

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES**

XCEL PROTECTIVE SERVICES, INC.

and

**INTERNATIONAL UNION, SECURITY,
POLICE, AND FIRE PROFESSIONALS
OF AMERICA, LOCAL 5**

**Cases 19-CA-232786
19-CA-233141
19-CA-234438
19-CA-237861
19-CA-241689**

**CHARGING PARTY INTERNATIONAL UNION,
SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA, LOCAL 5'S
CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION,
AND BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

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**INTERNATIONAL UNION,
SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA, LOCAL 5'S
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46(c) of the National Labor Relations Board (NLRB)'s Rules and Regulations, Charging Party International Union, Security, Police and Fire Professionals of America (SPFPA), Local 5 files this Brief in support of its Cross-Exceptions to the Administrative Law Judge's Opinion.

Xcel Violated the Act by its Constructive Discharge of Stephen Mullen

Under *Wright Line*² and its progeny, a charging party makes a prime facie showing of unlawful employee discipline where it shows “(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action.” *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). After making this showing, the burden passes to the employer to rebut the showing by a preponderance of evidence “that the same adverse employment action would have taken place even in the absence of the protected conduct.” *ManorCare Health Services-Easton*, 356 NLRB 202, 225 (2010).

Xcel violated the Act by its constructive discharge of Stephen Mullen. Like with Mark Salopek, Mullen's case meets the first two (2) *Wright Line* criteria. As to the first criterion, Mullen engaged in protected concerted activity. Mullen's July 2017 complaint with another employee, Robert Armstrong, to Capt. Michael Terry that employees were being qualified on non-Navy weapons and at non-Navy approved ranges was protected concerted activity. Tr. 448-50. Mullen's complaints with Salopek and another employee, Ben Gentry, in about June 2018 to supervisor Lt. Douglas Lux in front of a base armory

² 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (CA1 1981), cert. denied 455 U.S. 989 (1982).

about improper and unsafe gravel pit range qualifying was protected concerted activity. Tr. 459-461. Mullen's group complaint to Cmdr. Rocky Pulley on July 9 and follow-up email to ISO (Installation Security Officer) Michael Jones were, likewise, concerted.

Like with Salopek, that some of Mullen's complaints may have been misdated or erroneous is irrelevant. This does not make them less concerted. In any event, some complaints *were* well founded, partially those relating to Emily Coler and alteration of range locations stated in qualifications documents. Moreover, Mullen held a good faith belief that the gun range and qualifications were improper, as he resigned his position as an alternate lieutenant in May 2018 because he "just did not want to be a party" to "the unsafe weapons qualifications and due to the altering of time sheets." Tr. 457.

As to the second criterion, the Employer knew of this protected concerted activity on July 9 when Terry received a phone call from ISO Jones and Salopek concerning the in-person complaint to Pulley and received the email to Jones on the same date. Tr. 878-89; Tr. 887; E. Ex. 8. The Employer also knew of the concerted activity by John Morgan's unlawful interrogation of Mullen on July 9 about the Pulley complaint, which was conducted in front of Terry. Tr. 475-76.

As to the third criterion, Mullen's protected concerted activity was a motivating factor in the Employer's decision to constructively discharge Mullen by failing adequately to police harassment against him by unit employees Tom Cunningham and Kevin David and to notify him that it had undertaken such efforts.

There is longstanding support for a constructive discharge theory. "If the employer's action is taken for unlawful reasons and forces the employee to resign, a constructive discharge has occurred." *Am. Licorice Co.*, 299 NLRB 145, 148 (1990); See

also *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976) (framing inquiry as whether employer imposed a burden on employee that caused a change in working conditions).

Almost immediately after complaining to Pulley on July 9, Cunningham – who Mullen mentioned in his concerted complaints as lacking proper weapons qualifications – stormed into base training room where Mullen was sitting and began “yelling” at him to demand an apology, calling Mullen “a fucking rat” and “a fucking [skell]”³ while “waiving [a shotgun] across [Mullen’s] legs and ... thighs.” Tr. 468-69; Tr. 476. Mullen demanded that Cunningham point the shotgun in another direction. Tr. 469. Cunningham refused and continued yelling at Mullen. At the time, Mullen believed that Cunningham had “c[o]me in [from his patrol] specifically to yell at him (Mullen)” and that there was no work-related reason why Cunningham was carrying the shotgun. Tr. 470; Tr. 473-74. The Employer first became aware of Cunningham’s loud harassment against Mullen as it occurred, because Terry and Morgan were talking over a speaker phone within earshot of the incident, with Terry in the line of sight of the site of the harassment. Tr. 466.

Mullen did not report to work for the next three days, as he was not scheduled to work. Tr. 477. On July 10, Mullen received a text message from Kevin David, who Mullen mentioned in his concerted complaints as lacking proper weapons qualifications. The text message read: “So I’m on your little fucking list, your [sic] a fucking idiot & don’t know what you have stepped in. Better call your butt buddy Mark. Slander with no proof dumb ass. Stupid leading stupider.” GC. Ex. 6.

³ Mullen believed this term to be offensive and “derogatory.” Tr. 474.

Mullen called a Navy investigator, Steve Manson, minutes after receiving the text to complaint of David's harassment and left a voicemail describing the harassment. Tr. 481. Mullen then called Lux to report the harassment on the same day. Tr. 481-82. At the time of their call, Lux already knew of the text message and advised Mullen to contact local law enforcement about it. Tr. 482. Mullen also contacted local law enforcement, which advised him that it could take no action, because the text message was merely a "veiled threat." Tr. 488. As the Employer failed to police any harassment against Mullen, Mullen called off work on July 13. During a call with Gerald Powless that day, Mullen explained that he would be unable to report to work until the Employer addressed harassment against him. Tr. 489. Powless merely replied "okay." *Id.*

Given this lack of response, Mullen wrote an email to Terry on July 14 complaining of the Cunningham incident occurring July 9 – of which he was doubtless already aware – and David's threatening text message sent on July 10. J. Ex. 7 (Bates No. 1454). Mullen noted that "[Cunningham] was agitated and it look [sic] he was not thinking of safe gun control" and that "[harassment] has caused me a great deal of stress, to the point that I have not been able to return to work. This is not acceptable behavior from fellow employees. I would like you to look into this administratively." *Id.* Terry received and read this email the very same day, in late morning. Tr. 907-08. He discussed this email with Morgan the very same day. Tr. 909-10. There is no indication Morgan advised Terry to indicate to Mullen that the described harassment would be policed.

From July 14 to 17, the Employer gave no indication to Mullen that it had undertaken any action to police the harassment complained of in Mullen's multiple calls to supervisors and in his July 14 email. Faced with a total lack of perceived Employer

response to harassment against him, Mullen later resigned from the Employer by email on July 17, stating “I am separating by employment.. [t]he reason is for work place harassment and threats”. J. Ex. 4; Tr. 793-94. Management callously replied: “You will also need to turn in or destroy the corporate credit card information that you used for CPR/First Aid training. Also, you are required to read and sing a security debriefing.” *Id.*

About five (5) years before Terry, Morgan and other supervisors learned of Mullen’s protected concerted activity on July 9, Mullen had advised Terry, the then-site manager, and other unit employees of the lurid circumstances of his medical retirement as a California corrections employee, specifically that another employee caused him to be crushed by a large metal door. Tr. 223-29; Tr. 231-32. Accordingly, when Terry learned of the harassment against Mullen on July 9 and July 14, he knew Mullen had a particular sensitivity to workplace harassment and threats – that he was essentially an egg-shell employee. His and Morgan’s failure to indicate to Mullen that any action had be undertaken to police harassment against Mullen was a constructive discharge.

This is true notwithstanding the Employer’s taking of witness statements from Cunningham and another employee present during Cunningham’s harassment, Norm Simons, about Cunningham’s harassment and the Employer’s posting an excerpt of its anti-harassment policy on a workplace bulletin board without explanation. Predictably, Cunningham denies improper conduct. Simon’s statement is not probative of what happened on July 9, as it states that he was looking down as the harassment occurred.

The circumstances surrounding this refusal adequately to address harassment against Mullen and to communicate to him that such was being taken seriously was motivated by animus toward Mullen’s protected concerted activity. Any employee with

Mullen's work history of being crushed in a door by another employee would have quit his job when faced with his employer's outward indifference to his fate in the workplace and the hands of other employees, especially Cunningham who, prior to July 9, exhibited a propensity for violent outbursts against his fellow employees, including Ben Gentry. Tr. 1084.

This refusal and failure to communicate occurred in very short temporal proximity to Mullen's protected concerted activity and there is no other evidence that some other reasons caused the change. It occurred against a background of anti-union animus, specifically, but without limitation, Morgan's interrogation of Mullen regarding his group complaint to Pulley, Terry's later refusal to respond to SPFPA Local 5's information requests regarding Salopek's unlawful discharge submitted by Local representative Scott Harger, and by Terry's conduct toward Lein, especially his interrogation of Lein about his concerted complaint to Pulley on July 9, *infra*.

Finally, the Employer lacks any after-acquired evidence defense,⁴ despite its claim that such defenses exist because Mullen allegedly abandoned his South Patrol post on July 9 when making a complaint in Pulley's office and because he allegedly would have failed his PRT test that he was due to retake within about a week of his July 17 resignation.

As to the alleged post abandonment, the totality of record testimony shows that Mullen's concerted complaint to Pulley lasted about 15-20 minutes⁵ and occurred within

⁴ The offenses alleged against Salopek would not have actually resulted in discipline against Mullen, either, for the reasons explained *supra*.

⁵ Filibeck's testimony that Rake represented the complaint took a "couple of hours" must be discredited. Tr. 997. It is hearsay and contradicted by the testimony of three (3) witnesses would actually made the complaint. Moreover, Filibeck's attribution to Rake the term "junket" to describe is evidence that he bears intense animus toward Mullen. Rake never used this term in his Report. He never used it during testimony. Nor could anyone who knows the meaning of "junket" use that term to describe the July 9 complaint. Accordingly, it must be concluded that Filibeck's attribution of the term was false. This impugns his testimony as to the length of the complaint.

the area covered by South Patrol. Tr. 688 (Lein: "I would say [the complaint lasted] ten minutes, 15 minutes tops. It seemed a lot longer because it was kind of tense."); Tr. 308 (Salopek: "It couldn't have been more than 30 minutes."); Tr. 331 ("Actu- -- you know, sir, that's -- maybe 30 minutes -- maybe."); Tr. 464 (Mullen: Maybe 20, 30 minutes."); Tr. 516: (Mullen agreeing that "this meeting with the commanding officer took 20 to 30 minutes."); Tr. 164-65 (Mullen within patrol area).

This would not have caused his discharge. Employees on South Patrol would routinely stop patrolling for periods longer than 30 minutes at a time to relieve guards at the main gate, during which officers on South Patrol would not be on patrol, all without a superior's permission or relief. Tr. 748-756. Guards were permitted to "stop driving" while one patrol to wash their vehicle for 15 minutes, again all without a superior's permission or relief. Tr. 701. Likewise, South Patrol employees routinely took lunch breaks while on patrol, all without supervisors' authorization and would sit in a "truck station" located on base for extended periods. Tr. 752-53; Tr. 749-750. Mullen missed none of the routine checks of various locations on South Patrol because of his concerted complaint. Tr. 463-64. Therefore, the Employer would not have discharged Mullen for this alleged offense.

This analysis is unchanged by testimony from Rake and Filibeck that the Navy may have recommended Mullen's removal for this alleged post abandonment. As a threshold matter, it should be discredited as vague and unspecific. Tr. 592; Tr. 996. Even incorrectly crediting this testimony, it must be borne in mind that the Employer cannot hide behind a "devil made me do it excuse." As of October 27, Filibeck knew of Mullen's protected concerted activity occurring July 9 and as of that date he knew that any recommended removal was motivated by such activity. Accordingly, acting on that request by so much

as transferring Mullen would have violated the Act, to say nothing of discharging him. Moreover, if, in the unlikely event a requested removal did issue, the Act would have required the Employer to argue to the Navy that it rescind its request, as it had for Salopek in 2015. Failing that, Xcel could have responded to the request by simply transferring Mullen to another Employer worksite.

Speculation that Mullen may not have passed his PRT test shortly after his discharge and therefore would have lost his job within about a week of his resignation is just that, speculative. Record evidence shows that Mullen failed his PRT in 2016 because of a knee injury long-healed by the date of his termination. Tr. 217-18. After the injury healed, he passed the test when retaking it. Tr. 215-16. Mullen also failed the test in 2017, but succeeded on his second attempt. Tr. 221. There is no indication that Mullen would have been unable to do the same when retaking his PRT in late July 2018.

Accordingly, the Employer's anticipated after-acquired evidence defenses must be rejected.

Conclusion

For the reasons set forth in its Cross-Exceptions and Supporting Brief, Charging Party SPFPA respectfully requests that the Board partially overturn the Administrative Law Judge's Decision as it relates to these Cross-Exceptions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Charging Party, International Union, Security, Police and Fire Professionals of America (SPFPA), Local 5's Cross-Exceptions to the Administrative Law Judge's Decision, and Brief in Support of Cross-Exceptions was electronically served on February 2, 2021, upon the following parties:

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