

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**FRESENIUS USA MANUFACTURING, INC.,
Employer**

Case No. 2-CA-39518

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 445,
Petitioner.**

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S STATEMENT OF
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION**

Pursuant to § 102.46 of the Board’s Rules and Regulations, Counsel for the Acting General Counsel (the “General Counsel”) hereby files exceptions to certain portions of the Administrative Law Judge’s decision and recommended order, which issued on August 19, 2010. Specifically, the exceptions are:

EXCEPTIONS TO EVIDENTIARY RULINGS

1. The ALJ erred, as a matter of law, in admitting testimony concerning the subjective reactions of female employees Janet Buxbaum, Virginia Germino, and Barbara Moscatelli, to the statements made by Dale Grosso. (ALJD p. 5, ln 11-21, 27-28, 34-37, 49-50; p.6, ln 1-3). As General Counsel stated in objecting to the admission of this testimony during the hearing, the testimony is irrelevant and prejudicial. (Tr., 650:19-651:2, 795:23-796:19, 871:11-20).

2. The ALJ erred, as a matter of law, in admitting testimony concerning the conversations between female employees Buxbaum, Germino, Moscatelli, and Joan Bernadino

EXCEPTIONS TO FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

3. The ALJ's conclusion that Grosso's conduct constituted protected concerted activity, while correct, is too narrow. As a matter of law, the ALJ erred in not concluding that the conduct was also protected union activity. (ALJD p. 13, ln 16-18).

INVESTIGATION AND INTERROGATION

4. The ALJ erred, as a matter of fact and law, in finding that the first *Bourne* factor, background of the interrogation, weighed against a finding of unlawfulness because there was no "history of hostility or discrimination" because this finding is unsupported by record evidence and the ALJ's own findings of fact. (ALJD p. 24, ln 16-18; p. 7, ln 10-16).

5. The ALJ erred, as a matter of fact and law, in determining that the third *Bourne* factor, identity of the questioner, weighed against a finding of unlawfulness because this conclusion is not supported by record evidence and the ALJ's own findings of fact. (ALJD p. 24, ln 15-16; p. 24, ln 4).

6. The ALJ erred, as a matter of law, in finding that the second *Bourne* factor, nature of the information sought, weighed against a finding of unlawfulness because this conclusion is unsupported by record evidence and the ALJ's own findings of fact. (ALJD p. 24, ln 25-50; p. 25, ln 1-4).

7. The ALJ erred, as a matter of law, in relying on *Firestone South Carolina*, 350 NLRB 526 (2008), and *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005), because those cases are distinguishable from the instant case. (ALJD p. 24, ln 25-48).

8. The ALJ erred, as a matter of fact and law, in concluding that during the interrogation, “there was no discussion of the upcoming election of anything in any way related to the Union” because this conclusion is unsupported by record evidence and the ALJ’s own findings of fact. (ALJD p. 25, ln 3-4; p. 23, ln 5-6; p. 13, ln 16-18).

9. The ALJ erred, as a matter of law, in concluding that the interrogation did not violate Section 8(a)(1) because this conclusion is not supported by record evidence and the ALJ’s own findings of fact. (ALJD p. 25, ln 6-9).

10. The ALJ erred, as a matter of law, in concluding that Respondent’s investigation concerning the newsletter comments was lawful because this conclusion is unsupported by record evidence and the ALJ’s own findings of fact. (ALJD p. 25, ln 16, 33-35).

ATLANTIC STEEL ANALYSIS: FACTOR 1

11. The ALJ erred, as a matter of law, in concluding that the first *Atlantic Steel* factor, location of the conduct, weighed against protection where the conduct occurred in the employee breakroom. (ALJD p. 14, ln 10-11).

12. The ALJ erred, as a matter of law, in reasoning that whether employees were able to “ascertain [the] origin” of Grosso’s comments, “evaluate the pervasiveness of the sentiment”, and “ascertain the likelihood of future comments” are relevant components of the first *Atlantic Steel* factor, location of the conduct, or of any other part of the *Atlantic Steel* analysis. (ALJD p. 14, ln 16-22).

13. The ALJ erred, as a matter of law, in concluding that written comments cause a greater impact and have a more disruptive effect than verbal comments . (ALJD p. 14, ln 23-27).

14. The ALJ erred, as a matter of law, in reasoning that the fact that conduct takes place in an employee breakroom weighs against protection because the written comments were “easily visible” to employees in that location. (ALJD p. 14, ln 12-16, 25-26).

15. The ALJ’s conclusion that employees were unable to ascertain the origin of the comments was contradicted by the record and thus was an error of fact. (ALJD p. 14, ln 18).

16. The ALJ erred, as a matter of law, in assuming in her analysis of the first factor of the *Atlantic Steel* test that the comments constituted a “threat[]”. (ALJD p. 14, ln 22).

ATLANTIC STEEL ANALYSIS: FACTOR 2

17. While the ALJ was correct in concluding that the second factor of the *Atlantic Steel* test, subject matter of discussion, weighs in favor of protection, she erred, as a matter of fact, in not concluding unequivocally that the subject matter weighed strongly in favor of protection. (ALJD p. 15, ln 1; p. 13, ln 13-16).

ATLANTIC STEEL ANALYSIS: FACTOR 3

18. The ALJ erred, as a matter of law, in concluding that the third *Atlantic Steel* factor, “nature of the outburst”, weighed against protection. (ALJD p. 15, ln 29-39).

19. The ALJ’s finding that Grosso’s comments were threatening to employees was not supported by the record and thus was an error of fact. (ALJD p. 15, ln 33).

20. The ALJ erred, as a matter of law, in finding that Grosso’s comments were “arguably offensive” and “debatably threatening” to employees, thereby applying a subjective standard. (ALJD p. 15, ln 33).

21. The ALJ erred, as a matter of fact and law, in concluding that the Board's decision in *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669 (2007), was distinguishable when in fact in both cases the comments were "spontaneous, brief, and unaccompanied by physical contact or threat of physical harm." (ALJD p. 15, ln 18).

22. The ALJ erred, as a matter of fact and law, in concluding that the Board's decision in *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006), was distinguishable when in fact in both cases, the conduct at issue was unaccompanied by insubordination, physical contact, or a threat of physical harm.

23. The ALJ erred, as a matter of fact and law, in concluding that Grosso's comments were "arguably offensive" and "debatably threatening" to employees because she improperly relied on testimony which should not have been part of the record. (ALJD p. 15, ln 33). *See* Exception 1.

24. The ALJ erred, as a matter of fact, in concluding that the term "R.I.P." was "threatening" (ALJD p. 15, ln 33) as this conclusion is not supported by the record. (Tr., 88:11-21, 175:3-18, 704:17-705:22).

25. The ALJ erred, as a matter of law, in concluding that the term "R.I.P." was "threatening." (ALJD p. 15, ln 33).

26. The ALJ erred, as a matter of fact, in concluding that the term "pussies" was "offensive" to the female employees (ALJD p. 15, ln 32) because this conclusion is not supported by the record. (Tr., 823:10-15. *See also* Tr., 71:7-9, 905:20-24).

27. The ALJ erred, as a matter of law, in considering whether Grosso's comments were made with provocation as part of her analysis of the third *Atlantic Steel* factor, nature of the outburst. (ALJD p. 15, ln 35).

28. The ALJ erred, as a matter of law, in not giving sufficient weight to the fundamental nature of the Section 7 activity in which Grosso was engaged. (ALJD p. 15, ln 29-39).

ATLANTIC STEEL ANALYSIS: FACTOR 4

29. The ALJ erred, as a matter of law, in concluding that the fourth *Atlantic Steel* factor, whether the outburst was provoked, weighed against protection where the comments “were directly solely to employees” rather than to management. (ALJD p. 15, ln 48-50).

30. The ALJ erred, as a matter of law, in finding that the fourth *Atlantic Steel* factor, or any other part of the *Atlantic Steel* test for that matter, weighed against protection where the “wording [of Grosso’s comments] suggested that the source was apparently displeased with the warehouse employees for having initiated a decertification election and the possible removal of the Union as the bargaining representative.” (ALJD p. 16, ln 1-5).

31. The ALJ’s conclusion that, to the warehouse employees, the “comments came without warning from an unknown source,” is not supported by the record or the ALJ’s findings of fact and is thus an error of fact. (ALJD p. 16, ln 1-5, p. 13, ln 14-16; p. 5, ln 27; p.6, ln 35-36; p. 8, ln 2-7).

USES OF PROFANITY IN THE FACILITY

32. The ALJ erred, as a matter of law, in neglecting her duty to make credibility resolutions. (ALJD p. 19, ln 10-13).

33. The ALJ erred, as a matter of fact, in finding that because there was “little basis to substantially credit either group of witnesses with respect to the prevalence of profanity or vulgarity...[i]t is reasonable that the reality lies somewhere in the middle” because this conclusion was not supported by record evidence. (ALJD p. 19, ln 10-13).

34. The ALJ erred, as a matter of law, in considering the absence of prior discipline for profanity as part of her *Atlantic Steel* analysis. (ALJD p. 18, ln 20-22, p. 19, ln 4-6, ln 30-31).

35. The ALJ erred, as a matter of fact, in concluding that the record supported a finding that Grosso's comments "went beyond what was normal or tolerated" in the workplace because this conclusion was not supported by record evidence. (ALJD p. 19, ln 31).

36. The ALJ erred, as a matter of fact, in failing to consider record evidence that employee Moscatelli's testimony that she never heard or used profanity in the workplace (Tr., 685:5-687:6; Tr., 760:25-761:1) was directly contradicted by the testimony of supervisors Geoff Rogers and Frank Petliski. (Tr., 1027:19-1029:22, 1084:14-25, 1101:6-8). (ALJD p. 19, 8-31).

37. The ALJ erred, as a matter of fact, in failing to consider that employee Germino was caught in an outright lie on the record concerning the use of profanity. (Tr., 826:1-5, 826:19-22, 840:3-23; 841:15-25, 846:6-13). (ALJD p. 19, 8-31).

ATLANTIC STEEL AND RELATED CONCLUSIONS

38. The ALJ erred, as a matter of law, in considering Grosso's admissions that the comments "could" have a different meaning and impact than he intended and thus improperly applying a subjective standard. (ALJD p. 19, ln 35-48).

39. The ALJ erred, as a matter of fact and law, in finding that the comments contained "admittedly offensive and threatening wording" because this conclusion is not supported by the record evidence, the ALJ's findings, and the law. (ALJD p. 19, ln 50; p. 20, ln 1).

40. The ALJ's conclusion that Grosso's conduct was unprotected because his "well-intentioned motivation cannot dispel the nature of the conduct and its impact upon the warehouse

41. The ALJ erred, as a matter of fact and law, in concluding that, “Sadly, employees in today’s work environment are sensitized to threats and dangers that were not even imagined years ago. Regrettably, there are periodic news stories about employees who injure and kill their fellow employees for reasons that are totally unpredictable. Thus, any potential threat from a fellow employee would reasonably be viewed by an employee in the context of heightened awareness and concern about workplace risks and dangers.” (ALJD p. 20, ln 43-48). These conclusions are not supported by any record evidence and are not facts of which a judge may take judicial notice. Fed. R. Evid. 201(b).

42. The ALJ erred, as a matter of fact, in applying the conclusion about the “threats and dangers” in “today’s work environment” to the instant case because the implication that employees here viewed the threat in such a context is not supported by record evidence. (ALJD p. 20, ln 43-48).

43. The ALJ erred, as a matter of fact, in failing to consider record evidence that Grosso had no history of violence or confrontational behavior. (ALJD p. 20, ln 50; Tr., 89:14-25; 744:1-17).

44. The ALJ erred, as a matter of fact and law, in concluding that Respondent did not violate the Act when it suspended and terminated Grosso, because such a conclusion directly contravenes the most fundamental principles of the Act. (ALJD p. 20, ln 50; p. 21, ln 1-3).

WRIGHT LINE ANALYSIS

45. The ALJ erred, as a matter of fact and law, in finding that there was not a “basis upon which to infer animus sufficient to meet the requirements of the *Wright Line* analysis”

46. The ALJ erred, as a matter of fact and law, in failing to consider as evidence of animus that Respondent violated Section 8(a)(1) through its unlawful interrogation and investigation. (ALJD p. 22, ln 24-26).

47. The ALJ erred, as a matter of fact and law, in failing to consider as evidence of animus the record evidence that Respondent had knowledge that Grosso's comments indicated support for the Union in the upcoming election. (ALJD p. 22, ln 24-2).

48. The ALJ erred, as a matter of fact and law, in failing to consider as evidence of animus that Respondent suspended Grosso on September 22, the day before the decertification election and eleven days after it first learned about the comments. (ALJD p. 22, ln 24-2).

49. The ALJ erred, as a matter of law, in considering only whether there was evidence of animus directly imputed to manager Tyler. (ALJD p. 21, ln 48-49).

50. The ALJ erred, as a matter of fact and law, in concluding that Respondent met its burden of showing that it would have terminated Grosso even in the absence of any protected activity because the evidence the ALJ relied upon was not supported by the facts in the record. (ALJD p. 22, ln 29-30).

51. The ALJ erred, as a matter of fact and law, in finding that Respondent had discharged employees in similar circumstances for violations of its harassment and EEO policies. (ALJD p. 21, ln 14).

52. The ALJ erred, as a matter of fact and law, in relying on Respondent's sexual harassment policy because the record evidence clearly establishes that this policy was not a basis

53. The ALJ erred, as a matter of fact, in concluding that Respondent met its burden of showing that it would have terminated Grosso even in the absence of any protected activity because he was terminated for lying in an investigation. (ALJD p. 22, ln 41-42).

54. The ALJ erred, as a matter of law, in concluding that terminating Grosso for lying in response to Respondent's interrogation of him was a legitimate basis for terminating him. (ALJD p. 22, ln 41-42).

55. The ALJ erred, as a matter of fact and law, in finding that Respondent had discharged employees in similar circumstances for lying during a company investigation. (ALJD p. 22, ln 41-42; Tr., 68:14-69:5, 72:6-8, 192:9).

56. The ALJ erred, as a matter of fact and law, in finding that the Respondent satisfied its obligation under *Wright Line* because "[t]o have condoned or ignored Grosso's conduct would have disregarded not only the provisions of the employee handbook, but also the concerns of the female warehouse employees" although there is no record evidence that Respondent based its decision to discharge Grosso on these or related factors. (ALJD p. 22, ln 39-41)

57. The ALJ erred, as a matter of fact, in concluding that "[t]here is no evidence that Respondent has failed to discipline an employee under similar circumstances" because the ALJ disregarded record evidence contradicting this statement. (ALJD p.22, ln 43-45; p. 17, ln 20-39).

58. The ALJ erred, as a matter of fact and law, in failing to consider record evidence that Respondent's asserted reasons for discharging Grosso were pretextual. (ALJD p. 21, ln 43-45; p. 22, ln 24-26). (*See, e.g.*, Tr., 130:5-17, 158:20-159:23, 163:21-165:18, 166:7-8; 168:10-11, 185:6-186:2, 189:2-10, 204:20-205:1, 205:7-11, 223:16, 224:3-225:14, 602:17-25, 666:15-19, 716:2-9,

717:11-24, 1224:2-3, 1227:8-20, 1229:8-13, 1229:24-1230:9, 1244:8-15, 1282:14-21, 1295:15-25, 1301:10-24, 1302:21-1303:2; 1302:21-1303:2, 1315:3-25; 1325:23-5, 1326:20-1327:4; 1364:12-1366:9; Resp. Ex. 13).

59. The ALJ erred, as a matter of fact and law, in concluding that Respondent did not violate Section 8(a)(3) of the Act in suspending and discharging Grosso based on her own factual findings. (ALJD p. 11, ln 10-12).

60. The ALJ erred, as a matter of law, in not considering whether Grosso's discharge was lawful under the *Burnup & Sims* analysis. (ALJD p. 20, ln 34-40).

61. The ALJ erred, as a matter of fact and law, in failing to provide an intranet posting.

62. The ALJ erred as a matter of fact and law, in failing to provide a compound interest remedy.

Dated: October 13, 2010
New York, New York

Respectfully submitted,



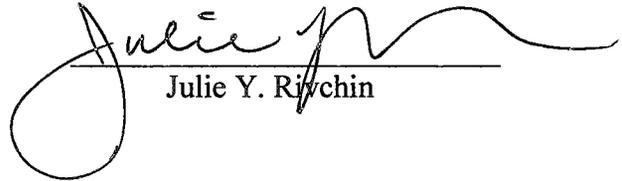
Julie Y. Rivchin
Counsel for the Acting General Counsel

CERTIFICATE OF SERVICE

This is to certify that on October 13, 2010, I caused the foregoing Counsel for the Acting General Counsel's Statement of Exceptions and Brief in Support of Exceptions to be served, via electronic mail, addressed as follows:

Thomas G. Servodidio
Duane Morris LLP
By email: TGServodidio@duanemorris.com
Counsel for Respondent

Daniel E. Clifton
Lewis, Clifton, and Nikolaidis, PC
By email: dclifton@lcnlaw.com
Counsel for the Charging Party


Julie Y. Rivchin

Dated this 13th of October, 2010