

**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 REPLY  
TO RESPONDENT'S ANSWERING BRIEF AND  
MOTION TO STRIKE EXTRA-RECORD EVIDENCE**

**I. INTRODUCTION**

Respondent's Answering Brief concedes it violated the Act when it mandated an evaluation of its employee, Larry Thurman Pretlow, II (the Charging Party), and conducted a meeting about that evaluation on June 8, 2016 (the Evaluation Meeting). Despite conceding its unlawful conduct, Respondent still urges the Board to reach the same erroneous conclusion as the Honorable Deputy Chief Administrative Law Judge (the ALJ), that the unfair labor practice of the Evaluation Meeting and the conduct occurring during that meeting are factually and legally distinct. Rather, it is the inextricable link between the unlawful Evaluation Meeting and the conduct occurring during that meeting which renders the discharge of the Charging Party unlawful as well. The Board's Decision and Order remanding this case makes clear that the application of *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003) compels the finding that if the Evaluation Meeting is unlawful, then so too is the Charging Party's discharge. As such, counsel for the General Counsel (CGC) respectfully requests the Board reject Respondent's arguments, and reverse the ALJ's dismissal of the discharge allegation.

Significantly, Respondent did not except to any of the findings or conclusions in the ALJ's Decision After Remand (the ALJDAR). Nonetheless, Respondent critiques various aspects of the decision in its Answering Brief. The Board should reject these critiques because of Respondent's failure to file exceptions. Respondent also misconstrues the theory of a violation and presents a straw-man argument geared to inoculate its discharge of the Charging Party based on his conduct in response to the unlawful Evaluation Meeting. Finally, Respondent relies on extra-record assertions and irrelevant considerations, which CGC respectfully requests the Board strike and disregard.

## **II. ARGUMENT**

### **A. Respondent Concedes it Violated the Act When it Mandated and Conducted the June 8, 2016 Evaluation Meeting of the Charging Party**

The ALJ found correctly in the ALJDAR that Respondent violated the Act when it mandated and conducted the Evaluation Meeting of the Charging Party. Respondent concedes this point, and did not except to the ALJ's finding of a violation. Despite conceding that mandating and conducting the Evaluation Meeting of the Charging Party was retaliatory in nature and violated the Act, Respondent in its Answering Brief asserts its "policy of evaluating probationary employees was a completely legitimate and innocuous exercise of well-established rules." (Respondent's Answering Brief at 2). That assertion is contrary to the ALJ's conclusion that "Respondent has not met its burden of proving that [the Charging Party] was not treated disparately in scheduling him for a performance review on his first day back to work or for giving him a performance review 30 days later." (ALJDAR 7:25-27). Respondent did not except to that portion of the ALJDAR, thus leaving the ALJ's conclusion intact. While Respondent produced evidence that employees at facilities other than the facility where the Charging Party worked were evaluated, Respondent failed to establish its *Wright Line* defense

that the same was done for employees at its Engleside Branch Post Office (Engleside) where the Charging Party worked. Again, Respondent did not except to the ALJ's finding that it failed in its burden to show the Charging Party was not treated disparately. (Ibid).

Respondent's arguments about how the operative rule governing probationary evaluations was implemented at Engleside, including that the Charging Party would likely have been evaluated at some point, should be disregarded. Respondent failed to meet its burden in establishing that the Charging Party was treated consistently with similarly situated employees at Engleside. Respondent alludes to record evidence going towards its practice of probationary evaluations, yet the ALJ found Respondent did not establish that it would have given the Charging Party an evaluation regardless of his protected activity. Because Respondent did not except to the ALJ's finding that the Evaluation Meeting violated the Act, Respondent is left with that legal conclusion in performing the subsequent analysis of whether basing the Charging Party's discharge exclusively on conduct occurring during that unlawful Evaluation Meeting rendered the discharge unlawful as well.

**B. Respondent Seeks to Ignore the Connection Between its June 8, 2016 Unfair Labor Practice and its Discharge of the Charging Party for Conduct Occurring Therein – Respondent's Discharge of the Charging Party Violated the Act**

Respondent's Answering Brief echoes the error in the ALJDAR of concluding the unlawful Evaluation Meeting and the Charging Party's conduct during the same are legally distinct from one another. Contrary to the ALJDAR and Respondent's Answering Brief, applicable Board precedent dictates the two are inextricably linked.

The Board stated in its Decision and Order Remanding in this case, "'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 No. 39, slip op. at 1 (2018), quoting *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 3 (2003).

In its Answering Brief, Respondent ignores the Board’s application of *Supershuttle*, and instead repeats the error in the ALJDAR. Both fail to make the connection between the unlawfully motivated Evaluation Meeting and what occurred during that Evaluation Meeting. In both this case and *Supershuttle of Orange County, Inc.*, the discharges are unlawful because “the only claimed basis for [the] discharge...did not exist independently of the unlawfully motivated” action of the respondents. *Supershuttle of Orange County, Inc.*, 339 NLRB at 3. In the present case, the asserted basis for the discharge—the Charging Party’s conduct in the Evaluation Meeting—did not exist independently from the Evaluation Meeting itself, the unlawfulness of which Respondent concedes.

Respondent incorrectly argues that the unlawfulness of the Evaluation Meeting has no bearing on the lawfulness of its discharge of the Charging Party for his conduct during that Evaluation Meeting. Contrary to Respondent’s assertions, what occurred during the Evaluation Meeting was not “an independent set of facts that [the Charging Party] alone was responsible for[,]” nor was the Charging Party’s conduct during the Evaluation Meeting an “unprovoked and[]a legitimate (and untainted) basis for his termination.” (Respondent’s Answering Brief at 5). Respondent’s assertions regarding the Charging Party’s conduct in response to the unlawful Evaluation Meeting lead Respondent to erroneously conclude “[t]he [ALJ] made the factual and legal finding that the motive for the June 8 meeting was disconnected from the motive to terminate [the Charging Party].” (Respondent’s Answering Brief at 6). Respondent’s argument is based on a flawed premise that Respondent’s motivations behind the Evaluation Meeting are

irrelevant once the Charging Party behaved in a certain manner during that Evaluation Meeting. That reasoning is inapposite to the Board's explanation in *Supershuttle of Orange County, Inc.* that employees are protected by the Act even if they "may have engaged in conduct that—in other circumstances—might justify discipline." *Supershuttle of Orange County, Inc.*, 339 NLRB at 3. If Respondent's reasoning here were applied to the facts of *Supershuttle of Orange County, Inc.*, it would not matter that the investigation against the discriminatee in that case was unlawfully motivated, because he was solely responsible for the incident report misrepresentations which formed the basis for his discharge. That is a misapplication of the Board's holding in that case. *Supershuttle of Orange County, Inc.* stands for the proposition that, absent the unlawfully motivated investigation, the discriminatee's conduct might have been a valid reason for discipline. The discharge in that case was unlawful because the basis for the discriminatee's termination would not exist if the employer had not conducted an unlawfully motivated investigation. The instant case is indistinguishable; the discharge in this case is unlawful because the basis for the Charging Party's termination would not exist if Respondent had not conducted an unlawfully motivated evaluation.

Respondent fails to accept that but for its unlawful Evaluation Meeting of the Charging Party, his conduct during the Evaluation Meeting, the sole reason for his discharge, would not exist. As in *Supershuttle of Orange County, Inc.*, if this were an ordinary evaluation of the Charging Party, similar conduct during such a lawful meeting could potentially form the basis for some sort of legitimate discipline. That is not the case at bar, as conceded by Respondent, because the Evaluation Meeting was itself unlawfully motivated by the Charging Party's protected conduct and a violation of the Act.

Finally, Respondent asserts the Evaluation Meeting was not motivated to be any sort of provocation, despite it being an unfair labor practice committed by Respondent rather than an ordinary evaluation of one of its probationary employees, something which had never before occurred at Engleside prior to the Charging Party. This is done without citing to any legal authority for the proposition that an unfair labor practice is not a “provocation,” even though cases like *Atlantic Steel* make it clear that an employer’s unfair labor practices can provoke employees. See, e.g., *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979); *Plaza Auto Center*, 360 NLRB 972, 973 (2014). Moreover, Respondent’s argument misconstrues the theory of a violation, and instead offers a straw-man argument regarding a meeting concocted with the intent to provoke the Charging Party into committing a dischargeable offense. CGC’s theory is not that Respondent designed to conduct the Evaluation Meeting in a manner intended to provoke the Charging Party into an emotional response. Rather, CGC’s theory of a violation is derivative; Respondent concedes the Evaluation Meeting was retaliatory (Respondent’s Answering Brief at 3), which, under *Supershuttle of Orange County, Inc.*, demands a conclusion that its discharge of the Charging Party was likewise unlawful.

**C. *Supershuttle of Orange County, Inc. and Kidde, Inc. Properly Apply to the Instant Case***

As argued in CGC’s Brief in Support of Exceptions, the ALJ erred in distinguishing *Supershuttle of Orange County, Inc. and Kidde, Inc.* In its Answering Brief, Respondent argues in support of distinguishing those cases that Respondent did not intend to manufacture the circumstances in which Respondent would acquire a basis to discharge the Charging Party (Respondent’s Answering Brief at 4-5). However, Respondent misreads the very case law the Board identified in its prior decision in this case.

In *Supershuttle of Orange County, Inc.*, the Board concluded the discharge was pretextual because the employer there “relied solely on the misconduct *triggered by and elicited* during the investigation[.]” *Supershuttle of Orange County, Inc.*, 339 NLRB 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].

Just as the discharge in *Supershuttle of Orange County, Inc.* was pretextual because of the link between the underlying unfair labor practice and the sole basis for the discharge, creating a “direct connection between [the] antiunion animus and [the] discharge[.]” the Charging’s Party’s discharge was unlawful because the reason for his discharge is directly connected to Respondent’s animus to the Charging Party’s protected activity, his conduct during the Evaluation Meeting. *Supershuttle of Orange County, Inc.*, 339 NLRB at 3. *Supershuttle of Orange County, Inc.* and *Kidde, Inc.* are not distinguishable, but are instead directly applicable to the instant case. An employer cannot, as here, provoke misconduct through an unfair labor practice and then use that conduct as grounds for a discharge. *Postal Service*, 366 NLRB No. 39 (2018); *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003); *Kidde, Inc.*, 294 NLRB 840 (1989); *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001); *Bozzuto’s, Inc.*, 365 NLRB No. 146 (2017). Respondent should not be permitted to benefit from its unlawful conduct as it seeks in the instant case.

**D. The Board Should Strike and Disregard Certain Portions of Respondent’s Answering Brief Which Assert Extra-Record Facts**

A fundamental principle of litigation is that parties establish the record, through witness testimony and exhibits moved into evidence. The judge controls the record by determining what

evidence is admissible. A party's attempt to rely on extra-record evidence is fundamentally opposed to that basic principle of the operation of litigation.

In its Answering Brief, Respondent makes various extra-record assertions to support the contention it was justified in discharging the Charging Party. The Board has granted "requests that [it] strike and disregard certain portions of [a] brief on the grounds that those portions of the brief incorporate facts not in evidence in support of [a party's] arguments." *Fund for the Public Interest*, 360 NLRB 877, 877 fn. 2 (2014).

On page 5 of its Answering Brief, starting with the section discussing the Charging Party's "hypersensitivity," Respondent makes assertions which are not supported by the record. The purpose of making these extra-record assertions relates to Respondent's arguments that while the Evaluation Meeting was itself unlawful, the Charging Party is responsible for how he reacted to this unfair labor practice, thereby supposedly sanitizing Respondent's decision to discharge him.

Respondent did not attempt to establish the alleged facts dealing with the Charging Party's communications with CGC or the ALJ on the record. Though irrelevant, CGC was not given the opportunity to cross-examine any witnesses or review any documents forming the basis Respondent's extra-record assertions. Respondent's Answering Brief also contains speculation about CGC's litigation strategy, including decisions about which witnesses to call and what questions to ask. This speculation by Respondent is inappropriate and not based on the record. Respondent's extra-record assertions are prejudicial for the aforementioned reasons. Accordingly, CGC respectfully requests the Board strike and disregard any extra-record assertions and speculation made by Respondent in support of its arguments.

Additionally, references to alleged facts which happened subsequent to the discharge at issue in the instant case are irrelevant to Respondent's decision to discharge the Charging Party solely based on his conduct during the unlawful Evaluation Meeting, and should also be ignored.

### **III. CONCLUSION**

As set forth in the Brief in Support of the CGC's Exceptions, and this Reply Brief, CGC respectfully requests that the Board affirm the ALJ's finding that Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily mandating an evaluation for the Charging Party. Further, CGC requests the Board find Respondent violated Section 8(a)(3) and (1) when it discharged the Charging Party. As conceded in its Answering Brief and its decision not to file exceptions, Respondent unlawfully retaliated against the Charging Party for his union activity by mandating and conducting the Evaluation Meeting. Respondent then discharged the Charging Party for conduct occurring during that unlawful Evaluation Meeting. Here, as in *Supershuttle of Orange County, Inc.*, Respondent relied solely on conduct which did not exist independently of its unfair labor practice, the Evaluation Meeting, and thus violated the Act in discharging the Charging Party. Respondent provoked the Charging Party by discriminatorily mandating and conducting the Evaluation Meeting. The Evaluation Meeting and the conduct occurring therein are inextricably linked. Both Respondent and the ALJ erred in failing to make this connection and instead by viewing the events as factually and legally distinct. Respondent raises no sound arguments to warrant sustaining that the ALJ's erroneous dismissal of the discharge allegation.

Dated at Washington, District of Columbia, this 9th day of November 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 REPLY TO RESPONDENT'S ANSWERING BRIEF AND MOTION TO STRIKE EXTRA-RECORD EVIDENCE in Case 05-CA-180590 was filed via E-Filing and served on the following individuals via electronic mail, on this 9<sup>th</sup> day of November 2018:

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