

G4S Regulated Security Solutions, A Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation and Thomas Frazier and Cecil Mack. Cases 12–CA–026644 and 12–CA–026811

April 30, 2013

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On November 16, 2012, Administrative Law Judge William N. Cates issued the attached supplemental decision. In the underlying decision, 358 NLRB 1701 (2012), the Board reversed the judge's finding that Charging Parties Thomas Frazier and Cecil Mack are supervisors under Section 2(11) of the Act. Having found that Frazier and Mack are statutory employees, the Board remanded this case to the judge to determine whether the Respondent violated Section 8(a)(1) when it discharged them.

After the judge issued his supplemental decision, the Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. The Acting General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the supplemental decision and the record in the light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.¹

¹ We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we shall order the Respondent to compensate Thomas Frazier and Cecil Mack for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters. We shall substitute a new notice to conform to the Order as modified.

The Respondent contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn.1 (2013).

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by discharging Frazier and Mack.² We also agree with the Acting General Counsel's contention that their suspension a few days before they were discharged was likewise unlawful. Inasmuch as the suspensions were steps taken as part of the Respondent's unlawful discharges of the two, we find that the suspensions also violated Section 8(a)(1) of the Act. See *Fort Dearborn Co.*, 359 NLRB 199, 199 (2012).

ORDER

The National Labor Relations Board orders that the Respondent, G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corp., Miami-Dade County, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or suspending employees because they engage in protected concerted activities.

(b) 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 Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

² In affirming the judge's finding that Frazier's and Mack's discharges were unlawful, we do not rely on any implication in the judge's decision that Frazier's discharge is appropriately analyzed under the standard set forth in *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted), or that Mack's discharge is not. As to Frazier, the Respondent discharged him for conduct that the judge found, and we agree, was protected under the Act. Accordingly, motive is not at issue, and it was neither necessary nor appropriate to analyze Frazier's discharge under *Wright Line*. See, e.g., *Phoenix Transit System*, 337 NLRB 510, 510 (2002).

As to Mack, however, the Respondent contends that his discharge was motivated in part by his use of profanity on one occasion. Thus, the Respondent did put motive at issue concerning Mack's discharge, and the judge properly applied *Wright Line*. Turning to that analysis, we agree with the judge that the Acting General Counsel made an initial showing under *Wright Line* that Mack's protected, concerted activity was a motivating factor in his discharge. We also agree with the judge that the Respondent did not establish a *Wright Line* defense, because the credited testimony established that the cursing incident did not happen—and even if it did, the evidence established that Mack would have received, at worst, a documented oral counseling. Either way, the incident was a pretext, i.e., either false or not in fact relied upon, and thus there is no need to perform the second part of the *Wright Line* analysis. See, e.g., *Evenflow Transportation, Inc.*, 358 NLRB 695, 696 (2012).

(b) Make Thomas Frazier and Cecil Mack whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Thomas Frazier and Cecil Mack for any adverse income tax consequences of receiving their backpay in one lump sum, and file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the discharges and suspensions and, within 3 days thereafter notify the employees in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Miami-Dade County, Florida facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 12, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 Respondent at any time since February 2, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 12 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.

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 discharge or suspend any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Frazier and Cecil Mack whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL compensate Thomas Frazier and Cecil Mack for any adverse income tax consequences of receiving their backpay in one lump sum, and WE WILL file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges and suspensions of Thomas Frazier and Cecil Mack, and WE WILL, within 3 days thereafter,

³ 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."

notify each of them in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

G4S REGULATED SECURITY SOLUTIONS, A
DIVISION OF G4S SECURE SOLUTIONS (USA)
INC.

Shelley B. Plass, Esq., for the Acting General Counsel.¹
Fred Seleman, Esq., for the Respondent.²

SUPPLEMENTAL DECISION

WILLIAM N. CATES, Administrative Law Judge. These are two discharge cases I heard in Miami, Florida, commencing on April 4, 2011, pursuant to a complaint that issued on December 29, 2010. The discharged employees were Thomas Frazier and Cecil Mack. On June 27, 2011, I issued a Decision and Recommended Order in which I found that Frazier and Mack were supervisors within the meaning of Section 2(11) of the Act and that the complaint be dismissed. On September 28, 2012, the Board issued a Decision and Order remanding in which it found that Frazier and Mack were not supervisors. *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012).

In my initial decision, I specifically noted that, in view of my finding that Frazier and Mack were supervisors, “the remaining issues need not be addressed, namely, whether Frazier and Mack engaged in concerted activities protected by the Act and whether they were discharged for doing so,” nor did I need to address “the Company’s affirmative defense that Frazier and Mack were discharged for valid considerations not based on unlawful motives or considerations.”

The Order remanding the case to me directs that, “based on the existing record, the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order regarding solely the Section 8(a)(1) discharge allegations.” Following receipt of the foregoing Order, I conducted a conference call with the parties who stated their desire to file briefs. The briefs filed by the parties have been received and considered.

FINDINGS OF FACT

A. Facts

As set out in my initial decision, Frazier was hired as a security officer in 1989, and Mack in 2002. Both were promoted to lieutenant in 2003. Both Frazier and Mack were suspended from work a few days before they were terminated. Mack was suspended on February 2, 2010, and informed that he was terminated on February 22. Frazier was suspended on February 12, 2010, and informed that he was terminated on February 15. Frazier’s termination notice states: “Failure to meet satisfactory leadership expectations.” Mack’s termination notice states: “Cecil was involved in an incident with the client that involved undesired behavior. As a part of the process management com-

pleted a review of Cecil’s personnel file. As a result of the review it is management’s perspective that Cecil’s performance does not meet satisfactory job performance or behavior standards.”

Project Manager Michael Mareth explained that the Company had not “hit the mark in our performance of supervisors . . . because we didn’t have the right oversight of the officers in the field.” The Company’s senior executives at headquarters and Florida Power & Light, the client and operator of the Turkey Point facility, agreed to initiate a leadership effectiveness program pursuant to which reviews of all supervisors were undertaken. The directive to perform those reviews came from Tim Kendall, president of the Company. Mareth confirmed that, as a result of the reviews there were “a number of individuals that were terminated because they didn’t meet the expectations.” Five lieutenants, including Thomas Frazier and Cecil Mack, were discharged.

It is undisputed that Frazier raised various concerns on behalf of the security officers including inadequate bathroom facilities, a requirement relating to having lanyards on weapons, a requirement from Florida Power & Light requiring the wearing of vests that was not required by the Nuclear Regulatory Commission, uncomfortable chairs, and insufficient water. Mack raised issues relating to security officers including being posted in the sun for 6 hours without any shelter, an inadequate supply of water, the vests being too hot, and complaints of “not being treated fairly.” Their testimony was not contradicted. Counsel for the Company acknowledged that “the Company does not dispute, as a basis matter, that the two individuals [Frazier and Mack] brought issues to the attention of management.”

Project Manager Mareth confirmed that he expected lieutenants to “give me feedback,” whether it be issues relating to Florida Power & Light or “my supervision.” The leadership effectiveness reviews reflect that he also expected them to deal with the issues they raised as supervisors, not as rank-and-file employees. The leadership effectiveness reviews rated lieutenants and captains in three areas, supervisor effectiveness, communication, and setting high standards for team performance. The Company considered lieutenants to be supervisors in making its evaluations.

The leadership effectiveness review of Frazier rated him as unsatisfactory in all three categories. Comments relating to his supervisory effectiveness included the following statements: “He doesn’t see himself a part of management and therefore is not leading us into the future,” and, at team briefing, “[O]penly criticizes management decisions.” In the area of communication, the comments note that Frazier “fails to balance the need of the organization with his sensitivity to individuals.” Regarding setting high standards, the review notes that Frazier’s “sensitivity to individuals is an overused strength with negative impact.”

Frazier was suspended on February 12, 2010, and discharged on February 15. At the discharge meeting, Mareth informed Frazier that he did “not effectively support management” and “would not effect change going forward.” Frazier responded that, even though he did not agree with all the policies and procedures, he always followed them, and that “he was a

¹ I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the Acting General Counsel as the Government.

² I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

voice for the security officers and the other lieutenants and it was not right for him to be terminated." Mareth did not state any specific dereliction on the part of Frazier.

Mack was also rated unsatisfactory in all three categories. Comments relating to his supervisory effectiveness included the following statement: "He doesn't see himself a part of management and as viewed by one direct report [i.e., a security officer], 'Is on the security officer's side.'" In the area of communication, the comments state that Mack had an "over alignment with security officer concerns," and that he is "more of 'a team member' than a team leader." He is criticized with regard to setting high standards because he "does not seek different opinions from all levels of management to gain a balanced approach to team performance."

Mareth claimed that an additional basis for the discharge of Mack was an incident that occurred on January 25, 2010, 3 weeks before he was discharged. On that date Mack had dealt with an incident in which access to the plant had been delayed for about 10 employees due to issues with one of the security entry machines. Brett Rittmer, site security manager for Florida Power & Light, was present when the incident occurred. When the situation was resolved, Mack and Rittmer entered the plant and went into the final access control (FAC) office where two security officers, Anthony McKay and Johnnie Davis, were present. In the office they "were joking about it because I mean it was just a big misunderstanding." Mack could not recall what, if anything Rittmer said, but "it was in a laid back setting."

Three days after the incident, Mack was called to the office of his supervisor, Captain Quintin Ferrer. Ferrer and Operations Coordinator Juan Rodriguez were present. Mack was asked what had happened on January 25. Mack explained what happened. They asked whether he used the word "cluster fuck" in front of Rittmer. Mack denied using those words. They asked him to write a "statement saying so." Mack did so and, a couple of hours later, gave his statement to Juan Rodriguez to give to Project Manager Mareth. He gave a copy of the statement to Captain Ferrer who "read it and he tore it up." Ferrer told Mack that it "sounds good," and Mack reported back to his shift.

On January 31, Captain Ferrer had Mack report to shift because the shift was low on manning levels and told him not to report to training. The next day Ferrer called Mack and told him "not to report to the shift or training," that he was being suspended for the "bullshit incident that happened in the hallway." Mack was directed to wait for a call from Project Director Mareth the next day. Mareth did not call, and so, on February 3, 2010, Mack called him. Mareth told Mack that it was alleged that he had used foul language in front of Florida Power & Light security and that he was "on suspension pending investigation."

Mareth called Mack and requested him to come in on February 22 "so we could speak." Mack requested that Rittmer be present at the meeting. The meeting was at noon on February 22, and Rittmer was present initially as were Mareth, Rodriguez, and Mack. Mack asked Rittmer why "he waited a couple of days" to bring up the issue of him using foul language or acting in an unprofessional manner at that time." Rittmer answered that he "had his vacation on his mind." Mareth told

Rittmer that he could leave.

Mack asked Rodriguez why he did not speak up when he knew that "I didn't curse." Rodriguez said that he "couldn't say that I did or didn't" because he was located in the FAC office and Mack "was outside in the hallway . . . addressing the situation, but he did say I did seem calm."

Mareth stated that the investigation was concluded and that he was terminating Mack because a witness had said that he had "used foul language." Mack responded that "there were witnesses that said that I didn't use foul language." Mareth said that "because of the conflicting stories that he was terminating my employment." As pointed out in the brief of the General Counsel, the leadership effectiveness review was not mentioned. So far as Mack knew, the January 25, 2010 situation was the reason for his discharge.

Although the Company's brief asserts that "Mack was loud and aggressive and used profanity during a discussion with the security manager" there is no credible evidence in that regard. Mack's discharge document, cites "undesired behavior" and failure to meet "expectations for Supervision," and that he is being issued a "Level I violation." The undesirable behavior is not described. Mareth mentioned only "foul language" when discharging Mack. Rodriguez "couldn't say" whether Mack "did or didn't" use foul language because he was in the FAC office. He said that Mack "did seem calm."

Rittmer, in a statement dated February 1, wrote that, when dealing with the situation, Mack referred to it as a "cluster fuck." He does not report that Mack was "loud and aggressive." Although Florida Power & Light Security Shift Coordinator Charles Sengenberger claimed that Mack said, "cluster fuck" in a voice "loud enough for everyone to hear," no one other than Rittmer reports hearing those words. Florida Power & Light Security Analyst Ted Ostenson, although stating that Mack "appear[ed] to be making his point in an overly 'assertive' manner," did not claim that Mack used the words "cluster fuck." Three Company security officers who were present, Antoine Giffried, Edward Daniels, and Nikki Napier gave statements that do not mention Mack saying "cluster fuck."

Neither Rittmer nor Sengenberger, the only individuals claiming that Mack said, "cluster fuck," testified. Rittmer took no immediate action and claimed that he did not do so because he "had his vacation on his mind." I conclude, Rittmer, notwithstanding his vacation, would not have tolerated "loud and aggressive" conduct and use of profanity by Mack. He would have taken immediate action. Even if the alleged comment had been made, it was descriptive of the situation. There is no claim or evidence that the alleged comment was directed to Rittmer. Mack denied using that language, and I credit Mack.

The Company has a progressive discipline policy. Level I offenses include serious offensives such as abandoning a security post, fighting, and inattention to duty. Less serious level II offenses include failure to follow procedures that affect security effectiveness and unexcused absences. Level III offenses include various offenses including smoking in unauthorized areas and using abusive or offensive language. A first offense for a level III violation under the disciplinary policy is an oral counseling. There is no evidence that any employee has been terminated for using offensive language when describing a situation.

The security officers below the grade of lieutenant are in a bargaining unit represented by Local Union 610 of the Security Police and Fire Professionals of America. Timothy Lambert, president of Local 610, testified without contradiction, that it is “fairly prevalent to hear profanity throughout your working day.” He acknowledged that abusive or offensive language towards another person would not be tolerated, but when directed to a situation “there’s not much response to it,” that “occasionally someone [who is offended] will say something.”

B. Analysis and Concluding Findings

The complaint alleges that Frazier and Mack were discharged for engaging in protected concerted activity.

My decision herein is predicated upon the determination by the Board that lieutenants are not supervisors. Board precedent establishes that an employer’s good-faith belief that individuals whom the employer considers to be supervisors but who are found to be employees does not deprive those employees of the protections of the Act. In *Pilot Freight Carriers, Inc.*, 221 NLRB 1026, 1028 (1975), the Board held: “[W]e find it immaterial that Respondent had . . . a good-faith belief that its dispatchers were already supervisors within the meaning of Section 2(11) of the Act.

More recently, in *Shelby Memorial Home*, 305 NLRB 919, 919 fn. 2 (1991), enfd. 1 F.3d 550 (7th Cir. 1993), the Board held that “[a]n employer acts at its peril when it takes steps calculated to chill the exercise of Sec. 7 rights by individuals who may later be found to be under the protection of the Act. See *Sav-On Drugs*, 253 NLRB 816, 820–821 (1980), enfd. 728 F.2d 1254 (9th Cir. 1984).”

The Company, in its brief, citing *Pillows of California*, 207 NLRB 369, 372 (1973), argues that the Company’s good-faith belief about the lieutenants’ supervisory status is a factor in determining whether it violated the Act. That case is inapposite. In that case, decided in 1973, before *Pilot Freight Carriers, Inc.*, an attorney had interrogated a purported supervisor who was found to be an employee. The judge determined that the attorney made prefatory remarks relating to voluntariness and assured the individual of the absence of any reprisals. The judge found that, in view of the prefatory remarks and the employer’s good-faith belief that the individual was a supervisor, it would not serve the purposes of the Act to find that by such interrogation the Company violated the Act.

The brief of the Company asserts that “it is unclear in what manner each (or any) of the issues [raised by Frazier and Mack] was raised in a concerted manner or related to a protected subject.” I disagree. The Company was aware that the complaints reported by Frazier and Mack including having lanyards on weapons, the wearing of vests, uncomfortable chairs, insufficient water, and being posted in the sun for 6 hours without any shelter were complaints raised by security officers relating to their working conditions. Insofar as the Board has found lieutenants to be employees, their raising of complaints on behalf of the security officers constituted protected concerted activity.

The Company expected Frazier and Mack to deal with those complaints as if they were supervisors. As stated in the Company’s brief, “the alleged discriminatees were required to be part

of solving and addressing issues and presenting the management side of an issue, not just raising complaints.” Because of that requirement, the leadership effectiveness review, found the performance of Frazier and Mack to be unsatisfactory. Neither Frazier nor Mack saw “himself a part of management.” Frazier criticized management decisions and failed “to balance the need of the organization with his sensitivity to individuals.” Mack was “on the security officer’s side” and had an “over alignment with security officer concerns.”

The Company, in its brief, argues that, although “other security officers and lieutenants regularly and consistently raised issues and concerns on behalf of themselves and other employees, there is no allegation that Respondent terminated or otherwise took any detrimental employment action relative to any of those other individuals for engaging in such conduct.” Employees whom the Company did not consider to be supervisors were not subject to the leadership effectiveness review. There is evidence that three other lieutenants were discharged, but there is no evidence that any charge was filed with the Board relating to those discharges, thus there was no investigation or determination that the Company violated the Act with regard to those individuals.

The Company argues that its “good faith belief about the alleged discriminatees’ supervisory status . . . demonstrates that Respondent did not harbor animus towards the alleged discriminatees, . . . and Respondent’s good faith belief belies any finding of retaliatory intent.” I disagree. Frazier and Mack were discharged pursuant to unsatisfactory evaluations based upon the Company’s mistaken belief that they were supervisors.

The evaluations reflect that the performance of Frazier and Mack was found to be unsatisfactory because, rather than giving full allegiance to management, they did not see themselves as “a part of management” but instead were “on the security officer’s side.” In view of the Board’s finding that lieutenants were not supervisors, their bringing complaints to management on behalf of the security officers and being on the side of the security officers constituted protected concerted activity. “The existence or lack of unlawful animus” is not material when “the very conduct for which employees are disciplined is itself protected concerted activity.” *Burnup & Sims*, 256 NLRB 965, 976 (1981); see also *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007).

Even if an analysis pursuant to *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), were applicable, the comments that Frazier and Mack did not see themselves as part of management, that Frazier criticized management decisions and failed “to balance the need of the organization with his sensitivity to individuals” and that Mack was “on the security officer’s side” and had an “over alignment with security officer concerns” establish animus towards Frazier and Mack because of their identification with and advocacy on behalf of rank-and-file employees. Pursuant to *Wright Line*, I find that Frazier and Mack engaged in protected concerted activity and the Company was aware of that activity. The Company bore animus towards individuals whom it deemed to be supervisors engaging in the protected concerted activity of raising complaints on behalf of security officers and thereafter being “on the security officers’ side.” No basis for the discharge of Frazier was cited other than

the unsatisfactory evaluation that was predicated upon the Company's erroneous belief that he was a supervisor. Although the Company contends that there was a further basis for the discharge of Mack, as hereinafter discussed, I find that basis did not exist. Even if it did, discipline for the alleged offense would, at worst, have been a documented oral counseling. The Company acted "at its peril" in treating individuals who were "later . . . found" to be employees as supervisors. The Company has not established that Frazier and Mack would have been discharged in the absence of their protected concerted activity.

The Company contends that there was an additional basis for Mack's discharge, an alleged comment that I have found he did not make. Insofar as Mack's alleged comment relating to a "cluster fuck" is asserted to have been a basis for his discharge, that action was an adverse action that directly affected his employment. Thus, the burden of going forward to establish that the same action would have been taken against him is upon the Company.

Mareth could not have held a good-faith honest belief that Mack had made the statement attributed to him by Rittmer and Sengenberger. Although Sengenberger claimed that Mack said, "cluster fuck" in a voice "loud enough for everyone to hear," no other individual present at the access incident reported hearing that description of the situation except Rittmer. Rittmer made no contemporaneous comment to Mack, nor did he speak with him regarding his alleged offensive language when he, Mack, and security officers Anthony McKay and Johnnie Davis were in the FAC office "joking about" the access incident. At Mack's discharge interview, Rittmer claimed that he had not mentioned the offensive language because he "had his vacation on his mind." He did not state how he could have been so distracted by thoughts of his vacation that he would ignore conduct that warranted discipline, and he did not testify. The Company did not present either Rittmer or Sengenberger as witnesses. Mack credibly denied using that language. When the reason given for a respondent's action is either false, or does not exist, the respondent has not rebutted the General Counsel's prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The Company, upon the mistaken belief that Frazier and

Mack were supervisors, gave them unsatisfactory evaluations and discharged them for engaging in protected concerted activities by presenting complaints on behalf of the security guards and advocating their positions regarding those complaints so much so that they were deemed not to be "a part of management" and were on "on the security officer's side." "An employer acts at its peril when it takes steps calculated to chill the exercise of Sec. 7 rights by individuals who may later be found to be under the protection of the Act." *Shelby Memorial Home*, supra at fn. 2. That is what happened in this case. The Company violated Section 8(a)(1) of the Act by discharging Frazier and Mack because of their protected concerted activity.

CONCLUSION OF LAW

The Company, by discharging employees Thomas Frazier and Cecil Mack because of their protected concerted activity, violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

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

The Company, having unlawfully discharged Thomas Frazier and Cecil Mack, it must offer them reinstatement. The Company must also make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from February 12, 2010, in the case of Thomas Frazier, and from February 2, 2010, in the case of Cecil Mack, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Company will also be ordered to post and email an appropriate notice.

[Recommended Order omitted from publication.]