

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Counterstatement of the Facts	2
A. The General Counsel Ignores Grosso’s Original Explanation For Writing the Comments on the Newsletters Which He Stated During an Interview on September 23, 2009 When He Was Represented by the Union	3
B. The General Counsel Ignores Grosso’s Concession that the Words He Wrote on the Newsletters Understandably Could Have Been Received as Both Offensive and Threatening to the Female Employees at the Chester Facility	4
C. The General Counsel Neglected To Recount Material Facts Surrounding the Complaints of the Female Warehouse Workers, the Investigation of Grosso’s Conduct, Grosso’s Confessions, Grosso’s Interviews; and the Decision to Terminate Grosso’s Employment.....	4
D. Judge Brakebusch Properly Admitted and Relied on Evidence Regarding Tyler’s Independent Investigation of Grosso’s Conduct:.....	6
III. Discussion.....	7
A. Judge Brakebusch Correctly Determined That Respondent Did Not Violate Section 8(a)(1) in Suspending and Discharging Grosso	7
1. Application of the Atlantic Steel Analysis	7
2. Grosso’s Conduct Was So Opprobrious As To Lose Its Protection.....	10
a. Place of the Discussion.....	11
b. Subject Matter of the Discussion.....	14
c. Nature of Employee’s Outburst.....	15
d. Whether the Outburst Was Provoked	28
3. Grosso Engaged in Misconduct and Therefore Was Properly Discharged by the Company	28
B. Judge Brakebusch Correctly Determined That Respondent Did Not Violate Section 8(a)(3) in Suspending and Discharging Grosso	31
1. The General Counsel Failed to Set Forth a Prima Facie Case.....	31

2.	Respondent Demonstrated that Grosso Would Have Been Terminated For the Independent Reason of His Dishonesty During the Investigation.....	36
C.	Judge Brakebusch Correctly Determined That Respondent Did Not Violate Section 8(a)(1) in Investigating and Interviewing Grosso.....	41
1.	Respondent Lawfully Investigated Grosso’s Conduct As Required By Respondent’s Policies and Applicable Law	41
2.	Respondent Lawfully Interviewed Grosso On September 21, 2009	44
a.	Background – Is There a History of Employer Hostility and Discrimination?	45
b.	Nature of the Information Sought.....	46
c.	Identity of the Questioner	48
d.	The Place and Method of Interrogation	48
e.	The Truthfulness of the Response	48
D.	Judge Brakebusch Correctly Determined That An Intranet Posting Remedy is Not Appropriate.....	49
IV.	Conclusion.....	50

TABLE OF AUTHORITIES

Federal Cases

<u>Adtranz ABB Daimler-Benz Transp. N.A., Inc. v. NLRB</u> , 253 F.3d 19 (D.C. Cir. 2001)	42, 43
<u>Bourne v. NLRB</u> , 332 F.2d 47 (2d Cir. 1964).....	45
<u>Burlington Indus., Inc. v. Ellerth</u> , 524 U.S. 742 (1998)	43
<u>Ellison v. Brady</u> , 924 F.2d 872 (9th Cir. 1991).....	30
<u>Gallagher v. Delaney</u> , 139 F.3d 338 (2d Cir. 1998).....	30
<u>NLRB v. Burnup & Sims, Inc.</u> , 379 U.S. 21 (1964).....	28-31

Regulatory Cases

<u>Airo Die Casting, Inc.</u> , 347 N.L.R.B. 810 (2006)	22
<u>Alcoa, Inc.</u> , 352 N.L.R.B. 1222 (2008)	16
<u>Alexian Bros. Med. Ctr.</u> , 307 N.L.R.B. 389 (1992)	3
<u>Aluminum Co. of Am.</u> , 338 N.L.R.B. 20 (2002).....	Passim
<u>AT&T Broadband</u> , 335 N.L.R.B. 63 (2001)	19-20, 31
<u>Atlantic Steel Co.</u> , 245 N.L.R.B. 814 (1979)	Passim
<u>Beverly Health & Rehab. Servs., Inc.</u> , 346 N.L.R.B. 1319 (2006)	11
<u>Blue Diamond Growers</u> , 2009 NLRB LEXIS 278 (2009)	49
<u>Boardwalk Regency Corp.</u> , 344 N.L.R.B. 984 (2005)	35-36
<u>Bridgestone Firestone South Carolina</u> , 350 N.L.R.B. 526 (2007).....	46
<u>DaimlerChrysler Corp.</u> , 344 N.L.R.B. 1324 (2005).....	47
<u>Datwyler Rubber and Plastics, Inc.</u> , 350 N.L.R.B. 669 (2007)	16
<u>Fairfax Hosp.</u> , 310 N.L.R.B. 299 (1993).....	17
<u>General Chemical Corp.</u> , 290 N.L.R.B. 76 (1988).....	22
<u>Great Lakes Window</u> , 319 NLRB 615 (1995).....	36
<u>Gruma Corp.</u> , 350 N.L.R.B. 336 (2007).....	32

<u>Hertz Corp.</u> , 316 N.L.R.B. 672 (1995).....	47
<u>J & R Flooring, Inc.</u> , 356 N.L.R.B. No. 9 (2010).....	49
<u>Jackson Hosp. Corp.</u> , 354 NLRB No. 42 (2009).....	34
<u>Kiewit Power Constructors Co.</u> , 355 N.L.R.B. No. 150 (2010).....	17
<u>Leasco, Inc.</u> , 289 N.L.R.B. 549 (1988)	17-19
<u>Martin Luther Mem’l Home, Inc.</u> , 343 N.L.R.B. 646 (2004).....	10
<u>Merillat Indus., Inc.</u> , 307 NLRB 1301 (1992).....	36
<u>Onyx Environmental Servs., L.L.C.</u> , 336 N.L.R.B. 902 (2001).....	39-40
<u>Piper Realty Co.</u> , 313 N.L.R.B. 1289 (1994)	24
<u>Randell Mfg. of Arizona, Inc.</u> , 345 N.L.R.B. 209 (2005)	33
<u>Rossmore House</u> , 269 N.L.R.B. 1176 (1984).....	45
<u>Sara Lee</u> , 348 N.L.R.B. 1133	9-10
<u>SKD Jonesville Div.</u> , 340 N.L.R.B. 101 (2003).....	46
<u>Spartan Plastics, Inc.</u> , 269 N.L.R.B. 546 (1984)	8-9, 40-41
<u>Starbucks Corp.</u> , 354 N.L.R.B. No. 99 (2009)	46
<u>Sunnyvale Med. Clinic, Inc.</u> , 277 N.L.R.B. 1217 (1985).....	45, 46, 48
<u>Sunrise Health Care Corp.</u> , 334 N.L.R.B. 903 (2001).....	32, 33
<u>Twilight Haven</u> , 235 N.L.R.B. 1337 (1978).....	31
<u>United Servs. Auto Ass’n</u> , 340 N.L.R.B. 784 (2003).....	38-39
<u>Verizon Wireless</u> , 349 N.L.R.B. 640 (2007)	Passim
<u>Wilkie Co.</u> , 333 N.L.R.B. 603 (2001)	22

Statutes

Title VII of the Civil Rights Act of 1964 (“Title VII”).....	Passim
--	--------

Rules

Rule 803(6) of the Federal Rules of Evidence	6
--	---

Regulations

29 C.F.R. § 1604.11(d).....43

I. Introduction

Judge Brakebusch, after conducting a five-day hearing, determined that Respondent Fresenius USA Manufacturing, Inc. (“Fresenius” or the “Company”) did not violate the National Labor Relations Act (the “Act”) when the Company: 1) conducted an investigation regarding offensive and threatening comments written on union newsletters placed in the break room of its Chester, NY facility in response to multiple complaints from several female employees about the comments, as it was required to do under its Equal Employment Opportunity (“EEO”) and Harassment Policies as well as under the applicable federal and state anti-discrimination laws; 2) interviewed Kevin “Dale” Grosso (“Grosso”) as part of the investigation after one of the complaining employees identified him as the likely author and only after the Company independently reviewed handwriting samples confirming that he was the likely author; and 3) suspended and discharged Grosso for lying during the investigation and violating its EEO and Harassment Policies by writing the offensive and threatening comments on the union newsletters, conduct which lost any protection under the Act due to its opprobrious nature.

The Counsel for the Acting General Counsel (“General Counsel”) now seeks to overturn each of these conclusions, which are well supported by both the record evidence and applicable legal precedent, by asking the National Labor Relations Board (the “Board”) to expand the notions of protected conduct under the Act so far that it essentially erases the Board’s well established protections afforded to employees against harassment and threats of violence in the workplace due to the opprobrious nature of an employee’s conduct.

Simply stated, Grosso acted outside the protections of the Act when he wrote comments that used words such as “Pussies,” “Catfood Lovers” (which Grosso admitted was a play on the word “Pussies” and it was understood as such by the readers of the comments) and “RIP” (which Grosso indicated referred to “Rest in Peace” or death) on newsletters left on display in a central

location at the Respondent's Chester facility since these words had the foreseeable and understandable impact of causing female employees to be both offended due to the sexually inappropriate nature of the words related to female genitalia and threatened due to the comment related to death. Judge Brakebusch correctly determined that these types of words deserve no protection at the workplace under any interpretation of the Act. Additionally, Grosso violated the Company's Equal Employment Opportunity and Harassment Policies which are intended to protect employees from the very type of sexually offensive and harassing conduct in which Grosso engaged and are required to be enforced by the Company under Title VII of the Civil Rights Act of 1964 ("Title VII") and applicable state law.

To have disregarded the multiple complaints of four female employees about the offensive and threatening nature of the comments on the newsletters which were asserted and restated to management over the span of about ten days would have required the Company to disregard its human resources policies as well as applicable Title VII and state anti-discrimination law with the ensuing legal obligation to provide a safe and harassment-free workplace for its employees. The record evidence in this case and applicable Board law does not support such a conclusion. Therefore, the ALJ's conclusions that the Company lawfully investigated and interviewed Grosso and then lawfully suspended and terminated his employment due to violations of its EEO and Harassment policies and for lying in the investigation should be upheld.

II. Counterstatement of the Facts

As Respondent already set forth its Statement of the Facts in Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision ("Respondent's Brief in Support of Exceptions") filed on October 13, 2010, Respondent incorporates herein by reference

that Statement of the Facts in the interests of brevity. Respondent will additionally address several factual statements set forth in General Counsel's Brief in Support of Exceptions¹.

A. The General Counsel Ignores Grosso's Original Explanation For Writing the Comments on the Newsletters Which He Stated During an Interview on September 23, 2009 When He Was Represented by the Union

The General Counsel describes, at length, Grosso's purported motives for writing the offensive and threatening comments on the union newsletters, asserting specifically that Grosso wrote the comments because he wanted the warehouse unit employees to read a particular article in the newsletters. GC 4. This contention on which the General Counsel relies heavily is complete conjecture and is not supported by the record. Grosso never testified that he had read any of the contents of the union newsletter, let alone any specific articles buried within the body of the newsletters, before writing the offensive and threatening comments on the newsletters. To the contrary, Grosso testified that when he first noticed the newsletters on the break room tables he immediately sat down and wrote on the newsletters after spending only "half a second" thinking about what words to write. Tr. at 259-61. Judge Brakebusch found that Grosso and a fellow employee, Mark Huertas, both "laughed and commented that the employees probably would not" read the newsletters, and that Grosso then "sat down at one of the tables and began to write comments on the top of the newsletters." ALJD p. 4; lines 30-35. Grosso's story about wanting the warehouse employees to read a specific article in the newsletter is flatly inconsistent with the record evidence and Judge Brakebusch's findings, which indicate instead that he never actually read the contents of the newsletters before he wrote on the face of them.

¹ The following abbreviations are used throughout this document: ALJD refers to the Administrative Law Judge's Decision and is cited with page and line number. References to the transcript of the hearing in the case are referred to as "Tr. ___". Also, references to the Counsel for the Acting General Counsel's exhibits are referred to as "GCX ___" and references to the Respondent's exhibits are referred to as "RX ___". Also, the Counsel for the Acting General Counsel will be referred to as the "General Counsel" in this brief for ease of reference. References to the General Counsel's Brief in Support of Exceptions are referred to as "GC ___."

The General Counsel's reliance on Grosso's purported motives for writing the comments on the newsletters which he stated for the first time at trial are not supported by the record evidence. Before making any decision about potential discipline, the Company provided Grosso with the opportunity to explain himself during the investigation into his conduct which occurred less than two weeks after Grosso actually wrote the comments. When given the opportunity to explain his conduct with no fewer than two union representatives present in an interview on September 23, 2009, Grosso's only explanation was that "in the spirit of full disclosure, I was looking out for the little people." Tr. at 1239, 1355; RX 23. Grosso's stated motive for writing the comments at the time of the events in September 2009 is the only motive that can be properly relied upon and certainly not the one that he crafted over seven months later in a transparent attempt to cloak his conduct as protected activity after the fact.

B. The General Counsel Ignores Grosso's Concession that the Words He Wrote on the Newsletters Understandably Could Have Been Received as Both Offensive and Threatening to the Female Employees at the Chester Facility

Grosso's purported understanding of the words "pussies," "catfood lovers," and "RIP" are misstated in the General Counsel's Statement of the Facts since the General Counsel suggests that Grosso only understood these words to be harmless. Regardless of the meaning Grosso may have intended to convey when he wrote the offensive words "pussies" and "catfood lovers" and the threat "RIP," Grosso testified that he understood that those words were both offensive to women and threatening. Tr. at 334, 356, 407. Despite any intent he ascribed at trial to writing these words, Grosso admitted that he understood the words referred to female genitalia and death, respectively, and therefore could understandably be received as both offensive and threatening to female employees. Tr. at 334, 407.

C. The General Counsel Neglected To Recount Material Facts Surrounding the Complaints of the Female Warehouse Workers, the Investigation of Grosso's

Conduct, Grosso's Confessions, Grosso's Interviews; and the Decision to Terminate Grosso's Employment

While the General Counsel describes in detail the events leading up to Grosso's writing the comments on the newsletters including Grosso's purported motives for writing the comments which he developed for trial, the General Counsel's Statement of the Facts conveniently neglects to recount any of the events between the time of Grosso's conduct and Grosso's eventual termination. The General Counsel leaves out the three instances wherein the female warehouse workers complained about the offensive and threatening nature of the comments on the newsletters, twice on September 10 and again on September 21; the identification of Grosso as the likely author of the comments by one of the female employees who complained to management; the review of the drivers' logs and Grosso's handwriting sample on September 21 supporting the conclusion that Grosso appeared to be the likely author of the comments; the initial interview of Grosso on September 21 during which he lied about similarities in his handwriting and the handwriting on the newsletters but acknowledged that female employees could have been offended and threatened by the comments written on the newsletters; Grosso's confession to writing the comments to Kevin King, Doug Maloney and Frank Petliski on the phone on September 22; the meeting with Grosso and his union representative on September 22 during which he was suspended; the interview of Grosso on September 23 wherein he again confessed to writing the comments on the newsletters, admitted to lying during the investigation, and described his real motive for writing the comments; the independent investigation by Jason Tyler, the Human Resources Manager, into Grosso's conduct; and the decision to terminate Grosso for violation of the EEO and Harassment Policies and for lying during the investigation.

Judge Brakebusch made findings of fact as to each of these critical events which may not have been supportive of the General Counsel's legal arguments in this case but which should not

have been ignored. ALJD p. 5, line 9 to p. 10, line 25. The events noted above are crucial in that they demonstrate that the Company properly conducted a full and fair investigation, as required by the law and by the Company's policies, at the urging of four female warehouse workers who complained of the offensive and threatening comments, and properly terminated Grosso for violation of its policies and his dishonesty during the investigation. A summary of the record evidence on these important events is set forth in the Respondent's Statement of Facts in its Brief in Support of Exceptions to the ALJ's Decision.

D. Judge Brakebusch Properly Admitted and Relied on Evidence Regarding Tyler's Independent Investigation of Grosso's Conduct

The General Counsel makes two erroneous contentions with respect to Tyler's independent investigation of Grosso's conduct and his determination to discharge Grosso. First, the General Counsel contends that, since Tyler relied on "particular documents and limited statements provided to him by other supervisors," "out of court statements made to other supervisors and not relied upon by Tyler were irrelevant and inadmissible hearsay." GC 7, n.9. First, it is unclear to which out of court statements the General Counsel refers. Insofar as the General Counsel refers to statements made by the female warehouse workers who complained of Grosso's conduct, however, those statements were admissible and relied upon by Tyler in several respects; namely, (1) Tyler specifically relied upon written statements by the complaining female employees submitted as part of the investigation, (2) Tyler relied upon written memoranda to the file completed by King, Maloney, and Petliski², some of which incorporated statements by the female warehouse workers, and (3) Tyler interviewed King, Maloney, and Healy, wherein the supervisors recounted certain statements made by the female warehouse

² Additionally, the memoranda to the file relied upon by Tyler are admissible business records pursuant to Rule 803(6) of the Federal Rules of Evidence, for the reasons explained in Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision.

workers, and he relied upon those interviews as well in making his decision to discharge Grosso. Tr. at 81, 84, 1244, 1376, 1150-51. Therefore, such out of court statements to supervisors are not hearsay since they are not offered for the truth of the matter asserted, but are instead offered to show what Tyler relied on during his independent investigation.

Additionally, the General Counsel contends that Judge Brakebusch's reliance on Respondent's sexual harassment policy was in error because Tyler "clearly testified . . . that the harassment and EEO policies were the only two policy violations on which the company relied in terminating Grosso." GC 7. This contention, however, mischaracterizes Tyler's testimony. Tyler testified that the Employee Handbook, which he reviewed during his investigation which ultimately led to terminating Grosso, informed employees "of a portion of the harassment policy and a portion of the sexual harassment policy." Tr. at 59, 64. Therefore, as the Employee Handbook which Tyler reviewed contained a portion of the sexual harassment policy, Judge Brakebusch did not err in relying on that portion of the sexual harassment policy.

III. Discussion

A. Judge Brakebusch Correctly Determined That Respondent Did Not Violate Section 8(a)(1) in Suspending and Discharging Grosso

1. Application of the Atlantic Steel Analysis

Judge Brakebusch properly applied Atlantic Steel analysis to determine whether Grosso's conduct lost its protection under the Act.³ As to the General Counsel's contention that Judge Brakebusch erred in not finding that Grosso's conduct constituted protected union activity,⁴ it is

³ As explained in Respondent's Exceptions to the Administrative Law Judge's Decision and Respondent's Brief in Support thereof, Respondent maintains that Grosso's conduct was neither protected nor concerted, and therefore did not fall within the protection of Section 7 of the Act. Assuming arguendo the Board concludes that Grosso's conduct was protected concerted activity, his conduct was so opprobrious as to lose its protection, as properly found by Judge Brakebusch. ALJD p. 19, line 50 to p. 20, line 2.

⁴ The General Counsel contends that "Respondent was aware from the outset that the newsletter comments were related to the Union and the decertification election." GC 8. Tyler, the only decisionmaker with

not material whether Grosso's conduct was protected concerted activity or protected union activity since, in either case, Judge Brakebusch properly applied the Atlantic Steel factors established by the Board to determine whether the protected activity was so offensive as to lose its protection. See, e.g., Verizon Wireless, 349 N.L.R.B. 640 (2007) (finding that, although the employee's "profane comments were made during the course of his protected efforts to promote the Union," his conduct lost its protection pursuant to the Atlantic Steel analysis) (emphasis added). Therefore, regardless of whether Grosso's conduct is characterized as "protected concerted activity" or "protected union activity," it is subject to the same analysis as to whether the conduct lost its protection under the Act.

The General Counsel contends that the facts of this case "do not fit comfortably into the four-factor Atlantic Steel test" because the "Atlantic Steel analysis developed [sic] to deal with cases in which employees are discharged for (1) a verbal outburst (2) directed toward a supervisor (3) during the protected activity of discussing a grievance or other protected discussions with an employer." GC 14. In so doing, the General Counsel seeks to narrow the application of the Atlantic Steel test in a manner inconsistent with Board precedent. Contrary to the General Counsel's contention, the Atlantic Steel factors are more generally applied in instances where "[o]pprobrious conduct may forfeit the protection of the act." Spartan Plastics, Inc., 269 N.L.R.B. 546, 551 (1984).

The Board has applied the Atlantic Steel analysis to other cases which, like the instant case, involved written, not verbal, conduct similar to Grosso's conduct. For example, in Spartan

respect to Grosso's discipline, specifically testified, however, that he was not aware, nor did he think, that the statements written on the Union newsletters related in any way to the upcoming decertification election for the warehouse unit employees at the Chester facility. Tr. at 115. Therefore, it is not accurate for the General Counsel to state that "the record is clear that Respondent was aware" that the newsletter comments related to the decertification election.

Plastics, Inc., the Board found that an employee's conduct in writing and distributing a series of questions to be submitted to the employer concerning certain terms and conditions of employment lost its protection under the Act, citing the Atlantic Steel factors. 269 N.L.R.B. at 551-52. Further, the Board has applied the Atlantic Steel factors to cases wherein, like this case, an employee's outburst was directed at other employees, not a supervisor. See Verizon Wireless, 349 N.L.R.B. at 642-43 (finding that an employee's conduct lost protection of the Act where the employee, in an attempt to solicit support of other employees for the union, used profanity and rejecting the argument that the fact that the conduct occurred in a work area should not weigh in favor of a loss of protection simply because the conduct was not directed at a supervisor).

Finally, the General Counsel's contention that the Atlantic Steel analysis was developed to deal with cases in which employees engaged in an outburst "during the protected activity of discussing a grievance or other protected discussions with an employer" as opposed to the instant case where Grosso engaged in misconduct "during the protected activity of urging his coworkers to support the union," is also refuted by well established Board case law. GC 14 (emphasis added). In Verizon Wireless, the Board applied the Atlantic Steel analysis to a situation where the Board analyzed whether an employee's use of profanity during the course of engaging in the protected activity of urging his coworkers to support the union (the exact conduct in which the General Counsel alleges Grosso was engaged in this case) lost its protection under the Act. 349 N.L.R.B. at 642-43 (finding that even where an employee was engaged in "core Section 7 activity," soliciting coworker support for the union, the employee's conduct lost its protection under the Atlantic Steel analysis); see also Sara Lee, 348 N.L.R.B. 1133, 1155 (applying Atlantic Steel analysis to determine whether employee's conduct in criticizing coworkers for refusing his invitation to attend a union meeting lost the protection of the Act).

The General Counsel's contention that the "concerns and principles" underlying the Atlantic Steel inquiry seeks to analyze the balance of the employee's Section 7 rights with the employer's "managerial concerns in maintaining discipline, control, and authority in its workplace" narrowly overlooks other important managerial concerns which the Atlantic Steel inquiry also seeks to protect. GC 14-15. The Board has recognized such other important managerial concerns when applying the Atlantic Steel analysis. For example, in Martin Luther Memorial Home, Inc., the Board recognized that "[u]nder the Act, rights guaranteed by Sec. 7 must be balanced against the reasonable expectations of employees not to be harassed." 343 N.L.R.B. 646, 648 (2004) (finding that an employer's rule prohibiting abusive and profane language, harassment, and verbal, mental and physical abuse were lawful and noting "[t]he question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the specific facts of each case," citing Atlantic Steel). Similarly, in Sara Lee, the judge reasoned that "[t]he Board recognizes that an employer may prohibit 'abusive or threatening language' in a desire to maintain order and avoid liability for workplace harassment." 348 N.L.R.B. at 1155 (applying Atlantic Steel analysis to determine whether employee's conduct lost protection of the Act). The concerns addressed in Martin Luther Memorial Home and Sara Lee more aptly express the Respondent's managerial concerns – maintaining a safe, harassment-free workplace. Therefore, the Atlantic Steel analysis properly addresses the circumstances and the Respondent's managerial concerns of the instant case and, therefore, was appropriately applied by Judge Brakebusch.

2. Grosso's Conduct Was So Opprobrious As To Lose Its Protection

Judge Brakebusch likewise appropriately found that Grosso's conduct was so opprobrious as to lose the protection of the Act under the Atlantic Steel analysis. ALJD p. 19, line 50 to p. 20, line 2. To decide whether the employee's conduct was so offensive so as to lose

protection under the Act, the Board considers the following factors: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.” Atlantic Steel Co., 245 N.L.R.B. 814, 816 (1979). Each of the four factors weighs in favor of Grosso’s conduct losing its protection.

a. Place of the Discussion

The place of the discussion, the employee break room, weighs in favor of Grosso’s offensive and threatening comments losing their protection under the Act.⁵ The Board has held that, when the employee’s conduct in question occurs in the employee break room, the place of discussion factor weighs in favor of the conduct losing the protection of the Act.⁶ See, e.g., Aluminum Co. of Am., 338 N.L.R.B. 20, 22 (2002) (holding that the first factor of the Atlantic Steel test weighed in favor of the employee’s conduct losing its protection where the “profane outbursts . . . took place in the employee breakrooms, where [the employee’s] sustained profanity could be overheard by coworkers”).

⁵ Judge Brakebusch properly found that the first factor of the Atlantic Steel analysis weighs in favor of a loss of protection under the Act because the comments were “visible to all employees in a common area that was accessible and used by both warehouse employees and drivers.” ALJD p. 14, lines 13-14. Judge Brakebusch also correctly reasoned that, since the employees were unable to determine the origin of the comments, as they were written anonymously, there was no way to “evaluate the pervasiveness of the sentiment or more importantly, to ascertain the likelihood of future comments or threats” and that therefore the comments “caused a greater impact upon the employees than an isolated comment in a meeting or conversation.” ALJD p. 14, lines 16-25.

⁶ The General Counsel cites Beverly Health & Rehab. Servs., Inc., 346 N.L.R.B. 1319 (2006) in support of the argument that the location of the conduct, the break room, should weigh in favor of protection under the Act. The Board in Beverly Health & Rehab. Servs., however, did not hold that the location of the conduct weighed in favor of protection. The Board held only that the location of the conduct, where the conduct occurred in an employee break room outside of work time and without causing disruption, did not weigh either in favor or against protection. Therefore, Beverly Health & Rehab. Servs. does not support the General Counsel’s argument that the location of Grosso’s conduct weighs in favor of protection under the Atlantic Steel factor test.

The General Counsel's contention that the location of Grosso's conduct weighs in favor of protection because the conduct occurred in a "non-work area" is not supported by the record evidence since the break room at the Chester facility was not some remote non-work area which employees only accessed during non-work time. As described in the Statement of Facts in Respondent's Brief in Support of Exceptions, the layout of the Chester facility required the hourly employees at the facility to walk through the employee break room on a daily basis in order to clock in and clock out due to the location of the time clock by the doors to the break room. Tr. at 791, 793. Moreover, warehouse employees regularly traveled through the break room to obtain their handheld devices and to obtain work instructions from the warehouse supervisor⁷. Tr. at 791-92. Further, employee group meetings were regularly held in the break room due to its size. Tr. at 1049. Perhaps most importantly, the break room was also used by drivers who would use the room to complete their route paperwork at the end of each day – a compensable work activity required to be completed by the drivers on a daily basis. Tr. at 1219. Therefore, the break room was (1) an area where work activities took place routinely; and (2) an area where a large number of employees were likely to see the comments on the newsletters, thereby having a widespread impact on the work environment. The record evidence supports the conclusion that the offensive and threatening comments written by Grosso on the newsletters and left on the tables in the break room were highly visible to employees upon passing through the break room to and from the warehouse or by employees using the break room for work activities and, therefore, would have maximum impact on the workforce. Tr. at 314-15; see Verizon Wireless, 349 N.L.R.B. at 642 (finding that the first factor of the Atlantic Steel analysis, the

⁷ In fact, Germino testified that she first saw the comments on the newsletters when she walked through the break room to get her hand held device for work that day after punching in at the time clock right outside the break room. Tr. at 791-92.

location of the conduct, weighed in favor of a loss of protection where the conduct occurred in an area where both supervisory and nonsupervisory personnel were likely to hear the employee's profane comments).

The General Counsel's argument that "Grosso's comments in no way interfered with management's rights" and had no "disruptive effect on the workplace" likewise fails. GC 16. Grosso's comments interfered with the Company's ability to maintain a safe, secure, and harassment-free workplace by injecting vulgar, offensive, and threatening comments into the workplace such that four female warehouse employees were so offended and frightened that they complained on no fewer than three occasions (twice in employee group meetings). Grosso's comments also had a disruptive effect on the workplace since, on the day the newsletters were discovered, the Distribution Center Manager, Shane Healy, had to take the time to individually meet with each female employee who was upset about the comments and then call a meeting in the middle of the workday with all of the employees present at the Chester facility to address the adverse impact the comments had on the employees at the workplace. Tr. at 877-78, 1051-52, 1222-26. Grosso's conduct was so disruptive, in fact, that after the women had complained twice to Healy on September 10, the women complained yet again on September 21 to Healy's superiors (King and Maloney) in another employee group meeting because the Company was not acting quickly enough in addressing the women's complaints.

The General Counsel's contention that Grosso's comments were "not insubordinate" is directly disputed by the fact that Grosso was well aware of the Company's Harassment and EEO policies and violated them, admitting during the course of his testimony that his comments could be considered violations of such policies. Specifically, Grosso testified that he received a copy of the Employee Handbook, containing the Harassment and EEO policies, when he was hired at

Fresenius. Tr. at 402-03. Grosso admitted that “Dear Pussies – Please Read,” “Hey Catfood Lovers, How’s Your Income Doing?” and “Warehouse Workers – RIP” were inappropriate in the workplace and were violations of the Company’s policies. Tr. at 400, 408-09. By violating two Company policies of which Grosso was aware, he was insubordinate in writing the offensive and threatening comments on the newsletters. Therefore, the ALJ’s conclusion that the place of the conduct weighed in favor of a loss of protection was supported by both the record evidence and the Board’s decisions⁸.

b. Subject Matter of the Discussion

As discussed more fully in Respondent’s Brief in Support of Exceptions, Judge Brakebusch erroneously determined that the second factor in the Atlantic Steel analysis, the subject matter of the discussion, weighs in favor of protection of Grosso’s offensive and threatening comments⁹. Grosso’s conduct was comprised of nothing more than the offensive and threatening words “pussies,” “catfood lovers,” and “RIP.” Unlike the conduct in Verizon Wireless, where the employee was soliciting union support from his coworkers, the purported reasons for Grosso’s conduct, allegedly to encourage employees to vote for the Union in the upcoming decertification election, were not apparent from reading the comments themselves. Grosso chose to write “Dear Pussies,” “Hey Catfood Lovers,” and “RIP.” The first two comments, by his own admission, were derogatory towards women and relate specifically to

⁸ The General Counsel suggests that Judge Brakebusch’s conclusion may have relied on her “improper assumption” that Grosso’s comments constituted a threat. This so called “assumption”, however, was not improper. There was extensive testimony at trial that the female warehouse workers who complained about the comments, as well as Tyler, the sole decisionmaker with respect to Grosso’s termination, all concluded that “Warehouse Workers - RIP” was a threat. Tr. at 89, 652, 800, 873; RX 5, 6, 8. Therefore, the Judge’s conclusion was proper and supported by the record evidence.

⁹ As noted by the General Counsel, Judge Brakebusch’s finding that the subject matter of Grosso’s conduct, the only factor the judge found to weigh in favor of protection, did not find that the factor weighed strongly in favor of protection. GC 19, n.13.

female genitalia. Tr. at 356, 407. The third comment referred to death, by Grosso's own admission, and was perceived as a serious threat by four female employees. Grosso admitted that people could read the words referring to female genitalia and be offended by them, that the comments could be demeaning to women, and that people could read his comments and understand them to be referring to women in a derogatory manner. Tr. at 330, 331, 438. Moreover, the comments never mention their purported motivation and purpose – the Union, voting, or the decertification election. Therefore, Grosso's comments were nothing more than offensive and threatening words, unaccompanied by any explanation regarding the upcoming decertification election or the Union. Therefore, the second factor, the subject matter of the discussion, weighs in favor of a loss of protection.

c. Nature of Employee's Outburst

Judge Brakebusch correctly found that the nature of Grosso's conduct weighs in favor of its loss of the Act's protection. ALJD p. 15, lines 8-38. The weight of the evidence (including Grosso's own admissions) demonstrates that the words "pussies" and "catfood lovers" are vulgar and offensive in that they are commonly understood to refer to female genitalia. Moreover, the use of "RIP" is commonly understood to refer to death and not only can be, but was considered a threat by no fewer than four female warehouse employees¹⁰. Consequently, the nature of Grosso's outburst supports a finding that his comments on the newsletters were so opprobrious

¹⁰ The ALJ's conclusion that "employees in today's work environment are sensitized to threats and dangers that were not even imagined years ago" and that "there are periodic news stories about employees who injure and kill their fellow employees for reasons that are totally unpredictable" is supported by record evidence. ALJD p. 20, lines 43-48. The Judge was not taking judicial notice of such facts, as alleged by the General Counsel. GC 23, n.22. There is testimony on record regarding the Columbine massacre, as well as the Yale incident wherein a graduate student was killed by a lab technician, both of which were relatively recently highly publicized events about employees or fellow students who injure and kill their fellow employees and students. Tr. at 90, 739-41. Moreover, these very events were referenced in the written statement submitted by one of the female employees who complained about the handwritten comments on the newsletters and were expressly considered by Tyler, the decision maker regarding Grosso's discharge. GCX 5.

as to lose the protection of the Act. The General Counsel argues, for the very first time as this argument did not appear in the General Counsel's post hearing brief, that "pussies," "catfood lovers," and "RIP" are ambiguous colloquialisms and therefore the nature of Grosso's conduct does not weigh in favor of a loss of protection. This argument fails as well.

First, Grosso's conduct was not a single, spontaneous outburst which might be excused as "part of the 'res gestae' of . . . concerted activity." Alcoa, Inc., 352 N.L.R.B. 1222, 1226 (2008). Although the Board has found certain conduct protected where the employee's conduct was "spontaneous, brief, and unaccompanied by physical contact or threat of physical harm," that is not the case here. Datwyler Rubber and Plastics, Inc., 350 N.L.R.B. 669, at *7-8 (2007). In this case, the nature of Grosso's conduct is just the opposite – it was composed of three separate, written instances of vulgar and threatening language, was not "brief" since it was in writing and therefore enduring, and was accompanied by a threat of physical harm – RIP meaning "rest in peace" or "death" by Grosso's own admission and as understood by the complaining employees. As opposed to Grosso blurting out a comment in the midst of the "res gestae" of concerted activity, Grosso deliberately sat at the first table in the employee break room and wrote "Dear Pussies – Please Read." He then got up from that table and moved to the second table in the break room and wrote "Hey Catfood Lovers How's Your Income Doing?," then getting up and deliberately moving to the third table to write "Warehouse Workers RIP." Tr. at 314-15. Therefore, unlike an employee's conduct which is "spontaneous," Grosso's conduct was considered and deliberate.

Further, the statement "RIP" is not a "colloquialism that standing alone does not convey a threat of actual physical harm," nor is it an "oblique" or "inherently ambiguous" statement. GC 20. The phrase "Warehouse Workers RIP" is an unambiguous, anonymous threat of death aimed

directly and unequivocally at the warehouse unit employees. In fact, all four female employees who complained understood this threat of physical harm or death and expressed serious concern for their safety which prompted management to take certain, specific steps to address their safety concerns. For these reasons, the instant case is distinguishable from the cases cited by the General Counsel. For example, “RIP” is categorically different from an employee warning that “it was going to get ugly” if he was terminated, or an employee threatening her supervisor with “retaliation” for posting anti-union literature. See Kiewit Power Constructors Co., 355 N.L.R.B. No. 150 (2010) (finding that the nature of the employee’s outburst weighed in favor of protection where he stated that things could “get ugly” because the phrases were ambiguous and cannot be construed as unprotected physical threats); Fairfax Hosp., 310 N.L.R.B. 299 (1993) (finding that an employee’s conduct in threatening her supervisor with “retaliation” was “inherently ambiguous”). Neither of those statements refers to death in the way that “RIP,” which is short for “rest in peace,” so refers. Moreover, the General Counsel conveniently ignores the fact that Grosso admitted in his testimony at trial that the phrase “RIP” could be understood, and commonly is understood, to refer to death. Tr. at 334, 356.

The other cases cited by the General Counsel in support of the argument that “RIP” is a so called ambiguous colloquialism that does not constitute a threat of actual harm and therefore should be afforded the Act’s protection are likewise distinguishable. In Leasco, Inc., the Board found that an employee’s conduct in telling a supervisor, at a bar after consuming several drinks, that “if you’re taking my truck, I’m kicking your ass right now,” did not lose the protection of the Act. 289 N.L.R.B. 549 (1988). The Leasco case is distinguishable for many reasons. First and most importantly, the supervisor in the Leasco case did not perceive the comment as a threat. 289 N.L.R.B. at 551. In fact, the supervisor, who was a 245-pound former truck driver, testified

that he was “concerned” by the comment, but not “upset,” and was described as “appearing calm and unfrightened.” Id. In the instant case, the four women who complained to management were extremely frightened by Grosso’s threat. Buxbaum felt that the comment “Warehouse Workers – R.I.P” was a threat and that whoever wrote it was willing to “actually do something . . . they could attack us.” Tr. at 873. Moscatelli, while upset by all three comments written on the newsletters, was particularly upset by the comment “Warehouse Workers – R.I.P.” because that comment indicates death. Tr. at 652. Germino testified that she felt intimidated and that the comment “Warehouse Workers – R.I.P.” was “like a threat.” Tr. at 800. In fact, Germino was so afraid by the comment that she felt uncomfortable submitting a written statement of her complaint when King informed her that her confidentiality could not be guaranteed. Tr. at 172.

Further, in Leasco, the employer had failed to discipline another employee who had engaged in the same conduct. 289 N.L.R.B. at 551 (another employee “was present and . . . made a similar “I’ll kick your ass” remark as well as other vulgarities . . . [but] no attempt was made to discipline” that employee). The ALJ in Leasco concluded that “Respondent’s decision to discharge [the employee] was arbitrary, discriminatory, and capricious and I infer that it would not have occurred were it not for [the employee’s] protected, concerted protests about conditions of employment,” relying in part on the fact that the employer had not similarly disciplined an employee who had engaged in the same conduct. Id. at 552. In the instant case, there is no record evidence that the Company failed to similarly discipline any employee for engaging in similar conduct, directing a death threat, “Warehouse Workers RIP,” at a group of employees. To the contrary, the only comparator of record was disciplined in exactly the same manner. Matthew Mierla (“Mierla”), an employee in the Kenosha, Wisconsin Distribution Center, made a similar threat that he “wanted to kill the members of the Fleet Department.” Tr. at 105. Tyler

viewed the two threats as similar and viewed both as violations of the Company's Harassment Policy (Tr. at 128), and thereby Tyler treated both employees the same, terminating them on a first offense. Tr. at 105.

Finally, the threat in Leasco, "I'll kick your ass," was found, by the ALJ, to be a "profane colloquialism used commonly to verbalize the speaker's desire to prevail over another person or group," as "accepted by prominent sports and political figures" which "standing alone in its ordinary usage, it does not convey a threat of physical harm." 289 N.L.R.B. at 552. In the instant case, there is no record evidence that "RIP" conveys anything other than a connotation of death in its ordinary usage. Tyler testified, in fact, that the common usage of "RIP" led him to believe that "Warehouse Workers RIP" was in fact a threat because "the warehouse workers that we employ are live human beings. So if I see something that says 'Warehouse Workers, rest in peace,' I do find that threatening. I would be threatened by it." Tr. at 111. Other than Grosso's explanations of what he meant when he said "RIP," and his usage of "RIP" in relation to the Boston Red Sox in the September 21 interview, there is no record evidence of any "common" use of the term "RIP" other than to refer to death. Therefore, unlike the phrase at issue in Leasco, "RIP" is not a "profane colloquialism used commonly." 289 N.L.R.B. at 552. In fact, there was no testimony at the trial that the term "RIP" was ever written down and directed at other employees nor used orally and heard by management or, for that matter, non-management employees at the Chester facility other than, of course, Grosso's use of the phrase.

The General Counsel's use of AT&T Broadband as support for its argument that "RIP" is an ambiguous colloquialism deserving of protection is equally misplaced. In AT&T Broadband, the Board found that an employee's conduct in calling another employee a "marked man" was protected conduct for which the employee should not have been disciplined. 335 N.L.R.B. 63

(2001). The ALJ, affirmed by the Board, reasoned that the “marked man” expression “has acquired a distinctive, if figurative, life of its own in modern times. For example, decisions by the Board and its administrative law judges frequently use the idiom usually to connote union supporters about to be discharged or discriminated against by their employers.” Id. at 68.

Unlike the “marked man” expression, used by the Board and administrative law judges to have a meaning within the union context, “RIP” is not commonly used by the Board, administrative law judges, or any other body, to connote anything other than “rest in peace.” Further, in AT&T Broadband, the credited version of events in which the “marked man” statement was made led the ALJ to conclude that the speaker used the phrase to convey to a coworker who did not support the union that his disloyal conduct would leave him “stigmatized in the eyes of the other employees forever.” Id. The judge also found that “[t]he fact that [the employee] immediately and persistently denied [his coworker’s] repeated assertions that he had been threatened lends considerable credence to the conclusion that, in fact, no threat occurred.” Id. Unlike the employee in AT&T Broadband, Grosso never denied that “RIP” was a threat until the time of trial. As described more fully above, the only credible explanation given by Grosso regarding his intent or motives in writing the comments is the explanation given on September 23 at his interview during the investigation at which he was represented by his union, wherein he stated that “in the spirit of full disclosure, I was looking out for the little people.” Tr. at 1239, 1355; RX 23. Any explanations crafted over seven months later in order to protect his indefensible threat of physical harm or death directed at the warehouse unit employees cannot be credited or relied upon. Therefore, the facts of the instant case are readily distinguishable from the cases cited by the General Counsel and they do not support the conclusion that the nature of Grosso’s conduct weighs in favor of protection.

The cases cited by the General Counsel aiming to persuade the Board that colloquialisms should remain protected address only one of the comments Grosso wrote on the newsletters, the threat “RIP”. The General Counsel cites no cases to support the apparent contention that the word “pussies” is somehow an ambiguous colloquialism. Rather, the General Counsel simply disregards the other two offensive comments which violated the Company’s Harassment and EEO Policies; namely, “Dear Pussies – Please Read” and “Hey Catfood Lovers How’s Your Income Doing?.” The word “pussies” is an unambiguous (and offensive) reference to female genitalia and Grosso conceded that the phrase “catfood lovers” was a play on the word “pussies”. Tr. at 266. Moreover, the women who read these comments understood them to refer to female genitalia. Tr. at 797, 870-71. Consequently, the use of these words of offense in the workplace directed at other employees (particularly since the only female hourly employees at Chester were in the warehouse) presented legitimate and serious concerns for the Respondent under Title VII law and Respondent’s own EEO and Harassment policies and could not be conveniently ignored as mere “colloquialisms.”¹¹

Finally, the General Counsel’s argument that the Board has, in the past, excused the use of “RIP” and “pussies” fails as well. The General Counsel, in an attempt to excuse Grosso’s offensive and threatening conduct, cites to two cases which are completely inapposite to the

¹¹ The General Counsel’s assertion that “Respondent’s own witnesses conceded that they understood the word ‘pussy’ to refer to a ‘wimp’ or ‘weak willed’ person” is a misstatement of the record evidence. GC 22. Germino, for example, testified that she has, in her lifetime, heard the word “pussies” used to mean weak-willed individuals and wimp, and that the word “pussy” has multiple meanings. Tr. at 823-24. She testified, however, that she felt that Grosso’s comment specifically, “Dear Pussies – Please Read,” was “talking about a woman’s body.” Tr. at 797. Buxbaum similarly testified that “Dear Pussies – Please Read” was “offensive. And it’s a part of like something nobody needs to see. This in a place where we work and we eat. It’s horrible.” Tr. at 870. She further testified that it was offensive toward women because she “took it as a part of a woman’s body.” Tr. at 871. Buxbaum never, in fact, testified that she understood “pussies” to mean wimp or weak-willed individual; in fact, Buxbaum simply indicated, in response to General Counsel’s question, that she has heard the phrase “pussy whipped” to mean “domination.” Tr. at 905.

instant case because they both involved picket line conduct. In Wilkie Co., the Board found that it was unlawful for an employer to confiscate a picket sign which read “RIP” with the initials of a member of top management who had, himself, committed a number of unfair labor practices which were a “contributing cause of the unfair labor practice strike.” 333 N.L.R.B. 603, 618 (2001). Further, the Board found that the sign reading “RIP” was not a death threat, but a sign which would “suggest that the Company’s labor relations are threatening the very existence of the Company and the positions of its managers” because “[the manager]. . . was the personification of the labor dispute.” Id. Therefore, as the sign was deemed a lawful picket sign, the employer violated the employees’ rights to engage in protected picket activity when it confiscated the sign. Id.

The findings in the Wilkie case are completely inapplicable to this case. First, the conduct in this case occurred in the workplace during work time, not on the picket line during a strike¹². Further, the picket sign in Wilkie directed the threatening language, “RIP,” at the company, not an individual, with whom the union was engaged in a labor dispute. In this case, Grosso directed the threatening language, “RIP,” at the warehouse unit employees – coworkers of Grosso’s with whom he had no dispute and who were individual human beings, not a personification of the Company. Finally, the Wilkie decision found that the employer violated the Act by confiscating a picket sign; there was no finding regarding whether the employer could have taken disciplinary action against the strikers for holding such a sign. Therefore, Wilkie

¹² The General Chemical Corp. case relied on by the General Counsel is likewise inapplicable since the employee allegedly called an independent contractor a “pussy” while picketing during a strike. 290 N.L.R.B. 76, 81 (1988). Conduct on a picket line is subject to a different standard than conduct occurring in the workplace. See Airo Die Casting, Inc., 347 N.L.R.B. 810 (2006) (“picket line misconduct is not governed by Wright Line, but by a standard requiring a two-part analysis, i.e., whether the strike misconduct tended to coerce or intimidate employees in their Section 7 rights, and whether the General Counsel has shown that the striker was denied reinstatement for conduct related to the strike”).

does not inform the question in this case, whether the Company lawfully disciplined Grosso for violating its Harassment Policy by threatening individual employees in the workplace.

Grosso's conduct was unusual and completely unacceptable by the standards of conduct at the Chester facility. As noted by Judge Brakebusch, Respondent presented eleven witnesses, both supervisors and non-supervisory employees, who testified that profanity and vulgarity were not commonplace in the Chester facility. ALJD p. 16, lines 19-21. None of the Respondent's eleven witnesses was found not to be credible by the ALJ and three of them (Rogers, Dobkowski and Dopheide) specifically were found to be credible. ALJD p. 18, lines 22-23; p. 22, line 15. In contrast, the General Counsel presented testimony of three witnesses on this point, one of whom (Rathbun) was expressly found not credible by the ALJ and no credibility determinations were made regarding the other two witnesses (one of whom was Grosso) even though they were contradicted by the Respondent's eleven witnesses on this issue.

The General Counsel's argument that the nature of Grosso's conduct weighs in favor of protection due to the use of profanity at the Chester facility fails because (1) the weight of credible testimony at the hearing demonstrated that cursing was neither widespread nor tolerated by supervisors; and (2) there is a far cry from the "run of the mill" curse words that a number of employees acknowledged have been said outside the presence of supervisors and the vulgar and threatening words chosen by Grosso to write on the newsletters directed at a group of warehouse employees.

As found by Judge Brakebusch, even if profanity did occur in the workplace at the Chester facility, the simple fact that some profanity was commonplace in the workplace does not mean that an employee's vulgar and threatening outburst will be excused and protected under the third prong of the Atlantic Steel factor test. See, e.g., Aluminum Co. of Am., 338 N.L.R.B. at

22. In fact, where the Board has distinguished between the profanity which was commonplace in the workplace and the profanity used by the employee whose conduct is in question, the Board has held that the nature of the employee's conduct weighs in favor of losing the protection of the Act even where profanity may have been common. See, e.g., Piper Realty Co., 313 N.L.R.B. 1289, 1290 (1994) (holding that an employee's conduct lost the protection of the Act because, although swearing was common in the workplace, the employee's swearing was distinguishable because he (1) directed it at a supervisor; and (2) the employees who overheard the outburst were shocked); Aluminum Co. of Am., 338 N.L.R.B. at 22 (holding that, although profanity was somewhat common, the employee's "profanity far exceeded that which was common and tolerated in the workplace" and therefore weighed in favor of losing its protection). Therefore, even if some profanity occurred in the Chester facility, such profanity is not "sufficient to envelope Grosso's comments within the protection of the Act," as "Grosso's comments went beyond what was normal or tolerated." ALJD p. 19, lines 29-31.

Starting with senior management, King testified that he has never heard any vulgarity in the Chester warehouse during his periodic visits to the facility. Tr. at 203.¹³ Although Grosso and Rathbun testified that the environment at the Chester facility was one where cursing was commonplace, that supervisors used vulgarity, and that employees used vulgarity in front of supervisors, such testimony is not credible. Grosso's testimony at trial about cursing in the workplace was contradicted by no fewer than eleven sequestered witnesses, (King, Maloney,

¹³ Of course, this testimony is supported by common sense since it is certainly understandable that employees are not likely to curse in King's presence at the facility and anticipate escaping discipline for such unprofessional conduct. King's testimony was also supported by numerous management and non-management witnesses including a former Human Resources manager (Dopheide) who had been involuntarily terminated by the Company and was found credible by the ALJ.

Healy, Petliski, Dobkowski¹⁴, Rogers¹⁵, Sereno, Dopheide¹⁶, Moscatelli¹⁷, Germino¹⁸, and Buxbaum) and is not credible for the additional reasons set forth below.¹⁹

Similarly, Rathbun's testimony was contradicted by the same eleven sequestered witnesses that contradicted Grosso's testimony and he was determined not credible at the trial for the reasons set forth herein. Judge Brakebusch specifically found Rathbun was not credible, both with respect to the specific instance involving his alleged discussions with Dobkowski regarding a sticker on another driver's electronic pallet jack, and with respect to his "overall testimony" due to a number of factors, including "his personal animosity toward Respondent's supervisors and lead counsel," his flippant demeanor at the hearing, and his refusal to sign and acknowledge attendance warnings which he was given prior to the hearing. ALJD p. 18, lines 23-50. In

¹⁴ Judge Brakebusch credited Dobkowski's testimony. ALJD p. 18, lines 22-23.

¹⁵ Judge Brakebusch credited Rogers' testimony. ALJD p. 18, lines 22-23.

¹⁶ Judge Brakebusch found Dopheide to be a "very credible witness." ALJD p. 22, line 15.

¹⁷ Moscatelli's testimony is credible despite the General Counsel's argument that there is an inconsistency between her testimony that she never used certain specific profanities in the workplace and Rogers and Petliski testifying that they had reprimanded Moscatelli for using the word "bastards" and "bullshit" on two occasions. First, Moscatelli's testimony was substantially consistent with the two other female warehouse workers who testified, Germino and Buxbaum, with respect to the material events testified to at trial. For example, Moscatelli, Germino, and Buxbaum, who were sequestered during the hearing, all testified consistently as to the same material events on both September 10 and September 21. Tr. at 648-666, 670-674, 794-805, 806-811, 869-881. Further, Moscatelli was asked very specific questions at the hearing regarding whether she ever used specific words at the Chester facility, some in reference to other employees and some just in general. Tr. at 685-86; 760-62. As Moscatelli was never specifically asked whether she used the word "bastards" in the workplace, there is no inconsistency with respect to her testimony and Rogers' testimony regarding the incident wherein he reprimanded Moscatelli for saying "bastard" in his office.

¹⁸ Germino's testimony on cross examination regarding her Facebook page does not affect her credibility. The Facebook entries Germino was asked about on cross examination related to use of certain words outside the workplace on a social media site. Germino specifically explained that the use of the word "bitch" on her Facebook page was, unlike the type of profanity being discussed at the hearing, not directed at anyone, not at the workplace, and she understood her Facebook profile to be private, only allowing her friends and family to access. Tr. at 840-42, 850-51. Certainly, Germino's use of the word "bitch" in a private, non-work setting is not relevant to the issues of this case and, in any event, does not undermine her testimony about work related profanity.

¹⁹ Grosso's testimony is not credible for several additional reasons, as explained at length in Respondent's Brief in Support of Exceptions which is incorporated by reference herein.

addition to being not credible for the reasons stated above, Grosso and Rathbun, though they made broad statements regarding the use of cursing by and in front of supervisors, the two witnesses together were able to provide only a small handful of concrete examples, each of which was refuted by at least one other, more credible witness.

The record evidence established that cursing and vulgarity are generally not tolerated by the Company at the Chester facility. In fact, the General Counsel's own witness, Kevin Farrell ("Farrell"), testified that the Company posted rules prohibiting profanity and the use of inappropriate language in the employee break room at the Chester facility. Tr. at 1444. In the few instances in which cursing or vulgarity did take place in front of a supervisor, the supervisor either disciplined the employee formally or instructed the employee to "knock it off."²⁰ As to the specific incident involving the "Don't Be a Dick" sticker, the record evidence establishes that as soon as it was brought to the attention of management, Dobkowski specifically, it was handled exactly the same way as Grosso's conduct – Dobkowski immediately did what was necessary to stop the conduct by demanding that it be removed immediately. Tr. at 536. Further, the incident regarding the "Don't Be a Dick" sticker is not comparable to Grosso's conduct, as Grosso's conduct was substantially more severe in that multiple employees saw the newsletters with the offensive words written on them and then complained about the situation whereas no employees observed the sticker on the pallet jack let alone complained about the sticker. Certain supervisors, such as Dobkowski, King, Maloney, Sereno, Dopheide, and Healy, testified un rebutted that cursing did not occur in their presence and words such as "pussies" and "RIP"

²⁰ For example, Farrell testified as to two incidents where he used profanity, the words "fuck" and "fucking" in front of Petliski and Healy. Tr. at 1412. In both instances, Farrell testified that he was reprimanded by the respective supervisor immediately. Tr. at 1412. Rogers also testified that, on two occasions, he heard Rathbun use the word "shit" in the workplace. Tr. at 1006. On both occasions, Rathbun was immediately reprimanded and told that the use of profanity was not appropriate. Tr. at 1007 – 1008. Petliski similarly reprimanded Germino for using inappropriate language when she said, "This is bullshit." Tr. at 1084.

were never used to their knowledge at the Company²¹. Tr. at 529-32, 1005, 1152-58, 1246, 1259-63, 1377-81.²²

Even if Grosso and Farrell were to be credited, which they should not be for the reasons noted herein, their testimony would only establish that employees used curse words which were not specifically directed at other employees, were not typically used in front of or by a supervisor, and typically did not include the words at issue here – “pussies,” “catfood lovers,” and “RIP.” Derogatory words such as “pussies” are inherently different in their vulgarity and reference to female genitalia than words such as “asshole” and “bullshit.” Further, the General Counsel failed to present any evidence that the phrase “catfood lovers” (which Grosso admitted was a play on the word “pussies”) had been used at the workplace before Grosso wrote the comment on the newsletter nor that any threats such as “RIP” were ever used in the workplace other than by Grosso in the situation at issue.

In this case, the nature of Grosso’s conduct was extremely offensive, so as to far exceed that which was purportedly common at the Chester facility. Even if employees commonly used inappropriate language in the workplace (which was not the case based on the overwhelming evidence presented), the nature of Grosso’s conduct was inherently different because (1) he directed it specifically at the warehouse employees and/or the females in the warehouse area; (2) the words he used were not commonly used in the workplace and were vulgar in their references

²¹ Farrell testified that the drivers used the word “pussies” “with each other on a daily basis depending upon the individuals.” Tr. at 1401. This testimony, however, misses the point since it is not relevant to the inquiry of whether the word “pussies” was ever used in front of the female warehouse employees or if it was ever brought to the attention of supervisors as was the case with Grosso’s words on the newsletters. Therefore, the language used between drivers in private, if such testimony is even credible, is not even remotely similar to the conduct by Grosso at issue in this case.

²² The testimony of the supervisory employees on this point was also supported by the female warehouse employees (Moscatelli, Germino, and Buxbaum). Tr. at 667-69; 797-99; 882-83.

to female genitalia; (3) it contained a threat of physical harm; (4) Grosso's words were written as opposed to spoken and displayed in the employee break room for maximum impact on the workforce; and (5) employees specifically complained, triggering the need for an investigation. See ALJD p. 19, lines 28-31 ("it is reasonable that some profanity is used by the employees at the facility. I do not find, however, that such usage is sufficient to envelope Grosso's comments within the protection to the Act. Similar to the circumstances in Aluminum Co., Grosso's comments went beyond what was normal or tolerated.").

d. Whether the Outburst Was Provoked

The General Counsel introduced no evidence of any conduct by Fresenius which may have provoked Grosso's outburst.²³ Therefore, this factor also weighs against Grosso's conduct retaining any protection under the Act. See, e.g., Verizon Wireless, 349 N.L.R.B. at 642 ("[t]he fourth factor, the presence of an unlawful provocation for the outburst, similarly weighs in favor of a finding that [the employee] lost the protection of the Act" where the employee's outbursts were directed at coworkers and the outbursts "were not a reaction to any unfair labor practice committed by the Respondent").

3. Grosso Engaged in Misconduct and Therefore Was Properly Discharged by the Company

Under the analysis set forth in NLRB v. Burnup & Sims, Inc., the Company did not violate Section 8(a)(1) of the Act because Grosso engaged in misconduct and was therefore properly discharged. In Burnup & Sims, Inc., the Supreme Court held that "§ 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct."

²³ In fact, all unfair labor practice charges filed against Fresenius by the Union prior to September 2009 were dismissed by the Regional Director as non-meritorious. Tr. at 1386.

NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964). First, the Burnup & Sims, Inc. analysis is not applicable to the present case since, as explained at length above and in Respondent's Brief in Support of Exceptions, Grosso was not engaged in protected activity when he wrote "Dear Pussies – Please Read," "Hey Catfood Lovers, How's Your Income Doing?," and "Warehouse Workers RIP" on the newsletters in the employee break room, one aspect of the conduct for which he was terminated. Grosso was likewise not engaged in protected activity when he lied during the investigation. The General Counsel's contention that "[i]t is undisputed here that Grosso was engaged in protected activity and Respondent knew it was such" is a gross misstatement. GC 32. Further, even if the Board were to find that Grosso was engaged in protected activity and applies the Burnup & Sims analysis, the Respondent has demonstrated that such activity constituted misconduct, and Grosso was therefore lawfully discharged for such misconduct. Importantly, in Burnup & Sims, a factual finding was made that the employees had not made any threats of harm to the employer's property and the fact that the employees were not guilty of any misconduct was central to the holding in that case. In contrast, in the present case, Grosso concedes he engaged in the misconduct at issue; namely, writing the offensive and threatening comments on the newsletters and lying during the investigation.

The Company's EEO Policy provides that Fresenius does not tolerate unlawful discrimination against any individual on the basis of gender. GCX 20. The Company's Harassment Policy provides that Fresenius "is committed to providing a work environment free from all forms of discrimination including harassment for all employees." GCX 3. Harassment is defined as "behavior that is unwelcome or personally offensive, which may include but is not limited to . . . conduct including written statements . . . that create an intimidating, hostile or offensive work environment." GCX 3. The Harassment Policy mandates that a manager or

supervisor “will investigate and respond immediately” upon receiving a complaint of harassment and must “administer corrective action up to and including termination of the individual engaging in harassment.” GCX 3 (emphasis added). Neither policy contemplates the intent of the employee engaging in the conduct in determining what constitutes a violation of the EEO or Harassment Policy. In fact, the Harassment Policy specifically refers to behavior which is unwelcome or offensive which, therefore, suggests that the perspective of the victim is the relevant perspective to determine whether conduct constitutes harassment. Further, Title VII law requires that, when considering whether conduct constitutes a hostile work environment, an employer “must consider the perspective of the victim to determine whether he/she was offended in addition to considering whether a reasonable person would find the comments offensive. Gallagher v. Delaney, 139 F.3d 338, 347 (2d Cir. 1998); see also Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (“in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim”). In fact, the federal courts have held that, under Title VII, conduct is classified as “unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment. Well-intentioned compliments by coworkers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments” offensive. Ellison, 924 F.2d at 880 (noting the importance of considering the perspective of the victim, not the harasser, where harasser harbored no “ill will” toward victim). Neither Respondent’s Policies nor Title VII examines an employee’s intent in engaging in certain conduct. Consequently, Grosso’s conduct constituted misconduct under the Company’s EEO and Harassment Policies, regardless of Grosso’s intent in writing the comments, and therefore Respondent’s termination of Grosso for his misconduct was lawful.

The other cases cited by the General Counsel are distinguishable from the facts herein and, therefore, do not support the General Counsel's arguments under the Burnup & Sims analysis. In Twilight Haven, for example, there were two conflicting accounts of the events at issue – the alleged victim's account and the employee's account who allegedly engaged in the misconduct. 235 N.L.R.B. 1337 (1978); see also AT&T Broadband, 335 N.L.R.B. at 65 (presenting two sides to the story regarding the incident which led to an employee's discipline). In this case, there is no dispute as to the events at issue – Grosso admitted that he wrote "Dear Pussies – Please Read," "Hey Catfood Lovers, How's Your Income Doing?," and "Warehouse Workers RIP" on the newsletters in the break room at the Chester facility. Tr. at 315-17. Further, in Twilight Haven, the conduct which the Company claimed was misconduct, sitting on another employee's lap, was found to be a "common practice" at the respondent's location. 235 N.L.R.B. 1342. Additionally, the Board found that there was "no objective basis for attributing misconduct" to the employee with regard to the alleged incident. Id. In this case, however, there is an objective basis for finding that Grosso engaged in misconduct.²⁴ Therefore, the cases cited by the General Counsel are distinguishable and do not support the General Counsel's argument that, under the Burnup & Sims analysis, the Company violated Section 8(a)(1) of the Act.

B. Judge Brakebusch Correctly Determined That Respondent Did Not Violate Section 8(a)(3) in Suspending and Discharging Grosso

1. The General Counsel Failed to Set Forth a Prima Facie Case

The General Counsel failed to set forth a prima facie case of discrimination under the Wright Line analysis because Grosso did not engage in protected activity and there is no record

²⁴ In particular, Tyler, in his objective view as a Human Resources professional, testified that "[w]hat mattered to [him] was these words – individuals in the Chester distribution center found them offensive and threatening. And as [his] job as an HR professional, [he] would agree that these statements are threatening and unprofessional, inappropriate." Tr. at 116.

evidence of animus, a necessary element of a prima facie case for a Section 8(a)(3) violation. The Respondent also refuted the General Counsel's prima facie case of discrimination by demonstrating that other employees who engaged in comparable conduct were disciplined in the same manner. Under the Wright Line standard, the General Counsel bears the initial burden of proving four elements: (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, (3) timing; and (4) antiunion animus. See Gruma Corp., 350 N.L.R.B. 336, 349 (2007). First, the General Counsel has failed to show that Grosso engaged in protected activity, as discussed at length above and in Respondent's Brief in Support of its Exceptions.

As properly found by Judge Brakebusch, the General Counsel has further failed to set forth any evidence of antiunion animus on the part of the only decision maker in this case, Tyler. ALJD p. 21, lines 48-49. Without evidence of animus on the part of the decision maker, the General Counsel has not successfully set forth a prima facie case of discrimination pursuant to Section 8(a)(3) of the Act. Sunrise Health Care Corp., 334 N.L.R.B. 903, 909 (2001) ("The Board looks at the lack of animus on the part of the decision maker to negate any discriminatory motive.") (emphasis added). In fact, the only evidence of antiunion animus presented throughout the course of the hearing is an alleged statement made by King at a nonspecific meeting some time in 2006, which was discredited by Judge Brakebusch and, in any event, found to be insufficient to establish animus. Tr. at 302-03; ALJD p. 22, lines 15-20.

Even if the testimony regarding King's statement were to be credited and the alleged incident were sufficient to establish animus on the part of King, which it was not as determined by the ALJ, any animus attributed to King cannot be imputed to Tyler, the decision maker.²⁵

²⁵ The Board has held that where no recommendations were made and the decision maker conducts an independent investigation, the animus of other individuals may not be imputed to the decision maker. See,

Tyler made the decision on his own without any recommendation from King. Tr. at 83. Tyler conducted his own independent investigation by reviewing: the investigative file containing notes taken during the investigation by King, Maloney, Petliski, and Healy; written statements from Moscatelli, Buxbaum, and Berardino; the Company Harassment Policy; the Company EEO Policy; the Company Corrective Action Policy; the Employee Handbook; and Grosso's personnel file. Tr. at 83-84. Further, Tyler interviewed King, Maloney, and Healy as part of his investigation. Tr. at 81. From his independent investigation, Tyler made an independent decision with respect to the appropriate discipline of Grosso. Therefore, any evidence of antiunion animus attributed to anyone other than Tyler cannot support the General Counsel's prima facie case.

The General Counsel, in a desperate attempt to argue the existence of anti-union animus in the absence of any record evidence to support such an argument, now asserts that animus can somehow be inferred from certain events which were found not to be violations of the Act by the Administrative Law Judge and from the timing of the discharge. GC 33. These arguments were not argued at trial nor presented in General Counsel's post hearing brief and are therefore being presented for the first time now. First, the investigation of Grosso's conduct and the interview of Grosso as part of that investigation cannot be viewed as animus because such conduct has been found to be lawful. ALJD p. 25, lines 6-8, 33-35. Further, the General Counsel's contention that "[t]he record does not support a finding that Respondent would have investigated the newsletters,

e.g., Randell Mfg. of Arizona, Inc., 345 N.L.R.B. 209, 216-17 (2005) (finding that evidence of a statement made by a supervisor threatening to discharge strikers was not evidence of antiunion animus relevant to Wright Line analysis where supervisor was not involved in the employee discharge, nor was he speaking for the decision makers); Sunrise Health Care Corp., 334 N.L.R.B. at 909 (finding insufficient evidence of animus and dismissing 8(a)(3) allegation where union animus of supervisor could not be attributed to the decision maker in that case); Alexian Bros. Med. Ctr., 307 N.L.R.B. 389, (1992) (finding that evidence of antiunion animus on the part of a supervisor was insufficient to support a finding of a violation of Section 8(a)(3) where the supervisor did not participate in the decision making process to deny an employee a raise).

much less discharged Grosso, had the newsletters not encouraged employees to vote for the Union in the upcoming election” is nothing short of ridiculous and is without any support in the record. GC 33. To the contrary, the record is replete with evidence that the Respondent investigated Grosso’s conduct because of the multiple complaints lodged by the female warehouse unit employees on three separate occasions and nothing in Grosso’s handwritten comments on the newsletters in any way encourages employees to vote for the Union in the upcoming decertification election. Tr. at 160, 1334.

The General Counsel’s argument that the timing of Grosso’s discharge is evidence of animus also fails because the timing of Grosso’s discharge directly resulted from the timing of the complaints by the female warehouse unit employees, the ensuing investigation and, of course, by the timing of Grosso’s confession which he alone controlled. Significantly, the Company suspended Grosso the day before the decertification election for the warehouse unit (an election in which Grosso was not even eligible to vote), not because it was the day before the election, but because it was the day that Grosso called King and confessed to writing the offensive and threatening comments on the newsletters. Tr. at 182, 370-71, 1142-43, 1344. The discharge of Grosso was after the warehouse unit decertification election and after the completion of the investigation into Grosso’s conduct so the timing of the discharge does not support the inference of anti-union animus.

The Company has further rebutted any inference of antiunion animus by setting forth evidence of a full and fair investigation conducted by the Company both before and after Grosso’s investigatory suspension. The Board considers evidence of a thorough and fairly conducted investigation to refute allegations of discrimination based on union animus. See, e.g., Jackson Hosp. Corp., 354 NLRB No. 42, 60 (2009) (finding that “the hospital conducted a full,

fair, and appropriate investigation” which supported the employer’s claim that it did not take action against the employee because of his union activities); Boardwalk Regency Corp., 344 N.L.R.B. 984, 997 (2005) (considering the quality of the employer’s investigation, including the reasons for investigating, and finding that a complete investigation supported a conclusion that the adverse action against the employee was lawful).

Contrary to the General Counsel’s argument, there is no evidence in the record that Respondent failed to discipline other employees under similar circumstances. Tyler terminated Grosso for legitimate, nondiscriminatory reasons, including that Grosso violated the Company’s EEO and Harassment policies when he wrote vulgar, offensive, and threatening comments on the union newsletters and that he lied during the investigation. The Company, and Tyler specifically, previously terminated employees on a first offense for misconduct similar to Grosso’s conduct. For example, Tyler considered as a comparator Mierta, a former employee of the Kenosha Distribution Center, who made a threatening statement that he was going to kill the fleet employees. Tr. at 128. Tyler interpreted Grosso’s threat to involve the threat of death, similar to the threat made by Mierta. Tr. at 128. Tyler had previously made the decision to terminate Mierta as a result of his threat in September 2009, which Tyler considered a violation of the Harassment Policy, just as he considered Grosso’s threat of “RIP” to be a violation of the Harassment Policy. Tr. at 128-29. Moreover, Tyler also was involved in the decision to terminate on a first offense two employees (Mary Leyva and Alice Reya) who were dishonest during a company investigation, no different than the decision to terminate Grosso for dishonesty during the Company investigation. Tr. at 71-72. The fact that similarly situated employees have been treated similarly by Tyler further reinforces the fact that no antiunion animus existed and

that the Company acted pursuant to legitimate, nondiscriminatory motives when terminating Grosso.²⁶

The General Counsel argued that the Company failed to treat another Chester employee, Huertas, similarly when a sticker which said “Don’t Be a Dick” was discovered on the electronic pallet jack shared by Rathbun and Huertas. GC 34. This argument fails because the incident regarding the “Don’t Be a Dick” sticker is not analogous and, therefore, does not provide a valid comparator. As noted above, the sticker was not displayed in the warehouse like the comments on the union newsletters were outwardly displayed in the employee break room, as several witnesses testified that despite frequent visits to and walks through the warehouse, they never saw or noticed the sticker. Tr. at 776, 1010, 1087, 1264. Further, no one ever complained about the sticker. Tr. at 622. Dobkowski, the supervisor who saw the sticker, testified that if any employee had observed the sticker on the pallet jack and made a complaint, the Company would have investigated it in the same manner as it investigated Grosso’s conduct and discipline would have issued. Tr. at 625-26. Thus, there is no record evidence to support the General Counsel’s belated argument of disparate discipline supporting an inference of anti-union animus.

2. Respondent Demonstrated that Grosso Would Have Been Terminated For the Independent Reason of His Dishonesty During the Investigation

Amazingly, the General Counsel states that “[t]here is no evidence in the record that dishonesty was an independent ground for discharge.” GC 33, n.25. Such a statement could not

²⁶ The fact that the comparators offered by the Respondent are not identical to the instant situation does not render the comparator evidence irrelevant or unconvincing. The Board has recognized that “it is rare to find cases of previous discipline that are ‘on all fours’ with the case in question.” Merillat Indus., Inc., 307 NLRB 1301, 1303 (1992). See also Boardwalk Regency Corp., 344 NLRB at 1002 (2005) (noting that “it is rare to find cases of previous discipline that are ‘on all fours’ with the case in question” and comparing company discipline of differently situated employees with that of the employee in question); Great Lakes Window, 319 NLRB 615, 618 (1995) (although 13 of the 22 employees disciplined under relevant company policy were probationary workers, and therefore not similarly situated to the employee in question, it was nonetheless relevant that the policy was uniformly applied to those employees as well).

be further from the truth and making such a statement suggests that the General Counsel will conveniently overlook and misrepresent record evidence in an all out effort to reverse the ALJ's decision to sustain Grosso's discharge. The clear and unmistakable record evidence establishes that the Company would have terminated Grosso, even in the absence of alleged protected activity, for his dishonesty throughout the course of the investigation. Specifically, Tyler testified that, in addition to the violations of Company policies, Grosso was terminated for "being dishonest during the investigation." Tr. at 78.

The General Counsel further erroneously contends that "[o]ne of the grounds on which Respondent relies for its discharge of Grosso was that he lied during an investigation. In particular, during the September 21 interrogation, Grosso stated that he did not write the comments on the newsletters." GC 13. To the contrary, Tyler cited two specific instances of Grosso's lying during the course of the investigation – his failure to tell the truth about writing the comments on the newsletters during the September 21 interview and his lying about his identity during the September 22 phone call with King. Tyler testified that "[b]ased on the documents that I reviewed to make my decision on his discharge, it was being dishonest while being asked questions if he doctored or authored those documents, as well as a phone call that was placed to Mr. King where Mr. Grosso denied being Mr. Grosso. And so those are both situations of dishonesty." Tr. at 80. Tyler further testified that Grosso's dishonesty when he denied being Grosso on the phone with King was "one of the bases for discharging him." Tr. at 80. Tyler testified that even just one of the instances of dishonesty was sufficient to justify termination. Tr. at 80. Both instances of dishonesty, however, were relied upon by Tyler in determining that Grosso should be discharged.

The General Counsel's argument that relying on Grosso's dishonesty during the September 21 interview was unlawful since "Grosso was within his rights not to respond truthfully" fails for several reasons. First, as explained in more detail below and as found by Judge Brakebusch, the September 21 interview was not an unlawful interrogation and Grosso was therefore not within his rights to lie. Further, assuming arguendo that the Board were to find that the September 21 interview was an unlawful interrogation, Grosso also lied during the September 22 phone call with King, which is not alleged to be an unlawful interrogation in any way. Tr. at 80, 373-74. Grosso's lie during the September 22 phone call is therefore not even arguably excusable.

The cases cited by the General Counsel in support of the argument that "an employer may not lawfully terminate an employer [sic] for lying during an investigation" are distinguishable from the instant case. GC 13. First and foremost, as mentioned above, unlike any of the cases cited by the General Counsel, Grosso lied on more than one occasion during the course of the investigation, both during an interview and outside of the interview challenged by the General Counsel as an unlawful interrogation. Significantly, Grosso's dishonesty during the September 22 phone call did not occur during any allegedly unlawful conduct on the part of the Respondent and is therefore both inexcusable and a valid basis upon which to rely for Grosso's discharge.

United Services Auto Association is also distinguishable from this case for several additional reasons. 340 N.L.R.B. 784 (2003). First, in the United Services case, the ALJ found that the employer had only one motive, which was unlawful, for interrogating the employees – to determine whether they participated in protected union activity. In the present case, the Company had a legitimate, lawful reason for interviewing Grosso, since four female employees

had complained about Grosso's conduct on three separate occasions, management had an obligation to investigate and interview Grosso under its Harassment Policy and under applicable Title VII and state anti-discrimination law, one of the employees actually identified Grosso as the likely author of the comments, and management independently determined that Grosso's handwriting was similar to the handwriting on the newsletters. Second, the employer in United Services failed to prove dissemination of a valid policy which deemed the employee's conduct a violation of such policy. In this case, the Company had an EEO Policy and an Harassment Policy which it disseminated to employees and which Grosso himself testified to having received. Tr. at 402-03. Grosso's conduct, unlike the employee's conduct in the United Services case, violated the Company's EEO and Harassment Policies. Third, in the United Services case, the employee asked multiple times for an attorney during the interview and was told that she did not need one unlike Grosso who never asked for legal or union representation at the initial September 21 interview and was promptly granted union representation in the subsequent meetings or interviews upon his request. Fourth, the United Services employee was questioned by a manager whom she had never met in a location with which she was unfamiliar. In this case, Grosso was interviewed by managers with whom he was friendly in a room in which he had attended many meetings in the past. Therefore, the United Services case is completely distinguishable and does not support any argument by the General Counsel that Grosso's dishonesty in the interview on September 21, 2009 was excusable.

Similarly, the Onyx Environmental Services, L.L.C. case is completely distinguishable from the instant case and therefore does not support the General Counsel's argument that Grosso's dishonesty was excusable and unlawfully relied upon by Respondent in terminating Grosso. 336 N.L.R.B. 902 (2001). First, in Onyx Environmental, the employee had engaged in

protected concerted activity which did not lose its protection, about which he was being questioned by the employer at the time of his dishonesty. In contrast, Grosso's conduct was not protected concerted activity and, assuming arguendo that it was protected concerted activity, it lost its protection under the Act as concluded by the ALJ. Further, in Onyx Environmental, the Board did not find that it was unlawful to discipline the employee for lying when questioned about his conduct. Instead, the Board found that the employee's "conduct did not lose the protection of the Act because he lied when questioned about his [conduct]," and it was therefore unlawful to discipline the employee for engaging in protected conduct. 336 N.L.R.B. at 907. In the instant case, the Respondent does not contend that Grosso's conduct lost the protection of the Act because he lied about it. Instead, Grosso's conduct lost its protection due to its offensive and threatening nature, as described more fully above, and then he was discharged both for his violations of the Company's policies and for lying during the course of the investigation. Therefore, the conclusions drawn in Onyx Environmental are inapposite to the instant case.

Finally, the Spartan Plastics, Inc. case on this point is also distinguishable. 269 N.L.R.B. 546 (1984). In Spartan Plastics, Inc., the employer's asserted reason for suspending, and eventually discharging, the employee in question was his lying to the employer regarding his involvement in writing a questionnaire, conduct which the Board found to be protected concerted activity which did not lose its protection under the Act. Id. The ALJ found, however, that the employer's asserted reason for disciplining the employee was not credible and that the employer had in fact disciplined the employee for engaging in protected concerted activity. Id. at 551. In this case, however, there is no evidence that either of Respondent's reasons for terminating Grosso is not credible. In fact, the General Counsel and the Respondent agree that the stated reasons for the discharge of Grosso include his violation of the EEO and Harassment Policies

due to the offensive and threatening words he wrote on the newsletters and for his dishonesty in the Company investigation – both of which were stated in Grosso’s termination letter. Tr. at 77-78; GCX 5. Therefore, the Spartan Plastics case does not support the General Counsel’s argument that Grosso’s dishonesty during the investigation, both during the September 21 interview and the September 22 phone call, is excusable.

Further, as noted above, Tyler had, in the past, imposed similar discipline for similar conduct when he terminated two employees at the Fresenius Apple Valley, CA location for lying during the course of a Company investigation. Tr. at 127-28. Since the Company has demonstrated that it would have terminated Grosso even if it were not for his allegedly protected, concerted activity of writing the comments on the Union newsletters, the Company did not violate Section 8(a)(3) of the Act by terminating Grosso.²⁷ Therefore, the record evidence supports the ALJ’s decision that Grosso would have been discharged for the independent reason of his dishonesty during the investigation.

C. Judge Brakebusch Correctly Determined That Respondent Did Not Violate Section 8(a)(1) in Investigating and Interviewing Grosso

1. Respondent Lawfully Investigated Grosso’s Conduct As Required By Respondent’s Policies and Applicable Law

Judge Brakebusch correctly determined that Respondent did not violate the Act by initiating and conducting an investigation into Grosso’s conduct in response to multiple complaints lodged by the female employees. ALJD p. 25, lines 10-11. First, Grosso’s conduct which was the subject of the investigation was unprotected, as discussed at length above and in Respondent’s Brief in Support of Exceptions. The Respondent had a duty under both the law

²⁷ The General Counsel’s statement that “[w]hile the company’s progressive discipline policy allows employees to be discharged on a first offense for serious misconduct, Respondent could cite only a single example where that had occurred” is false. GC 34. The Company set forth evidence at the hearing of two instances wherein employees were terminated for dishonesty during an investigation. Tr. at 72.

and its own policies to investigate Grosso's conduct after receiving complaints from the female warehouse unit employees on three occasions about offensive and threatening comments in the workplace. It is undisputed that the female warehouse employees complained about the offensive and threatening comments three times: twice to Healy on September 10 and once to King and Maloney on September 21. Tr. at 154-58, 1053, 1221-27. As a result of the complaints, the Company was obligated to investigate Grosso's conduct.

The Company's Harassment Policy mandates that a manager or supervisor "will investigate and respond immediately" upon receiving a complaint of harassment and must "administer corrective action up to and including termination of the individual engaging in harassment." GCX 3 (emphasis added). King testified that he commenced an investigation on September 21 because "[i]t's [his] obligation under the policy to start an investigation when employees report incidences of harassment."²⁸ Tr. at 204. Although Healy became aware of employee complaints regarding Grosso's conduct on September 10, he did not commence an investigation at that time because he sought advice of counsel, as he "viewed it as a catch 22"²⁹ situation . . . [y]ou have a harassment EEO issue at the same time you have the upcoming election."³⁰ Tr. at 1325-26.

²⁸ Although King had seen the comments on the newsletters in an email to counsel on September 10, he was not aware of any complaints about the comments until the September 21 meeting. Tr. at 204-07.

²⁹ Courts have recognized the precise "catch 22" which Healy pointed out when analyzing the intersection between Title VII and the National Labor Relations Act: "To bar, or severely limit, an employer's ability to insulate itself from [Title VII] liability is to place it in a 'catch 22.'" Adtranz ABB Daimler-Benz Transp. N.A., Inc. v. NLRB, 253 F.3d 19, 27 (D.C. Cir. 2001).

³⁰ The General Counsel's contention that there is no "reasonable explanation for why Respondent waited eleven days to suspend Grosso pending investigation" is not supported by the evidence. Healy gave a very real and credible explanation – that he was seeking legal counsel since he found himself in a "catch 22" and did not want to make any missteps. During that eleven day period, Healy and King participated in calls with counsel seeking legal advice so as to comply with the law regarding the investigation and interview of Grosso and to also comply with their Title VII legal obligations in light of the complaints from the female employees. Tr. at 156, 1327.

Title VII further obligates the employer to investigate complaints of harassment and sexual harassment and to remedy them promptly and effectively, or risk liability. Courts have recognized the importance of allowing the employer to “maintain a workplace free” of language which could rise to the level of harassment due to the fact that “employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment.” Adtranz ABB Daimler-Benz Transp. N.A., Inc. v. NLRB, 253 F.3d 19, 27 (D.C. Cir. 2001) (acknowledging the need of employers to be sensitive to workplace conduct and to adopt rules prohibiting abusive and threatening language in the workplace). Federal regulations regarding sexual harassment under Title VII provide that “with respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.” 29 C.F.R. § 1604.11(d) (emphasis added); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

The General Counsel incorrectly argues that the record does not contain any evidence that Respondent had any legitimate concerns of EEO or Title VII liability stemming from Grosso’s conduct. To the contrary, the record evidence establishes that the Respondent was concerned about the EEO issue created by Grosso’s offensive and threatening comments. For example, Tyler testified that he reviewed the Company’s EEO and Harassment Policies as part of his decision-making process and that he determined that Grosso’s conduct violated the Company’s EEO and Harassment Policies. Tr. at 118. King likewise testified that Grosso violated the EEO Policy in writing the offensive and threatening comments. Tr. at 150. Additionally, Healy testified more than once that he identified Grosso’s conduct as an “EEO issue.” Tr. at 1227, 1325-26. The record evidence clearly indicates that the Company’s

managers were concerned about the EEO issues related to Grosso's offensive and threatening comments on the newsletters.

The General Counsel also seeks to challenge the Company's legitimate concerns regarding Grosso's violations of the EEO and Harassment Policies and the employees' complaints relating to such violations by arguing that Respondent's actions showed "a marked lack of urgency and seriousness in Respondent's response to the comments". GC 36. The record evidence demonstrates, however, that after learning of the existence of the comments and the warehouse employees' reactions thereto, Healy immediately took appropriate steps to ensure the safety of the employees who were threatened by the comments. First, Healy advised the female employees who had expressed concern about their safety where they could park their cars in order to be within the view of the Chester facility's surveillance cameras which were monitored by supervisory employees. Tr. at 1232. Additionally, he stayed late every day to make sure they all left the building safely. Tr. at 1224, 1232. Healy also explored security options for the facility by reaching out to several security companies to investigate what would be necessary to obtain security for the building. Tr. at 1231. After Healy sought legal counsel for the reasons stated above, further action was taken by King conducting an investigation. At that point, the Company's safety department was also notified of both the threat and the security measures taken by Healy. Tr. at 186-87. By these actions, the Company demonstrated a legitimate concern regarding the EEO issue and the threat created by Grosso's conduct and reacted both appropriately and prudently in light of the competing interests under Title VII and the NLRA.

2. Respondent Lawfully Interviewed Grosso On September 21, 2009

Judge Brakebusch correctly found that the Company did not violate the Act by interviewing Grosso on September 21, 2009. ALJD p. 25, lines 6-8. In determining whether an interview or interrogation of an employee violates Section 8(a)(1) of the Act, the Board asks

“whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” Rossmore House, 269 N.L.R.B. 1176, 1177 (1984). The inquiry involves a “case-by-case analysis” whereby the Board examines the following factors: “the background, the nature of information sought, the identity of the questioner, and the place and method of interrogation.” Sunnyvale Med. Clinic, Inc., 277 N.L.R.B. 1217, 1218 (1985). A fifth factor, the truthfulness of the reply, is also considered. Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964). Each of the factors weighs in favor of a finding that the September 21 interview of Grosso was lawful.

a. Background – Is There a History of Employer Hostility and Discrimination?

Judge Brakebusch correctly determined that the first factor of the Bourne analysis weighs in favor of the September 21 interview being lawful. ALJD p. 24, lines 15-16. As discussed above, there is no history of employer hostility and/or discrimination toward any Union supporters. In fact, the few unfair labor practice charges filed against the Respondent by the Union were all dismissed as non-meritorious by the Regional Director. Tr. at 1386. The General Counsel’s contention that the interview took place “two days before the decertification election and after a three-year union battle, on a day when King was present at the facility to conduct a captive audience meeting with employees about the election” does not support the General Counsel’s argument. The interview took place on September 21 because that was the day that the female warehouse unit employees complained for the third time to management (but for the first time to King specifically), and thereby the day that the investigation was commenced after consultation with legal counsel. Tr. at 204. The background of the September 21, 2009 interview centers around the heartfelt complaints of several women who indicated that they were offended and threatened by the comments written on the union newsletters left in the employee

break room on three separate occasions, not around the fact that the Warehouse Unit decertification election was scheduled for September 23, 2009. By the time King interviewed Grosso on September 21, 2009, the women had complained three times, the latest instance on that very same day.

Also relevant to the background of the interview is the fact that Grosso was an open union supporter who made his support of and participation in the Union known by virtue of joining the Drivers' Bargaining Committee. The Board has found that where the employee being questioned is an open union supporter who had not tried, in the past, to conceal his union support from the employer, the interrogation is less likely to be unlawful. See, e.g., Starbucks Corp., 354 N.L.R.B. No. 99, at *190, n.64 (2009) (considering that the employee was an outspoken union supporter as part of its determination that an interrogation of that employee was lawful); SKD Jonesville Div., 340 N.L.R.B. 101, 102 (2003) (same); Sunnyvale Med. Clinic, 277 N.L.R.B. at 1218 (1985) (same).

b. Nature of the Information Sought

As determined by Judge Brakebusch, the nature of the information sought further leads to the conclusion that the September 21, 2009 interview was lawful and did not violate Grosso's Section 7 rights under the Act. ALJD p. 24, lines 15-16. The questions asked by King were specifically geared at getting information only regarding who wrote the comments on the newsletters. ALJD p. 24, lines 25-27. The Board has held that, where the interrogation is specifically targeted at and tailored to the offensive misconduct, the interrogation is not unlawful. See Starbucks Corp., 354 N.L.R.B. No. 99, at *190, n.64 (2009) (finding that interrogation was lawful where the employer "confined [its] inquiry to the type of [offensive] language employed" by the employee); Bridgestone Firestone South Carolina, 350 N.L.R.B. 526, 528 (2007) (holding that interrogation was lawful where the employer "made reasonable efforts

to circumscribe its questioning to avoid unnecessarily prying into [the employee's] views"); DaimlerChrysler Corp., 344 N.L.R.B. 1324, 1328 (2005) (holding that interrogation was lawful where the interrogation "focused quite specifically on his involvement with" the offensive conduct at issue).

As an initial matter, contrary to the General Counsel's assertion otherwise (GC 11), Grosso volunteered that he did not write the comments on the newsletters and that he did not know who had authored them before King even had an opportunity to ask him the direct question. Tr. at 351-352, 1140, 1236-37, 1339, RX 14. Grosso was never asked about his views on the Union, nor would King's questions elicit such information indirectly. The questions that Grosso was asked concerned only his unprotected conduct in writing vulgar and threatening comments on the newsletters. Additionally, there was a fourth newsletter which stated "Stand Up or Shut Up!". RX 43. Grosso was never asked about this fourth newsletter, however, since no complaints had been received about it and it was not under investigation.

Further, the General Counsel's argument that King's failure to offer "any assurance against reprisal"³¹ leads to the conclusion that the interview was an unlawful interrogation is not supported by the record evidence, as King never made a decision with respect to disciplining Grosso. GC 11. Tyler testified that he made the decision to discharge Grosso on his own without receiving any recommendations from anyone, including King. Tr. at 83. Therefore, as

³¹ The General Counsel's citation to Hertz Corp., 316 N.L.R.B. 672 (1995) is misplaced. In Hertz Corp., the employer asked employees about their "union sentiments without communicating a valid purpose and an assurance against reprisal." 316 N.L.R.B. at 684. In this case, King asked Grosso not about his union sentiments (which were well-known due to Grosso's open support for the Union), but instead about whether he had information relating to the vulgar and offensive comments written on Union newsletters which prompted several complaints from multiple employees. Therefore, King had a valid purpose for interviewing Grosso, unlike the employer in Hertz Corp.

simply an investigator³², King had no authority or ability to offer Grosso assurances against reprisal.

c. Identity of the Questioner

The identity of the questioner further leads to the conclusion that the interview of Grosso on September 21 was lawful. ALJD p. 24, lines 15-17. The Board has found that where the relationship between the questioner and the employee is a friendly one, this factor weighs in favor of a lawful interrogation. See, e.g., Sunnyvale Med. Clinic, 277 N.L.R.B. at 1218. Although King was a higher level manager at Fresenius, he, along with Maloney, had a friendly rapport with Grosso due to frequent visits to the Chester facility and casual conversations with Grosso over the course of the three year period preceding the September 2009 investigation. Tr. at 346-47; 1330-31.³³ This friendly, casual relationship between King, Maloney and Grosso is evidenced by the “small talk and friendly banter” which occurred at the beginning of the September 21, 2009 interview. Tr. at 348.

d. The Place and Method of Interrogation

Judge Brakebusch mistakenly concluded that the place and method of interrogation factor weighed in favor of a finding that the September 21 interview of Grosso was an unlawful interrogation. Respondent addressed the place and method of interrogation factor at length in Respondent’s Brief in Support of Exceptions, and hereby incorporates such discussion herein.

e. The Truthfulness of the Response

³² King did not discipline Grosso when he suspended him on September 22. Rather, the suspension was investigatory only, (not disciplinary), as contemplated by Respondent’s Corrective Action Policy. Tr. at 185; GCX 4.

³³ Grosso was comfortable enough with King, in fact, to ask King to look into how overtime was assigned at the Chester facility during an earlier conversation with King. Tr. at 1330.

Respondent also addressed the fifth factor, the truthfulness of the response, at length in Respondent's Brief in Support of Exceptions, and hereby incorporates such discussion herein. In short, Grosso's lack of truthfulness in response to King's questions at the September 21 interview is indicative of nothing more than the fact that Grosso lied consistently throughout the investigation. (Grosso admitted during the hearing that he was dishonest at least six times during the course of the investigation into his conduct). Therefore, the truthfulness of his response to questions on September 21, or lack thereof, does not weigh in favor of a finding that the September 21 interview was an unlawful interrogation.

D. Judge Brakebusch Correctly Determined That An Intranet Posting Remedy is Not Appropriate

The General Counsel argues that an intranet remedy is appropriate and necessary in this case. Judge Brakebusch correctly determined that no such remedy is appropriate. ALJD p. 30, lines 48-49. The Board has recently held that an intranet posting is appropriate in cases where "the respondent customarily disseminates information to employees or members through electronic means." J & R Flooring, Inc., 356 N.L.R.B. No. 9 (2010). The Board reasoned that the Board's remedial notices should "be communicated in the manner deemed appropriate by the respondent for its own communications." Id.

The only allegations in this case involve the investigation and termination of one single employee at Respondent's Chester, NY facility.³⁴ Therefore, the relevant inquiry in this case is whether Fresenius customarily disseminates information to employees through electronic means

³⁴ Due to the fact that the only allegedly unlawful activity in this case occurred at the Chester, NY facility, an intranet remedy which would, for all practical purposes, effectuate a Company-wide notice, is inappropriate and unnecessary. Respondent maintains facilities throughout the country, none of which is implicated in this case. Therefore, a remedy ordering a Company-wide intranet posting would be unnecessarily broad and inappropriate in this case. See Blue Diamond Growers, 2009 NLRB LEXIS 278, at *129 (2009) (Despite the broad discretion given to the Board in issuing remedies, "the Board will not order a remedy unnecessarily broad or severe to remedy the particular violations of the Act committed").

at the Chester, NY facility. At the Chester facility, while the Employee Handbook and other Company policies are generally available for employees on the intranet, each employee is actually given a hard copy of the Employee Handbook to retain upon hiring. Tr. at 908. Moreover, there is evidence in the record that rules are actually posted in the break room at the Chester facility. Tr. at 1444. Therefore, the testimony indicates that the Company communicates with employees at the Chester, NY facility, the only facility implicated by the allegations in this case, by the distribution and posting of hard copies of rules and policies. As found by Judge Brakebusch, the evidence is not “sufficient to show that Respondent ‘customarily communicates’ with employees electronically.” ALJD p. 30, lines 44-45. An intranet posting is therefore wholly inappropriate in this case and is yet another example of overreaching by the General Counsel.³⁵

IV. Conclusion

For the reasons set forth above, and in Respondent’s Brief in Support of Exceptions as referenced herein, the Respondent respectfully requests that the Board affirm the ALJ on the following findings and conclusions: 1) the September 21, 2009 interview of Grosso was not an unlawful interrogation and the Respondent therefore did not violate Section 8(a)(1) of the Act; 2) the investigation commencing on September 21, 2009 was not an unlawful investigation and the Respondent therefore did not violate Section 8(a)(1) of the Act; 3) the Respondent did not unlawfully discriminate in either investigating, suspending, or discharging Grosso and the Respondent therefore did not violate Section 8(a)(3) of the Act; and 4) Grosso’s conduct was so offensive as to lose the protection of the Act, and the Respondent therefore did not violate Section 8(a)(1) for discharging him for such conduct.

³⁵ Respondent also preserves its rights to present evidence and raise all arguments contained herein during any Compliance proceedings which may occur in this matter.

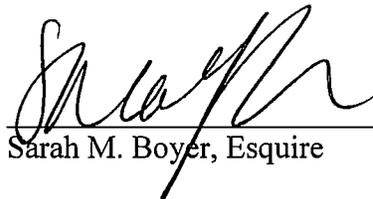
CERTIFICATE OF SERVICE

This is to certify that on October 27, 2010, I caused the foregoing Brief in Support of Exceptions to the Administrative Law Judge's Decision to be served electronically, properly addressed as follows:

Elbert Tellem
Acting Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278-0179
Elbert.Tellem@nlrb.gov

Julie Y. Rivchin
Counsel for the General Counsel
26 Federal Plaza, Room 3614
New York, NY 10278-0179
Julie.Rivchin@nlrb.gov

Daniel Clifton, Esquire
Lewis, Clifton & Nikolaidis, P.C.
350 Seventh Ave., Suite 1800
New York, New York 10001-5013
dclifton@lcnlaw.com



Sarah M. Boyer, Esquire

Dated: October 27, 2010