

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BOZZUTO’S, INC.

**Respondent
and**

**UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 919**

Charging Party

**Case Nos. 01-CA-115298
01-CA-120801**

August 18, 2015

**RESPONDENT’S REPLY TO THE GENERAL COUNSEL’S ANSWERING
BRIEF TO RESPONDENT’S EXCEPTIONS TO THE DECISION AND
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

The Respondent, Bozzuto’s, Inc., (“Bozzuto’s”) hereby files the following reply to the General Counsel’s answering brief to respondent’s exceptions to the decision of the Administrative Law Judge (“ALJ”) in accordance with the rules and regulations of the National Labor Relations Board (“Board”).

**I. THE GENERAL COUNSEL HAS NO RESPONSES TO THE
MANDATE OF SECTION 10(C) OR THE CONTROLLING CASE LAW**

In its Answering Brief, the General Counsel failed to address the mandate of Section 10(c) of the Act, which provides that “[n]o 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 back pay, if such individual was suspended or discharged for cause.” 29 U.S.C. Sec. 160(c). The General Counsel has no answer because there is no answer.

As the legislative history of Section 10(c) makes clear, the erroneous order of the ALJ reinstating Greichen with back pay is precisely what Congress sought to avoid in enacting Section 10(c) of the Act. The legislative history of Section 10(c) provides:

[I]n Section 10(c) of the amended act,...it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of back pay if such individual was discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity.

House Conference Rep. No. 510, 80th Cong. 1st Sess., 39 (1947), U.S. Code Cong. Serv. 1947, pp. 1135, 1146, reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 543 (1948)(emphasis added).

Greichen's surreptitious recording of his interactions with management on October 8, 2013 provides indisputable proof that Greichen was terminated for cause. First, contrary to any possible speculation that Bozzuto's wanted to be rid of Greichen, the recording shows the repeated efforts of management personnel Vaughan and Winans to persuade Greichen to keep his job by merely attending a meeting about the issue he had raised that very day – whether supervisors were changing the labor standards on a daily basis to cheat employees. (R-12, p. 18-25) Vaughan expressly assured Greichen that he would suffer no adverse consequences by attending the meeting:

Mr. Vaughan: . . . But I'm telling you now, and I don't want to delay it anymore, but if you absolutely refuse to go upstairs, there is nothing here that's unsafe or discriminatory or harassment in this meeting because we're paying you, you're not going to lose -- you're not going to lose incentive. You're going to get down time away, good stuff, we're not doing anything negative to you. If you don't do it, that is considered insubordination.

(R-12, pp. 21, 23-24)

Greichen acknowledged his choice to attend the meeting and remain employed or refuse to go and be found insubordinate as follows:

Mr. Greichen: Right. Okay. I guess so it's termination if I don't go to the meeting; correct? And its non-termination if I do go to the meeting; right?

Mr. Vaughan: Yeah. You're not going to get terminated upstairs.

(R-12, p. 21)

Finally, Mr. Greichen confirmed his refusal to attend the meeting:

Mr. Vaughan: So it's your choice now.

Mr. Greichen: Yeah. My choice is not to go to the meeting.

(R-12, p. 24-25)

Because of Greichen's recording, the situation could not be clearer that Greichen knowingly refused to attend a required meeting on the clock during work hours despite Bozzuto's efforts to convince him to attend. Because Greichen was terminated for cause, insubordination, Section 10(c) of the Act prohibits orders of reinstatement or back pay.¹

Case law confirms that if an employee engages in conduct that warrants termination for cause, orders of reinstatement or back pay are statutorily prohibited regardless of whether or not the employee was engaging in protected activities.

When concerted activity was initially involved, courts and the Board "have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty." NLRB v. Local Union 1229, IBEW, 346 U.S. 464, 474 (1953) See also Champlin Co., 2003 NLRB LEXIS 324, *17 (2003) (employee's action unprotected if, during course of his protest, actions became insubordinate); Carolina Freight, 295 NLRB 1080, n.1 (1989) (employer lawfully discharged employee who in

¹ The "Hobson's Choice" line of cases, see, e.g., Intercom I, 333 NLRB 223 (2001) is inapplicable. Those cases involve the voluntary resignation of an employee when his continued employment is conditioned on abandonment of Section 7 rights. Greichen was only required to attend a meeting.

asserting a contract right persisted in challenging a supervisor's direct order to clock out); Interlink Cable System, 285 NLRB 304, 306-307 (1987) (unprotected insubordination where employees refused to obey supervisor's order to sign warning slip). The fact that an employee was engaging in concerted activity in that it concerned a working condition does not necessarily mean the employee can engage in the activity with impunity. Atroostock County Regional Opthamalogy Center v. NLRB, 81 F. 2d 209, 214-215 n.5 (D.C. Cir. 1996) Were the rule otherwise, any employee who is guilty of conduct warranting discharge could protect himself by openly engaging in union activity. See Waterbury Community Antenna, Inc. v. NLRB, 587 F. 2d 90, 97 (2d Cir. 1978); Firestone Tire & Rubber Co., 539 F. 3d 1335, at 1337 n. 7 (4th Cir. 1976). Because of Section 10(c)'s statutory restriction and case law, the remedies of reinstatement and back pay are not permitted in a termination for cause regardless of whether the offending conduct related to protected activities.²

In his Decision, the ALJ ignored the undisputed substantive facts recorded by Greichen which establish beyond cavil that he was terminated for cause. The ALJ stated: "Even taking Respondent's premise that Greichen's refusal to attend a meeting constituted insubordination, I still think the discharge was unlawful." (ALJ 6:28-30) The ALJ's erroneous premise is that regardless of termination for cause, the remedies of reinstatement and back pay are available if the termination related to protected activities. That conclusion can only be reached by disregarding the statutory mandate of Section 10(c) of the Act, and the ALJ lacked authority to do so.

² Section 10(c) does not restrict the imposition of other remedies in the event that the offending conduct in a termination for cause involves protected activities, for example, a remedy of notice posting.

In accordance with the controlling statutory mandate of Section 10(c) of the Act and case authority, the Board should reverse the ALJ's order that Greichen be reinstated with back pay.

II. GREICHEN WAS NOT TERMINATED FOR ENGAGING IN PROTECTED ACTIVITY

Bozzuto's long standing work rules establish insubordination as an offense dischargeable on its first occurrence, (GC-8; R-34; R-42), and Bozzuto's has discharged employees for this offense in the past. (R-44) Greichen himself acknowledged his obligation to follow reasonable work orders and his awareness of the insubordination rule. (Greichen Testimony, Tr. 832-833, 836-839)

In its Answering Brief the General Counsel speculates that Greichen refused to attend the meeting on work standards on October 8, 2013 because he "reasonably believed that he would be subjected to further unlawful discriminatory conduct, as he had the week earlier, if he were to attend the meeting." (G.C. Answering Brief at 11) The General Counsel further speculates that Greichen's "refusal was largely provoked by the Employer's unfair labor practice of the week before." (G.C. Answering Brief at 11) There is no support in the record for the General Counsel's speculations regarding Greichen's motivation for refusing to attend the required meeting on October 8, 2013.

Contrary to the General Counsel's unsupported speculations, Greichen testified under oath that his reasons for refusing to attend the meeting were that he did not want to hear what management had to say and that he did not want to jeopardize a wage complaint he had filed with the Department of Labor.³ (Greichen Testimony, Tr. 848,

³ Greichen's complaint with the Wage and Hour Division of the Federal Department of Labor claimed that Bozzuto's terminated his employment in retaliation for his pursuit of a wage complaint with the Connecticut Department of Labor and further claimed that Bozzuto's had not calculated his incentive pay correctly. The Department of Labor dismissed Greichen's complaint as unsubstantiated. (R-39, R-40)

885) The reasons that Greichen gave under oath for his refusal to attend the meeting on production standards had nothing to do with any protected activity but were reasons that were personal to Greichen. Indeed, Greichen had participated in many prior similar meetings with management with no adverse consequences and testified that he had no hesitation about meeting with Clark. (R-43; Vaughan Testimony, Tr. 435-439; Greichen Testimony, Tr. 857) The ALJ's finding that Greichen was terminated for engaging in protected concerted activity is incorrect.

Moreover, Greichen's conduct warranted his termination regardless of the meeting on October 1, 2013. The record is clear that Bozzuto's has terminated other employees for insubordination including before the onset of union activities. The following chart depicts the disciplines at Bozzuto's for insubordination:

<u>EMPLOYEE</u>	<u>DATE OF VIOLATION</u>	<u>DISCIPLINE</u>
Isidore Germain	12/26/2007	3-Day Suspension
Salomon Drakeford	06/18/2012	Termination
Charles Harrington	09/09/2013	Termination
Patrick Greichen	10/08/2013	Termination
Frank Leon	12/06/2013	2-Day Suspension
Jourdin Senior	12/20/2013	Termination
Joshua Christian	03/10/2014	Termination

(R-44). As seen above, insubordination typically results in termination at Bozzuto's. Two employees appropriately received suspensions for insubordination. Leon, a driver, initially refused but ultimately performed the runs he was assigned. (R-44, Tab 5) His situation is easily distinguished from Greichen who, despite numerous opportunities, never agreed to do as instructed. Germain was a selector who was denied permission to unload a truck ("lumping") but proceeded nonetheless to unload the truck. (Koch Testimony, Tr. 929-930; R-44, Tab 1). Again, that situation is easily distinguished from Greichen's. Germain worked his entire shift unloading a truck. He had been directed to

perform a different task, but it is not as if he simply refused to work. Both suspensions were appropriate under the circumstances of those infractions.

Discipline for the other employees is consistent with the discipline imposed on Greichen. Drakeford, Senior and Christian were all terminated for refusing to follow the instructions of their supervisors. (R-44, Tabs 2, 6, 7). The General Counsel's claim that "there is no evidence that employees have been terminated for similar misconduct" is untrue.⁴ (See Answering Brief, p. 7) To the contrary, the evidence shows that Greichen was treated similarly to other employees.

Finally, the General Counsel appears to contend that by holding an optional meeting with new hires, Bozzuto's somehow forfeited its right to require any employee to attend any meeting. (See Answering Brief, p. 10) Clark held a meeting with a group of new hires and advised the attendees that they were free to leave the meeting at any time. In contrast, Bozzuto's required Greichen to attend a meeting with the industrial engineers to address issues regarding work standards that Greichen had raised earlier that day. Greichen's attendance was mandatory, and he was so advised. The General Counsel cannot overcome Bozzuto's exceptions by citing to a situation that is dissimilar to the circumstances of Greichen's termination.

III. THERE WAS NO UNLAWFUL INTERROGATION

McCarty reported one verbal exchange mentioning a union with Senior Vice President Rick Clark ("Clark") after September 22, 2013 as follows: when he was coming out of a restroom in the warehouse on either September 27 or October 4, 2013,

⁴ The General Counsel erroneously cites to employees who were disciplined for reasons other than insubordination for the proposition that Greichen was subjected to disparate treatment: Kevin Pilgrim - failing to start work in a timely fashion (GCX 12, p. 3); Artay Buster - sleeping on the clock (GCX 12, p. 1); Francisco Arias - falsely recording that he had washed two batteries; Jean Carlos Ortiz-Leon - unexcused absences (GCX-16, p. 5). None of those disciplines were for insubordination. Accordingly none of those disciplines evidences that Greichen was subjected to disparate treatment for his act of insubordination.

Clark said to him; “Hey Todd, what’s going on with this union stuff?” McCarty’s reply was “I’m not going to talk about it with you Mr. Clark.” Clark put up his hands and said “ok.” Nothing else was said in this conversation. (McCarty Testimony, Tr. 485) McCarty had no further conversations with Clark about union activity. (McCarty Testimony, Tr. 486)

This single “offhand and somewhat innocuous comment” (ALJ 8:21-22) could not possibly amount to an unlawful interrogation under the Bourne analysis. See Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964). First, there is no history of discrimination at Bozzuto’s. To the contrary, the ALJ found that it had not been shown that the Respondent had violated the Act in the past or that it will likely violate the Act in the future. (ALJ 10: 41-42) Further, the ALJ found that the violations found were not “numerous, pervasive or outrageous”. (ALJ 10: 40-41) Thus, the first Bourne factor weighs in favor of Bozzuto’s. Second, Clark’s single, brief question was not directed at discovering information about any particular individual. Thus, the second, and arguably most important, Bourne factor weighs in favor of Bozzuto’s. Since Clark is a Senior Vice President at Bozzuto’s, the third Bourne factor weighs in favor of the Complainant. Fourth, the exchange during a chance meeting occurred on the warehouse floor, not Clark’s office. Thus, the fourth Bourne factor weighs in favor of Bozzuto’s. Finally, McCarty’s response was direct (“I’m not going to talk about it with you”), and its tone certainly suggests no intimidation. There were no follow up questions after McCarty dismissed Clark’s remarks. Thus, the fifth Bourne factor weighs in favor of Bozzuto’s.

The General Counsel concedes the applicability of the Bourne factors but fails to analyze each of the factors in the context of the evidence. Instead, the General Counsel speculates, without any evidentiary support, that Clark “intended to intimidate McCarty”

by his solitary passing question. (See Answering Brief at p. 3) However, the Bourne factors are directed to the evidence, not to a party's speculations regarding motivation.

Four of the five applicable factors that must be applied to determine if unlawful interrogation occurred weigh in favor of Bozzuto's. Under these circumstances there can be no finding of unlawful interrogation as a matter of law.

IV. THE ALJ'S DETERMINATION THAT BOZZUTO'S VIOLATED THE ACT BY DISCIPLINING AND DISCHARGING MCCARTY SHOULD BE REVERSED

The General Counsel erroneously claims that McCarty was treated differently from other employees. To the contrary, in the year prior to McCarty's termination twelve (12) other employees were terminated for low productivity, including eleven (11) terminations prior to the onset of union organizing. (See R-45) The General Counsel erroneously claims that other employees were not disciplined with productivity at or above 90%. To the contrary, in the year prior to McCarty's termination other employees were disciplined eleven (11) times for productivity scores between 90% and 93.5%.⁵ (See R-45; Addendum A to Answering Brief)

The ALJ ignored the fact that McCarty incurred two corrective reviews for production deficiencies a few months prior to any union activity and that McCarty made comments on each of these disciplines. (R-7) There would have been no suspension and termination in January-February 2014 without these prior disciplines.

The ALJ also did not acknowledge that McCarty had within his possession photographic evidence demonstrating that his production numbers had been altered (McCarty Testimony, Tr. 499-500; GC-45; GC-46a), made no comments on his corrective reviews as he had done in the past (compare R-7 with R-8 and R-9), and elected to withhold this evidence from Bozzuto's so that he was terminated in

⁵ Productivity scores below 95% subjects an employee to discipline for low productivity.

accordance with Bozzuto's policy on production deficiency discipline. Indeed, once given the evidence by the Board agent in April 2014 (R-19), two months after McCarty's discharge, Bozzuto's promptly reviewed hundreds of individual transactions to conclude that McCarty's production records had been tampered with and offered McCarty unconditional reinstatement.

Given Bozzuto's prompt investigation and reinstatement offer to McCarty once the relevant evidence had been supplied, the only reasonable conclusion is that McCarty would not have been disciplined or discharged if Bozzuto's had been given McCarty's photographic evidence and that his union activity made no difference. This is particularly so in view of McCarty's testimony that during his employment when he brought pay discrepancies to the attention of Bozzuto's management, Bozzuto's corrected the issue. (McCarty Testimony, Tr. 645)

The ALJ's determination that Bozzuto's violated Sections 8(a)(1) and (3) of the Act by disciplining and discharging McCarty because of his union activity should be reversed.

V. CONCLUSION

For the forgoing reasons, the Respondent's exceptions should be granted and the ALJ's decision on those issues should be reversed.

