

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

UNITED STATES POSTAL SERVICE,
Respondent

and

Case 05-CA-180590

LARRY THURMAN PRETLOW, II, an Individual
Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE DECISION AFTER REMAND AND ORDER
OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

The Complaint in this case alleges two related unfair labor practices. The first allegation is that Respondent discriminatorily mandated a 30-day evaluation for the Charging Party in retaliation for his union and protected concerted activity of invoking the protections of a collective-bargaining agreement and filing, and prevailing on, a grievance. Importantly, Respondent did not mandate, nor perform, such evaluations for other similarly situated employees. The second, related allegation is that Respondent held a meeting concerning that discriminatory evaluation, and terminated the Charging Party for his conduct during that meeting.

Following the August 1, 2017 issuance of the Honorable Deputy Chief Administrative Law Judge's (the ALJ) decision (ALJD) dismissing the Complaint in this case, counsel for the General Counsel (CGC) filed exceptions with the Board. As will be discussed in more detail below, the Board remanded the instant case for three purposes: (1) for the ALJ to make findings about whether the Charging Party's protected activity was a motivating factor in Respondent's decision to mandate a 30-day evaluation for the Charging Party; (2) for the ALJ to make credibility determinations regarding Manager Shakeel Khan's (Khan) explanation of why Respondent mandated the evaluation for the Charging Party;¹ and (3) for the ALJ to re-evaluate the Charging Party's discharge in light of the findings and conclusions regarding the performance evaluation allegation. *Postal Service*, 366 NLRB No. 39, slip op. at 1 (2018). The Board's remand specifically highlighted its "principle that 'misconduct provoked by an employer's unfair labor practice is not grounds for discharge' because employers should not be 'permitted to take advantage of their unlawful actions, even if employees may have engaged in

¹ Because the ALJ correctly determined not to credit Khan's explanations about why Respondent mandated the 30-day evaluation for the Charging Party, there is not extensive discussion on the issue. (ALJDAR: 4:24-34)

conduct that—in other circumstances—might justify discipline.” *Postal Service*, 366 NLRB slip op at 1, citing *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 3 (2003). That principle applies to the allegations in this case, and compels the finding of a violation for both the Evaluation and the termination.

After the Board’s remand, the ALJ correctly reached the conclusion of law that Respondent’s evaluation of the Charging Party violated the Act. Despite reaching that conclusion, the ALJ failed to properly analyze the unlawful evaluation as the precipitating factor for the discharge as mandated by *Supershuttle of Orange County, Inc.* But for the unlawful evaluation, Respondent would not have discharged the Charging Party because the events Respondent relied upon in the termination would not have happened. Further, the Charging Party’s conduct during the meeting about the evaluation (Evaluation Meeting) did not occur in a vacuum, as considered in the ALJD, but instead occurred in the context of Respondent’s unfair labor practice of discriminatorily mandating and conducting the Evaluation Meeting in retaliation for the Charging Party’s prevailing in an arbitration over a prior discharge. This unfair labor practice is intrinsically linked with the conduct Respondent used as the basis for discharging the Charging Party. Moreover, the Charging Party was engaged in protected conduct during the Evaluation Meeting, and his conduct during that meeting did not lose the protection of the Act. Thus, the Board should find the discharge to be unlawful.

II. BACKGROUND AND PROCEDURAL HISTORY

On March 21, 2017, the Regional Director for Region 5 (the Region) of the National Labor Relations Board (the Board) issued a Complaint and Notice of Hearing (the Complaint) in this case. The Complaint alleges that Respondent United States Postal Service (Respondent or the Postal Service) violated Section 8(a)(3) and (1) of the Act in two ways: (1) by

discriminatorily mandating an evaluation for the Charging Party Larry Thurman Pretlow, II (the Charging Party) and (2) then discharging him because of his conduct during a meeting concerning that unlawful evaluation. (GCX 1(c)).² The Complaint alleges both the decision to require the evaluation for the Charging Party and the subsequent discharge of the Charging Party as distinct violations of the National Labor Relations Act (the Act). An initial session of the hearing was held on May 31, 2017, and June 1, 2017 (2017 Session).

After the ALJ's initial decision dismissing the Complaint in its entirety (ALJD), CGC filed exceptions and the Board issued a decision and order remanding the case to the ALJ. Following the Board's remand, the ALJ issued an Order Reopening the Record (ALJ Order Reopening) for the purpose of receiving evidence related to the rule governing the performance evaluation Respondent mandated for the Charging Party and evidence as to whether employees similarly situated to the Charging Party received performance evaluations prior to him. (GCX 18). Pursuant to the ALJ Order Reopening, a hearing was held on July 2, 2018. (2018 Session). Following the 2018 Session, the ALJ issued a Decision after Remand on September 14, 2018. (ALJDAR).

III. FACTS

a. The Charging Party's Employment with Respondent

Respondent hired the Charging Party in March 2013 as a City Carrier Assistant (CCA) in the Engleside Branch Post Office (Engleside) in Alexandria, Virginia (Alexandria). On February 21, 2015, the Charging Party converted to the position of a full-time regular carrier. (City

² GCX__ refers to General Counsel's Exhibit followed by the exhibit number; RX__ refers to Respondent's Exhibit followed by exhibit number; "Tr. __:___" refers to transcript page followed by line or lines of the unfair labor practice hearing held between May 31 to June 1, 2017 and on July 2, 2018.

Carrier)³ (GCX 2; Tr. 26:21-24). Five days later, Respondent discharged the Charging Party.⁴ (GCX 3). The Charging Party filed a grievance over his discharge pursuant to the collective-bargaining agreement between his union, the National Association of Letter Carriers (NALC) and Respondent. Because the parties could not resolve the grievance, it was heard by an arbitrator on April 8, 2016. (Tr. 28:5-8; GCX 2). On April 22, 2016, the Charging Party prevailed in his grievance challenging the propriety of his 2015 discharge. (GCX 2). In her award, the arbitrator ordered Respondent to reinstate the Charging Party. (Ibid.). The Charging Party returned to work at Engleside on May 4, 2016. (Tr. 259:4-6). Because the Charging Party had only served as a City Carrier for five days at the time of his February 2015 discharge, the arbitrator ordered him to complete the remainder of his 90-day probationary period upon his reinstatement. (GCX 2). At the times relevant to the Complaint, the Charging Party worked at Engleside and was supervised Khan and Supervisor of Customer Service Reber Chergosky (Chergosky). (Tr. 27:15-20, 258:24-25). Khan played a role in the Charging Party's 2015 discharge which was the subject of the arbitration ordering the Charging Party's reinstatement. (ALJDAR 3:1-2; ALJD 2:7-9).

On the Charging Party's very first day back at work after prevailing in his grievance at arbitration, Khan informed the Charging Party he would have an evaluation on a PS Form 1750, despite declining to mandate the same for those similarly situated employees who preceded the

³ Respondent's Northern Virginia District Manager of Labor Relations Roberta Clemmer (Clemmer) testified "where it says city carrier, they're all regular carriers. Carrier technicians are regular carriers." (Tr. 445:18-19). For the sake of clarity, the terms 'city carrier', 'regular carrier', and 'carrier technician' should be considered interchangeable wherever they appear in the record.

⁴ The circumstances of the February 2015 termination are irrelevant in this proceeding because Respondent explicitly states that the Charging Party's June 2016 termination was based solely on his behavior at the Evaluation. (GCX 4).

Charging Party. (Tr. 157:15-158:2). Prior to that date, such evaluations were not in fact mandated for other similarly situated employees at Engleside.

Respondent held the Evaluation Meeting on June 8, 2016 in an office which was typically used by Respondent in disciplinary circumstances. (Tr. 46:22-24, 55:21-22, 56:13-24, 57:1-2). Present at the meeting were the Charging Party, NALC Shop Steward Dwayne Martin (Martin), Khan, and Chergosky. (ALJDAR 5:8-9; ALJD 3:28-29). The ALJ credited Martin's version of the meeting and found that, "Chergosky told the Charging Party that his work quantity was unacceptable. The Charging Party loudly objected. Shakheel Khan and the Charging Party began to argue loudly." (ALJDAR 5:1-16; ALJD 3:29-36). The ALJ went on to find, "there was no screaming, no threatening and no finger pointing. However, Martin took the Charging Party out of the room to calm him down," but upon returning to the meeting and being told his dependability was unacceptable, "[the Charging Party] loudly protested again." (ALJDAR 5:16-21; ALJD 36-41). This resulted in the Charging Party and Khan arguing again, but the ALJ found that "[the Charging Party] did not scream, bang on doors (as Khan testified) or otherwise behave in a bizarre manner." (ALJDAR 5:21-23; ALJD 1-2). The ALJ found the Evaluation Meeting ended when "[the Charging Party] stated that 'he could not take this.' Then he left the room again." (ALJDAR 5:23-26; ALJD 4:2). Solely based on the Charging Party's conduct at the Evaluation Meeting, Respondent discharged the Charging Party again on June 9, 2016, and issued him a letter to that effect. (Tr. 295:16-25; GCX 4).

b. Respondent's Rule Governing Evaluations of Probationary Employees

Respondent's Employee Labor Relations Manual EL-312 applies to all of Respondent's facilities. (RX 10, Tr. 352:22-25; 353:1-3). All of Respondent's probationary bargaining-unit employees must be given evaluations at the same 30, 60, and 80 day intervals prescribed by

Section 584.5 of Respondent's EL-312 Handbook. (Tr. 416:21-25). The evaluations conducted pursuant to EL-312 Section 584.5 must be documented on PS Form 1750s. (Tr. 417:6-8).

Article 12 of the collective-bargaining agreement between Respondent and the NALC in RX 13 defines the relevant probationary period, and it covers new City Carrier Assistants (CCAs) and City Carriers during their first 90 days of employment. (RX 13, Tr. 423:6-24). The rule requiring the evaluations documented in PS Form 1750s had been in place for at least five years prior to the 2018 Session. (Tr. 418:1-8).

c. Respondent's Application of Its Rule Governing Evaluations of Probationary Employees

One of the express purposes of the ALJ Order Reopening was to receive evidence about whether employees similarly situated to the Charging Party received probationary evaluations prior to that mandated for the Charging Party. (GCX 18). Though Khan testified during the 2018 Session that he was aware of three employees at Engleside prior to the Charging Party for whom PS Form 1750s were completed, the ALJ did not credit that testimony. (Tr. 449:15-450:11; ALJDAR 7:40-43). The record reflects no PS Form 1750s for any Engleside employees prior to the Charging Party's evaluation.

Martin testified he never saw or knew Khan to give probationary evaluations to regular carriers on probation, or any other evaluations for regular carriers on probation. (Tr. 55:1-7). Martin was familiar with evaluations for CCAs, which he testified were conducted quickly, on the open floor, less than two minutes in duration; Martin also testified that he had never been present for an evaluation in the back room like what the Charging Party experienced. (Tr. 55:8-22).

d. How Respondent Claims It Learned the Charging Party Had to Be Evaluated

In the 2017 Session, Khan testified “[w]e have meetings at the main office every week, so it’s one of the meetings the postmaster called that all managers went to, and that’s when I first discovered that we need to start doing it, because CCAs are turning regular faster than ever, and we need to make sure anybody less than 2 years, that we conduct their evaluations. That’s something the first time we discovered in 2016, it was the same years. I don’t recall the exact month, but I think it was a few months prior to this. I don’t remember the exact date.” (Tr. 137:19-25; 138:1-3).

When the subject of that meeting first came up again in the 2018 Session, Khan testified “I don’t remember the exact date. It was in one of the weekly meetings we have at the main office in conference room in April of that year, sometime around the spring, that’s all I remember.” (Tr. 439:11-14). After being shown a document which is not identified in the record but was used to refresh his recollection, Khan repeated that the meeting occurred in April. (Tr. 439:18-25; 440:1-25; 441:1-7). The ALJ specifically declined to credit Khan’s testimony on these points. (ALJDAR 4:24-34).

IV. THE ALJ’S DECISION

The ALJ noted that prior to the Charging Party, no evaluations of Respondent’s employees at Engleside were documented on PS Form 1750s. (ALJDAR 4:18-20). This resulted in the ALJ finding, “[the Charging Party] would not have been given a performance evaluation 30 days after his return to work-absent his protected activity[.]” and that “Respondent did not meet its burden that it would have given the performance evaluation after 30 days absent its animus towards [the Charging Party’s] filing and prevailing on his grievance.” (ALJDAR 7:30-

34). Accordingly, the ALJ concluded, “Respondent violated the Act, as alleged, in giving [the Charging Party] a performance evaluation on June 8, 2016.” (ALJDAR 7:37-38).

Notwithstanding the ALJ’s conclusion that Respondent violated the Act with respect to the evaluation, the ALJ stated, “Respondent was entitled to terminate the Charging Party for insubordination because scheduling him for a performance evaluation does not rise to the level of a ‘provocation.’” (ALJDAR 8:40-42). The ALJ further found that, “[a]ssuming arguendo that the scheduling of the performance evaluation was a ‘provocation,’ I conclude that it was such a minimal provocation that Respondent was entitled to terminate the Charging Party for insubordination by refusing to cooperate in it.” (ALJDAR 8:44-9:3). Ultimately, the ALJ concluded that Respondent terminated the Charging Party “for his insubordination in the evaluation, as opposed to terminating him for filing and prevailing in his grievance.” (ALJDAR 9:27-30).

V. THE EXCEPTIONS AND ARGUMENT IN SUPPORT

Upon concluding that Respondent violated the Act by mandating the evaluation and conducting the Evaluation Meeting, the ALJ erred in dismissing the discharge allegation. In particular, the ALJ incorrectly distinguished *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003) and *Kidde, Inc.*, 294 NLRB 840 (1989)⁵ from the instant case. Critical in the ALJ’s determination that Respondent’s discharge of the Charging Party did not violate the Act was that Respondent discharged the Charging Party for what the ALJ found to be insubordination during the Evaluation Meeting, as opposed to the Charging Party’s union and protected concerted activity of filing and prevailing with his grievance.

⁵ *Kidde, Inc.* stands for the same principle as *Supershuttle of Orange County, Inc.*, that alleged misconduct borne out by an employer’s unfair labor practice cannot be sanitized of its connection to that unlawful conduct and used as the basis for a discipline or discharge which will be considered lawful.

This analytical approach fails to account for the intrinsic link between the unfair labor practice of the evaluation and its bearing on the discharge of the Charging Party for conduct occurring *during the unlawful* Evaluation Meeting and thus fails follow the Board’s mandate in its remand of considering the Charging Party’s discharge in light of the lawfulness of the Evaluation Meeting. It is precisely because Respondent discharged the Charging Party for his conduct during the commission of an unfair labor practice that made the discharge itself unlawful. The ALJ’s factual findings support this same conclusion, but the ALJ nonetheless reached a different result, ignoring the clear causal connections between the protected activity, the discriminatory decision to conduct an evaluation, and the discharge decision. The ALJ should not have treated the Charging Party’s conduct during the Evaluation Meeting as occurring in a vacuum. The conduct forming the basis for the discharge is intertwined with Respondent’s unfair labor practice of mandating the evaluation, rendering the discharge an unfair labor practice as well.

a. Exceptions 1, 2, 3, and 4: Legal Standard – An Employer Cannot Provoke Its Employee into Engaging in Misconduct by Committing an Unfair Labor Practice and Then Use that Misconduct as the Basis to Discharge that Employee

An employer cannot, through its own unlawful conduct, provoke its employee into misconduct and then use that misconduct as a basis for an adverse employment action. See, e.g., *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849-850 (2001). This is because “misconduct provoked by an employer’s unfair labor practice is not grounds for discharge.” *Supershuttle of Orange County, Inc.*, 339 NLRB at 3. As the Board made clear in its decision remanding this case, the Board will not allow employers “to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might

justify discipline.” *Postal Service*, 366 NLRB No. 39, slip op. at 1 (2018) citing *Supershuttle of Orange County, Inc.*, 339 NLRB at 3 (2003).

i. The ALJ Erred in Distinguishing *Super Shuttle of Orange County, Inc.* and *Kidde, Inc.* from the Instant Case

The ALJ incorrectly distinguished *Supershuttle of Orange County, Inc.* and *Kidde, Inc.* by noting “[t]he investigations conducted in those two cases were undertaken with a motive to find a basis for terminating the discriminatees. As the Board states in *Supershuttle*, Respondent’s reasons for the termination in that case were pretextual. That is also evident in *Kidde*.” (ALJDAR 9:22-25).

The conduct at issue in *Supershuttle of Orange County, Inc.* involved a driver employee who was observed by a supervisor to be 40 miles away from that employee’s dispatch office. *Supershuttle of Orange County, Inc.*, 339 NLRB at 1. Upon returning to the dispatch office, the employee was suspended and directed to fill out an incident report, in which the employee made misstatements. *Id.* The Board found the respondent’s animus to the employee’s union activity “led to the investigation,” and the employee’s misconduct of making false statements during that investigation existed “only in the context of [r]espondent’s tainted investigation.” *Id.* The applicable collective-bargaining agreement in the case noted that, “[w]illfully falsifying any [employer] records” was a potential basis for immediate discharge. *Id.* at 2. Based on facts developed during the course of the respondent’s unlawfully motivated investigation into the employee’s conduct, the respondent believed the employee made misrepresentations in the first incident report he completed, and thus asked the employee to complete a second incident report. *Id.* The second incident report again contained information leading the respondent to conclude the employee had misrepresented facts. *Id.* The Board found the discharge to be pretextual because the respondent “relied solely on the misconduct *triggered by and elicited* during the

investigation[.]” Id. at 3. [emphasis in original]. Critical was that “the only claimed basis for [the] discharge, *the incident report* misrepresentations, did not exist independently of the unlawfully motivated investigation.” Id. [emphasis in original].

In finding the discharge of the employee in *Supershuttle of Orange County, Inc.* unlawful, the Board was unconcerned with the fact that the discharged employee had made false statements on incident reports which would ordinarily form a valid basis for the employer to discharge an employee. The reason the Board was not troubled by the misconduct of the employee in *Supershuttle of Orange County, Inc.* was, as noted in the Board’s remand in the instant case, because of the “principle that ‘misconduct provoked by an employer’s unfair labor practice is not grounds for discharge’ because employers should not be ‘permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline.’” *Postal Service*, 366 NLRB slip op at 1, citing *Supershuttle of Orange County, Inc.*, 339 NLRB at 3 (2003).

Just as the conduct forming the basis for the employee’s discharge in *Supershuttle of Orange County, Inc.* existed “only in the context of [r]espondent’s tainted investigation[.]” the Charging Party’s conduct forming the basis for his discharge in the instant case existed “only in the context of Respondent’s tainted [Evaluation].” Id. at 1. Like the employer in *Supershuttle of Orange County, Inc.* which “relied solely on the misconduct” elicited during an unlawfully motivated investigation, Respondent here relied solely on the Charging Party’s conduct during the unlawfully motivated Evaluation Meeting in making its decision to discharge him. Respondent’s termination letter establishes this direct connection. (GCX 4). As was the case with *Supershuttle of Orange County, Inc.*, “the only claimed basis for [the Charging Party’s]

discharge [...] did not exist independently of the unlawfully motivated” evaluation. *Supershuttle of Orange County, Inc.*, 339 NLRB at 3.

The discharge in *Supershuttle of Orange County, Inc.* was pretextual because the conduct forming the basis for the discharge was inextricably linked to an unlawful investigation motivated by that employer’s anti-union animus. That created a “direct connection between [the] antiunion animus and [the] discharge.” *Supershuttle of Orange County, Inc.*, 339 NLRB at 3. In the instant case, the Charging Party’s discharge was also pretextual because of the indelible connection between the unlawfully-mandated evaluation and the basis for the discharge. The evaluation was mandated by Respondent because of the Charging Party’s filing and prevailing with his grievance over his first discharge, conduct protected by the Act. But for the evaluation motivated by animus towards the Charging Party’s protected conduct, the basis for the Charging Party’s discharge would not exist. Respondent has not severed that link. Given that the Charging Party’s conduct forming the basis for his discharge did not exist independently of the unlawfully motivated Evaluation Meeting, like in *Supershuttle of Orange County, Inc.*, it necessarily follows that the termination of the Charging Party is unlawful.

The Board’s recent application of *Supershuttle of Orange County, Inc.* in *Bozzuto’s, Inc.* further compels a finding that the discharge is unlawful, as *Bozzuto’s, Inc.* is also factually similar to the instant case. The employer in *Bozzuto’s Inc.* violated the Act when it discharged an employee for refusing to attend a meeting that “was an outgrowth” of an earlier unfair labor practice. *Bozzuto’s, Inc.*, 365 NLRB No. 146, slip op. at 4 (2017). The Board there held the employee’s “refusal to attend the meeting, which the [r]espondent deemed insubordination, was not a lawful basis for discharging him.” *Id.*

Similar to the discriminatee in that case being unlawfully discharged for refusing to attend a meeting that was an outgrowth of an unfair labor practice, the Charging Party here was unlawfully discharged because of his conduct in a meeting that was itself an unfair labor practice.⁶ Just as the discriminatee's refusal to attend a meeting in *Bozzuto's, Inc.* could not serve as a lawful basis for his termination, the Respondent in this case could not lawfully discharge the Charging Party for his conduct at the Evaluation Meeting.

ii. The ALJ Failed to Properly Apply an *Atlantic Steel* Analysis to the Charging Party's Discharge

In refusing to apply *Atlantic Steel* the ALJ noted:

I do not believe I would reach a different result under *Atlantic Steel*, but I think that analysis is best (or only) suited for a situation in which the alleged discriminatee was disciplined or discharged for misconduct related to protected conduct. That was not the case with regard to [the Charging Party]. Moreover, [the Charging Party]'s conduct was not merely an "outburst," it constituted insubordination in effectively refusing management's direction to participate in a performance evaluation.

(ALJDAR 7:4-9).

The Charging Party was engaged in protected conduct at the time of his actions which formed the sole stated basis for his discharge. As the Board noted in *Stanford Hotel*, "When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford Hotel*, 344 NLRB 558, 558 (2005). On the Charging Party's first day of work upon being reinstated by the arbitrator, Khan informed the Charging Party he would have the evaluation. No employees at Engleside experienced a similar evaluation prior to

⁶ The fact that the evaluation in the instant case was itself an unfair labor practice directly resolves the reasons Member Miscimarra distinguished the application of *Supershuttle of Orange County, Inc.* in *Bozzuto's, Inc.* *Bozzuto's, Inc.*, 365 NLRB No. 146, n. 21 (2017) (Miscimarra, dissenting in relevant part).

the Charging Party. As the Respondent had already demonstrated its discriminatory conduct, the Charging Party's participation in a meeting about his work performance, in which he was represented by a union representative, constituted protected activity. The direct connection between the Charging Party's grievance and the Evaluation Meeting made the evaluation part of the *res gestae* of the Charging Party's protected conduct.

The Charging Party was at work and called into a meeting with his supervisors to discuss his work performance. At that meeting, he was represented by his NALC shop steward, Martin. Once in the Evaluation Meeting, the Charging Party protested the unlawful evaluation in the presence of a union representative. This conduct is fundamental Section 7 activity, and it cloaked the Charging Party with the protection of the Act. If not for the unfair labor practice committed by Respondent in mandating the evaluation and convening the meeting on it, the Charging Party would not have been in the room where the conduct forming the basis for his discharge occurred. Thus, through its unfair labor practice of discriminatorily singling the Charging Party out to scrutinize his work performance in ways not mandated for other employees, the Respondent engaged in significant provocation. As noted *supra*, and by the Board in the decision remanding this case to the ALJ, it is unlawful for an employer to discharge an employee for conduct provoked by that employer's unlawful conduct. See, e.g., *Postal Service*, 366 NLRB No. 39 (2018), *Bozzuto's, Inc.*, 365 NLRB No. 146 (2017), *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003), *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001).

A. Legal Standard

When looking at whether conduct by an employee loses the protection of the Act, “[t]he decision as to whether the employee has crossed that line depends on several factors: (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 an employer's unfair labor practice." *Atlantic Steel*, 245 NLRB 814, 816 (1979).

The four-factor analysis created by the Board in *Atlantic Steel* is the result of it taking "into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). Because of these realities, an employee's rights under the Act allow for "some leeway for impulsive behavior." *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

The first factor, the place of the discussion, is perhaps the most critical factor in the *Atlantic Steel* analysis. "As the Board's discussion in *Atlantic Steel* makes clear, the location where the outburst occurs is very significant in balancing the employee's right to engage in Section 7 activity 'against the employer's right to maintain order and discipline' in its establishment." *Plaza Auto Center, Inc.*, 360 NLRB 972, 978 (2014), citing *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286, 292 (9th Cir. 2011). The Board has "regularly observed a distinction between outbursts under circumstances where there was little if any risk that other employees heard the obscenities and those where that risk was high." *NLRB v. Starbucks Corp.*, 679 F.3d 70, 72 (2d Cir. 2012). The place of discussion is so significant because "[a]n employer's interest in maintaining order and discipline in his establishment is affected less by a private outburst in a manager's office away from other employees than an outburst on the work floor witnessed by other employees." *Plaza Auto Center, Inc.*, 360 NLRB at 978.

The second factor, the subject matter of the discussion, weighs in favor of protection when it deals with terms and conditions of employment. *Kiewit Power Constructors Co.*, 355

NLRB 708, 709 (2010) enfd. 652 F.3d 22 (D.C. Cir. 2011); *Plaza Auto Center, Inc.*, 360 NLRB at 978.

The third factor, the nature of the outburst, is concerned with whether the conduct is “so violent or of such serious character as to render the employee unfit for further service.” *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008). In a case where an employee engaged in premeditated conduct by himself instigating a meeting with a manager, in the presence of other managers, and then “lodged a series of profane verbal attacks” at the one manager in the presence of other managers, the third factor weighed heavily against the employee and he lost the protection of the Act. *Trus Joist MacMillan*, 341 NLRB 369, 371 (2004). Critical in the Board’s determination in that case was that the outburst “was not a spontaneous or reflexive reaction to the [provocation]” but that instead the employee “orchestrated a confrontational, face-to-face meeting on a date of his own choosing.” *Id.* Because of that fact, “[t]he provocation [was] balanced off by [the employee’s] premeditation.” *Id.*

The Board will distinguish “between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service.” *Kiewit Power Constructors Co.*, 355 NLRB at 710, citing *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973). In *Union Carbide Corp.*, an employee did not lose the protection of the Act when he called his supervisor a “fucking liar[.]” *Union Carbide Corp.*, 331 NLRB 356, 359-360 (2000).

An “employee did not lose Act’s protection by insubordinately referring to supervisor as a ‘fucking kid’ three times” *Plaza Auto Center, Inc.*, 360 NLRB at 979, citing *Felix Industries, Inc.*, 339 NLRB 195 (2003). In *Plaza Auto Center, Inc.* the Board, in ultimately concluding the employee did not lose the protection of the Act, was concerned with whether the conduct in question “solely involved obscene and denigrating remarks that constituted insubordination, or whether it also was menacing, physically aggressive, or belligerent.” *Plaza Auto Center, Inc.*, 360 NLRB at 974. “The question, however, is not whether the outburst was something to be encouraged—no outburst is—but whether it was so unreasonable as to warrant denying protections that the Act would otherwise afford.” *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 27 (D.C. Cir. 2011).

The final factor, whether the outburst was prompted, in any way, by an unfair labor practice, is another critical factor in the *Atlantic Steel* analysis. “[S]ubstantial weight must be given to the circumstances that provoke[]” the outburst in question. *Felix Industries, Inc.*, 339 NLRB at 196. However, it is not required that the unfair labor practice which provokes an outburst be found to be an unfair labor practice, or even be alleged. *Pier Sixty*, 362 NLRB No. 59, slip op. at 3, n. 4 (2015). Moreover, something as simple as a supervisor telling an employee to “shut up” can be sufficient provocation under an *Atlantic Steel* analysis. *Battle’s Transportation, Inc.*, 362 NLRB No. 17 (2015).

B. Analysis

The events occurring in connection with the Evaluation Meeting as found in the ALJD and the ALJDAR demand the conclusion that the Charging Party did not lose the protection of the Act. After the Charging Party was first told that his work quantity was unacceptable, he loudly objected. After this, Khan and the Charging Party began to argue at a high volume,

though there was no screaming, no threatening, and no finger pointing. Following that, Martin took the Charging Party out of the room to calm him down. Upon their return, Chergosky informed the Charging Party that his dependability was unacceptable. The Charging Party protested that assertion, and another loud argument between Khan and the Charging Party ensued. The Charging Party then stated “he could not take this” and left the room. The Charging Party did not scream, bang on doors, or otherwise behave in a bizarre manner. The ALJ found that Khan and the Charging Party testified consistently with regard to how the meeting ended and determined that it was the Charging Party’s conduct which prevented the meeting from being concluded. *Postal Service*, 366 NLRB No 39 slip op. at 3 (2018).

The first and fourth *Atlantic Steel* factors both weigh heavily in favor of the Charging Party retaining the protection of the Act. The meeting was in a back room and not in the presence of any other employees other than Martin, who was present in his capacity as a shop steward. What occurred between the Charging Party and Respondent in the back room is the sort of “private outburst” in a private room that would in no way interfere with Respondent’s “right to maintain order and discipline” in its workplace. *Plaza Auto Center, Inc.*, 360 NLRB at 978.

With respect to the fourth *Atlantic Steel* factor, while it is not required for the provocation to actually be an unfair labor practice, in the instant case the Charging Party’s conduct was provoked by Respondent’s unfair labor practice as found by the ALJ, as both occurred contemporaneously. The Respondent was actively committing an unfair labor practice at the time of the conduct in question. As discussed supra, the decision to conduct this evaluation was discriminatory in nature. Respondent should not be allowed to rely on “misconduct provoked by [its] unfair labor practice [as] grounds [for The Charging Party’s] discharge.” *Supershuttle of Orange County, Inc.*, 339 NLRB at 3.

The second *Atlantic Steel* factor also weighs in favor of the Charging Party retaining the protection of the Act. As this was a performance evaluation going over the Charging Party's past work performance and future expectations, being physically documented on a form of Respondent's, it is directly linked to the Charging Party's terms and conditions of employment.

Finally, the third *Atlantic Steel* factor does not weigh in favor of the Charging Party losing the protection of the Act. But for the evaluation, which was unlawful, the Charging Party's conduct for which he was discharged would not have occurred. *Supershuttle of Orange County, Inc.*, 339 NLRB at 3. This case is readily distinguishable from *Trus Joist MacMillan*, where an employee lost the protection of the Act because he engaged in a premeditated course of conduct with the express purpose of embarrassing one manager in front of other managers. *Trus Joist MacMillan*, 341 NLRB at 370-371. Here, the Charging Party was called by management into the very evaluation meeting that served as the provocation. The provocation by Respondent in this case was exceptionally strong, as the Charging Party had been previously terminated in 2015, an action in which Khan played a part. On the Charging Party's very first day back at work after his reinstatement, Khan revealed his discriminatory objective to the Charging Party. Then, within a month of his reinstatement by the arbitrator based on the Charging Party's grievance, Khan brought the Charging Party in a back room for a formal evaluation which was not mandated for other employees. The record reflects no other instances of Respondent performing evaluations in a similar manner at Engleside.

The Charging Party's conduct during the Evaluation Meeting did not consist of screaming, cursing, insults, finger pointing, or physical violence. The Charging Party did nothing more than argue loudly with Khan, who also raised his voice; the Charging Party also stated that he "could not take [it]." Because the "outburst", if this could even be accurately

described as such, was relatively mild and a “spontaneous or reflexive reaction to the [provocation],” rather than something premeditated by the Charging Party and resulting from improper motives, the Charging Party did not lose the protection of the Act. The “outburst” of the Charging Party here should not lose the protection of the Act because it effectively amounted to the Charging Party refusing to actively participate in an ongoing unfair labor practice being committed by Respondent against the Charging Party.

Assuming *arguendo* that refusing to participate in an unfair labor practice as the Charging Party did here amounts to insubordination, as the ALJ found, that does not end the *Atlantic Steel* analysis, as incorrectly stated in the ALJDAR. (ALJDAR 7:5-9). The Board has applied *Atlantic Steel* in circumstances where insubordinate behavior is involved. In *Plaza Auto Center, Inc.*, the Board noted “we must first determine the nature of [the] outburst, namely whether it solely involved obscene and denigrating remarks that constituted insubordination, or whether it also was menacing, physically aggressive, or belligerent.” *Plaza Auto Center, Inc.*, 360 NLRB at 974. That is because “substantial weight must be given to the circumstances that provoked” the Charging Party’s conduct. *Felix Industries, Inc.*, 339 NLRB at 196. The Charging Party’s conduct at the Evaluation Meeting was a direct and immediate response to Respondent’s unfair labor practice, with the Charging Party as the discriminatee in that unfair labor practice.

The Charging Party’s conduct during the Evaluation Meeting did not lose the protection of the Act. The evaluation and what occurred during the Evaluation Meeting cannot be considered as two separate incidents for the purposes of analyzing the lawfulness of the Charging Party’s discharge. The evaluation and the conduct during the Evaluation Meeting are indistinguishable from one another. The evaluation was an unfair labor practice which provoked the Charging Party into conduct which was then used as the sole basis for his discharge. Nothing

the Charging Party did was calculated or would have interfered with Respondent's ability to run its Engleside facility. Respondent's discharge of the Charging Party violated the Act, contrary to the ALJ's finding, precisely because the basis for the discharge was the Charging Party's conduct provoked by Respondent's unfair labor practice.

b. The ALJ Erred in Referencing and Discussing the Charging Party's Post-Discharge Conduct

The ALJ described the Charging Party's reaction on June 9, 2016, upon arriving at work and learning he was being discharged. (ALJDAR 6:20-24; ALJD 4:34-38). Respondent's stated reasons for discharging the Charging Party relate exclusively to his conduct at the Evaluation Meeting. (GCX 4). What the Charging Party did the next day when he was given the terrible news that he was being discharged is entirely irrelevant to these proceedings. CGC objected to testimony related to this subject. (Tr. 299:16-300:8).

As the ALJ properly ruled during the 2017 Session, the matters currently at issue are limited to those addressed in the Complaint—whether the Act was violated as alleged.⁷ (Tr. 240-241). The ALJ correctly ruled during the 2017 Session that Respondent could not have relied upon any events subsequent to the notice of termination for why Respondent terminated the Charging Party, one of the alleged violations of the Act. (Tr. 242:15-17). Because Respondent's stated reasons for discharging the Charging Party are limited to his conduct at the Evaluation Meeting, what happened the next day is irrelevant to the finding of a violation.

⁷ The Charging Party's post-discharge conduct is not relevant to the allegations pled in the Complaint. Paragraphs 12 and 13 of the Complaint describe conduct constituting the underlying alleged violations of the Act. Specifically, paragraph 12 alleges that Respondent gave a 30-day probationary evaluation to the Charging Party on June 8, 2016, and paragraph 13 alleges that Respondent discharged the Charging Party one day later, on June 9, 2016. Paragraphs 14 and 15 allege Respondent's motives in engaging in the conduct described in paragraphs 12 and 13. Paragraphs 16 and 17 of the Complaint allege the specific sections of the Act that were violated for engaging in the conduct referenced in paragraphs 12 through 15.

Respondent had decided to terminate the Charging Party and terminated him prior to the June 9, 2016 events described in the ALJDAR, thus there is no reason for the inclusion of these irrelevant details in the ALJDAR.

c. The ALJ Erred in Finding the Charging Party Would Likely Have Been Given an Evaluation at Some Time After He Returned to Work

The ALJ found “it likely that at some time after his return to work, the Charging Party would have been given a formal evaluation. I base this on the fact that management gave such evaluations to at least 3 other employees after the Charging Party’s discharge. There is no basis for concluding that these evaluations were given to provide Respondent cover for giving the Charging Party a formal evaluation.” (ALJDAR 8:1-5). The ALJ also concluded, in distinguishing *Supershuttle of Orange County, Inc.* and *Kidde, Inc.* that “investigation into potential misconduct of a known union supporter is different than a performance evaluation that every employee, particularly a probationary employee, should expect in some manner at some time.” (ALJDAR 9:29-31).

The rule which compelled the evaluation of the Charging Party *requires* Respondent to give the same evaluation to *all* probationary employees at the same prescribed intervals of 30, 60, and 80 days. (Tr. 416:21-25). As the Charging Party was reinstated to work on May 4, 2016, he would have completed his 80-day evaluation period under EL-312 on July 22, 2016. The earliest evaluation on a PS Form 1750 referenced by the ALJ in making the conclusion that the Charging Party would “likely” have been given an evaluation at some point is Jessica Walker’s (Walker) (GCX 12), which was completed on August 15, 2016, 25 days after the Charging Party’s 80th day. Farmer’s PS Form 1750 shows a 30-day and 60-day evaluation being completed on December 1, 2017 and January 2, 2018 respectively, but nothing beyond that.

(GCX 21). Vicky Hemphill, another Engleside employee, has a PS Form 1750 showing only a 30-day evaluation, completed on December 12, 2017. (GCX 22).

The only complete set of evaluations pursuant to EL-312 documented on PS Form 1750s at Engleside was that for Walker, (GCX 12), all sections of which were completed shortly after the Charging Party's probationary period would have ended. The fact that the only complete set of evaluations for an Engleside employee on a PS Form 1750 was completed shortly after the Charging Party filed the instant charge on July 21, 2016 makes it seem that it was done to provide Respondent with cover. The other two evaluations referenced by the ALJ as providing proof that the Charging Party would have "likely" been given an evaluation at some point actually show the opposite. Farmer's shows two evaluations rather than three, neither of which occurs at the prescribed interval of 30 or 60 days from her appointment date of October 28, 2017. (GCX 21). Hemphill's PS Form 1750 contains only one evaluation, the same 30-day evaluation the Charging Party was given for discriminatory reasons. There is no record evidence about what ultimately happened with Hemphill and Farmer to explain why they never got the complete set of evaluations which the ALJ assumes the Charging Party would have received. Significantly, it must be stressed that the ALJ found that Respondent violated the Act by deciding to evaluate the Charging Party.

Moreover, there is no record evidence about any of the other probationary employees at Engleside in the time subsequent to the Charging Party's discharge. Assuming arguendo that evaluations of probationary employees at Engleside after the Charging Party are relevant to the merits of the case, there is no way to make a meaningful comparison about how Respondent applied EL-312 during that time. The record does not establish which employees were on probation or how many of those employees were given evaluations documented on PS Form

1750s. Additionally, the only other evidence about evaluations occurring at Engleside was the informal, quick evaluations occurring on the open floor as described by Martin, which is vastly different than the evaluation of the Charging Party. There is no evidence these other evaluations referenced by the ALJ, assuming they actually occurred,⁸ were similar to the evaluation administered to the Charging Party.

Another problem with inferring that the Charging Party likely would have been given an evaluation at some point after his return is the lack of evidence that Respondent ever documented evaluations for any other City Carriers in Alexandria. The three PS Form 1750s referenced by the ALJ as the basis for concluding the Charging Party would have likely been given an evaluation are for CCAs at Engleside. None of the PS Form 1750s introduced by Respondent from other locations are for individuals with the title City Carrier.⁹ (RX 20-22). The Charging Party is unique amongst Respondent's probationary employees in this regard. (GCX 3).

Finally, it is improper to speculate as to how the Charging Party might have behaved in some unknown future evaluation. First, it must be stressed that the ALJ found the evaluation to be unlawful. Second, there is insufficient evidence to conclude that the Charging Party would have been given an evaluation absent his protected conduct which prompted the evaluation. Third, speculating about how the Charging Party might have reacted to some potential future evaluation is wholly irrelevant to the question of whether discharging the Charging Party for conduct during an unlawful evaluation violated the Act. The conclusions of law should relate to the facts and evidence in the record, rather than speculative future conduct.

⁸ There is no evidence about the circumstances surrounding the forms.

⁹ This is also inconsistent with Khan's testimony at the 2017 Session that CCAs were converting to carriers faster than ever. If that were the case, it would be reasonable to expect the Charging Party to not be the only City Carrier in Alexandria for whom a PS Form 1750 was completed.

VI. CONCLUSION

For the foregoing reasons, CGC request the Board grant the General Counsel's exceptions, find that Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully evaluating and then discharging the Charging Party, and order all appropriate remedies, including offering the Charging Party reinstatement, backpay, and expungement of the evaluation and termination from the Respondent's records. CGC further requests Respondent be required to post in its facility an appropriate Notice to all employees in the bargaining unit to advise them of Respondent's violations.

Dated at Washington, District of Columbia, this 12th day of October 2018.

Respectfully submitted,

/s/ Stephen P. Kopstein

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CERTIFICATE OF SERVICE

I hereby certify that the COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AFTER REMAND AND ORDER OF THE ADMINISTRATIVE LAW JUDGE in Case 05-CA-180590 was filed via E-Filing and served on the following individuals via electronic mail, on this 12th day of October 2018, on the following:

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