

One week later, on June 1, management officials again interviewed Smith about his fall, and again unlawfully failed to allow him a union representative. On June 11, management interviewed Smith for a third time, but this time a union representative was present.

On June 18, Respondent's management met to discuss possible disciplinary action against Smith. The meeting included a presentation regarding the investigation of Smith's injury. The presentation detailed alleged inconsistencies in Smith's description of the accident during his various interviews with management. The presentation also referred to Smith's prior 2011 discipline, which purportedly showed a "history of dishonesty." Following the presentation, management decided to discharge Smith.

On June 21, Smith received a letter from the Respondent stating that he was terminated for "[f]alsification of records, data, documents, or other information including giving false or incomplete information during employment or when applying for employment, or in connection with management investigations."

Discussion

1. The judge's remedial findings based on *Taracorp*

In addition to alleging that the Respondent violated Section 8(a)(1) by denying Smith's request for a *Weingarten* representative at the May 24 and June 1 interviews, the General Counsel alleged that the Respondent terminated Smith, "in part, for conduct in which he engaged during the May 24 and June 1 Interviews." The complaint accordingly requested a make-whole remedy, requiring the Respondent to reinstate Smith and compensate him for any lost wages and benefits. Citing *Taracorp, Inc.*, supra, the judge found that unless Smith was discharged for asserting his *Weingarten* right, Board law prohibited a make-whole remedy for the Respondent's *Weingarten* violations. The judge further found that Smith was not discharged for asserting his *Weingarten* right, but for his "dishonesty [in] allegedly [giving] inconsistent responses to questions asked at his various interviews during the investigative process." Therefore, the judge concluded that Smith's discharge was for cause and that make-whole relief was proscribed under *Taracorp*.

In *Taracorp*, the employee's misconduct—insubordination and a refusal to perform a requested task—occurred outside the interview where the employer unlawfully denied the employee's request for a *Weingarten* representative. In limiting the relief for the *Weingarten* violation to a cease-and-desist order, the Board determined that make-whole relief "for this or any similar *Weingarten* violation" is contrary to Section

10(c)'s specific remedial instruction that the Board should not order reinstatement or backpay for an employee who was suspended or discharged "for cause."³ *Taracorp*, 273 NLRB at 221–222. In explaining its decision, the Board reasoned that, in the "typical" *Weingarten* case, id. at 223, "there simply is not a sufficient nexus between the unfair labor practice committed (denial of a representative at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy." Ibid.

2. The parties' contentions

The General Counsel contends that this case differs from *Taracorp* because the misconduct for which Smith was discharged did not occur before or independent of the unlawful *Weingarten* interviews. Instead, the General Counsel argues that Smith's discharge was based on conduct that occurred *during* and was *prompted* by the unlawful interviews. The General Counsel maintains that in these circumstances, unlike in *Taracorp*, a make-whole remedy is warranted because there is a nexus between the Respondent's unfair labor practices (the unlawful interviews) and the employee misconduct (dishonesty during those interviews).⁴

The General Counsel further maintains that *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), review denied 303 F.Appx 899 (D.C. Cir. 2008), relied on by the judge in denying the requested make-whole remedy, is inapposite. In *Anheuser-Busch*, the Board found make-whole relief inappropriate where the employees had been discharged for misconduct discovered through unlawful surveillance. In denying a make-whole remedy, the Board specifically noted that the case was unlike ones in which the Board had provided make-whole relief to employees notwithstanding their misconduct. The Board explained that in those other cases it was unclear "whether the employees' actions . . . would have merited the discipline imposed—that is, whether the employees' actions would have constituted 'cause' for discipline—if the employer

³ Sec. 10(c) of the Act (29 U.S.C. § 160(c)) provides:

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

⁴ The General Counsel further asserts that *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003), relied on by the judge in denying make-whole relief, actually supports the requested remedy. Thus, in finding that make-whole relief was warranted in *Supershuttle* for an employee discharged for conduct during a discriminatorily motivated investigation, the Board found that "the discharge . . . was not based on misconduct uncovered by the investigation, but rather on misconduct that was triggered by and elicited during the investigation." Id. at 3 (emphasis omitted). The General Counsel argues that this is precisely what happened here, because the Respondent relied on Smith's conduct in the unlawful May 24 and June 1 meetings when discharging him.

had not committed the unfair labor practices.” *Id.* at 649.⁵ The General Counsel argues that the present case is like those distinguished by the *Anheuser-Busch* Board: it was during the unlawful interviews that Smith engaged in the conduct for which he was discharged, and had the Respondent acted lawfully and either provided a representative or terminated the interview when it failed to honor Smith’s representation request, Smith might not have been discharged.

Recognizing that the Board has never directly addressed the issue of whether a make-whole remedy is available to an employee discharged for misconduct occurring during an unlawful *Weingarten* interview, the General Counsel urges the Board to consider the rationale set forth in memoranda from the Division of Advice advocating such relief. In one such case, *Birds Eye Foods*,⁶ an employer discovered through lawful video surveillance that an employee had tossed a cup of coffee into a supervisor’s office. During an unlawful *Weingarten* interview, the employee initially denied throwing the coffee. The employer discharged the employee, citing both the coffee-throwing and the employee’s dishonesty during the interview as reasons for the discharge. Reasoning that a union representative could have informed the employee about the video surveillance system prior to the meeting, making it unlikely that the employee would have lied, the Division of Advice determined that a close nexus existed between the employer’s unfair labor practice and the employee’s discharge. The Division of Advice concluded that unless the employer could demonstrate that it would have discharged the employee absent the employee’s dishonesty during the unlawful interview, a make-whole remedy would be appropriate.⁷

Similarly, in *National Rehabilitation Hospital*,⁸ the Division of Advice recommended a make-whole remedy where the employer discharged an employee because of his intemperate behavior during an unlawful *Weingarten* interview. The Advice memorandum explained that a

make-whole remedy was appropriate because the “employee’s conduct of losing his temper upon being accused of improper conduct was the direct result of the Employer’s having violated [the employee’s] *Weingarten* right.”

Applying the foregoing reasoning to this case, the General Counsel contends that a representative would have aided Smith in preventing the misconduct that he assertedly committed during the May 24 interview. Instead, exhausted from his nighttime work shift and hospital visit, and unable to take his diabetes medication, Smith provided seemingly inconsistent and dishonest answers when discussing work with which he was unfamiliar and inexperienced. Smith’s behavior, the General Counsel urges, could have been avoided had a representative been present to assist him, or had the Respondent terminated the interview after denying Smith’s request for representation.

In response, the Respondent contends that this case falls squarely within the parameters set forth in *Taracorp* and *Anheuser-Busch*, and that pursuant to those holdings, a make-whole remedy is appropriate in the *Weingarten* setting only if an employee is discharged or disciplined for asserting the right to representation. The Respondent argues that the evidence shows that the Respondent discharged Smith for cause—dishonesty during the investigation—and not because he asserted his *Weingarten* rights. Therefore, the Respondent contends, make-whole relief is not available.⁹

3. Analysis

We agree with the General Counsel that this case presents an issue of first impression post-*Taracorp*: whether to provide make-whole relief to an employee discharged for misconduct that occurred during an unlawful interview. And, contrary to the Respondent and our dissenting colleague, we do not think that resolution of this issue is as simple as saying that the only remedy for a *Weingarten* violation is a cease-and-desist order. Such a categorical limitation fails to provide a suitable remedy in cases where an employee is disciplined, not merely for prior misconduct—whether discovered through lawful or unlawful means—but for misconduct precipitated by and occurring during an unlawful interview. In the latter circumstances, we agree with the rationale urged by the General Counsel and in the cited Advice memoranda, and we accordingly find that a make-whole remedy is appropriate when: (1) an employer, in discharging an

⁵ See, e.g., *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849–851 (2001); *Kidde, Inc.*, 294 NLRB 840 (1989).

⁶ Case 03–CA–026833, Advice Memorandum dated February 3, 2010.

⁷ The relevant Advice memoranda posited that where an employee is discharged for misconduct occurring, at least in part, during an unlawful *Weingarten* interview, a make-whole remedy is warranted “unless the employer can meet a [] mixed motive burden, showing that it would have discharged the employee independent from his or her conduct during the unlawful interview.” *The Lusty Lady*, Case 19–CA–026979, Advice Memorandum dated September 8, 2000, citing *National Rehabilitation Hospital*, Case 05–CA–024870, Advice Memorandum dated February 28, 1995.

⁸ Case 05–CA–024870, Advice Memorandum dated February 28, 1995.

⁹ The Respondent further asserts that the General Counsel “conveniently ignores Smith’s inconsistent responses (i.e., dishonesty) during several indisputably lawful interviews which occurred both before and after any alleged unlawful interview.”

employee, relies at least in part on the employee's misconduct during an unlawful interview; and (2) the employer is unable to show that it would have discharged the employee absent that purported misconduct.

Awarding a make-whole remedy in such circumstances is not contrary to Section 10(c)'s prohibition against ordering reinstatement and backpay to any individual suspended or discharged "for cause." 29 U.S.C. § 160(c). As stated in *Taracorp*, make-whole relief should not have been granted in those earlier *Weingarten* cases where the employers had discharged employees for reasons "wholly independent" of any unfair labor practice, and therefore "for cause." *Id.* at 223. But as the Board acknowledged in *Anheuser-Busch*, the same logic does not apply where there is a nexus between an employee's misconduct and the employer's unlawful denial of the employee's request for a union representative. See *Anheuser-Busch*, *supra*, 351 NLRB at 649.

Two circuit court cases preceding *Taracorp* illustrate the significance of that nexus for purposes of the remedy. In *NLRB v. Potter Electric Signal Co.*, 600 F.2d 120 (8th Cir. 1979), the employer unlawfully refused the requests of two employees for a *Weingarten* representative during investigatory interviews concerning a fight between them. *Id.* at 123. Both employees were eventually discharged for fighting. *Ibid.* The court denied reinstatement and backpay, finding such a remedy contrary to Section 10(c). In doing so, the court explained that the employer's *Weingarten* violation was "incidental" to the employees' discharge, and that the employees, "by their own actions, caused their own discharges by participating in a fight which stopped the production line." *Ibid.* The court reached a similar conclusion in *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095 (8th Cir. 1981), finding that a make-whole remedy was inappropriate where the employer, following an unlawful *Weingarten* interview, discharged employees for stealing employer merchandise. The court stated that "the employees effected their own discharge by stealing and the [*Weingarten*] violation was simply incidental to the investigation which preceded the firing." *Id.* at 1097.

This case differs from *Taracorp* and similar cases in one critical respect: the nexus between the misconduct and the unlawful interview. Unlike the typical *Weingarten* case, where the misconduct occurs independent of the unlawful interview, here the misconduct giving rise to the discharge (Smith's alleged dishonesty) is asserted to have occurred *after* the denial of the *Weingarten* rights and *during*, as opposed to before, the unlawful interview. Thus, unlike *Taracorp*, where the employer's unfair labor practice played no role in the employees' misconduct, in this case the unlawful

Weingarten interview was not merely incidental to Smith's discharge; rather, it may have created the circumstance that led to the conduct for which Smith was discharged. Therefore, cases like *Taracorp* are fundamentally distinguishable from this case, given the nexus between the employer's unlawful interview and the misconduct for which the employee was discharged.

Our colleague accords no significance to the timing of the misconduct for which an employee is discharged, stating that whether the misconduct occurred before, during, or after an unlawful interview is a "distinction without legal significance." But the temporal distinction is far from meaningless and is precisely what distinguishes this case from *Taracorp* and its progeny. In fact, the scenario at hand—misconduct occurring *during* unlawful *Weingarten* interviews—reveals a gap in our jurisprudence for which, until now, there was no answer. And our answer here comports with Section 10(c)'s guiding principle, which is to restore the status quo following an unfair labor practice. Our colleague's refusal to see the significance in the timing of the misconduct turns a blind eye towards the unlawful role that the Respondent may have played in Smith's discharge.

Nor does our decision today signal a return, partial or otherwise, to our previously criticized *Kraft Foods*¹⁰ standard. We applied that standard to cases involving misconduct that preceded an unlawful interview. Member Johnson's criticism in this regard is based on his misperception that the timing of the misconduct is not crucial. As we stated above, this case addresses a scenario to which neither *Taracorp* nor its predecessor, *Kraft Foods*, spoke.

Our colleague's alarm that our decision amounts to an application of the fruit of the poisonous tree principle, and thereby enters the criminal procedure labyrinth that *Taracorp* sought to avoid, is likewise misplaced. In the criminal context, the fruit of the poisonous tree doctrine prevents the government from relying on evidence of wrongdoing brought to light because of illegal actions on the part of the police. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 592–593 (2006). The rule we announce today imposes no similar limitation on employers. Thus, we do nothing to impair an employer's ability to take action against an employee based on preexisting misconduct brought to light only through an unlawful interview. We merely hold that in the very different situation where an employer discharges an employee for misconduct that it caused in the first instance by persisting in an unlawful interview, the remedy for the unlawful interview should

¹⁰ *Kraft Foods*, 251 NLRB 598 (1980), overruled in *Taracorp*.

ordinarily include make-whole relief for the discharged employee.

Our decision also withstands our colleague's criticism that the standard announced today has no limiting principle. The dissent incorrectly portends that our decision will result in make-whole remedies for discharges prompted by all sorts of outlandish, even criminal, behavior that possibly could occur during an unlawful *Weingarten* interview. Our decision does not alter the well-established principle that the Board's make-whole remedy is not available for conduct that is objectively "so egregious as to take it outside the protection of the Act, or . . . render the employee unfit for further service." *Richmond District Neighborhood Center*, 361 NLRB 833, 834 (2014) (internal quotation marks and citations omitted); see also *C-Town*, 281 NLRB 458, 458 (1986) (Board may withhold the traditional make-whole remedies of reinstatement and backpay "in those flagrant cases in which [an employee engages in post-discharge] misconduct . . . of such character as to render the employee unfit for further service" (internal quotation marks and citations omitted)).¹¹

In sum, neither *Taracorp* nor Section 10(c) prohibits the Board from ordering a make-whole remedy where, as here, the employee's discharge may have been caused, at least in part, by conduct that would not have occurred but for the employer's violation of the employee's *Weingarten* right. Such relief is not only within the Board's "broad" remedial discretion under Section 10(c), *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953), but is necessary to "restore as nearly as possible the situation that would have prevailed but for the unfair labor practices." *State Distributing Co.*, 282 NLRB 1048, 1048 (1987).

Whether a make-whole remedy is appropriate in this case, however, depends on whether the Respondent, in discharging Smith, relied, at least in part, on Smith's behavior during the two unlawful interviews. Smith participated in several interviews, both lawful and unlawful, during the investigatory process. In finding that Smith was discharged for his dishonesty and inconsistency during "various interviews," the judge did not identify which of the interviews gave rise to the misconduct for which Smith was discharged. The Respondent contends that all of the inconsistencies that formed the basis for

Smith's termination were either disclosed for the first time via lawful sources and repeated during one or both of the unlawful interviews, or were not discussed at all during those interviews. The General Counsel, meanwhile, points to record evidence showing that the unlawful interviews were the original source of at least five of the discrepancies cited in the Respondent's June 18 personnel review of Smith prior to his termination. Absent a specific finding on this question, the Board cannot determine whether a make-whole remedy of backpay and reinstatement is warranted, or whether the more limited cease-and-desist and notice-posting remedies are appropriate.

Accordingly, we remand this case to the judge to first determine whether Smith's discharge was based, at least in part, on his conduct during one or both of the unlawful interviews. If the judge so finds, the Respondent will bear the burden of showing that it would have discharged Smith regardless of any conduct during the two unlawful interviews. If the Respondent succeeds in establishing that it discharged Smith for reasons independent of his conduct during the unlawful interviews, then a make-whole remedy is inappropriate. If, however, the Respondent fails to make this showing, then the judge must order the Respondent to make Smith whole, including backpay and reinstatement, consistent with our decision today.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and Orders that the Respondent, E.I. DuPont de Nemours & Co., Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, subject to potential modification of the remedy following remand.

IT IS FURTHER ORDERED that this proceeding is remanded to Administrative Law Judge Steven Davis for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall afford the parties an opportunity to present evidence on the remanded issues and shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER JOHNSON, dissenting in part.

I agree with my colleagues that the Respondent twice unlawfully denied employee Joel Smith's request for *Weingarten* representation during investigatory interviews. The appropriate remedy for this 8(a)(1) violation

¹¹ Contrary to the partial dissent, the limiting principle set forth above does not presume that an employee is engaged in protected activity during an unlawful *Weingarten* interview. As *C-Town* and other postdischarge cases make clear, the Board's consideration of whether an employee's conduct has rendered that employee unfit for further service is not limited to circumstances where the purported misconduct is part of the *res gestae* of protected activity.

is a cease-and-desist order. As for Smith's discharge, the only question that should be asked is whether the discharge was motivated, at least in part, by his protected request for representation. Undisputedly, it was not. Under longstanding law set forth in *Taracorp, Inc.*, 273 NLRB 221 (1984), Smith is not entitled to a make-whole remedy of reinstatement and backpay. My colleagues, however, remand this case to the judge with instructions to apply an evidentiary standard for determining Smith's entitlement to a make-whole remedy of reinstatement. This remand cannot be reconciled with the Board's holding in *Taracorp*. I vigorously dissent from what is effectively a partial return to the discredited *Kraft Foods* standard that courts of appeals criticized and the *Taracorp* Board justly overruled on statutory and policy grounds.

My colleagues attempt to distinguish *Taracorp* on factual grounds, and they are correct that the alleged discriminatee in that case was discharged for conduct that occurred prior to the unlawful denial of *Weingarten* rights, rather than for conduct that occurred during an interview after the *Weingarten* violation. However, that is a distinction without legal significance. *Illinois Bell Telephone*¹ is instructive on this point. In that case, alleged discriminatee Hatfield was unlawfully denied *Weingarten* representation. During the ensuing interview, she confessed to making personal telephone calls without paying for them and to improperly adjusting the timing of certain collect calls. She was discharged for this misconduct, and the Board originally provided a make-whole remedy under *Kraft Foods*.

On review, the Seventh Circuit noted that the Respondent had discharged Hatfield for cause and remanded the case with instructions that the Respondent should be permitted to show whether it had evidence of Hatfield's misconduct, independent of that which was obtained during the illegal interview. A hearing was held and an administrative law judge found that the Respondent failed to produce any credible evidence of Hatfield's misconduct independent of the interview. He therefore found that Hatfield would not have been fired but for her participation in the interview and under *Kraft Foods* was entitled to a make-whole remedy.

By the time the Board reviewed the judge's supplemental decision, it had issued the *Taracorp* decision, specifically overruling both *Kraft Foods* and the relevant part of the prior *Illinois Bell* decision.² Accordingly,

¹ *Illinois Bell Telephone Co.*, 251 NLRB 932, 933 (1980), enf. denied and remanded in relevant part 674 F.2d 618 (7th Cir. 1982), supplemented 275 NLRB 148 (1985), enf. sub nom. *Communications Workers Local 5008 v. NLRB*, 784 F.2d 847 (7th Cir. 1986).

² *Taracorp*, 273 NLRB at 222 fn. 6.

without disputing the judge's determination that Hatfield would not have been fired but for information obtained during the interview conducted after denial of her *Weingarten* rights, the Board found that she was not entitled to make-whole relief. Specifically, the Board stated "Hatfield's discharge resulted from her alleged misconduct and not from the Respondent's denial of her request for a representative. Accordingly, there is an insufficient nexus between the violation committed and the reason for the discharge to warrant a make-whole remedy."³

To the extent that my colleagues would draw an even finer line of factual distinction to validate their remand here—i.e., that unlike the cases discussed above, the Respondent here relied on misconduct during the interview that was unrelated to the misconduct that triggered the investigation—even that distinction is meaningless in light of the express language and rationale of *Taracorp*. The Board there stated that "in *Weingarten* cases, the reason for the discharge is not an unfair labor practice, but some type of employee misconduct. In short, there simply is not a sufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy."⁴

Contrary to my colleagues and the analyses in the non-precedential Division of Advice memoranda cited by the General Counsel, *Taracorp* clearly does address the factual situation presented here and is not amenable to any reasonable interpretation that a make-whole remedy could in any circumstances be based solely on a nexus between the *Weingarten* violation and unprotected misconduct that is an otherwise valid reason for the discharge, regardless of whether that misconduct occurred prior to or during the unlawful investigatory interview. As the Board stated in a subsequent decision, "To clarify, the Board does not order make-whole remedies for the denial of employees' *Weingarten* rights. *Taracorp, Inc.*, 273 NLRB at 223. The appropriate remedy for a *Weingarten* violation is an order requiring the employer to cease and desist from further such violations and to post a notice to that effect. *Id.* at 224. A make-whole remedy is appropriate only if the General Counsel can prove an *additional* violation."⁵ Consistent with this rationale, there must be a showing that the discipline was

³ *Illinois Bell*, 275 NLRB at 148; see also *Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984), enf. mem. 785 F.2d 316 (9th Cir. 1986) (make-whole remedy found inappropriate under *Taracorp* for employee discharged based on confession obtained during unlawful interview); *Massillon Community Hospital*, 282 NLRB 675, 677 (1987) (same).

⁴ 273 NLRB at 223.

⁵ *Barnard College*, 340 NLRB 934, 936 fn. 12 (2003) (emphasis in original).

based, at least in part, on the protected request for *Weingarten* representation,⁶ or on other conduct that cannot be deemed misconduct under the Act, or results from an act that was itself an independent unfair labor practice, such as an unlawfully implemented layoff,⁷ an unlawful work rule,⁸ or an unlawfully motivated investigation.⁹ This case does not involve any of those scenarios.

My colleagues strive to portray Joel Smith in a sympathetic light,¹⁰ but none of that has any bearing on the legal issue presented, nor can it be the basis for limiting the scope of their remedial determination to the facts of this case. As far as their legal nexus test goes—and it goes quite far—any employee will be entitled to reinstatement and backpay if discharged for misconduct that “occurred *after* the denial of the *Weingarten* rights and *during*, as opposed to before, the unlawful interview.” There is no limiting principle that would permit a different result if the employee were a loathsome character or if the misconduct causing the discharge was heinous or even criminal. For instance, if Smith had become angry and punched a supervisor during his unlawful interviews, he would nevertheless be entitled to a make-whole remedy because the denial of union representation may have created the circumstance that led to the misconduct.¹¹ It

⁶ *Taracorp*, 273 NLRB at 223 fn. 12.

⁷ E.g., *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964), cited for this proposition and expressly distinguished from *Weingarten* violations in *Taracorp*, 273 NLRB at 222–223.

⁸ See generally *Continental Group, Inc.*, 357 NLRB 409 (2011). Accordingly, if the alleged “misconduct” at issue in an unlawful *Weingarten* interview is shown to be based on what is itself an unlawful rule, a make-whole remedy may be appropriate.

⁹ E.g., *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003), and *Kidde, Inc.*, 294 NLRB 840, 840 fn. 3 (1989).

¹⁰ In describing Smith’s 2012 accident and the investigatory interviews that led to his discharge the factual narrative in the plurality opinion mentions that Smith’s 2012 accident occurred during a “hot and difficult nighttime shift,” he was inexperienced in performing the assigned work, and he missed taking his diabetes medicine as a result of one investigatory interview.

¹¹ My colleagues’ statement of the motivational test to be applied on remand directs “the judge to first determine whether Smith’s discharge was based, at least in part, on his conduct during one or both of the unlawful interviews. If the judge so finds, the Respondent will bear the burden of showing that it would have discharged Smith regardless of any conduct during the two unlawful interviews.” (Emphasis added.) This statement of the test, and its but-for logic, do not indicate any exception relating to the nature of the interview misconduct. Nevertheless, my colleagues assure that adherence to precedent holding that certain conduct may be objectively so egregious as to lose the Act’s protection would limit the entitlement to a make-whole remedy for employees who engage in such misconduct during an unlawful interview. Apart from the analytical dissonance of this claim—which includes the mistaken presumptions that the mere fact of participation in an unlawful interview is protected activity and that the employee’s misconduct is caused by the interview—I question the efficacy of this

is not even clear that my colleagues’ rationale stops there, or whether it would extend to the disclosure of previously unknown misconduct, such as theft of company property or the sale of drugs, during an unlawful interview investigating unrelated misconduct. In this respect, the result here is a partial restoration of the “fruit of the poisonous tree” policy that invites renewal of judicial criticism and flies in the face of the *Taracorp* Board’s concern that “What began as a limited protection of employees and a potential guide to management in conducting fair and expeditious investigations of employee misconduct has become a labyrinth of rules and procedures analogous to the law of criminal procedure.”¹²

In sum, there is not, and should not be, any basis for interpreting the extant law set forth in *Taracorp* as permitting a make-whole remedy based solely on a denial of *Weingarten* representation rights. The judge here correctly came to this conclusion in rejecting the General Counsel’s request for this remedy. I would affirm the judge, and I dissent from my colleagues’ failure to do so consistent with the requirements of clearly controlling precedent.

RD

Jesse Feuerstein, Esq., for the Acting General Counsel.

Michael R. Moravec, Esq. (Phillips Lytle LLP), of Buffalo, New York, for the Respondent.

Catherine Creighton, Esq. (Creighton, Johnsen & Giroux, Esqs.), of Buffalo, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed by the United Steelworkers, Local 6992 (the Union) on October 4, 2012, a complaint was issued against E.I. DuPont de Nemours & Co., Inc. (the Respondent or the Employer) on February 12, 2013.

The complaint, as amended, alleges that in violation of Section 8(a)(1) of the National Labor Relations Act (the Act), the Respondent denied the request of its employee Joel Smith to be represented by the Union during an interview which began on May 24, 2012, and which continued on June 1, 2012.¹ The complaint alleges that Smith had reasonable cause to believe that the interview would result in disciplinary action being taken against him.

supposed limitation in light of the Board’s recent disinclination to find almost any misconduct to be so egregious. See my dissents in *Pier Sixty, LLC*, 362 NLRB 505, 508 (2015), *Jimmy John’s*, 361 NLRB 283, 292 (2014), and *Plaza Auto Center, Inc.*, 360 NLRB 972, 987 (2014). At the very least, as my colleagues make clear in this case, dishonesty during an unlawful interview will not be found sufficiently egregious.

¹² 273 NLRB at 223.

¹ All dates hereafter are in 2012, unless otherwise stated.

The complaint also alleges that on about May 24, and continuing on June 1, the Respondent conducted the interview with Smith even though the Respondent denied Smith's request for union representation. Finally, the complaint alleges that the Respondent terminated Smith for conduct in which he engaged during the interview.

The Respondent's answer denied the material allegations of the complaint, and on April 15, 2013, a hearing was held before me in Buffalo, New York. Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the Acting General Counsel² and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a corporation having its office and place of business in Tonawanda, New York, is engaged in the manufacture of chemical products. Annually, the Respondent purchases and receives at its Tonawanda, New York facility, goods valued in excess of \$50,000 directly from points outside New York. The Respondent 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. The Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

Smith has been employed for 7 years at the Yerkes plant. He is a special projects operator in the tedlar department in which he processed a liquid mix into film. The process includes the mix being subject to temperature changes, its being pulled through a series of wipers which dry it by removing water and a chemical called DMAC, and then the film is cut and stretched, and placed in an oven. The film goes onto a vacuum roll which holds it taut. The wind up operators attach the film to a waste roll, the operators cut the trim off and cause knives to cut part of the film. The detached area is taken down three stairs to a pit where a trim puller takes the film and it is then placed in a vacuum tube where it then is transported to a different area.

Occasionally, the film breaks during this process. At those times, an alarm bell rings and the wind up operators must "hustle" in responding "as fast as [they] can." After responding they have to enter the pit.

A. Smith's 2011 Injury

In May 2011, Smith slipped on a wet floor and fell, injuring his chest and knee. He did not file a workers' compensation claim and lost no time at work. He reported the injury and an investigation was conducted by Cheri Park, a safety specialist whose job it is to investigate accidents. Smith stated that Park interviewed him and they visited the area of the accident, and Smith explained the incident to her. Park denied visiting the site of the accident with Smith.

Smith was given a "Corrective Action Document" entitled "unsatisfactory job performance and violation of serious acts of

² Hereafter, the Acting General Counsel shall be referred to as the General Counsel.

misconduct." It cited four findings: that Smith was insubordinate in that he failed to comply with management's instructions not to work in the specific area; his job performance was unsatisfactory in that he failed to complete his sit down assignment in a timely manner and failed to provide a written list of ideas to improve production of low volume products; he was dishonest by hindering the investigation by originally stating that the solvent on the floor was a small amount, but then admitting that he spilled one to two gallons of solvent; and that he did not report his injury immediately, as required. The letter concluded that Smith's performance was unsatisfactory, and warned that it was "imperative that you demonstrate sustained satisfactory performance in all aspects of your job. You need to understand that this write up is serious and that it is expected that all areas of your job performance remain satisfactory. . . . Failure to comply with these terms could result in further corrective action." (Emphasis in original.)

B. Smith's 2012 Injury

Smith's regular job was that of a special projects operator. In September 2011, he was assigned to work as a wind up operator, a completely different type of job. He was trained as a wind up operator for 3 to 4 months, and worked in that job title only two to three times for a maximum of 45 minutes per shift over a period of 1 month. He worked in that position to relieve other wind up operators while they took their breaks. He was then returned to his regular job as a special projects operator for a period of 2 to 3 months, and then worked in a different area, and finally was assigned to work again as a wind up operator. He received no additional training in the wind up area before this assignment, and mentioned his concern about being inexperienced to his Supervisor Michael Szymanski.³ Nevertheless, Smith began work on May 23 in the 7:30 p.m. to 7:30 a.m. shift.

Just prior to the beginning of that shift, Szymanski met with Smith and his coworkers, wind up operators Dave Riester⁴ and Tim Eberle and reviewed the night's tasks.

Supervisor Szymanski stated that the sheet of film broke about 30 times during Smith's worktime, which was more than the usual number. Smith was required to descend three steps into the pit "constantly" or at least every 30 minutes and look up at the passing sheet in order to observe any defects in the film.

At about midnight, while Smith was in the pit, the film broke. He responded to the alarm by attempting to ascend the stairs. He put his foot on the first step and it slid off. He threw his arms forward to break his fall and hit his knee against the stair. He continued to work after the fall. He then noticed a red stain on the film and discovered that it was his blood which was coming from a small cut on his arm. He removed the three pairs of gloves he was wearing at the time. He threw out the

³ Szymanski denied that Smith expressed any concern about his ability to perform his work.

⁴ Dave Riester's name was also variously spelled Reister throughout the documents received in evidence and in the transcript. I have used the name he gave at the Workers' Compensation hearing. Since he testified there, that is probably the most accurate spelling of his last name.

cotton gloves with which he wiped the blood, and removed his other gloves.

Smith then went to Szymanski's office, but Szymanski was not present. Smith stated that he then went to the breakroom where he wiped the blood from his arm and applied a band aid to his arm. He stated that he had band aids in his lunchbox. He stood at the exit door for some fresh air, and told Riester and Eberle, who approached him, that he hurt his knee. Smith then returned to Szymanski's office and told him that he hurt his knee, explaining that it felt that it was swollen five times its normal size and was "throbbing." He also told Szymanski that he had been bleeding and Szymanski noted that Smith was wearing a band aid.

Smith showed his knee to Szymanski who testified that he did not see any swelling but gave Smith an ice pack, which he applied to his knee. Then, for the first time, Smith felt severe pain in his shoulder and applied the ice pack to that area, telling Szymanski that his shoulder hurt worse than his knee. Szymanski asked if he wanted to go to the hospital and Smith declined. He went to the breakroom, and remained there for about 30 minutes during which time his shoulder pain became worse. He then told Szymanski that he wanted to go to the hospital. Szymanski drove him to the main gate where a taxi took him to the hospital. The physician took X-rays and advised that Smith should see an orthopedist. Szymanski drove him back to the plant.

Szymanski testified that, before Smith returned to the plant, he (Szymanski) phoned Barb Pilmore, the Tedlar area superintendent who is his supervisor, and told her that Smith fell and was injured. Szymanski then went to the area of the accident and did not see any liquid on the floor. Pilmore, who did not testify at this hearing, testified at the Workers' Compensation hearing that when she heard that Smith had slipped due to something wet on his shoe and had hurt his knee and shoulder, "it was suspicious to me because it was exactly the way he described an injury that happened to him a year before, so I immediately was suspicious about it just because of the way the injury was described to me."

The Respondent's witnesses testified that, whenever there is an injury at the plant, an investigation must take place as possible thereafter. The purpose of the investigation is to learn what happened and identify the causes, thereby preventing a reoccurrence of the accident. Such an investigation includes a careful chronological history of how the accident occurred and whether it was caused by a failure of systems, equipment, materials, or human error. Smith conceded that the Employer's safety department always conducts an interview concerning the cause of an accident.

Pursuant to this protocol, an investigation was begun with Szymanski asking Smith certain questions about the accident. Szymanski testified that he and Smith went to the pit area together and Smith demonstrated how he fell. Smith denied returning to the area with Szymanski that night.

Szymanski's notes of his conversations with Smith on May 24 stated that Smith told him that he was working with the vacuum roll and standing on wet film when he slipped on the first stair and fell. Smith told him that he and Riester were working in the pit; Smith told the medical department that the

"floor was wet—a lot of film breaks—foot slipped off the stair because of water—place was soaked—water was everywhere"; that neither he nor Riester saw any "objective signs of the injury"; Szymanski saw band aids on Smith's right arm with some evidence of blood on the band aid. Smith told the medical department nurse that when he fell he jammed his arms and left shoulder and heard something pop in his left shoulder.

Szymanski asked Smith to report to the Respondent's medical department, which he did at about 6:45 a.m. He told medical assistant, Shannon, what happened and then Nurse Charlene entered. They asked how the accident happened. They asked if the floor was very wet and Smith said it may have been. The nurse examined his shoulder, and told him that Cheri Park, the safety specialist, wanted to see him.

C. The May 24 Meeting and the Request for Union Representation

Smith stated that at about 8:30 a.m. on May 24, he met with Park, Pilmore, and Szymanski in a conference room, and that before he sat down he said, "I'd like a union representative with me." Smith testified that he asked for a union agent because his interview with Park 1 year earlier "contributed" to his discipline at that time.

Szymanski quoted him as saying, "[D]o I need a union representative for this?" and that he or Park replied, "[N]o, we are just doing a regular, standard investigation." The Respondent's answer to the complaint admitted that Smith was told that he "did not need union representation and denied his request." No union agent was asked to join the conversation and the interview continued without a union representative being present.⁵

Smith was asked questions by Park and Pilmore. The questions included a chronology of events leading up to the accident and its aftermath. They asked where he was and what he was doing at the time of the accident; did anyone see him fall; was he wearing his personal protective equipment; was the floor wet or dry; how did he fall; whether his shoes were wet; whether he used the handrails to climb the stairs? Smith answered that the floor was wet at times during his shift, but that he could not recall whether it was wet at the time of the accident.

After each answer, Park wrote Smith's response on a flip chart, an erasable board. She then asked Smith whether his version of his answer was correct. If not, she revised what she wrote. Then another question would be asked.

The answers were transcribed from the flip chart onto a computer. They included a time-line of the events beginning with the start of the shift. They stated that at about midnight, Smith was in the pit with Riester, and at 12:35 a.m. his right leg slipped off the pit stair, noting that there was "nothing on the stair; possibly wetness from trim on shoe; wet film on floor; floor surface was dry; arms went out to catch himself while

⁵ Jim Briggs, the Union's representative who serviced the plant for more than 10 years, testified that he informs employees that they should ask for union representation if they are injured on the job. He also advises the shop stewards to meet with the employee and investigate the matter before the injured worker is interviewed by the Employer. Park testified that she conducted 10 to 15 investigations involving employee accidents and none of the workers involved requested union representation.

falling forward; noticed blood on sheet from arm; right arm; kept working; grabbed a paper towel to wipe arm. At 12:45 a.m. reported to Szymanski's office; showed Mike his knee—throbbing; iced knee—took ice and placed it on shoulder and discussed what happened. A notation stated that his shoes were “fairly new.”

Smith testified that the questions asked at the meeting were the same as those posed by Szymanski during the 1-1/2 hour meeting earlier in his office, and Szymanski testified that Smith gave the same answers at the meeting as he had given to Szymanski. Smith testified that the questions, which were the same but phrased differently each time, were posed by Park one right after the other. He stated that he had the impression that Park was “trying to trick me into saying something.” Pilmore asked him about wet trim being on the floor, and if he saw puddles or tripping hazards on the floor.

Smith testified that he felt “very antsy,” was shaking inside, and was uncomfortable. He was upset at her asking the same questions “over and over again in different ways.” He tried to hold his temper despite his getting agitated, and attributed his feeling this way possibly to his exhaustion, and that he had not yet taken his diabetes medication. His arm was very sore and at 8:30 a.m. he told Szymanski and Park that his shoulder was very painful and that he wanted to go home. Szymanski and Park denied that Smith appeared agitated or frustrated.

After the meeting, Park and Pilmore met with Riester and Eberle and asked them what happened. Thereafter, Smith was seen by an orthopedic surgeon who recommended surgery. Smith returned to work on light duty, meaning that he sat in the breakroom for his entire shift.

That afternoon, Sharon Laskowski, the safety, health and environmental manager who was Pilmore's supervisor, emailed Park and Pilmore, stating that she had reviewed the flip charts and interactions with the medical department, and suggested areas for follow up:

With the shift crew: whether water was “everywhere” as Smith allegedly told the medical department, were Band Aids on his arm prior to the incident, the exact locations of all individuals during the shift, witnesses to the accident, and

With Smith: what he did with the bloody paper towel, why he did not report the incident when he saw blood, where he obtained the Band Aids, the condition and type of tread on his shoes (visual check please), confirm whether there were handrails on the stairs, and if so ask Smith if he used them, what personal protective equipment he wore at the time of the incident.

Later, Pilmore and Park interviewed Eberle, Riester, and Craig Moeller about the accident. They were asked about the wet condition of the floor, Smith's band aids, and their knowledge of the accident. Park took notes which mainly consisted of a chronology of the events relating to the accident.

According to the notes, Riester related that he noticed two band aids on Smith's arm at the 8:15 p.m. meeting with Szymanski; he noticed that Smith was having a “hard time” and was sweating and tired, and Riester assisted him because of his difficulty; Riester believed that Smith was not properly qualified to perform that job; Riester noted that wet trim was on the

floor, but that the film was not dripping; he did not see any puddles; Riester did not see Smith fall; Smith told Riester that he hurt his knee and that it was swollen five times the normal size; he did not see Smith bleeding; Riester was with Smith and Szymanski when Smith displayed his knee but he did not see any evidence of an injury or swelling.

The interview with Eberle revealed that Eberle also saw Smith wearing two band aids on his arm during the meeting before the accident, and when he saw Smith limping, asked him what happened and was told “nothing, I have a bad knee.” Eberle saw no bleeding. Moeller's interview produced no information relating to the accident.

Laskowski testified that she was “concerned” after reading the chronology, and wanted more information concerning Smith's shoe treads, what protective equipment he wore, and, because blood had been involved, she wanted to learn where the blood went, did it contaminate anything and was it cleaned up properly. Accordingly, she wanted to ask Smith some more questions.

D. The June 1 Meeting

On June 1, Smith was told to attend a meeting. The session took place in Pilmore's office where Laskowski was also present.

Smith did not ask for union representation at that meeting because, he testified, he asked for a union representative at the first meeting on May 24, and was refused. Accordingly, he believed that another request would be futile. Nevertheless, he testified that he was fearful that this meeting could result in discipline based on his experience the prior year when a meeting with Park led to his receiving a disciplinary warning.

Smith stated that during the 1-hour meeting, Laskowski asked many questions, many of which were the same as asked of him at the May 24 meeting but were posed in different ways. Additional questions were asked about how he disposed of the bloody glove, where he put it, and did he know that it should have been placed in a biohazard bag. Laskowski also asked about the condition of his shoes.

Szymanski entered the meeting as it was ending when the participants were speaking about the shoes and sleeves that Smith wore at the time of the accident. The removable sleeves are made of butyl rubber to protect the wearer. Szymanski was asked to look at Smith's shoes and sleeves. Szymanski examined Smith's shoes which were in a locker and reported that they were in new condition with the tread being new and dry. He located many sleeves but could not find any with Smith's initials or name on them. Szymanski testified that Smith said that his initials were on the sleeves.

After the meeting, Laskowski sent an email to Pilmore and Anthony Casinelli, a manager, advising that she and Pilmore met with Smith, and that she asked him what personal protective equipment he had been wearing; the condition of the tread on his shoes; she asked him for clarification regarding the type of pit he stood in; whether there were handrails on the steps in the pit (answer: he did not know); whether he recalled using them (answer: probably not); whether anyone was in the pit with him (answer: he did not know); asked for a description of how he fell (answer: his foot was probably wet from standing

on wet film and he slipped on the first step); Laskowski wrote that he did not offer that his arms were extended when he fell or that he caught himself; Laskowski also wrote that Smith “confirmed” that the floor was not wet from water, and that she asked him several times and he answered that he was sweating profusely but water was not on the floor. Laskowski noted that Smith said that when he fell, something cut through his butyl sleeve, and he did not know where the sleeve was.

One hour later, Pilmore sent an email to Laskowski, advising of some “oddities” including that Smith had not mentioned that he was wearing butyl sleeves before the meeting that morning, or that there was a tear in it caused by his fall. She also mentioned a discrepancy that, in the prior week, Smith said he was removing a wrap from the vacuum roll, but that morning, told them that he was pulling bad film from the good roll. Pilmore questioned why he would be wearing butyl sleeves for either task, concluding “nothing big, but a couple more little things that just don’t make sense.”

E. The June 11 Meeting

Another hour-long meeting took place on June 11. Present were Szymanski and Paul Szulist, the head of special projects. The Respondent brought in Union Representative Mark Khoury. Smith stated that the meeting began immediately with Szulist’s “accusations” that there were “discrepancies” in his answers at the prior meetings. It was asserted that two band aids had been on Smith’s arm before the accident, specifically that Smith entered the plant that day with a band aid on his arm. Szulist claimed that at the meeting with Szymanski just prior to the start of the shift on May 23, Smith had a band aid on his arm which was seen by Szymanski, Riesert, and Eberle.⁶ Smith denied that claim. Szulist repeated that there were discrepancies in Smith’s story in the prior meetings.

As testified by Szymanski, Szulist also claimed that Smith had been told when he was hurt last year that he must stop work and report the injury immediately. Szulist asked why Smith had not done that after his current injury. Smith replied that he wanted to continue to work, and would report it later. Szulist also claimed that neither Szymanski, Riesert, nor the hospital’s personnel noticed that Smith’s knee was swollen, and asked Smith if he reported that fact. Smith answered that the ice pack brought the swelling down before he arrived at the hospital. Szulist asked about whether there was water on the floor of the pit.

Szymanski testified that at about the time of this meeting, Pilmore told him that she was “immediately suspicious” of Smith’s injury, indeed, Szymanski stated that, although he was not suspicious of Smith because he did not know him, he believed that “everything didn’t match,” meaning that Smith’s answers to Szulist’s questions did not match what Szymanski had seen and heard from Smith immediately after the accident. However, Szymanski conceded that what Smith told him on the

night of the accident was the same as he told Pilmore and Park the next morning.

Szulist took notes of the nine questions asked of Smith and the answers given by him.⁷ The questions were ostensibly for the purpose of clarifying statements Smith made in prior interviews. The questions were not simply asked and replies received. Rather, Szulist challenged Smith’s answers, occasionally causing him to change his answer. The questions and answers as written by Szulist are as follows.

Smith was confronted with his comment during the safety investigation that he cut his arm when he fell and applied band aids which he had in his lunchbox, but at a shift meeting later that night he was seen with band aids on. “Please explain.” Smith answered that he attended no earlier meeting, and when Szymanski said that there was a meeting, Smith “still eluded the question,” when Smith denied having a break that evening, he was challenged and then admitted to having a break. Later, Smith was asked whether he was wearing band aids when he visited the Employer’s medical department in the morning. Smith replied that he was not certain but must have had them on, then maybe he was not wearing them, but was not certain.

Smith was reminded that he said that his knee struck the steps, and Szulist said that there was no bruising or abrasions on his knee or leg . . . “how do you explain this?” Smith replied that his knee was swollen and red and he showed it to Szymanski. Szymanski denied seeing any signs of redness or swelling. Szulist mentioned that Smith said that his knee was swollen to five times its normal size but there was “no observed swelling” and when he saw the Employer’s medical department and hospital physician, “your issue was your shoulder. Please help me understand the differences.” Smith answered that the swelling was reduced because ice was applied before he went to the hospital, and that he told Szymanski that his shoulder hurt also. Szulist also asked him how much blood dripped from his wound and what he did with the film which had blood on it. Smith replied that there were only one to two drops of blood on the film, and that he wiped it off with his glove and threw the glove in the garbage. Szulist asked if that method of disposal was “standard practice.” Szulist also asked Smith to again explain the circumstances of the blood stain. Szulist asked why he threw the butyl gloves out. Smith said that he threw his cotton gloves out but retained his butyl gloves. Szulist said “that isn’t what he first told me and he said that that is what happened.”

Szulist asked Smith “initially you stated that you were pulling film off from the vacuum roll. Later you stated that you were moving bad film from a good roll. What were you really doing at the time of the incident?” Smith answered, and then said that there were so many things occurring that evening that it was hard to remember exactly what happened. Smith said that he did not know whether another employee was in the pit with him, but then Szymanski noted that Smith told him that night that Riester was in the pit with him. Smith said that he did not remember whether Riester was with him.

Szulist asked how much time elapsed between the time he noticed blood on the film and the time he reported it to his su-

⁶ Riesert and Eberle were interviewed by the Respondent and stated that they saw Smith wearing the band aids during the meeting. Neither man testified here. A videotape of Smith’s arrival at the plant that day show that he was wearing no band aids or bandages on his arm at that time.

⁷ GC Exh. 6.

pervisor. Smith relied that about 15 minutes had elapsed. Szulist asked why he waited, and reminded him that following his injury last year he was instructed to immediately report any injury. Finally, Smith was asked the condition of the floor at the time of the incident. He said the floor was clear, and there was no liquid on the floor. Szymanski then reminded Smith that during their initial interview Smith stated that he was standing on wet film which probably got on his boots and caused him to fall. Smith replied that he did not recall.

Szulist's conclusion was that Smith was "very nervous and evasive on some of the questions. When challenged on discrepancies of previous statements made during initial investigations, he stated that he was unsure of which statement was the correct one." At the end of the meeting, Smith asked Szulist if he was being discharged and Szulist replied that he was trying to understand some of the discrepancies in his statements.

F. *The Decision to Discharge Smith*

Conni Krysiak, the Respondent's employee relations superintendent, testified that following the meeting with Szulist, as typically occurs after an investigation is completed if there is any potential impact on the employee, the "area" (in this case the Tedlar area) will discuss with her the findings they made. Pursuant to this process, Szulist and Pilmore, the Tedlar area superintendent, shared "all of the notes from the investigation with me." Krysiak also reviewed the emails, interview notes and typed flip chart notes.

A written "Personnel Review—Joel Smith Alleged Injury" dated June 18 was presented at a staff review session attended by 15 people. The review document stated that Smith was interviewed on the morning of the incident, and that followup interviews were conducted with a supervisor, two coworkers, and the Employer's medical department on the date of the incident. It stated that "there were multiple inconsistencies in Joel's own description of the event and with information collected from others who were involved."

The review then set forth seven alleged inconsistencies:

1. Smith claimed that his knee was swollen five times larger than normal, but no knee swelling/injury was observed by supervisor, coworker, Employer's medical department or hospital staff.
2. Smith stated that he applied Band-Aids from his lunchbox following the accident, but two coworkers and his supervisor noted that Band-Aids were present during a meeting prior to the accident.
3. Smith said that he had no work breaks, but supervisor and coworkers stated that he had two work breaks. Smith admitted to having a break. Smith stated that runability was poor for five hours (multiple film breaks) Computer data indicates that there was a period of 90 minutes with no film breaks.
4. Smith stated that blood dripped on film and he wiped the blood with his glove and threw his bloody gloves away, then stated that he discarded only the cotton gloves. No one saw blood. When asked if there was a lot of blood, Smith stated that he did not know.

Smith first told his supervisor he was in the pit with a coworker but the coworker denied that he was in the pit with Smith. Smith later said that he was not certain if anyone was in the pit with him, and then that he could not remember if anyone else was present.

5. Smith first said that at the time of the accident he was pulling film from a vacuum roll, and then said that he was pulling bad film off the good roll. When asked about the discrepancy he said he couldn't remember.

6. Smith first said that he was standing on wet film and slipped off a step. Later he told the medical department that the floor was wet, and water was everywhere. In later interviews he stated that the floor was clear and there was no water or liquid.

7. Smith told his supervisor that his arms went out as he fell forward and hurt his shoulder. He told the medical department that he jammed his arms and heard a pop. In a follow-up investigation he said he didn't remember if he landed on his shoulder and made no mention of extending his arms.

The review document also has a section entitled "other extenuating circumstances: history of dishonesty from April 11, 2011 incident." That section states that (a) Smith "hindered" that investigation by initially claiming that he slipped on a small amount of solvent on the floor which was discharged in the course of flushing a new pump. "When questioned and challenged that the solvent was not there just prior to the incident and the amount on [the] floor is not reflective of splashing from a pump cleaning, and showing him the pictures just after the incident, Smith then admitted that he spilled some solvent while filling a pail and (b) claimed that he completed his sit down assignment but had put it in his lunchbox and taken it home and would bring it in when he returned to work on May 21. When asked for it he said it was in his locker but he could not produce it even after checking two lockers and his lunchbox, after which he said it was in a locked locker for which he had no keys.

Finally the document states that after the 2011 incident he was told that following an injury he must stop and report to his supervisor immediately, but after the current 2012 injury he did not. He was asked if he remembered the advice of 2011. "He said he did remember, and knew what he was supposed to do, but stated he chose to continue working because it was his nature to want to complete the job."

Smith's misconduct was viewed by the Tedlar area as a violation of the Employer's "serious acts of misconduct." Krysiak stated that "it's up to the area to recommend what disciplinary action to take, and it recommended discharge. Krysiak considered how serious the violation was and recommended that Smith be discharged. A staff review which included 15 people, considered the recommendation, approved it, and the plant manager also agreed that termination was appropriate. Krysiak noted that the safety personnel have no responsibility regarding disciplinary decisions.

Krysiak testified that Smith was fired for falsification. When asked what the falsification was, she stated that "he didn't give complete information or he gave false information, because

there were so many discrepancies in his story that we really couldn't figure out what had happened or if anything had happened. . . . The falsification of company records is his recount of the events."

G. The Letter of Discharge

Smith received a letter dated June 21, signed by Krysiaak, which stated that he was terminated, effective immediately, "as a result of your violating a Serious Act of Misconduct, specifically":

7. Falsification of records, data, documents, or other information including giving false or incomplete information during employment or when applying for employment, or in connection with management investigations.

Analysis and Discussion

The complaint alleges that in violation of Section 8(a)(1) of the Act, the Respondent denied Smith's request to be represented by the Union during an interview which was conducted on May 24 and June 1, despite his reasonable belief that the interview would result in disciplinary action being taken against him. The complaint also alleges that on about May 24, and continuing on June 1, the Respondent conducted the interview with Smith even though it denied Smith's request for union representation.

H. The Request for Union Representation

The complaint alleges that Respondent denied Smith's request to be represented by the Union during an interview which began on May 24, 2012.

In commenting on the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975), the Board stated in *Consolidated Edison Co. of New York*, 323 NLRB 910, 910 (1997), that

Weingarten entitled an employee to union representation on request at an investigatory interview which the employee reasonably believes might result in his being disciplined. *Weingarten* therefore requires an employer to evaluate an investigatory interview situation from an objective standpoint—e.g., whether an employee would reasonably believe that discipline might result from the interview.

I credit Smith's testimony that on May 24 he said, "I'd like a union representative with me." Even assuming that he did not make such a specific request, Supervisor Szymanski's recollection that Smith asked, "[D]o I need a union representative for this" constituted a proper request for union representation. Szymanski testified that he or Park replied, "[N]o, we are just doing a regular, standard investigation." The Respondent's answer admitted that Smith was told that he did not need union representation and denied his request. Assuming that Szymanski responded that way, or, as the Respondent admits, that he was told that he did not need a representative, those responses were not sufficient to allay Smith's fear of disciplinary action as the Respondent did not give any reason why he did not need assistance. *Lennox Industries*, 244 NLRB 607, 608 (1979).

The Board has held that a request necessary to invoke the *Weingarten* right to representation is "liberal, and need only be

sufficient to put the employer on notice of the employee's desire for union representation." *Consolidated Edison*, above at 916. Thus, a question to a supervisor "whether he should obtain representation" was held to be sufficient to require the presence of a union agent. *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977); *Illinois Bell Telephone Co.*, 251 NLRB 932, 938 (1980). I accordingly find and conclude that Smith made a proper request for union representation at the investigatory interview concerning his accident.

III. THE WEINGARTEN VIOLATION

I further find that Smith would reasonably believe that the May 24 interview might result in his being disciplined. He was disciplined 1 year earlier for another accident involving a fall and injury. Where an employee had been disciplined before the interview at issue, it has been held that he had a reasonable belief that the instant interview might result in discipline. *Circuit Wise, Inc.*, 308 NLRB 1091, 1109 (1992); *Quazite Corp.*, 315 NLRB 1068, 1069 (1994). Indeed, Smith testified that he asked for a union agent because his interview with Park 1 year earlier "contributed" to his discipline at that time.

Further, inasmuch as Pilmore was "immediately suspicious" when she heard that Smith had fallen and injured himself, her evaluation of the May 24 interview from an "objective standpoint" should have led her to believe that Smith would reasonably believe that he would be disciplined for this accident as well.

The Respondent argues that the May 24 interview was a "preliminary step in a standard accident—not disciplinary—investigation, and that the purpose of the investigation is to determine the cause of the accident in order to prevent its recurrence." I agree, but regardless of the purpose of the investigation, the question is whether Smith reasonably believed that he would be disciplined as a result of it. *Weingarten* holds that union representation is called for in an investigatory as well as disciplinary interview. It is true that such investigations are properly required and routinely conducted in the plant whenever an accident or injury occurs. By definition, the investigation into the cause of the accident is an "investigatory interview" which requires, upon request, the presence of a union representative.

Park testified that no employee requested union representation in the score of accident investigations that she has been involved in. The Respondent argues that therefore, none of those employees reasonably believed that they would be disciplined as a result of the investigation. That may be the case, but Smith reasonably believed that he would be disciplined following the investigation, and he requested such representation.

As set forth above, Smith did not request union representation at the meeting 1 week later, on June 1. He credibly testified that he believed that it would be futile to do so since his initial request was denied. In *Ball Plastics Division*, 257 NLRB 971, 976 (1981), the Board held that an employee's request for union representation made at an initial meeting was sufficient to require the employer to furnish representation at later meetings. An additional request at the later meeting was not necessary to invoke the *Weingarten* right to union represen-

tation. The Board noted that the same supervisor to whom the initial request was made was present at the later meetings. See *Amoco Oil Co.*, 278 NLRB 1, 8 (1986). Here, Pilmore was present at the May 24 and the June 1 meetings. I find that Smith would reasonably believe that inasmuch as his initial request on May 24 was denied, that any further request would similarly be denied.

In addition, it is clear that the June 1 meeting was a continuation of the fact-finding investigative process begun at the May 24 meeting. Thus, as set forth above, after the May 24 meeting, Park and Pilmore interviewed Riester and Eberle. Later on May 24, Laskowski became concerned after reviewing the evidence amassed thus far, and asked that certain follow-up questions be asked of Smith and his coworkers. That prompted the meeting with her, Pilmore, and Smith on June 1. Following the meeting, Laskowski, in reporting the details to Anthony Casinelli, her supervisor, stated that “Barb Pilmore and I met with Joel . . . to continue the safety investigation re his alleged slip/fall.” The two interviews were not independent, dealing with separate incidents or occurrences. They both involved an inquiry into the May 23 accident and Smith’s actions therein.

It is clear that the responses that Smith gave at the May 24 session prompted the June 1 meeting. The questions posed and the answers given on May 24 were expanded upon on June 1. The nature of the sessions was the same—to investigate Smith’s accident and inquire into the exact course of events. Thus, this meeting was an investigation which Smith would reasonably believe would result in discipline. In fact, the information brought out in this meeting and the May 24 meeting were later used in the personnel review to provide a basis for his discharge. It was noted in that report that his interviews in the morning of the incident and “follow-up interviews with employee” on June 1 and 11 revealed “multiple inconsistencies in Joel’s own description of the event . . .”

I accordingly find that in requesting union representation at the May 24 meeting, Smith reasonably believed that he would be disciplined as a result of the interview that day. I further find that the Respondent violated Section 8(a)(1) of the Act by not providing Smith with union representation at the May 24 and June 1 interviews, and by failing to discontinue the investigation or giving him the choice between continuing the interview unrepresented or having no interview at all. *Postal Service*, 241 NLRB 141, 141 (1979).

IV. THE REQUEST FOR A MAKE-WHOLE REMEDY

The complaint alleges that the Respondent terminated Smith for conduct in which he engaged during the interview, and the General Counsel seeks a remedy which would include the reinstatement of Smith with backpay.

In *Taracorp, Inc.*, 273 NLRB 221 (1984), the Board, in overruling *Kraft Foods*, 251 NLRB 598 (1980), held that a make-whole remedy is inappropriate in a case involving a *Weingarten* violation. It stated that an employee discharged for misconduct or any other nondiscriminatory reason is not entitled to reinstatement and backpay even though the employee’s Section 7 rights may have been violated by the employer in a context unrelated to the discharge. The Board held that it was “unable to justify the imposition of a make-whole remedy where an

employer’s only violation is the denial of an employee’s request for representation at an investigatory interview.” Section 10(c) of the Act precludes the Board from granting a make-whole remedy to employees disciplined for misconduct uncovered through an unlawfully-conducted investigatory interview.” *Anheuser-Busch, Inc.*, 351 NLRB 644, 646 (2007).

In *Barnard College*, 340 NLRB 934, 936 fn. 12 (2003), the Board stated that it “does not order make-whole remedies for the denial of employees’ *Weingarten* rights, citing *Taracorp*, above. The appropriate remedy for a *Weingarten* violation is an order requiring the employer to cease and desist from further such violations and to post a notice to that affect. A make-whole remedy is appropriate only if the General Counsel can prove an additional violation . . . that [the employees] were disciplined, at least in part, for asserting their *Weingarten* rights.” (Emphasis in original.) A make-whole remedy would apply only if the employee was discharged for asserting his right to representation. Here, of course, there is no allegation and no proof that Smith was discharged for asserting his right to union representation at the interviews.

Nevertheless, the General Counsel seeks to expand the remedies for *Weingarten* violations to include a make-whole order, citing three cases analyzed by the Board’s Division of Advice.⁸ The Division of Advice recommended that a make-whole order be sought because the employers’ decision to discharge the employees was based on their conduct during the unlawfully conducted interview. I note, of course, that Division of Advice memoranda are not Board decisions and have no precedential weight.

The Board has stated that the “meaning of the phrase ‘for cause’ does not include an inquiry into the source of the employer’s knowledge of the misconduct.” Cause means the absence of a prohibited reason. The Board noted that in the *Weingarten* cases that the employees were discharged, as here “based on information obtained during interviews” and engaged in misconduct for which they were discharged. The Board concluded by holding that it interprets Section 10(c) to preclude it from granting a make-whole remedy where the employees were disciplined for cause, even if the employer learns of the misconduct through unlawful means.” *Anheuser-Busch*, above at 647.

The General Counsel’s reliance on *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003), is misplaced. In that case, the Board found that the employer’s antiunion animus toward the employee led to the investigation in which the employee made false statements which prompted his discharge. The Board distinguished *Taracorp*, and held that since this investigation was unlawfully motivated there was a “clear and direct connection between the employer’s unlawful conduct (its anti-union animus) and the reason for discipline.” Finally, the Board stated that the discharge was not based on misconduct uncovered by the investigation, but rather on misconduct that was triggered by and elicited during the tainted investigation, concluding that “there is a direct connection between [the man-

⁸ *Birds Eye Foods*, Case 03-CA-026833 (2010); *The Lusty Lady*, Case 19-CA-026979 (2000); *National Rehabilitation Hospital*, Case 05-CA-024870 (1995).

ager's] antiunion animus and [the employee's] discharge." 339 NLRB at 3.

Here, in contrast, there is no evidence that the Respondent possessed any antiunion animus toward Smith who was discharged for misconduct and for no other reason.

The General Counsel correctly argues that Smith was discharged for dishonesty because he allegedly gave inconsistent responses to questions asked at his various interviews during the investigative process. It is clear that the Respondent sought to question and re-question him about the events at issue. Its motivation for the several interviews is questioned by Smith who testified that the Employer sought to take advantage of his weakened and painful physical condition and "trick" him into making false statements.

Regardless of the reason for the several interviews, it is clear that the Respondent used Smith's different responses to establish to its satisfaction that his answers were inconsistent. The General Counsel argues that had Smith's request for a union representative been granted, the representative would have counseled him that he should not answer questions due to his physical condition or to provide only those answers that he was certain of. In this regard, the General Counsel cites the Supreme Court's reason for its requirement of union representation—that "a single employee confronted by an employer on whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors . . . a knowledgeable union representative could assist the employer by eliciting favorable facts. . . ." 420 U.S. at 262–263.

It is possible that a union representative could have assisted Smith in this manner. The Respondent argues that any help a union representative could have provided would not have aided Smith. Since union representation was not provided, we cannot know the answer.

I find and conclude that a make-whole order is not appropriate and would be contrary to Board law.

CONCLUSIONS OF LAW

1. The Employer, E.I. DuPont de Nemours & Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Steelworkers, Local 6992, is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying the request of employee Joel Smith for union representation during the interviews conducted by the Respondent on May 24 and June 1, under circumstances in which, at the time of the request, Smith reasonably believed that the interview might result in his discipline, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. The Respondent has not violated the Act by failing and refusing to reinstate Joel Smith.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, E.I. DuPont de Nemours & Co., Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring any employee to take part in an interview without union representation, if such representation has been requested by the employee and the employee has reasonable grounds to believe that the interview will result in disciplinary action.

(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 after service by the Region, post at its facility in Tonawanda, New York, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 2012.

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

⁹ 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.

¹⁰ 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."

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 require you to take part in an interview without union representation, if such representation has been requested by you and you have reasonable grounds to believe that the interview will result in disciplinary action against you.

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

E. I. DUPONT DE NEMOURS & CO., INC.