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Alle Processing Corp. d/b/a Meal Mart and Traverse Joel Wilson. Case 29–CA–213963

April 2, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On June 19, 2019, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions² and to adopt the judge’s recommended Order as modified and set forth in full below.³

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 1.

¹ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent’s exceptions implied that the judge’s rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge’s decision and the entire record, we are satisfied that the Respondent’s contentions are without merit.

We agree with the judge that Charging Party Traverse Joel Wilson engaged in protected union activity by refusing to sign the dues-checkoff form. *Keller Mfg. Co.*, 237 NLRB 712, 717 (1978), enfd. mem. in part 622 F.2d 592 (7th Cir. 1980); *Penn Cork & Closures, Inc.*, 156 NLRB 411, 414–415 (1965), enfd. 376 F.2d 52 (2d Cir. 1967), cert. denied 389 U.S. 843 (1967); see also *Bluegrass Satellite, Inc.*, 349 NLRB 866, 867 (2007) (“[T]he Board has long held that employees have a Section 7 right to refuse to sign a checkoff authorization.”) (citing cases). We find it unnecessary to pass on her finding that Wilson also engaged in protected concerted activity because such finding would not materially affect the remedy.

In evaluating Wilson’s predischarge outburst under *Atlantic Steel*, 245 NLRB 814 (1979), we agree with the judge that Wilson’s comment, “I will fix this on the street,” is too vague to constitute a threat and, therefore, does not weigh against Wilson retaining the protection of the Act. *Kiewit Power Constructors Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011). In doing so, we find it unnecessary to rely on the judge’s interpretation of Wilson’s comment as an indication that he planned to obtain outside assistance.

Further, although we do not condone the profane gesture Wilson made or his casual use of profanity during the January 30, 2018 meeting, we

“1. The Respondent violated Section 8(a)(3) and (1) of the Act on January 30, 2018, by discharging employee Traverse Joel Wilson because of his union activity.”

ORDER

The National Labor Relations Board orders that the Respondent, Alle Processing Corp. d/b/a Meal Mart, Maspeth, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Traverse Joel Wilson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Wilson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

find that this conduct does not weigh against Wilson retaining the protection of the Act. We emphasize the judge’s findings that the Respondent’s managers coerced Wilson into signing a dues-checkoff form, which Wilson was legally entitled not to sign, that the Respondent had no rule against profanity, and that the Respondent tolerated profanity among employees, even when directed at supervisors. See *Nexteer Automotive Corp.*, 368 NLRB No. 47, slip op. at 1 fn. 2 (2019). In reaching this conclusion, we find it unnecessary to rely on *Plaza Auto Center, Inc.*, 360 NLRB 972 (2014).

We also agree with the judge that Wilson’s postdischarge conduct was not so flagrant as to render him unfit for further service and therefore did not cause him to forfeit his right to the Board’s standard reinstatement and backpay remedies. In so finding, we do not rely on the judge’s determination that Wilson’s conduct of grabbing a coffee carousel was not a “deliberate or premediated” attempt to intimidate the Respondent’s officials because this conclusion does not reflect the Board’s standard for evaluating postdischarge misconduct. See *Hawaii Tribune-Herald*, 356 NLRB 661, 662 (2011) (holding that relief from standard remedies is only available when employer proves postdischarge misconduct that is “so flagrant as to render the employee unfit for further service” or that constitutes “a threat to efficiency in the plant”).

² In affirming the judge’s unfair labor practice findings, we do not rely on her citations to *Alcoa, Inc.*, 352 NLRB 1222 (2008), and *Comau, Inc.*, 358 NLRB 593 (2012), which were issued by panels subsequently found invalid by the Supreme Court in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), and *NLRB v. Noel Canning*, 573 U.S. 513 (2014), respectively.

³ We have amended the judge’s conclusions of law to conform to her unfair labor practice finding and modified her recommended Order to conform to the Board’s standard remedial language. We shall substitute a new notice to conform to the Order as modified.

(c) Compensate Wilson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the of the date that the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and, within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Maspeth, New York facility copies of the attached notice marked "Appendix" in English and Spanish.⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 30, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 2, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you because of your union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Traverse Joel Wilson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Traverse Joel Wilson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Traverse Joel Wilson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

Director for Region 29, within 21 days of the of the date that the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Traverse Joel Wilson, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ALLE PROCESSING CORP. D/B/A MEAL MART

The Board's decision can be found at <https://www.nlr.gov/case/29-CA-213963> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Brent Childerhose, Esq., for the General Counsel.
Jeffrey A. Meyer, Esq. (Nixon Peabody LLP),
of Jericho, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. This case was tried in Brooklyn, New York, on March 26, 2019. Traverse Joel Wilson (Wilson) filed a charge on January 31, 2018, amended on March 9 and April 25, 2018, alleging that Alle Processing Corp. d/b/a Meal Mart (Alle or Respondent) violated Section 8(a)(3) and (1) of the Act by discharging him at the behest of a labor union for refraining from becoming a member of the union and/or for declining to sign a dues-checkoff authorization.

The consolidated complaint in this matter issued on January 24, 2019, and the Regional Director for Region 29, issued an erratum on February 8, 2019. The consolidated complaint initially included allegations that Alle provided unlawful assistance and support to International Union of Journeymen & Allied Trades, Local 726 (Local 726 or the Union) by recognizing and entering into a collective bargaining agreement with Local 726 at a time when Local 726 did not represent an uncoerced majority of the bargaining unit employees, in violation of Section 8(a)(2) and (1). The consolidated complaint further alleged that Alle deducted dues from employees' weekly pay and required that

employees maintain membership in Local 726, in violation of Section 8(a)(2) and (1). Alle filed an answer on February 6, 2019, denying the Consolidated Complaint's material allegations. These allegations were resolved by the parties in an Informal Settlement Agreement reached prior to the opening of the hearing. (GC Exh. 3.) As part of the Informal Settlement Agreement, General Counsel and Alle withdrew the allegations of the Consolidated Complaint and Answer, respectively, related to the issues of unlawful assistance as described above. (GC Exh. 3.)

In addition, the consolidated complaint initially contained allegations against Local 726 based upon a charge filed in Case 29-CB-216248 filed by Wilson on March 9, 2018, and amended on April 25, 2018. The consolidated complaint alleged that Local 726 violated Section 8(b)(1)(A) by entering into a collective bargaining agreement with Alle at a time when the Union did not represent an uncoerced majority of the bargaining unit employees, and violated Sections 8(b)(1)(A) and (2) by accepting recognition from Alle and causing Alle to maintain an unlawful union security provision. The charge against Local 726 was also resolved between the parties prior to the opening of the hearing in an informal settlement agreement. (GC Exh. 2.) As part of the informal settlement agreement, General Counsel withdrew the allegations of the consolidated complaint related to the violations of Sections 8(b)(1)(A) and (2) of the Act, and Local 726 withdrew its Answer. (GC Exh. 2.)

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and Alle, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits in its answer and I find that at all material times it has been a domestic corporation with a principal place of business and office located at 56-20 59th Street, Maspeth, New York, and has been engaged in the manufacture and packaging of kosher food products for hospitals and stores. Respondent admits and I find that annually in the conduct of its business operations Alle sold and shipped from its Maspeth facility goods valued in excess of \$50,000 directly to customers located outside of New York State. Based on the foregoing admissions, I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(5) of the Act.

Ivan Talavera testified at the hearing that he is Alle's Production Manager and Plant Manager. (Tr. 15.) Moshe Ginsberg, who also testified at the hearing, handles Alle's Human Resources, including payroll. (Tr. 103.) Mamodou Diallo, also called by Alle, is the Director of Housekeeping at the Maspeth facility. (Tr. 142.) Charging Party Traverse Joel Wilson also testified at the hearing.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As admitted in its Answer, Alle manufactures and packages kosher food products for hospitals and stores at its Maspeth facility. (Tr. 17.) Alle employs between 350 and 400 employees at its Maspeth facility, in production, warehouse, shipping, and

receiving departments. (Tr. 17–18.) The facility consists of three buildings—the production building, the freezer/refrigerator building, and the dry goods building. (Tr. 25.) About 30 to 40 employees work in the warehouse department, which is located in the freezer building, on two shifts. (Tr. 18–19, 25.) The warehouse employees are the only employees that work in the freezer building. (Tr. 26.) There is one parking lot adjacent to both the freezer building and the production building. (Tr. 25.)

At the time of his discharge on January 30, 2018, Charging Party Traverse Joel Wilson had been employed by Alle for almost 10 years as a stock worker on the 6 p.m. to 2 a.m. shift. (Tr. 40–41.) The stock workers receive orders for product, place the requested items on a pallet, skin and pack them, and load the product on a truck for delivery the following morning. Tr. 41. About 20 employees worked on the 6 p.m. to 2 a.m. shift in the Annex or warehouse department, supervised by Jacob Gottlieb and Chaim Meir Rosenberg (also referred to as Amaya). (Tr. 41.) Wilson testified without contradiction that he was never disciplined during his 10 years of employment with Alle. (Tr. 102.) Wilson testified that Gottlieb and Rosenberg told him that he was the best worker on the crew, and testified that he received raises which more than doubled his hourly rate over his 10-year period of employment.¹ (Tr. 64, 67.)

Wilson had engaged in protected concerted and union activities long before the series of events which ultimately culminated in his discharge. Wilson testified without contradiction that in approximately 2015 he met with his co-workers in the warehouse department and prepared a statement requesting a wage increase, because the warehouse employees believed that they were not being paid fairly for the work that they were performing. (Tr. 42.) Wilson and a group of his co-workers then went together to Talavera’s office, where Wilson read the prepared statement and informed Talavera that the employees were prepared to go on strike. (Tr. 42–43.) Talavera told them there was no need to go on strike, and a week or two later the warehouse employees received pay raises, new equipment, and new uniforms. (Tr. 43.) Wilson also participated in an organizing campaign on behalf of Local 342, UFCW, in approximately 2010, attempting to convince his coworkers to vote for the union in an election which Local 342 ultimately lost. (Tr. 43.) During the summer of 2017, Wilson also took authorization cards from union representatives trying to speak to Alle employees in the parking lot. (Tr. 43–44.) Wilson spoke to these union representatives twice and distributed the cards to his co-workers, but his co-workers never returned them. (Tr. 44–45.)

Wilson was an outspoken opponent of Local 726 when it began its activities at Alle in late 2017. Wilson testified that in December 2017, an employee named Apple approached him and his co-workers on the loading dock carrying a clipboard containing a paper with names, signatures and dates. (Tr. 45–46.) Apple told Wilson that the paper was for the union that was going to represent the employees and said that the employees would get a 30 or 3-cent raise to cover the union dues which would be deducted from their paychecks. (Tr. 45–46.) Wilson told Apple

that that the employees were not signing and wanted to see a contract and additional information first. (Tr. 46.) Only one employee signed the paper at that time. (Tr. 46.) Apple tried to convince Wilson to sign the same paper a few more times, but Wilson refused to do so, asking whether he would get a raise. Tr. 46–47. Wilson testified that he discussed the Local 726 issue with about 10 to 12 of his co-workers every day. (Tr. 47.)

Towards the end of December 2017, the 20 warehouse department employees on Wilson’s shift attended a meeting with Talavera, Rosenberg, Gottlieb, and two representatives of Local 726.² (Tr. 47.) The Local 726 representatives introduced themselves, told the employees that they were going to represent them, and described the benefits and pay raises the employees would receive. (Tr. 47–48.) The employees began asking questions regarding the contract, with Wilson asking about health insurance and raises. (Tr. 48.) The Local 726 representatives stated that nothing could be done with respect to these issues in the Union’s first deal with Alle, because the Union had to “put in some time with the company.” (Tr. 48.) The employees repeatedly asked for a copy of the contract, and the Local 726 representatives stated that they did not have it with them and would get back to the employees later. (Tr. 48–49.) The Local 726 representatives had union authorization cards with them at the meeting but did not distribute them. (Tr. 49–50.) After the Union representatives were gone, Talavera told the employees, “I shouldn’t be telling you guys this but this is a good deal. During my past experience, I’ve seen companies go out of business or close down because they can’t afford a union.” (Tr. 49.) Wilson testified that after this meeting, he and his co-workers in the warehouse department discussed Local 726 on a daily basis, and decided that they would not sign anything pertaining to the Union because they saw no benefit to doing so. (Tr. 49–50, 68–69.)

It is undisputed that on January 1, 2018, Alle and Local 726 entered into a collective bargaining agreement recognizing Local 726 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time employees in the following departments: Meat, poultry, Deli Slicing, Freezer/Shipping, Production, Smokehouse, Mixers, Drivers, Housekeeping, Maintenance, Dishout Packing, Retort Production, R&D, Security and Warehouse; however, excluding all managers, confidential employees, office clericals, casual employees, professional employees, technical employees, guards and supervisors as defined by the National Labor Relations Act.

See also (R.S. Exh. 2, 3; Tr. 35.) This contract contains a union-security clause requiring that the bargaining unit employees become and remain members in good standing of Local 726, and requiring that, upon notice from the Union, Alle discharge any bargaining unit employee who has failed to remit dues and initiation fees. (R.S. Exh. 2, 4; Tr. 35.) The collective bargaining agreement was executed for Alle by Edwin Weinstock, its Chief Executive Officer. (R.S. Exh. 2, 19; Tr. 116–117.)

Thereafter, Local 726 representatives came to visit the facility

“explain” to the employees “that they were representing them.” Tr. 38. However, he stated that he “went in and out,” and did not describe the meeting in any detail. Tr. 38.

¹ Gottlieb and Rosenberg did not testify at the hearing.

² Talavera confirmed that this meeting took place and testified that the purpose of the meeting was for the Local 726 representatives to

and meet with the employees on Tuesdays. (Tr. 50.) Talavera testified that the purpose of these meetings was for the employees to sign dues deduction authorization forms for Local 726. (Tr. 38.) Wilson testified that when he arrived at work on January 9, 2018, Chaim Rosenberg told him that a union representative wanted to speak to him, and he was directed to an office about 10 feet from Talavera's. (Tr. 50–51.) There were two Local 726 representatives in the office, who asked Wilson if he was going to sign the paper. (Tr. 50–51.) Wilson asked what benefits the contract would have, and the Union representatives said that they could not do anything in their first deal. (Tr. 53.) Wilson refused to sign the paper, and returned to work. (Tr. 51, 53.) Wilson testified that he missed work the next Tuesday, and when he returned to Alle the next day his co-workers told him that they had signed the papers for the Union. (Tr. 51–52.)

Talavera testified that supervisors were provided with forms for Alle employees to sign authorizing the deduction of Local 726 dues from their paychecks and directed to give the forms to employees. (Tr. 36.) Talavera testified that he brought employees that refused to sign dues-checkoff authorizations into his office and explained that the employees needed to sign them. (Tr. 36.) Talavera testified that he had individual meetings with two employees—Lincoln Gashetti and Andrew Wagner—both of whom signed the dues-checkoff authorization form as a result. (Tr. 37.) Talavera testified that by the end of January 2018, Wilson was the only employee that was not having dues deducted from his paycheck and remitted to Local 726. (Tr. 39.)

On or about January 25, 2018, Kevin Barry of Local 726 sent a letter to Moshe Ginsberg entitled “Enforcement of Union Security Clause Regarding Traverse Wilson.” (R.S. Exh. 1; Tr. 105–06.) This letter notified Alle that Wilson had failed to pay dues and initiation fees as required by the Union and stated that in such a situation Alle was required pursuant to the collective bargaining agreement to terminate Wilson's employment within 15 days. (R.S. Exh. 1.) The letter contended that Local 726 had met with Wilson “multiple times to seek . . . enrollment in the Union,” but Wilson had “failed to comply.” (R.S. Exh. 1.) The letter stated that Local 726 was willing to meet with Wilson and Alle again “if there is any chance of avoiding the consequences of [Wilson's] actions and security compliance with our collective bargaining agreement.” (R.S. Exh. 1.)

Ginsberg testified that after receiving the Union's January 25, 2018 letter he called Local 726 and “told them that I really didn't want to get involved with get[ting] anyone to pay dues.” (Tr. 106.) Ginsberg testified that the Union responded that they intended to enforce the union security provision of the collective bargaining agreement. (Tr. 106–107.) Ginsberg testified that he therefore “made it my business to meet with” Wilson and explain that he was required to pay dues to Local 726 under the collective bargaining agreement. (Tr. 107.)

³ This statement does not appear in Wilson's affidavit prepared during the investigation of the charge. Tr. 71. Rosenberg did not testify at the hearing.

⁴ In his affidavit prepared during the investigation of the charge, Wilson stated that Talavera told him during this meeting, “You no longer work for the company; you're dismissed.” Tr. 73. Wilson testified that he was not sure whether Talavera meant by that statement that Wilson was discharged, because on many occasions Talavera had told him that

B. The Events of January 30, 2018

On January 30, 2018, Ginsberg and Talavera had a series of meetings with Wilson regarding his refusal to sign a dues-checkoff authorization for Local 726. Director of Housekeeping Mamodou Diallo was also present for a part of the discussions. All four testified regarding the events of that day.

Wilson testified that he arrived at work at his customary time on January 30, 2018 and changed into his uniform. (Tr. 54.) While he was waiting on the loading dock to begin work, his supervisor, Chaim Rosenberg, told him that Talavera wanted to speak with him in Talavera's office. (Tr. 54.) Wilson testified that while Rosenberg escorted him to Talavera's office, he told Rosenberg that there was no benefit to him in joining Local 726, and asked Rosenberg if he could increase his pay. (Tr. 70–71.) According to Wilson, Rosenberg responded, “this is over my head; I can't do nothing for you.”³ (Tr. 54.)

Talavera testified that his office, which he shares with plant manager Ralph Freedman, is on the first floor of the production building. (Tr. 27.) Wilson testified that the office is approximately 12 feet by 12 feet square. (Tr. 87.) The office has a door and contains two desks facing one another, one used by Talavera and one used by Freedman. (Tr. 27, 29, 87.) Talavera testified that he generally does not interact directly with warehouse employees, only other managers. (Tr. 26.) Talavera testified that warehouse employees visit his office two or three times a week to discuss work-related issues such as hours and vacations, but also stated that warehouse employees request vacation time from their direct supervisors. (Tr. 28–29.) Talavera also testified that he issues discipline to employees in his office. (Tr. 30.) Wilson testified that he visited Talavera in his office approximately once each year. (Tr. 55.)

Wilson testified that when he and Rosenberg arrived at the office, Talavera was alone sitting behind his desk. (Tr. 55.) Talavera began the meeting by stating that he needed Wilson to sign a paper for Local 726 containing a dues-checkoff authorization. (Tr. 55.) Wilson responded that the paper, “has no benefits towards me whatsoever; why would I sign it?” (Tr. 55.) After some additional discussion along these lines, Talavera told Wilson he was “dismissed.” (Tr. 55.) Wilson asked, “Does that mean I'm fired?” (Tr. 55.) Talavera responded, “No, you're dismissed.”⁴ (Tr. 55.) Wilson then returned to his workstation on the loading dock. (Tr. 55–56.) Wilson testified that he and Talavera may have raised their voices during this meeting, but there was no shouting during their conversation.⁵ (Tr. 55–56.)

Wilson testified that he called Lincoln Gashetti while walking through the parking lot on the way back to his workstation. (Tr. 56.) He described his conversation with Talavera, and, according to Wilson, Gashetti described a similar meeting with Talavera.⁶ (Tr. 56.) According to Wilson, Gashetti stated that he told

he was “dismissed” when sending Wilson home for the remainder of that particular day. Tr. 72–73.

⁵ Talavera contended during his testimony that his only meeting with Wilson on the day of his discharge was the meeting with Ginsberg and Diallo also present, discussed *infra*. Tr. 132.

⁶ Gashetti did not testify at the hearing, but Talavera testified that he met individually with Gashetti regarding Gashetti's executing a dues checkoff authorization, as discussed previously. Tr. 37.

Talavera he needed a day to consider whether or not to sign the dues-checkoff authorization, and Talavera sent him home. (Tr. 56.)

Wilson testified that after he returned to the loading dock, Rosenberg approached him to escort him back to Talavera's office, telling Wilson that someone else wanted to speak to him. Tr. 56. When Rosenberg and Wilson returned to Talavera's office, Moshe Ginsberg was also present. (Tr. 56–57.) Talavera was seated behind his desk, while Ginsberg, Rosenberg and Wilson remained standing. (Tr. 57.) Wilson testified that he had never met Ginsberg before. (Tr. 57.)

Wilson testified that Ginsberg began the meeting by telling him, "I've heard great things about you. You've been working here 10 years and we would like to keep you another 10." (Tr. 57.) Ginsberg then told Wilson that he needed to sign the agreement to pay dues to Local 726. (Tr. 57, 77–78.) Wilson responded that there were no benefits whatsoever for him in the contract, so he was not going to sign it. (Tr. 57.) Ginsberg stated that the arrangement he had with Local 726 obligated the entire company to sign. (Tr. 57.) Wilson asked Ginsberg whether he could increase Wilson's pay or do anything else for him before he signed, and Ginsberg said that he could not bargain with Wilson directly because of his contract obligations with the Union. (Tr. 74–76.) According to Wilson, Ginsberg and Talavera told him repeatedly that he had to sign or he was dismissed. (Tr. 57–58.) Wilson asked them whether "dismissed" meant that he was fired, stating "If I'm fired, you tell me I'm fired." (Tr. 58.) Wilson testified that Ginsberg and Talavera continued to use the word "dismissed," so he left the office to calm down.⁷ (Tr. 58.) Wilson testified that there was screaming and shouting at this meeting. (Tr. 57.)

After leaving Talavera's office, Wilson went outside, and in the area between the parking lot and the loading dock he called an attorney to try to obtain advice about the situation before he returned to the office. (Tr. 58.) Wilson testified that based upon his understanding that the other warehouse employees had signed the forms and his belief that Gashetti was going to sign as well, he had no choice but to do the same. (Tr. 58.)

Wilson then returned to Talavera's office; Diallo was now present as well, and everyone was standing. (Tr. 58–59.) Wilson testified that he was behind both of the desks in the office, and the three managers were on the other side. (Tr. 60.) Wilson testified that he said, "You got me, I'm going to sign it," and Ginsberg thanked him and handed him the dues-checkoff authorization form. (Tr. 59.) Wilson said to Ginsberg, "Do you know that you're forcing me to do something I do not want to do?" Ginsberg responded, "Yes, I know." (Tr. 59.) Wilson testified that he signed the form, and after he did so Ginsberg said, "Welcome, glad to have you," and reached out to shake his hand.⁸ (Tr. 59.) Wilson testified that he believed that Ginsberg was mocking him by doing so, so he raised his middle finger to Ginsberg. Tr. 59, 85. Ginsberg stated, "Now I have a reason to fire you;

insubordination." (Tr. 59–60, 89.) Wilson said that Ginsberg then ripped up the paper that he had signed. (Tr. 59–60.) Wilson told Ginsberg, "don't be in your feelings now," or not to take offense at the gesture, because Ginsberg was aware that Wilson was upset about having been required to sign the paper. (Tr. 59, 85–86.) Wilson stated that he had signed the paper and was ready to work. (Tr. 85–86, 89.) Ginsberg stated that he had never been disrespected like that in his life. (Tr. 62, 85.) Ginsberg told Wilson that Wilson was fired.⁹ (Tr. 90–91.) Wilson then stated to the managers, "Fuck all y'all. Y'all think I need this job?" (Tr. 60.) Wilson paced around for a few seconds, went to grab the door and paused; then he left the office. (Tr. 60.) Wilson said that the managers "jumped" or "twitched" when he grabbed the door to leave. (Tr. 91–92.) Wilson testified that he and Ginsberg shouted and used profanity, with Ginsberg telling him "fuck you" two or three times toward the end of the meeting. (Tr. 63, 85, 99.) Wilson testified that the meeting did not "get physical" in any way. (Tr. 62.)

Moshe Ginsberg also testified regarding the meeting with Wilson, Talavera, and Diallo. As discussed above, Ginsberg testified that he had "made it my business" to arrange the meeting after receiving the letter from Local 726 stating that the Union intended to enforce the union security provisions of the collective bargaining agreement with respect to Wilson. (Tr. 106–107; R.S. Exh. 1.) Ginsberg testified that when he entered Talavera's office, Talavera and Diallo were sitting, and Talavera asked Diallo to stay. (Tr. 107.)

Ginsberg testified that when Wilson arrived, he told Wilson that he had received a request from the Union that Wilson pay dues, and asked him to sign a form the Union had provided, which contained areas for Wilson's signature authorizing Alle to deduct dues, for the welfare fund, and for a life insurance policy being offered. (Tr. 108.) According to Ginsberg, Wilson said that he didn't get anything out of it and asked to be given a reason to sign the form, specifically mentioning a raise. (Tr. 108.) Ginsberg responded that he had negotiated the contract with the Union on behalf of the employees; the contract was settled and the Union was just trying to collect dues. (Tr. 109.) Ginsberg asked whether Wilson wanted additional vacation time, attempting to offer a humorous example of the sort of benefit that he was unable to actually grant. (Tr. 108, 121–122.) Ginsberg stated that he was not there to bargain or negotiate with Wilson. (Tr. 109.) Wilson then turned to Diallo and said that he was not upset with him. (Tr. 109.) Wilson said, "I know how to get what I want. If I get what I want then we can talk." (Tr. 109.) Ginsberg stated again that the company was not in a position to negotiate because all of the employees were covered by the same agreement. (Tr. 109–111.) Ginsberg testified that Wilson became more agitated during the discussion. (Tr. 109.) Ginsberg then told Wilson that if he did not sign the dues-checkoff authorization, the Union was going to enforce the union security clause and request that Wilson be discharged. (Tr. 111.)

⁷ Ginsberg testified that he could not recall what, if anything, Talavera said during this meeting. Tr. 110.

⁸ Ginsberg testified that he did not remember offering his hand to Wilson at the meeting. Tr. 125. Talavera also could not recall whether Ginsberg offered his hand to Wilson. Tr. 138.

⁹ This statement does not appear in Wilson's affidavit provided during the investigation, and Wilson did not testify on direct examination that Ginsberg explicitly told him that he was fired during this meeting. Tr. 90–91.

Ginsberg testified that Wilson stated, "I'm a streets guy, I know how to get what I want, and...I have my ways of getting what I want." (Tr. 111.) Ginsberg testified that this "didn't faze me much." (Tr. 111.) According to Ginsberg, Wilson then said that Ginsberg was "a motherfucker" and didn't understand him. (Tr. 112.) Wilson stated, "none of this is my problem...You made a contract that's nothing to do with me," and "I don't have to sign this...I could do this my way." (Tr. 112.) Ginsberg testified that Wilson said several times, "you and me, we can take this on the street, I can find this on the streets, I know how to get to you." (Tr. 112.) Ginsberg testified that he "brushed that off." (Tr. 112.) Ginsberg testified that after some further discussion, Wilson decided that he would sign the dues-checkoff authorization. (Tr. 113.) Ginsberg testified that he told Wilson, "That's a good idea, sign it," and Wilson raised his middle finger. (Tr. 113.) Ginsberg stated, "you're only giving me reasons to fire you," and "that doesn't help anything." (Tr. 113.) Ginsberg testified that prior to this point the room was quiet, but then Wilson lost his temper and the conflict escalated. (Tr. 119.) Wilson responded, "I can get to you whenever I want . . . whenever I want I can find you...this is how I work, I'm a streets guy."¹⁰ (Tr. 113.) Wilson stated, "Eventually you have to leave this place, so I'll get you then." (Tr. 113.) Ginsberg testified that at this point Wilson was screaming and yelling. (Tr. 113.)

Ginsberg testified that at that point, Wilson "grabbed" a small stand or carousel containing "K-cups," or individual servings of coffee for use in a coffee machine, which sat on top of the coffee machine in the office. (Tr. 113–114, 123, 139–140.) This stand is approximately 8 inches tall and holds about 25 small plastic cups containing individual servings of ground coffee and milk. (Tr. 123.) Ginsberg testified that Wilson grabbed the stand and lifted it up, and Talavera grabbed Wilson's hand.¹¹ (Tr. 124.) Ginsberg testified that Wilson "was in the middle of throwing" the coffee stand and also testified that Wilson was "planning on throwing it," when Talavera grabbed his hand. (Tr. 124.) Talavera and Diallo also placed themselves between Ginsberg and Wilson. (Tr. 113–114, 124.) Wilson said to Talavera, "don't touch me," and Talavera let him go. (Tr. 114.) Talavera told Wilson several times to punch out, get out, and go home. (Tr. 114.) Wilson began yelling and screaming, saying "this is my job, and you can't fire me over this," or something similar. (Tr. 114.) Wilson then left. Ginsberg testified that Wilson was about 4 feet away from him during the meeting. (Tr. 127.)

Talavera also testified that Ginsberg began the meeting by telling Wilson that he had to sign the dues-checkoff authorization because of the letter that Ginsberg had received from Local 726. (Tr. 132–133.) Wilson said that he did not want to sign, because he hadn't seen any contract, and asked how signing would benefit him. (Tr. 133.) Ginsberg responded that there was a contract that the company had to follow, and that the entire issue had nothing to do with Wilson personally. (Tr. 135.) Talavera testified that his memory of the rest of the conversation was less than specific. (Tr. 135.) However, Talavera testified that Wilson said that he would sign the paper. (Tr. 135.) After he did so,

¹⁰ Wilson denied making any such statement to Ginsberg during his testimony. Tr. 96–97.

Ginsberg said, "thank you very much," and "It's a smart decision that you're making." (Tr. 135, 138.) Wilson then "flipped the finger" to Ginsberg. (Tr. 135–136.) Ginsberg stated that Wilson had "crossed the line," with behavior that was "insubordination and disrespectful, and he was being terminated." (Tr. 136, 138–139.)

Talavera testified that Wilson then grabbed the small carousel containing "K-cups" for use in the coffee machine. (Tr. 139–140.) Talavera testified that the carousel was about 1 ½ feet tall. (Tr. 140.) Talavera placed one of his hands over Wilson's hand that was holding the carousel. (Tr. 140–41.) Wilson told Talavera "don't touch me," so Talavera removed his hand and Wilson then left the office. (Tr. 141.)

Diallo testified that on January 30, 2018, he was discussing a cleaning task with Talavera in his office when Ginsberg and Wilson arrived. (Tr. 144.) Diallo began to leave, but Talavera asked him to stay, so he stood in a corner of the office during the ensuing discussion. (Tr. 144.) Diallo also testified that Ginsberg began the meeting by directing Wilson to sign a document, and Wilson refused. (Tr. 144.) Diallo also stated that Wilson said that the document did not benefit him, and Ginsberg responded that that was not his concern, because he was required to comply. (Tr. 145.) Diallo stated that Wilson said that as a leader and as an individual employee he would not sign a paper that did not benefit him. (Tr. 145.) Diallo testified that Ginsberg "reminded him what kind of leadership he has in the company," and Wilson continued to discuss why he and his co-workers did not want to sign the document, stating that his coworkers had signed "behind his back." (Tr. 145.) Ginsberg told Wilson not to "go off topic," but "Just sign," which would "make everything easier." (Tr. 145.) Diallo stated that at one point Wilson "showed sign that he was about to sign," but then "turn[ed] around and g[a]ve a finger to" Ginsberg. (Tr. 146.) Ginsberg then stated, "listen, now you cross a line," "if you go that way, I will fire you." (Tr. 146.) According to Diallo, Ginsberg took the document and asked "what can you do for me for me to sign...because I am from the street. And life is kind of—it's hard. But you got to show me something." (Tr. 146–147.) Ginsberg again stated, "this is not a negotiation. I'm not here for representing the union. I'm representing the company." (Tr. 147.) Ginsberg stated that if Wilson wanted to discuss another issue with him, "my office is any time it's open for you." (Tr. 147, 151–152.) Diallo testified that at that point Wilson looked at him and said, "you're my brother," "I wouldn't say nothing to you, but I will fix this on the street." (Tr. 147.) Ginsberg responded, "Now you're threatening me," "now you're really fired," and Talavera told Wilson to punch out and go home. (Tr. 147.) Diallo testified that Wilson used the word "fucking" repeatedly during the conversation, but Ginsberg and Talavera did not use any profanity. (Tr. 148–149.)

Diallo testified that as Wilson was leaving the office he grabbed the coffee carousel, and Diallo and Talavera stepped in between Wilson and Ginsberg. (Tr. 147–148.) After Wilson picked up the carousel, Talavera put one open hand on Wilson and said, "be smart." (Tr. 149–150.) Wilson told Talavera not

¹¹ Wilson was asked on cross-examination whether he recalled ever trying to throw a coffee machine at Ginsberg during this meeting, and said no. Tr. 97.

to touch him, and then left the office 15 to 30 seconds later. (Tr. 147–148, 150.) Diallo told Ginsberg to take it easy and go home, and then returned to his own work. (Tr. 152–153.)

Wilson testified that after he left the meeting with Ginsberg, Talavera, and Diallo, he went back to the annex and said good-bye to Rosenberg, Gottlieb, and his co-workers. (Tr. 60–61.) Wilson testified that while walking through the parking lot on his way to the locker room in the production building to change out of his uniform, he saw Ginsberg about 15 feet away, but the two did not interact. (Tr. 61.) After changing his clothes, Wilson left the premises. (Tr. 61.)

Talavera testified that he instructed a security guard to call the police regarding the incident. (Tr. 141.) However, Talavera testified that there was no difficulty in getting Wilson to leave the facility after his discharge.¹² (Tr. 142.) No police report was filed, and there was no written record of this incident prepared by Alle. (Tr. 126, 141–142, 153.)

III. DECISION AND ANALYSIS

A. Credibility Resolutions

A decision in this case necessarily involves an assessment of witness credibility. Credibility determinations require consideration of the witness' testimony in context, including factors such as witness demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003); see also *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014). Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). It is not uncommon in making credibility determinations to find that some but not all of a particular witness' testimony is reliable. See, e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014).

In making credibility resolutions here, I have considered the witnesses' demeanor, the context of their testimony, corroboration via other testimony or documentary evidence or lack thereof, the internal consistency of their accounts, and the witnesses' apparent interests, if any.

B. The Discharge of *Traverse Joel Wilson on January 30, 2018*

General Counsel contends that Alle unlawfully discharged Wilson on January 30, 2018, for his protected activity in refusing to sign a dues-checkoff authorization for Local 726 at the meetings with Ginsberg, Talavera and Diallo. Alle contends that Wilson's discharge did not violate the Act on two grounds. First, Alle asserts that Wilson was not engaged in protected activity during the events on January 30, 2018, that culminated in his discharge. Alle further contends that even if Wilson was

engaged in protected activity, he lost the protection of the Act by virtue of his statements and conduct at the January 30, 2018 meetings.

1. Wilson was engaged in protected activity during his meetings with Talavera, Ginsberg, and Diallo

As an initial matter, I find that Wilson was engaged in protected activity during his meetings with Talavera, Ginsberg, and Diallo. It is well settled that the Act "guarantees to each employee the right to determine for himself, free from coercion, whether he shall sign a checkoff authorization or not." *Comau, Inc.*, 358 NLRB 593, 596 (2012), quoting *Herman Bros., Inc.*, 264 NLRB 439, 442 (1982); see also *Bluegrass Satellite, Inc.*, 349 NLRB 866, 867 (2007). Thus, Wilson's repeated refusals during the January 30 meetings to execute dues-checkoff authorizations for Local 726, despite Talavera and Ginsberg's exhortations, and his protests and arguments against doing so, constituted protected activity.

In this regard, I credit Wilson's testimony that he met with Talavera and his supervisor Chaim Rosenberg earlier during his shift on January 30, and that during this meeting Talavera directed Wilson to sign a dues-checkoff authorization and Wilson refused. Wilson's account of his initial meeting with Talavera and Rosenberg on January 30 was detailed, internally consistent, and consonant with the events which followed. Talavera by contrast provided testimony, which was vague, evasive, and generally less credible overall than Wilson's testimony on this issue. And although Talavera testified that his only meetings with Wilson on January 30 were the meetings with Ginsberg and Diallo present, Talavera also admitted that he had individual meetings with other warehouse employees where they signed dues-checkoff authorizations. (Tr. 36–37, 132.) Thus, the evidence establishes that Wilson's January 30 meeting with Ginsberg, Talavera, and Diallo followed an earlier meeting with Talavera, all convened for the specific purpose of convincing Wilson to sign a dues-checkoff authorization for Local 726.

Alle contends that Wilson's conduct at the January 30 meetings did not constitute concerted activity protected under Section 7 of the Act, because Wilson acted solely for his own personal benefit by requesting a pay raise or other personal concessions in exchange for executing the dues-authorization form. posthearing brief at p. 7–8, citing *Quicken Loans, Inc.*, 367 NLRB No. 112 (2019).¹³ Wilson testified that after Ginsberg directed him to sign the dues-checkoff authorization he asked whether the company would increase his pay or "do anything for me" in exchange for signing. Tr. 74. However, I do not find that Wilson's comments in this respect establish that his conduct at the January 30 meetings was not protected because it was not concerted in nature. First of all, pursuant to the cases discussed above Wilson's refusal to sign the dues checkoff was protected regardless of the rationale he articulated for declining to do so. In addition, however, I credit Diallo's testimony that Wilson specifically linked his own refusal to execute the dues checkoff

¹² Talavera confirmed that Wilson would have had to go to the locker room to change out of his work uniform before leaving the premises. Tr. 142.

¹³ In *Reynolds Electric, Inc.*, 342 NLRB 156 (2004), also cited by Alle, the Board "assum[ed] without deciding that the judge correctly found"

that the discharged employee "had engaged in concerted activity." As a result, that case is not precedential with respect to conduct constituting protected concerted activity.

authorization to the position of the other warehouse employees with respect to this issue. Specifically, Diallo testified that Wilson “was saying that he – as a leader, and not only as a leader, as an individual employee, he will no[t] sign a paper that doesn’t benefit him.” (Tr. 146.) Diallo further testified that as the discussion proceeded Wilson continued “talking about he and his fellows and why they don’t want to sign.” (Tr. 146.) Diallo’s testimony is also consistent with Wilson’s un rebutted description of his repeated discussions with his co-workers regarding Local 726, culminating in the warehouse employees’ initial position that they would not sign in support of the Union because they could see no benefit to doing so. Given the foregoing, Wilson’s statements soliciting an individual pay raise or benefit at the January 30 meeting with Ginsberg and Diallo do not establish that his conduct was not concerted activity, as Alle suggests.

For all of the foregoing reasons, the record establishes that Wilson was engaged in protected concerted activity during the January 30 meetings with Talavera, Ginsberg, and Diallo.

2. Wilson did not lose the protection of the Act pursuant to *Atlantic Steel*

Both parties contend that the question of whether Wilson’s conduct at the January 30 meetings lost the Act’s protection is governed by the analysis set forth in *Atlantic Steel*, 245 NLRB 814 (1979). Pursuant to *Atlantic Steel*, the Board considers the following factors in order to determine whether otherwise protected conduct lost the protection of the Act: (i) the place of the discussion; (ii) the discussion’s subject matter; (iii) the nature of the outburst on the part of the employee; and (iv) whether the outburst was provoked by the employer’s unfair labor practices. See, e.g., *Postal Service*, 364 NLRB No. 62 at 3 (2016); *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1099 (2011); *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), remanded 664 F.3d 286 (9th Cir. 2011), decision on remand 360 NLRB 972 (2014). These four criteria are intended to permit “some latitude for impulsive conduct by employees” during protected concerted activity, while acknowledging the employer’s “legitimate need to maintain order.” *Plaza Auto Center, Inc.*, 355 NLRB at 494. Overall the *Atlantic Steel* analysis is intended to evaluate whether the employee’s conduct is “sufficiently egregious or opprobrious to remove it from the protection of the Act.” *Meyer Tool, Inc.*, 366 NLRB No. 32 at 1 fn. 2 (2018), enf. 763 Fed.Appx. 5 (2d Cir. 2019).

Based upon the record evidence, the first, second, and fourth components of the *Atlantic Steel* analysis strongly support a conclusion that Wilson’s conduct during the January 30 meetings did not lose the Act’s protection. The third factor of the *Atlantic Steel* analysis also militates in favor of a determination that Wilson’s conduct retained the protection of the Act. As a result, the evidence overall establishes that Alle violated Section 8(a)(3) and (1) of the Act by discharging Wilson in retaliation for his protected activity.

The first of the *Atlantic Steel* factors—the place of the discussion—firmly supports a finding that Wilson’s conduct remained protected. It is undisputed that all of the January 30 meetings took place entirely within Talavera’s office on the first floor of the production building, and not in a work area. See *Postal Service*, 364 NLRB No. 62 at 3; *Datwyler Rubber & Plastics, Inc.*,

350 NLRB 669, 670 (2007). Ginsberg, Talavera, and Diallo—all managers or supervisors—were the only individuals present at the meetings other than Wilson. See *Postal Service*, 364 NLRB No. 62 at 1, 3 (only supervisor and employee/union representative attended the meeting in question); *Plaza Auto Center, Inc.*, 355 NLRB at 494 (meeting involved employee and management officials only). The office has a door which could have been closed at any time should any of the managers have desired to do so. And in any event, there is no evidence that any other employee of Alle saw or heard anything that occurred during the meetings. *Postal Service*, 364 NLRB No. 62 at 3 (no evidence that “anyone else was within earshot” of the discussion); *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322 fn. 20, 1323 (2006). Indeed, the warehouse employees worked in an entirely different building in the facility. See *Meyer Tool, Inc.*, 366 NLRB No. 32 at 1, fn. 2, and at 11 (discussion took place in “a separate building” from the facility’s production areas). As a result, the evidence does not establish that Wilson’s conduct, or the meetings generally, were disruptive to the work of other employees or undermined the authority of any of the managers present. *Postal Service*, 364 NLRB 972, 978; *Plaza Auto Center*, 360 NLRB 972 at 978. This component of the *Atlantic Steel* analysis therefore militates in favor of a finding that Wilson’s conduct did not lose the protection of the Act.

The second of the *Atlantic Steel* criteria—the subject matter of the discussion—strongly supports the conclusion that Wilson’s conduct retained its protected character. As discussed above, there is no dispute that the January 30 meetings addressed Wilson’s refusal to sign a dues-checkoff authorization for Local 726. Indeed, Ginsberg testified that his meeting with Wilson was specifically called for that purpose after he received the letter from Local 726 stating that the Union intended to enforce the union security clause contained in its contract with Alle. Wilson had long been a vocal opponent of Local 726, and the evidence establishes that as of January 30, 2018, he was the only one of the warehouse employees who had not signed a dues-checkoff authorization. As discussed above, by protesting and refusing to sign the dues-checkoff authorization for Local 726, Wilson was invoking “the right to determine for himself, free from coercion, whether he shall sign a checkoff authorization or not.” *Comau, Inc.*, 358 NLRB at 596; *Bluegrass Satellite, Inc.*, 349 NLRB at 867. Thus, because Wilson’s conduct “occurred in the context of his attempted assertion of a fundamental right under the Act,” the second component of the *Atlantic Steel* analysis strongly supports a finding that that conduct retained its protected character. *Stanford Hotel*, 344 NLRB 558, 559 (2005).

The third component of the *Atlantic Steel* analysis requires a consideration of “the nature of the employee’s outburst or alleged misconduct.” *Postal Service*, 364 NLRB No. 62 at 3; *Crowne Plaza LaGuardia*, 357 NLRB at 1099. Alle contends that during the January 30 meetings Wilson made an obscene gesture to Ginsberg, threatened him, and attempted to assault Ginsberg with a coffee cup rack. Alle argues that as a result the third of the *Atlantic Steel* factors weighs heavily against a finding that Wilson’s conduct remained protected. In order to address these assertions, I must evaluate the credibility of the testimony regarding Wilson’s behavior during the meeting, and the relative credibility of the witnesses—Wilson, Ginsberg, Talavera, and

Diallo—that addressed this issue. I generally found Diallo and Wilson to be the most credible of the four witnesses. Diallo genuinely appeared to be recounting the meeting to the best of his recollection and providing specific detail to the best of his ability, candidly admitting that he did not want to attend the meeting and was not paying attention until Ginsberg asked Wilson to sign the dues-checkoff authorization and Wilson refused. (Tr. 144.) Diallo does not appear to have been involved with the warehouse department and does not interact regularly with Ginsberg. (Tr. 143, 155.) He generally testified with equanimity and in a straightforward manner. Wilson’s testimony was relatively forthright, but conflicted in certain respects with his affidavit, and was inconsistent on direct and cross-examination regarding a crucial matter involving his termination, as discussed in further detail below. Ginsberg was a garrulous witness who attempted as described below to manipulate language or obfuscate the events of the meetings, such that his testimony was less reliable overall. Talavera’s testimony, by contrast, was terse, and he contended at one point that he could not remember the specifics of the most critical January 30 meeting. (Tr. 135.) I have generally credited his testimony regarding the meetings only to the extent that it is corroborated by other witnesses or constitutes an admission.

It is undisputed that Wilson used profanity and made an obscene gesture during the January 30 meeting with Ginsberg, Talavera, and Diallo. All of the witnesses present at the meeting, including Wilson himself, testified that Wilson raised his middle finger to Ginsberg and used the word “fuck” several times. Diallo testified that Wilson used the word “fucking” repeatedly, including the statement, “I will not fucking sign this document.” (Tr. 148.) However, I do not credit Ginsberg’s testimony that Wilson referred to him as a “motherfucker,” which was uncorroborated by any other witness. (Tr. 112.) I also do not credit Wilson’s testimony that Ginsberg told him “fuck you,” two or three times toward the end of the meeting. (Tr. 99.) Instead, I credit Diallo’s testimony corroborating Ginsberg’s assertion that he did not use profanity toward Wilson. (Tr. 111–112, 148–149.) Thus, the evidence establishes that except for the raised middle finger, Wilson’s profanity was not specifically directed toward Ginsberg or the other managers.¹⁴ Instead, the evidence indicates that Wilson used the word “fuck” as an intensifier, to more vehemently express his own emotional state, particularly his frustration with Talavera and Ginsberg’s exhortations to sign the dues-checkoff authorization. In any event, the Board has repeatedly found that profanity directed toward management is insufficient to establish that the third component of the *Atlantic Steel* analysis weighs against a finding that the employee’s conduct remained protected. See *Plaza Auto Center*, 355 NLRB 494–495 (employee’s activity remained protected, despite reference to owner as a “fucking motherfucker,” “fucking crook,” and “asshole,” as “a single verbal outburst of insulting profanity does not exceed the bounds of the Act’s protection”); see also *Alcoa*,

Inc., 352 NLRB 1222, 1225–1226 (2008) (employee referred to supervisor as an “egotistical fucker”); see also *Burle Industries*, 300 NLRB 498, 500, 504 (1990), *enfd.*, 932 F.2d 958 (3d Cir. 1991) (employee called supervisor a “fucking asshole”).

In addition, the record demonstrates that Alle’s employees use profanity in the workplace as a matter of course, occasionally in discussions with their supervisors. The Board considers evidence regarding the commonplace nature of profanity in a workplace when evaluating the third component of the *Atlantic Steel* analysis. See, e.g., *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 at 1, 3 (2018); *Stanford Hotel*, 344 NLRB at 559. Talavera testified that employees use profanity at work “When they’re talking among themselves.” Tr. 34. Talavera further admitted that Alle has no rule prohibiting the employees from using profanity, and that no employee had ever been disciplined for doing so. Tr. 34–35. Instead, he stated that an employee might be told verbally to “tone [it] down.” Tr. 35. Furthermore, Wilson testified without contradiction that he had heard other warehouse employees tell supervisors Rosenberg and Gottlieb to “fuck themselves,” and call them “a whole bunch of bitches” while complaining about work assignments. Tr. 62–63. There is no evidence that any of these employees were disciplined in any way for doing so. See, e.g., *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 at 1, 3 (employer’s “general tolerance of profanity in the workplace” belies claim that employee’s obscene statement “was particularly egregious”). Thus, the evidence establishes that Alle generally tolerated the warehouse employees’ use of profanity without imposing discipline.

Alle also contends that Wilson verbally threatened Ginsberg during the January 30 meeting. The Board determines whether specific conduct is threatening using an objective standard, as opposed to evidence regarding the subjective reactions or responses of the individuals involved in a particular incident. *Meyer Tool, Inc.*, 366 NLRB No. 32 at 12; *Plaza Auto Center, Inc.*, 360 NLRB at 974. Specifically, Alle argues that Wilson threatened Ginsberg based upon Ginsberg’s testimony that Wilson stated to him, “I can get to you whenever I want,” “I’m a streets guy,” and “Eventually you have to leave this place, so I’ll get you then.” (Tr. 113; posthearing brief at p. 5.) I do not credit this testimony of Ginsberg’s, however, which was uncorroborated by Diallo or Talavera. I credit instead Diallo’s testimony that when Ginsberg continued to ask Wilson to sign the dues-checkoff authorization, Wilson asked what Ginsberg could do for him, “because I am from the street. And life is kind of—it’s hard.” (Tr. 146.) I further credit Diallo’s testimony that during the ensuing argument, Wilson told the managers, “I will fix this on the street.” (Tr. 147.) However, this statement does not explicitly refer to any sort of physical violence. Instead, the record evidence more reasonably indicates that Wilson was referring to approaching Local 726 directly regarding membership and dues payments or to filing unfair labor practice charges. Ginsberg

¹⁴ Wilson testified that at the end of the meeting he told Ginsberg, Talavera, and Diallo, “Fuck all y’all.” However, for the reasons discussed *infra*, I find that Wilson made this particular comment after he was discharged. As a result, it is addressed pursuant to the standard for evaluating an employee’s post-discharge conduct, and not in the context

of the third of the *Atlantic Steel* criteria. However, given the caselaw discussed herein, the comment, “Fuck all y’all,” would not engender a finding that the third of the *Atlantic Steel* criteria favored a determination that Wilson’s conduct lost the Act’s protection.

himself testified that during this portion of the conversation, Wilson said, “I don’t have to sign this . . . I could do this my way.” (Tr. 111.) Such a remark is more reasonably interpreted as referring to addressing the dues issue directly with Local 726 as opposed to via dues checkoff, which was Wilson’s prerogative pursuant to the caselaw discussed above. In addition, Wilson testified that as of January 30, he already intended to meet with personnel from NLRB Region 29, so that after the meetings ended, “I was upset but I knew I was coming down to the labor board.” (Tr. 100–101.) He also testified without contradiction that he attempted to speak to an attorney during a hiatus in the January 30 meetings. (Tr. 95–96.) This context indicates that Wilson’s statement that he would address the Local 726 dues issue in a different manner referred to possible legal action, and not to inflicting physical harm. See *Plaza Auto Center, Inc.*, 355 NLRB at 495 and 360 NLRB at 976 (employee’s statement that employer would “regret” firing him threatened legal consequences only given employee’s inquiry to a State agency regarding minimum wage requirements); *Meyer Tool, Inc.*, 366 NLRB No. 32 at 5, 12, fn. 30 (employee’s statement that human resources generalist would “pay for her actions” more reasonably referred to the addition of the human resources generalist to a previously filed internal complaint and not to physical harm). Furthermore, during his testimony regarding the January 30 meeting Ginsberg minimized the impact of Wilson’s allegedly threatening remarks, stating, “it didn’t faze me much,” and “I brushed that off.” (Tr. 111–112.) This testimony is consistent with record evidence establishing that while Talavera directed security to call emergency services, no police report was ever filed, and none of the managers present at the January 30 meetings ever bothered to prepare a written statement regarding the incident. (Tr. 125, 140.) Thus, the contextual evidence is not consonant with a finding that Wilson’s remarks regarding “the street” constituted a threat of physical violence.

Alle also asserts that during the January 30 meetings, Wilson attempted to assault Ginsberg with a carousel containing individual servings of ground coffee and creamer. Posthearing brief at 11–12. As discussed below, I credit Diallo and Talavera’s testimony that Wilson grabbed or placed his hand on the coffee carousel, and that Talavera placed his hand over Wilson’s while Diallo and Talavera moved between Wilson and Ginsberg. However, the weight of the evidence establishes that Ginsberg discharged Wilson before Wilson touched the coffee carousel. It is well-settled that the fact of a discharge is not contingent upon an employer’s choice of words. *Johnston Fire Services, LLC*, 367 NLRB No. 49 at 10 (2019), citing *Ridgeway Trucking Co.*, 243 NLRB 1048, 1048-1049 (1979), *enfd.* in relevant part 622 F.2d 1222, 1224 (5th Cir. 1980) (supervisor’s statement that employee was “not needed anymore” sufficient to constitute a discharge). Instead, it suffices that “the words or actions of the employer would logically lead a prudent person to believe his tenure has been terminated.” *Ridgeway Trucking*, 243 NLRB at 1048–1049. In determining whether a discharge has occurred, the statements and actions of the individuals involved are evaluated

from the employee’s perspective. *Johnston Fire Services, LLC*, 367 NLRB No. 49 at 10. The employer is generally considered responsible for any ambiguity in the situation. *Kolkka Tables*, 335 NLRB 844, 846 (2001).

Here, the evidence, including the testimony of Wilson, Diallo, and Talavera, conclusively establishes that Ginsberg discharged Wilson before Wilson grabbed or placed his hand on the coffee carousel. Wilson’s account of Ginsberg’s statements immediately after Wilson raised his middle finger varied on direct and cross-examination. See (Tr. 59–60, 89–91.) However, both versions were actually corroborated by one of the managers at the meeting, and both establish that Wilson was discharged prior to touching the coffee carousel. On cross-examination, Wilson testified that after he gave Ginsberg “the finger,” Ginsberg stated that he was discharged. (Tr. 89–91.) This testimony was corroborated by Talavera, who testified that immediately after Wilson’s obscene gesture, Ginsberg stated that Wilson had “crossed the line,” that his behavior was “insubordinat[e] and disrespectful, and he was being terminated.” (Tr. 135–136.) This language clearly conveys that Wilson was discharged. On direct examination, Wilson testified that Ginsberg responded to “the finger” by stating, “Now I have a reason to fire you, insubordination.” (Tr. 59–60.) This testimony is roughly consonant with Diallo’s testimony that Ginsberg stated, “listen, now you cross a line” and “if you go that way, I will fire you.” (Tr. 146.) Diallo further testified that Wilson then asked for a raise or some benefit in exchange for signing, and after Ginsberg declined, Wilson stated, “I will fix this on the street,” to which Ginsberg responded, “Now, you’re threatening me . . . now you’re really fired.” (Tr. 147.) Diallo testified that it was only after that exchange that Wilson grabbed the coffee carousel. (Tr. 147.) Thus, the testimony of Diallo, Talavera, and Wilson establishes that Ginsberg discharged Wilson prior to any conduct involving the coffee carousel.¹⁵

The context in which Ginsberg’s specific statements took place also supports that conclusion. I credit Wilson’s testimony that he asked Talavera, and later Ginsberg, whether he was being discharged when Talavera referred to him as “dismissed,” a question which evinces Wilson’s uncertainty regarding his employment status based on Talavera and Ginsberg’s statements. Furthermore, Wilson had never interacted with Ginsberg before, and therefore had no previous experience with his use of language. Ginsberg was a manager who handled the company’s human resources and payroll as opposed to supervising employees on the shop floor. As a result, it would have been abundantly reasonable for Wilson to interpret even Ginsberg’s more equivocal statements as indicating that Ginsberg was discharging him for insubordination. In any event, because the evidence demonstrates that Wilson was discharged before touching or grabbing the coffee carousel, that action is appropriately addressed pursuant to the standard for evaluating post-discharge conduct, as opposed to within the third component of the *Atlantic Steel* analysis.

For all of the foregoing reasons, the record evidence

¹⁵ Given Diallo, Talavera, and Wilson’s testimony, I do not credit Ginsberg’s various assertions that neither he nor Talavera definitively stated that Wilson was discharged. Tr. 114, 126–127.

establishes that the third of the *Atlantic Steel* factors militates in favor of a conclusion that Wilson’s conduct at the January 30 meeting

The fourth of the *Atlantic Steel* criteria—whether the outburst was provoked by the employer’s unfair labor practices—significantly supports a finding that Wilson’s conduct did not lose the protection of the Act. Indeed, the entire scenario in which Wilson’s outburst occurred constituted coercive conduct on the part of Alle. As discussed above, an employee is entitled under the Act to “determine for himself, free from coercion, whether he shall sign a checkoff authorization or not.” *Comau, Inc.*, 358 NLRB at 596. Thus, “any conduct, express or implied, which coerces an employee in his attempt to exercise this right clearly violates [the Act.]” *Comau, Inc.*, 358 NLRB at 596, quoting *Electrical Workers IUE Local 601 (Westinghouse Electric Corp.)*, 180 NLRB 1062 (1970). In particular, an employer “may not lead employees to believe that the dues-checkoff authorization method of fulfilling financial obligations to their union is compulsory.” *Comau, Inc.*, 358 NLRB at 596; see also *Rochester Mfg. Co.*, 323 NLRB 260, 262 (1997), enf’d, 194 F.3d 1311 (6th Cir. 1999). An employer’s conduct tending to coerce employees into executing dues-checkoff authorizations violates Section 8(a)(1). *Comau, Inc.*, 358 NLRB at 595, 596–597 (employer violated Section 8(a)(1) when human resources manager called employee into his private office, questioned employee regarding employee’s refusal to sign dues-checkoff authorization form, and “expressed doubts about the reliability of paying [dues] by other means”); *Rochester Mfg. Co.*, 323 NLRB at 261 (employer violated Section 8(a)(1) by “conditioning employment on the execution of checkoff authorization forms”).

The evidence here establishes that Talavera and Ginsberg made repeated attempts to induce Wilson to sign the dues-checkoff authorization on January 30. For the reasons discussed previously, I credit Wilson’s testimony that he met with Talavera and his supervisor Chaim Rosenberg earlier during his shift on January 30, and that during this meeting Talavera directed Wilson to sign a dues-checkoff authorization, and Wilson refused. Furthermore, Wilson’s supervisor Chaim Rosenberg, who according to Wilson was also present at the initial January 30 meeting with Talavera, did not testify. Therefore, Wilson’s testimony that Rosenberg told him that Talavera wanted to speak to him and escorted him to Talavera’s office, telling Wilson, “this is over my head; I can’t do nothing for you,” is un rebutted.¹⁶ Tr. 54. The evidence establishes that warehouse employees did not typically interact with Talavera or visit his office, and that Talavera issued discipline to employees there. Tr. 26, 29–30. After Wilson refused to sign the dues-checkoff authorization, Talavera told Wilson that he was “dismissed,” and Wilson was unsure enough about his continued employment status that he asked Talavera whether he was fired. I further credit Wilson’s un rebutted testimony that Rosenberg approached him on the loading dock and escorted him back to Talavera’s office for the meeting with

¹⁶ These statements attributed to Rosenberg by Wilson are not included in Wilson’s affidavit prepared during the investigation of the charge. However, in that Wilson’s testimony is un rebutted in this respect, I find it credible. See *Coserv Electric*, 366 NLRB No. 103 at 3, fn. 7, and at 8 (2018) (crediting un rebutted witness testimony despite demeanor issues and conflicts between witness’s testimony and affidavit).

Ginsberg, ultimately with Diallo present. Ginsberg freely admitted that this meeting was initiated in order to address Wilson’s refusal to sign the dues-checkoff authorization. It is undisputed that after Wilson arrived, Ginsberg directed him to sign a dues-checkoff authorization,¹⁷ and that Wilson refused, at least initially, to do so. This overall sequence of events—with Wilson subjected to mandatory meetings with managers of increasing authority who repeatedly demanded that he sign a dues-checkoff authorization despite his protestations—constituted coercive behavior on the part of Alle under the pertinent caselaw. The evidence therefore establishes that Wilson’s conduct at the January 30 meetings was provoked by a course of action on Alle’s part which likely would have been found unlawful had it been alleged as an unfair labor practice. See *Felix Industries*, 331 NLRB 144, 145, fn. 10 (2000), enf. denied 251 F.3d 1051 (2d Cir. 2001) (“conduct which would have been found unlawful had it been so alleged” may be considered in the context of the fourth of the *Atlantic Steel* criteria); *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 at 3, fn. 14.

The evidence also establishes that, independent of the meetings’ coercive nature overall, Wilson was provoked by Ginsberg during their interactions. In addressing the fourth component of the *Atlantic Steel* analysis the Board considers not only the potentially coercive or unlawful nature of the circumstances in which the employee’s outburst took place, but also the conduct of the various individuals participating in the exchange as it unfolds, and that conduct’s potential impact. See, e.g., *Meyer Tool, Inc.*, 366 NLRB No. 32 at 1 fn. 2, and at 12 (employee’s initially calm demeanor changed after supervisor dismissively responded to his complaint by repeatedly stating “whatever”); *Battle’s Transportation, Inc.*, 362 NLRB 125, 133–134 (2015) (employee provoked when chief operating officer told him to “shut up”); *Plaza Auto Center, Inc.*, 355 NLRB at 493–495 (manager provoked employee by failing to respond to employee’s concerns and repeatedly telling employee that “he did not need to work there”); *Burle Industries*, 300 NLRB at 504 (employee provoked by belief that supervisor “was making light of what he viewed as a grave situation”). The Board also addresses any surrounding events pertinent to the specific issue being discussed when the outburst occurred. See *Battle’s Transportation, Inc.*, 362 NLRB at 134 (employee provoked by employer’s “previous discrimination and animus against him”); *Plaza Auto Center, Inc.*, 355 NLRB at 493 (discussing employee’s history of activity with respect to the compensation issues addressed during the meeting where employee’s outburst took place).

The record evidence here establishes that Wilson was a primary opponent of Local 726’s representation of the warehouse employees, and had led the warehouse employees’ opposition to the Union for weeks. As of January 30, 2018, Wilson was the only warehouse employee who had not executed a dues-checkoff authorization. Local 726 had notified Alle in writing that it

¹⁷ The evidence does not establish that Ginsberg merely explicated the union-security clause during the meeting; the weight of the credible evidence establishes that Ginsberg simply directed Wilson to sign the dues checkoff authorization. All of the witnesses testified that the meeting began in that manner, and Wilson and Diallo did not testify that Ginsberg mentioned the union-security provisions of the contract at all.

intended to enforce its union security clause with respect to Wilson, which would have resulted in his discharge. Yet Ginsberg admitted in his testimony that during the January 30 meeting he attempted to joke with Wilson, countering Wilson's request for a pay raise if he signed the dues-checkoff authorization by stating, "are you kidding, you want more vacation, what do you want me to do?"¹⁸ (Tr. 108–109, 120–122.) I further credit Wilson's testimony that when he eventually acquiesced in signing the dues-checkoff authorization he asked, "Do you know you're forcing me to do something I do not want to do?" and that Ginsberg responded, "Yes, I know." (Tr. 59.) There is no dispute that, regardless of whether Ginsberg offered to shake Wilson's hand at that point, Ginsberg made a statement acknowledging that Wilson was acquiescing in signing the dues-checkoff authorization—in Ginsberg's account he told Wilson, "that's a good idea, sign it"¹⁹—and construing his having done so as a positive development. (Tr. 113.)

The credible evidence establishes that the intensity of the meeting escalated immediately at that point. Wilson, Talavera, Ginsberg, and Diallo all testified that Wilson responded to Ginsberg's statements by raising his middle finger at him. Wilson testified that he did so because he felt that Ginsberg was mocking him. (Tr. 59–60.) I credit Wilson's testimony describing this response, given Ginsberg's admission that he had previously attempted to joke around or "jest" regarding Wilson's terms and conditions of employment pursuant to the Local 726 contract, and Wilson's history of opposition to Local 726 and of advocacy for the warehouse employees. Thus, the evidence demonstrates that Wilson's obscene gesture and language were provoked at least in part by Ginsberg's statements at the January 30 meeting. Given all of the foregoing, the fourth component of the *Atlantic Steel* analysis militates substantially in favor of a finding that Wilson's conduct remained protected.

For all of the foregoing reasons, the first, second, and fourth of the *Atlantic Steel* criteria weigh significantly in favor of finding that Wilson's conduct remained protected under the Act. The third factor in the *Atlantic Steel* analysis also militates in favor of a finding that Wilson's conduct retained the Act's protection. As a result, Wilson's conduct remained protected, and Alle violated Section 8(a)(3) and (1) of the Act by discharging him on January 30, 2018.

3. Wilson did not forfeit his eligibility for reinstatement and backpay based upon his postdischarge conduct

As discussed above, I have found that the credible evidence establishes that Ginsberg discharged Wilson after Wilson raised his middle finger. However, the evidence also establishes that after Ginsberg discharged Wilson, Wilson grabbed the coffee carousel in Talavera's office. Specifically, I credit the testimony of Diallo and Talavera that Wilson grabbed the coffee carousel, and that Talavera then put his hand over Wilson's and told him, "Be smart." I further credit Diallo's testimony that he and

Talavera moved between Wilson and Ginsberg, believing that Wilson was about to throw or strike Ginsberg with the coffee carousel. I do not, however, credit Ginsberg's testimony that Wilson was "in the middle of throwing" the coffee carousel when Talavera and Diallo interceded. The record does not establish that Wilson raised the coffee carousel in the air, "wound up" in some way to throw the coffee carousel, or directed the coffee carousel toward Ginsberg. Instead, the record establishes that Wilson touched or grabbed the coffee carousel, Talavera placed his hand over Wilson's, telling him, "Be smart," and Talavera and Diallo moved between Wilson and Ginsberg. Wilson then told Talavera, "Don't touch me," Talavera removed his hand from Wilson's, and Wilson left the office almost immediately. Finally, Wilson testified that after Ginsberg fired him, he told the managers, "Fuck all y'all. Y'all think I need this job."

General Counsel argues in his Posthearing brief at page 12 that the legal import of Wilson's post-discharge conduct "is a matter to be determined in a compliance proceeding," and is not relevant to Respondent's liability for the unfair labor practices alleged. However, the Board routinely addresses post-discharge conduct potentially affecting eligibility for reinstatement and backpay in the same proceeding as the underlying unfair labor practices. See, e.g., *Fund for the Public Interest*, 360 NLRB 877 (2014); *Teen Triumph*, 358 NLRB 11 (2012); *Hawaii Tribune Herald*, 356 NLRB 661 (2011), enfd. 677 F.3d 1241 (D.C. Cir. 2012). It is particularly efficient to do so where, as here, the post-discharge conduct potentially affecting a remedy occurred as part of the same sequence of events as the allegedly unlawful discharge itself.

The Board has recognized that evaluating post-discharge employee conduct which potentially disqualifies an employee from full relief entails a "sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge." *Hawaii Tribune Herald*, 356 NLRB at 662, quoting *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), enfd. 548 F.2d 391 (1st Cir. 1977). It is therefore well settled that in order to obviate the reinstatement and backpay obligations engendered by an unlawful discharge, the employer must demonstrate that the employee's post-discharge conduct was "so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant." *Hawaii Tribune Herald*, 356 NLRB at 662, quoting *O'Daniel Oldsmobile*, 179 NLRB 398, 405 (1969). As the Board has noted, denial of reinstatement is appropriate only in "extraordinary situations," such as a death threat, intentionally striking a supervisor with an automobile, and threatening to "report a probation violation in order to influence a witness's testimony during a Board hearing." *Fund for the Public Interest*, 360 NLRB at 877, quoting *Timet*, 251 NLRB 1180, 1180–1181 (1980), enfd. 671 F.2d 973 (6th Cir. 1982), and collecting cases.

Two cases involving an employee's physical conduct toward

Alle, "at its discretion, may grant individual merit increases in addition to" the contract wage rates. R.S. Ex. 2, p. 17.

¹⁹ Wilson testified that Ginsberg said, "welcome, glad to have you." Tr. 59–60. Talavera testified that Ginsberg said "thank you very much, it's a smart decision you're making." Tr. 135.

¹⁸ Ginsberg referred to these comments as "a joke" on direct examination, but then attempted to obscure this testimony by questioning the meaning of the word "joke" on cross-examination. Tr. 108, 122. I also note that despite Ginsberg's statements to Wilson that pay increases could not be provided on an individual basis as a result of the collective bargaining agreement with Local 726, the contract itself provides that

management immediately after an unlawful discharge – *Casa San Miguel*, 320 NLRB 534 (1995), and *Family Nursing Home*, 295 NLRB 923 (1989)—illustrate the Board’s approach to such situations. In *Casa San Miguel*, the employee meeting with Respondent’s assistant director of nurses “became very upset” after her unlawful discharge, and “begged” the assistant director to “re-scind” it. 320 NLRB at 552. When the assistant director refused to do so, the employee “followed” her out of the office, “yelled that [the assistant director] should go to hell,” and “tried to punch [the assistant director] in the face, but was prevented from doing so by another nurse who pulled her away.” *Casa San Miguel*, 320 NLRB at 552. The administrative law judge affirmed by the Board, concluded that the employee’s attempted assault was a “spontaneous response . . . clearly provoked” by the unlawful discharge, and therefore did not warrant forfeiture of the typical reinstatement and backpay remedies. See *Casa San Miguel*, 320 NLRB at 534 fn. 2, and at 557; see also *Fund for the Public Interest*, 360 NLRB at 877. In *Family Nursing Home*, by contrast, the Board affirmed the ALJ’s conclusion that unlawfully discharged employee Marilyn Holland forfeited reinstatement and backpay remedies based upon the following conduct toward Director of Nursing David Fisher:

Fisher explained that leaving the unit left patients unattended and that because of that and her past performance, [Holland] was being terminated. Holland then backed up, grabbed a bowling trophy and came at Fisher with it in her hand, still protesting her discharge. Fisher picked up a chair to hold her off. Holland grabbed a leg of the chair to pull it away. At this point Fisher asked [supervisor] Sue Castro to call the police. Castro went to the phone, but Holland, seeing this, grabbed the phone receiver and pulled it out of the phone, wires and all, exclaiming that no one was going to make any “fucking calls to the police on this phone.” Fisher then told Castro to use a phone in another office . . . Castro left the room and made the call. Still protesting that she could not be terminated, Holland put down the trophy and left the room. After leaving, Holland returned to the floor where she tore the linen from some made-up beds and threw them [sic] on the floor.

295 NLRB at 923, fn. 2, 926, 927, 928, 931. The Board affirmed the administrative law judge’s conclusion that Holland’s conduct was sufficiently “flagrant” and “violent” that she was unfit for further service. *Family Nursing Home*, 295 NLRB at 923, fn. 2, citing *Carthage Fabrics Corp.*, 101 NLRB 541, 553–555 (1952) (employee who struck supervisor “in the face with his fists” after discharge forfeited reinstatement and backpay); *Stein-Way Clothing Co.*, 131 NLRB 132, fn. 2 (1961) (employee denied reinstatement and backpay where she physically assaulted a co-worker immediately after discharge).

The situation at issue here strongly evokes the rationale which informs the Board’s standard for evaluating post-discharge conduct, the leeway afforded to employees for spontaneous,

impassioned responses to an unlawful discharge. Specifically, the evidence indicates that Ginsberg’s discharge of Wilson precipitated Wilson’s intemperate behavior in grabbing the coffee carousel. I credit Talavera’s testimony that it was after Ginsberg told Wilson that he was being terminated for insubordinate and disrespectful behavior that Wilson got “all bent out of shape, upset,” and placed his hand on the coffee carousel.²⁰ (Tr. 136.) I further credit Wilson’s testimony that it was after Ginsberg fired him that he made the statement, “Fuck all y’all. Y’all think I need this job.” The evidence overall therefore establishes an escalating sequence of emotionally charged statements and behaviors, with Wilson, placed in a coercive situation involving issues with which he had a history of advocacy on behalf of the warehouse employees, repeatedly provoked during his interactions with management—the ultimate provocation being the discharge itself. The evidence thus establishes that Wilson’s touching the coffee carousel was a “spontaneous response” to his unlawful discharge, and not a deliberate or premeditated attempt to intimidate Ginsberg, Talavera or Diallo. *Casa San Miguel*, 320 NLRB at 557. Furthermore, Wilson’s post-discharge behavior—grabbing the coffee carousel and cursing—is of a qualitatively different order than the physical assault at issue in *Family Nursing Home*, described above. And although the Board has stated that “the success or failure of such an assault” does not conclusively decide the forfeiture of reinstatement and backpay remedies, Wilson’s post-discharge behavior was significantly less volatile than the employee in *Casa San Miguel*’s attempt to “punch” her supervisor “in the face” immediately after her discharge. 320 NLRB at 534 fn. 2, 557. In addition, there is no evidence that Wilson had a history of violent or intimidating conduct.²¹ Indeed, there is no evidence that Wilson had any disciplinary history whatsoever. And, as discussed above, Alle’s failure to file a police report or even ensure that the managers present at the January 30 meeting prepared written statements belies its contention that Wilson’s behavior constituted a deliberate threat of violence or attempt at intimidation. As a result, I find that Wilson’s post-discharge conduct here was not sufficiently flagrant “as to render [Wilson] unfit for further service, or a threat to efficiency in the plant” under the applicable caselaw.

For all of the foregoing reasons, I find that Wilson did not forfeit his eligibility for reinstatement and backpay by virtue of his postdischarge conduct on January 30.

CONCLUSIONS OF LAW

1. Alle violated Section 8(a)(3) and (1) of the Act by discharging Traverse Joel Wilson on January 30, 2018, at the behest of a labor union for refraining from becoming a member of the Union and/or for declining to sign a dues-checkoff authorization.

2. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Alle has engaged in an unfair labor

between the facility gate and the parking lot after he confronted the employee for allegedly stealing his brother’s phone. Tr. 94–95. There is no evidence that management was involved in this incident, Wilson was not disciplined, and no written record was created.

²⁰ Ginsberg also testified that the conflict escalated after he responded to “the finger” by telling Wilson, “you’re only giving me reasons to fire you.” Tr. 119.

²¹ Wilson testified without contradiction that the sole physical altercation he had at Alle occurred when another employee assaulted him

practice, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Alle discharged Traverse Joel Wilson at the behest of a labor union for refraining from becoming a member of the Union and/or for declining to sign a dues-checkoff authorization, I shall order Respondent to offer Wilson reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Alle shall also compensate Wilson for his search-for-work and interim employment expenses, likewise with interest compounded daily, regardless of whether those expenses exceed interim earnings, pursuant to *King Soopers, Inc.*, 364 NLRB No. 93 (2016), *enfd.* in relevant part, 859 F.3d 23 (D.C. Cir. 2017). Alle shall further compensate Wilson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director allocating the backpay award to the appropriate calendar year, pursuant to *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, Alle must remove any reference in its files to Wilson's unlawful discharge, and notify Wilson in writing that this has been done and that the discharge will not be used against him in any way.

Alle will also be ordered to post an appropriate informational notice, as described in the attached appendix, in English and Spanish. This notice shall be posted in Alle's facility or wherever notices to employees are regularly posted for 60 days without anything obscuring or defacing its contents. In addition to the physical posting of paper notices, notices in English and Spanish shall be distributed electronically, such as by e-mail, posting on an intranet or internet site, and/or other electronic means, if Alle customarily communicates with its employees in such a manner. *Dish Network Corp.*, 366 NLRB No. 119 at 13-14 (2018). In the event that, during the pendency of these proceedings, Alle has gone out of business or closed the facility involved herein, Alle shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Alle at any time since January 30, 2018.

The Consolidated Complaint also seeks an order requiring that a representative of Alle read the notice to employees in English and Spanish during worktime, or to allow a Board agent to do so in the representative's presence. It is unclear from General Counsel's posthearing brief and the Settlement Agreements resolving the allegations with respect to the recognition and execution of a collective-bargaining agreement between Alle and Local 726 whether General Counsel continues to seek such a remedy. In any event, the Board finds this extraordinary remedy appropriate only in particularly egregious cases, where high-level managers committed numerous unfair labor practices directly affecting the entire bargaining unit and/or did so in a

particularly public manner. See, e.g., *El Super*, 367 NLRB No. 34 at 1 (2018); *AdvancePierre Foods, Inc.*, 366 NLRB No. 133 at 5 (2018). As a result, such a remedy is not warranted here.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

ORDER

The Respondent, Alle Processing Corp. d/b/a Meal Mart, Maspeth, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees at the behest of a labor union for refraining from becoming a member of the union and/or for declining to sign a dues-checkoff authorization.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, offer Traverse Joel Wilson full reinstatement to his former position, or if that position no longer exists to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Wilson whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, in the manner set forth in the remedy section above.

(c) Make Wilson whole for his reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section above.

(d) Compensate Wilson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the of the date that the amount of backpay is fixed by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Board's order.

(f) Within 14 days, remove from its files any reference to the discharge of Traverse Joel Wilson, and, within 3 days thereafter, notify Wilson in writing that this has been done and that the discharge will not be used against him in any way.

(g) Within 14 days after service by the Region, post at its facility in Maspeth, New York, copies of the attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Alle's authorized representative, shall be posted by Alle and

²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Alle customarily communicates with its employees by such means. Reasonable steps shall be taken by Alle to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Alle has gone out of business or closed the facility, Alle shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Alle at the Maspeth, New York facility at any time since January 30, 2018.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C., June 19, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you at the behest of a labor union for refraining from becoming a member of the union and/or for declining to sign a dues-checkoff authorization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Traverse Joel Wilson full reinstatement to his former position, or if that position no longer exists to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Traverse Joel Wilson whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, less any net interim earnings, plus interest.

WE WILL make Traverse Joel Wilson whole for his reasonable search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings, and consequential economic harm she may have incurred, plus interest.

WE WILL compensate Traverse Joel Wilson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the of the date that the amount of backpay is fixed by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL within 14 days, remove from our files any reference to the discharge of Traverse Joel Wilson, and WE WILL, within 3 days thereafter, notify Wilson in writing that this has been done and that the discharge will not be used against him in any way.

ALLE PROCESSING CORP. D/B/A MEAL MART

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/29-CA-213963> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

