Plaza Auto Center, Inc. ***and*** **Nick Aguirre.** Case 28–CA–22256

August 16, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

On July 21, 2009, Administrative Law Judge Lana H. Parke issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.[2]

The General Counsel excepts to the judge's dismissal of the complaint allegation that the Respondent unlawfully discharged employee Nick Aguirre following his outburst at a meeting with the Respondent's owner and sales managers. The General Counsel contends that Aguirre was engaged in protected concerted activity at the meeting and that his outburst was not so egregious as to lose the protection of the Act under *Atlantic Steel Co.*, 245 NLRB 814 (1979). We find merit in the exceptions.

Facts

The Respondent, which sells preowned automotive vehicles, hired Aguirre in August 2008 as a salesperson.[3] On his first day of work, the Respondent was conducting one of its periodic tent sales in a Sears parking lot. When Aguirre inquired as to what restroom he should use during the sale, his coworkers laughed and pointed in various directions. Sales Manager Juan Felix pointed toward the Sears store and a gas station across the street. At a sales staff meeting the following week, Aguirre asked whether the Respondent gave employees a break and a meal during the tent sales, and Felix responded, "You're always on break, buddy . . . you just wait for customers all day," adding that if Aguirre did not like the way that the Respondent operated, he could leave at any time.

At the next tent sale, Aguirre asked other employees about the Respondent's compensation system, and they told him that the salesmen were paid straight commission with no guaranteed minimum. Aguirre also discussed how the salespeople could alternate restroom breaks. However, when he asked Felix if he could take a break to eat and use the restroom, Felix refused, again telling Aguirre that if he did not like it he could leave. Felix also reiterated to Aguirre and the other salesmen that they were always on break.

At the next sales staff meeting, another employee raised the subject of pay. Sales Manager Gustavo MacGrew responded that if the employees did their jobs right, including following procedures, doing test drives, and completing paperwork, and did not give cars away for free, they would make money. When Aguirre sold a vehicle listed on the Respondent's Flat List[4] as carrying a commission of $1000–$2000, he was surprised to receive a check for only $150 gross. His colleagues agreed that the amount was unfairly low, and Aguirre confronted Felix, who replied that the Respondent had given the vehicle away almost for free.

During a later sales staff meeting, the Respondent's owner, Tony Plaza, mentioned that there were scratches on a vehicle and threatened to deduct the repair cost from all of the salesmen's pay unless the person responsible came forward. Aguirre asserted that the cost should instead be shared by all employees who had access to the vehicle. At the same meeting, Plaza raised the subject of employee negativity, stating that he had a stack of applications from which he could easily hire. Employee Oscar Martinez brought up breaks and meal periods, adding that Felix had been disrespectful when Martinez asked about them. Plaza answered that the Respondent was trying to work out the break issue.

In October, Aguirre told Felix that he wanted to know which cars carried a good commission, because he thought that the Respondent was stealing his money. Felix answered that if Aguirre did not trust the Respondent, he was welcome to go elsewhere.

Aguirre subsequently contacted a State wage and hour agency. He told his coworkers that the "Labor Commission" said that employees should get minimum wage as a draw against commissions and that he would inform Office Manager Barbara Montenegro after he obtained more information. On October 28, Aguirre asked Montenegro whether salesmen were entitled to a minimum

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the conclusions of law, amended the remedy, and substituted a new notice for that of the administrative law judge.

[3] All dates are 2008 unless otherwise indicated.

[4] The Flat List shows vehicles that have been on the lot for an extended time and predetermined commissions intended as an incentive for the salesmen to sell those vehicles.

wage draw, and she replied that the Respondent did not pay minimum wage and that, if he wanted a minimum wage job, the sales job was not the job for him. Aguirre told her that he had spoken with the State Labor Board and asked if she could find the answer, perhaps by asking Plaza.

On the same afternoon, Felix called Aguirre into his office to meet with Plaza, Felix, and MacGrew. Felix had just informed Plaza that Aguirre complained about everything, including not trusting the Respondent concerning commissions and not knowing the Respondent's cost of vehicles. Plaza began the meeting by stating that Aguirre was "talking a lot of negative stuff" that would negatively affect the sales force. Aguirre said that he had questions about vehicle costs, commissions, and minimum wage. Plaza admitted responding that Aguirre needed to follow policies and procedures, including the pay structure, and that he should not be complaining about pay. He added that car salesmen normally did not know the cost of vehicles. At least twice, Plaza said that if Aguirre did not trust the Respondent, he did not need to work there. Aguirre became upset and told Plaza that he was an "F'ing mother F'ing," an "F'ing crook," and "an asshole," and that he was stupid, nobody liked him, and everyone talked about him behind his back. At one point, Aguirre stood up in the small office, pushed his chair aside, and said that, if he was fired, Plaza would regret it. Following Aguirre's outburst, Plaza fired him. The judge found that the Respondent had discharged salesman Eddie Yemes in 2008 for telling Felix at a tent sale to "f— himself."

Discussion

As an initial matter, the judge determined that Aguirre's questioning of the Respondent's policies concerning breaks, restroom facilities, and compensation constituted protected concerted activity under the Act. Moreover, she found that the Respondent's statements in response to Aguirre's inquiries, that if he disliked the Respondent's policies he did not need to work there, violated Section 8(a)(1). No party excepted to these findings. The judge further found that the Respondent terminated Aguirre because of his outburst toward Plaza. We adopt these findings. We also adopt the judge's findings of fact concerning the October 28 meeting, which are largely based on her assessment of credibility.

The *Atlantic Steel* Analysis

Because Aguirre's outburst occurred at a meeting held in the context of his protected concerted activity, the judge applied the test set forth by the Board in *Atlantic Steel*, 245 NLRB 814, 816 (1979), for determining whether the conduct was so egregious as to lose the protection of the Act.[5] In *Atlantic Steel*, the Board identified four factors to be balanced in the determination: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. As the judge here correctly observed, the Act allows some latitude for impulsive conduct by employees in the course of protected concerted activity, but, at the same time, recognizes that employers have a legitimate need to maintain order.[6] The balance between these policy concerns lies at the heart of the *Atlantic Steel* analysis.

Factors 1, 2, and 4: We agree with the judge that the first, second, and fourth *Atlantic Steel* factors favor a determination that Aguirre's conduct was protected. With respect to the first factor, the place of the discussion, the meeting took place in Felix's office, in the presence of only management officials. Montenegro, whose office is adjacent to Felix's, testified that she could hear Aguirre speaking in a loud voice but could not hear what he was saying. Under these circumstances, his outburst could not have undermined workplace discipline at the Respondent's facility. As to the second factor, the subject matter of the discussion, the discussion involved Aguirre's protected concerted activity of raising questions about terms and conditions of employment, particularly the Respondent's policies pertaining to breaks and compensation. Finally, with regard to the fourth factor, whether the employee was provoked, at least twice during the meeting, the Respondent reiterated to Aguirre its frequent warning that if he did not like the Respondent's policies he did not need to work there. The judge found, and we agree, that these statements were unlawful and provocative responses to Aguirre's inquiries. *Felix Industries*, supra, 331 NLRB at 145.

Factor 3: Contrary to the judge, we do not find that the third factor, the nature of the outburst, favors the loss of protection, or that this factor warrants an ultimate conclusion that Aguirre forfeited his Section 7 protections.

[5] The judge also analyzed Aguirre's discharge under the Board's test in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). That test, however, provides a means of resolving questions of employer motivation. Here, it is undisputed that the Respondent terminated Aguirre because of his outburst in the October 28 meeting, which the judge found, and we agree, otherwise involved protected concerted activity. In such circumstances, *Atlantic Steel* provides the appropriate analysis. *Felix Industries*, 331 NLRB 144, 145–146 (2000), enfd. in relevant part 251 F.3d 1051 (D.C. Cir. 2001), supplemented 339 NLRB 195 (2003), enf. mem. 2004 WL 1498151 (D.C. Cir. 2004).

[6] *Tampa Tribune*, 351 NLRB 1324, 1324–1325 (2007), enf. denied sub nom. *Media General Operations v. NLRB*, 560 F.3d 181 (4th Cir. 2009); *NLRB v. Thor Power Tool*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379, 1380 (1964).

The Board has found that communications in the course of protected activity are also protected unless they are "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204–205 (2007) (citations omitted), enfd. 519 F.3d 373 (7th Cir. 2008). As the judge acknowledged, a single verbal outburst of insulting profanity does not exceed the bounds of the Act's protection. Thus, in *Burle Industries*, 300 NLRB 498 (1990), enfd. 932 F.2d 958 (3d Cir. 1991), the Board found that an employee did not forfeit protection when, in the course of encouraging employees to leave the facility due to a possible chemical spill, he called a supervisor a "f'ing asshole" for wanting employees to work despite the fumes. The judge there found that the employee overreacted when he believed that the supervisor was making light of the situation, but that the outburst was attributable to frustration and "animal exuberance" in the heat of the moment.

Here, the judge variously labeled Aguirre's "cursing and derogating" of Plaza as "belligerent," "menacing," and "at least physically aggressive if not menacing." Although we do not condone Aguirre's outburst toward Plaza, the judge's characterizations of it are inconsistent with her own factual findings and overstate its severity in light of the evidence. Because the judge's descriptions are unsupported by the record, we do not rely on them; instead we assess Aguirre's conduct based on the credited evidence.[7]

In context, we find that Aguirre's profanity was not so opprobrious as to deprive him of statutory protection. Prior to the October 28 meeting, Aguirre on several occasions expressed concerns about the Respondent's policies and stated that he believed that its compensation policies violated state wage and hour requirements. The Respondent consistently dismissed his inquiries, which it viewed as demonstrating a negative attitude that it did not want to influence other employees. Moreover, the Respondent's unlawful refrain that if Aguirre did not like its policies, he could quit invited a strong reaction from Aguirre, which finally occurred when Plaza repeated the statement at the October 28 meeting.[8] Unlike the employee in *Burle Industries*, supra, Aguirre uttered more than a single profanity against Plaza. Nevertheless, his was a single and brief outburst provoked by Plaza's failure to respond to Aguirre's concerns and his invitation, once again, that Aguirre work elsewhere.[9] Moreover, according to Aguirre's unrebutted testimony, Felix had also used obscene language, including "the F word," on several occasions in addressing sales employees, sometimes in the presence of MacGrew. Therefore, the record shows that profane language was not outside the range of conduct at the Respondent's facility.[10]

We further find that Aguirre's statement that if Plaza fired him he would regret it was not a threat of physical harm. The statement itself did not refer to such harm in any way. In the context of Aguirre's recent inquiry to a State agency regarding the employees' entitlement to a minimum wage draw against commissions, it seems clear that Aguirre was threatening legal consequences. Furthermore, the record shows no evidence of any physical harm or threat thereof by Aguirre during his employment. Under these circumstances, we find it much more likely that Aguirre was threatening to report the Respondent's practices to State authorities than to retaliate against the Respondent through violence.

[7] Our dissenting colleague would accept the judge's characterizations of Aguirre's conduct based on the premise that the judge was in a position to observe witnesses' representations of Aguirre's tone and body language, which are not apparent in the written record. However, it is the Respondent's responsibility to present on the record all relevant evidence supporting its position, including, where appropriate, testimony concerning a speaker's tone and gestures. The Respondent here has provided no such evidence that warrants the judge's descriptions of Aguirre's conduct. In addition, as discussed infra, the judge did not explain the basis of her findings, whether it be witnesses' nonverbal imitations of Aguirre's conduct or otherwise. Therefore, in reviewing the record based on the General Counsel's exceptions, we cannot rely on the judge's unexplained and unsupported characterizations.

[8] Plaza also admitted telling Aguirre at the meeting that he should not complain about the Respondent's pay structure. This statement was not separately alleged as unlawful.

[9] Compare *Aluminum Co. of America*, 338 NLRB 20, 21–22 (2002) (repeated incidents of ad hominem profanity against supervisor not emotional outburst provoked by officials of the employer and not within Act's protection).

In view of Plaza's invitation that Aguirre work elsewhere, and the judge's finding, with regard to the fourth factor, that Aguirre's outburst was provoked by Plaza, we find that the judge erred in stating that it occurred "[w]ithout extreme provocation from overt hostility or antagonism from [Plaza]."

The judge also cited the Respondent's September discharge of Yemes, whose misconduct she deemed less serious than Aguirre's because it was less extensive and not directed at the Respondent's owner. However, we do not find Yemes' discharge relevant to this case. As explained, the legality of Aguirre's discharge does not turn on the Respondent's motive or its past practice. Whether the Respondent discharged another employee in arguably comparable circumstances, lawfully or not, does not bear on whether Aguirre lost the protection of the Act.

[10] In finding that the Respondent satisfied its burden under *Wright Line* to show that it would have discharged Aguirre even in the absence of his protected concerted activity, the judge cited the Respondent's September discharge of Yemes for an arguably comparable outburst toward Felix at a tent sale. We do not find Yemes' discharge relevant to our decision. As explained, because the Respondent's motivation here is not at issue, the legality of Aguirre's discharge is appropriately analyzed under *Atlantic Steel* rather than *Wright Line*. Further, even if Yemes' discharge indicates that the Respondent did not tolerate obscene language on that occasion, the fact remains that such language was used in the Respondent's workplace, as demonstrated by Felix's own conduct.

For these reasons, we disagree with the judge that Aguirre's verbal outburst was "belligerent," "physically aggressive," or "menacing." The judge also failed to identify any physical aggression that would support such a description, and we find none. In fact, the only physical movement by Aguirre that the judge found was his standing up and pushing aside the chair. However, even considering Aguirre's apparent frustration or anger during the meeting, it is not clear from the record, and the judge did not find, whether this was a hostile action or one of necessity in Felix's office, which Plaza testified was "really small," approximately 8 or 10 feet by 10 feet.[11] Moreover, neither Plaza's contemporaneous note nor the Respondent's position statement to the Board in response to the unfair labor practice charge referred to any physical conduct by Aguirre, and the judge found that the Respondent discharged him for his verbal attack, not for any physical threat.

Relying on the judge's findings of fact, we conclude that Aguirre's outburst, while vehement and profane, was brief and unaccompanied by insubordination, physical contact, threatening gestures, or threat of physical harm. Therefore, we find that his conduct did not render him unfit for further service and thus did not exceed the bounds of statutory protection under *Atlantic Steel*'s third factor.

Based on our determination that all of the *Atlantic Steel* factors weigh in favor of finding Aguirre's conduct in the October 28 meeting within the protection of the Act, we reverse the judge and conclude that the Respondent violated Section 8(a)(1) by discharging him.[12]

[11] In this regard, the judge acknowledged but did not resolve the inconsistencies in the testimony of the Respondent's witnesses. Thus, she did not determine whether Aguirre threw the chair (Felix), hit the desk (MacGrew), or "got on [sic] my face" (Plaza). None of these statements was corroborated by another witness, and the judge did not rely on them in her findings of fact.

[12] Cf. *Daimler-Chrysler Corp.*, 344 NLRB 1324, 1328–1328 (2005). In that case, as the judge found, only the second factor favored protection, and the Board found the employee's conduct repeated, profane, and insubordinate. Chairman Liebman dissented in *Daimler-Chrysler*. Member Pearce did not participate in that case and takes no position as to whether it was correctly decided.

Even assuming for the sake of argument that the third factor favors the loss of protection, the *Atlantic Steel* test requires a careful balancing of the four factors to determine whether the employee's conduct crossed the line of statutory protection. 245 NLRB at 816. On balance, we find that Aguirre's conduct did not cross that line. Factors 1, 2, and 4 clearly favor protection for the reasons discussed. Even if factor 3 favors depriving Aguirre of the Act's protection, we find that, in the circumstances here, it is outweighed by the other factors. We note particularly the absence of prior improper conduct, the Respondent's unwillingness to resolve the issues previously raised by Aguirre, and Plaza's provocation of the outburst. *Felix Industries*, 339 NLRB 195, 196–197 (2003).

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by telling employees that they could quit or leave the Respondent's employ if they did not like company policies and/or procedures.
3. The Respondent violated Section 8(a)(1) of the Act by discharging employee Mark Aguirre because he engaged in protected concerted activity in order to discourage other employees from exercising their rights under the Act.
4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

AMENDED REMEDY

We adopt the remedies recommended by the judge. In addition, having found that the Respondent violated Section 8(a)(1) by discharging employee Mark Aguirre because he engaged in protected concerted activity in order to discourage other employees from exercising their rights under the Act, we shall order the Respondent to offer Aguirre immediate reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. We shall also order the Respondent to make Aguirre whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the discharge, and to notify Aguirre in writing that this has been done and that the discharge will not be used against him in any way.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Plaza Auto Center, Inc., Yuma, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Telling employees that they can quit or leave the Respondent's employ if they do not like company policies and/or procedures.

(b) Discharging or otherwise discriminating against any employee because he engaged in protected concerted

activity in order to discourage employees from exercising their rights under the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Nick Aguirre full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Nick Aguirre whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the Amended Remedy section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its Yuma, Arizona facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2008.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER SCHAUMBER, dissenting.

I agree with my colleagues and the judge that the first, second, and fourth factors of the *Atlantic Steel*[1] analysis favor a finding that Nick Aguirre's conduct was protected by the Act. As to the third factor, however, I would adopt not only the judge's findings concerning what occurred at the October 28, 2008 meeting, but also her assessment of the nature and seriousness of Aguirre's conduct. Therefore, I agree with the judge that the third factor does not favor protection. Moreover, like the judge, I would dismiss the complaint.

The critical evidence in this case is the testimony of Aguirre and the Respondent's officials, evidence that the judge is in a unique position to evaluate. Thus, based on her observation of the demeanor of the witnesses, the judge credited the testimony of the Respondent's officials over that of Aguirre. The majority has accepted this determination, in accordance with the Board's longstanding policy,[2] and I agree with my colleagues on this point.

However, the opportunity to view and evaluate witness demeanor is not the administrative law judge's only advantage. The judge also gains important insights from the manner in which testimony is conveyed, including the witnesses' representations of a speaker's tone and body language. The hearing transcript, on which the Board must rely, cannot adequately communicate these aspects of the witnesses' testimony. Therefore, in a case such as this, which turns primarily on Aguirre's words and actions in the October 28 meeting, I would not overturn the judge's characterization of the pivotal events unless the record included compelling evidence that she was wrong. I find no such evidence in this case.

In addition, I disagree with my colleagues that Felix's use of profanity toward employees and in MacGrew's presence indicates that the Respondent tolerated such language. Aguirre conceded in his testimony that Felix had never used profanity when Plaza was present. Moreover, Plaza's decision to discharge employee Eddie Yemes for uttering a single obscenity toward Felix shows that the Respondent in fact maintained a strict policy against profane language toward supervisors.

For the above reasons, I agree with the judge that the third factor of the *Atlantic Steel* analysis favors a finding that Aguirre forfeited the protection of the Act. Also like the judge, I find that, in balancing the test's four factors, substantial weight should be accorded to the third factor and, in cases of outrageous behavior, it can be determinative.[3] In my view, this is such a case. Plaza's statement that Aguirre could work elsewhere was unlawful but not

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *Atlantic Steel Co.*, 245 NLRB 814 (1979).

[2] *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

[3] *Stanford Hotel*, 344 NLRB 558, 559 fn. 7 (2005) (stating my agreement with Chairman Battista's dissent on this point in *Felix Industries*, 339 NLRB 195 (2003), enfd. per curiam D.C. Cir. 2004) (No. 03–1221, 03–1239)).

extreme, and Aguirre's shouted profanity was far out of proportion to this provocation. Accordingly, I would find that the Respondent lawfully discharged Aguirre under *Atlantic Steel*.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell employees that they can quit or leave our employ if they do not like our policies and/or procedures.

WE WILL NOT discharge or otherwise discriminate against any of you because you engage in protected concerted activity in order to discourage you from exercising your rights under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Nick Aguirre full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Nick Aguirre whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Nick Aguirre, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

PLAZA AUTO CENTER, INC.

Joel C. Schochet, Atty., for the General Counsel.
Alicia Z. Aguirre, Atty. (Law Office of Alicia Z. Aguirre, PLC), of Yuma, Arizona, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by Nick Aguirre (Mr. Aguirre), an individual, the Regional Director of Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint) on January 30, 2009. The complaint alleges that Plaza Auto Center, Inc. (the Respondent) violated Sections 8(a)(1) of the National Labor Relations Act (the Act). This matter was tried in Somerton, Arizona, on May 5, 2009.[1]

II. ISSUES

1. Did Respondent violate Section 8(a)(1) of the Act by discharging Mr. Aguirre on October 28?

2. Did Respondent violate Section 8(a)(1) of the Act by threatening employees with unspecified reprisals and by inviting them to quit their employment?

III. JURISDICTION

At all relevant times, the Respondent, an Arizona corporation, has been engaged in the business of selling pre-owned automotive vehicles with an office and place of business in Yuma, Arizona (the Respondent's facility).[2] In conducting its business operations during the 12-month period ending December 1, the Respondent derived gross revenues in excess of $500,000 and purchased and received at its facility goods valued in excess of $50,000, directly from points located outside the State of Arizona and from other enterprises located within the State of Arizona, each of which had received the goods directly from points outside the State of Arizona. I find Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

IV. STATEMENT OF FACTS

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings:

The individuals named below, holding the stated positions with the Respondent, were supervisors within the meaning of Section 2(11) of the Act and comprised the management hierarchy of the Respondent:

Tony Plaza Sr. (Mr. Plaza)	—	Owner
Juan Felix (Mr. Felix)	—	Sales Manager
Gustavo MacGrew (Mr. MacGrew)	—	Sales Manager
Barbara Montenegro (Ms. Montenegro)	—	Office Manager

In its business, the Respondent utilized two shifts of sales personnel: 8 a.m. to 3 p.m. and 1 p.m. to 8 p.m. The Respondent had no employee break policy.[3] Periodically the Respon-

[1] All dates are 2008, unless otherwise specified.

[2] Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

[3] However, according to Mr. Felix, employees could take breaks "whenever they want to most likely."

dent held vehicle sales events at a Sears parking lot in Yuma (Sears tent sale) over 3-day weekends, commencing Friday and concluding Sunday. The Respondent's vehicle salespeople and supervisors staffed the Sears tent sales. The Respondent compensated its salespeople by commission only.[4] The Respondent maintained a "Flat List" of vehicles for sale, i.e., vehicles that were hard to sell, for sale of which the Respondent paid its sales personnel an incentive fee called a "flat commission." The Respondent commonly held sales staff meetings each Wednesday.

Mr. Aguirre began working for the Respondent at the end of August as a salesperson. His first day of work coincided with a Sears tent sale. In the course of his first day, Mr. Aguirre asked fellow salespeople what restroom facilities he was to use. Some laughed and pointed in various directions. When Mr. Aguirre asked Mr. Felix the same question, Mr. Felix pointed to an area across the street from the parking lot where the Sears store and a Circle K gas station were located.[5]

On the following Wednesday, Mr. Aguirre attended a sales staff meeting at the Respondent's facility along with other salespeople and Mr. Felix and Mr. MacGrew. At the meeting, Mr. Aguirre learned the company held the Sears tent sales every 2 weeks. Mr. Aguirre asked if employees were entitled to a break and a meal during the Sears tent sales. Mr. Felix said, "You're always on a break, buddy . . . you just wait for customers all day." Mr. Felix also said that if Mr. Aguirre did not like the way the company operated, he was welcome to leave at any time.

The Respondent held its next Sears tent sale in mid-September. At that sale, Mr. Aguirre discussed the Respondent's employee compensation system with other salespeople. They told him that compensation was straight commission with no income floor, i.e., a guaranteed minimum amount of compensation a salesperson earns within a specified time period. During the course of the sale, Mr. Aguirre discussed with two other salespeople how to alternate restroom breaks. Mr. Aguirre asked Mr. Felix if he could take a break to eat and use the restroom. Mr. Felix refused, saying "If [Mr. Aguirre] didn't like it that [he] could just [leave]." Mr. Felix told Mr. Aguirre and salesmen, Oscar Martinez and Jimmy Pagan, who were also present, that the sales staff was always on a break.

At the following sales staff meeting held at the Respondent's facility, a salesperson other than Mr. Aguirre asked how much employees would be paid. Mr. MacGrew answered that if the sales staff did their jobs right, did the test rides, filled out the proper paperwork, followed the procedures, and did not give the car away for free, they would make money.[6]

At some point prior to receiving his first paycheck, Mr. Aguirre sold a 1999 Suburban that had been on the Respondent's lot for several months. According to Mr. Aguirre, a vehicle of the same description was listed on the Flat List with a commission rate of $1,000 to $2,000. When Mr. Aguirre received his paycheck, he was surprised that the amount was only $150 gross. Mr. Aguirre showed his paycheck to several fellow salespersons who agreed with him that the amount was unfair. When Mr. Aguirre confronted Mr. Felix about his small paycheck, pointing out he had sold the 1999 Suburban, Mr. Felix said the company had given the vehicle away almost for free.

Over the weeks of his employment, Mr. Aguirre talked to other sales employees about his concerns with the way the Respondent paid them, the lack of a restroom facility at the Sears tent sales, and the inability to leave the work area by car to eat.

At one of the Respondent's Wednesday sales meetings, date unspecified, Mr. Plaza raised the following concerns: (1) scratches on the left rear panel of a vehicle for sale and (2) employee negativity. As to the first issue, Mr. Plaza said if the employee responsible for the damage to the vehicle did not come forward, he would deduct the repair cost from sales employees' paychecks. Mr. Aguirre objected, saying, "I believe that is unfair for you to do that to us. We work hard for our money . . . if you're going to deduct any kind of money from anyone's payroll, it would be fair to deduct from everyone who has access to this vehicle." As to the issue of employee negativity, Mr. Plaza said Respondent had a stack of applications from hopeful job seekers whom they could easily hire.[7] Mr. Plaza asked employees to speak about employee morale. Salesman Oscar Martinez told Mr. Plaza the only problem he had was with the breaks and meal periods and that Mr. Felix, in addressing those issues, was short with him and disrespectful. Mr. Plaza answered that the company was trying to work out the meal and break issue and that he would talk to Mr. Felix.

In October at a Sears tent sale, Mr. Aguirre told Mr. Felix, essentially, that he wanted to know which cars would deliver good commissions upon sale because he thought the company was stealing his money. Mr. Felix told Mr. Aguirre that if he didn't trust the company or their method of payment, he was welcome to go elsewhere.[8]

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[4] Sometime in 2009 after being contacted by the Industrial Commission of Arizona with regard to minimum wage violations, the Respondent began compensating its salespeople with a minimum wage as a draw against commissions.

[5] Consequent to the Respondent's rental of the Sears parking lot, the Respondent's employees were permitted to use the mall's restrooms.

[6] The Respondent encouraged salespeople to fill out all proper documentation for the sale, including customer references, identification, insurance, etc., to urge the customer to pay the purchase price rather than pressuring the "desk" to lower the price, to avoid offering up to $500 cash-back incentives on select vehicles, and to take potential buyers on test rides. At some unspecified time, Mr. Felix had told Mr. Aguirre that if he did not offer incentives, he could make good money.

[7] Mr. Plaza denied telling Mr. Aguirre at this meeting that if he did not like company procedures, he didn't have to work there or could leave. Mr. Plaza did not deny referring to multiple employment applicants, and I find that employees could reasonably infer from his statements that they could seek other employment if they were dissatisfied. Counsel for the General Counsel sought permission to amend the complaint to allege Mr. Plaza's statement as a violation of Sec. 8(a)(1), which I denied. While not addressed herein as a violation, the exchange between Mr. Aguirre and Mr. Plaza is relevant to animus.

[8] Mr. Felix denied this statement, saying he told Mr. Aguirre that "nobody should be in a company if they don't believe in the company." However, in his Board affidavit, Mr. Felix recounted, "I told [Mr. Aguirre] that if he did not trust the company, that he should not work for the company," and in redirect examination, did not challenge the underlying fact assumption in Respondent counsel's question,

In late October, Mr. Aguirre contacted an Arizona agency with jurisdiction over wage and hour issues[9] about the Respondent's sales compensation system. Thereafter, Mr. Aguirre told fellow salespersons that the Labor Commission had said the employees should get minimum wages as a draw against commissions. Mr. Aguirre told the others that when he got the full facts from the Labor Commission he would inform Ms. Montenegro of his findings.[10]

On October 28, Mr. Aguirre approached Ms. Montenegro in her office and asked her if the salespeople were entitled to minimum wage as a safety net toward future commissions. Ms. Montenegro said the company did not pay minimum wage and if Mr. Aguirre wanted a minimum wage job, the sales job was not the job for him. Mr. Aguirre told Ms. Montenegro he had spoken to the Arizona Labor Board and that the salespeople were entitled to minimum-wage compensation. He asked Ms. Montenegro if she could find the answer to his minimum pay question, suggesting she ask Mr. Plaza.

Later that afternoon, Mr. Felix called Mr. Aguirre to his office for a meeting with Mr. Plaza (the October 28 meeting). Just prior to the meeting, Mr. Felix told Mr. Plaza that Mr. Aguirre complained about everything all the time, e.g., about not trusting the company's calculation of commissions and not knowing the vehicle cost. Mr. Plaza, Mr. Felix, and Mr. MacGrew were present for the Respondent at the meeting. All four participants testified to what occurred there. Because the sequence, as well as the substance, of statements made in the meeting is critical to final determinations herein, a summary of each account follows:

> Mr. Aguirre's account: Mr. Aguirre initially testified that Mr. Plaza said, "Nick, you know, you're asking too many questions . . . we're giving you an opportunity to work here and you're just asking all these questions about everything . . . about the price of the vehicles, you're asking too much information.[11] You're asking about the minimum wage. You are not following policy and procedures. . . You're being negative towards the pay . . . you don't meet our criteria. You're fired." Under further examination, Mr. Aguirre expanded the scope of the conversation: Mr. Plaza said the cost of vehicles was for his eyes and his eyes only and that if Mr. Aguirre did not like it, he was more than welcome to leave or to quit. Mr. Plaza said the company paid the salespeople very well and asked why Mr. Aguirre did not complain when he received a check for seven or eight hundred dollars to which Mr. Aguirre expressed concern about payment accuracy. Mr. Aguirre protested Mr. Plaza's charge that he did not meet the company's criteria, saying he took care of the customers with respect, did what he was told, moved cars back and forth, did everything he could, and did the proper paperwork. Mr. Aguirre told Mr. Plaza he believed Mr. Plaza was upset because he called the Labor Board.
>
> Only after Mr. Plaza told Mr. Aguirre he was fired, did Mr. Aguirre respond intemperately, saying "How can you do this to somebody, especially somebody that works hard that just had a baby[12] . . . this is what I get for trying to succeed." Mr. Aguirre told Mr. Plaza he was an "F'ing mother F'ing," an "F'ing crook, and an a—hole." He asked how Mr. Plaza could fire him just for calling the Labor Board.
>
> Mr. Aguirre asked for his pay since he was being fired. When Mr. Plaza told him he had up to three days to provide the final check, Mr. Aguirre said, "You'll get what's coming to you if I don't get my check."[13]
>
> Mr. Plaza's account: Mr. Plaza met with Mr. Aguirre because he understood from Ms. Montenegro that Mr. Aguirre had raised minimum wage concerns with her and had requested a meeting. Mr. Plaza had no intention of discharging Mr. Aguirre.
>
> At the inception of the meeting, Mr. Plaza asked Mr. Aguirre what was going on, stating that he was concerned because Mr. Aguirre was "talking a lot of negative stuff" that would have a negative impact on the sales force. Mr. Aguirre said he had questions about vehicle costs, sales commissions, and minimum wage. Mr. Plaza told Mr. Aguirre he needed to follow company policies and procedures, referring to the company's pay structure, about which he thought Mr. Aguirre should not be complaining.[14] Mr. Plaza told Mr. Aguirre it was a normal practice in the car business for employees not to know the cost of vehicles. Mr. Plaza twice told Mr. Aguirre that if he did not trust the company, he did not need to work there. Mr. Aguirre became upset, arose from his chair, and said that Mr. Plaza was a f— a—hole, that nobody liked him, that he was f— stupid, that he did not know what he was doing, that he did not know everyone was talking about him, and that he thought he could fire anybody he wanted to. Mr. Plaza believed Mr. Aguirre would have physically attacked him if the others had not been there. Mr. Plaza asked Mr. Aguirre to

"[W]hy did you make the comment to Aguirre that, if he didn't trust the company, that he should not work for the company?" I accept Mr. Aguirre's account of the statement.

[9] The parties did not identify the agency's official title. In its post-hearing brief, the General Counsel states the correct title is "Industrial Commission of Arizona." References to the Labor Commission or Arizona Labor Board are to the Arizona agency covering wage and hour issues.

[10] Salesman James Pagan testified, essentially, that Mr. Aguirre told other employees he was looking into the minimum wage question and that he was going to speak to the Arizona Labor Board. Mr. Pagan denied that Mr. Aguirre spoke for him, saying, "If I had a problem with my workplace, I could take care of it myself."

[11] Mr. Plaza did not specifically deny that he accused Mr. Aguirre of asking too many questions, and his testimony that he told Mr. Aguirre he was "talking a lot of negative stuff" that would have a negative impact on the sales force sends an equivalent message, i.e., that Mr. Aguirre was improperly questioning company practices. I credit Mr. Aguirre's testimony in this regard.

[12] Mr. Aguirre's second child was born October 11. His first child had just turned two, and Mr. Aguirre was the sole support of his family.

[13] Mr. Aguirre testified that he only meant he would call the proper authorities or organizations to help him get any money due him, but Mr. Aguirre did not in any way qualify his warning that Mr. Plaza would get what was coming to him, and I conclude his statement was menacing.

[14] According to Mr. Plaza, Mr. Aguirre was at that time making more than minimum wage.

"calm down, settle down, to quit saying what he was saying." When Mr. Aguirre did not comply, and after Mr. Aguirre called him a f— a—hole for the "tenth time," Mr. Plaza told him, "you're done, Nick." Mr. Aguirre asked, "You're going to f— fire me for calling the Labor Department?"
Mr. Plaza answered, "No, Nick. I'm firing you because you abused me verbally, almost physically."

On October 28, following Mr. Aguirre's discharge, Mr. Plaza wrote the following memo:

> October 28, 2008
> (Tuesday) I had a meeting with my managers, Juan & Gustavo with salesman Nick Aguirre. He had asked to meet with me as soon as I came in and I also had concerns about his attitude and negative influence to the rest of my employees. He was always talking negative about work procedures and everything in general. I also went over that if he could not follow policy and procedures according to our policy manual, then he did not need to work here. I also told him we would not let him know our investment in each of the vehicles and again told him he did not have to work here. At this point he got really upset and every sentence out of his mouth included the "F" word. I asked him to calm down but he was out of control and after several uses of the "F" word I terminated him immediately. We will not tolerate verbal abuse and in conclusion will never rehire or refer Nick to anyone who calls for references.

Mr. Felix's account:[15] Mr. Plaza told Mr. Aguirre they were meeting because Mr. Felix and Ms. Montenegro had told him Mr. Aguirre wanted to speak to him about concerns Mr. Aguirre had. Mr. Plaza told Mr. Aguirre the Respondent had rules and policies like every other company, and if an employee was not happy with the rules, they did not need to work there. Mr. Aguirre said he had been doing everything he had been asked to do. Mr. Aguirre told Mr. Plaza why he wanted to know the cost of the vehicles, and Mr. Plaza said, "I am just telling you that, if you are not happy here, you don't have to work here." At some point, Mr. Aguirre asked if he were going to be fired, a question he repeated six or seven times during the meeting and to which Mr. Plaza invariably answered, "No."[16]

During the course of the meeting, Mr. Aguirre called Mr. Plaza f— stupid and said that if he got fired, Mr. Plaza was going to regret it.[17] He said Mr. Plaza was f— stupid because he didn't even know what people were saying about him outside the building. As he was "cussing" Mr. Plaza, Mr. Aguirre stood up, "threw his chair," and faced Mr. Plaza. Believing Mr. Aguirre was going to hit Mr. Plaza, Mr. Felix stood also, as did Mr. MacGrew. Mr. Plaza said, "You know what, that's it, I don't have to get all this from you." Mr. Plaza then told Mr. Aguirre he was done; he was fired. Mr. Felix and Mr. MacGrew "invited" Mr. Aguirre to leave Mr. Felix's office.

Mr. MacGrew's account:[18] At the beginning of the meeting, Mr. Plaza told Mr. Aguirre that whether or not he liked working at the company, he needed to follow the company's procedures and policies. Mr. Plaza told Mr. Aguirre that if he did not trust the company, he did not have to work there. Immediately Mr. Aguirre began telling Mr. Plaza he was stupid, did not know people were talking about him behind his back, was an a—hole, and f— Mr. Plaza. In the course of the meeting, Mr. Aguirre repeatedly asked if Mr. Plaza was going to fire him. Toward the end of the meeting, Mr. Aguirre stood up, and Mr. Felix and Mr. MacGrew told him that was enough and that it was time to go. Mr. Plaza also stood and said, "You know, I don't need to hear this; you're done."

Mr. Felix occasionally used obscene language, including the "F" word, when directing employees, but Mr. Aguirre had never heard him do so in Mr. Plaza's presence. In 2008 the Respondent fired salesman, Eddie Yemes, because he was "abusive with foul language" to Mr. Felix while working at a tent sales event when he told Mr. Felix to f— himself.

V. DISCUSSION

A. Underlying Legal Principles

Section 7 of the National Labor Relations Act provides that employees have the right to engage in union activities and, in pertinent part, "the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

To enjoy Section 7 safeguards, employee activity must be both "concerted" and "protected," which a propounding party may prove by showing the activity (1) involves a work-related complaint or grievance; (2) furthers some group interest; (3) seeks a specific remedy or result; and (4) is not unlawful or otherwise improper. *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976), cited with approval by the Board in *Northeast Beverage Corp.,* 349 NLRB 1166 fn. 9 (2007). To

[15] Mr. Felix described the meeting both on direct and cross-examination. His two accounts vary in certain details and order but are otherwise consistent.

[16] Counsel for the General Counsel argues that Mr. Felix's testimony regarding the number of times Mr. Aguirre asked if he were going to be fired was so hyperbolic that it destroyed Mr. Felix's credibility. While it seems unlikely Mr. Aguirre made the inquiry as often as Mr. Felix estimated, the apparent exaggeration does not destroy Mr. Felix's credibility, and I credit Mr. Felix's testimony that Mr. Plaza denied any intent to fire Mr. Aguirre.

[17] As noted earlier, Mr. Aguirre admitted to a similar statement (that Mr. Plaza would "get what's coming to" him) but placed the threat after the discharge and in connection with a question about his final paycheck.

[18] Mr. MacGrew's account, as set forth herein, is an amalgamation of his direct and cross-examination testimony.

be concerted, employee activity must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 882 (1986). Concerted activity includes individual activity that seeks to initiate or to induce or to prepare for group action, as well as individual employees bringing group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882 (1986). Employees do not have to accept the individual's call for group action before the invitation itself is considered concerted. *Cibao Meat Products,* 338 NLRB 934 (2003); *Whittaker Corp.*, 289 NLRB 933, 934 (1988); *El Gran Combo*, 284 NLRB 1115 (1987). "[C]oncertedness . . . can be established even though the individual [speaking] was not 'specifically authorized'. . . to act as a group spokesperson for group complaints." *Herbert F. Darling, Inc.,* 287 NLRB 1356, 1360 (1988). Concerted activity includes concerns that are a "logical outgrowth" of group concerns. *Salisbury Hotel*, 283 NLRB 685, 687 (1987); *Compuware Corporation,* 320 NLRB 101 (1995). Work-related complaints or grievances include terms and conditions of employment[19] and concerted complaints to governmental agencies.[20]

In cases turning on employer motivation, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing protected concerted activity was a motivating or substantial factor in an adverse employment action. The elements commonly required to support such a showing are protected activity by the employee, employer knowledge of that activity, and animus on the part of the employer. The burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Alton H. Piester, LLC,* 353 NLRB 369 (2008).

Even when an employee is engaged in protected activity, he or she may lose the protection of the Act by egregious behavior, including displaying "an opprobrious or abusive manner." *Verizon Wireless*, 349 NLRB 640, 646 (2007). In assessing employee behavior asserted to be egregious, the Board considers four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Atlantic Steel*, 245 NLRB 814, 816 (1979).[21]

B. Mr. Aguirre's Concerted Protected Activities

1. Mr. Aguirre's concerns about breaks and restroom facilities

Mr. Aguirre's first day of employment coincided with a Sears tent sale, where Mr. Aguirre discussed availability of restroom facilities with fellow salespeople. A few days later, during a sales staff meeting with management, Mr. Aguirre asked about employee entitlement to breaks and meal periods during the Sears tent sales. In this concern, Mr. Aguirre was joined by another salesman who, at a later sales meeting, expressed dissatisfaction with the Respondent's breaks and meals arrangements. Mr. Aguirre continued to raise this and related concerns with other employees in the ensuing weeks: discussing alternating restroom breaks, talking about the lack of a restroom facility at the Sears tent sales, and complaining about the inability to leave the work area by car for meals.

Employee breaks and availability of restroom facilities are employment terms and conditions of general application to employees. Mr. Aguirre raised those issues with management during a sales meeting, as did another employee in a later meeting. From those circumstances, as well as Mr. Aguirre's ongoing related discussions with fellow sales personnel, it is clear that Mr. Aguirre's complaints about breaks and restroom facilities were both protected and concerted. *Hahner, Foreman & Harness, Inc.,* 343 NLRB 1423 (2004) (complaint about paycheck not compensating for lost benefits to management in the presence of coworkers); *Cibao Meat Products,* at 934 ("activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." Such individual action is concerted as long as it is "engaged in with the object of initiating or inducing . . . group action." Citations omitted.) *NLRB v. Caval Tool Division*, 262 F.3d 184, 190 (2d Cir. 2001) (enforcing Board order finding employee complaint about working conditions made in group meeting was protected concerted conduct on behalf of the group); *Phillips Petroleum Company,* 339 NLRB 916 (2003); *Avery Leasing*, 315 NLRB 576, 580 fn. 5 (1994) (finding concerted activity where an employee, in the presence of other employees, complained to management concerning wages, hours, or other terms and conditions of employment).

Mr. Aguirre's actions with regard to employee breaks and restroom facilities, as described herein, constituted concerted protected activity.

2. Mr. Aguirre's concerns about sales compensation

Early in his employment, Mr. Aguirre took issue with the Respondent's commission-only compensation of sales personnel and its calculation of commissions. Expression of his concern included talking with other salespeople about the Respondent's compensation system, asking Mr. Felix for information as to which vehicles were likely to produce good commissions, showing his unexpectedly low first commission to other employees who agreed the amount was unfair, asking management about the basis of the commission, discussing with fellow salespeople his plan to contact an Arizona state agency about the Respondent's commission-only policy, contacting the agency, thereafter sharing the information learned with fellow employee, telling fellow employees he would inform management, and thereafter sharing his findings with Ms. Montenegro.

Wages are clearly an employment term of prominent interest to employees and employee attention to wages is protected. Although fellow salesman, James Pagan, denied that Mr. Aguirre spoke for him in pursuing his wage inquiries, it is clear Mr. Aguirre attempted to engage the interest of other sales em-

[19] *Valley Hospital Medical Center,* 351 NLRB 1250, 1252 (2007).

[20] *Delta Health Center, Inc.*, 310 NLRB 26 (1993).

[21] Evidence of employer knowledge that activity is protected is not a necessary element under *Alliance Steel Products*. The test is whether employer conduct would interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights. *Alliance Steel Products* at 495.

ployees, including Mr. Pagan, in his wage inquiries by discussing with them perceived wage inequities, by telling them of his state agency information quest, and by alerting them to his intended confrontation with management. It is equally clear that the wage issues Mr. Aguirre addressed affected all sales employees and that the resolutions Mr. Aguirre sought would impact all sales employees. In these circumstances, Mr. Aguirre's involvement with wage issues was concerted. See *Meyers Industries*, 281 NLRB 882 (1986) (individual employees bringing group concerns to the attention of management); *Cibao Meat Products,* supra (concerted action does not depend on employee acceptance of individual's call for group involvement); *Salisbury Hotel*, supra (concertedness includes concerns that are a "logical outgrowth" of group concerns); *Compuware Corp.,* supra (individual employee complaint to State labor board, although unauthorized by group, was a continuation of group efforts); *JMC Transport,* 272 NLRB 545, 546 fn. 2 (1984), enfd. 776 F.2d 612 (6th Cir. 1985) (complaint about discrepancy in individual paycheck was a continuation of employees' protected concerted activity in protesting, a month earlier, the company's change in the way employee wage payments were calculated).

Mr. Aguirre's actions with regard to sales employee compensation, as described herein, constituted concerted protected activity.

C. Alleged Threats of Reprisal and Invitations to Quit Employment

The Complaint alleges that the Respondent violated Section 8(a)(1) of the Act when the following supervisors on the following dates threatened employees by inviting them to quit their employment:

Mr. Felix	—	September 3 and October
Ms. Montenegro	—	October 28
Mr. Plaza	—	October 28

At a late August/early September sales staff meeting, when Mr. Aguirre asked about employee breaks during Sears tent sales, Mr. Felix told him that if he did not like the way the company operated, he was welcome to leave at any time. At a Sears tent sale in mid-September, Mr. Aguirre discussed with other employees how to alternate restroom use. In the presence of two other salesmen, Mr. Aguirre asked Mr. Felix for permission to take a meal break and use the restroom. Telling all three salesmen that the sales staff was always on a break, Mr. Felix refused Mr. Aguirre's request, saying that if Mr. Aguirre did not like it, he could just leave.[22] At another Sears tent sale held sometime in October, when Mr. Aguirre asked Mr. Felix to identify cars whose sale would deliver good commissions, Mr. Felix replied that employees who do not trust in the company should leave its employ.

On October 28, when Mr. Aguirre, after conferring with fellow employees, asked Ms. Montenegro about the sales staff's entitlement to a minimum wage draw against commissions, Ms. Montenegro told him that if he wanted a minimum wage job, the sales job was not the job for him. Later that same day, during the course of his meeting with Mr. Aguirre, Mr. Plaza told Mr. Aguirre that if he did not like the company's refusal to divulge vehicle costs, he was more than welcome to leave or to quit, and Mr. Plaza twice told Mr. Aguirre that if he did not trust the company, he did not need to work there.

An employer that responds to protected concerted protests of working conditions by telling employees they can leave if they do not like the conditions coerces employees within the meaning of Section 8(a)(1) of the Act. Inviting employees to quit their employment in such circumstances interferes with the free exercise of employees' Section 7 right to protest working conditions. *Alton H. Piester, LLC,* 353 NLRB 369 (2008); *House Calls, Inc.,* 304 NLRB 311, 313 (1991); *Chinese Daily News,* 346 NLRB 906 (2006); *McDaniel Ford, Inc.,* 322 NLRB 956 fn. 1 (1997) ("It is well settled that an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that . . . engaging in . . . concerted activities and their continued employment are not compatible, and implicitly threatens discharge of the employees involved.")

Mr. Felix, Ms. Montenegro, and Mr. Plaza's suggestions to Mr. Aguirre that he cease working for the Respondent if he did not like its terms and conditions of employment were made in response to his protected concerted activities described above. As such, the suggestions were coercive. Accordingly, the Respondent's conduct in this regard violated Section 8(a)(1) of the Act as alleged in the complaint.

The complaint further alleges the Respondent violated Section 8(a)(1) of the Act when Mr. Plaza threatened employees with unspecified reprisals. The basis for the allegation is Mr. Plaza's statement to Mr. Aguirre in the October 28 meeting that he was "asking too many questions [about company policies]." The General Counsel argues this statement alone impliedly threatened reprisals if Mr. Aguirre persisted in the protected activity of questioning company practices. While Mr. Plaza expressed displeasure with Mr. Aguirre's protected inquiries and thereby evidenced animus toward those activities, it is too great a stretch to categorize the statement as a threat. Accordingly, I will dismiss that allegation of the complaint.

D. Discharge of Nick Aguirre

The General Counsel argues that the only reason the Respondent discharged Mr. Aguirre was because of the negative influence Mr. Plaza believed Mr. Aguirre's protected activities had on other employees. The Respondent argues that the only reason the Respondent terminated Mr. Aguirre was his physically intimidating and abusive behavior in the October 28 meeting. Determining the Respondent's motivation requires a *Wright Line* analysis. If the Respondent's argument is accepted, determining whether Mr. Aguirre's behavior at the October 28 meeting justified his discharge requires an *Atlantic Steel* analysis.[23]

Many of the facts surrounding Mr. Aguirre's discharge are not disputed: On October 28, Mr. Aguirre told Ms. Montenegro

[22] Although the record shows this exchange to have occurred in mid-September, it fits within the time parameters of complaint allegation 4(c) that such a threat was made "in or about October 2008."

[23] See *Alton H. Piester*, supra; *Waste Management of Arizona, Inc.,* 345 NLRB 1339 (2005).

he had learned from an Arizona State agency that the Respondent was improperly withholding minimum wage compensation from its commissioned salespeople. Ms. Montenegro thereafter arranged the October 28 meeting. Just prior to the meeting, Mr. Felix told Mr. Plaza that Mr. Aguirre complained about everything all the time, e.g., about not trusting the company's calculation of commissions and not knowing the vehicle cost. At the meeting, Mr. Plaza criticized Mr. Aguirre's negative attitude toward company policies and procedures. Mr. Plaza told Mr. Aguirre that if he did not trust the company, he did not need to work there. During the course of the meeting, Mr. Aguirre became upset and, according to the various accounts, told Mr. Plaza that he was a "F'ing mother F'ing," a "F'ing crook," and an a—hole, that he was stupid, that nobody liked him, and that everyone was talking about him behind his back. At some point in the meeting, Mr. Plaza fired Mr. Aguirre.

There remain two critical factual disputes as to what happened at the October 28 meeting: (1) At what point in the meeting did Mr. Plaza fire Mr. Aguirre? (2) What were the circumstances and manner of Mr. Aguirre's outburst? The General Counsel's position is that Mr. Plaza fired Mr. Aguirre before Mr. Aguirre verbally assailed Mr. Plaza and that, given the Respondent's unlawful conduct, Mr. Aguirre engaged in no unjustifiable behavior. The Respondent's position, on the other hand, is that Mr. Aguirre's threatening and volatile verbal attack both preceded and was the direct cause of Mr. Aguirre's discharge.

I have carefully considered the testimonies of all witnesses to the October 28 meeting. In doing so, I have taken into account the witnesses' manner and demeanor while testifying, as well as the circumstances surrounding the discharge. I give greater weight to the testimonies of Mr. Plaza, Mr. Felix, and Mr. MacGrew. While discrepancies exist in each of their accounts, I found the three management witnesses demonstrated efforts to convey honest, unbiased recollections of the meeting. Mr. Aguirre's testimony was not as believable. Mr. Aguirre initially testified that at the October 28 meeting, Mr. Plaza bluntly itemized his displeasure with Mr. Aguirre's activities and abruptly fired him. Under further questioning, Mr. Aguirre significantly expanded his account of what occurred at the meeting, including Mr. Plaza's statement that if Mr. Aguirre did not like being kept in ignorance of vehicle cost, he was more than welcome to leave or to quit. Not only was Mr. Aguirre's initial testimony not fully congruous with his expanded version of the meeting, Mr. Plaza's implicit invitation to Mr. Aguirre to accept company policy or quit is incompatible with Mr. Aguirre's earlier testimony of abrupt discharge. Accordingly, I do not credit Mr. Aguirre's account of the October 28 meeting where it conflicts with the accounts of Mr. Plaza, Mr. Felix, and Mr. MacGrew.

Mr. Plaza testified he had no intention of firing Mr. Aguirre when he began the October 28 meeting and, until the conclusion of the meeting, told Mr. Aguirre he was not being fired. Consistent with the credibility assessments herein, I accept Mr. Plaza's testimony. Mr. Plaza, Mr. Felix, and Mr. MacGrew, whose testimonies I have credited, were consistent in placing Mr. Aguirre's verbal outburst before Mr. Plaza announced his discharge. Therefore, I find that Mr. Aguirre's denouncement of Mr. Plaza preceded Mr. Aguirre's discharge. I further find that Mr. Aguirre's behavior in cursing and derogating Mr. Plaza was at least physically aggressive if not menacing.[24]

A finding that Mr. Aguirre verbally attacked Mr. Plaza before rather than after Mr. Plaza fired him on October 28, does not, of course, automatically resolve the issue of why the Respondent fired Mr. Aguirre. The question remains whether the Respondent fired Mr. Aguirre solely because he engaged in concerted protected activities, as counsel for the General Counsel contends, or whether, as the Respondent contends, the Respondent fired Mr. Aguirre because he insulted Mr. Plaza. Since the existence of an arguably valid reason for discharge cannot, in and of itself, expunge an unlawful reason, the Respondent's motivation must be determined by application of a *Wright Line* analysis.

The General Counsel has proven the elements required by *Wright Line*: the General Counsel has shown that Mr. Aguirre engaged in concerted protected activity, that the Respondent's managers knew of the activity, and that the Respondent bore animus toward the activity, as demonstrated by management's repeated suggestions that unhappy employees seek employment elsewhere. The General Counsel having met his initial burden, the burden of proof shifts to the Respondent to prove it would have fired Mr. Aguirre even in the absence of his protected activity.

The Respondent contends that irrespective of Mr. Aguirre's protected activity, Mr. Plaza would have fired him for his profane personal attack at the October 28 meeting. There is no question that Mr. Aguirre's behavior could reasonably be expected to provoke discharge. However, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *Yellow Ambulance Service,* 342 NLRB 804, 804 (2004), citations omitted. In 2008, Mr. Plaza directed Mr. Felix to fire salesman Eddie Yemes because he told Mr. Felix to f— himself. Considering that Mr. Aguirre's October 28 contumely was directed at Mr. Plaza himself and was more extensive and opprobrious than Eddie Yemes' outburst, it is reasonable to conclude that the Respondent would have fired Mr. Aguirre for his verbal attack on Mr. Plaza regardless of the Respondent's animosity toward Mr. Aguirre's protected activity. Accordingly, I find the Respondent has met its shifted burden under *Wright Line* and has shown that it fired Mr. Aguirre because he verbally abused Mr. Plaza.

A finding that the Respondent fired Mr. Aguirre because of his October 28 outburst does not lay the discharge issue to rest. The purpose of the October 28 meeting was to address Mr. Aguirre's complaints about the Respondent's sales compensation practices. Mr. Aguirre's participation in the meeting was a furtherance of his concerted, protected wage complaints. At the meeting, Mr. Aguirre engaged in behavior the Respondent contends was opprobrious. "An employer violates the Act by discharging an employee engaged in the protected concerted activ-

[24] In finding Mr. Aguirre's behavior to be belligerent, I rely on credited testimony that in the course of his outburst and prior to the discharge, Mr. Aguirre rose from his chair, pushed it aside and said that if he was fired, Mr. Plaza would regret it. As noted earlier, Mr. Aguirre admitted to menacing language—"You'll get what's coming to you"—although in a different context.

ity of voicing a complaint about his employment terms unless, in the course of that protest, the employee engages in opprobrious conduct, costing him the Act's protection." *Alton H. Piester, LLC,* supra at 374. Although I have found that the Respondent fired Mr. Aguirre because of his contumacious behavior in the October 28 meeting, it must yet be determined whether Mr. Aguirre's behavior was so egregious as to lose the Act's protection. See *Verizon Wireless*, 349 NLRB 640, 646 (2007).

In assessing employee behavior asserted to be egregious, the four factors enunciated in *Atlantic Steel*[25] must be considered: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

Considering the first factor, Mr. Aguirre's outburst occurred in the presence of management only, and there is no evidence any unit employee overheard the confrontation. The outburst, therefore, had no impact on workplace discipline, nor did Mr. Aguirre's offensive behavior undermine management authority. The place of the discussion, thus isolated from other workers, argues against loss of protection.[26] As to the second and fourth factors, the discussion related wholly to Mr. Aguirre's protected concerted activity. Further, Mr. Aguirre's outburst was contemporaneous with both the Respondent's censure of Mr. Aguirre's protected activity as "a lot of negative stuff" that negatively impacted the sales force and the Respondent's coercive conduct in pointing out that Mr. Aguirre did not have to work for the Respondent if he did not like or trust the company. Both statements are provocative, and the latter, as detailed above, is an unfair labor practice. The subject matter of the discussion, intertwined as it was with the Respondent's intrinsically provocative unfair labor practice, also militates against loss of protection.[27] Accordingly, the first, second, and fourth *Atlantic Steel* factors weigh in favor of protection.

The third factor, the nature of Mr. Aguirre's outburst, is not so easily resolved. Board law establishes that "employees are permitted some leeway for impulsive behavior when engaging in concerted activity, subject to the employer's right to maintain order and respect [citation omitted]." *Tampa Tribune,* 351 NLRB 1324, 1324–1325 (2007), enf. Denied sub nom. *Media General Operations, Inc. v. NLRB,* 560 F. 3d 181 (4th Cir. 2009).[28] The standard for determining whether specified conduct is removed from the protection of the Act is whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Merry Healthcare Centers*, 350 NLRB 203, 204–205 (2007); *Dreis Rump Mfg. v. NLRB*, 544 F.2d 320, 324, (7th Cir. 1976). Insulting profanity alone is not so egregious as to justify loss of the Act's protection.[29] However, repeated use of profanity in a loud ad hominem attack on a supervisor may lose the Act's protection. *Daimler Chrysler Corp.*, 344 NLRB 1324, 1329–1330 (2005).

The question is whether, in the instant circumstances, Mr. Aguirre retained the Act's protection in spite of his outburst or lost the Act's protection because of his outburst. In *Daimler Chrysler Corp.*, supra, the behavior that cost an employee the Act's protection was the making of repeated, extensive, and personally derogatory statements to a supervisor, behavior similar to Mr. Aguirre's. However, *Daimler* differs from the instant situation in that only one *Atlantic Steel* factor—subject matter—favored protection, while here three of the four *Atlantic Steel* factors favor protection with only the nature of Mr. Aguirre's outburst weighing against protection.

Notwithstanding the fact that only one *Atlantic* steel factor disfavors Mr. Aguirre's protection in this case, the impact of that sole factor must not be minimized. It is clear the Board carefully considers the form and scope of offensive language in opprobrious behavior cases.[30] Upon court remand of *Felix Industries*[31], the Board considered the question of whether the nature of an employee's outburst (factor three), by itself, may outweigh the other *Atlantic Steel* factors. The Board stated that "the nature of [an employee's] outburst must be given considerable weight towards losing the Act's protection." *Felix Industries,* 339 NLRB 195, 196 (2003). While the Board in *Felix Industries* decided that the other factors outweighed factor three in that case, the

[25] *Atlantic Steel*, supra at 816.

[26] Remarks made in private are less disruptive to workplace discipline than those made in the presence of fellow employees. *Stanford Hotel,* 344 NLRB 558 (2005); *Noble Metal Processing*, 346 NLRB 795, 800 (2006) (place of discussion weighs in favor of protection where outburst occurred away from employees' work area and did not disrupt the work process).

[27] *Care Initiatives,* 321 NLRB at 152 ("[A]n employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee [citation omitted]"); *Datwyler Rubber & Plastics*, 350 NLRB 669, 669–670 (2007) (employee did not lose protection of the Act by calling supervisor a devil whom Jesus Christ would punish for requiring a 7-day work week); *Stanford Hotel,* supra (brief profanity protected where it was a response to unlawful threats).

[28] The protections of Sec. 7 would be meaningless were the Board not to take into account the realities of industrial life and the fact that disputes over wages, bonus, and working conditions are among the disputes most likely to engender ill feelings and strong responses. *Consumers Power Co.*, 282 NLRB 131, 132 (1986).

[29] See *Alcoa Inc.*, 352 NLRB 1222 (2008), (referring to supervisor as "egoistical f—er"); *Tampa Tribune* supra, (calling supervisor a "stupid f—ing moron."); *Union Carbide Corp.*, 331 NLRB 356, 359 (2000) (calling supervisor a "f—ing liar"); *Burle Industries*, 300 NLRB 498, 502, 504 (1990) (calling supervisor a "f—ing a—hole"); *Thor Power Tool Co*., 148 NLRB 1379, 1380 (1964), enfd. 351 F. 2d 584 (7th Cir. 1965), (referring to supervisor as a "horse's ass"); *Postal Service*, 241 NLRB 1074 (1979) (referring to acting supervisor as an "a—hole"); *NLRB v. Cement Transport Co.*, 490 F.2d 1024, 1030 (6th Cir. 1974) (referring to company president as a "son of a bitch").

[30] See, e.g., *Alcoa, Inc*., at 1226 (employee/union steward's pejorative description of a supervisor as an "egotistical f—er" was "a single verbal outburst of profane language, in a disciplinary meeting . . . unaccompanied by physical contact or threat of physical harm," which did not destroy the Act's protection); *Beverly Health & Rehabilitation Services,* 346 NLRB 1319, 1323 (2006) (employee conduct "consisted of a brief, verbal outburst of profane language unaccompanied by insubordination, physical contact, or threat of physical harm); *Trus Joist Macmillan* 341 NLRB 369, 371–372 (2004) (employee's repetitious remarks that were personal and highly offensive cost him the protection of the Act); *Datwyler Rubber & Plastics, Inc.*, supra, (employee outburst protected, as it was spontaneous, brief, and unaccompanied by physical contact or threat of physical harm).

[31] *Felix Industries*, 331 NLRB 144, 146 (2000), enf. denied and remanded 251 F.3d 1051 (D.C. Cir. 2001).

Board emphasized that the supervisor involved, who was also the son of the company's president, directed "extremely hostile" remarks to the employee, provoking his response that the supervisor was just a "f—ing kid" to whom the employee did not have to listen. Id. at 195, 196–197.

In applying the balancing test utilized by the Board in these kinds of cases, I have particularly noted the following circumstances: Mr. Aguirre's outburst was qualitatively and quantitatively more opprobrious than that considered in *Felix Industries.* Without extreme provocation from overt hostility or antagonism from Mr. Plaza, Mr. Aguirre repeatedly reviled Mr. Plaza in obscene and personally denigrating terms accompanied by menacing conduct and language. Considering these circumstances and the record as a whole, I find that Mr. Aguirre's behavior at the October 28 meeting was so egregious as to forfeit the protection of the Act. Accordingly, I find the Respondent did not violate the Act when it discharged Mr. Aguirre.

VI. CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by telling employees they could quit or leave the Respondent's employ if they did not like company policies and/or procedures.

3. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]