

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

CY-FAIR VOLUNTEER FIRE DEPARTMENT

Cases 16-CA-107721
16-CA-120055
16-CA-120910

and

ROBERT BERLETH

and

CRAIG ARMSTRONG

**CHARGING PARTY BERLETH'S AMENDED BRIEF IN
SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**



Robert Berleth
Charging Party
P.O. Box 692293
Houston, Texas 77269
713/962-1119 telephone
713/481-0894 facsimile
robert@robertberleth.com

Table of Contents

A. Statement of the Case..... 3

B. Reference to Post-Trial Brief 5

C. Summary of Argument..... 5

D. Exceptions..... 6

Exception 1: Credible Evidence and the Burden 6

Exception 2: The Union Defined 13

Exception 3: Berleth’s Final Shift on May 6, 2013 14

Exception 4: The Timeline is Clear 15

Exception 5: Berleth Never Sent Disrespectful Emails 17

Exception 6: Conclusions of Law 18

COMES NOW, Charging Party Robert Berleth (hereinafter “Berleth”), the undersigned, and files the following exceptions to the Administrative Law Judge’s decision issued in this matter on October 22, 2015.

A. Statement of the Case

Pursuant to charges filed by the Charging Party Berleth and Charging Party Craig Armstrong, a Consolidated Complaint was issued by the Regional Director of Region 16. The Consolidated Complaint alleges Respondent engaged in conduct in violation of Section 7 & 8(a)(1), (3), and (5) of the National Labor Relations Act (hereinafter “the Act”). A hearing was held on the issues raised by the Consolidated Complaint on August 12, 13 & 14, 2015 before Administrative Law Judge Joel P. Biblowitz.

On October 22, 2015, Judge Biblowitz issued his decision in the case finding Cy-Fair Volunteer Fire Department (hereinafter “Respondent”) violated Sections 7 and 8(a)(1) of the Act. Specifically, Judge Biblowitz found Respondent violated Section 7 of the Act by overly restricting employees in the exercise of their rights and violated section 8(a)(1) of the Act by threatening employees with discharge for violating the No Solicitation/Distribution rule

Judge Biblowitz, however, erroneously found the evidence was insufficient to establish Respondent did not further violate the Act as alleged in the complaint and refused to provide relief to Charging Party Robert Berleth as requested, rather stating:

The only evidence that the Respondent was aware of Berleth’s union activity is Flemmons testimony about his conversation with Keith Kercho at the ATV rally and Armstrong’s testimony that while having breakfast with Justice. . . .

Flemmons testified that [Keith] Kercho told him (in the presence of his wife, Supervisor Littrell-Kercho) not to back off, that everyone wanted to see what his next step was, and that he responded that he shouldn’t worry about, it that he and Berleth were talking about putting a union together. In addition to the fact that this conversation would have

occurred about 2 months before Berleth began soliciting cards for the Union, Littrell-Kercho did not participate in the discussion and testified that she does not recollect the subject of the conversation. I find this evidence too tenuous to establish that the Respondent had knowledge of Berleth's union activities at that time.

The Administrative Law Judge erroneously disregarded the Respondent's own submissions, the timeline of events, and clear and convincing evidence that Berleth was identified, targeted, and discharged due to his protected activity in orchestrating the Union.

The Administrative Law Judge found Respondent violated the Act by threatening employees with discharge if they violated the No Solicitation/Distribution Policy, an unlawful policy furthered by Assistant Chief of EMS Kenneth Grayson in open meetings with employees as early as May 10, 2013, and solidified in an email to all employees on May 17, 2013 specifically meant to intimidate employees from participating in protected activities.

As the Administrative Law Judge found, not only did Respondent threaten the employees with discharge for protected activities, they made an example by discharging the main union organizer, an otherwise exemplary FTO/Paramedic (Berleth's Exception 1); the record clearly shows Berleth as the main organizer of the Union (Berleth's Exception 2); Berleth's final shift occurred on May 6, 2013, just 4 days prior to these several open meetings conducted by the Respondent, during which Berleth was subjected to ongoing discrimination from Assistant Chief Kenny Grayson, his wife Denise Grayson, and her subordinate supervisor and close friend, Stephanie Littrell-Kercho (Berleth's Exception 3); Counsel for the General Counsel satisfied the burden to prove that protected conduct was a "motivating factor" in the Respondents decision to terminate (Berleth's Exception 4); the Decision also erroneously cited that "Berleth's disrespectful emails" were a factor in determining Berleth's testimony on the timeframe was "confusing" when no such email exists (Berleth's Exception 5); and Charging Party Berleth

hereby asserts that Judge Biblowitz Conclusion of Law is erroneous as set forth in ¶ 4 that Respondent did not further violate the Act (Berleth's Exception 6). By these errors, the Judge has allowed Respondent not only to threaten, but also discharge the main union organizer and "get away with it", to which Charging Party Berleth takes great exception (*emphasis added*).

B. Reference to Post-Trial Brief

Because the undersigned is *pro se*, has limited legal experience, and due to the extremely high quality of General Counsel's Post-Trial Brief to the Administrative Law Judge, arguments set forth in counsel's brief on pages 18-35, 39-44, & 60-63 by the more sophisticated legal mind of Mr. Roberson, *esq.* are incorporated herein and set forth as if the same.

Also, this brief was written without access to all exhibits presented at trial, and relies heavily upon the aforementioned brief for accuracy in citing to particular sections of the record.

C. Summary of Argument

The smoking gun in this case is the timeline and actions of the Respondent; through an extremely well-heeled legal team and over two years of collaboration, the Respondent has been able to "get the story straight" among the supervisory witnesses and their testimony should be suspect, especially in the face of overwhelming logic. Case in point, Ms. Litrell-Kercho, who was able to testify about and recite emails and telephone conversations nearly verbatim from over two years previously, was suddenly struck with amnesia when asked by Judge Biblowitz about the conversation she had at General Sam's Off-Road Park with Eddie Flemmons about the Union organizing efforts. (TR 501) She was able to describe the date of the conversation, knew

the name of the location, identified who was present (including Mr. Flemmons), and described the various activities at the event; yet suddenly when asked about the union conversation, which she readily admits she was present for, she simply “[could] not recall their discussion” (TR 501). Similarly, then-ringleader Asst. Chief Kenneth Grayson¹ testified that he knew of no employee at Respondent that attended graduate or law school while working full time at the fire department, with the full knowledge that Fire Chief Amy Ramon, coincidentally sitting across the room from him as the Respondent’s representative at trial, had attended and completed law school while working in an office several doors down the hall from his own (TR 115). These are just two examples of how the Respondent is willing to bend testimony to obtain an unjust legal outcome and violate the Act. Judge Biblowitz erred; the Decision should be amended to show that Berleth was disciplined and discharged in violation of the Act.

D. Exceptions

Exception 1: Credible Evidence and the Burden

With an intellectually honest review of the timeline of events regarding Berleth’s discharge, the credible evidence clearly shows beyond doubt that Berleth was discharged due to his union organizing. The egregious nature of several serious disciplinary proceedings early in his career, followed by a 2011 promotion to FTO as an elite paramedic (Resp Exhibit 14, TR 29, 30, 83, 482) proves he was a clinically sound Paramedic and a leader among the employees. A loosely substantiated dismissal within 30 days of the Respondent obtaining irrefutable proof that

¹ Shortly following the union election and NLRB complaint filing, Assistant Chief of EMS Kenneth Grayson was removed from his position. Even though technically a lateral transfer, his new position carries minimal clout of his previous designation. Furthermore, the entire board of directors of the Respondent was forced to undergo a massive restructuring by the department’s governing agency, Harris County Emergency Services District #9. None of the board members that voted to terminate Berleth, save for the President of the Board Jennifer Walls, remain in office.

Berleth was the Union organizer shows a clear pattern of the employer's desire to discharge Berleth for participating in protected activities in violation of the Act.

The Board has long recognized that discriminatory motive may be demonstrated by circumstantial evidence based on the record as a whole. *Case Farm of North Carolina, Inc.*, 353 NLRB 257, 260 (2008), *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to the other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union or other protected concerted activity. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004). Improper motivation, a pretext, may also be inferred from reasons advanced by the employer that either did not exist or were not in fact relied upon, thus leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F. 2d 799 (6th Cir. 1982). The evidence proffered by Respondent is insufficient to establish it would have even suspended Berleth much less terminated him. The evidence shows that Respondent discharged Berleth in violation of the Act.

By Respondent's own trial counsel admissions, Berleth is "a pretty sharp guy" (TR 295). Berleth was sharp enough to research his rights and responsibilities as an organizer, contact the IAFF, coordinate meetings, and distribute cards for over 18 months without surfacing to the Respondent as the main Union organizer. During this time Berleth had the strong (and correct) suspicion that Asst. Chief Grayson would summarily discharge anyone threatening his personal fiefdom.² Once Berleth was discovered as the main organizer, Respondent in short order,

² At the time of Berleth's discharge, Asst. Chief Kenneth Grayson managed all the EMS staff and ambulances, which accounts for nearly 80% of the call volume and a similar portion of the annual budget of the Respondent. By

presumably at the direction of Asst. Chief Grayson and through his wife and her best friend, EMS Supervisors Denise Grayson and Stephanie Litrell-Kercho manipulated an otherwise unremarkable shift and nominal events into fireable offenses in an attempt to quash the union organizing (TR 460³, 489). Grayson's efforts succeeded; the union election failed.

During early 2013, knowing the union rumors and efforts were intensifying, Berleth knew he was being carefully watched and performed at a high level in his work duties, even surpassing the level of a highly experienced FTO, all to no avail (Berleth Affidavit at page 11, TR 291). On May 6, 2013, when Berleth arrived for his normally scheduled shift following a 30-day suspension, with no disciplinary behavior whatsoever, he was again suspended pending termination, and then subsequently grilled by a disoriented Training Coordinator, Jacob Duke about the union organizing (Berleth Affidavit page 9, line 3). This conversation and action proves the Respondent had knowledge that Berleth was a main organizer earlier than May 6, 2013, despite Respondent's claims otherwise, and certainly before the May 20 meeting Judge Biblowitz cites on page 18, line 51 of the Decision as his basis for denying Berleth's complaint.

Respondent cannot credibly argue the disciplinary actions prior to August 1, 2011 reflected poorly on Berleth or were considered when he was suspended and discharged 2 years later in the spring of 2013. Its argument is not credible because Respondent promoted Berleth to a Field Training Officer (FTO) on August 1, 2011, less than six weeks after the June 21 discipline. (Resp Exhibit 13) In order to become a FTO an employee must be recommended by

controlling this crucial position Mr. Grayson became an extremely powerful political figure within the department and was able to bypass policy on a whim without opposition (Respondent's Exhibit 23, TR 88). Case in point, from his position, he was able to promote his wife, son-in-law, and wife's best friend to EMS supervisors, his daughter as head of dispatch, his other daughter as an FTO (disputed), and best friend to supply supervisor. (TR 25-28). A union threatened all these positions, even if only to enforce the Respondent's own anti-nepotism policy; Chief Grayson testified he did not know a nepotism policy was included in the Employee Handbook. (TR 113)

³ Litrell-Kercho testified that both Omar Dar's and Berleth's cellular phones and all three commercial radios on the ambulance unit spontaneously failed simultaneously during her efforts to contact them; *Berleth asserts otherwise.* (TR 250-251)

his or her supervisor and approved by Chief Grayson and Martha Hannah. (TR 29, 83)(Resp Exhibit 14) As an FTO, Berleth was responsible for training newly hired employees on the existing Standard and Operating Guidelines and protocols and, when necessary, train employees to Respondent's new Standard Operating Guidelines and protocols. (TR 29)

Direct evidence of motive is not required. Discriminatory motive may be inferred from circumstantial evidence and the record as a whole, the timing of the adverse action in relation to the protected activity, statements and actions showing the employers' animus toward the activity, and evidence demonstrating that the employer's proffered explanation for the adverse action is a pretext. *Baptist Med. Ctr./Health Midwest*, 338 NLRB 346, 377 (2002); *Tubular Corp. of America*, 337 NLRB 99 (2001); *Washington Nursing Home*, 321 NLRB 366, 375 (1996); *Best Plumbing Supply*, 310 NLRB 143, 144 (1993).

The evidence shows Respondent did not treat Berleth's three disciplinary actions between March 28, 2013 and June 21, 2013 as an impediment when it recommended and approved his promotion to a training position with more responsibility and more pay.⁴ As such, Respondent's assertion the disciplinary actions prior to August 1, 2011 were relied upon in its decision to terminate his employment is not persuasive. In fact, the evidence establishes more persuasively that Respondent's use of these disciplines was a pretext.

For comparative purposes that might be most instructive, the Board can look to Respondents Exhibit 92, specifically disciplinary actions issued to Paramedic Jason Miller in a 10-week period in 2012. On March 7, Miller was issued a written warning for being late. The incident description states "Jason Miller overslept for work again. He was talked to on 1/1/12 about being late and that it would not be tolerated this year." The investigation section of the report states "Jason's next offense this year will result in a 24-hour suspension [and] possibility

⁴ Berleth received a raise when he was promoted to a Field Training Officer. (Resp Exhibit 14)

for termination. (G.C. Exhibit 11) On March 29, Miller was issued a written warning for not washing his ambulance. Later in the shift, it was discovered that Miller did not help his partner clean the truck, and he lied to his supervisor and claimed he cleaned the truck. The investigation section says “found Jason Miller lying directly to an officer and official of Cy-Fair F.D. *twice* over a task that was directly told of him to do. Therefore, Mr. Miller will receive 24 hours of suspension for insubordination to an officer of the fire department. If this or any other occurrence happens again it could result in termination.” (*emphasis added*)(G.C. Exhibit 11) On May 16, Miller reported to work late. (General Counsel 11) During the same shift, he was disciplined for leaving a LifePak 15 monitor behind, *exactly the same circumstances Berleth faced*. Respondent issued Miller a 48-hour suspension. Miller received 5 disciplinary actions between March 2012 and May 2012. Yet, as of January 23, 2013, Miller was still employed by Respondent. On that day, he received a *verbal warning* for reporting to work one-hour late. (G.C. Exhibit 11) In fact, at the time of the hearing, Miller was still employed by Respondent. (TR 662)

On March 29, 2013, about 5 weeks after she learned of Berleth’s effort to organize Respondent’s employees, Littrell-Kercho issued a disciplinary action to Berleth for 3 separate incidents within the same shift. Littrell-Kercho’s asserted reasons for recommending Berleth be discharged are the “multiple incidents of insubordination and policy/procedure violations.” (Resp Exhibit 29) The Board has found that a supervisor’s knowledge is imputed to the employer. *State Plaza Inc., d/b/a State Plaza Hotel*, 347 NLRB 755, 757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001). Respondent acquired knowledge of Berleth’s activity through Littrell-Kercho. While she learned of Berleth’s activity in a less theatrical and shocking manner, it is sufficient to impute that knowledge to Respondent.

Respondent produced an abundance of exhibits and disciplinary actions on Berleth, the vast majority of which occurred *prior* to his promotion to FTO or on the March 28-29, 2013 shift. Regardless and despite this abundance, Respondent has not produced one item showing it has counseled, warned, or disciplined any employee for remaining out of territory, failing to go in-service and respond to an emergency call, or for violating the workout hour policy. As opposed to Mr. Miller's several disciplines, Berleth had never been warned verbally or in writing about remaining out of territory or abusing the workout policy. Denise Grayson, who supported Littrell-Kercho's recommendation to discharge Berleth, also testified she had never written anyone up for remaining out of territory. (TR 578) Littrell-Kercho testified she had not, in her 8 years as a supervisor, disciplined anyone for not answering an emergency call or even confronted the issue an employee remaining out of territory too long. (TR 489-490, 496)

Being rude and abrupt are the stated reasons for discharging Berleth, but Respondent still needed a tangible reason to discharge Berleth, even if hyper-inflated. When Berleth and his partner left a monitor behind on the March 29 shift, the Respondent pounced. Despite written and historical policies to the contrary, Littrell-Kercho places the blame squarely on Berleth in her email to Denise Grayson and recommends termination, despite the fact that Berleth and Dar were equally paramedics and responsible for the ambulance as a whole and that no other employee's discipline for leaving equipment had exceeded 48 hours suspension. (Resp Exhibit 29, 92) Nearly every single witness for both General Counsel and the Respondent admitted that temporary misplacement of equipment is commonplace in the industry and that discipline is rare. (TR 132, 408, 517) The sole instance of insubordination in Respondent's Exhibit 92 involved an employee becoming confrontational with his partner and physically pushing his partner out of the way in the presence of a patient.

Littrell-Kercho, on direct examination, testified Berleth was uncooperative in attempting to locate and return the monitor. (TR 469) On cross-examination, she resisted acknowledging it would have been unadvisable for Berleth to transport the monitor, which she estimated costing thousands of dollars, on his motorcycle.⁵

Littrell-Kercho's claims of rudeness or misconduct on Berleth's part do not require much of an inferential leap when you consider how she made such an issue of the fact. In her email to Denise Grayson, Littrell-Kercho has an unmistakable tone when she assigns blame for the missing equipment. (Resp Exhibit 29)

Despite the absence of any similar violations by any of its employees in the past, Respondent magnified the severity of these incidents in order to mask its true motivation for Berleth's discharge. It is undisputed that Littrell-Kercho confronted Berleth on incidents in which neither she nor Respondent had issued disciplinary actions on in the past. She asserts he was rude and abrupt in her email to Denise Grayson. Berleth adamantly denies being rude or abrupt, and asserts that the perceived rudeness is being manufactured by Littrell-Kercho to aid in the justification of terminating a senior FTO over simply forgetting equipment. Berleth further asserts that *IF* he had retrieved the equipment on his motorcycle, he would have been terminated just the same for endangering valuable equipment.

It is an unfair labor practice under Section 8(a)(1) of the Act for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. 29 U.S.C. § 158(a)(1). Section 7 of the Act gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

⁵ A basic internet search for Lifepak 15 shows the monitor cost runs anywhere between \$12,000 and \$30,000, confirming Littrell-Kercho's estimation. She further resisted the common knowledge that Berleth rode a motorcycle to work nearly every day. During his employment, Littrell-Kercho had several casual conversations both on and off duty with Berleth *while seated on the motorcycle*.

own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .” 29 U.S.C. § 157. Section 8(a)(1) of the Act therefore limits the manner in which employers may respond to those activities protected by Section 7.

Judge Biblowitz erred in the Decision by stating “no credible evidence exists” when the record clearly establishes Berleth was engaged in protected activity as the main organizer, Respondent was aware of his activity, Respondent generally demonstrated hostility towards employees’ efforts to organize, Respondent specifically exhibited hostility towards Berleth for engaging in protected activity, and, as a result, it terminated his employment because he engaged in union and other protected concerted activity.

For the reasons stated above and on the record as a whole, the undersigned respectfully requests the Board find the Administrative Law Judge erred and that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Berleth because of his union and protected concerted activity. The Board should find and fashion an appropriate remedy that would require Respondent to post an appropriate Notice to Employees of the unlawful discharge of Berleth and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Exception 2: The Union Defined

It has been well established by the evidence that Berleth organized and arranged meetings with the International Association of Firefighters (IAFF) and legal counsel for the Union, Patrick M. Flynn. (TR 196) It is further established that due to the IAFF rules regarding an “EMS only” union such as the one proposed, a union would have to be formed and then admitted to the IAFF.

These several transitions and multiple union cards were performed with the guidance of legal counsel and the knowledge of the other organizing employees. They were not intended to be “confusing testimony” as Judge Biblowitz found on page 18, line 24 of the Decision. (TR 268) The Administrative Law Judge inadvertently erred by not clarifying which party he supported and which union(s) qualified as a labor organization within the meaning of Section 2(5) of the Act.

For the reasons stated above and on the record as a whole, the undersigned respectfully requests the Board clearly define which union falls within the meaning of Section 2(5) of the Act. The Board should find and fashion an appropriate remedy that would require Respondent to post an appropriate Notice to Employees of the determination and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Exception 3: Berleth's Final Shift on May 6, 2013

Judge Biblowitz correctly cites that Berleth was suspended by Littrell-Kercho on April 4, 2013, but errs by failing to mention that the April 4 disciplinary suspension was limited to 30 days, pending termination proceedings. In fact, Berleth returned to work for his next scheduled shift following the suspension on May 6, 2013, because the termination proceedings had not yet completed. (TR 105)

Berleth asserts that if he had not arrived for his scheduled shift on May 6, 2013, the Respondent would have just quickly disciplined him for missing a shift. By the final shift, there was no doubt in any employee or supervisor's mind that Berleth was openly advocating for a labor organization collective bargaining election. In fact, because Berleth had to leave town for a job interview, the necessary union cards to hold a collective bargaining election were

gathered and submitted to the Unions attorney's office on or about May 10, 2013. (TR 273) The Respondent apparently urges the Board to abandon the logic set forth by the evidence, and accept that somehow in the four day period from May 6, 2013 to May 10, 2013, Berleth was able to orchestrate a department-wide labor union organization movement complete with all the necessary requirements for a collective bargaining agreement election from scratch, all without the knowledge of management. It simply isn't possible. However, history has shown it is possible for Littrell-Kercho to magnify otherwise minor disciplinary events (TR 237). This magnification becomes more apparent once confronted with the political atmosphere and that Littrell-Kercho was achieving this result at the behest of her boss and best friend's husband. It is even more obvious that a powerful political figure within the Respondent's organization has the ability to skew the determinations of a disciplinary board.⁶

For the reasons stated above and on the record as a whole, the undersigned respectfully requests the Board find the Administrative Law Judge erred, that Berleth's final shift was on May 6, 2013, and that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Berleth because of his union and protected concerted activity. The Board should find and fashion an appropriate remedy that would require Respondent to post an appropriate Notice to Employees of the unlawful discharge of Berleth and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Exception 4: The Timeline is Clear

In the Decision, Judge Biblowitz erred by characterizing Berleth and Armstrong's testimony as "very confusing" on page 18, line 24. Berleth's timeline in both his initial affidavit

⁶ Following Berleth's discharge, the disciplinary board procedures were also changed. An EMS member now sits on the disciplinary board; Berleth received no such accommodation.

and testimony are completely congruent, which is easily verified by emails to the IAFF, legal counsel, and other employees. The Respondent's timeline and exhibits verify that the most egregious disciplinary issues occurred *prior* to Berleth's promotion to the FTO position, with an obvious late cluster within the last 30 days, culminating in his discharge. It is not coincidental that at the same time, Berleth was openly campaigning for a labor organization.

During his testimony, Eddie Flemmons inadvertently confused the exact order of some events, either through confusion of the question being asked or simple uncertainty. Respondent has ambushed this oversight, all the while ignoring their own witnesses' mistakes, in an attempt to further muddy the waters of who said what and when. The Board should view Mr. Flemmons oversight on the timeline as just that— an innocent oversight.

Respondent has recited again and again the “extensive disciplinary history” of Berleth in an effort to eschew the logical conclusion of the magnified disciplines in the spring of 2013, while downplaying the exemplary performance and efforts put forth by Berleth during his employment. (General Counsel's Exhibit 14, Berleth Affidavit at page 11)

Respondent's storyline is that Berleth's attitude, during one shift, was so egregious that his discharge was warranted. The evidence, however, is more persuasive in showing the claimed instances of insubordination are a pretext to Respondent's desire to discharge Berleth, who was the primary employee in the labor organizing effort. Once the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to discipline or discharge employees, the burden shifts to the employer to demonstrate the same action would have take place even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1098. The employer has failed that burden.

For the reasons stated above and on the record as a whole, the undersigned respectfully requests the Board find the Administrative Law Judge erred, that Berleth's testimony is congruent with the evidence showing that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Berleth because of his union and protected concerted activity. The Board should find and fashion an appropriate remedy that would require Respondent to post an appropriate Notice to Employees of the unlawful discharge of Berleth and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Exception 5: Berleth Never Sent Disrespectful Emails

Judge Biblowitz correctly found on page 19, footnote 8, that "Berleth's disrespectful emails" were different from Denise Grayson's "email to a friend", but the honorable judge found exactly the opposite of what the evidence showed. Berleth never sent a disrespectful email; rather he was known for well-articulated evaluation emails as an FTO (TR 201). Denise Grayson, however, did send an offensive email to the entire fire department, in which she called a subordinate friend a "hoe". Congratulatory or not, there is a big difference between Berleth using vulgar language to describe a supervisor in private with his partner and a Senior Supervisor sending out derogatory emails about any person, friend or not, to the entire fire department (TR 579). Further, then-supervisor Cindy King, David Tilbury and Denise Grayson admitted that vulgar language was regularly used around the workplace, and even directed at Berleth on occasion. (TR 189, 289, 580)

The inference by Judge Biblowitz is that he is referring to the disciplinary incident which occurred on November 9, 2009, fully two years before Berleth was promoted to FTO status, or to the events in December, 2012, which very well may have been union-related in retaliatory efforts

by a disgruntled trainee. The Respondent's continued citing to this incident as being part of the decision to terminate is disingenuous at best.

Respondent contends to promote a literal application of its sexual harassment policies and how Berleth's conduct is inconsistent with those policies. However, the evidence shows the practice and culture at Respondent's facility, and the application of its policy, are truly asymmetrical. Senior Supervisor Denise Grayson appears to be just as cavalier in her use of crude language as non-supervisory employees. There is also evidence Supervisor Cindy King engaged in similar verbal jarring when referring to Berleth. Respondent portrayal of Berleth's conduct as unacceptable is not supported by the evidence.

For the reasons stated above and on the record as a whole, the undersigned respectfully requests the Board find the Administrative Law Judge erred in determining that Berleth sent derogatory emails. The Board should find and fashion an appropriate remedy that would require Respondent to post an appropriate Notice to Employees that Berleth sent no such email and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Exception 6: Conclusions of Law

Charging Party Berleth excepts to the Administrative Law Judge's Conclusion of Law on page 21, line 11, that Respondent did not further violate the Act as alleged in the complaint.

The previous five exceptions clearly show a lack of transparency and manipulation of the facts for the self-serving interests by the Respondent to avoid the liabilities of the egregious behavior of the senior EMS managers in the Spring of 2013 to discharge Berleth in violation of

the Act. These violations are well-established by General Counsel at trial and in the evidence presented and should be enforced by the Board.

The Board has long held an employer violates Section 8(a)(1) of the Act when it threatens to discharge employees because they engage in union activity or other protected concerted activity. *Desert Toyota*, 346 NLRB 118, 122 (2005); *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001); *Bloomington-Normal Seating Co.*, 339 NLRB 191 (2003); *Paper Mart*, 319 NLRB 9 (1995); *Lyman Steel Co.*, 249 NLRB 296, 301 (1980). On May 17, 2013, Respondent violated the Act when it threatened employees with discharge.

The evidence clearly establishes Chief Grayson threatened employees with discharge during his mid-May meeting with employees, which was held in response to the distribution of union flyers at Respondent's facility. It is also clear that Chief Grayson's follow up email on May 17 was intended to reinforce the threat of discharge during the meeting. Respondent's threat, by Chief Grayson at the May 17, 2013 meeting and his email immediately following the meeting, to enforce its overly broad non-solicitation rule by threat of discharge was designed to restrain employees in the exercise of their Section 7 rights to engage in union activity in violation of Section 8(a)(1) of the Act. *C.P. Associates, Inc.* 336 NLRB 167 (2001).

For the reasons stated above and on the record as a whole, the undersigned respectfully requests the Board find the Administrative Law Judge erred in his conclusion of law and that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Berleth because of his union and protected concerted activity. The Board should find and fashion an appropriate remedy that would require Respondent to post an appropriate Notice to Employees of the unlawful discharge of Berleth and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

SIGNED in HOUSTON, TEXAS on this, the 3rd day of April, 2016.

Respectfully submitted,



Robert Berleth
Charging Party
P.O. Box 692293
Houston, Texas 77269
713/962-1119 telephone
713/481-0894 facsimile
robert@robertberleth.com