

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OSHKOSH CORPORATION,
Respondent,

and

Case 30-CA-18716

JASON LITTLE,
Charging Party.

Tabitha Boerschinger and Christina B. Hill, Esqs.,
for the General Counsel.

Robert H. Duffy and Courtney R. Heeren, Esqs.
(*Quarles & Brady LLP*), of Milwaukee, Wisconsin
for the Respondent,

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Oshkosh, Wisconsin, on January 18-19, 2011. The charge was filed by Jason Little against the Oshkosh Corporation (Company or Respondent) on June 24, 2010,¹ and the amended charge was filed August 13. The complaint issued November 8, 2010, and alleges that the Company: (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying Little's request for union representation on March 29; and (2) violated Section 8(a)(3) and (1) by suspending Little on March 29 and discharging him on April 7 because he refused to take a drug and alcohol test and engaged in protected concerted activities. The Company, in its timely filed answer, denied the material allegations of the complaint.

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 make the following

Findings of Fact

I. Jurisdiction

The Company, a corporation, is engaged in the designing and manufacturing of products, such as specialty trucks, truck bodies, and access equipment at its Oshkosh, Wisconsin facility, where it annually sells and ships goods and materials valued in excess of \$50,000 directly to customers located outside the State of Wisconsin. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Union, United Automobile, Aerospace and Agricultural

¹ All dates are 2010 unless otherwise indicated.

Implement Workers of America and its Local 578, UAW (collectively referred to as the Union) are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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A. *The Parties*

10 The Company admits that the following individuals are company supervisors within the meaning of Sections 2(11) and 2(13) of the Act: Rich Cummings – Operations Manager; Tony Way – Area Manager in the Materials Department; Nathan Grose, Travis Lamrock, and Rick Reed – Team Coordinators; Jake Radish – Area Manager; Katie Engleman – Director of Human Resources; and Katie Hess – Human Resources Generalist.²

15 The Company and the Union are parties to a series of collective-bargaining agreements. The current agreement (CBA) is effective from October 1, 2006, through September 30, 2011.³ Article 1 defines the bargaining unit as all of the Company’s “production and maintenance employees located in Winnebago County, Wisconsin, except the following: Office employees, supervisors, coordinators, and plant managers.” Another significant provision is Article 22, which reflects the parties’ agreement that management of the Company’s business and direction of its employees is vested exclusively with the Company. Such company operations and functions include the direction, supervision, and discipline of its employees, and to make and enforce reasonable rules and regulations.

25 Jason Little, the Charging Party, was hired by the Company in March 2007. In December 2009, he transferred to the position of yardman at the Company’s South Plant facility. As a yardman, Little was trained to operate a 13,000-pound forklift. He operated the vehicle in the yard and regularly drove between the South and West Plants to unload equipment and vehicles, restock products, and refuel propane tanks.⁴

30 Little served as a union steward from June 2007 until December 2009. As a steward, he represented bargaining unit employees in the initial steps of the grievance process.⁵ As a steward, Little filed 41 grievances,⁶ including at least one alleging that employees were denied their *Weingarten* rights.⁷ The number of grievances filed by Little, however, was not an

35 ² GC Exh. 1(g).

³ R. Exh. 3.

⁴ It is not disputed that Grose was adequately trained and lacked any previous safety infractions on the job. (Tr. 22–24, 152–153.)

40 ⁵ There was no testimony explaining why Little stopped serving as a steward. (Tr. 22, 28.)

⁶ I denied the Company’s request to admit a summary showing the total number of grievances filed by all stewards, as the documents upon which the document was based were not provided to, nor available for examination by, the General Counsel. See FRE 1006. I did, however, receive a summary of the total number of grievances filed by Little, as that information was provided to the General Counsel. (R. Exh. 27(a).)

45 ⁷ It is not disputed that Little was familiar with his *Weingarten* rights and, as a steward, filed grievances on behalf of other employees. (GC Exh. 3, 13(k).) Contrary to the General Counsel’s assertion, however, Little’s December 18, 2008 grievance for a “written verbal warning” from Radish for allegedly chewing tobacco did not claim he was denied representation. It was his chief steward’s response to Step B that added such a comment. Coupled with Little’s acknowledgment that Radish merely “set it” (the warning) in his “work area,” I do not credit that grievance as evidence of Little’s habit of requesting representation in all encounters with

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extraordinary amount compared to those filed by other employees and stewards at the Company.⁸

5 Little's supervisor as of March 2007 was team coordinator Nathan Grose. He replaced Radish, who was promoted to Area Manager.⁹ Little's relationship with Grose was uneventful. His relationship with Radish, however, was more adversarial. Little filed approximately 15 grievances against Radish in August, October, and December 2008. In nine of those instances, Little demanded Radish's immediate termination. In a grievance filed August 6, 2008, Little charged that Radish violated safety guidelines under the CBA by preventing Weidenhaft, who complained of heat exhaustion, from taking a break. The other eight grievances included five relating to Radish's treatment of coworker Joe Dubinski, and three relating to Radish's assignment and documentation of overtime work.¹⁰

15 *B. The Company's Labor Relations Practices*

20 As part of its periodic labor relations training program, the Company instructs its managers and supervisors regarding the recognition and application of employees' rights pursuant to *NLRB v. Weingarten*, 420 U.S. 251 (1975). In *Weingarten*, the Supreme Court held that employees have a right to union representation at investigatory interviews. The Company's most recent training for team coordinators was in September 2008. A slide presentation by the Company at that time of its *Weingarten* procedure informed Company supervisors that they have three options if an employee makes a "clear request for union representation before or during an interview."

- 25 1. Grant the request and delay questioning until the union representative arrives and has a chance to consult privately with the employee; or

supervisors, including noninvestigatory encounters with supervisors. (GC Exh. 2, 13(m); Tr. 63-65.)

30 ⁸ The General Counsel stipulated that Little did not file an extraordinary number of grievances in comparison to the total number of grievances filed. (Tr. 436-437.)

⁹ Tr. Neither Little nor Grose gave any indication of significant problems arising between them (22, 150.)

35 ¹⁰ The General Counsel claimed at trial that the Company discriminatorily discharged him because he complained about the lack of sun visors while operating forklifts and had filed grievances as a steward. (Tr. 13-14, 16-17.) Subsequently, the Company called Radish as a witness and the General Counsel elicited testimony on cross-examination that Little filed numerous grievances against him and in several of those instances called for Radish's discharge. (Tr. 352-353.) Notwithstanding the General Counsel's stipulation that Little did not file an extraordinary number of grievances (Tr. 436-437.), I directed that the General Counsel submit all of his grievances into evidence and deemed them received as GC Exh. 13. The General Counsel filed GC Exh. 13 (a) through (v) on February 28, 2011. On March 16, 2011, the Company objected to admission of all of the grievances, except GC Exh. 13(k) and (m), as irrelevant and prejudicial. In a response, dated March 18, 2011, the General Counsel contends that the Company "agreed to the revised admission of Exh. 13(a) through (n) but objected to Exh. 13(o) through (v) on relevancy, presumably because these grievances were presented to Jake Radish but did not reference him in the body of the grievance." The General Counsel presumably misstated the Company's objection to GC Exh. 13 as those referenced in (o) through (v). While I reiterate my earlier ruling and overrule the Company's objection, I agree that GC Exh. 13(o) through (v) have no bearing on the relationship between Little and Radish. Accordingly, I accord them no weight.

2. Deny the request and end the interview immediately; or
3. Give the employee a choice of: (1) having the interview without representation or (2) ending the interview.¹¹

5 The slide presentation further advised supervisors that, if they denied an employee's request for representation, it would constitute an unfair labor practice to continue to ask questions. In such an instance, the employee would have the right to refuse to answer and could not be disciplined for such a refusal.¹²

10 *C. The Company's Safety Rules and Procedures*

The Company's safety rules are incorporated into the CBA. Two of those rules govern procedures that employees must follow when incurring a work-related injury or medical problem:

15 10. Employees must report every work-related injury, no matter how slight, to their supervisor and receive any necessary first aid treatment. Only the Occupational Health Nurses and certified First Aid Representatives are allowed to treat an employee's injury on the premises. If an employee requires treatment from a provider away from Oshkosh Truck, he/she must give Health Services an Oshkosh Truck "Return-to-Work" slip or one of similar format.

20 12. Employees must contact Health Services before seeking treatment for any non-emergency work-related medical problem. Contact must include the date of injury and name of doctor. Contact must be made during regular business hours of 7:30 AM – 4:00 PM.¹³

25 An issue in this case is employee protection from sun glare when operating a company vehicle. The Company has regularly provided yardmen with tinted safety glasses and permitted them to wear baseball caps to shield the sun whenever necessary. In or around December 30 2009, however, Little, Mike Weidenhaft, and several other yardmen on his team complained at team meetings that they were distracted by sun glare while operating forklifts. Grose, their coordinator, responded in early 2010 by ordering tinted film for their vehicles' windshields. However, the yardmen reported that the film created a separate hazard by blurring nearby 35 objects. Grose also considered using opaque visors, but ruled them out after determining that they created unsafe blind spots.¹⁴

¹¹ R. Exh. 24, p. 1.

40 ¹² Hess and Engleman testified that it is company practice to stop the conversation if an employee requests representation. (Tr. 365, 416–417.) The Company's counsel interpreted that testimony that mean that a supervisor would honor such a request regardless of whether the employee's fear of ensuing discipline was reasonable or not. (R. Br. at 5–6.) Such an interpretation is contradicted by the third section of the slide presentation, which explains that such a right exists only "[i]f an employee has a **reasonable belief** that discipline or other 45 adverse consequences may result from what he or she says. (emphasis in original) (R. Exh. 24, p.1.)

¹³ R Exh. 3, p. 60–61.

50 ¹⁴ It is evident from the testimony of Little and Grose that the latter was receptive to the sun glare issue and attempted to resolve it. (Tr. 25–27, 153–157, 232.) More significantly, while corroborating Little's assertion that sun glare presented a problem for forklift operators, Weidenhaft credibly testified on cross-examination that the problems could be avoided by

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D. The Code of Conduct

5 The Company's Code of Conduct provides for progressive discipline for violations of
Company rules: verbal warning; first written warning; second written warning; final written
warning, which may include suspension, and results in probation; and discharge. Serious
behavior violations, however, "are so serious that progressive discipline will be superseded and
immediate discharge is required." Pertinent examples of such conduct that "will result in
immediate discharge," although it further states that the "Company may suspend at its
10 discretion," are:

3. Directing or engaging in insubordination, failure or refusal to carry out specific
instructions, or intentional restriction of production.

15 4. Reporting to work under the influence of alcohol or drugs not prescribed by a
physician, or the possession or use of either substance at work.

7. Fighting or placing a fellow employee in apprehension of harm.¹⁵

20 *E. The Company's Drug and Alcohol Testing Policy*

The Company's drug and alcohol testing policy, issued July 6, 2006, sets forth a
procedure for "reasonable cause testing" where team coordinators, among others, suspect an
employee "to be under the influence of drugs or alcohol." In such instances, the team
25 coordinator "will contact another . . . team coordinator . . . to witness the behavior of the
employee. They will independently complete the observation checklist."¹⁶ The team coordinator
is then to "confront the employee with the observations and ask all the questions on the health
questionnaire." If the team coordinators "conclude that the employee appears to be under the
influence of alcohol and/or drugs, they will request that the employee submit" to drug and/or
30 alcohol testing at a specified medical facility. "If the employee refuses to submit to the test, [the
Company] will proceed according to the facts of the case." In setting up a test, the team
coordinator is to contact the occupational health nurse and then call a taxi to have the employee
transported to the designated medical facility, "while the occupational health nurse contacts the
facility to notify them of the situation." The nurse is to then "instruct the facility to notify her if the
35 employee does not report for the test within 30 minutes, or if the employee refuses to sign the
consent form for the test." After the employee leaves for the medical facility, the team
coordinators "will immediately document their observations in detail. This documentation is to be
done independently of one another."¹⁷ Finally, the policy states that "[r]efusal to be tested will be
considered insubordination and grounds for discipline up to and including discharge."

40 The Company's right to discharge an employee for refusing to take a drug and alcohol
test was previously upheld in an arbitration award, dated January 21, 2005. At page 15 of his
award, arbitrator Amadeo Greco noted that, although there was no mention in the CBA of the
Company's drug and alcohol testing policy, the Union previously waived its right to object to
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lowering the brim of his hat and/or using his hand as a shield. (Tr. 123-125, 128-129, 131-
132.)

¹⁵ R. Exh. 3, pp. 65-66.

¹⁶ GC Exh. 9.

50 ¹⁷ It is not clear from the written policy whether the team coordinators were to generate
additional documentation of their observations or supplement their earlier observation checklist.

such testing, which was first implemented in 1993, and that the Company, pursuant to Article 22 (Management Rights), was justified in ordering Louis Klapa, a forklift operator with the Company for 19-1/2 years, to submit to testing after he was involved in five separate forklift accidents in one morning.¹⁸

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The Company has a history of discharging employees who fail drug and alcohol tests or refuse to take them. On February 22, 2007, Randy Hayes was discharged after drug and alcohol testing confirmed that he reported to work under the influence of alcohol.¹⁹ On January 8, 2010, two bargaining unit members were discharged based on the Company's testing policy. Thor Nielsen, another bargaining unit employee, was initially suspended for attendance problems. He was discharged after appearing for the hearing smelling of alcohol and then refusing to submit to a drug and alcohol test.²⁰ In a separate incident, Terry Plumb was discharged after testing positive for alcohol. Plumb's explanation, rejected by the Company, was that the test results were the result of drinking the night before.²¹

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F. The March 26 Incident

On March 25, Little requested and obtained Grose's approval for a full day of leave on March 26.²² He decided, however, to report for work that day. Little's shift began at 2 p.m. At approximately 6:45 p.m., he dropped off parts at South Plant and began driving his forklift back to West Plant when he crashed head-on into a light pole, virtually destroying it and causing it to lean over.²³ Although the sun was setting, it was not facing Little immediately prior to the accident.²⁴ Little exited the vehicle and lay on the ground clutching his neck in pain. Grose saw Little on the ground as he left the nearby building, approached Little, and asked if he was alright and what happened. Little told him that he was on his way to pick up parts from another section of the yard when his forklift struck the light pole. He added, however, that "it didn't pay to report the accident because [Grose] wasn't going to do anything about it anyway." Little also told Grose that he was lucky that he was in the yard at the time, otherwise, Little would not have reported the accident.²⁵

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After speaking with Little for several minutes and taking photographs of the scene, Grose directed him to park his forklift and meet him at the Axle Department where he would

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¹⁸ R. Exh. 19.

¹⁹ R. Exh. 20.

²⁰ R. Exh. 18.

²¹ R. Exh. 25.

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²² Contrary to Little's assertion at trial, his leave request was for a full day. (Tr. 78-79.)

²³ While the General Counsel disputes whether the crash caused the bolts in the base to crack, it was not disputed that the photographs taken by Grose and Lamrock fairly depicted a light post heavily damaged by Little's forklift that needed to be removed. (R. Exh. 14, p. 2; Tr. 152, 172-175, 179-180, 236-237, 273-274, 280, 290, 293.)

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²⁴ Contrary to Little's assertion that the sun blinded him, the photographic evidence and credible testimony demonstrates that the front of the forklift—and thus Little—was not facing the sun at the time of the accident. The sun was off to his left at the time. (Tr. 29, 31-34, 194.)

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²⁵ I generally found Grose more credible than Little, as there were several significant inconsistencies between the latter's testimony and his Board affidavit. However, I credit Little's testimony blaming the accident on the blinding sun and Grose's failure to resolve such a problem. Grose did not deny that assertion and his recollection as to the position of the sun at the time reflects an immediate response to verify such a claim. (Tr. 35-36, 169-173.)

receive further training on the operation of the forklift. While parking, Little called Grose on his radio and asked if he could take a half-day of vacation. Grose said he would discuss it with him when he got there.²⁶

5 Grose arrived at the Axle Department first and discussed the incident with another team coordinator, Travis Lamrock. Once he arrived, Little told Grose that he was experiencing pain in his neck and requested the rest of the day off. Grose responded that Little needed to be seen in the Company's first-aid office and complete an accident report. Little asked if he could just go home and see his own doctor, but Grose and Lamrock both insisted that Little be examined by
10 the first-aid representative and submit a report. Little agreed to go to the first-aid office. The Company's first-aid officer recommended Little receive further medical attention and called an ambulance.²⁷

15 While Little received emergency care from emergency personnel, Grose called Radish and explained what he saw.²⁸ Radish suggested that Grose investigate whether Little might have been under the influence of alcohol or drugs at the time of the incident. Grose and Lamrock then proceeded to review the Company's drug and alcohol policy. The policy required that two supervisors independently complete an observation checklist and ask the employee certain questions, including whether the employee would voluntarily submit to a drug test.²⁹

20 Grose and Lamrock proceeded to fill out the observation checklist while Little was in the first-aid office. Grose noted on his checklist that Little was calm, walking normal, cooperative and his eyes appeared normal. However, he also noted that Little appeared messy, his face was pale, and his speech and body movements were slow.³⁰ Lamrock also observed Little's
25 appearance as normal, his demeanor as and calm and cooperative, but noted his movements were slow and he appeared drowsy.³¹ Neither Grose nor Lamrock observed blood on Little's body or clothing.³²

30 ²⁶ Company policy required employees to obtain prior supervisory approval for leave requests. (Tr. 157-160, 166.) An employee could, however, change his mind, report to work and work the shift he previously requested off. Once an employee reports to work on an approved vacation day, however, the employee must get separate approval for leave time that day. (Tr. 77-78.) There is no contention that Grose's actions in this regard were inappropriate. (R. Exh. 30, 32; Tr. 35-37, 162-168, 186.)

35 ²⁷ It is evident from Grose's testimony that Lamrock apprised him of the need to have Little be seen in the first-aid office and complete an accident report. (Tr. 36-38, 188-189, 266-267.)

40 ²⁸ I found Grose's account credible regarding his impressions of the accident. The position of the forklift in relation to the sun seemed to rule out glare as the cause of the accident and this type of accident in the yard was unprecedented. (Tr. 157, 178, 194, 229; R. Exh. 14, p. 1.) Grose also noticed a cellular telephone on the floor of the vehicle and mentioned it in his subsequent report. However, as noted by the General Counsel, the fact that Little had a cellular telephone in the vehicle was not relied upon by the Company as a basis for discipline. (Tr. 194-196; R. Exh. 33.)

45 ²⁹ Grose and Lamrock conceded that, prior to Grose's telephone conversation with Radish, neither suspected that Little might have been under the influence of drugs or alcohol. (Tr. 189-190, 238-239, 246, 267, 288, 292; GC Exh. 9; R. Exh. 12.)

50 ³⁰ I do not credit Grose's testimony that he initially suspected something odd because Little, whom he knew to be trained as a first-aid representative, was apparently attempting to flaunt Company reporting procedures. (Tr. 189-193; R. Exh. 5.) The thought of Little being under the influence had not crossed Grose's mind until Radish mentioned it in their conversation.

³¹ Lamrock independently completed the form, but like Grose, had not considered that Little

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Grose and Lamrock were unable, however, to ask Grose questions before he was transported to the hospital by ambulance. They called Radish back, briefed him on their findings and said they were unable to ask Grose whether he would voluntarily submit to a reasonable suspicion drug test. At Radish's suggestion, Grose called the hospital and requested that a reasonable suspicion drug test be performed on Little when he arrived.³³

After arriving at the hospital, Little was treated, evaluated and providers performed diagnostic imaging of his neck. At the Company's request, an emergency room nurse asked Little to submit to a drug and alcohol test. The nurse notified Little of his supervisor's request, but responded, "absolutely not. They don't do post-accident drug screens [at] Oshkosh. I'm the union steward. I refuse."³⁴ Grose was informed that Little refused to take the test. Nevertheless, he waited for Little in the emergency room. Upon discharge, Little saw Grose and told him that he was disappointed in himself because of the accident. Grose did not, however, mention anything about the test and told Little to go home.³⁵

G. The Company Suspends Little Pending Investigation and Arranges for a Taxi and a Union Steward

Little's next work shift was scheduled for 2:30 p.m. on March 29. At approximately 1:30 p.m. that day, Hess convened several supervisors—Radish, Lamrock, Way, materials director Ellen Brennand, plant manager Bob Murkley, and safety director Jason Havlik—to discuss Little's accident and his refusal to submit to a test while at the hospital. Based on the severity of the incident and the fact that Little was not going to report the accident resulting in damage to Company property, a violation of the Company's Code of Conduct and listed as a Safety Behavior Violation, the Company decided to suspend Little pending further investigation. As part of that investigation, Little would be given another chance to submit to a drug and

might have been under the influence of alcohol or drugs at the time of the incident until Radish mentioned the possibility. (Tr. 267–270; R. Exh. 6.)

³² I also credit the testimony of Grose and Lamrock that Little did not have blood on his face after the accident. (Tr. 170, 275.) Little testified that he suffered a bloody nose from the accident, but such an observation was not noted on their observation lists or the Little's medical records. (Tr. 35; R. Exh. 5–6, 16.)

³³ It was evident that Radish prompted Grose to call the hospital. Grose's initial response to the accident, coupled with his clear inexperience as to the drug testing process and inability to complete the applicable questionnaire, indicates that his evaluation of the situation was significantly influenced by Radish. (Tr. 194, 197, 245–247, 260–261, 334–337.)

³⁴ Little's testimony that he did not recall medical personnel asking him to take a test was not credible and I find that he was told that his supervisor requested that he be administered the test, but he refused. (Tr. 38, 200; R. Exh. 16, p. 13.) Based on the documented observations of Grose and Lamrock a short while earlier, Little was clearly able to communicate and understand what people were asking him. Moreover, I place considerable weight on the reliability and accuracy of the medical records. See *Richardson v. Perales*, 402 U.S. 389, 405 (1971), where the Supreme Court recognized the reliability and probative worth of written medical records in both administrative adjudications, as well as District Court proceedings. See also FRE 803(4) (statements for purposes of medical diagnosis or treatment).

³⁵ Grose explained that he did not confront Little about his refusal to take the drug test because it was not the right time and place. (Tr. 39, 197–201.) I do not doubt that Grose felt that way, but it evidenced his disinclination to confront Little about submitting to a drug test. (Tr. 246–248.)

alcohol test. Refusal to take the test would be considered insubordination and grounds for termination.³⁶

5 As Little was arriving shortly for his work shift, Lamrock arranged for a taxi to pick up Little and transport him to the hospital for the drug and alcohol test.³⁷ In addition, in preparing to confront Little upon his arrival with news of the adverse action, Way asked Jake Wall, a Team Coordinator on the plant floor, to arrange to have Dawn Johnson, a union steward on the 3 p.m. shift, available if Little requested one.³⁸

10 *H. Little Again Refuses Drug Test on March 29*

15 Little arrived for work on March 29 at 2:30 p.m. expecting to be disciplined for the March 26 incident. He shared his concerns with several coworkers as he entered the Company's facility.³⁹ Little's fears came true a several minutes later when he saw Grose, Way, and another person, Hess, approaching him in the yard. At some point, Grose walked ahead of Hess and Way and called him to join them for a discussion. Grose did not tell Little at that time what the issue was, as Grose wanted to avoid any discussion in front of other employees in the yard at the time. Little followed Grose over to the group and did not say anything to Grose while doing so.⁴⁰

20 As soon as Little joined the group, Grose informed him that he was suspended due to the seriousness of the accident, and placing himself and others in the apprehension of harm. Grose also requested that Little submit to a reasonable suspicion test. Little replied that he knew the Company would blame him for the accident and insisted it was not his fault. Little also
25 claimed that the accident would not have occurred if Grose had provided him with a sun visor. Little refused to take the test, insisting that he was a union steward, knew his rights, and company policy did not require post-accident tests. Hess repeated the Company's request that Little submit to a drug and alcohol test and warned that if his refusal to take the test would be

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³⁶ It is clear that Little's refusal to take the drug test on March 26 was one component of the adverse action. (Tr. 213-215, 358, 362-363; R. Exh. 3, p. 66.)

³⁷ Aside from calling for a taxi and assisting Grose in the performing portions of the drug and alcohol test process, there is no indication that Lamrock played a significant role. (Tr. 296.)

35 ³⁸ I agree with the General Counsel that Way was less than credible on this issue. The time records indicated that Johnson would not be starting her shift at 3 p.m., while union vice-president Andrew Schaller's unrefuted testimony revealed that she was actually attending a stewards' meeting outside of the facility at or around that time. As a result, Johnson did not actually start work until 7:45 p.m., nearly 5 hours later. (Tr. 96-97, 99, 317-318; GC Exh. 6, 12.)
40 On the other hand, given the Company's preparations for the adverse encounter, its past practice affording *Weingarten* representation to employees, and Little's background as a steward, I find no reason to believe that the Company would have denied Little's request for representation. (Tr. 276, 304, 309, 372-374.)

45 ³⁹ Little's cause for concern, given that he had gotten in a serious workplace accident, was credible. However, his contention that Grose was responsible for the incident because he did not adopt Little's proposal to use visors, was not. (Tr. 43, 129-130.)

50 ⁴⁰ I did not credit Little's testimony that he requested representation as Grose approached him in the yard. (Tr. 44-45, 53.) Grose, whom I found more credible overall, testified that Little did not say anything until they joined the group. (Tr. 217-219.) In this regard, I do not attribute weight to the testimony of Hess and Way, whom may or may not have been able to hear anything stated by Little at that moment. (Tr. 313, 367.)

tantamount to insubordination⁴¹ and grounds for discharge. She also told Little that the Company arranged for a taxi to transport him to the hospital for the test. Little then handed Grose his badge and told him to “have a nice day.”⁴²

5 Hess, Way, and Grose followed Little as he walked out of the facility. On his way out, he passed a group of coworkers in a shift meeting and, referring to a wager that he would be discharged because of the March 26 accident, blurted out that one of them owed him \$20. As he walked toward the exit, Hess repeated the request that Little submit to a drug test. Little reiterated that he was a steward, knew his rights, and did not need to submit to a drug test
10 merely because there had been an accident. He added that this was all attributable to harassment by Radish. Hess asked Little one last time to take the test as he left the facility, but he simply kept walking out to the parking lot and disappeared.⁴³

15 *I. Little's termination on April 7*

On April 7, Hess, Way, Little, and Engleman met with Little and Schaller, his union representative, to discuss the incidents of March 26 and March 29. Hess informed Little that the purpose of the meeting was to provide Little with a chance to share his version of the incidents before the Company made a final decision as to what action to take. During the meeting, which
20 lasted approximately 15 minutes, the group discussed the March 26 accident and Little's refusal to take a drug test when asked to do so on March 26 and 29. Little admitted that he told Grose that he would not have reported the accident had Grose not appeared on the scene. However, he insisted that the comment was made in jest. He also acknowledged refusing to take the drug test, but insisted that he did not have to do so. When Engleman asked why he refused the
25 Company's request on March 29, Little resorted to a myriad of excuses ranging from a “shut down” or being “turned off” in a stressful situation to not wanting to “lose it” and thus being unable to effectively comprehend what was happening at the time. During the meeting, Little also alleged, for the first time, that he requested a steward as Grose approached him in the yard on March 26 and the request was refused.⁴⁴ Little also asserted during the April 7 meeting that
30 he had requested that sun visors be put in place in the forklifts but that nobody had done anything to resolve the issue.⁴⁵

35 ⁴¹ R. Exh. 3, p. 66.

⁴² Interestingly, although well acquainted with his *Weingarten* rights, Little did not testify that he actually requested representation in front of Hess and Way, but simply remarked, after refusing to take the drug test and being informed that he was suspended, to “[t]alk to me when I have union representation.” (Tr. 44–45.) I find it unlikely that Little would have made such a
40 remark simply based on two alleged requests made to Grose and without making the request to Hess, whom he knew to be from the Human Resources office. (Tr. 219–220, 368–369.)

⁴³ Little did not deny being asked several times in the yard to take the drug test. He testified, however, that Hess told him to “Have a nice termination” or “Enjoy your termination” as he exited the property. (Tr. 41–42, 45.) That assertion, however, is contradicted by the more
45 credible testimony of Hess, Grose, and Way that he never requested union representation and fled the scene without further comment. (Tr. 222–223, 310, 371–372.)

⁴⁴ 46, 392, 396–400.

⁴⁵ This was not a credible assertion, as Little knew that Grose previously considered distributing sun visors to forklift drivers. (Tr. 399.) Furthermore, even Little's fellow union
50 member, Weidenhaft, admitted that a baseball cap was more than sufficient to deal with any glare caused by the sun. (Tr. 131.)

After hearing Little's version, Engleman and the other company supervisors present excused themselves to discuss the matter. They returned shortly and informed Little of the Company's decision. She rejected Little's contention that he crashed into a light pole because he was blinded by the sun, as well as his claim that Grose disregarded Little's request for sun
 5 visors and did nothing to address the problem. Engleman explained that, coupled with the severity of the accident, Little's statement that he was not going to report the accident, and his refusal to submit to drug testing on March 26 and March 29, Little's conduct amounted to "willful or negligent misconduct of a serious nature" under Article 13 of the CBA, as well as serious
 10 behavior violations under the Code of Conduct. Accordingly, the Company decided to terminate Little on April 7.⁴⁶ Engleman documented that action in a letter, dated April 27. The letter specifically cited two serious behavior violations by Little as the basis for the action— subordination and placing himself and other employees in apprehension of harm. It elaborated as to the details of the accident, Little's comment that he was not going to report the accident, his refusal to take a drug and alcohol test at the hospital, and his refusal to take the test when
 15 asked again at work on the next business day.⁴⁷

*J. The Company's Custom and Practice Regarding
 Enforcement of Safety Rules*

20 The Company's past approach in dealing with workplace accidents revealed stern discipline for employee negligence in the operation of equipment. On May 8, the Company discharged Greg Putzer for negligent operation of a forklift that collided with a coworker's forklift. The coworker was injured and taken to the hospital. Four months earlier, Putzer had signed a
 25 "last chance agreement" that any subsequent violation would result in immediate discharge.⁴⁸ On February 12, 2009, Ray Redlin was suspended for 28 days without pay and entered into a last chance agreement after driving a forklift onto a beam that could not support it. As a result, the forklift was in danger of tipping over and causing injury or death to Redlin or a coworker.⁴⁹ On April 29, 2010, Cheryl Kmecheck was discharged for the unsafe operation of a hand pallet
 30 lift jack that lacked breaks. The hand pallet slipped and pinned her foot, but she apparently escaped significant injury. Two months earlier, Kmecheck had been placed on probation for serious behavior violations and the terms included termination for any violation of the CBA.⁵⁰

35 ⁴⁶ As noted by the Company, there were several inconsistencies between Little's Board affidavit and testimony regarding the incident, his alleged requests for representation and whether he or Grose spoke first on March 29. (Tr. 44-45, 55-57, 93; R. Exh. 28, p.4.) While the testimony of the Company's witnesses may have been rehearsed (Tr. 230-231, 283-286, 322-
 40 326, 353-355, I still found them more credible than Little. (Tr. 379, 399-404; R. Exh. 3, pp. 24-25.)

⁴⁷ I drew no inference from letter's erroneous references to the incident date as April 2 and a behavior violation for placing oneself and others in harms way as number 6, when it is actually number 7. (R. Exh. 4.) Moreover, I am not convinced by the General Counsel's argument that Engleman's testimony describing Little's conduct as "willful and negligent," a term not mentioned
 45 in the termination letter, was inconsistent with the grounds laid out therein. A review of that testimony indicates that Engleman was merely characterizing the significance of the serious behavior violations within the context of the CBA as "additional reasons above and beyond willful or negligent conduct that would result in immediate termination." (Tr. 401-403.)

⁴⁸ R. Exh. 21.

⁴⁹ R. Exh. 23.

⁵⁰ R. Exh. 22.

III. Alleged Unfair Labor Practices

A. Little's Requests for Union Representation

5 The General Counsel alleges that the Company violated Section 8(a)(1) of the Act on
 March 29 when Nathan Grose, Tony Way, and Katie Hess denied Little's requests to be
 represented by the Union during a reasonable suspicion drug and alcohol test. The Company
 denies that Little requested union representation on March 29. Assuming, arguendo, that Little
 10 did request union representation on March 29, the Company contends that Little's *Weingarten*
 rights were not triggered because the Company formally decided to suspend Little before asking
 him to take the test.

 The Supreme Court has long held that an employee has a right to have union
 representation at an investigatory interview that the employee reasonably believes may result in
 15 disciplinary action. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 262 (1975). The test for
 determining whether an employee reasonably believes that an investigatory interview might
 result in disciplinary action is considered from an objective perspective under all the
 circumstances of the case rather than by the employee's subjective motivation. *Weingarten*,
 20 *supra* at 257; *Lennox Industries*, 244 NLRB 607, 614-615 (1979), *enfd.* 637 F.2d 340, 344 (5th
 Cir. 1981), *cert. denied* 452 U.S. 963 (1981); *United Telephone Co. of Florida*, 251 NLRB 510,
 513 (1980). The right to union representation under *Weingarten* does not apply where the
 adverse action has been decided and the employee is merely being informed of the decision
 taken. *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992). However, when an employer informs an
 25 employee of a disciplinary action and then seeks facts or evidence in support of that action, or
 attempts to have the employee admit his alleged wrongdoing or to sign a statement to that
 effect, the employee's right to union representation would attach. *Baton Rouge Water Works*
Co., 246 NLRB 995, 997 (1979). *See also Electric Co.*, 355 NLRB No. 71 (2010)(citing *Titanium*
Metals Corp., 340 NLRB 766 (2003)).

30 On March 29, Hess met with supervisors Grose, Radish, Lamrock, Way, Brennand,
 Murkley, and Havlik about an hour before the start of Little's shift to discuss the March 26
 incident. The group decided to suspend Little pending a further investigation of his forklift
 accident. They also decided to give Little a "second chance" to submit to an immediate drug and
 alcohol test as part of that investigation. As directed by Hess' group, Lamrock arranged for a
 35 taxi to pick up Little after he arrived for his shift in order to transport him to the hospital for the
 drug and alcohol test. A short while later, Grose, Hess, and Way confronted Little, informed him
 that he was suspended and was required to submit to a drug and alcohol test. When he rejected
 that directive, Hess warned Little that his failure to submit to the drug and alcohol test would
 constitute insubordination and grounds for immediate discharge.

40 The Company correctly argues that it already decided to suspend Little because of the
 March 26 incident and his refusal to take a drug and alcohol test. Standing alone, Little's
 representation rights would not attach if the Company had already decided on adverse action
 and was merely informing the employee of that decision. *LIR-USA*, *supra* at 305. The
 45 circumstances here, however, are different, as the Company's decision to suspend Little was
 accompanied by a directive that he submit to an immediate drug and alcohol test as part of an
 investigation or face further charges of insubordination and possible discharge. Given that the
 Company sought additional evidence in relation to that decision, Little's right to union
 representation attached. *Baton Rouge Water Works*, *supra* at 997. *See also Safeway Stores*,
 50 *Inc.*, 303 NLRB 989, 989-990 (1991) (where a drug test is part of a larger investigation into an
 employee's conduct, *Weingarten* rights will attach if the employee reasonably believes the
 investigation may result in discipline).

While Little would have been entitled to union representation under the circumstances, the question of whether he actually made such a request is a more difficult question. The credibility of the testimony from both parties was less than compelling. Little's credibility on this point was significantly impeached and fraught with inconsistencies, while the testimony of the Company's witnesses was less than compelling. The Company's witnesses collectively rehearsed their testimony on the morning of trial and claims that a steward would be made available while a taxi waited to take Little to the hospital is belied by the facts. Nevertheless, comparing the consistent, albeit rehearsed testimony of the Company's witnesses to Little's suspect version, I was left with the distinct impression that Little did not request union representation on March 29 when confronted by Grose, Way, and Hess and asked to take a drug and alcohol test. By his own account, Little, a strong-willed and opinionated person anticipating disciplinary action on March 29 because of the March 26 incident, lost control when told that he was suspended and required to take a drug and alcohol test. As a result, he refused, insisted that he was a Union steward, knew his rights, claimed that Company policy did not require post-accident tests, and stormed out of the facility. Under the circumstances, Little waived his *Weingarten* rights to union representation. *Weingarten*, *supra* at 257.

Accordingly, I conclude that the Company did not violate Section 8(a)(1) of the Act.

*B. The Suspension and Discharge of Little for Complaining
about the Sun Glare*

The complaint alleges that the Company violated Section 8(a)(3) and (1) of the Act by suspending Little on March 29 and discharging him on April 7 because (1) he refused to take a drug and alcohol test without union representation and (2) he assisted the Union and engaged in protected concerted activities. The Company denies that it had discriminatory motivation in discharging Little and contends that he was discharged for a safety violation on March 26 and insubordination by refusing twice to take a drug and alcohol test. The Company further contends that the gravity of Little's forklift violation would have resulted in discharge in any event.

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must show, by a preponderance of the evidence, that the employee's protected conduct motivated the employer's adverse action. The General Counsel's *prima facie* case must establish that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus against the protected activity, and the employer took action because of this animus. If the General Counsel establishes these elements, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 *fn.* 12 (1996), *enfd.* 127 F.3d 34 (5th Cir. 1997) (*per curiam*). To meet this burden, "an 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 conduct." *Serrano Painting*, 332 NLRB 1363, 1366 (2000), *citing Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). If, however, the evidence establishes that the reasons given for the employer's action are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. *United Rentals*, *supra* at 951-952 (*citing Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982)).

1. Concerted protected activity

5 There is no doubt that complaints by Little and Weidenhaft in or around December 2009
 about the lack of sun visors or other sun glare protection constitutes concerted protected activity
 under Section 7 of the Act. The Board has long held that an employee's complaints to an
 employer about unsafe working conditions are protected activity under the Act, providing the
 complainant has a good-faith, reasonable belief that such a condition exists. *Diversified Bank*
 10 *Installations, Inc.*, 324 NLRB 457, 470 (1997). See generally *NLRB v. Washington Aluminum*
Co., 370 U.S. 9 (1962). In addition, while a steward in 2008 and 2009, Little filed 15 grievances
 against Radish and demanded his termination in 9 of those instances. Only one of those
 grievances complained about safety conditions. The rest related to overtime work, shift
 assignments, and the treatment of coworkers. In any event, all of the grievances referenced
 some provision of the CBA and clearly involved concerted protected activity.

2. Knowledge of the activity

20 Addressing the second prong of a *Wright Line* analysis, Grose acknowledged that Little
 complained about sun glare and requested that employees be provided with sun visors. Grose
 also confirmed that sun glare posed a problem and, in response, he explored several
 approaches, including the use of tinted film and opaque visors. None of the alternatives entirely
 resolved the problem. Grose settled on the tinted safety glasses and caps that employees were
 permitted to wear as the only practical means for shielding the sun. In addition, Little's
 25 grievances against Radish, which the latter acknowledged, all reflected charges of numerous
 violations of the CBA and Company procedures.

3. Animus

30 The more difficult part of this analysis is whether the Company harbored animus against
 Little because he engaged in protected concerted activity. Unlawful animus can be
 demonstrated "based on direct evidence or can be inferred from circumstantial evidence based
 on the record as a whole." *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). Evidence of
 suspicious timing, false reasons given in defense, failure to adequately investigate alleged
 35 misconduct, departures from past practices, tolerance of behavior for which an alleged
 discriminatee was fired, and disparate treatment of the discharged employee, all support
 inferences of animus and discriminatory motivation. *Coastal Insulation Corp.*, 355 NLRB No.
 146 (2010)(citations omitted).

40 With respect to animus, the General Counsel's concession that Little did not file an
 extraordinary number of grievances negates the conclusion that those grievances, taken alone,
 constitute discriminatory motivation on the part of the Company. Nevertheless, the General
 Counsel contends that Little's complaints to Grose about the lack of sun visors and grievances
 filed against Radish provide circumstantial evidence of unlawful animus. There is no evidence
 45 indicating that it was anything other than coincidental that Grose and Radish, the Area Manager
 on duty at the time, were the two supervisors whose discussion after the accident triggered the
 process to have Little submit to a drug and alcohol test. Although Radish raised the notion of the
 test, it was Grose who made the decision to implement the testing process.

50 There is absolutely no credible evidence of animus on Grose's part. His supervisory
 history with Little was uneventful and there is no evidence that the latter ever filed a grievance
 against him. Grose did fail to comply with the procedural requirements of the drug testing policy,
 which I attribute to inexperience, but do not equate with animus. The General Counsel

5 contends, however, that Little's discipline on the next business day following his renewed
complaint about the lack of sun visors was so close in time as to warrant an inference of
discriminatory motivation. See *State Plaza, Inc.*, 347 NLRB 755, 756 (2006); *La Gloria Oil &
Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). That claim lacks
10 merit for several reasons. Little's version that the accident was caused by sun glare was not
credible because the sun was not in front of him at the time. Grose realized that almost
immediately and had no reason to feel threatened by Little's obvious attempt to divert
responsibility for the accident – even less so after Little told him that he would not have reported
the accident had Grose not appeared on the scene. Moreover, Grose responded to the sun
15 glare complaint several months earlier by exploring several remedies before settling on the
status quo – the use of tinted safety glasses and a cap. Little did not refute Grose's explanation
as to his efforts to address the problem or hint at any acrimony resulting over this episode.
Viewed objectively, Little's comments were conjured excuses as to how the accident occurred
and did not reflect a good-faith, reasonable belief that the condition was caused by sun glare.
20 *Diversified Bank Installations, Inc.*, *supra* at 470. As such, Little's explanation did not serve to
revive his earlier protected conduct.

25 Radish, the other piece to the General Counsel's animus theory, was the target of a
barrage of grievances by Little's charging him with numerous violations of the CBA and
Company procedures. In several of those instances, Little called for Radish's termination. Only
one of those grievances, however, related to a safety concern—depriving Weidenhaft of a work
break while he complained of heat exhaustion. Moreover, the grievances, which were filed in
August, October, and December 2008, were remote to the incident in question. None were filed
in 2009 or 2010. As in the case with Grose, there is no evidence that Radish ever made any
statements suggesting hostility toward Little simply because he filed grievances or complained
about safety or other terms and conditions of employment.

30 The General Counsel also contends that the Company's shifting explanation for
disciplining Little reveals discriminatory motives. See *Approved Electric Corp.*, 356 NLRB No. 45
(2010)(citing *City Stationery, Inc.*, 340 NLRB 523, 524 (2003)) (nondiscriminatory reasons for
discharge offered at the hearing were found to be pretextual where different from those set forth
in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an
employer provides inconsistent or shifting reasons for its actions, a reasonable inference can
35 be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.").
Specifically, the General Counsel relies on Engleman's testimony that Little was terminated
because of willful and negligent conduct, a term not mentioned in the termination letter. That
argument is unavailing, as Engleman's reference to the term was merely an attempt to place the
cited behavioral violations in context with a standard cited elsewhere in the CBA with respect to
40 termination.

45 Finally, the General Counsel contends that Little's discipline resulted from disparate
treatment with respect to the Company's administration of the drug and alcohol testing policy
and its discipline of other employees. Grose conceded making several mistakes implementing
the Company's drug and alcohol testing policy. The Company's drug and alcohol testing policy
required that supervisors complete an observation checklist, confront the employee with the
observations, and ask the employee all the questions on the health questionnaire before
requesting that the employee take the drug and alcohol test. Grose testified that while he and
Lamrock independently completed the observation checklists, they failed to confront Little with
50 their findings or proceed with the health questionnaire because the ambulance was waiting to
take him to the hospital. Grose failed to ask Little to submit to the test and, instead, asked the
emergency room nurse make the request. It is also evident that Grose had not yet cured those
procedural deficiencies when he and Engleman asked Little to take the test on March 29.

Nevertheless, I find nothing in the record to suggest that Grose's rushed deviations from the Company's drug and alcohol policy were motivated by animus. His failure to comply in the testing procedures on March 26 was clearly attributable to a combination of inexperience and reluctance to confront Little with that request. The Company's follow-up request for testing on
5 March 29 was premised on Little's refusal to take the test on March 26 and based on the verbal reports and incomplete documentation of Grose and Lamrock. Although all of the testing documentation still had not been completed at that point pursuant to Company procedures, the Company was faced with the dilemma of an employee who got into an accident involving heavy machinery under suspicious circumstances. While the Company's failure to fully comply with its
10 safety procedure is noteworthy, I cannot conclude from the facts and circumstances that the Company's continued pursuit to determine whether drugs or alcohol were a cause of the accident was attributable to animus.

With respect to its disciplinary history, the Company presented evidence of comparable
15 treatment for other employees charged with similar violations of Company policies during the previous 5 years. Two employees were discharged for insubordination because they refused to take a drug and alcohol test, while another two were discharged for testing positive for alcohol. In addition, the Company has exercised stern discipline with respect to employee negligence resulting in workplace accidents. In one instance, a forklift operator (Redlin) was suspended for
20 28 days for unsafe operation of a forklift, but there was no personal injury or property damage involved. In another instance, a forklift operator on probation at the time (Kmecheck), was discharged for unsafe operation of a forklift after suffering a minor injury to her foot. In a third case, a forklift operator (Putzer) working under a "last chance agreement," was discharged for colliding with another forklift and injuring that coworker.

The General Counsel contends that the aforementioned cases were less egregious than
25 Little's case. I disagree. While none of those cases involve the very same facts and circumstances, Little's situation covers a mixture of violations affecting workplace safety and the prohibition of drugs and alcohol on the job. Even assuming, *arguendo*, that the circumstances resulting in Little's discipline were less egregious than the comparable cases, the Board has
30 held that "[a]n employer's more stringent enforcement of its work rules will not constitute a violation of the Act unless it is a consequence of employee participation in protected activity. The existence of protected activity alone, however, does not foreclose an employer from more strictly enforcing its work rules, even where the employer previously tolerated infractions of
35 those rules." *Schrock Cabinet, Co.*, 339 NLRB 182, 183-184 (2003).

4. The Company's burden of proof

As the General Counsel failed to establish a *prima facie* violation of Section 8(a)(3) and
40 (1), it is unnecessary to discuss a shifting of the burden of proof to the Company to show that it took the adverse action for a legitimate nondiscriminatory reason. See *Wright Line, supra* at 1089 (1980); *NLRB v. Transportation Corp.*, 462, U.S. 393, 401-02 (1983). Nevertheless, consideration of the Company's past discipline of employees for violations of its drug and alcohol policy and workplace negligence establishes that Little would have been investigated
45 and disciplined as a result of the March 26 incident.

Based on the foregoing, I find that Little was not discharged as the result of unlawful animus on the part of the Company.

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. Jason Little did not request union or other representation on March 29, 2010 and, therefore, the Company did not violate his *Weingarten* rights.

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3. Jason Little's discharge by the Company on April 7, 2010, for insubordination and serious workplace safety violations which placed him and coworkers in apprehension of harm was not motivated by unlawful animus.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵¹

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ORDER

The complaint is dismissed.

Dated: Washington, D.C. April 8, 2011

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Michael A. Rosas
Administrative Law Judge

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⁵¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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