

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

**Plaza Auto Center, Inc.**

**Case: 28-CA-22256**

**and**

**Nick Aguirre, an Individual**

**Amended**

**RESPONDENT'S RESPONSE BRIEF  
TO GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**I. INTRODUCTION**

"[t]he Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Standard Dry Wall Products*, 91 NLRB 544 (1950).

This is a case where the clear preponderance of all the evidence shows that the Administrative Law Judge Lana H. Parke ("ALJ") made a correct ruling by fully and carefully considering the circumstances and the record as a whole leading to the termination of Complainant Nick Aguirre ("Aguirre") on October 28, 2008 (Hereinafter referred to as "October 28th meeting") The testimony of Respondent's Office Manager, Barbara Montenegro ("Montenegro"), and Sales Manager, Juan Felix ("Felix"), showed that Aguirre requested the October 28th meeting with Respondent's Owner, Tony Plaza, ("Plaza"), Transcript of Proceedings held May 5, 2009, (hereinafter "Tr.") (Tr. 212-213).

All of the objective facts reflect that Plaza and the witnesses gave an accurate and credible account of the sequence of events in the October 28th meeting. General Counsel proposes that Respondent's three managers "fabricated and coordinated their stories to

avoid legal liability” resulting from the discharge of Aguirre.<sup>1</sup> (GC Brief 1). It would be more accurate to state that Aguirre fabricated his self-serving testimony and so exaggerated his portrayal of the events that he even knew that Respondent was mad before the October 28th meeting (Tr. 90). Aguirre, however, provides conflicting testimony by saying that prior to the meeting he had a cordial conversation with Plaza (Tr. 91). Additionally, Aguirre did not provide any witnesses to collaborate the version of his self-serving testimony of the events that occurred on October 28, 2008, nor to the events that took place prior to October 28, 2008. The Board should further note that Aguirre did not avail himself of the opportunity to have anyone present in the hearing supporting him in his fabricated and rehearsed testimony surrounding his actions immediately prior to termination. General Counsel also fails to cite case law where Board precedent allows a person’s personal and family life is to be considered as mitigating evidence in deciding a case.

Counsel for the Respondent therefore requests that the Board uphold the ALJ’s credibility findings and find that Respondent did not discharge Aguirre because of his protected activity but discharged him only after Aguirre became verbally abusive and repeatedly called Plaza a “fucking asshole,” “fucking stupid,” “you’re a fucking asshole,” and stated “you don’t know what you’re doing,” “everybody’s talking about you.” (Tr. 34-35, 168-70, 197-99). Aguirre got up out of his chair in an aggressive manner that caused both Felix and Gustavo MacGrew (“MacGrew”) to instinctively rise from their chairs, fearing that Aguirre was going to strike Plaza (Tr. 34-36, 171-72). Plaza

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<sup>1</sup> The General Counsel goes as far as to instruct the Board to use the 1969 movie *Z*, as the basis for deciding on the credibility of Respondent’s witnesses. Respondent takes exception to such a preposterous suggestion made by the GC, that is, that the Board consider the words of an actor in the role of prosecuting magistrate in a foreign language film.

repeatedly asked Aguirre to calm down, and when Aguirre would not calm down, Plaza told Aguirre, "That's it, you're done." Plaza informed Aguirre that he was being fired because of his verbal abuse. (Tr. 35-39, 134, 170-78, 193).

Aguirre did not merely "curse" at the Respondent's owner, Tony Plaza, he engaged in egregious misconduct by the use of strong words of anger and aggression and hostile physical body language. An employee loses protection of the Section 8(a) (1) of the National Labor Relations Act ("Act") through egregious misconduct. *Atlantic Steel Company*, 245 NLRB 814, 816-17 (1979).

## II. FACTS AND ARGUMENT

### A. Statement of Facts Surrounding Aguirre's Termination from Plaza Auto Center, Inc.

This case centers primarily on the termination of Complainant Aguirre from Respondent Plaza Auto Center, Inc. ("Plaza Auto"). Plaza Auto, a pre-owned automobile retail business in Yuma, Arizona, employs approximately 10 to 15 employees and is owned by Tony Plaza ("Plaza"). (Tr. 12). Aguirre was hired at Plaza Auto on about August 30, 2008, and began working as a car salesman on about September 1, 2008. (Tr. 27, 59-60). On October 28, 2008, Aguirre was terminated due to his repeated and unacceptable use of obscene language towards Plaza during a meeting with Plaza and Plaza Auto Sales Managers Felix and MacGrew. (Tr. 35-37, 134, 172-73).

On the morning of October 28, 2008, upon his arrival at the Plaza Auto dealership, Plaza was informed by the company's Office Manager Barbara Montenegro ("Montenegro") that Aguirre wanted to speak to Plaza about his commission. (Tr. 47, 130, 212-13). Earlier in the day Aguirre had stopped into Montenegro's office and

inquired about whether he was paid on a minimum wage or commission basis and asked to meet with Plaza. (Tr. 212-13). Plaza asked Felix to find Aguirre so he could meet with him to discuss Aguirre's concerns. Felix also informed Plaza that Aguirre had been questioning him a few days earlier about his method of payment and had stated to Felix that he did not trust the company and thought the company was stealing his money. (Tr. 47, 53, 162-68).

Aguirre, Felix, MacGrew and Plaza met in Felix's small, private office. At the beginning of the meeting, Plaza informed Aguirre that he had been told about some concerns that Aguirre had, and he (Aguirre) wanted to meet with him. Aguirre asked whether he was going to be fired, and Plaza replied "no." During the conversation Aguirre repeatedly asked whether he was being fired, and Plaza repeatedly said he was not firing Aguirre. (Tr. 168-69, 198). After Plaza informed Aguirre he would not disclose certain information about the price of cars because the company did not provide that information to sales personnel, Aguirre blew up and repeatedly called Plaza a "fucking asshole," "fucking stupid," "you're a fucking asshole" and stated "you don't know what you're doing," "everybody's talking about you." (Tr. 34-35, 168-70, 197-99). Aguirre got up out of his chair in an aggressive manner that caused both Felix and MacGrew to instinctively rise from their chairs, fearing Aguirre was going to strike Plaza. (Tr. 34-36, 171-72). Plaza repeatedly asked Aguirre to calm down, and when Aguirre would not calm down, Plaza told Aguirre "That's it, you're done." Plaza informed Aguirre that he was being fired because of his verbal abuse. (Tr. 35-39, 134, 170-78, 193). Aguirre told Plaza he would regret firing him. (Tr. 34-36, 171-72).

### III. ANALYSIS

Three witnesses consistently testify that Plaza began speaking to Aguirre by answering Aguirre's questions and when Aguirre did not like Plaza's answers Aguirre started cussing him out. Plaza also testified that he had no intention in terminating Aguirre's employment and it was only after he was subjected to foul and egregious language that he told Aguirre, "That's it, you're done." (Tr. 37). Only Aguirre testified that he did not yell at Plaza until after Plaza discharged him.

#### A. The "Inherent Probabilities" Do Not Support Aguirre's Testimony.

General Counsel ("GC") wants the Board to consider that Aguirre was nervous testifying and had no one (other than the GC) present in his support. (GC Brief 9) That was Aguirre's choice. The GC fails to show how the absence of a support system on behalf of Aguirre diminishes the credibility of Respondent's witnesses.

Further, the GC raises the issue that Plaza had his wife present during the May 5, 2009, hearing, implying that Plaza had an unfair advantage because his wife was present as a support system or that her presence unduly influenced the testimony of the witnesses. Whereas in fact, Anna B. Plaza, is part owner of the business and as such is a *defacto* co-respondent. GC also infers that Plaza's presence during the questioning of all the Respondent's managers was a disadvantage to Aguirre. Further, the GC would also have the Board believe that the presence of Mrs. Plaza and Plaza during the hearing somehow affected the credibility of the witnesses. The GC has cited no legal authority that allows exclusion of respondents in these administrative type actions from being present during testimony of witnesses. If the GC had an objection to the presence of Mrs. Plaza or

Plaza's presence at the May 5, 2009, hearing, the time to raise such objection was during the hearing and not as an exception to the ALJ's ruling.

GC goes on to state that the testimony of Plaza, Felix and McGrew sounded rehearsed including the exaggerations of number of times Aguirre reportedly asked Plaza if he was being fired. MacGrew testified that Aguirre asked "two, three or four times" (Tr. 198). Felix testified "During the whole meeting, around six or seven times." (Tr. 169). Plaza's testimony indicates Aguirre asked one time. (Tr. 39). If the testimony of the witnesses was rehearsed and coordinated as GC would have the Board believe, one would expect all three witnesses (MacGrew, Felix and Plaza) to give the exact same answer. Here, the testimony of MacGrew and Felix is not so exactly similar as to make it appear rehearsed or coordinated.<sup>2</sup> (GC Brief 9).

On several occasions, Plaza stated he could not remember what he had said in his affidavit and had to have his recollection refreshed. (Tr. 135-138). A person who fabricates, rehearses or coordinates their testimony certainly does not state that they don't remember. It is outrageous that GC instructs the Board to compare a scene straight out of the 1969 movie Z to the present case and base its decision regarding the credibility of witnesses on the dialogue of the movie. GC is essentially asking the Board overrule the ALJ credibility resolutions based on a particular scene in a foreign movie. Perhaps the GC could provide case law allowing this practice.

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<sup>2</sup> This is not similar to the scene in the 1969 movie Z, where all three witnesses say that the legislator jumped on a truck "as quick and as lithe as a tiger."

B. Plaza's Decision to Terminate Aguirre is Consistent with the *Wright Line* Defense.

Protected activity on Aguirre's part was not the motivating factor in Plaza Auto's decision to terminate his employment. *Wright Line*, 251 NLRB 1083 1089 (1980), enf'd 662 F.2d 899 (1<sup>st</sup> Cir. 1981). The only reason Aguirre was terminated was due to his verbal abuse of Plaza. (Tr. 35). The words used by Aguirre were so egregious that a reasonable person would be offended and respond as Plaza did. Aguirre requested the meeting with Plaza. (Tr. 24, 168, 213). Three witnesses' gave similar, but not identical, accounts of the testimony of the events leading to the October 28th meeting. (Tr. 35, 169, 198). Only Aguirre gave a different version of the events. (Tr. 94-96).

GC points out that there was inconsistent testimony as to the number of times that Aguirre asked Plaza if he was getting fired, but no rebuttal evidence was offered by Aguirre. The small inconsistent testimony of the witnesses gives weight to their credibility and shows that their testimony was not fabricated or rehearsed as proposed by the GC. (GC Brief 9). Had it been fabricated or rehearsed, each witness would have responded with the exact same answer.

The ALJ carefully considered the demeanor of the witnesses, the circumstances leading to the October 28th meeting and the record as a whole (ALJD at 15) and correctly found that Aguirre's outburst was so egregious that he lost the protection of Section 8(a)(1) of the National Labor Relations Act ("Act"). (ALJD 15). The GC also instructs the Board to believe that Aguirre's conduct, even if it occurred before he was discharged was justified. The GC would have the Board believe that Aguirre's outburst was not

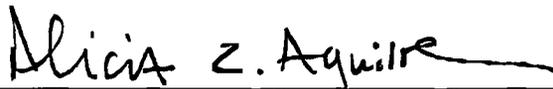
egregious as determined by the ALJ. (ALJD 14); and calls a “step forward” in a threatening manner as hardly menacing. (GC Brief 10). The uncontroverted testimony of the witnesses is in agreement that Felix and MacGrew instinctively arose from their chairs in response to Aguirre’s aggressively getting out of his chair and stepping towards Plaza. People in heated confrontations do not simply go into defensive positions because they have coolly and logically analyzed the situation and determine that defensive action is necessary. They react because their life experience has taught them to recognize subconsciously that the circumstances that they are observing are likely to lead to an assault. They subconsciously come to the conclusion that violence is about to occur and they subconsciously and instinctively react to protect themselves. Felix and MacGrew’s instinctive response goes directly to the ALJs witness credibility determinations. The ALJ quite correctly recognized Felix and MacGrew’s instinctive defensive actions and gave appropriate weight in the determination of the credibility of their testimony.

The Act is intended to protect employees, but it is not intended to allow employees to get away with using abusive language or to engage in aggressive behavior simply because they are in a meeting with an employer and they do not like what they hear. *Carleton College v. NLRB*, 230 F.3d 1075, 1081-82 (we cannot allow an employee to leverage his rights by wrongful conduct giving an employee license to defy his employer); *Trus Joist Macmillian*, 341 NLRB at 371, *Daimler Chrysler*, 344 NLRB at 1329 (employees are permitted some leeway for impulsive behavior when engaged in concerted activity, but this must be balanced against the employer’s right to maintain order and respect).

#### IV. CONCLUSION

For all of the reasons set forth above, the Board should uphold the findings of fact and conclusions of law of the Administrative Law Judge. Aguirre became verbally abusive before his employment was terminated and was only terminated after he became verbally abusive toward Plaza. The ALJ made the correct finding regarding credibility resolutions, findings of fact, and conclusions of law and appropriately applied the *Wright Line* rule to this case. Aguirre's actions were not protected concerted activity. The Board should therefore uphold the ALJ's decision regarding the circumstances leading to Aguirre's termination finding that Aguirre's behavior at the October 28th meeting was so egregious as to forfeit the protection of the Act and that Respondent did not violate the Act when it discharged Aguirre.

DATED this <sup>4th</sup> 2nd day of September 2009.



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**AMENDED CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **Amended Respondent's Response Brief to the General Counsel's Brief in Support of Exceptions in to the Decision of the Administrative Law Judge** has been served to the below listed parties in the manner indicated on this 4th day of September, 2009, to the following:

*Via E-File and U.S. Mail*

Lester A. Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board Region 28  
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*Via Facsimile: 702-388-6248*

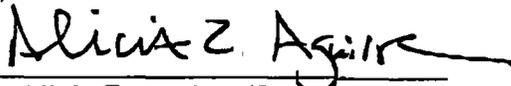
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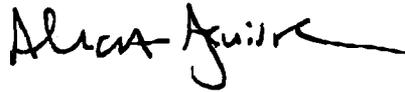


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National Labor Relations Board, Region 28 Facsimile No. 602-640-2178

From: Alicia Z. Aguirre, Esq. 

Date: September 4, 2009

Re: Respondent's Response to the General Counsel's Exceptions to the Decision of the Administrative Law Judge and Amended Respondent's Response Brief to General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge.

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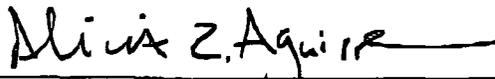
**Nick Aguirre, an Individual**

**RESPONDENT'S RESPONSE TO  
GENERAL COUNSEL'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Counsel for the Respondent submits the following response to the General Counsel's exceptions to the Decision of the Administrative Law Judge:

1. Respondent's decision to Terminate Aguirre is consistent with the *Wright Line* Defense.
2. Aguirre's egregious behavior was unprotected. (ALJD, p. 14-15, lines 28-3).

DATED this <sup>4th</sup> ~~3rd~~ day of September, 2009.



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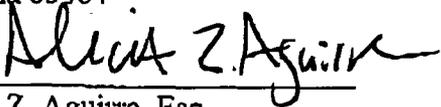
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NATIONAL LABOR RELATIONS BOARD



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