

United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: March 14, 2018

TO: William B. Cowen, Regional Director  
Region 21

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: Dunn-Edwards Corp.  
Case 21-CA-211066

506-0170  
506-2001-5000  
506-4033-5500  
512-5036-6720-7500  
625-3350-1133-6700

The Region submitted this case for advice on whether the Charging Party was engaged in protected concerted activity when (b)(6), (b)(7)(C) discussed with (b)(6), (b)(7)(C) coworker, and raised with the Employer, a (b)(6), (b)(7)(C) remark made to (b)(6), (b)(7)(C) by another coworker. The Region should issue a complaint, absent settlement, alleging a violation of Section 8(a)(1) of the Act because the Employer terminated the Charging Party for engaging in the protected concerted activity of seeking assistance about how to handle the (b)(6), (b)(7)(C) remark made by (b)(6), (b)(7)(C) coworker.

**FACTS**

The Employer, Dunn-Edwards Corp., is a manufacturer and supplier of architectural and industrial paint coatings. The Charging Party worked as a (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) in the (b)(6), (b)(7)(C) department at the Employer's corporate office. On about (b)(6), (b)(7)(C) 2017,<sup>1</sup> the Employer issued the Charging Party a final disciplinary warning for unprofessional conduct and insubordination.

On about May 23, while on break at the lunch tables, the Charging Party got into a conversation with (b)(6), (b)(7)(C) coworker ("Coworker 1"). Coworker 1 had recently moved and the Charging Party asked how (b)(6), (b)(7)(C) move went. Coworker 1 launched into a rant and said that (b)(6), (b)(7)(C) hated (b)(6), (b)(7)(C) new apartment and did not know there were so many (b)(6), (b)(7)(C) people in the area. Coworker 1 went on to say that (b)(6), (b)(7)(C) people are lazy, pigs, slobs, and loud. (b)(6), (b)(7)(C) said they partied all the time and left their dog waste everywhere. The Charging Party was very offended by the comments made by Coworker 1 and excused

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<sup>1</sup> All dates hereafter are in 2017, unless otherwise indicated.

(b)(6), (b)(7)(C) from the conversation. The Charging Party is (b)(6), (b)(7)(C) and is (b)(6), (b)(7)(C) to a (b)(6), (b)(7)(C) and has (b)(6), (b)(7)(C)

After that conversation, the Charging Party went to (b)(6), (b)(7)(C) immediate supervisor, the (b)(6), (b)(7)(C) “Supervisor”). Without disclosing the identity of Coworker 1, the Charging Party described the incident with the (b)(6), (b)(7)(C) rant.<sup>2</sup> The Supervisor then describe (b)(6), (b)(7)(C) past experience with (b)(6), (b)(7)(C) comment in the workplace.

The Charging Party then ran into another employee, Coworker 2. The Charging Party told Coworker 2 about the upsetting comments made by Coworker 1 and asked how (b)(6), (b)(7)(C) would handle the situation. Coworker 2 responded that (b)(6), (b)(7)(C) believed Coworker 1 to be (b)(6), (b)(7)(C) because Coworker 1 had previously made a (b)(6), (b)(7)(C) offensive comment to (b)(6), (b)(7)(C) at work.<sup>3</sup> Coworker 2 described the comment to the Charging Party. Coworker 2 said that (b)(6), (b)(7)(C) told the Charging Party at the end of this conversation that (b)(6), (b)(7)(C) should report Coworker 1’s comments to management.<sup>4</sup>

The Supervisor reported the conversation to (b)(6), (b)(7)(C) superior, the (b)(6), (b)(7)(C) (b)(6), (b)(7)(C). The (b)(6), (b)(7)(C) asked the (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) to investigate the incident. That same day, the (b)(6), (b)(7)(C) met with the Charging Party. The (b)(6), (b)(7)(C) said that (b)(6), (b)(7)(C) had heard the Charging Party was upset and asked what happened. The Charging Party told the (b)(6), (b)(7)(C) what Coworker 1 had said and, after the (b)(6), (b)(7)(C) asked, identified Coworker 1’s name.<sup>5</sup> The Charging Party also told the (b)(6), (b)(7)(C) about the previous (b)(6), (b)(7)(C)

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<sup>2</sup> The Employer states that the Charging Party informed the Supervisor during this conversation that (b)(6), (b)(7)(C) had already told (b)(6), (b)(7)(C) employees, Coworkers 2 and 3, what Coworker 1 had said and asked them for advice regarding what (b)(6), (b)(7)(C) should do. Both Coworker 2 and Coworker 3 are (b)(6), (b)(7)(C), as is the Supervisor. The Charging Party does not recall discussing the incident with Coworker 2 before talking with the Supervisor, or ever discussing it with Coworker 3. Resolution of this discrepancy is not necessary for purposes of our analysis.

<sup>3</sup> Coworker 2 had discussed this (b)(6), (b)(7)(C) offensive remark with several other employees and reported it to management. There is no evidence as to whether the Employer took action to address that comment.

<sup>4</sup> The Charging Party has stated that they did not discuss filing a complaint about Coworker 1’s rant.

<sup>5</sup> The (b)(6), (b)(7)(C) claims that the Charging Party did not identify Coworker 1 at this meeting even after (b)(6), (b)(7)(C) asked, and that (b)(6), (b)(7)(C) took the position that (b)(6), (b)(7)(C) identity was

offensive comment that Coworker 1 had made to Coworker 2. The (b)(6), (b)(7)(C) shared (b)(6), (b)(7)(C) own past experiences with discrimination. The (b)(6), (b)(7)(C) asked the Charging Party whether (b)(6), (b)(7)(C) wanted anything done about the comments. The Charging Party said (b)(6), (b)(7)(C) did not know, but (b)(6), (b)(7)(C) should do whatever needed to be done.

After this meeting, the (b)(6), (b)(7)(C) met with Coworker 2 and confirmed the Charging Party's story.<sup>6</sup> Coworker 2 did not make any complaint about the Charging Party discussing Coworker 1's (b)(6), (b)(7)(C) remarks with (b)(6), (b)(7)(C). Nor is there evidence that any other employee complained about the Charging Party's behavior.

Several months later, the (b)(6), (b)(7)(C) and the (b)(6), (b)(7)(C) met with the Charging Party again. The Charging Party described what Coworker 1 previously had said to (b)(6), (b)(7)(C). The (b)(6), (b)(7)(C) claims that (b)(6), (b)(7)(C) then said that (b)(6), (b)(7)(C) needed to know who had made the comments because that kind of commentary was not appropriate in the workplace. The (b)(6), (b)(7)(C) claims that the Charging Party then identified Coworker 1. The (b)(6), (b)(7)(C) asked the Charging Party whether Coworker 2 knew about Coworker 1's comments, and the Charging Party confirmed that (b)(6), (b)(7)(C) did.

The (b)(6), (b)(7)(C) and the (b)(6), (b)(7)(C) then met with Coworker 1 and asked (b)(6), (b)(7)(C) about the comments. Coworker 1 admitted to making the comments to the Charging Party. The Employer later gave Coworker 1 a final warning for making the (b)(6), (b)(7)(C) comments in the workplace. Coworker 1 then resigned.

On about September 6, the (b)(6), (b)(7)(C) the (b)(6), (b)(7)(C) and the Supervisor called the Charging Party into the (b)(6), (b)(7)(C) office for a meeting. They informed the Charging Party that (b)(6), (b)(7)(C) was being terminated for repeating Coworker 1's (b)(6), (b)(7)(C) comments to other employees, especially to (b)(6), (b)(7)(C) employees. The Employer claimed that repeating the comments violated the Charging Party's final warning as being unprofessional.

The Charging Party was upset by (b)(6), (b)(7)(C) termination and went back to (b)(6), (b)(7)(C) office next door and began to pack up (b)(6), (b)(7)(C) artwork and other personal belongings. The (b)(6), (b)(7)(C) entered the office and started taking down some of the artwork, and in response the Charging Party protested loudly. After the Charging Party had quickly

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irrelevant because it was not a work-related issue. Resolution of this credibility dispute is not necessary for purposes of our analysis.

<sup>6</sup> The Employer says that in addition to Coworker 2, the (b)(6), (b)(7)(C) also met with Coworker 3, who confirmed discussing the incident with the Charging Party. Whether the Charging Party met with one or two other employees is not determinative for the analysis in this case.

gathered (b)(6), (b)(7) belongings, the (b)(6), (b)(7)(C) and (b)(6), (b)(7) Supervisor escorted (b)(6), (b)(7) out of the building. During this process, the Employer says that the Charging Party yelled things like “this is bullshit,” called (b)(6), (b)(7) Supervisor a “bitch” and “trash,” and said “you guys are a f-king joke.” The Employer also says that the Charging Party hit the wall of the hallway while (b)(6), (b)(7) was walking out. There is no evidence that the Charging Party did any damage or that other employees were present when the Charging Party was escorted out of the building.

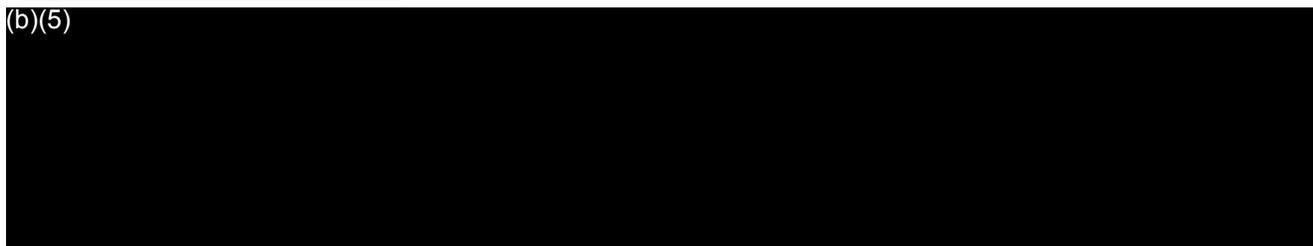
### ACTION

We conclude that the Charging Party was engaged in protected concerted activity when soliciting (b)(6), (b)(7) coworker’s opinion on how to deal with the (b)(6), (b)(7)(C) remarks made by another coworker in the workplace.<sup>7</sup> Nothing about the discussion caused the Charging Party’s conduct to fall outside of the protection of the Act. Consequently, the Employer violated Section 8(a)(1) by discharging the Charging Party for that discussion. The Region should seek the full reinstatement and backpay remedy because the Charging Party’s post-termination conduct did not make (b)(6), (b)(7) unfit for further service.

#### **I. The Charging Party Engaged in Protected Concerted Activity Within Section 7’s Mutual Aid or Protection Clause**

Section 7 of the Act expressly protects employees’ right to “self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>8</sup> To fall within the ambit of this protection, an employee’s conduct must be both “concerted” and for mutual aid or protection. Board precedent makes clear that these two elements are analytically distinct.<sup>9</sup>

(b)(5)



<sup>8</sup> 29 U.S.C. § 157. *See, e.g., NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 829 (1984).

<sup>9</sup> *Summit Regional Medical Center*, 357 NLRB 1614, 1615 (2011); *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 884, 885 (1986), *enfd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

### A. The Charging Party's Conduct was Concerted

Conduct is concerted when it is “engaged in with or on the authority of other employees,” or when an individual employee seeks “to initiate or to induce or to prepare for group action” or to bring group complaints to management’s attention.<sup>10</sup> An individual acts on the authority of other employees even if not directly told to take a specific action if the concerns expressed by the individual employee to management are a “logical outgrowth of the concerns expressed by the group.”<sup>11</sup> Employees’ discussion of shared concerns about terms and conditions of employment can be concerted, even when the discussion “in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.”<sup>12</sup> When analyzing whether an employee has engaged in protected concerted activity, the Board has found that the subjective motivations of the individual employee are irrelevant because the standard is an objective one.<sup>13</sup>

Here, the Charging Party’s conduct was concerted when (b)(6), (b)(7) spoke with Coworker 2 concerning what to do about Coworker 1’s (b)(6), (b)(7)(C) rant. After the Charging

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<sup>10</sup> *Meyers Industries (Meyers II)*, 281 NLRB at 885, 887.

<sup>11</sup> *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038-39 (1992) (finding four employees’ individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over new scheduling policy), *supplemented by* 310 NLRB 831 (1993), *enfd.* 53 F.3d 261 (9th Cir. 1995).

<sup>12</sup> *Meyers Industries (Meyers II)*, 281 NLRB at 887, quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951). *See also Holling Press, Inc.*, 343 NLRB 301, 302 (2004) (finding that an employee was engaged in concerted activity to the extent that she “exhorted another employee” to support her sexual harassment claim).

<sup>13</sup> *Circle K Corp.*, 305 NLRB 932, 933 (1991) (“Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one.”), *enforced mem.*, 989 F.2d 498 (6th Cir. 1993). *See also Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 4 (2014) (“Under Section 7, both the concertedness element and the ‘mutual aid or protection’ element are analyzed under an objective standard. An employee’s subjective motive for taking action is not relevant to whether that action was concerted.”). While *Fresh & Easy* supports this proposition, our analysis does not rely on the Board’s holding in that case. (b)(5)

(b) (5)

(b)(5)

Party shared the upsetting interaction with Coworker 2, Coworker 2 also discussed (b)(6), (b)(7)(C) experience with Coworker 1 making a (b)(6), (b)(7)(C) hostile comment to (b)(6), (b)(7)(C) in the workplace. The Charging Party specifically requested guidance from Coworker 2 about what action to take in that situation. After having established that both employees had heard Coworker 1 make (b)(6), (b)(7)(C) comments in the workplace, Coworker 2 told the Charging Party to report the (b)(6), (b)(7)(C) rant to management.<sup>14</sup> The Charging Party then did exactly that, reporting the incident to both (b)(6), (b)(7)(C) Supervisor and the (b)(6), (b)(7)(C).<sup>15</sup> Thus, in soliciting assistance from Coworker 2 with respect to how to handle the (b)(6), (b)(7)(C) comments by Coworker 1, the Charging Party was engaged in concerted activity.

### **B. The Charging Party's Conduct was for Mutual Aid or Protection**

Mutual aid or protection focuses on the goal of the concerted activity and whether the employee or employees involved are seeking to “improve terms and conditions of employment or otherwise improve their lot as employees.”<sup>16</sup> As with the element of

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<sup>14</sup> Even if Coworker 2 did not tell the Charging Party to report this to management (the Charging Party does not recall this aspect of the conversation), the conduct is still concerted as a “preliminary step to self-organization.” See *Meyers Industries (Meyers II)*, 281 NLRB at 887. The employees were discussing a shared workplace issue, Coworker 1's (b)(6), (b)(7)(C) comments, and the Charging Party solicited advice from Coworker 2 about how to handle the situation. The two employees do not have to agree to a fully-formed plan for the discussion to be considered concerted, as such a standard would permit employers to pre-empt almost all protected concerted activity. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (“inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.”).

<sup>15</sup> The Employer's contention that the Charging Party stated that the issue was not work-related and, therefore, could not be concerted activity is immaterial. The (b)(5)

<sup>16</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). See also *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, slip op. at 3.

concert, the standard for determining whether the purpose of the conduct was for mutual aid or protection is an objective standard.<sup>17</sup> The Charging Party's discussion with Coworker 2 about the upsetting<sup>(b)(6), (b)(7)(C)</sup> comments made by Coworker 1 clearly related to their terms and conditions of employment and their desire and right to be free from<sup>(b)(6), (b)(7)(C)</sup> hostility in the workplace.<sup>18</sup> The Board has repeatedly recognized that<sup>(b)(6), (b)(7)(C)</sup> discriminatory terms and conditions of employment are a matter of mutual concern for employees.<sup>19</sup> Further, the Board has confirmed that employee discussions about and efforts to draw management's attention to a coworker who is creating a difficult work environment involves conduct intended to improve a condition of employment.<sup>20</sup>

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<sup>17</sup> See note 13, *supra*; see also *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 n.10 (7th Cir. 1976) (“The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of ‘mutual aid or protection’ of employees.”).

<sup>18</sup> Cf. *Ellison Media Co.*, 344 NLRB 1112, 1113-14 (2005) (finding a discussion between two employees about a sexually suggestive comment a supervisor may have made to be protected concerted activity because it was “for the purpose of ‘mutual aid or protection’ within the meaning of Section 7 of the Act, i.e., the two employees’ common interest in eliminating offensive remarks from their workplace.”).

<sup>19</sup> See, e.g., *Churchill's Restaurant*, 276 NLRB 775, 777 (1985) (finding employee statement protesting employer's alleged discriminatory treatment of Hispanic employees was protected activity); *Vought Corp.*, 273 NLRB 1290, 1294 (1984) (employee statement was protected because it concerned employer's alleged racial discrimination), *enforced*, 788 F.2d 1378 (8th Cir. 1986); *Honeywell, Inc.*, 250 NLRB 160, 160–61, 161 n.6 (1980) (finding protected employee graffiti accusing the employer of racially discriminatory promotional practices), *enforced mem.*, 659 F.2d 1069 (3d Cir. 1981). See also *Dearborn Big Boy No. 3*, 328 NLRB 705, 705, 710, 710 n.33 (1999) (adopting ALJ finding that discussion about racial discrimination in hiring was protected).

<sup>20</sup> See *Gatliff Coal Co.*, 301 NLRB 793, 798 (1991) (affirming the ALJ's finding that an employee's concerted activity was protected because it concerned harassment by a fellow employee including rumors of adultery), *enforced*, 953 F.2d 247 (6th Cir. 1992); *Leslie Metal Arts Co.*, 208 NLRB 323, 326 (1974) (employees' walkout found protected when it was in response to management's failure to respond to an employee creating a hostile environment), *enforced*, 509 F.2d 811, 814 (6th Cir. 1975); *St. Rose Dominican Hospitals*, 360 NLRB 1130, 1132 (2014) (employee's petition concerning a coworker's attitude in the workplace and its real or perceived effect on working conditions was protected concerted activity and not merely personal griping).

Coworker 1's (b)(6), (b)(7)(C) rant to the Charging Party was not an isolated instance of Coworker 1's (b)(6), (b)(7)(C) at work. Coworker 2 had also been subjected to a (b)(6), (b)(7)(C) offensive comment from Coworker 1.<sup>21</sup> After the Charging Party discussed these incidents with Coworker 2, (b)(6), (b)(7)(C) told the Senior VP about the comment that Coworker 1 made to Coworker 2, in addition to the (b)(6), (b)(7)(C) rant (b)(6), (b)(7)(C) witnessed. The Employer considers it important to have a workplace free from (b)(6), (b)(7)(C) hostility, and the (b)(6), (b)(7)(C) expressed as much when (b)(6), (b)(7)(C) told the Charging Party that Coworker 1's identity was important because commentary like (b)(6), (b)(7)(C) was not acceptable in the workplace. The fact that the Employer claims that the Charging Party self-characterized the incident as not a workplace issue does not make (b)(6), (b)(7)(C) comments in the workplace any less of a workplace concern.<sup>22</sup> Therefore, the purpose of the Charging Party's conduct, both in discussing the situation with (b)(6), (b)(7)(C) coworker and in bringing the concern to management, was for mutual aid or protection.<sup>23</sup>

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<sup>21</sup> This fact distinguishes this case from the sexual harassment complaints at issue in *Holling Press* and *Fresh & Easy*. In *Holling Press*, the Board found that an individual's sexual harassment complaint, while concerted, was not for mutual aid or protection because the complaint was individual in nature and there was "no evidence that any other employee had similar problems—real or perceived—with a coworker or supervisor." *Id.* at 302. The Board majority in *Fresh & Easy* overturned *Holling Press* on this point, deciding that individual complaints about sexual harassment in the workplace are for mutual aid and protection. 361 NLRB No. 12, slip op. at 10. In his dissent, Member Miscimarra took issue with that aspect of the majority opinion, in part, because with an individual complaint of sexual harassment, the "bare possibility that the second employee may one day suffer similar treatment, and may herself seek help, is far too speculative a basis on which to rest a finding of mutual aid or protection." *Id.* at 16. It is unnecessary to weigh in on that issue here as there is clear evidence that more than one employee had a specific, shared concern (Coworker 1's (b)(6), (b)(7)(C) comments at work), and that the Charging Party's actions (reporting to the Employer the (b)(6), (b)(7)(C) rant Coworker 1 made to (b)(6), (b)(7)(C) and that Coworker 1 had made a prior (b)(6), (b)(7)(C) offensive comment to Coworker 2) reflected that fact. The Charging Party in no way threatened or bullied Coworker 2 into supporting (b)(6), (b)(7)(C), as was an issue in both *Fresh & Easy* and *Holling Press*. Rather, Coworker 2 admittedly encouraged the Charging Party to report the (b)(6), (b)(7)(C) rant to management, just like Coworker 2 had previously done when Coworker 1 made the (b)(6), (b)(7)(C) comment to (b)(6), (b)(7)(C)

<sup>22</sup> See, e.g., *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d at 328 n.10.

<sup>23</sup> Although the Employer asserts that it terminated the Charging Party because (b)(6), (b)(7)(C) conduct violated the final warning, that is not a valid defense to the Section 8(a)(1) discharge allegation because the conduct that the Employer says violated the warning

### C. The Charging Party's Conduct Did Not Fall Outside the Protection of the Act

The evidence does not support the Employer's claim that the Charging Party's conduct fell outside the protection of the Act and, therefore, she was lawfully terminated for repeating Coworker 1's comments. The Board has held that certain egregious conduct, which would otherwise be protected but significantly disrupts work processes or creates a hostile work environment, is not protected concerted activity. For example, in *Honda of America*, the Board found that the company lawfully terminated an employee for publishing a newsletter that included an offensive comment directed at a coworker and other offensive language, about which numerous employees had complained to management.<sup>24</sup> In that same light, in *Google, Inc.*, the Division of Advice recently concluded that the company lawfully terminated an employee for promoting gender stereotypes and making claims about biological differences between the sexes in a memorandum that (b)(6), (b)(7)(C) circulated among employees.<sup>25</sup> In that case, the company received many complaints about the stereotypes promoted by the employee in (b)(6), (b)(7)(C) memorandum, including from two applicants who withdrew their applications from the company after learning about the employee's statements.

Unlike those situations, the Charging Party was not promoting any of (b)(6), (b)(7)(C) own views, much less personally offensive views. (b)(6), (b)(7)(C) discussion of Coworker 1's rant and solicitation of advice regarding the comments was not directing (b)(6), (b)(7)(C) comments at other employees. The Charging Party was clearly upset by Coworker 1's statements and in no way condoned them, which was the reason (b)(6), (b)(7)(C) as asking Coworker 2 about how to deal with the comments in the first place. The Charging Party could not have engaged in protected concerted activity relating to the incident with Coworker 1 without discussing the incident and the comments themselves. There is also no evidence that any employees complained to management about the Charging Party's conduct or were offended by (b)(6), (b)(7)(C) conduct. Rather, Coworker 2 was supportive of the Charging Party's efforts to deal with and address Coworker 1's comments. Thus, the

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was protected concerted activity. Moreover, contrary to the Employer's argument, where the conduct for which an employer claims to have terminated an employee is protected concerted activity, the termination violates Section 8(a)(1) and no motive analysis under *Wright Line* is necessary. See e.g., *Neff-Perkins Co.*, 315 NLRB 1229, 1229 n.2 (1994); *Circle K Corp.*, 305 NLRB at 934.

<sup>24</sup> 334 NLRB 746, 749 (2001).

<sup>25</sup> *Google, Inc.*, Case 32-CA-205351, Advice Memorandum dated January 16, 2018.

Charging Party's conduct of repeating Coworker 1's comments while soliciting advice about how to deal with such comments is not the type of egregious conduct that the Board finds is outside of the protection of the Act.

## II. The Charging Party's Post-Termination Conduct Did Not Make [REDACTED] Unfit for Further Service

There is also no merit to the Employer's claim that it would have terminated the Charging Party in any case for [REDACTED] post-termination conduct, or in other words, that the Charging Party is not entitled to reinstatement and backpay remedies under the Act. The Board applies a different standard to post-termination conduct than the conduct for which an employee was terminated, because of the instigating aspect of an unlawful termination.<sup>26</sup> The Board "looks at the nature of the misconduct and denies reinstatement in those flagrant cases 'in which the misconduct is violent or of such character as to render the employee unfit for further services.'"<sup>27</sup> In doing this analysis, the Board "takes into account whether the misconduct was an 'emotional reaction' to the employer's own unlawful discrimination against the employee."<sup>28</sup> The Board does this because "employers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victim's natural human reactions to the unlawful acts."<sup>29</sup>

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<sup>26</sup> See *Alto-Shaam, Inc.*, 307 NLRB 1466, 1467 (1992) (distinguishing the standard for reinstatement of an employee accused of strike misconduct and the standard for evaluating misconduct by the employee after he has been discriminatorily discharged), *enfd.* 996 F.2d 1219 (7th Cir. 1993), *cert. denied* 510 U.S. 965 (1993).

<sup>27</sup> *Family Nursing Home*, 295 NLRB 923, 923 n.2 (1989), citing *C-Town*, 281 NLRB 458, 458 (1986).

<sup>28</sup> *Alto-Shaam*, 307 NLRB at 1467, citing *Blue Jeans Corp.*, 170 NLRB 1425 (1968). See also *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976) ("evaluation of postdischarge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge"), *enfd.* 548 F.2d 391 (1st Cir. 1977); *Precision Window Mfg.*, 303 NLRB 946, 946 (1991) (where the Board found a threat to kill the supervisor to be reactionary and part of the unlawfully discharged employee's emotional ramblings), *enforcement denied* 963 F.2d 1105 (8th Cir. 1992).

<sup>29</sup> *Hawaii Tribune Herald*, 356 NLRB 661, 662 (2011) (holding that the postdischarge statements of an employee disparaging his former employer did not bar his reinstatement and backpay under the "unfit for further service" test), *enfd.* 677 F.3d 1241 (D.C. Cir. 2012).

Applying that test, the Board has determined that outrageous and violent conduct such as the physical assault of a supervisor after an unlawful discharge bars reinstatement of a discriminatee.<sup>30</sup> A substantial threat of physical harm to a coworker three days after the unlawful termination is also sufficient to forfeit reinstatement and backpay.<sup>31</sup> However, the Board will not bar a full remedy for conduct that does not rise to that level, e.g., an employee calling his supervisor a “bald-headed a--hole” after being terminated for engaging in protected concerted activity,<sup>32</sup> or an employee using the “F word” with her boss and calling a coworker a “stupid, f--king bitch” in front of customers after being unlawfully terminated.<sup>33</sup>

The Charging Party’s emotional reaction to being unlawfully terminated does not prevent (b)(6), (b)(7)(C) from being accorded the full remedies of the Act. Although (b)(6), (b)(7)(C) used inappropriate and harsh language (including “bitch,” “trash,” and “bullshit”), (b)(6), (b)(7)(C) conduct did not rise to the level of misconduct precluding reinstatement.<sup>34</sup> The Charging Party did not engage in violence towards any of the (b)(6), (b)(7)(C) members of management who were present for (b)(6), (b)(7)(C) discharge nor did (b)(6), (b)(7)(C) threaten any of those managers. There is no evidence that other employees were present during the Charging Party’s outburst or that (b)(6), (b)(7)(C) disturbed the workplace in any way. After the Charging Party left the Employer’s facility shortly after being terminated, (b)(6), (b)(7)(C) engaged in no additional improper conduct. Therefore, the Charging Party’s post-termination conduct does not render (b)(6), (b)(7)(C) unfit for further employment or bar reinstatement and backpay.

Accordingly, the Region should issue a complaint, absent settlement, alleging that the Employer unlawfully terminated the Charging Party for engaging in protected concerted activity. Additionally, the Region should seek reinstatement and backpay for the Charging Party as part of the remedy.

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<sup>30</sup> *Family Nursing Home*, 295 NLRB at 923, n.2.

<sup>31</sup> *Alto-Shaam*, 307 NLRB at 1467 (the Board noted that the threat could not be considered an emotional reaction since three days had passed since the unlawful termination).

<sup>32</sup> *Systems with Reliability, Inc.*, 322 NLRB 757, 760-61 (1996).

<sup>33</sup> *Dearborn Big Boy No. 3, Inc.*, 328 NLRB at 709, 712. The Board adopted the ALJ’s findings which noted that such language had previously been tolerated in the workplace.

<sup>34</sup> See e.g., *Systems with Reliability, Inc.*, 322 NLRB at 760; *Dearborn Big Boy No. 3, Inc.*, 328 NLRB at 709.

/s/  
J.L.S.

ADV.21-CA-211066.Response.DunnEdwardsCorp (b)(6), (b)(7)(C)