

**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**

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGES'S DECISION**

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## **I. STATEMENT OF THE CASE**

On August 26, 2013, Administrative Law Judge Steven Davis (“ALJ”) issued a decision (“ALJD”) finding 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 interrogation which began on May 24, 2012, and continued on June 1, 2012, and that the appropriate remedy was a cease-and-desist order. The ALJ further determined, despite the fact that Smith was terminated as a result of conduct he engaged in during the two unlawful interrogation sessions, that Smith was not entitled to a make whole remedy. The General Counsel has filed exceptions to the ALJ’s failure to grant a make-whole remedy.

In finding that Respondent violated Section 8(a)(1) of the Act, the ALJ appropriately determined that Smith “reasonably believed that the interview might result in discipline,” that consistent with that belief Smith requested union representation at the outset of the May 24, 2012 interrogation, and that Respondent unlawfully denied that request and continued with the interrogation. The ALJ further found that answers Smith provided Respondent during the unlawful May 24 interrogation caused Respondent to further interrogate Smith on June 1, 2012. (ALJD at 4-5, 13, 15).

The ALJ appropriately determined that the June 1, 2012 interrogation was a continuation of the May 24, 2012 interrogation, and therefore, Smith’s request for union representation on May 24 carried through to June 1. The ALJ further properly determined that Respondent, in violation of Section 8(a)(1) of the Act, unlawfully failed to provide Smith union representation on June 1, and instead continued with the interrogation. (ALJD at 13).

The ALJ further appropriately determined that Smith was terminated as a result of allegedly inconsistent information that Smith provided during both the May 24 and June 1 interrogations. (ALJD at 14).

Respondent filed cross-exceptions on October 24, 2013. Respondent excepts to a wide range of factual and legal findings by the ALJ in his determination that Respondent violated Section 8(a)(1) of the Act by denying Smith with union representation during the May 24 and June 1 interrogations. Respondent additionally excepts to a portion of the ALJ's determination regarding the appropriate remedy. As discussed below, the ALJ's determinations in regard to Respondent's 8(a)(1) violation are fully supported by the administrative record and Board precedent. Further, Respondent's exceptions in regard to appropriate remedy lack basis in Board precedent. As such, Respondent's exceptions lack merit and should be dismissed.

### **III. ARGUMENT**

#### **A. The ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act by refusing to grant Smith's request for a union representative during the May 24 and June 1 interrogations. (Cross-Exceptions 1-15, 21)**

Despite Respondent's contentions to the contrary, the ALJ's determination that Respondent violated Section 8(a)(1) of the Act by refusing to grant Smith's request for union representation during the May 24 and June 1 interrogation is fully supported by the record and relevant case law.

##### **1. Smith was entitled to the protections of Weingarten on May 24**

The Supreme Court has held that employees have a Section 7 right to have a union representative present at an investigatory interview which an employee believes might result in discipline. NLRB v. Weingarten, 420 US 251, 261 (1975). Weingarten requires "an employer to evaluate an investigatory interview from an objective standpoint – i.e., whether an employee

would reasonably believe that discipline might result from the interview.” Consolidated Edison, 323 NLRB 910 (1997), *citing* NLRB v. Weingarten, 420 US at 262.

As explained below, despite Respondent’s claims to the contrary, the ALJ appropriately determined that Smith was entitled to the protections of Weingarten during the May 24 interrogation because the interview was investigatory in nature and because Smith reasonably believed that disciplinary action might result from the interrogation. (ALJD at 12, 13).

**a. The May 24 interview was investigatory in nature**

Despite Respondent’s claims to the contrary, the ALJ appropriately determined, and the record reflects, that the May 24 interview was investigatory in nature. The events leading up to and following the May 24 meeting clearly indicate that Respondent was immediately suspicious of Smith’s injury as evidenced by Respondent Area Superintendent Barb Pilmore’s testimony at the worker’s compensation hearing. The record further reflects that Respondent remained suspicious of Smith’s injury throughout its investigation, as evidenced by the questions asked during each interrogation and the communications between Respondent management, including Respondent’s safety, health and environmental manager Sharon Laskowski’s decision, subsequent to reading the notes from the May 24 interrogation of Smith, that a second interrogation was necessary, and the June 1 e-mail from Pilmore which pointed out admittedly “little things” about Smith’s recall that were allegedly inconsistent. (ALJD at 4, 12; Tr. 204-206, 261-262, GC Ex. 4, day two, p.25, 27, GC Ex. 9).

During the May 24 interrogation, Respondent’s representatives asked Smith numerous questions about circumstances surrounding his injury, in an obvious attempt to gather information as to what transpired. The record reflects that Smith’s answers to those questions eventually led to his discipline. Respondent’s interview of Smith was part of a broader

investigation into Smith's injury, which also included interviews with additional witnesses. (ALJD at 5; Tr. 75-82, 115-118, 173-176, 232, 236, 240, 244-245; GC Ex. 7).

Despite Respondent's claim to the contrary, based on the overwhelming record evidence, the ALJ appropriately determined that the May 24 interview was investigatory in nature. (ALJD 11, 12)

**b. Smith had a reasonable belief that disciplinary action might result from the May 24 interrogation.**

Respondent's numerous exceptions to the ALJ's decision claiming that Smith lacked a reasonable belief that disciplinary action might result from the May 24 interrogation are all unsupported by the record.

As noted by the ALJ, Smith was previously disciplined under similar circumstances only one year earlier. In that instance, Smith suffered an on-the-job injury, and the Employer's investigation consisted largely of a meeting between Smith and Cheri Park. The Board has held that, in a Weingarten setting, an employee with a history of disciplinary and/or work performance issues has a reasonable belief of discipline. Circuit-Wise, 308 NLRB 1091, 1108-1109 (1992); Lennox Industries, Inc., 244 NLRB 607, 608-609 (1979); Vantran Electric Corp., 218 NLRB 43, 43-44 (1975); Quazite Corp., 315 NLRB 1068, 1069-1070. (ALJD at 12; Tr. 50-54; GC Ex. 2).

Despite Respondent's assertion to the contrary, a review of the decisions in both Circuit-Wise and Quazite Corp. support the ALJ's determination that Smith's prior discipline was highly relevant in determining that Smith reasonably believed he would be disciplined as a result of the May 24 interrogation.

In Circuit-Wise, an employee requested and was denied union representation prior to a meeting which the respondent claimed was merely to discuss retuning late from lunch and that

no discipline was contemplated. However, as in the instant matter, no one informed the employee that discipline was not being contemplated. Despite respondent's contention, and as noted by Respondent in its brief, the ALJ in Circuit-Wise specifically determined that the employee's disciplinary history played a crucial role in determining that he "reasonably feared discipline could result from the meeting based on objective evidence." Id. at 1109.

Quazite Corp. is similarly on point. In Quazite Corp., an employee who had once before been disciplined for lack of production was found to hold a reasonable belief that he would be disciplined when a supervisor requested a meeting with him in which he wanted to show the employee production records of other employees in the plant. The ALJ, in decision upheld by the Board, found that "under all of the objective circumstances, that [the employee] had a reasonable basis for believing that this meeting was an investigatory meeting which could lead to discipline." Id. at 1070.

Also of note is that Smith's concern that he would be disciplined during the May 24 interrogation was further heightened when he was confronted by not one (as had previously been the case), but three supervisors when he entered the interview room. Upon realizing this, Smith immediately requested a union representative. (Tr. 77).

As properly noted by the ALJ, the record evidence that Pilmore, Respondent's area superintendant, was immediately suspicious of Smith's injury when she found out about prior to the initial interrogation further supports the finding that Smith had reason to be concerned that the May 24 interrogation could lead to discipline. The Board has consistently found that evidence of an employer's suspicion of wrongdoing prior to the unlawful interview can be further evidence of a Weingarten violation. See e.g. Taracorp, Inc., 273 NLRB 221 (1984); Anheuser-Busch, Inc., 351 NLRB 644, 654 (2007). (ALJD at 12; Tr. 203-204; GC Ex. 4).

As summarized above, the ALJ's determination that Smith reasonably believed that he would be disciplined at the time he requested union representation is firmly supported by record evidence.

**c. The purpose of Respondent's investigation is irrelevant to determining whether Smith had a reasonable belief that he would be disciplined.**

The ALJ appropriately determined that "regardless of the purpose of the investigation, the question is whether Smith reasonably believed that he would be disciplined as a result of it." The ALJ further appropriately determined that because the interrogation was investigatory in nature, Respondent's argument that Smith could not have formed a reasonable belief that he would be disciplined simply because it was following its internal safety management procedures wholly lacks merit. (ALJD at 12).

Respondent acknowledges that the purpose of an accident investigation is to determine what occurred, but claims that accident investigations are not intended to result in discipline. As previously noted, however, Smith was previously disciplined as a result of an accident investigation. Therefore, even assuming *arguendo* that accident investigations are not intended to result in discipline, Smith's prior discipline served to create a reasonable belief of discipline on May 24. The Board has held that "it is no answer to [a Weingarten allegation] that [the employer was] only engaged in fact-finding, or that [the employer] had no intention of disciplining [the employee] at the time of the interview. Neither of those conditions is inconsistent with [an employee's] reasonable belief that discipline could result from the interview." Consolidated Edison, 323 NLRB at 910. (ALJD at 12; Tr. 50-54; GC Ex. 2).

In Circuit-Wise, Inc., *supra*, the Board further articulated that the employer's intended purpose of the meeting is irrelevant. In Circuit-Wise, the Board upheld an ALJ's determination that the employer had committed a Weingarten violation even though the employer's witnesses

testified that the purpose of the meeting in question was not to administer discipline. The ALJ in that case noted that at no time prior to the meeting was the employee made aware that discipline would not result or informed of the subject matter of the meeting. Similarly, in the instant matter, Smith was never informed that the May 24 interrogation would not result in discipline, and he was not informed prior to the meeting as to the subject matter of the meeting. (Tr. 50-54, 76, 219-222, 257-258; R. Ex. 1).

Further, despite Respondent's assertions, the record contains very limited evidence to suggest that Smith had any knowledge as to the Employer's general investigative practices. In fact, the only specific evidence in record regarding Smith's knowledge of workplace investigations clearly indicates that Smith's had concrete reason to believe that he was likely to be disciplined as a target of a workplace investigation. (Tr. 50-54, 122; GC Ex. 2).

Respondent's reliance on Southwestern Bell Telephone Co., 338 NLRB 552 (2002), is misplaced. In that case, a supervisor held monthly non-disciplinary monthly meetings with each employee regarding production. The supervisor had never disciplined any employee for production problems. In one of these meetings, held on August 1, the supervisor informed an employee with a history of mental instability that his production was poor and he had six weeks to "bring it up to compliance with the standards." Id. at 553. Within the next few weeks, the employee told another supervisor that he was "about to snap." That incident was reported to the area manager, who was aware of the employee's history of mental instability. As a result, the area manager took an unusual step and sought a meeting with the employee. On August 27 (less than four weeks after the August 1 production meeting), the employee was told to meet with the area manager. The employee asked if he would need a union representative, and told he would not. The employee was not told what the meeting would be about. The meeting was held and

the employee was not afforded union representation. During the meeting, there was discussion about the employee's mental state and his level of production.

The Board, in upholding the ALJ's determination that the employer had not violated the employee's Weingarten rights, determined that the employee could not have reasonably believed that the meeting in question would lead to discipline because the record contained nothing to indicate how "disciplinary measures or policies related to an employee's low production performance." Id. at 552. As such, the Board determined that there was a "failure of proof to support the assertion that [the employee] could have reasonably believed that the August meeting would result in discipline." Id. The Board further found that the employee could not have reasonably believed that the meeting would result in discipline because he had recently stated that he was "about to snap" and that any discussion about his mental state would not have been disciplinary in nature. Id.

Unlike Southwestern Bell, the ALJ in the instant case found, as supported by the record, that there is an established history of employees being disciplined as a result of Respondent's workplace investigations. Moreover, the record establishes that Smith himself was previously disciplined as a result of a prior workplace investigation, and history repeated itself when Smith was disciplined as a result of the instant investigation. If anything, the Board's holding in Southwestern Bell further supports a finding that Respondent violated Section 8(a)(1) of the Act because the record reflects that Respondent has a documented history of disciplining Smith due to findings resulting from workplace investigations.<sup>1</sup> (Tr. 50-54; GC Ex. 2).

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<sup>1</sup> Similarly, Respondent's claim that the ALJ "disregarded" evidence that other employees did not request union representation at investigatory interview is without merit. As repeatedly noted, the Board, in analyzing a potential Weingarten violation, looks to whether a similarly-situated employee had a reasonable belief that discipline could result. As noted by the ALJ, because Smith was previously disciplined under similar circumstances and therefore clearly had a reasonable expectation of discipline, it is irrelevant whether other employees involved in accident investigations were ultimately disciplined. (ALJD at 12).

Based on the above, the ALJ appropriately refused to determine that Respondent's alleged motivation for the initial unlawful interrogation was relevant to a determination as to whether Respondent's action violated Section 8(a)(1) of the Act.

**d. Smith's fear of discipline was never "allayed" by Respondent.**

Respondent's erroneous claim that Smith did not reasonably believe that discipline would result from the May 24 interrogation was properly disposed of by the ALJ. Respondent's claim is not supported by the record. The ALJ appropriately determined that neither Respondent supervisor Michael Szymanski nor Respondent safety specialist Cheri Park allayed Smith's fear that discipline might result from the May 24 interrogation. Consistent with the record, the ALJ determined Smith requested union representation at the outset of the May 24 interrogation.<sup>2</sup> Respondent denied that request, and instead, told Smith that it was performing a "standard, regular investigation." Respondent then proceeded to interrogate Smith. (ALJD at 4-5, 12; Tr. 77, 115-116, 173).

As noted by the ALJ, simply telling an employee that he does not need union representation "is not sufficient basis to disregard an employee's request." Lennox Industries, 244 NLRB 607, 608 (1979). In fact, the ALJ appropriately determined that, given the opportunity to allay those fears after Smith requested representation, Respondent instead provided a perfunctory response and immediately began the interrogation. Additionally, Respondent's "standard, regular investigation," approximately one year earlier, resulted in Smith receiving a discipline. As such, Smith's fears would not have been allayed with that knowledge, but rather, Smith would have a reasonable fear that some form of discipline would result from

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<sup>2</sup> Cheri Park's testimony that she did not recall Smith asking for union representation is refuted by the testimony of Smith and Szymanski. Further, Respondent, in its answer, does not dispute that Smith requested union representation. (Tr. 77, 173, 225, 234, GC Ex. 1[e]).

such a meeting. Further, the record contains absolutely no evidence to indicate that Respondent told Smith that he would not be disciplined as a result of the May 24 interrogation. (ALJD at 4-5, 12; Tr. 77, 115-116, 173).

In sum, the ALJ appropriately determined that the protections of Weingarten fully applied to the May 24 interrogation. As such, Respondent violated Section 8(a)(1) of the Act when it failed to either provide Smith with union representation upon request, discontinue the interrogation upon Smith's request for representation, or give Smith the option of either continuing the interview without representation or having no interview at all. United States Postal Service, 241 NLRB 141, 141 (1979). (ALJD at 13).

**2. Smith was entitled to the protections of Weingarten on June 1.**

Despite Respondent's assertions to the contrary, the record supports the ALJ's determination that Respondent's failure to honor Smith's standing request for union representation on June 1 represented a violation of Section 8(a)(1) of the Act because Smith reasonably believed that discipline could result from the interrogation.

**a. The ALJ appropriately determined that Smith's request for union representation on May 24 carried through to June 1 because the June 1 interrogation was simply a continuation of the May 24 interrogation.**

The ALJ appropriately determined that the June 1 interrogation was simply a continuation of the May 24 interrogation, and therefore, Smith's request for representation on May 24 carried through to June 1. (ALJD at 13).

Board law fully supports the ALJ's determination in this regard. The ALJ appropriately found, as supported by the record, that Pilmore was present at both the May 24 and June 1 interrogations, and as such, the request from May 24 carried over to June 1. The Board has held that an employee's request for union representation need not be repeated at the interview in question if it was previously made to the individual conducting the interview. *See Lennox Industries*, 244 NLRB 607, 608 (1979); *Amoco Oil Co.*, 278 NLRB 1, 8 (1986). As noted by the ALJ, in *Ball Plastics Division*, 257 NLRB 971 (1981), an employee requested, and was denied, a union representative in an initial interview. The employee did not request a representative in numerous subsequent interviews regarding the same matter. The ALJ, in a decision upheld by the Board, determined that because the respondent "was aware that [the employee] wanted union representation at these subsequent meetings, but by her having requested and being denied union representation at the initial meeting...it was not necessary that she renew her request in order to avail herself of the legal right to union representation." *Id.* at 976 (citations omitted). Additionally, in *Anheuser Busch, Inc.*, 337 NLRB 3 (2001), the ALJ, in a decision upheld by the Board, determined that an employee's request for a specific steward made at an investigatory interview the previous day still stood even though the employee did not repeat the request. The ALJ determined that the employee did not have to reiterate the request because he "had already made it perfectly clear he wanted [the requested steward] and no one else." *Id.* at 9. Importantly, the ALJ noted that had the employer not denied the employee the requested representative the

previous day, the representative would have been present for the meeting at issue. Id. (ALJD at 12-13; Tr. 115, 172, 224, GC Ex. 4, GC Ex. 8, GC Ex. 9; R. Ex. 2).

Notably, Respondent was unable to cite any Board precedent to dispute the ALJ's well-supported finding that Smith's request for union representation carried through to June 1. Additionally, Respondent cites no Board precedent for its argument that the lapse of time between May 24 and June 1 necessarily required Smith to re-request union representation. Rather, Respondent relies on a single Advice Memorandum to support these baseless assertions. As noted by the ALJ in his decision, Advice Memoranda "are not Board decisions and have no precedential weight." (ALJD at 14).<sup>3</sup>

More importantly, a review of the Advice Memorandum in Wal-Mart Stores, Inc., Case 19-CA-27720, relied by Respondent to support its argument that the June 1 interrogation was not a continuation of the May 24 interrogation, illustrates that it has absolutely no bearing on the instant matter. In Wal-Mart, a manager asked an employee to report to the personnel office without explanation. The employee requested a witness, but was told by the manager that was not necessary. During the meeting, the employer questioned the employee about an incident involving his use of foul and threatening language. The employee denied engaging in any such behavior and was sent home and told to prepare a written statement. The next day, the manager again asked the employee to report to his office. The employee again requested a witness, and the manager denied his request. The employee refused to report to the manager's office. The sole question asked of Advice was whether the employer, by sending the employee home to

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<sup>3</sup> Respondent, in both its Brief in Support of Cross Exceptions and its Answering Brief to General Counsel's Exceptions, cited Dresser Rand Co., 358 NLRB No. 97, 5 at fn. 4, for the premise that "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." Respondent's Brief in Support of Exceptions at 31, Respondent's Answering Brief to General Counsel's Exceptions at 19.

write the statement about the incident violated the employee's Weingarten/Epilepsy Foundation rights. Advice concluded that there was no violation because the employer allowed the employee to write the statement at home and did not instruct him as to how to write the statement, and therefore, the writing of the statement did not constitute a portion of the unlawful interview. Id. at 5.

Clearly, the reasoning in Wal-Mart is wholly inapplicable to the instant matter. In Wal-Mart, no employer representatives were present while the employee wrote the statement, and the employer did not ask questions or otherwise play any role in the creation of the employee's written statement, unlike the instant matter, where Respondent, by asking Smith questions during the June 1 interrogation, by crafting questions, played an integral role in the information that it received from Smith. There is a clear distinction: Wal-Mart provides guidance on the issue of whether Weingarten protections apply to an employee writing a statement that was requested during an unlawful interview, and is wholly unrelated to whether a request for a union representative during an unlawful interrogation applies to a later-in-time continuation of that interrogation.

The record fully supports the ALJ's determination that Smith's request for union representation on May 24 carried through to June 1. The record contains ample evidence to support the ALJ's finding that the purpose of both the May 24 and June 1 interrogations was the circumstances surrounding Smith's on-the-job injury. In fact, Respondent's Respondent safety, health and environmental manager, Laskowski, specifically requested the June 1 meeting after reviewing Respondent's notes from the May 24 interrogation, illustrating that the May 24 meeting was the sole catalyst for Respondent's decision to continue the interrogation on June 1. In addition, Laskowski wrote, in an e-mail to human resource manager Casinelli, that the

purpose of the June 1 interrogation was “to continue the investigation into [Smith’s] alleged slip/fall.” Further, as noted by the ALJ, it is undisputed that Respondent area superintendent Pilmore was present at both the May 24 interrogation, at which Smith requested a union representative, and the June 1 meeting. (ALJD at 6, 13; Tr. 115, 172, 224, 262, 267-268, GC Ex. 4, GC Ex. 8, GC Ex. 9; R. Ex. 2).

Additionally, as appropriately determined by the ALJ, the content of the June 1 interrogation clearly indicates that it was simply a continuation of May 24 interrogation. The record reflects that on June 1, Smith was again interrogated about the circumstances that led to his on-the-job injury, but this time, more attention was paid to Smith’s bleeding that resulted from the accident and what Smith did with the bloody glove. In addition, Smith was asked about the manner in which he fell and the clothing he wore. (ALJD at 6-7, 13; Tr. 84-88, 120-123, 179, 190-191, 209-210, 261-269; GC Ex. 9).

In sum, a review of the record and relevant Board law clearly indicates that the ALJ properly determined that Smith’s request for union representation on May 24 carried through to June 1, and that the June 1 interrogation was simply a continuation of the May 24 session.

**b. The ALJ correctly found that the June 1 interrogation was investigatory in nature and that Smith had a reasonable expectation of discipline during the interview.**

The Weingarten protections applied to the June 1 interrogation for the same reasons they applied to the May 24 interrogation. The ALJ appropriately determined that the June 1 interrogation was investigatory in nature. The record reflects that Smith was again interrogated about the circumstances leading up to his injury, with special attention paid to Smith’s bleeding caused by the accident and his handling of the resulting bloody glove. He was further asked

about the manner in which he fell and the clothing he wore. (ALJD at 6-7, 13; Tr. 84-88, 120-123, 179, 190-191, 209-210, 261-269, GC Ex. 9).

The ALJ further appropriately determined that Smith had a reasonable belief that discipline might result from the June 1 meeting for reasons similar to the May 24 meeting. Most importantly, Smith had previously been disciplined under similar circumstances. See Circuit-Wise, *supra*; Quazite Corp., *supra*. Further, this was Respondent's second interrogation of Smith, further objectively raising Smith's suspicions about Respondent's ultimate intent. (ALJD at 13, 15; Tr. 77, 86).

Respondent's alleged evidence that that Smith lacked reasonable expectation wholly lacks merit. As far as Smith knew, his forced participation in the May 24 interrogation completed Respondent's investigation into the matter. He was given no advance notice that Respondent would subject him to a second interrogation until he was called into that June 1 meeting. As such, Smith's failure to discuss the May 24 interrogation with management prior to the second meeting is wholly irrelevant to a determination of whether he reasonably feared discipline on June 1. To the contrary, the fact that that Smith requested union representation on May 24 should have plainly alerted Respondent that Smith was concerned about potential discipline resulting from the investigation. Further, whether or not Smith was calm or agitated during the interrogation has no bearing on whether or not he feared the discipline might result from the meeting. Arguably, if Smith believed discipline might result from the meeting, his best chance to avoid such discipline was to remain calm despite the threatening circumstances. (Tr. 77, 122-123, 129).

In sum, the ALJ appropriately determined that the protections of Weingarten fully applied to the June 1 interrogation, and therefore properly found that Respondent violated

Section 8(a)(1) of the Act when, on June 1, it failed to either provide Smith with union representation due to his standing request for representation, discontinue the interrogation, or give Smith the option of either continuing the interview without representation or having no interview at all. United States Postal Service, 241 NLRB at 141. (ALJD at 13).

**B. The ALJ appropriately determined that Respondent obtained information during both the May 24 and June 1 interrogations that it ultimately used to terminate Smith.** (Cross-Exceptions 16, 17)

Respondent argues that its multiple, time-consuming, and meticulously planned interrogations of Smith uncovered absolutely no new information and ultimately played absolutely no role in its decision to terminate Smith. To the contrary, the record evidence refutes this contention, and rather, fully supports the ALJ's determination that Respondent obtained important information from the May 24 and June 1 interrogations to determine that Smith was dishonest, and further, that Respondent ultimately terminated Smith as a result of Smith's alleged dishonesty during those interrogations. (ALJD at 13-14).

Respondent's claim that its multiple lengthy interrogations of Smith revealed no new information wholly lacks merit. The ALJ appropriately determined, and Counsel for the General Counsel has previously, in great detail, demonstrated that Respondent used statements made by Smith during the unlawful interrogations on May 24 and June 1 to determine that Smith had been untruthful, and that Respondent used information obtained during these unlawful interviews in framing its continuing investigation. (ALJD at 5, 7, 14; Tr. 75-82, 115-118, 173-176, 232, 236, 240, 244-245; GC Ex. 7).

Further, documentary evidence created by Respondent during the investigation that led to Smith's termination clearly illustrates that Respondent used information gleaned from those interrogations to terminate Smith. The written presentation created and presented (sometime

after the June 11 interview) by Respondent area superintendant Pilmore in support of her recommendation to terminate Smith, states that some of the information relied upon in making the termination recommendation was collected during the May 24 and June 1 interrogations (both of which were attended by Pilmore). In fact, the written presentation lists numerous inconsistencies that Respondent learned from questioning Smith during the May 24 and June 1 interrogations, including: which gloves Smith used to wipe the blood away and what he did with the gloves; inconsistencies regarding whether there was anyone with Smith in the trim pit when he fell; inconsistencies regarding what roll of film Smith was working with at the time of the accident; whether Smith was standing on wet film and whether the floor was wet; and the manner in which Smith fell. (ALJD at 9-10; Tr. 300-302; CP Ex. 2).

Regarding how the inconsistencies were uncovered, the Pilmore's presentation notes state that "[e]mployee was interviewed the morning of the incident (May 24). Follow-up interviews with the employee were conducted 6/1 and 6/11. Additional interviews were conducted with FLS, 2 coworkers and site medical on date of incident. There were multiple inconsistencies in Joel's own description of the event and with information collected from others that were involved." (emphasis added). (ALJD at 9; CP Ex. 2).

Further, the termination letter that was written by Respondent and issued to Smith states that Smith was terminated for "giving false or incomplete information ...in connection with management investigations." It is notable that Pilmore attended both the May 24 and June 1 interrogation sessions, that she did not speak to Smith on any other occasion about his injury, and that she was the sole author of the recommendation to terminate Smith. (Tr. 280-285, 301-302, 307; GC Ex. 3, CP Ex. 2).

Additionally, during the June 11 investigatory meeting (at which a union representative was present), Smith was confronted with nine groups of questions that clearly challenged the validity of the statements he made during the May 24 and June 1 interrogations. Several of the questions referenced responses Smith provided during the May 24 or June 1 interrogations and compared them to other statements Smith made during those interviews, or to statements Smith made outside of those interviews, clearly evidencing that Respondent used information obtained during the unlawful interrogations against Smith. In fact, the first five groups of questions specifically referenced statements Smith made during either the May 24 and June 1 interrogations, and asked Smith to rationalize those statements in the face of other evidence obtained by Respondent. The other four groups of questions did not specifically refer to statements made in the two initial interrogations but were in fact previously discussed with Smith during the May 24 and/or June 1 interrogation sessions. Despite Respondent's claim to the contrary, a review of Respondent's notes of Smith's responses from the June 11 interrogation fails to reveal any evidence that Respondent obtained new information from Smith during the June 11 interrogation. (GC Ex. 6).

Respondent's position statement to the Region (provided during the initial investigation) specifically points to several alleged inconsistencies in Smith's statements throughout the investigation. Respondent learned of a majority of those inconsistencies as a result of the unlawful interrogations of Smith on May 24 and June 1. (GC Ex. 8)

Counsel for the General Counsel does not dispute that Respondent learned some information about the circumstances surrounding Smith's injury outside of the May 24 and June 1 interrogations as a result of Smith's conversations with management, plant medical and coworkers prior to the May 24 meeting. However, Respondent greatly exaggerates the length of

these conversations and the information it obtained during these conversations. In fact, the record reflects that during these rather brief conversations, Smith did not reveal great detail about the circumstances surrounding his accident. (ALJD at 3-4; Tr. 68-75, 164-166, 169-170, 232, 236, 244-245; GC Ex. 7; CP Ex. 3).

It should first be noted that the May 24 and June 1 interrogation sessions lasted a combined 150 minutes, during which time Smith was asked numerous and repeated questions about the specific circumstances surrounding his injury. Purely based on the length of the interviews, there is no doubt that these sessions comprised a substantial portion of information obtained by Respondent about Smith's injury. As noted below, Smith's conversations with others outside of the interviews were much shorter, more focused on Smith's health than the circumstances of his injury, and lacked the specificity of the May 24 and June 1 interrogation sessions. (Tr. 81, 88).

Though Respondent claims that supervisor Szymanski spoke with Smith on several occasions following the injury, the record reflects that during only one of those instances, for about ten minutes, did Szymanski and Smith discuss in any detail the circumstances surrounding Smith's injury. Smith refuted Szymanski's testimony that the two returned to the scene of the accident to demonstrate what had occurred. (ALJD at 3-4; Tr. 69-73, 164-166, 169-170).

Smith's discussions with receptionist Shannon Thomas and nurse Charlene Hanson in the Yerkes Plant medical office immediately prior to the initial May 24 interrogation were similarly brief. His visit to the medical office lasted no more than 20 to 30 minutes, during which he was in great deal of pain. Hanson performed numerous range of motion exercises to determine the extent of Smith's injury. The record reflects that during that time, the two engaged in some conversation about the circumstances surrounding Smith's injury. The ALJ found that Smith

explained how he fell, and stated that the floor may have been wet. It is notable that Respondent failed to call either Thomas or Hanson to testify regarding their interactions with Smith. (ALJD at 4; Tr. 74-75).

Smith's discussions with employees Tim Eberle and Dave Reister, which occurred immediately after his fall, were extremely brief, solely regarding whether or not Smith was OK, and were wholly unrelated to the circumstances surrounding his injury. Respondent interviewed Eberle and Reister only after first meeting with Smith, and the record reflects that the purpose of those meetings was to fact-check the information it had already garnered from Smith. Respondent safety, health and environmental manager Sharon Laskowski ordered Pilmore to interview Eberle and Reister after comparing the notes of the Smith's May 24 interrogation with the notes summarizing Szymanski's, Thomas' and Hanson's notes of their interactions with Smith immediately after his injury. Reister's recollection of the events in question essentially confirmed Smith's recollection of the events (the lone exception being that Reister did not see Smith fall). Eberle had very little information to provide. He saw Smith limping, and Smith told him that he had hurt his knee. Notably, this was consistent with Smith's recollection of the events. The record further reveals that Respondent compared the information provided by Eberle and Reister to the information provided by Smith during the May 24 interrogation, in preparation for the June 1 interrogation of Smith, further evidencing Respondent utilized the information collected during the May 24 and June 1 interrogations of Smith to terminate him. (Tr. 68, 232, 236, 244-245; GC Ex. 7; CP Ex. 3).

The ALJ properly found, as supported by the record, that Respondent did not solely use the information obtained from these interactions to terminate Smith. Indeed, if those outside interviews provided enough ammunition to terminate Smith, then there would have been no need

to interrogate Smith on three separate occasions about the circumstances surrounding his injury. (ALJD at 3-4, 14-15; Tr. 68-75, 164-166, 169-170, 232, 236, 244-245; GC Ex. 7; CP Ex. 3).

Even more importantly, Smith was not terminated because of what happened on the line. Indeed, Smith's termination letter indicates that he was terminated not because of the circumstances surrounding his injury, but because he allegedly provided "false or incomplete information" about the circumstances surrounding his injury. As such, the record clearly reflects that the allegedly inconsistent statements made by Smith during the May 24 and June 1 interrogations caused Respondent to terminate Smith. Any argument to the contrary by Respondent is simply without merit. (GC Ex. 3).

Even assuming *arguendo* that Respondent failed to learn any new information at either unlawful interrogation session, Board law *cited by Respondent* clearly indicates that an employer's refusal to grant an employee's request for union representation during an investigatory interview can be a Weingarten violation even if the employer uncovered no new information during that interview. In Pacific Telephone and Telegraph Co., 262 NLRB 1034 (1982), the employer had already uncovered clear evidence of misconduct prior interviewing either of the offenders. At the subsequent interviews, the employees were not permitted to speak with their union representatives prior to the interview despite the union's request for such a consultation. The employer uncovered no new evidence during the interviews. The ALJ, in a decision upheld by the Board, determined that, despite the fact that nothing new was learned during the interviews, that Weingarten and its progeny applied to interviews, and that the employer had violated Section 8(a)(1) of the Act. *Id.* at 1037-1038. In Radisson Mulbach Hotel, 273 NLRB 1464 (1985), the employer called an employee in for an interview to discuss whether the employee should be suspended. The employee requested, and was denied, the presence of a

union representative, and the interview continued. During the interview, the employee simply corroborated information the employer already had, and the employer decided to suspend him. The ALJ, in a decision upheld by the Board, determined that, in continuing on with the interview despite the employee's request for union representation, the employer had failed to provide the employee his Weingarten rights in violation of Section 8(a)(1) of the Act. Id. at 1477-1478.

As the record demonstrates, Respondent relied heavily on information it obtained during the May 24 and June 1 interviews in terminating Smith for providing false or incomplete information about his injury. Accordingly, it is wholly disingenuous and contrary to the weight of the evidence for Respondent to argue that it obtained all of the information it needed to terminate Smith outside of the May 24 and June 1 interrogation sessions. Further, even assuming *arguendo* that Respondent obtained information from Smith that it already had, Weingarten protections still applied to those interrogations because, as described above, Smith requested representation, the interrogations were investigatory in nature, and Smith reasonably believed discipline would result from the interrogations. As such, Respondent's failure to grant Smith's request for union representation violates Section 8(a)(1) of the Act. *See Pacific Telephone and Telegraph Co., supra, Radisson Mulbach Hotel, supra.*

**C. A make-whole remedy is appropriate in the instant matter.**<sup>4</sup> (Cross-Exception 18)

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<sup>4</sup> Because the ALJ appropriately determined that Respondent violated Section 8(a)(1) of the Act by failing to provide Smith with union representation during the unlawful interrogations on May 24 and June 1, the ALJ properly determined that a cease-and-desist order, the traditional remedy for a Weingarten violation, was appropriate. As such, Respondent's exception to the ALJ's proposed remedy, order and notice lacks merit. *See, e.g., Taracorp Inc., 273 NLRB 221 (1984).* (Cross-Exceptions 22, 23)

As appropriately determined by the ALJ, the record reflects that Smith was terminated because Respondent claimed Smith was dishonest when allegedly providing inconsistent responses during the unlawful May 24 and June 1 interrogations. In sum, the ALJ found that Smith's misconduct (his alleged dishonesty) during the unlawful interrogations caused Respondent to terminate Smith. (ALJD at 3-4, 14-15; Tr. 68-75, 164-166, 169-170, 232, 236, 244-245; GC Ex. 7; CP Ex. 3).

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.<sup>5</sup> 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

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<sup>5</sup> Available on the Board's public website at [www.nlr.gov](http://www.nlr.gov). General Counsel recognizes that Division of Advice Memoranda are without precedential value. However, as stated in Southwest Regional Council of Carpenters, 356 NLRB No. 88, slip op. at 24 (Feb. 3, 2011), "While it is axiomatic that ... advice memoranda have no precedential authority, they 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."

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 (alleged dishonesty) during the unlawful interrogations.

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 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 Board’s determination in Supershuttle 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 determined that “Smith was discharged for dishonestly because he allegedly gave inconsistent responses to questions asked at his various interviews during the investigative process.” The ALJ correctly concluded that it was Smith’s conduct at these interviews, and not the information gleaned during the interviews, that caused the Employer to terminate Smith. Therefore, consistent with the Board’s determination in Supershuttle, because Smith was terminated as a result of his conduct during the unlawful interview, he is entitled to backpay and reinstatement. (ALJD at 14-15).

Respondent’s reliance on several Board cases that stand for the premise that that a make-whole remedy is unavailable in instances where an employer learns no new information during an unlawful interview is misplaced. See Houston Coca-Cola Bottling Co., 265 NLRB 1488 (1982); Pacific Telephone and Telegraph, *supra*; Radisson Muehlbach Hotel, 273 NLRB 1464 (1985). To the contrary, as supported by the record, the ALJ appropriately determined that Respondent obtained a large portion of the alleged inconsistent and dishonest statements from Smith that it ultimately used to terminate him during the lengthy unlawful interrogations. (ALJD at 3-4, 14-15; Tr. 68-75, 164-166, 169-170, 232, 236, 244-245; GC Ex. 3, GC Ex. 8, GC Ex. 9; CP Ex. 3)

Further, Respondent’s claim that there is no causal link between the unlawful interrogation and the termination lacks merit. Record documentary evidence, including communications among Respondent’s management, the letter of termination issued to Smith, the presentation created by Respondent’s superintendent, Pilmore, recommending termination, and

Respondent's position statement provided to the Region during the unfair labor practice investigation in the instant case, all clearly indicate that the content of Smith's answers provided during the unlawful interrogations were the specific cause of Smith's termination. (GC Ex. 3, GC Ex. 8, GC Ex. 9; CP Ex. 3).

Based on the foregoing, Smith is entitled to a make-whole remedy as a result of the ALJ's determination, as supported by the record, that Smith was terminated as a result of alleged dishonest statements made during the unlawful interrogations. (ALJD 3-4, 14-15).

**D. The ALJ appropriately determined that union representation may have assisted Smith during the unlawful interrogations on May 24 and June 1, 2012.** (Cross-Exceptions 19, 20)

The ALJ correctly determined that union representation may have assisted Smith on May 24 and June 1, but Respondent's unlawful failure to grant Smith's request for representation robs the fact-finder from definitively making such a determination. (ALJD at 15).

As noted by the ALJ, the Supreme Court in Weingarten noted that "a single employee confronted by an employer on whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated" and that a union representative could "assist the employer by eliciting favorable facts." NLRB v. Weingarten, 420 US at 262-263. The record supports a finding that this was precisely the type of assistance that Smith needed, and would have received, on May 24 and June 1.

The minor inconsistencies in Smith's recall would likely have been avoided had he been afforded union representation. The record reflects that Smith was "antsy" (because he had yet to take his diabetes medication), exhausted and in great physical pain when subjected to the initial unlawful interrogation on May 24. Had Respondent properly honored Smith's timely request for

union representation, a union representative could have advised Smith not to answer questions due to his compromised physical and mental state; to only provide answers he was certain of; and to obtain clarifications to the litany of ambiguous and confusing questions. Similarly, during the second unlawful interrogation on June 1, during which Smith was subjected to confusing questions in rapid-fire fashion, a union representative could have assisted Smith in constructing a cohesive narrative of the events. (Tr. 78, 86-88).

Respondent's argument that union representation could not have assisted Smith during either of the unlawful interrogations is simply not supported by the record. Rather, the record provides concrete evidence that, had Respondent appropriately provided Smith with a union representative upon his request, the representative would have been trained to assist Smith. The United Steelworkers International Union provides numerous trainings to local union officers, including stewards, regarding representation of employees during investigatory interviews. The record reveals that based on the training and practices of union stewards at the Yerkes Plant, a union representative, prior to any formal interview conducted by Respondent, would have requested to meet with Smith individually and reviewed Smith's entire story with him, in order to help Smith in constructing a consistent narrative as what occurred, thus diminishing the prospect of Smith providing inconsistent information during the two interrogations. The record reflects that the representative would have taken notes during the interview and provided assistance in resolving discrepancies that arose during the interrogations. Additionally, the representative would have talked to witnesses to the incident to see if their recollections were consistent with Smith's. Record evidence fully rebuts Respondent's unsupported assertion that a union representative would only have provided Smith with limited assistance that would not have improved his position. Rather, the record contains a voluminous amount of evidence fully

supporting the ALJ's determination that a union representative might have been able to assist Smith during the two unlawful interrogations. (Tr. 18-22, 70-71, 75, 78, 86, 88, 148-151; GC Ex. 9).

## **V. CONCLUSION**

For the reasons set forth above, record evidence and applicable precedent fully establishes that, as appropriately determined by the ALJ, 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 and unlawful interrogation which began on May 24, 2012, and continued on June 1, 2012. Record evidence and Board precedent further established that the ALJ appropriately determined that Smith was terminated as a result of conduct that he engaged in during the unlawful interrogations. As such, Respondent's exceptions to the ALJ's appropriate factual and legal findings lack merit, and should be dismissed.

Finally, the ALJ determined that a cease-and-desist order was the appropriate remedy. While the ALJ concluded, based on a lack of case law authority, that Smith was not entitled to either backpay or reinstatement as a result of Respondent's actions, the General Counsel has argued herein and in General Counsel's brief in support of exceptions, that the ALJ's recommended remedy and order should be modified to include a make-whole remedy and any other remedy as deemed appropriate by the Board.

**DATED** at Buffalo, New York, this 18th day of November, 2013.

Respectfully submitted,

/s/ Jesse Feuerstein

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