:5-11.) He previously threw his gauntlets (wrist to shoulder protection) where he left his gloves. (106:12-18.) Smith's Band-Aid was not removed in the emergency room, as he testified that no one looked at his alleged wound. (132:9-16.) Smith received ibuprofen and returned to the Plant from the emergency room at about 5:00 a.m.

(107:23-108:3.) Szymanski met Smith at the gate and drove him back to the wind operation. (108:4-7.) Szymanski testified that Smith stated during the ride that his knee didn't really hurt much anymore, but that his shoulder was very sore. (169:14-15.)

When they returned, Szymanski and Smith walked to his office, where Smith testified they further discussed how the accident occurred for about 10 minutes. (108:8-12.) It is undisputed that Smith did not request any Union representation during this meeting. (108:13-16.) Smith testified that he didn't "think" he returned with Szymanski to the location where the incident allegedly occurred and reenacted the incident for Szymanski. (108:17-22.) Szymanski, however, testified that he had Smith put on his Nomex all the way and the two went down in the pit where Smith reenacted how he fell. (170:1-16.)

Smith testified that Szymanski instructed Smith to report to plant medical at 7:00 a.m. (109:13-20.) While Smith was in plant medical, Eberle and Riester approached Szymanski about the incident. (194:1-23.) Riester stated that he did not recall Smith being in the pit with him. (Id.) Eberle stated that he asked Smith if something happened in the pit and Smith said "no, I've just got bad knees." (Id.)

E. Smith's Discussion With Plant Medical Before the May 24 Accident Interview.

Smith arrived at plant medical at about 6:45 a.m. (110:11-13.) Smith testified that he spoke to the medical assistant at the reception desk first and then met with the assistant and the plant nurse. (110:14-16, 111:1-6.) Smith provided the medical assistant and nurse with a description of how the alleged incident occurred. (111:8-10.) Smith testified that they asked whether the floor was wet and Smith testified that he replied that he did not remember. (111:11-16.) Smith testified he stated that there were sheets of trim covered with DMAC (a coating on the end of a Tedlar® roll) on the floor before the incident when they had encountered problems. (111:17-21.) However, during his visit with plant medical, the medical assistant noted Smith's

statements that the floor was wet and that the his foot slipped off of the stair because of water. (CP-4, p. 4.) The medical assistant also noted Smith's statements that the area was soaked and water was everywhere at the time of the alleged accident. (Id.)

Smith was told to call his orthopod and make an appointment which Smith did from plant medical. (112:12-14) Smith testified that he called at around 7:30 a.m. and was able to reach the physician's office. (112:19-20.) At the end of the visit with plant medical, the nurse told Smith that Cheri Park, plant safety specialist, wanted to speak with him. (113:16-20, 217:21.) Park did not supervise Smith, or anyone else, and did not have the authority to hire, fire, transfer, promote, demote, recommend raises, etc. (218:2-9.) Park was responsible for handling safety issues at the Site. (218:10-14.)

F. The May 24 Accident Interview.

Smith testified that he went directly from plant medical to meet with Park and Szymanski, but could not recall whether Pilmore attended. (113:21-114:2, 114:22-115:4, 115:5-8, 19-21.) Smith admitted that Park asked him the same questions Szymanski previously asked when he and Smith met earlier, including whether there was film on the floor, what personal protective equipment he wore, why he was there, what he was leaving for, what the response was and whether Dave Riester was in the pit with him. (118:14-20.) Importantly, Smith admitted that Park did not ask him anything that he had not already told Szymanski. (118:21-23.) Szymanski's testimony confirmed that Smith provided the same responses during the meeting with Pilmore and Park as Smith previously provided when he met with Szymanski. (206:18-207:18.) Although Smith testified that he had not taken his diabetes medication before the meeting (77:23-78:7), Smith admitted that he did not mention anything to Park or Szymanski about his diabetes medication during this meeting. (115:15-17.)

Smith testified that he stated he "would like a union rep with [him]" as he walked into the meeting. (77:4-9.) When asked why at the hearing, Smith stated "[w]ell, the previous time I had her I got in trouble. So I just wanted someone there to advise me." (77:10-14.) However, Ms. Park testified her involvement with the May 2011 accident was limited to inspecting the area with the supervisors who gathered preliminary information regarding the accident and assisting them with performing the root cause failure analysis. (222:20-223:17.)

According to Smith, Park responded to Smith's inquiry by stating that she just had a few questions for him. (77:15-21.) Park and Szymanski contradicted Smith's account. Szymanski testified that Smith asked, at the beginning of the meeting, "do I need a union rep for this?" (173:10-16.) Szymanski testified that he or Pilmore replied that he did not because the meeting was a regular, standard accident investigation. (173:16-19.) Szymanski testified that Smith said "okay" and the meeting proceeded. (173:20-25.)

According to Park, she began the meeting by stating that they were going to make a chronology based on information from Smith to fix any problems in the area. (225:12-17.) Park specifically stated "the sole purpose of this [meeting] is to prevent reoccurrence and we don't want anybody else getting hurt." (Id.) Park did not recall Smith asking for Union representation. (225:18-21.) As Park testified, the purpose of the meeting with Smith was "to get a chronology of what happened from Joel, so that we could take a look at what happened and see if there was anything there that we could do and to ask further questions too, so that we could prevent reoccurrence." (224:12-16.)

During the meeting, Park took notes on a white board and a notepad. (117:7-10.) Park or Pilmore asked for a chronology of how the incident happened and wrote Smith's responses on the white board. (116:18-117:6, 226:17-227:7.) The questions were in the nature of "tell us

what went on" and "what happened next." (250:21-25.) Park testified that they did not confront Smith during the meeting, but rather wrote down what he said and asked for clarification when Smith stated that was not what he meant. (Id.)

Park submitted the flip charts to her supervisor, Sharon Laskowski, the Safety, Health and Environmental ("SHE") manager, who made a verbatim summary from the charts because Park went on vacation. (227:8-18, 260:3-8; R-2.) Park testified that the information reflected on R-2 is the information she recorded on the flip charts. (228:13-16.) The times on R-2 are approximations, but the statements were not. (230:22-231:4.) Park testified that there was no discussion about bandages or whether he was wearing his sleeves during the meeting. (231:13-21.) Park testified that "there was really no aggression in the room whatsoever," that Smith "seemed fine, calm" during the meeting, that he did not indicate that he was in any pain or that he needed a break at any time. (232:9-14, 240:1-17.) Park and Pilmore interviewed Riester, Eberle and Carl Moeller that evening after the meeting to find out if they possessed any further facts that might help prevent reoccurrence. (232:18-233:8, 236:3-14.)

G. The June 1 Accident Interview.

After the incident, Smith was assigned to light duty and testified that he sat in a break room throughout his shift. (131:4-9.) Smith did not provide any testimony about discussing the incident with anyone from management until June 1, 2012. (See 119:6-18, 124:1-7.) Laskowski testified that she arranged this meeting because she had a few additional safety related questions after reading the chronology prepared by Park and Pilmore. (261:10-15.)

Smith recalled that Laskowski and Pilmore attended for the Company, but did not remember Szymanski attending the meeting. (119:6-18, 122:11-13.) Szymanski testified that his involvement with this meeting was retrieving sleeves and shoes from where Smith represented that they were. (189:6-190:1, 215:21-216:1.) Szymanski was instructed to verify the

kind of tread on the shoes, observed the shoes and found that they had the tread of very new shoes. (192:2-20, 263:2-10.) Szymanski was also asked to look for Smith's sleeves, found one sleeve with a rip in it where Smith stated he left his sleeves, but the rip was horizontal whereas the blood showing through Smith's Band-Aid when Szymanski met with Smith earlier was vertical and the sleeves did not have Smith's name on them. (209:1-1, 211:10-23, 212:21-23, 264:22-25.) Szymanski reported his observations to Laskowski and Pilmore and left the meeting. (208:10-17.)

Crucially, it is undisputed that Smith did not ask for Union representation during the June 1 meeting. (120:12-14, 261:16-18.) Moreover, Smith was never told that a Union representative could not attend this meeting with him. (121:9-12.) Smith freely admitted that he had not spoken to a Union representative before this meeting because he had no reason to:

> Q: Okay. Between the meeting with Cheri and the meeting with Sharon Laskowski, did you talk to your union representative?
>
> A: No.
>
> Q: Why not?
>
> A: What was I going to talk to him about.

(120:20-25.) Laskowski asked most of the questions during the meeting. (261:25-262:1.) Smith admitted that the June 1 meeting was devoted mainly to blood borne pathogen concerns and how Smith disposed of his gloves and gurdas. (121:17-20.) As Laskowski testified, most of her questions involved what PPE he was using at the time of the alleged incident. (262:4-23.)

Although Smith claimed that he was agitated during the May 24 meeting, he conceded that he was not agitated during this meeting with Laskowski and Pilmore. (122:20-123:2.) Laskowski echoed Smith's sentiment, as she recalled that Smith was "very pleasant, relaxed." (261:19-21.)

H. June 11 Meeting With Smith and Union Representative.

Smith testified that he attended a meeting on or about June 11, 2012 with Paul Szulist and Szymanski (the "June 11 Meeting"). (124:8-17.) Union representative Mark Khoury attended the meeting at the Company's request. (125:1-6.) For the first time since the incident, the Company asked Smith about inconsistencies in his description of the incident to Szymanski and the circumstances surrounding the incident. (90:5-91:2)

Szymanski testified that he was not previously suspicious of Smith (as he did not know him at the time of the incident (205:4-5)), but noticed that something was not right when Smith's responses to Szulist's questions did not match with what Smith had first told Szymanski when he met with Smith on the night of May 24, 2012 and repeated during the May 24 Accident Interview. (206:7-207:7.) Smith admitted that Khoury asked Szulist several questions during the meeting. (91:6-10.) The meeting lasted for approximately an hour. (91:15-16.) Szulist wrote down everything and noted the several inconsistencies in Smith's shifting story. (184:17-185:20, GC-6.) Smith even changed his story several times during just this meeting. (GC-6.)

I. DuPont's Extensive Review Process Culminates in a Decision to Terminate Smith's Employment.

Conni Krysiak, Employee Relations Supervisor, handles employee relations and discipline at the Plant. (277:14-15, 278:9-12.) Krysiak became involved after the June 11 meeting. (279:8-14.) Szulist and Pilmore shared the documentation from the June 11, 2012 meeting and the rest of the investigation with Krysiak. (280:1-11.) Pursuant to Company practice, the area superintendent (in this case Pilmore) approached Krysiak with proposed discipline for what she believed was a serious act of misconduct. (280:21-281:2, 282:6-21.) The first consideration for such a violation is always termination. (Id.)

DuPont followed its normal disciplinary policies and Ms. Pilmore assembled a "staff review" − a PowerPoint presentation that presents the facts from the investigation − and reviewed the information with her supervisor, then Tedlar® unit manager Tom Davis. (281:7-13, 282:15-283:2, 300:12-21, CP-2.) Ms. Pilmore then made a presentation to site staff leadership − a team of about 15 individuals including Krysiak and the Plant Manager. (Id.) The presentation explained seven (7) inconsistencies in Smith's description of the alleged accident and with information collected from witnesses. (CP-2, pp. 3, 4.)

As Krysiak testified, to the extent CP-2 reflects any information from the May 24 Accident Interview, Smith previously shared that same information with Szymanski before the May 24 Accident Interview or the information otherwise came from sources other than Smith (e.g. Smith's co-workers, emergency room records, site medical records, production records, etc.). (285:17-292:16.)

Krysiak's testimony demonstrates that none of the information regarding the sources of the inconsistencies was discovered for the first time during the May 24 Accident Interview and/or June 1 Accident Interview:

- Inconsistency 1 regarding Smith's purported knee injury: Information regarding inconsistencies originally obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (103:2-18; 104:24-105:3; 163:9-16; 164:20-24; 165:2-18), from Smith's co-workers (CP-4, p. 1), from emergency room and site medical records (GC-6, p. 4), and from the June 11 Meeting (GC-4, p. 2); (285:17-286:23)
- Inconsistency 2 regarding Band-Aids: Information regarding inconsistencies originally obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (159:12-160:6; 187:4-8), from information obtained from Smith's co-workers (101:25-102:5; GC-4, pp. 38, 39, 53; CP-4, p. 1), and from the June 11 Meeting (GC-6, p. 3); (286:24-287:9)

- Inconsistency 3 regarding Smith's breaks from work: Information regarding inconsistencies not reflected in Park's interview notes from May 24 Accident Interview (see R-2) and was otherwise obtained during the June 11 Meeting (GC-6, p. 1) and from production records and Szymanski's meetings with Smith before the May 24 Accident Interview (287:10-288:3);
- Inconsistency 4 regarding:
    - blood/gloves: Information regarding inconsistencies not reflected in Park's interview notes from May 24 Accident Interview (see R-2) and was otherwise obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (108:8-12; 167:11-19; 170:1-16; CP-4, p. 3), site medical records (CP-4, p. 4), and from the June 11 Meeting (GC-6, p. 2); (288:4-289:6)
    - presence of employees in pit with him at the time of the purported accident: Information regarding inconsistencies obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (108:8-12; CP-4, p. 3), from interviews with Smith's co-workers (CP-4, p. 1) and from the June 11 Meeting (GC-6, p. 2); (289:7-290:11)
- Inconsistency 5 regarding task Smith was performing at the time of the purported accident: Information regarding inconsistencies not reflected in Park's interview notes from May 24 Accident Interview (see R-2) and was otherwise obtained from Szymanski's meetings with Smith from before the May 24 Accident Interview (CP-4, p. 3; 108:8-12; 170:1-16); (290:16-291:1)
- Inconsistency 6 regarding the conditions of the area where the purported accident occurred: Information regarding inconsistencies obtained from Szymanski's meetings with Smith before the May 24 Accident Interview (CP-4, p. 3; 108:8-12; 170:1-16), site medical records and discussions with medical (CP-4, p. 4; 111:11-16), and from the June 11 Meeting (GC-6, p. 3); (291:2-15)
- Inconsistency 7 regarding purported injury to shoulder: Information regarding inconsistencies not reflected in Park's interview notes from May 24 Accident Interview (see R-2) and otherwise obtained from Szymanski's meetings with

Smith before the May 24 Accident Interview (104:24-105:3; 163:9-16; 164:20-24; CP-4, p. 3) and site medical records (CP-4, p. 4); (292:5-292:16)

(285:17-292:16.)

Each member of the staff review listened to the presentation and indicated whether they supported Pilmore's recommendation. (284:14-25.) Pursuant to Company policy, the Plant Manager made the final decision and in this case, upheld the decision to terminate. (284:22-285:6.) Smith was terminated for falsification of information in association with an investigation. (285:7-13.)

ARGUMENT

POINT I

THE ALJ ERRONEOUSLY DETERMINED THAT DUPONT VIOLATED SMITH'S WEINGARTEN RIGHTS

A. Smith Was Not Entitled To Weingarten Protections During The May 24 Accident Interview Because He Had No Reasonable Basis For Anticipating That Discipline Would Result Therefrom.

It is well-settled that Weingarten protections are only triggered where an employee requests union representation where he or she reasonably anticipates that an investigatory interview would result in discipline. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). Whether an investigatory interview may lead to disciplinary action is an objective inquiry based upon a reasonable evaluation of all the circumstances, not upon the subjective reaction of the employee. Id. at 257 n.5; Southwestern Bell Tel. Co., 338 NLRB 552 (2002) ("[T]he Weingarten standard is an objective one. Thus, the standard is not what [an employee] subjectively believed.") Thus, the standard is ***not*** what an employee with a particular history would believe. See id. Indeed, in Weingarten, the Supreme Court specifically rejected a rule that requires probing an employee's subjective motivations. 420 U.S. at 257, fn. 5.

The ALJ based his determination that Smith reasonably believed the May 24 interview might result in discipline on the following three findings: (i) Smith received discipline in 2011 which was related to DuPont's accident investigation program, (ii) the ALJ's determination that an investigation into the cause of an accident is necessarily "an 'investigatory interview' which requires, upon request, the presence of a union representative"; and (iii) that Pilmore was initially suspicious regarding Smith's accident. (ALJD, pp.12-13.) None of these findings are sufficient to uphold the ALJ's conclusion.

Smith's prior discipline involving the 2011 accident was insufficient as a matter of law to create any reasonable belief by him that discipline might result from the May 24 meeting. Under controlling Board law, the fact that an employee previously received discipline for conduct which also involved a non-disciplinary program is irrelevant to determining whether the employee reasonably believed that discipline might result from a subsequent meeting concerning the non-disciplinary program. Southwestern Bell Tel. Co., 338 NLRB 552 (2002). The only relevant inquiry is whether a reasonable employee (not a particular employee with a particular history) would reasonably believe that the meeting would result in discipline. Id. at 552.

In Southwestern Bell Tel. Co., the ALJ determined and the Board affirmed that employee Paz did not have a reasonable belief that his meeting with management would lead to discipline. 338 NLRB at 552. Paz was an employee with a well-known need for professional health assistance. Id. at 557. Approximately a week before the meeting at issue, Paz told a supervisor that "he was about to snap." Id. at 557. Paz had twice previously been required to submit to mandatory EAP counseling and had once received discipline for an incident upon which an EAP referral was based. Id. at 557.

Wilson – the Company's Area Manager – desired to meet with Paz concerning his statement. Id. at 553. Petty (Paz's supervisor) informed Paz of the meeting, that Wilson would be present for the meeting and that Petty did not know what the meeting was about. Id. at 557. Paz requested and was denied union representation for the meeting. Id. at 556-57. The ALJ determined that Paz might have reasonably formed a belief that Wilson wanted to speak to him about his statement. Id. at 557. However, the ALJ also determined that, "if Paz formed a belief that Respondent's EAP might be discussed during the interview because of his remark to [his co-worker], it should be noted that the EAP program is not a disciplinary program according to Respondent's policies." Id. at 557. Moreover, Paz's statement itself (the reason for the meeting) could not have led to a violation of the Workplace Violence Policy pursuant to which he previously received a warning. Id. at 557, fn. 8. The ALJ thus found and the Board affirmed that Paz had no reasonable belief that the meeting might lead to discipline. Id.

Under Southwestern Bell Tel. Co.'s reasoning, Smith had no reasonable basis for believing that discipline would result from the May 24 Accident Interview. Smith could not have been disciplined based on the substance of the purported accident alone, as he testified that he attempted to report the occurrence within minutes. (100:13-20; 101:3-24; 102:15-25; 119:3-5.) Indeed, Smith did not receive any discipline based on the substance of the purported accident alone. (See CP-2.)

Moreover, Smith could not form a reasonable belief that discipline might result from the May 24 Accident Interview based on any belief that DuPont's accident investigation program might be discussed. It is undisputed here that DuPont's accident investigation program is not a disciplinary program. Safety meetings like the May 24 meeting are required by DuPont's written policy − the Process Safety Management manual, which sets forth the investigation protocol.

(219:2-6, 278:19-279:4, R-1.) The purpose of the accident investigations has nothing whatsoever to do with discipline. Rather, the investigations seek (i) to find out what happened to prevent the cause from reoccurring and (ii) to ensure that the Company has fulfilled its responsibilities regarding investigating accidents and alleged accidents under applicable OSHA regulations. (257:16-258:13, 278:19-279:4.) Those who conduct the investigations − Park, Burghardt and Laskowski − have no responsibility whatsoever regarding disciplinary decisions. (222:1-13, 279:5-7.)

It is undisputed that DuPont's SHE department always conducts a safety investigation when there is an injury or purported injury on site. (220:25-221:7.) It is undisputed that the normal protocol is for the SHE department to work with the area supervisor (in this case Pilmore) and the first line supervisor (in this case Szymanski) during the investigation. (224:9-11, 19-25.) Indeed, it is undisputed that Park participated in the investigation mainly to assist with creating the root cause failure analysis (or the "WHY Tree", which seeks to identify equipment or system failures to prevent future accidents). (223:3-14.)

Thus, even if Smith formed a belief that DuPont's non-disciplinary accident investigation program would be discussed during the May 24 meeting, any such belief was not a reasonable belief that the meeting would result in discipline. See Southwestern Bell Tel. Co., supra. The ALJ's determination that any "investigatory interview," accident or otherwise, necessarily triggers Weingarten protections upon an employee's request contradicts settled Board law. See Southwestern Bell Tel. Co.; see also, Postal Service, 252 NLRB 61 (1980) (Weingarten protections did not apply to fitness for duty examination which was not part of disciplinary procedure). Notably, the ALJ provided no support whatsoever for his over expansive interpretation of Weingarten.

The ALJ's determination that Smith received discipline in 2011 which was related to DuPont's accident investigation program, therefore, does not establish any reasonable belief by Smith that discipline would result from the May 24 Accident Interview. The cases the ALJ relied on do not compel any different result.

The ALJ reasoned that, "[w]here an employee had been disciplined before the interview at issue, it has been held that he had a reasonable belief that the instant interview might result in discipline." (ALJD, 12.) First, this proposition ignores that a prior discipline related to a program which is not disciplinary in nature is not enough to show reasonable anticipation sufficient to invoke Weingarten protection. See, Southwestern Bell Tel. Co., supra. Moreover, the cases the ALJ relied on for this proposition do not involve meetings related to programs which are not disciplinary in nature and are otherwise inapposite to the facts of the present case.

Circuit Wise, Inc., 308 NLRB 1091, 1109 (1992), relied upon by the ALJ, involved employee's request and denial for union representation for a meeting with his department supervisor and the area plant manager. The employee reasonably believed that the meeting could have involved typical disciplinary issues, as he (i) had a confrontation with the department supervisor the day before the meeting over the employee's refusal to follow his supervisor's work assignment (Id. at 1109); (ii) received a written warning approximately a month before the meeting and, on the day of the meeting, had shared a letter he wrote complaining about the written warning with a co-worker (Id. at 1107-08); and (iii) received a verbal warning a few weeks before the meeting and was then told that discipline "was not going to be administered *at that time*." (Id. at 1109.)

Quazite Corp., 315 NLRB 1068, 1069 (1994), the other case relied upon by the ALJ, involved an employee's request and denial for union representation concerning a meeting with

his supervisor to discuss the employee's low production and the supervisor's expectation that the employee improve his production or face discipline if he did not. Id. at 1069. The supervisor issued the employee a written warning for poor production approximately a week after the meeting and had previously written the employee up for low production. See id.

Thus, Quazite Corp. and Circuit Wise, Inc. demonstrate that much more than mere receipt of discipline before the interview at issue is necessary to demonstrate an employee's reasonable belief that the instant interview might result in discipline. Here, Smith and other employees' involvement with accident investigations without Union representation confirms that neither Smith nor management had any reasonable anticipation that this interview would result in discipline.

Smith had workplace accidents before the subject incident during his 6 to 7 years of employment with DuPont. (96:13-21, 122:14-19.) Smith was familiar that standard practice mandated accident investigations. He knew that management must prepare a report when there is a workplace injury. (125:17-20.) There is no evidence in the record that Smith previously requested representation during the multiple accident investigations in which he was involved.

Also, Smith freely approached Szymanski without Union representation and relayed all of the information he later provided during the May 24 Accident Interview. Indeed, Smith reiterated the description and reenacted the events when he returned from the emergency room, demonstrating that he did not reasonably anticipate discipline would result from the later meeting. (See 102:15-103:18, 108:8-12, 170:1-16, 206:18-207:18.) Moreover, Smith's undisputed failure to seek out the Union at any time after the May 24 Accident Interview confirms he was not concerned about discipline after the meeting. (See 120:20-25.)

Park's undisputed testimony establishes that she has performed 10-15 employee accident investigations involving injuries and no employee had ever asked for Union representation. (226:4-14, 234:2-5.) Indeed, Park and Pilmore interviewed Riester, Eberle and Moeller about the alleged accident and there is no evidence that they requested Union representation during those discussions. (232:18-233:8, 236:3-14.)

The ALJ incorrectly determined that Smith reasonably believed that the May 24 interview might result in discipline because Pilmore became suspicious when she heard about the purported accident. Pilmore's vague "suspicion" regarding Smith's purported accident cannot outweigh the overwhelming evidence that Smith himself and his co-workers did not anticipate that standard DuPont accident meetings would result in discipline. Further, the initial report that Pilmore received concerning Smith's accident did not involve anything suggesting that Smith lied about the cause of the accident or waited too long to report to accident – the two accident related bases for which he received discipline concerning the 2011 accident.

Thus, there was no *reasonable* basis for Smith to believe that the May 24 Accident Interview would result in discipline. Any basis that Smith may have had for anticipating discipline was purely subjective. Smith testified that he stopped work to report the accident within minutes. (100:13-20; 101:3-24; 102:15-25; 119:3-5.) Thus, he could not reasonably anticipate discipline for late reporting of any injury. See id. Having received discipline for initially lying about the cause of his 2011 accident, Smith knew that lying during the May 24 Accident Investigation could lead to discharge on grounds completely unrelated to the non-disciplinary accident program. (See GC-2.) However, Smith's subjective reaction alone is insufficient to trigger Weingarten protections. Weingarten, 420 U.S. at 257, fn. 5; Southwestern Bell Tel. Co. Applying Weingarten protections here would amount to a determination that an

employee reasonably anticipates discipline any time the employee knows he or she has been or will be dishonest. Weingarten affords no such protection.

B. Smith Was Not Entitled To Weingarten Protections During The June 1 Accident Interview.

i. Smith had no reasonable basis for anticipating that discipline would result from the June 1 Accident Review.

Smith similarly had no reasonable basis for anticipating that discipline would result from the June 1 Accident Interview for the same reasons he had no reasonable basis for anticipating that discipline would result from the May 24 Accident Interview. There is no evidence that anything changed between the May 24 and June 1 Accident Reviews which could create any reasonable belief in Smith's mind that the June 1 meeting might result in discipline.

There is no evidence that Smith discussed the incident with anyone from management between the May 24 and June 1 Accident Interviews. (See 119:6-18, 124:1-7.) Moreover, it is undisputed that the June 1 Accident Interview was a follow-up meeting mostly concerning PPE issues. Smith admitted that the June 1 Accident Interview was devoted mainly to blood borne pathogen concerns and how Smith disposed of his gloves and gurdas. (121:17-20.) As Laskowski testified, most of her questions involved what PPE he was using at the time of the alleged incident. (262:4-23.) Smith conceded that he was not agitated during this meeting. (122:20-123:2.) Laskowski echoed Smith's sentiment, as she recalled that Smith was "very pleasant, relaxed." (261:19-21.)

Thus, Smith similarly had no reasonable basis to conclude that the June1 Accident Interview might result in discipline.

ii. Smith was required to, but did not, request union representation at the June 1 Accident Interview before any Weingarten protections could be triggered.

The ALJ erroneously concluded that Smith was not required to request union representation at the June 1 meeting to invoke any right to Weingarten protections. (ALJD, 13.) The ALJ based this erroneous conclusion on his determinations that: (i) Smith reasonably believed that any request for union representation at this meeting would be denied and (ii) the June 1 Accident Interview was a continuation of the fact-finding investigative process. (ALJD, 13.) As explained below, neither of these of these findings are sufficient to uphold the ALJ's conclusion.

The ALJ ignored the considerable time that passed between the May 24 and the June 1 Accident Interviews. The June 1 Accident Interview was a separate interview separated by significant time and opportunity for Smith to consult with the Union without any influence whatsoever by the Company. When that much time passes between interviews, a request during the prior interview does not carry over to the subsequent interview.

The decisions the ALJ relied on involve denied requests for union representation that were followed by disciplinary meetings on the same or next day. See Ball Plastics Div., 257 NLRB 971, 976 (1981) (employee refused to do her assigned job, she requested to see union representative, her request was denied and a succession of meetings between her and various management personnel were held the same day); Amoco Oil. Co., 278 NLRB 1, 8 (1986) (disciplinary interviews with management were held approximately 8 hours after the initial meeting with the supervisor during which the employees first requested union representation).

The facts of the present case are clearly distinguishable from the decisions on which the ALJ relied. It is undisputed that Smith did not request Union representation at the June 1 meeting or even during the week of June 1. (120:12-14, 261:16-18.) Nothing prevented Smith

from requesting Union representation. There is no evidence to support Smith's conclusory and convenient claim that he believed he could not request or secure Union representation for the meeting. (See 120:24-121:12.) Smith admitted that the Company never explicitly denied him Union representation or represented that he could not have Union representation at any subsequent meeting during the May 24 meeting. (116:1-5, 121:9-12.) There is no evidence that Smith even desired Union representation, as he never consulted with the Union between the May 24 and June 1 Accident Interviews. (120:20-25.) Moreover, Smith acknowledged that the June 1 Accident Interview was not confrontational, as he admitted that he did not feel agitated during the meeting. (122:20-123:2.)

There is no merit to the Region's suggestion that the June 1 Accident Interview was somehow a continuation of the May 24 Accident Interview such that Smith's request for Union representation applied to the former meeting. Rather, the record demonstrates that the June 1 Accident Interview was a separate interview separated by significant time and opportunity for Smith to consult with the Union without any influence whatsoever by the Company.

The Office of General Counsel's Advice Memorandum in Wal-Mart Stores, Inc., Case 19-CA-27720 is instructive. There, the employer denied the employee's request for a witness during a meeting involving the employee's use of foul language in an intimidating manner. Id. at p. 2. The employee denied any wrongdoing. Id. The employer sent the employee home for the day and asked him to prepare a written statement describing his version of the events while at home. Id. The employee had not complied with the request when he reported to work the next day and refused to do so. Id.

The question submitted for advice was whether the Employer further denied the employee his Weingarten/Epilepsy Foundation rights by sending him home and telling him to

prepare the written statement. Id. at p. 3. The Office of the General Counsel determined that the employer's request was not a further violation because the unlawful interview was terminated when the employee was to prepare the statement. Id. The employee was sent home, where he was no longer being interviewed by management. Id. Thus, his Weingarten/Epilepsy Foundation rights were no longer implicated because he was not subject to employer intimidation and coercion Weingarten rights guard against. Id. at p. 4. The employer did not engage in any coercive or intimidating tactics after terminating the interview, nor did it tell the employee not to consult with anyone. Id. at p. 5.

Here, the May 24, 2012 interview was terminated that morning. There is no evidence that DuPont intimidated or coerced Smith after the meeting. There is no evidence that the Company discussed the incident with Smith between the May 24 and June 1 Accident Interviews. Smith was free to consult with the Union during this time period, although he admittedly did not. (120:20-22, 131:4-9.) Smith even admitted that he did not feel agitated during the June 1 meeting, whereas he testified that he felt agitated during the May 24 meeting. (122:20-123:2) The record thus demonstrates that Smith was not subject to any employer intimidation or coercion Weingarten rights guard against between the May 24 and June 1 meetings. Thus, the June 1 interview is not a continuation of the allegedly unlawful May 24 meeting.

Based on the foregoing, there was no violation of Section 8(a)(1) during the June 1 Accident Interview.

POINT II

THE ALJ CORRECTLY DETERMINED THAT MAKE-WHOLE RELIEF WAS UNAVAILABLE EVEN ASSUMING, *ARGUENDO,* THAT A WEINGARTEN VIOLATION OCCURRED, BUT SHOULD HAVE ALSO DONE SO ON ADDITIONAL GROUNDS

A. Make-Whole Relief Is Unavailable Because There Is No Connection Between The Alleged Weingarten Violation And Discipline Ultimately Imposed Upon Smith And *Also* Because Smith Was Terminated For Cause.

"[B]oth the Board and reviewing courts consistently have held that Section 10(c) precludes the Board from granting a make-whole remedy to employees disciplined for misconduct uncovered through an unlawfully-conducted investigatory interview." Anheuser-Busch, Inc., 351 NLRB 644 (2007). Thus, "the Board does not order make-whole remedies for the *denial* of employees' *Weingarten* rights." Barnard College, 934 NLRB 934, 936, n. 12 (2003) (emphasis in original) (citing Taracorp., Inc., 273 NLRB at 223). "The appropriate remedy for a *Weingarten* violation is an order requiring the employer to cease-and-desist from further such violations and to post a notice to that effect." Id.

"A make-whole remedy is appropriate only if the General Counsel can prove an *additional* violation, i.e. that [an employee] w[as] disciplined, at least in part, for *asserting* their *Weingarten* rights." Barnard College, 934 NLRB at 936 (citation omitted); see also, Taracorp, Inc., 273 NLRB 221, 223, n.12 (1984) ("A make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for asserting the right to representation."); United States Postal Service, 314 NLRB 227 (1994) (reversing ALJ order ordering expunction of discipline based on Weingarten violation where discipline was for cause, the violation was a denial of representation during interviews and "there was no demonstrated nexus between the wrongful denial of representation and the subsequent discipline").

The Board uses a two-part test to determine whether an employee was disciplined for asserting his or her Weingarten rights:

> First, the General Counsel must establish that the employee has engaged in protected concerted activity and that animus against that conduct was a motivating factor in the imposition of discipline. If that showing is made, the Board will find the violation unless the employer proves that it would have disciplined the employee even in the absence of protected conduct.

Barnard College, 340 NLRB at 936.

"[W]here the General Counsel shows that an unlawful investigatory interview has occurred, and that the employee was disciplined or discharged for conduct which was the subject of the interview, the burden then shifts to the employer to show that its decision to discipline or discharge was not based on information which it obtained at the interview." Houston Coca Cola Bottling Co., 265 NLRB 1488, 1488 (1982) (quoting Illinois Bell Telephone Company, 251 NLRB 932 (1980)).

However, where "the [allegedly] unlawful interview produced no information other than that which [the Employer] already possessed, [the Board] will issue only a cease-and-desist order." See id. at 1489. In other words, reinstatement and back pay are unavailable where no new damaging information is revealed during an unlawful interview. See id.; see also, Pacific Telephone and Telegraph Co., 262 NLRB 1034 (1982), order enf'd, Pacific Tel. & Tel. Co. v. NLRB, 711 F.2d 134 (9th Cir. 1983); Radisson Muehleback Hotel, 273 NLRB 1464 (1985).

The Board's decision in Houston Coca Cola Bottling Co. is on point. There, the Board rejected the ALJ's recommendation that reinstatement was the proper remedy for the Weingarten violation. Id. at 1488. General Counsel established that an unlawful interview occurred and that the employee was discharged for conduct that was the subject of the interview. Id. During the unlawful interview, the employer asked the employee to explain why he left his post without

permission and whether he knew that he entered a restricted area. Id. The employee provided his explanation, which reiterated his statement to his supervisor from the previous day that he did not know how product was put in his forklift. Id. The Board found that the explanation "amounted to nothing more than what Respondent already knew," as "[n]o additional damaging information was obtained." Id. at 1488-89.

The Board determined that a make-whole remedy was inappropriate and issued only a cease-and-desist order. Id. at 1489. Importantly, the Board noted:

> [T]he mere fact that discipline is imposed for misconduct which was the subject of a *Weingarten* violative interview does not irrefutably establish the required casual [sic] link between the interview and the discipline. To hold otherwise would render meaningless any attempt by respondent to establish that it did not rely on any information obtained during an unlawful interview in deciding to interview an employee . . . Since Ross was discharged for cause and the unlawful interview produced no information other than that which Respondent already possessed, we will issue only a cease-and-desist order.

Id. at 1489.

The Board has refused to order reinstatement in other cases where the employer did not learn any new information during the unlawful interview. For instance, in Pacific Telephone and Telegraph Co., 262 NLRB 1034 (1982) the Board adopted the ALJ's recommendation that reinstatement was inappropriate for the employer's Weingarten violation. The employer violated two employees' Weingarten rights by denying their requests to consult with union representatives before interviews concerning improper long distance calls. Id. at 1036, 1038. The employer knew the information on which the decision to discharge was based before the interviews − the employer did not obtain any further information during the interviews. Id. at 1038. The ALJ thus determined that the employer's decision to discharge was not based on any information obtained during the unlawful interviews. Id. The Board affirmed, "satisfied that the

discharges were based on information other than that obtained during the unlawful interviews." Id. at 1034.

In Radisson Muehlbach Hotel, 273 NLRB 1464 (1985) the Board adopted the ALJ's recommendation that a cease-and-desist order be issued for the employer's Weingarten violation. The ALJ determined that the employer violated employee Grimes's Weingarten rights by denying his request for representation during an interview concerning whether suspension was appropriate. Id. at 1477-78. During the interview, however, Grimes merely corroborated another witness's account and denied bad intent, "add[ing] nothing to Respondent's knowledge." Id. at 1481. Because "Respondent learned nothing it did not already know from its unlawful interview of Grimes . . . . the appropriate and proper remedy [was] the standard cease-and-desist order . . ." Id. at 1481. The Board adopted the ALJ's recommendation in this respect. Id. at 1464-65.

The foregoing cases demonstrate the impropriety of a reinstatement remedy for any alleged Weingarten violation during the May 24 and June 1 Accident Interviews. Like the employers in the above cases, DuPont did not learn any of the information that the discharge was based on (CP-2, pp. 3, 4) for the first time during the allegedly unlawful interviews (here, the May 24 and June 1 Accident Interviews). Rather, DuPont first obtained this information by lawful means, or more specifically, through (i) Smith's conversation**s** with Szymanski on May 24 before the May 24 Accident Interview, (ii) Smith's conversations with his co-workers before the May 24 Accident Interview, (iii) Smith's conversations with plant medical before the May 24 Accident Review, (iv) production records, and (v) Smith's statements during the June 11 Meeting (during which it is undisputed that he had Union representation). (285:17-292:16; GC-6, p. 3, 4; see also, pp. 13 - 15, supra.)

Thus, all of the inconsistencies which formed to basis for Smith's termination (CP-2, pp. 3-4) were either disclosed for the first time via lawful sources and repeated during May 24 and/or June 1 Accident Interviews or were not discussed at all during the May 24 and/or June 1 Accident interviews. (121:17-20; 262:4-23; 285:17-292:16; GC-6, p. 3, 4; R-2; see also, pp. 13 - 15, supra.) A termination based on such lawfully obtained information does not magically become tainted merely because Smith may have repeated the information during the May 24 or June 1 Accident Interviews. See e.g., Houston Coca Cola Bottling Co. 265 NLRB at 1488-89 (holding that employer learned no new information during the unlawful interview despite the fact that employee repeated his statement from the prior day to his supervisor that he did not know how product was put in his forklift).

Even assuming, *arguendo*, that the May 24 and June 1 Interviews were unlawful (which they were not), the undisputable facts show there is no causal link between those interviews and the termination. Thus, make-whole relief is not available. See, Houston Coca Cola Bottling Co., supra, Pacific Telephone and Telegraph Co., supra, Radisson Muehlbach Hotel, supra.

Moreover, the fact that Union representation could not have improved Smith's position during the May 24 or June 1 Accident Interviews demonstrates that any alleged denial of Smith's Weingarten rights had nothing to do with his ultimate discipline.

A Union representative could have advised Smith to (i) refuse to provide answers, (ii) provide the same answers that Smith previously provided to Szymanski and others before the May 24 Accident Interview or (iii) provide different answers than Smith previously provided to Szymanski and others. If Smith was instructed in accordance with (i) or (ii) above, Smith would have been in the same position that he was in after completing the May 24 Accident Interviews without Union representation (i.e., the Company would have had only the information Smith

previously provided to Szymanski). If Smith was instructed in accordance with (iii) above, he would have revealed a prior dishonesty. (Indeed, this was the result during the June 11 Meeting. See, GC-6.)

Union representation during the May 24 or June 1 Accident Interviews could not have improved Smith's position. Thus, there can be no causal link between Smith's discharge and any allegedly unlawful interview. Make-whole relief is, therefore, unavailable.

Moreover, as the ALJ properly determined, granting make-whole relief would be inappropriate even if DuPont learned of the inconsistencies through the May 24 and June 1 Accident interviews and those interviews were determined to be unlawful because Smith was disciplined for cause. (See ALJD, 14, citing Anheuser-Busch, Inc., 351 NLRB 644, 647 (2007)). The ALJ thus properly determined that Supershuttle of Orange County, Inc., 339 NLRB 1 (2003) is inapplicable to the present case. (See ALJD, 14, correctly noting that the unlawful investigation in Supershuttle was spawned by antiunion animus, of which there is no evidence whatsoever in the case at bar).

The ALJ also properly rejected the reasoning of the Advice Memoranda cited by the Region. (See ALJD, 14.) Such Advice Memoranda have no precedential weight, are not controlling as to the Board's view of the law and may freely be rejected by an Administrative Law Judge. See e.g., Dresser-Rand Co., 358 NLRB No. 97, at 5, fn. 4 (2012) (declining to consider an Advice Memorandum and noting counsel for the General Counsel's argument that "advice memoranda are not controlling as to the Board's view of the law, but are statements of positions taken by the General Counsel, and the reasons therefor"). Moreover, decisions such as Houston Coca Cola Bottling Co., supra, Pacific Telephone and Telegraph Co., supra, Radisson

Muehlbach Hotel, supra squarely address the factual scenario at bar and obviate any need to consider the Advice Memoranda.

Accordingly, any alleged denial of Smith's Weingarten rights during the May 24 meeting was not factor in his discipline and make-whole relief is, therefore, unavailable.

CONCLUSION

Based on the foregoing, DuPont respectfully submits that the Complaint must be dismissed in its entirety. Alternatively, if it is determined that DuPont violated Section 8(a)(1), DuPont respectfully submits that a cease-and-desist order is the only remedy.

Dated: Buffalo, New York
October 24, 2013

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STATEMENT OF SERVICE

I hereby certify that on October 24, 2013, I caused to be electronically filed the ***Brief in Support of Cross-Exceptions to Decision of Administrative Law Judge Steven Davis*** on Behalf of E. I. du Pont de Nemours and Company in Case No. 03-CA-090637 to the National Labor Relations Board using the NLRB E-Filing system, and I hereby certify that I provided the same document via electronic mail (e-mail) to the following individuals:

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