

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

PLAZA AUTO CENTER

and

Case 28-CA-22256

NICK AGUIRRE, an Individual

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

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I. INTRODUCTION

As the Board often notes, “[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), *enfd.* 188 F.2d 362 (3d Cir. 1951).” *Tinney Rebar Services*, 354 NLRB No. 61, slip op. at 1, n. 2 (2009). This is a case where the “clear preponderance of all the evidence” requires that the Board overturn the credibility findings of Administrative Law Judge Lana H. Parke (ALJ). As demonstrated below, the ALJ failed to consider the testimony of one of the Respondent’s managers that supported the testimony of Charging Party Nick Aguirre (Aguirre) with regard to what happened in the critical meeting on October 31, 2008¹, where he was discharged. Further, the ALJ ignored Aguirre’s personal and family circumstances and the circumstances of the meeting itself. All of these objective facts reflect that the Charging Party related an accurate account of the sequence of events in the meeting in question and that the Respondent’s three managers fabricated and coordinated their stories to avoid legal liability resulting from the discharge. Counsel for General Counsel (CGC) therefore requests that the Board reverse the ALJ’s credibility findings and find that the Respondent discharged Aguirre

¹ All dates are in 2008 unless otherwise noted.

because of his protected concerted activity, and not because he cursed at the Respondent's owner, Tony Plaza (Plaza).

II. FACTS

The Respondent is a used car dealership in Yuma, Arizona, whose owner is Plaza. (TR. 12) Aguirre began working at the Respondent in August as a salesperson after managers Gustavo MacGrew (MacGrew) and Juan Felix (Felix) hired him. His first day of work was at the "tent sale" that the Respondent holds on certain weekends, from Friday through Sunday. While he was working at the tent sale, Aguirre met fellow salespeople, including Oscar Martinez (Martinez) and James Pagan (Pagan). Aguirre asked the other employees how they were supposed to take restroom breaks, and they informed him that they used the restrooms in Sears or in a nearby Circle K convenience store. Aguirre also discussed the Respondent's pay structure and was informed by employees that it was straight commission. (TR. 59-63) Aguirre asked Felix, in the presence of Martinez and Pagan, when the employees could take breaks. Felix responded by saying that they could not leave because it would leave one fewer person available. (TR. 69)

When Aguirre received his first paycheck, he was surprised at how low it was, as he received only \$132. (TR. 73) In a previous job as a salesman at Yuma Furniture, Aguirre received a draw of minimum wage against the commission that he would earn, and he understandably expected that he would receive the same draw at the Respondent. Aguirre questioned the failure to be given a draw against commission and he was told that he was working for commission only. Although Aguirre had signed an acknowledgement that he would be paid commissions only, he believed that he was due minimum wage as a draw against his commission. Aguirre discussed his belief that the Respondent's salespeople should receive

minimum wage as a draw against commissions with other employees, including Francisco Felix, Pagan and Martinez. (TR. 75-75, 147, 149)

The Wednesday after he was hired, Aguirre attended a sales meeting held at the Respondent's facility. Plaza spoke at the meeting and mentioned that a vehicle had been damaged. Plaza said that the cost of the repair would come out of every salesman's pay if the person who damaged the car did not come forward. Aguirre looked around at the other salespeople and saw them shake their heads. Aguirre spoke up and, believing that he was speaking for all of the salespeople, said that this was unfair and that everyone who had contact with the car, and not just the salespeople, also should be charged. (TR. 76-79) In the same meeting, Aguirre once again raised the issue of employee breaks. He asked if employees were entitled to a break and a meal. Felix responded: "You're always on a break, buddy. Look at you. You don't—You just wait for customers all day." Felix went on to say, if Aguirre did not like the way the company operated, he was welcome to leave at any time. (TR. 65-67)

After more discussions with employees about the pay issue, Aguirre went to the state unemployment office in Yuma to ask about the Respondent's legal obligations. After that visit, Aguirre contacted the Industrial Commission's² office in Phoenix. Aguirre then told Martinez and Pagan what he had learned, that even when the pay structure is commission only, employees must not be paid less than the minimum wage. Aguirre said that he was going to speak with Barbara Montenegro (Montenegro), the Respondent's office manager, and tell her what he had learned. Both employees told Aguirre to let them know what occurred with Montenegro. (TR. 81-83)

² Aguirre continually referred to the "Labor Commission" or "Labor Department." The ALJ noted that References herein to the Labor Commission or Arizona Labor Board are to the Arizona agency covering wage and hour issues. (ALJD at 4, n. 9)

Before he spoke with Montenegro about the pay issue, Aguirre asked Felix at a tent sale in October how he, Aguirre, could find out the cost of a vehicle to the Respondent so that he could ensure that he would be getting the proper commission. Repeating a familiar theme, Felix told Aguirre that if he did not trust the company, he was more than welcome to go elsewhere. (TR. 83-87)

On October 28, Aguirre went to Montenegro's office and asked her if she was sure that the Respondent's failure to pay minimum wage to salespeople when their commission was below minimum wage was proper. Montenegro said that she was sure and that if Aguirre wanted a minimum wage job, the job with the Respondent was not for him. (TR. 88-90)

After the conversation with Montenegro, Aguirre and Pagan were ordered to go and pick up another employee who had delivered a car. In the facility, he was greeted by Felix, who told him that Plaza wanted to speak with him in Felix's office. (TR. 90-92)

Aguirre entered Felix' office with Felix and noticed that Plaza and MacGrew were present. Plaza began by sitting down, shaking his head, and said, "Nick, you know, you're asking too many questions." (TR. 92-93) (Plaza also testified that he began the meeting as follows: "As I started to talk about his negative attitude and influence to the rest of my employees. " (TR. 134-36; *see also* GCX 3 (December 5, 2008, letter to the Region from Tony Plaza)) Plaza elucidated and said that Aguirre was asking about the price of vehicles and about the minimum wage and that Aguirre was being negative by telling other employees what he had learned about the minimum wage. Plaza went on and told Aguirre that Aguirre was not meeting the Respondent's criteria. Aguirre retorted that he had treated the customers with respect and moved the Respondent's cars back and forth. Plaza repeated that Aguirre did not meet the Respondent's criteria and told Aguirre that he was terminated. Aguirre asked how Plaza could

do that to someone who had just had a baby. At this point, and not before, Aguirre swore at Plaza, calling him a crook, among other things. Aguirre told Plaza that if he was being fired that Plaza should pay him. Plaza replied that he had three days to pay him. Aguirre left Felix's office and departed the facility. (TR. 93-99, 184)

III. ARGUMENT

The ALJ found merit to most of the General Counsel's allegations of unlawful statements by the Respondent's managers. The ALJ also found that Aguirre had engaged in protected concerted activity and that General Counsel had established a prima facie case that the Respondent's discharge of Aguirre was motivated by that protected conduct. (ALJD at 12) However, the ALJ found that the three managers in the October 31 meeting – Plaza, MacGrew and Felix – were more creditable than Aguirre. In support of that finding, the ALJ stated: "I give greater weight to the testimonies of Mr. Plaza, Mr. Felix, and Mr. MacGrew. While discrepancies exist in each of their accounts, I found the three management witnesses demonstrated efforts to convey honest, unbiased recollections of the meeting." (ALJD at 11) The ALJ also found that Aguirre expanded upon his version of events upon further questioning, which led the ALJ to discredit his testimony. The ALJ, however, failed to consider the testimony of Montenegro, the Respondent's office manager, and the objective circumstances surrounding the October 28 meeting. These failures led to erroneous credibility determinations by the ALJ.

A. The Board May Overturn the ALJ's Findings of Fact.

The Board has held that:

It is the Board's established policy to attach great weight to a judge's credibility findings insofar as they are based on demeanor. However, the Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of the evidence, and the Board is not bound by the judge's findings

of facts, but bases its findings on a de novo review of the entire record. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951).

The Board has found that such one-on-one credibility contests may be resolved with reference to “the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole.” *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (internal quotation marks and citation omitted).

RC Aluminum Industries, 343 NLRB 939, 939 nn. 1 & 2 (2004).

While the ALJ cited the witnesses’ demeanor as the deciding factor in her credibility resolutions, the “established or admitted facts, inherent probabilities, and reasonable inferences” support Aguirre’s testimony. The Board should exercise its power and responsibility and determine that the Respondent discharged Aguirre before Aguirre began yelling at Plaza.

B. The “Established or Admitted Facts” Support Aguirre’s Testimony.

The Respondent’s witnesses confirmed Aguirre’s testimony regarding the Section 8(a)(1) statements made by the managers. For instance, the ALJ found that all of the managers alleged to have invited Aguirre to resign made those threats; indeed, two of them even admitted making them. (Felix: ALJD at 9-10, TR. 183; Montenegro: ALJD at 10; Plaza: ALJD at 5, TR. 19) The two managers who backed up Plaza at the October 28 meeting admitted that Plaza made that threat at the October 28 meeting. (Felix: ALJD at 6, TR. 184; MacGrew: ALJD at 6-7, TR. 206) These admissions reflect that Aguirre was not inventing violations by the Respondent. Further, the ALJ credited Aguirre’s testimony with regard to Plaza’s statement in the October 28 meeting that Aguirre was “talking a lot of negative stuff.” (ALJD at 4, n. 11) Yet, the ALJ failed to credit Aguirre’s testimony that he did not become verbally abusive until after Plaza had fired him.

An “admitted fact” supporting Aguirre’s version of what occurred at the October 28 meeting, but not considered by the ALJ, is the testimony of office manager Montenegro. All three managers in the meeting testified that Aguirre became loud and abusive shortly after the

meeting began, and Aguirre testified that he did not yell at Plaza until Plaza discharged him the end of the meeting. Montenegro testified that she could not hear what was said in Felix's office, which was next to hers, but that she could hear the voices. She testified that she heard Aguirre's voice rise, but it was towards the end of the meeting. (TR. 221) This testimony, which the ALJ did not mention or consider, comports with Aguirre's testimony that he did not become loud and abusive until Plaza had discharged him. Thus, all of the established or admitted facts support Aguirre's testimony.

C. The "Inherent Probabilities" Support Aguirre's Testimony.

The ALJ mentioned some evidence giving rise to the "inherent probabilities" of what occurred at the October 28 meeting, but it does not appear that she considered those probabilities in making her findings of facts. As the ALJ noted, Aguirre had just added a second child to his family 17 days before the fateful October 28 meeting. (ALJD at 5, n. 12) Moreover, the Respondent's managers knew of Aguirre's economic problems. (E.g., TR. 178-79 (Felix)) It strains credulity to believe that a man with two young children and a wife who worked only in the home would jeopardize his job during the current economy by cursing out his boss without substantial provocation.

Also improbable is the testimony by both Felix and MacGrew that Aguirre asked Plaza many times in the meeting – Felix said six or seven times (TR. 176-77) and MacGrew said "two, three or four" times (TR. 198) – whether Plaza was firing him. The ALJ dispensed with Felix's obvious falsehood by merely saying "the apparent exaggeration does not destroy Mr. Felix's credibility." (ALJD at 6, n. 16) The ALJ did not discuss MacGrew's similar "exaggeration." Nevertheless, the ALJ ruled: "While discrepancies exist in each of their accounts, I found the three management witnesses demonstrated efforts to convey honest, unbiased recollections of the

meeting.” (ALJD at 11) The ALJ was not so generous with the inconsistencies she noted with Aguirre’s testimony:

Mr. Aguirre initially testified that at the October 28 meeting, Mr. Plaza bluntly itemized his displeasure with Mr. Aguirre’s activities and abruptly fired him. Under further questioning, Mr. Aguirre significantly expanded his account of what occurred at the meeting, including Mr. Plaza’s statement that if Mr. Aguirre did not like being kept in ignorance of vehicle cost, he was more than welcome to leave or to quit. Not only was Mr. Aguirre’s initial testimony not fully congruous with his expanded version of the meeting, Mr. Plaza’s implicit invitation to Mr. Aguirre to accept company policy or quit is incompatible with Mr. Aguirre’s earlier testimony of abrupt discharge.

(ALJD at 11) The ALJ did not consider that Aguirre was nervous testifying and had no one (other than CGC) present in support. On the other hand, Plaza was present during the questioning of all the Respondent’s managers. (Plaza even had his wife present at hearing.) The testimony of Plaza, Felix and MacGrew sounded rehearsed, including the “exaggerations” concerning the number of times Aguirre purportedly asked Plaza if he was being fired.³

In addition, the repeated threats made to Aguirre throughout his brief employment with the Respondent, including Plaza’s threats during the October 28 meeting itself, reflect that the Respondent continued to have problems with Aguirre’s protected concerted activity. And the owner of a company does not have two managers with him for a closed-door meeting with a relatively new employee to listen to the employee’s complaints. Those threats and the presence of the owner and two managers in the October 28 meeting establish that Aguirre was called in to be terminated.

D. Aguirre’s Conduct After he was Discharged is not a *Wright Line* Defense.

The ALJ, after finding that Aguirre cursed at Plaza before he was terminated, analyzed

³ In the 1969 movie *Z*, the prosecuting magistrate concludes that the testimony of supposed witnesses (who were, in fact, the killers of a leftist legislator) is rehearsed when all three say that the legislator jumped on a truck “as quick and as lithe as a tiger.” The coordination of witness testimony here should lead the Board to the same conclusion.

the Respondent's action under the four factors set forth in *Atlantic Steel Company*, 245 NLRB 814 (1979). Notwithstanding that the ALJ found that three of the four factors favored finding Aguirre's outburst – even before the Respondent discharged him, according to the ALJ – to be protected, the ALJ concluded otherwise. (ALJD at 13) The conclusion by the ALJ that Aguirre's outburst was not protected pursuant to *Atlantic Steel* is further error by the ALJ.

The four factors to be reviewed pursuant to *Atlantic Steel* are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Id.* at 816. The ALJ concluded that the place of the discussion – behind closed doors of a manager's office – was isolated from employees and, therefore, had no impact on employee discipline. The ALJ similarly and correctly found that the second and fourth factors also argued against loss of protection in that the meeting was held because Aguirre's protected activity and Aguirre's outburst was provoked by the Respondent's "censure" of Aguirre's protected activity as "a lot of negative stuff." (ALJD at 13)

The ALJ, however, concluded that Aguirre's outburst was so egregious so as to lose the protection of the Act. In so finding, she characterized Aguirre allegedly taking a step toward Plaza as "menacing conduct." (ALJD at 14) A step forward is hardly menacing conduct, especially when Plaza was backed up by two managers. Moreover, in concluding that Aguirre's conduct was "qualitatively and quantitatively more opprobrious" than that in *Felix Industries*, 331 NLRB 144 (2000), *enforcement denied and remanded*, 251 F.3d 1051 (D.C. Cir. 2001), and that Aguirre acted "[w]ithout extreme provocation from overt hostility or antagonism" from Plaza, the ALJ ignored her earlier findings that Plaza threatened Aguirre with discharge when the owner told the employee that he could quit if he did not like the working conditions at the

Respondent. Contrary to the ALJ's finding and conclusion, Aguirre's conduct, even if it occurred before he was discharged, is similar to that in the cases cited by the ALJ where the Board held that the employee did not lose the Act's protection. (ALJD at 14, n. 29) In fact, the words used by Aguirre are the same as those used by the employees in those cases. Whether or not the Board reverses the ALJ's findings of fact that Aguirre cursed at Plaza before he was terminated, the Board should reverse the ALJ's application of *Atlantic Steel* which is contrary to Board precedent, and hold that Aguirre did not lose the protection of the Act because of his outburst.

IV. CONCLUSION

For all the reasons set forth above, the Board should reverse the findings of the ALJ with regard to what occurred at the October 28 meeting; find that Charging Party Nick Aguirre did not become verbally abusive until after his employment was terminated; and that the Respondent terminated Aguirre's employment because of the employee's protected concerted activity. Even if the Board determines not to overturn the ALJ's credibility resolutions, the Board should reverse the ALJ's conclusion that Aguirre's outburst lost the protection of the Act, and hold that the Respondent unlawfully discharged Aguirre in violation of Section 8(a)(1) of the Act.

Dated at Las Vegas, Nevada, this 18th day of August 2009.

Respectfully submitted,

/s/ Joel C. Schochet

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in PLAZA AUTO CENTER, INC. Case 28-CA-22256, was served via E-Gov, E-Filing, and by regular mail, on this 18th day of August 2009, on the following parties:

Via E-Gov, E-Filing:

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/s/ Katherine Stanley

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AMENDED CERTIFICATE OF SERVICE

I hereby certify that a copy of the GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in PLAZA AUTO CENTER, INC. Case 28-CA-22256, was served via E-Gov, E-Filing, and by regular mail, on this 18th day of August 2009, on the following parties:

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