NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 12-1387, 12-1415

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Fresenius USA Manufacturing, Inc.,
Petitioner/Cross-Respondent,

v.

National Labor Relations Board,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW
AND CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

NLRB Case No. 02-CA-039518

OPENING BRIEF FOR PETITIONER/CROSS-RESPONDENT FRESENIUS USA MANUFACTURING, INC.

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January 25, 2013

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

1. Fresenius USA Manufacturing, Inc. ("Fresenius") is the Petitioner/Cross-Respondent.

2. The National Labor Relations Board ("Board" or "NLRB") is the Respondent/Cross-Petitioner.

3. The International Brotherhood of Teamsters, Local 445 ("Union") was the charging party in the proceeding before Region 2 of the Board. The Union is not a party to this appeal.

4. The U.S. Chamber of Commerce, Equal Employment Advisory Council, National Association of Manufacturers, Council on Labor Law Equity, HR Policy Association, Coalition for a Democratic Workplace, and the Retail Industry Leaders Association are participating as *amici curiae* before this Court in support of Fresenius.

B. Ruling Under Review.

Fresenius seeks review of the Board's Decision and Order in *Fresenius USA Manufacturing, Inc. and International Brotherhood of Teamsters, Local 445*, Case No. 02-CA-039518, 358 N.L.R.B. No. 138 (Sept. 19, 2012).

C. Related Cases.

The instant case has not previously been before this Court or any other court involving the same parties. As of the date of this filing, Fresenius is aware of

several other cases pending before this Court involving substantially the same or similar issues as the instant case.

The issue of requesting confidentiality in a harassment investigation is raised in *Hyundai America Shipping Agency, Inc. v. NLRB,* (D.C. Cir. Case Nos. 11-1351, 11-1413) and *Banner Health System v. NLRB* (D.C. Cir. Case Nos. 12-1359, 12-1377).

The issue of whether the Board's orders are valid in the absence of a lawful quorum is pending in *Noel Canning v. NLRB* (D.C. Cir. Case Nos. 12-1115; 12-1153); *Sands Bethworks Gaming, LLC v. NLRB* (D.C. Cir. Case No. 12-1240); and *Kimberly Stewart v. NLRB* (D.C. Cir. Case No. 12-1338) and raised in the statement of issues filed in *Milum Textile Services Co. v. NLRB* (D.C. Cir. Case Nos. 12-1235, 12-1275); and *Meredith Corp. v. NLRB* (D.C. Cir. Case No. 12-1287). The quorum issue has also been raised in other circuits. *See NLRB v. New Vista Nursing* (3d Cir. Case Nos. 11-3440, 12-1027 & 12-1936); *NLRB v. Enterprise Leasing Co.* (4th Cir. Case No. 12-1514); *NLRB v. Nestle Dreyer's Ice Cream Co. v. NLRB* (4th Cir. Case Nos. 12-1684; 12-1783); and *Huntington Ingalls, Inc. v. NLRB* (4th Cir. Case No. 12-2000).

CORPORATE DISCLOSURE STATEMENT

Petitioner/Cross-Respondent Fresenius USA Manufacturing, Inc. ("**Fresenius**"), makes the following disclosure pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1:

Fresenius is engaged in the manufacture and distribution of dialysis products. Fresenius was the respondent in the proceeding below before the National Labor Relations Board.

All parent corporations and any publicly held companies that own ten percent or more of Fresenius' stock are: Fresenius Medical Care Holdings, Inc.; Fresenius Medical Care North America Holdings Limited Partnership; Fresenius Medical Care US Vermogensverwaltungs GmbH & Co. KG; Fresenius US Zwei Vermogensverwaltungs GMBH & Co. KG; Fresenius Medical Care Beteiligungsgesellschaft mbH; Fresenius Medical Care Vermogensverwaltungs GmbH; Fresenius Medical Care Management AG; and Fresenius Medical Care AG & Co. KGaA.

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GLOSSARY OF ABBREVIATIONS

"Act"	National Labor Relations Act
"ALJ"	Administrative Law Judge
"Board"	The National Labor Relations Board
"Charge"	Unfair Labor Practice Charge
"EEO"	Equal Employment Opportunity
"EEOC"	Equal Employment Opportunity Commission
"Fresenius"	Fresenius USA Manufacturing, Inc.
"GC"	Acting General Counsel for the National Labor Relations Board
"Grosso"	Kevin ("Dale") Grosso
"JA"	Joint Appendix
"NLRA"	National Labor Relations Act
"NLRB"	National Labor Relations Board
"Order"	September 19, 2012 Decision and Order of the Board
"Union"	International Brotherhood of Teamsters, Local 445

STATEMENT OF JURISDICTION

This proceeding arises from the underlying decision in *Fresenius USA Manufacturing, Inc. and International Brotherhood of Teamsters, Local 445*, Case No. 02-CA-039518, 358 N.L.R.B. No. 138 (Sept. 19, 2012) ("**Order**"). The Board had subject matter jurisdiction of the proceeding pursuant to Section 10(a) of the NLRA, 29 U.S.C. § 160(a). The Order is final with respect to all parties.

Fresenius timely filed a petition for review of the Order on September 28, 2012. The Board filed a cross-application for enforcement of the Order on October 16, 2012. This Court has jurisdiction over these consolidated proceedings pursuant to Sections 10(e) and (f) of the NLRA, 29 U.S.C. §§ 160(e) and (f). Venue is proper in this Court pursuant to 29 U.S.C. § 160(f).

STATEMENT OF ISSUES

I. Whether the NLRB committed reversible error in finding that Fresenius violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("**NLRA**"), 29 U.S.C. § 158(a)(1) and § 158(a)(3), by suspending and discharging Kevin "Dale" Grosso ("**Grosso**") because:

A. Grosso wrote vulgar, offensive and threatening comments on several union newsletters distributed at the Company's premises in violation of the Company's Equal Employment Opportunity ("**EEO**") and Harassment Policies and the Board's conclusion that such egregious

misconduct is protected under the NLRA conflicts with Fresenius' obligations under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., state anti-discrimination/anti-harassment laws, and implementing regulations;

B. Grosso's multiple instances of dishonesty during the course of the investigation into the vulgar, offensive and threatening comments written on several union newsletters is not protected under the NLRA and constitutes a legally sufficient basis to suspend and discharge Grosso; and

C. the NLRB's order of reinstatement and back pay on behalf of Grosso is barred by Section 10(c) of the NLRA, 29 U.S.C. § 160(c), which prohibits the Board from issuing an order requiring reinstatement and back pay to an individual suspended or discharged for cause.

II. Whether the NLRB committed reversible error in finding that Fresenius violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by encouraging Grosso to refrain from discussing the EEO investigation so as to, *inter alia*, protect the safety of the female employees who had complained about Grosso's conduct.

III. Whether the NLRB's Order is invalid because the NLRB lacked a lawful quorum of at least three members and, therefore, had no statutory authority to adjudicate the unfair labor practice charge against Fresenius.

RELEVANT STATUTES AND REGULATIONS

See Addendum for pertinent excerpts.

STATEMENT OF FACTS

I. Factual Background.

Fresenius manufactures and distributes dialysis products from facilities across the United States, including a Distribution Center in Chester, New York. This petition for review arises from Fresenius' suspension and termination of Grosso in September 2009 for writing vulgar, offensive and threatening comments on newsletters distributed in the employee break room at the Distribution Center and for multiple instances of dishonesty during the company investigation into the comments Grosso wrote on the newsletters.

A. The Decertification Election at Fresenius' Distribution Center and the Anonymous Vulgar, Offensive and Threatening Comments Written on Newsletters Distributed in the Employee Break Room.

In September 2009, Fresenius' New York Distribution Center had two bargaining units—the Warehouse Unit and the Drivers Unit—both of which were represented by the International Brotherhood of Teamsters, Local 445 ("**Union**"). (JA 315). A decertification election on whether to retain the Union as the employees' bargaining representative was scheduled in the Warehouse Unit for September 23, 2009. (JA 44). Shortly before the election, someone anonymously

wrote the following comments on three union newsletters, and left the newsletters on three separate tables in an employee break room in the warehouse:

- "Dear Pussies – Please Read!" (JA 72, 86, 451).
- "Hey Catfood Lovers How's Your Income Doing?" (JA 86, 452).
- "Warehouse Workers – R.I.P." (JA 86, 453).

Four female warehouse employees complained to management that the terms "pussies" and "catfood lovers" (which the employees understood and Grosso admitted was a play on the word "pussies") were vulgar, offensive and derogatory to women. (JA 172, 208, 226, 315-16). The female employees also complained that the phrase "R.I.P." (which the employees understood and Grosso admitted meant "Rest in Peace" or death) was a threat of harm specifically directed at the warehouse workers and causing them to fear for their safety. (JA 171-72, 209, 227, 315-16).

A female employee reported to management that "all the women in the facility were upset over the comments." (JA 315). In response to the complaints, the Distribution Center Manager, Shane Healy ("**Healy**"), interviewed each complaining employee and assured them that the Company would launch an investigation to ensure a safe workplace. (JA 315-16).

B. Fresenius' Human Resources Policies and Security Measures Taken to Protect Female Employees at the Distribution Center.

On the same day that he received the complaints, Healy called a meeting of all Distribution Center employees. (JA 228, 272, 316). Healy explained that the newsletter comments were inappropriate for the workplace and reminded employees of Fresenius' Harassment Policy. (JA 316). At the meeting, several female warehouse employees again complained about the vulgar, offensive and threatening nature of the comments on the newsletters. (JA 272, 316).

The Harassment Policy states that Fresenius "is committed to providing a work environment free from all forms of discrimination including harassment for all employees." (JA 445). It also mandates that a manager or supervisor "will investigate and respond immediately" upon receiving a harassment complaint and must "administer corrective action **up to and including termination** of the individual engaging in harassment." (JA 446) (emphasis added). In addition, Fresenius maintained an EEO Policy contained in Fresenius' Employee Handbook, as well as in a separate policy document. (JA 482-83). It states that Fresenius "does not tolerate unlawful discrimination against any individual on the basis of . . . sex." (JA 482).

Fresenius also maintained a Corrective Action Policy. It provides for various levels of discipline depending on the severity of the conduct, such as a written warning, suspension, or termination. (JA 447). The policy states that

"[t]ermination may also occur **immediately** as a result of a serious violation by the employee, including but not limited to misconduct, **harassment**, insubordination or actions jeopardizing patient care." (JA 449) (emphasis added).

Healy recognized that he faced a "catch-22 situation" because, while the company's EEO and Harassment policies required investigation into the EEO complaints made by the female employees concerning the handwritten comments, at the same time, those comments were made on union newsletters during the midst of a union decertification election. (JA 302, 317, 341). As a result, Healy concluded that he needed to consult with legal counsel regarding the next steps to be taken. (JA 341). In the meantime, Healy indicated to the employees that he would take steps to ensure employee safety. (JA 316). To protect the women at the Distribution Center, Healy advised them to park their cars within view of the Distribution Center's surveillance cameras, stayed late to ensure they were able to safely leave the building, and explored additional security options for the Distribution Center. (JA 316-18).

C. Fresenius' Investigation into the Vulgar, Offensive and Threatening Comments and Grosso's Deliberate, Repeated Dishonesty During the Investigation.

On September 21, 2009, Kevin King ("**King**"), Vice President of Supply Chain Management, and Doug Maloney ("**Maloney**"), Director of Distribution Operations, held a meeting with the Warehouse Unit employees regarding the

upcoming decertification election. (JA 44, 291, 342). At the meeting, three of the four women who had complained to Healy again voiced their concerns. (JA 44-46, 343). This meeting marked the third time these employees complained to management in a short period, and the second time they had done so in a public forum.

King assured the employees that the Company would investigate the complaints. (JA 46, 343). After the meeting, one of the female employees approached King indicating she thought she recognized the handwriting on the newsletters as Grosso's handwriting. (JA 47, 343). Management compared handwriting samples from each of the drivers' work logs to the handwriting on the newsletters. (JA 47, 343-44). Management also reviewed additional handwriting samples from Grosso. (JA 47-48, 293-94). After reviewing the handwriting samples, management concluded that it appeared Grosso wrote the comments on the newsletters. (JA 48, 293). King then interviewed Grosso in the presence of other managers. (JA 50, 294, 318, 527).

Grosso initially stated that he disagreed with the employees who had complained that the statements were offensive, vulgar, intimidating and threatening, but ultimately admitted that he could see that some of the comments may offend women. (JA 51, 96, 294, 527). During the interview, Grosso falsely

stated that he did not know who had written the comments and denied writing them himself. (JA 95, 294, 319, 344, 527).

The next morning, King received a call on his cell phone. (JA 51, 295, 345, 528-29). The caller did not initially identify himself but, instead, began recounting the interview the day before indicating that management questioned him about the handwritten comments on the newsletters, that he denied having knowledge of the comments, and that he specifically denied writing the comments. (JA 52, 346, 528). At this point, King realized that he was talking to Grosso. (JA 52, 346).

King, believing that Grosso had called to confess, motioned for the other managers in the conference room, Maloney and Frank Petliski ("**Petliski**"), the Warehouse Supervisor, to witness the conversation on speakerphone. (JA 52, 274, 295, 346, 528-30). Grosso then admitted that he wrote the comments on the newsletters. (JA 52, 99, 274, 295, 346, 528-30). King then identified himself and said, "Dale, this is Kevin King. I'm in the conference room with Doug Maloney and Frank Petliski." (JA 52, 274, 295, 346, 528-30).

Grosso initially thought he called his union representative. When Grosso discovered he was speaking with a manager, Grosso denied his identity. (JA 76-77). Specifically, Grosso paused and said, "This isn't Dale. This isn't happening." (JA 52, 100, 274, 295, 346, 528-30). King then stated to Grosso, "Come on, Dale. You called me on my company cell phone from your company cell phone." (JA

52, 295, 346, 528-29). King then instructed Grosso to stop what he was doing, and to return to the Distribution Center immediately. (JA 52, 274, 295, 346, 528-30).

D. Grosso's Investigatory Suspension; Grosso's Second Interview; the Independent Human Resources Investigation; and Grosso's Termination.

Grosso returned to the Distribution Center pursuant to King's instructions and requested union representation. (JA 52, 277, 296, 346, 531-33). After the Union's Business Representative arrived, Grosso was informed that he was suspended pending the results of the investigation. (JA 52, 277, 296, 346-47, 531-33). The suspension was not disciplinary, but an investigatory suspension issued pursuant to Fresenius' Corrective Action Policy to allow Fresenius to fully and completely investigate the situation. (JA 53, 447). King told Grosso not to return to work until he was instructed to do so, and encouraged Grosso to refrain from discussing the investigation with other employees while it was ongoing. (JA 347, 531).

On September 23, 2009, King interviewed Grosso again. Healy and Grosso's union representatives were present for this interview. (JA 52, 319, 348, 534-35). Grosso now admitted to writing the comments on the union newsletters. (JA 319, 348, 534-35). Grosso also admitted to lying to King on September 21 when he denied writing the comments on the newsletters, and lying on September 22 when he denied that he was "Dale" in the telephone conversation with King.

(JA 320, 348-49, 534-35). When given the opportunity to explain himself, Grosso indicated that "[i]n the spirit of full disclosure, I was looking out for the little people." (JA 319, 348, 534-35).

Two days later, King sent Fresenius' Senior Human Resources Manager, Jason Tyler ("**Tyler**"), an investigative file composed of investigatory memos, interview notes, and written statements from the complaining employees. (JA 351, 521-25, 526-30, 531-33, 534-36). Tyler reviewed the investigation file and conducted his own independent investigation that included interviewing King, Maloney and Healy. (JA 27, 297, 321, 354). Based on this investigation, Tyler determined that Grosso should be terminated. (JA 26). Tyler concluded that the words "pussies" and "catfood lovers" violated the Company's EEO and Harassment Policies. (JA 26, 33-34). Tyler also concluded that Grosso's use of the term "R.I.P." constituted a threat and also violated the company's Harassment Policy. (JA 28-29, 36). Finally, Tyler concluded that Grosso should be terminated due to his dishonesty during the investigation. (JA 26, 450). Tyler had previously terminated other Fresenius employees in Wisconsin and California on similar grounds for making a threat in violation of the Company's Harassment Policy and for dishonesty during a company investigation. (JA 34, 36, 38).

Upon completion of Tyler's independent Human Resources investigation, Grosso was terminated on September 25, 2009 for his misconduct; namely: (1)

making vulgar, offensive and threatening comments in violation of Fresenius' EEO and Harassment policies, and (2) dishonesty during the course of the EEO investigation. (JA 26, 450). In particular, Grosso lied during the interview when he denied authoring the handwritten comments on the newsletters and further denied knowing who had authored the comments. (JA 95, 294, 319, 344, 527). Grosso also lied when he denied his identity in the telephone confession the morning after the interview. (JA 26).

II. Procedural History.

A. Unfair Labor Practice Charge and Complaint.

In October 2009, the Union filed an Unfair Labor Practice Charge ("**Charge**") and amended it in December 2009. (JA 378-79, 381). The Union alleged that Fresenius conducted an unlawful investigation into Grosso's conduct, and conducted an unlawful interview of Grosso during the course of the investigation; improperly prohibited Grosso from speaking to other employees about the investigation; and unlawfully suspended and terminated Grosso's employment as a result of the investigation. (JA 378-79, 381). Region 2 of the NLRB issued a Complaint on each of these allegations, prompting a hearing before an Administrative Law Judge ("**ALJ**"). (JA 383-88).

B. ALJ's Decision.

The ALJ issued a decision on August 19, 2010, in which she concluded that: (1) Fresenius appropriately commenced and conducted an investigation into

Grosso's conduct prompted by the complaints received from the female warehouse employees; (2) the interview of Grosso was not an unlawful "interrogation" but rather was narrowly and appropriately focused to confirm that Grosso authored the vulgar, offensive and threatening comments; and (3) Fresenius appropriately suspended and discharged Grosso for both violation of its EEO and Harassment Policies and for his dishonesty during the investigation into his misconduct. (JA 685, 694-95, 697-99). The ALJ determined that Fresenius violated the NLRA by asking Grosso to refrain from discussing the investigation with other employees. (JA 704).

C. Board's Decision and Dissenting Opinion.

On September 19, 2012, the Board issued an Order in which it concluded that Fresenius did not violate the NLRA when it investigated the anonymous newsletter comments and interviewed Grosso about those comments. (JA 862). Consequently, the lawfulness of the EEO investigation and the interview of Grosso during the course of the investigation are no longer at issue.

In the Order, the majority of the Board concluded, contrary to the ALJ, that Fresenius' suspension and discharge of Grosso violated Sections 8(a)(3) and 8(a)(1) of the NLRA. (JA 862). The Board also affirmed the ALJ's conclusion that Fresenius violated Section 8(a)(1) of the NLRA by asking Grosso to refrain from discussing the investigation with other employees. (JA 862 n.1).

Board Member Hayes dissented because the majority decision gave greater protection to employee misconduct occurring in the context of alleged organizational activity than such misconduct would receive in other contexts, and that the decision would interfere with employers' ability to comply with the requirements of other labor laws (such as Title VII of the Civil Rights Act and state anti-discrimination laws). (JA 870). Specifically, Member Hayes stated:

> I specifically dispute [the majority's] implication that greater latitude must be accorded to misconduct occurring in the course of organizational activity than for other Section 7 activity, that profanity in the course of labor relations is the presumptive and permissible norm in *any* workplace, that remarks by one employee to another that would be unprotected on the shop floor should be protected if made in the breakroom, that comments which coworkers reasonably view as harassing and sexually insulting are not disruptive of productivity, and that threatening speech alone cannot warrant loss of statutory protection. Taken as a whole, these pronouncements confer on employees engaged in Section 7 activity a degree of insulation from discipline that the Act neither requires nor warrants. . . . [M]y colleagues thereby impermissibly fetter the ability of employers to comply with the requirements of other labor laws and to maintain civility and order in their workplace by maintaining and enforcing rules nondiscriminatorily prohibiting abusive and profane language, sexual harassment and verbal, mental and physical abuse.

(JA 870).

SUMMARY OF ARGUMENT

In response to multiple complaints received from several female employees about anonymous vulgar, offensive and threatening comments written on newsletters distributed in an employee break room, Fresenius commenced an EEO

investigation in an effort to identify the author of the comments. During that investigation, Fresenius interviewed Grosso. In this interview, Grosso falsely denied both authoring the comments and knowing who had written them. After inadvertently confessing to authoring the comments and then admitting he lied during the investigation, Fresenius terminated Grosso for violating its EEO and Harassment Policies and for his repeated dishonesty during the investigation.

Incredibly, the Board found that despite properly conducting an EEO investigation arising from the EEO complaints and properly interviewing Grosso, it was improper for Fresenius to take corrective measures to ensure compliance with its EEO and Harassment Policies and to prevent a hostile work environment. In so finding, the Board relied on Grosso's purported motives for writing the comments rather than acknowledging the legitimate reactions of the complaining employees who Grosso offended and frightened.

The Board's conclusion that Grosso's misconduct was protected under the Act presents an irreconcilable conflict with Fresenius' obligations under federal and state anti-discrimination laws and is not reasonably defensible under this Court's and the Board's precedent. The Board's decision forces employers to refrain from taking any measures to end sexual (or other types of) harassment in the workplace whenever the employee who committed the harassment contends that it occurred under circumstances involving arguable union activity. The

inevitable consequence is that employers will be exposed to federal and state civil liability for failure to take measures to end workplace harassment.

Similarly, the Board's conclusion that Grosso was privileged to lie multiple times in an obvious attempt to avoid detection during a lawful interview conducted during a lawful EEO investigation is flatly inconsistent with the point of harassment investigations which is to determine whether harassment has occurred in the workplace and, if so, who is responsible for such conduct so that prompt and effective remedial measures may be undertaken to prevent a hostile work environment. Grosso's dishonesty was an independent and legitimate basis for his termination.

Grosso's misconduct in authoring the offensive and threatening comments on the newsletters and his dishonesty were not protected by the NLRA. To the extent some aspect of his misconduct is somehow considered protected, the Board uses its *Wright Line* decision to examine employee discipline motivated by protected and unprotected conduct. The Board's failure to analyze Grosso's termination under the Board's *Wright Line* standard is reversible error. Further, the Board's order of reinstatement and back pay for Grosso is barred by Section 10(c) of the Act, which expressly prohibits the Board from ordering such remedies to an employee terminated for cause. Consequently, the Board's conclusion that

Grosso's misconduct was protected is neither supported by substantial evidence of record nor reasonably defensible under this Court's and the Board's precedent.

Out of concern for the safety of the complaining female employees, Fresenius encouraged Grosso to refrain from discussing the investigation with other employees during its pendency. The Board has ruled that an employer may properly request confidentiality of an investigation for this reason. Therefore, substantial evidence of record and Board precedent fails to support the Board's conclusion that Fresenius improperly encouraged Grosso to refrain from discussing the investigation.

Finally, the Board's Order is invalid since it was issued without a proper quorum and should therefore be vacated.

STANDING

Fresenius has standing to seek review in this Court as an aggrieved party to a final order of the Board pursuant to 29 U.S.C. § 160(f). *See Retail Clerks Local 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965).

ARGUMENT

I. Standard of Review.

This Court may deny enforcement and vacate a Board order where the Board adopted an unreasonable or otherwise indefensible interpretation of the NLRA. *See Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001). Although the Board is entitled to deference, the review is "not so

deferential that the court will merely act as a rubber stamp for the Board's conclusions," and "Board orders will not survive review when the Board's decision has no reasonable basis in law or when the Board has failed to apply the proper legal standard." *Titanium Metals Corp. v. NLRB,* 392 F.3d 439, 445-46 (D.C. Cir. 2004). The Board's departure from established precedent without a reasoned analysis renders its decision arbitrary. *See E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 66-67 (D.C. Cir. 2012); *Mail Contractors of Am. v. NLRB*, 514 F.3d 27, 31 (D.C. Cir. 2008). Similarly, a Board decision is reversible when the Board's application of law to facts is arbitrary or otherwise erroneous. *See Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 437 (D.C. Cir. 2012); *Harter Tomato Prods. Co. v. NLRB,* 133 F.3d 934, 937 (D.C. Cir. 1998).

Questions of fact are accorded deference only if supported by the substantial evidence in the record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). A Board decision is not entitled to deference when it rests upon a finding unsupported by substantial evidence in the record. *See Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1141 (D.C. Cir. 2011); *Int'l Transp. Serv., Inc. v. NLRB,* 449 F.3d 160, 163 (D.C. Cir. 2006). The court's "review must take into account whatever in the record fairly detracts from the weight of the evidence cited by the Board to support its conclusions." *Cleveland Constr., Inc. v. NLRB,* 44 F.3d 1010, 1014 (D.C. Cir. 1995).

II. After Finding that Grosso Had Made "Vulgar, Offensive, and In Isolation, Possibly Threatening" Written Statements in the Workplace, and Finding that Grosso Had Repeatedly Lied About His Authorship of Those Statements, The NLRB Committed Reversible Error by Nonetheless Concluding Grosso's Misconduct Was "Protected".

A. The NLRB's Expansive Interpretation of Protected Conduct Under the NLRA Is Not Reasonably Defensible and Causes Irreconcilable Conflict with Fresenius' Obligations Under Title VII of the Civil Rights Act, the EEOC's Implementing Regulations, and State Anti-Discrimination Laws.

The Board found that the anonymous statements were "vulgar, offensive, and, in isolation, possibly threatening," and then properly concluded that Fresenius' investigation into the authorship of the anonymous comments handwritten on union newsletters distributed in an employee break room, prompted by multiple complaints from female employees, was "fully consistent with its anti-harassment policy" and did **not** violate the NLRA. (JA 862-64). The Board further properly concluded that Fresenius' interview of Grosso during the investigation in an attempt to determine if he authored the comments also did **not** violate the NLRA. (JA 864).

Nonetheless, the Board concluded that even after Grosso falsely denied and then later confessed to writing the vulgar, offensive and threatening comments on the newsletters during an admittedly lawful investigation, Fresenius violated the NLRA when it acted consistently with its Harassment, EEO, and Corrective Action Policies by taking corrective remedial measures in suspending and subsequently

terminating Grosso's employment for such misconduct. (JA 864). In so holding, the Board demonstrated remarkable indifference to an employer's obligations to investigate and take appropriate corrective actions in response to harassment complaints under Title VII of the Civil Rights Act of 1964 ("**Title VII**"), 42 U.S.C. § 2000e-2, its implementing regulations, and state anti-discrimination laws. Title VII provides, in pertinent part, that:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

42 U.S.C.§ 2000e-2(a)(1).[2] The Equal Employment Opportunity Commission ("**EEOC**") is responsible for enforcing Title VII. 29 C.F.R. § 1690.104. Under the EEOC's implementing regulations, conduct can constitute sexual harassment when it "has the *purpose* ***or*** *effect* of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (emphasis added). Further, an employer is liable for acts of sexual harassment in the workplace where the "employer (or its agents or supervisory employees) knows or should have known of the conduct, *unless it can show that it took immediate and appropriate corrective action*." *Id.*

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[2] A similar provision exists under New York state law applicable to Fresenius at its Chester, NY Distribution Center. N.Y. Exec. Law § 296(1)(a).

§ 1604.11(d) (emphasis added); *see also* EEOC, *Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors* (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html (last visited Jan. 25, 2013) (providing that employers are obligated to investigate employee complaints to management of alleged harassment).

In light of these statutory and regulatory provisions, an employer is obligated to investigate complaints of workplace harassment and take prompt and appropriate remedial measures. *See Faragher v. City of Boca-Raton*, 524 U.S. 775, 807 (1998) (finding employers are legally obligated to take prompt, remedial action to address harassment in the workplace); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (same); *Curry v. D.C.*, 195 F.3d 654, 660 (D.C. Cir. 1999) (paraphrasing 29 C.F.R. § 1604.11(d) and announcing it to be the standard for employer liability in co-worker harassment cases); *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999) (imposing liability if employer "*knew* or should have known of the harassment in question *and failed to take prompt remedial action*") (emphasis added); *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999) (same); *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 987 (8th Cir. 1999) (same).

Consequently, the Board's decision in this case, which greatly expands the sphere of protected conduct under the NLRA, places employers in an irreconcilable conflict with their obligations under Title VII and state anti-

discrimination laws. Upon receiving a complaint of sexual harassment, an employer is bound under federal and state anti-discrimination laws to promptly conduct an investigation. Once the employer determines that sexual harassment has occurred, it must take prompt and appropriate corrective action – otherwise the employer will face liability under these federal and state laws for letting harassment occur unaddressed at its workplace. However, under the NLRB's decision, if the sexual harassment occurs within the context of some arguably protected, concerted activity under the NLRA, the employer will violate the Act if it takes any corrective action against the harasser. For this reason, the NLRB's decision is unreasonable and an indefensible interpretation of the NLRA.

1. The NLRB's Conclusion that Grosso's Misconduct is "Protected Conduct" Under the NLRA Was Not Reasonably Defensible.

This Court's decision in *Adtranz* is particularly instructive in demonstrating the Board's reversible error in this case. *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001). In *Adtranz*, the Board concluded that an employer's prohibition in its employee handbook of the use of abusive or threatening language on company premises was unlawfully overbroad under the NLRA. *Id.* at 23-24. This Court vacated the Board's decision on the ground that its conclusion was "not reasonably defensible" because, among other reasons, the Board failed to consider that "under both federal and state law, employers are

subject to civil liability should they fail to maintain a workplace free of racial, sexual and other harassment" and that "[a]busive language can constitute verbal harassment triggering liability under state or federal law." *Id.* at 27.

This Court further indicated that "to bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a 'catch 22'" and "it defies explanation that a law enacted to facilitate collective bargaining and to protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace." *Id.* at 27, 28. Relying on *Adtranz*, this Court recently noted that "we have found the Board 'remarkably indifferent to the concerns and sensitivity' that lead employers to adopt rules intended 'to maintain a civil and decent workplace'" and, in so doing, vacated the Board's decision finding that an employer violated the Act by enforcing its dress code rules that prohibited insulting, provocative or confrontational statements. *Medco Health Solutions of Las Vegas, Inc. v. NLRB*, 2012 U.S. App. LEXIS 25548, *3-4, 14, 19 (D.C. Cir. Dec. 14, 2012).

In this case, the Board has once again demonstrated "remarkable indifference" to an employer's legal obligations to take prompt and appropriate corrective action upon notice of conduct that may constitute sexual harassment and/or create a hostile work environment on the basis of gender. The Board concluded that it was appropriate for Fresenius to conduct an investigation upon

receipt of the sexual harassment complaints and to interview Grosso about his role in making sexually harassing and threatening comments on the newsletters distributed in the break room. However, once Fresenius confirmed that Grosso had engaged in harassment in violation of its EEO and Harassment policies, the Board effectively held that Fresenius could take no corrective measures to prevent the harassment at the workplace from creating an intimidating, hostile or abusive working environment.

In this regard, the Board holds that *any* type of discipline, such as a verbal warning, written warning, or even a reminder to comply with the employer's harassment policy will chill an employee's "right" to engage in protected concerted activity. *See, e.g., Arkema, Inc.*, 357 N.L.R.B. No. 103, 2011 NLRB LEXIS 607, *3 (Oct. 31, 2011) (concluding that a written reminder to comply with the employer's harassment policy violated the NLRA); *Contemporary Cars, Inc.*, 358 N.L.R.B. No. 163, 2011 NLRB LEXIS 684, *6 (Sept. 28, 2012) (finding that a documented coaching session with an employee for failure to conduct himself in a courteous, respectful and polite manner violated the NLRA); *Noble Metal Processing, Inc.*, 346 N.L.R.B. 795, 795, 799-802 (2006) (finding that a documented verbal warning for disorderly, antagonistic, and disrespectful conduct at an employee meeting violated the NLRA). The Board's decision here, coupled with its holdings as noted above, effectively precludes an employer from taking

any remedial measures to address legitimate complaints of harassment at the workplace.

Consequently, the Board's Order forces employers into the very "catch 22" that Healy, the Distribution Center Manager, recognized upon receiving the complaints amid a union decertification campaign and which, as this Court has recognized, places employers in an unreasonable position when they are attempting to maintain a civil and decent workplace consistent with federal and state employment discrimination laws. The Board's decision directly contradicts an employer's obligations under Title VII and state anti-discrimination laws, is incompatible with the principles set forth in *Adtranz* and *Medco* and, therefore, is not reasonably defensible.

2. The NLRB's Reliance on Grosso's Purported Intent Behind Making the Vulgar, Offensive and Threatening Comments Is Inconsistent with Title VII Law and Prior Board Precedent.

The Supreme Court held in *Harris v. Forklift Systems, Inc.* that Title VII is violated when a hostile or abusive work environment exists, based on both the *victim's subjective perception* that workplace conduct is abusive and on the objective view of *a reasonable person.* 510 U.S. 17, 21-22 (1993); *accord Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F. 3d 426, 437 n.3 (2d Cir. 1999) ("Title VII seeks to protect those that are targets of such conduct, and *it is*

their perspective, not that of bystanders or the speaker, that is pertinent.") (emphasis added).

Similarly, the NLRB's own precedent focuses on whether the employer reasonably concluded that an employee's language was vulgar, offensive and in violation of its harassment policy – not on the intent of the speaker or author of such language. *See, e.g.*, *Honda of Am. Mfg., Inc.*, 334 N.L.R.B. 746, 748 n.6 (2001) (rejecting General Counsel's argument that certain remarks had innocuous meanings because the speaker's intent is irrelevant "even if the language was capable of an innocent as well as an offensive interpretation"); *Consol. Diesel Co.*, 332 N.L.R.B. 1019, 1028 (2000) (citing EEOC Notice 915.050 that "the reasonable person standard should consider the victim's perspective"), *enf.*, 263 F.3d 345 (4th Cir. 2001); *Sw. Bell Tel. Co.*, 200 N.L.R.B. 667, 670 (1972) (providing that "it is no answer that the employees did not in fact intend the derogatory and insulting connotation placed upon the slogan by management").

The Board's decision in *Honda* is particularly instructive in demonstrating the Board's unreasonable disregard of the perception of the EEO complainants and the perception of the employer in this case. *Honda of Am. Mfg., Inc.*, 334 N.L.R.B. 746 (2001). In *Honda*, an employee authored and distributed a newsletter to other employees in which he used the phrases "come out of the closet" (referring to another employee's alleged homosexuality) and "bone us" (as a play off the word

"bonus" and referring to the employer's bonus program). *Id.* at 746.[3] The author testified that he did not intend the comments to be taken in a sexual or demeaning manner. *Id.* The employer, however, considered these comments to be inappropriate, vulgar and offensive in the workplace and to violate the employer's harassment rules which prohibited abusive or threatening language or conduct that could create a hostile or offensive work environment. *Id.*

The Board's General Counsel argued in *Honda* that since the comments could have an innocuous meaning as well as a vulgar or offensive meaning, the comments did not lose their protection under the Act. *Id.* at 747, 748 n. 6. The Board concluded that even if the newsletter comments were capable of such a dual interpretation, it was insufficient for the author to simply claim he did not intend the derogatory connotation. *Id.* Rather, the Board stated that:

> Concededly, the Board has the authority to declare that certain statements are protected by Section 7, even if they are somewhat distastefully expressed. However, in making that judgment, the Board must take into account an employer's legitimate interest (and perhaps legal obligation) to refrain from having an offensive working environment.

Id. at 748. After considering the employer's legitimate interest and legal obligation to prevent an offensive working environment, the Board held that the

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[3] In this decision, it was acknowledged that the phrase "come out of the closet" commonly refers to openly admitting one's homosexuality, and the phrase "bone us" refers to copulation or anal intercourse. *Id.* at 747.

comments in the newsletter were "so offensive as to render the otherwise protected newsletters unprotected" and, therefore, the employer appropriately disciplined the author of the comments for violating the policy. *Id.* at 749.

In contrast, the Board in this case failed to apply the same standard that it applied in *Honda*, a standard which employers must follow under Title VII and state anti-discrimination laws. Several female warehouse employees complained to management that the comments "Dear Pussies, Please Read!" and "Hey Catfood Lovers" were vulgar, offensive and demeaning to women. (JA 172, 208, 226, 315-16). An independent human resources investigation likewise concluded that these comments were vulgar, offensive and inappropriate under the Company's Harassment and EEO policies. (JA 35). During his interview, even Grosso acknowledged that the comments could offend women. (JA 51, 96, 294, 527). In its decision, even the Board acknowledged that Grosso's comments were "vulgar and could reasonably offend other employees." (JA 866). Yet, the Board reverted to accepting Grosso's self-serving explanation at the hearing that the words could also have an innocuous meaning and concluded:

> [W]e find that Grosso's use of the term 'pussy' does not weigh against continued protection . . . the term is also commonly employed to refer to a weak or ineffectual person—someone who is not a 'man.' That clearly was the sense in which Grosso used the term in his attempt to discourage all warehouse employees—not any particular employee or only female employees—to 'man up' and support the Union in the decertification election.

(JA 867).

Similarly, the female warehouse employees complained to management that the "Warehouse Workers – R.I.P." comment was intimidating and threatening, causing them to fear for their safety. (JA 171-72, 209, 227, 315-16). Again, an independent human resources investigation concluded that this comment was indeed threatening to the warehouse workers and unacceptable under the Company's Harassment Policy. (JA 28-29). Yet, the Board similarly reverted to Grosso's self-serving explanation at the hearing that the term "R.I.P." was not intended to threaten anyone but had the innocuous meaning of something one might read on a tombstone. (JA 90). The Board disregarded the perceptions of the female employees who complained about the "R.I.P." comment and the employer's perception of the comment made while attempting to prevent a hostile or abusive work environment when it concluded that:

> [W]e agree with the judge that it could, in isolation, be construed as threatening. But context matters. Board precedent makes clear that, in the circumstances presented here, there is *no reason* to interpret Grosso's 'RIP' comment as threatening death or serious physical harm to employees for failing to support the Union.

(JA 867) (emphasis added).

Under well-established Title VII and Board precedent, the Board should have given the perception of the victim (the complaining female warehouse workers) and the perception of the employer (Distribution Center management and

the independent Human Resources Manager) significant weight in determining whether Grosso's comments could be reasonably viewed as vulgar, offensive and threatening and, thereby, contribute to a hostile or abusive work environment. Instead, the Board relied on the purported intent of the speaker, Grosso, as expressed after-the-fact at the hearing, to conclude that the comments had an innocuous meaning and, therefore, did not lose protection under the Act, even though Grosso himself admitted that motive or intent does not really matter since a recipient could view the comments as offensive. (JA 109).

The Board's reliance on the purported intent of the speaker is inconsistent with an employer's obligations under Title VII and state anti-discrimination laws to consider workplace comments from the perspective of the victim and from the perspective of a reasonable person to protect against the creation of a hostile or abusive work environment. The Board's reliance on the speaker's apparent intent also contradicts its own precedent. Consequently, once again the Board has demonstrated "remarkable indifference" to an employer's obligations under federal and state employment laws and the equal employment opportunity and harassment policies adopted to comply with such laws – all of which are designed to maintain a "civil and decent workplace." *See Adtranz,* 253 F.3d at 27; *Medco*, 2012 U.S. App. LEXIS 25548, *3-4, 14, 19 (D.C. Cir. Dec. 14, 2012). For these reasons, the

Board's decision is not reasonably defensible, is inconsistent with its own precedent, and should therefore be vacated.

3. The Board's Conclusion that Grosso's Vulgar, Offensive and Threatening Comments Were Concerted Protected Conduct Is Not Supported by the Substantial Evidence of Record.

In addition to ignoring the holdings in *Adtranz*, *Medco*, and *Honda*, the Board's conclusion that Grosso's vulgar, offensive and threatening comments constituted protected concerted activity is inconsistent with prior Board precedent and unsupported by substantial evidence.

Section 7 of the Act protects an employee's right to "engage in . . . concerted activities for the purpose of mutual aid or protection." 29 U.S.C. § 157. In order to fall within the protection of the NLRA, an employee's conduct must be both concerted and protected. *Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984) ("*Meyers I*"), *reaff'd*, *Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986) ("*Meyers II*"), *enf.*, 835 F.2d 1481 (D.C. Cir. 1987). Grosso testified that his purported motive in writing the comments on the newsletters was to get the attention of the warehouse workers, prompt them to read the newsletters, and prompt them not to back down in the upcoming decertification election. (JA 72-73). This testimony was merely an after-the-fact attempt to position himself to argue the concerted nature of his conduct, since Grosso provided no such explanation when given the opportunity to do so during the investigation. Indeed, during the investigation and in the presence

of his Union Business Representative and Union Shop Steward, Grosso explained his motivation by stating only that "in the spirit of full disclosure, I was looking out for the little people." (JA 319, 348, 534-35). "[L]ooking out for the little people" constitutes neither initiating nor inducing group action and, therefore, does not evidence concerted activity.

Further, the words Grosso anonymously and sinisterly used were offensive and threatening on their face. As the ALJ found, Grosso's statements suggest that he ". . . was displeased with the warehouse employees for having initiated a decertification election and the possible removal of the Union as the bargaining representative." (JA 690). Grosso's use of the words "pussies," "catfood lovers" and "R.I.P." amounted to mere words of offense or threats, devoid of substantive value or content, which were intended to and had the effect of intimidating his coworkers. *See, e.g., Media Gen. Operations*, 394 F.3d 207, 211 (4th Cir. 2005) (concluding that employee's comments and behavior were unprotected because they were "devoid of substantive content and of meaningful value").

Grosso's conduct in writing the offensive, threatening comments on the newsletters was neither concerted, nor was it for mutual aid or protection, and therefore is not entitled to protection under Section 7 of the Act. Moreover, even if conduct falls within the ambit of Section 7, an employee may engage in conduct which is so opprobrious as to lose its protection under the Act. *Hawaiian Hauling*

Serv., Ltd., 219 N.L.R.B. 765, 766 (1975). To decide whether an employee's conduct is so offensive 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).

The Board reasoned that, under the *Atlantic Steel* test, Grosso was engaged in "protected union activity" when he wrote the comments on the newsletters because (i) an employee break room is an appropriate place for the distribution of union-related literature even if such literature contains vulgar, offensive and threatening comments directed at co-workers; (ii) Grosso was purportedly expressing concern over other employees' faltering support for the union through his comments on the newsletters; and (iii) Grosso's comments were impulsive, not uncommon at the workplace, and not intended to be offensive or threatening. (JA 866-69). The Board reached this same conclusion when analyzing Grosso's conduct under the "totality of the circumstances" test. (JA 868-69). Although the ALJ weighed the four *Atlantic Steel* factors to conclude that Grosso's conduct was so egregious as to lose protection of the Act, the Board improperly overturned the ALJ's analysis of these factors and concluded that Fresenius' suspension and

discharge of Grosso violated Sections 8(a)(3) and (1) of the NLRA.[4] A review of each of the four *Atlantic Steel* factors follows.

a. Place of the Discussion

Concerning the first *Atlantic Steel* factor, the place of the discussion, the Board indicated that an employee break room is generally an appropriate place to distribute union-related literature since it is an area unlikely to disrupt production. (JA 866). Consequently, the Board concluded that the location of Grosso's comments generally favored protection of those comments under the Act. *Id.*

To be clear, the employee break room at the Distribution Center was **not** some remote non-work area which employees accessed only during non-work time. To the contrary, the layout of the Distribution Center required the hourly employees to walk through the employee break room every day in order to clock in and clock out because the time clock was located near the doors to the break room. (JA 206-07). Moreover, warehouse employees regularly traveled through the break room to obtain their handheld devices and to receive work instructions from

[4] These provisions make it an unfair labor practice for an employer to "discourage membership in any labor organization" or "interfere with, restrain, or coerce employees in the exercise of" their guaranteed rights "to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *See* 29 U.S.C. §§ 158(a)(1), (a)(3).

the warehouse supervisor.[5] (JA 206-07). Further, employee group meetings were regularly held in the break room due to its size. (JA 271). Perhaps most importantly, drivers used the break room to complete their route paperwork at the end of each day – a compensable work activity that they were required to perform on a daily basis. (JA 314). 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 substantial evidence of record supports the conclusion that the vulgar, offensive and threatening comments that Grosso wrote on the newsletters and left on the tables in the break room were highly visible to employees upon passing through the room to and from the warehouse or when using the break room for work activities and, therefore, would have maximum impact on the workforce. (JA 85-86).

Moreover, Grosso's comments on the newsletters interfered with Fresenius' ability to maintain a safe and harassment-free workplace by injecting vulgar, offensive, and threatening comments into the workplace such that four female

[5] One of the female employees who complained about the comments testified that she first saw the comments on the newsletters when she walked through the break room to get her handheld device for work that day after punching in at the time clock right outside the break room. (JA 206-07).

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, spent time speaking with each female employee who was upset about the comments and then calling a meeting in the middle of the workday with all employees present at the Distribution Center to address the adverse impact of the comments on the employees. (JA 228, 272, 315-16). Grosso's conduct was so disruptive that after the women had complained twice to Healy on September 10, the women complained **yet again** on September 21 to Healy's superiors in another employee group meeting because they perceived that the Company was not acting quickly enough in addressing their complaints.

In its decision, the Board indicated that even though Grosso's comments were read or heard by other employees, at best the location factor was neutral in its analysis of whether the comments were protected. (JA 866). However, the substantial evidence of record, which the Board overlooked, supports the conclusion that the location of the comments weighed against protection under the Act – as the ALJ properly determined. (JA 687-88).

Moreover, the Board's failure to recognize this substantial evidence of record is inconsistent with the Board's own precedent. *See Verizon Wireless*, 349

N.L.R.B. 640, 642 (2007) (finding that the first factor of the *Atlantic Steel* analysis weighed in favor of losing protection where the conduct occurred in an area where both supervisory and nonsupervisory personnel were likely to hear the employee's profane comments); *Aluminum Co. of Am.*, 338 N.L.R.B. 20, 22 (2002) (holding that an outburst in an employee break room lost protection where the employee's "sustained profanity could be overheard by coworkers and would reasonably tend to affect workplace discipline . . . ."). Thus, the substantial evidence does not support the Board's conclusion that this factor was at best neutral and the Board erred in failing to apply established law to the facts of this case.

b. Subject Matter of the Discussion

As to the second *Atlantic Steel* factor, the subject matter of the discussion, the Board indicated that Grosso was purportedly expressing concern over the warehouse workers' faltering support for the Union through his comments and this weighed strongly in favor of protection under the Act. (JA 866). However, the subject matter of the discussion here involved vulgar, offensive and threatening words. Grosso chose to write "Dear Pussies," "Hey Catfood Lovers," and "R.I.P." on the newsletters. The first two comments, by Grosso's own admission, are derogatory towards women and relate to female genitalia. (JA 96, 109). The third comment, referring to death, was perceived as a serious threat of harm by four female employees. (JA 90, 172, 209, 227). On their face, Grosso's statements did

not (as found by the Board) encourage "warehouse employees to support the Union in the decertification election." (JA 868). To the contrary, Grosso's statements on their face ridiculed, insulted, and threatened those warehouse employees whom Grosso thought were opposed to continued union representation.

At the hearing, Grosso testified that he wrote the comments on the newsletters hoping for the warehouse workers to read a specific article in the newsletter. (JA 73). Importantly, Grosso never testified that he read any of the contents of the newsletter, let alone any specific article buried within the body of the newsletter before writing the comments. To the contrary, Grosso testified that he initially saw the newsletters and then immediately sat down and wrote on the face of the newsletters after spending only "half a second" thinking about what words to write – testimony which is **flatly inconsistent** with his story about wanting the employees to read a specific article. (JA 72).

Grosso also testified at length about what he purportedly **meant** when he wrote the offensive and threatening comments on the newsletters in the employee break room, but Grosso's self-serving and post-hoc "motives" in writing "pussies," "catfood lovers," and "R.I.P." are irrelevant to analyzing whether an employee's conduct loses the protection of the Act under *Atlantic Steel*. In a rare moment of truth, Grosso admitted that his innocuous interpretations of the offensive words he wrote on the newsletters were simply his "**spin on it after the fact**". (JA 116)

(emphasis added). Moreover, Grosso admitted that co-workers could read his comments as offensive, that the comments could be demeaning to women, and that people could read his comments and understand them to refer to women in a derogatory manner. (JA 89-90, 116). The Board ignored all of this evidence when analyzing this factor.

The Board's conclusion that Grosso's comments were protected under the Act is also inconsistent with prior precedent. In particular, Grosso's use of the words "pussies," "catfood lovers" and "R.I.P." amounted to nothing more than words of offense or threats which were devoid of substantive value or content. *See Trus Joist MacMillan*, 341 N.L.R.B. 369, 370-72 (2004). Accordingly, the Board's conclusion that this factor weighed in favor of protection under the Act is not supported by the substantial evidence of record and the Board erred in failing to apply established law to the facts of this case.

c. Nature of the Outburst

As to the third *Atlantic Steel* factor, the nature of the outburst, the Board indicated that Grosso's comments were impulsive, not uncommon at the workplace, and not intended to be offensive or threatening. (JA 866-67). Once again, the Board's analysis of this factor is not supported by the substantial evidence of record and is inconsistent with prior Board precedent.

As more fully described above, the substantial evidence demonstrates that the words "pussies" and "catfood lovers" are vulgar and offensive because they are commonly understood to refer to female genitalia and were actually viewed as offensive by the complaining female employees and the Human Resources Manager who independently investigated the complaints. Moreover, the use of "R.I.P." is commonly understood to refer to death and in this case was actually considered a threat by no fewer than four female warehouse employees, the Distribution Center Manager, and the Human Resources Manager. Consequently, the very nature of Grosso's misconduct supports a finding that his comments on the newsletters were so opprobrious as to lose the protection of the Act.

In its decision, the Board erroneously compared the instant case to other cases involving sudden oral outbursts in order to find the conduct protected. (JA 866). Significantly, Grosso's conduct was not a single, spontaneous outburst which might be excused as part of the "res gestae" of protected activity. (JA 867). 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 did not occur here. *See Datwyler Rubber and Plastics, Inc.*, 350 N.L.R.B. 669, 670 (2007) (finding spontaneous, verbal outburst without profanity and unaccompanied by physical threat did not lose protection under the Act).

The substantial evidence of record demonstrates that the nature of Grosso's conduct was just the opposite – it comprised three separate, written instances of vulgar, offensive and threatening language, was not "brief" or ephemeral because the statements were written and therefore enduring, and were accompanied by a threat of physical harm – "R.I.P." meaning death. As opposed to Grosso blurting out a comment in the midst of the "res gestae" of protected activity, Grosso deliberately sat at the first table in the employee break room and wrote "Dear Pussies – Please Read." (JA 86). Grosso then got up and moved to the second table and wrote "Hey Catfood Lovers How's Your Income Doing?" (JA 86). Grosso then deliberately moved to the third table to write "Warehouse Workers R.I.P." (JA 86). Therefore, unlike "spontaneous" employee conduct, Grosso's conduct was calculated and deliberate.

In concluding that the nature of Grosso's comments merited protection under the Act, the Board stated that the Distribution Center was "not unused to profane speech" and that Fresenius did not consider profane language like that used by Grosso to be particularly egregious. (JA 867). Substantial evidence of record fails to support the Board's conclusion that the nature of Grosso's conduct weighs in favor of protection due to the use of profanity at the Distribution Center because (1) the weight of credible testimony at the hearing demonstrated that cursing was neither widespread nor tolerated by supervisors; and (2) the vulgar,

offensive and threatening words Grosso chose to **write** on the newsletters **directed at** a group of warehouse employees are a far cry from the "run of the mill" curse words that some employees acknowledged have been **said outside** the presence of supervisors.

At the hearing, no fewer than eleven witnesses, both supervisory and non-supervisory employees, testified that profanity and vulgarity were not commonplace at the Distribution Center. None of the these eleven witnesses was found not to be credible by either the ALJ or the Board and three of them were specifically noted to be credible. (JA 692, 696). In contrast, the General Counsel presented testimony about alleged profanity at the Distribution Center through three witnesses, one of whom (Rathbun) was expressly found **not** credible and no credibility determinations were made regarding the other two witnesses (one of whom was Grosso) even though they were contradicted by eleven other witnesses on this issue. Finally, at least six supervisors testified that cursing did not occur in their presence and that words such as "pussies" and "R.I.P." were never used to their knowledge at the Company. (JA 140-41, 260, 297-99, 321, 324-25, 354-55).

As to the specific incident involving the "Don't Be a Dick" sticker on the pallet jack, the record evidence establishes that as soon as management observed the sticker, it handled the situation in the same manner as it did Grosso's conduct – the supervisor immediately took the necessary steps to stop the conduct and

prevent a hostile or abusive work environment. (JA 142). Further, Grosso's conduct was substantially more severe than the sticker incident because multiple employees saw the vulgar, offensive and threatening comments on the newsletters and then complained in both private and public fora, whereas no employees who observed the sticker complained about it to management.

In this case, the substantial evidence of record demonstrates that the nature of Grosso's conduct was so offensive as to far exceed that which was purportedly common at the Distribution Center. Even if the substantial evidence of record demonstrated employees commonly used inappropriate language in the workplace (which was not the case here), the nature of Grosso's conduct was inherently different because (1) he directed it precisely at the female warehouse employees and/or all warehouse employees; (2) he used words that were not commonly used in the workplace and were vulgar in their references to female genitalia; (3) the comments contained a threat of physical harm; (4) Grosso's words were written, as opposed to spoken, and he published them in the employee break room for maximum impact on the workforce; and (5) employees specifically complained, triggering the need for an investigation under the Company's EEO and Harassment Policies.

Moreover, the Board contravened its precedent when it concluded that the nature of Grosso's conduct weighed in favor of protection under the Act relying, in

part, on instances of other types of profanity at the workplace. The Board has previously held that simply because some profanity is common in the workplace, that does not alone excuse or protect an employee's vulgar and threatening outburst under the third prong of the *Atlantic Steel* test. Where the Board has distinguished between profanity which was found to be common in the workplace and that 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. *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 since 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. 20, 22 (2002) (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 protection).

In fact, this Court has recognized that obscene and personally denigrating comments by an employee, even when intertwined with protected activity, may weigh against protection under the Act. *See Felix Indus., Inc. v. NLRB*, 251 F.3d 1051, 1054-55 (D.C. Cir. 2001) (holding that the nature of an employee's outburst consisting of obscene language weighed against protection under the Act under the

Atlantic Steel analysis). Therefore, even if some employees may have used profanity at the Distribution Center, the precedent of this Court and the Board renders such profanity insufficient to cloak Grosso's conduct in the protection of the Act.

d. Whether the Outburst Was Provoked

Finally, the fourth *Atlantic Steel* factor examines whether the outburst was provoked. The Board acknowledged that no evidence demonstrated that Grosso's conduct was in response to any unfair labor practice by Fresenius. (JA 868). Nevertheless, contrary to the ALJ, the Board concluded that this factor was neutral, neither weighing in favor of nor against protection under the Act. (JA 868). The Board relied upon a line of cases holding that when the offensive remarks are directed at co-workers (as opposed to supervisors), this factor is treated as neutral. (JA 868). The Board, however, provides no compelling rationale for such a distinction.

As noted above, an employer is subject to civil liability if it fails to take prompt corrective action to address complaints of harassment in the workplace under Title VII and state anti-discrimination laws. Therefore, employers must address vulgar, obscene and threatening comments directed at co-workers. *See Curry v. D.C.*, 195 F.3d 654, 660 (D.C. Cir. 1999). To protect harassment directed

at co-workers any less under the law than that directed at supervisors is an arbitrary conclusion deserving no deference by this Court.

For all of the reasons above, the Board's analysis under either the *Atlantic Steel* factors or the "totality of the circumstances" test is unsupported by the substantial evidence of record, inconsistent with prior Board precedent, and is arbitrary. Therefore, the Board's reversal of the ALJ's analysis of the *Atlantic Steel* factors, and the Board's conclusion that Grosso's vulgar, obscene and threatening comments deserve protection under the Act is not reasonably defensible and should be vacated.

B. The Board Erred in Failing to Recognize that Grosso's Dishonesty During the Course of the Investigation Was A Permissible Basis for the Termination of His Employment.

As previously indicated, the substantial evidence of record and applicable law supports the conclusion that Grosso's vulgar, offensive and threatening comments on the newsletters were unprotected under the Act. However, Grosso was also terminated for a separate and independent reason; namely, his multiple instances of dishonesty during the course of the investigation into his misconduct. The Board erred as a matter of law in failing to apply its *Wright Line* analysis and, in so doing, erroneously concluding that Grosso's dishonesty was not a permissible basis to suspend and then terminate his employment.

1. The Board Erred in Concluding that Grosso's Dishonesty in an Interview Conducted During the Course of an Investigation Into His Misconduct Did Not Constitute a Legally Sufficient Basis for Termination.

The Board concluded that Fresenius' investigation to determine the author of the vulgar, offensive, and threatening remarks was lawful, but then incongruously concluded that Grosso was privileged to lie to Fresenius' managers during that lawful investigation. The Board concluded that Fresenius could not lawfully discipline Grosso for dishonesty since an employee may lie when asked about protected conduct unless the inquiry is related to the employee's job performance or the employer's ability to operate its business. (JA 864-65 n.6). The Board relied on its decision in *Tradewaste Incineration*, 336 N.L.R.B. 902, 907 (2001) to reach this conclusion. The Board, however, erred as a matter of law in relying on *Tradewaste* for its conclusion that Grosso could lie during the EEO and Harassment investigation into his misconduct.

In *Tradewaste*, the Board held that the employer unlawfully interrogated the employee about his protected concerted activity because there was no apparent legitimate business reason for conducting the interview. *Id.* at 902, 909. In contrast, in the present case the Board expressly held that Fresenius had a legitimate business reason to investigate the vulgar, offensive and threatening comments on the newsletters and, furthermore, lawfully interviewed Grosso as part of that investigation. (JA 864). The Board stated:

> We find, based on the handwritten newsletter comments themselves and the multiple complaints it received, that Fresenius had a legitimate interest in investigating those comments. Fresenius' decision to investigate those comments, moreover, was fully consistent with its antiharassment policy . . . . We also agree with the judge that Fresenius' questioning of Grosso during the investigation did not violate the Act.

(JA 864). Therefore, *Tradewaste* provides no support for the Board's conclusion that Grosso was permitted to lie during a lawful investigation and lawful interview into his misconduct.

As previously indicated, Title VII and state anti-discrimination laws mandate that employers investigate EEO or harassment complaints and take appropriate corrective action. The central focus of the investigation is to determine what conduct occurred and whether such conduct violated the employer's EEO and harassment policies. Certainly, to allow an employee to lie during an EEO investigation so as to prevent the employer from learning the truth about the conduct and then taking appropriate corrective action to prevent a hostile or abusive work environment is entirely inconsistent with the expectations and obligations that Title VII imposes on employers.

For this reason, courts have recognized that dishonesty during the course of a company investigation is an appropriate basis for discipline up to and including termination. In *Williams v. Boorstin*, this Court noted that employees who lie to their employers cannot reasonably expect to retain their job after establishing a

record of dishonesty. 663 F.2d 109, 117 (D.C. Cir. 1980). *See also EEOC v. Total Sys. Servs., Inc.,* 221 F.3d 1171, 1176-77 (11th Cir. 2000) (holding that an employee could properly be discharged based on her employer's good faith belief that she lied in an internal harassment investigation). Thus, the Board's conclusion that Grosso was privileged to lie during his interview and during the investigation into the EEO and harassment complaints is not reasonably defensible and is an error of law.

Further, the Board here even recognized that an employee may not lie during an interview when the questions relate to the employee's job performance or the employer's ability to operate its business. The Board, however, entirely failed to analyze this standard, let alone note the substantial evidence demonstrating that Grosso's dishonesty directly related to his job performance and Fresenius' ability to operate its business.

The Fresenius Employee Handbook specifically identifies honesty and integrity as core values expected of all employees. (JA 407). Additionally, the Fresenius Corrective Action Policy specifically indicates that corrective action will be taken against all employees who fail to meet the standards of conduct established by the Company. (JA 447). Moreover, Fresenius has terminated employees before for dishonesty in a company investigation. (JA 38). Therefore, the questions posed to Grosso during the interview about whether he authored the

comments directly related to the employer's performance expectations for Grosso. To suggest that Grosso's dishonesty in his interview – which was part of a company EEO and Harassment investigation – is somehow unrelated to his job performance is simply unsupported by the substantial evidence of record. Moreover, it was reversible error for the Board to have neglected to undertake this analysis in its decision.

Next, Fresenius' ability to operate its business would be severely impaired if the workplace were permeated by hostility to women, and if employees were privileged to ridicule, insult, and threaten co-workers. Grosso's vulgar, offensive and threatening comments prompted four female employees to complain in private meetings with their supervisor and in two Distribution Center-wide employee meetings. (JA 44-45, 316, 343). One such employee reported that all female employees in the Distribution Center were upset about the comments on the newsletters. (JA 315). The Distribution Center manager was required to undertake security precautions in order to protect the female employees who were afraid due to the threatening comments. (JA 316-18). Finally, Fresenius launched a corporate investigation, as required under the company's EEO and Harassment policies. The substantial evidence of record demonstrates that the interview questions posed to Grosso solely to determine whether he wrote the offensive and threatening comments on the newsletters were directly related to Fresenius' ability

to operate its business and to prevent a hostile or abusive work environment. Therefore, it was impermissible for Grosso to lie in response to these questions. Once again, it was reversible error for the Board to have failed to undertake this analysis in its decision.

Thus, the Board's conclusion that Grosso was privileged to lie in response to questions posed in a lawful interview conducted in connection with a lawful investigation as required under its EEO and Harassment Polices and applicable federal and state anti-discrimination laws is unsupported by the substantial evidence of record, is an error of law, and is not reasonably defensible.

2. The Board Failed to Analyze Whether Grosso's Dishonesty in Denying His Identity Was Another Legally Sufficient Basis to Terminate his Employment.

The Human Resources Manager who made the decision to terminate Grosso testified that Grosso was dishonest on two separate instances, each of which served as an independent basis for his termination. The first instance, discussed more fully above, concerned when Grosso falsely denied authoring the comments in the interview conducted in connection with the EEO investigation. (JA 26.) In the second instance, Grosso denied his identity after realizing he inadvertently confessed to writing the comments on the newsletters. (JA 26). The Board failed to analyze or reach any conclusions about whether this second instance of

dishonesty, separate and apart from the dishonesty in the interview, was itself a lawful basis for discharge. The Board's failure to do so was reversible error.

3. The Board Erred in Failing to Apply the *Wright Line* Analysis to the Suspension and Termination Decision.

The Board erred in failing to analyze Grosso's suspension and termination under the test in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enf.*, 662 F.2d 899 (1st Cir. 1981). For the reasons noted above, Fresenius terminated Grosso for engaging in unprotected conduct including, but not limited to, dishonesty during the course of a lawful EEO investigation. The Board applies the *Wright Line* analysis when there are protected and unprotected reasons for employee discipline. Under *Wright Line*, the Board must initially prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action – in other words, that the employee engaged in protected activity, the employer knew of the activity, and the employer had union animus. *Id.* at 1089. Once this *prima facie* showing is made, the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action in the absence of the employee's protected activity. *Id.*

There exists no evidence of record to indicate any anti-union animus on the part of the **only** decision maker in this case, Jason Tyler, the Human Resources Manager. Further, Tyler was located in the company's Waltham, Massachusetts headquarters – not in the Chester Distribution Center – and he had neither

knowledge of nor contact with Grosso before the investigation into Grosso's misconduct. (JA 18). Without evidence of animus on the part of the decision maker, there is no *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).

Fresenius further rebutted any inference of anti-union animus by establishing evidence of a full and fair investigation conducted in response to the EEO complaints. 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.,* 2008 NLRB LEXIS 232, *48 (N.L.R.B. Div. of Judges July 29, 2008) (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, 999 (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).

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 repeatedly lied during the investigation. The Company, and Tyler specifically, previously terminated employees on a first offense for misconduct similar to Grosso's conduct. (JA 38-39). Tyler's similar treatment of similarly situated employees further reinforces the fact that no anti-union animus existed and that the Company acted pursuant to legitimate, nondiscriminatory motives when terminating Grosso. The Board's failure to apply the *Wright Line* analysis in this case was reversible error.

C. The Board's Order of Reinstatement and Back Pay Is Barred by Section 10(c) of the NLRA, Which Prohibits the Board from Issuing an Order Requiring Reinstatement and Back Pay to an Individual Suspended or Discharged for Cause.

The Board is prohibited from mandating the reinstatement of any employee "suspended or discharged for cause." 29 U.S.C. § 160(c). The Board has explained that the term "for cause" refers to discipline imposed for a reason not otherwise prohibited under the Act. *See Anheuser-Busch, Inc.,* 351 N.L.R.B. 644, 647 (2007). The NLRA's legislative history corroborates this interpretation:

> Furthermore, in section 10(c) of the amended act . . . it is specifically provided that no order of the Board shall . . . require reinstatement or back pay for any individual who was suspended or discharged for cause. *Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules* . . . or for other cause . . . *will not be entitled to reinstatement.*

See H.R. Rep. No. 510, 80th Cong., 1st Sess. 38-39, 55 (1947) (conf. rep.) (emphasis added). The Supreme Court has also confirmed this interpretation of the NLRA. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964) ("The legislative history of that provision indicates that it was designed to preclude the Board from reinstating an individual who has been discharged for cause . . ."); *NLRB v. Jones & Laughlin*, 301 U.S. 1, 45-46 (1937) (stating the NLRA "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them" and "the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than . . . intimidation and coercion.").

As previously discussed, Grosso's authorship of vulgar, offensive and threatening comments was "cause" to terminate him. Moreover, Grosso's dishonesty regarding the authorship of the newsletter comments and regarding his identity constitute grounds to terminate for "cause" separate from his misconduct in authoring the comments, even if the latter conduct was "protected activity" under the NLRA. *See NLRB v. Local Union No. 1229*, 346 U.S. 464, 475 (1953) ("The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough."); *see also Anheuser-Busch, Inc.*, 351 N.L.R.B. at 647 (providing that "cause" under 10(c) refers to discipline for non-prohibited reason). Consequently, this Court should reverse the Board's order of

reinstatement and backpay for Grosso as impermissible under Section 10(c) of the Act.

III. The NLRB Committed Reversible Error in Concluding that Fresenius' Request that Grosso Refrain from Discussing the EEO Investigation Violated Section 8(a)(1) of the NLRA.

The Board has previously recognized that where an employer has substantial and legitimate business reasons for requesting confidentiality of an investigation, such as to protect witnesses, a confidentiality request is lawful. *See Hyundai Am. Shipping Agency, Inc.*, 357 N.L.R.B. No. 80, 2011 NLRB LEXIS 498 (Aug. 26, 2011) (providing that an employer has a substantial and legitimate business interest in requesting confidentiality in an investigation if the employer determines that witnesses need protection); *Belle of Sioux City*, 333 N.L.R.B. 98, 98, 113-14 (2001). The Board has further recognized that requesting confidentiality in a harassment investigation is lawful. *IBM Corp.*, 341 N.L.R.B. 1288, 1293 (2004). Similarly, in *Caesar's Palace*, the employer imposed a confidentiality rule during an investigation of alleged illegal drug activity in the workplace "to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated." 336 N.L.R.B. 271, 272 (2001). The Board in *Caesar's Palace* found that the employer "has established a substantial and legitimate business justification for its rule and that, in the circumstances of this case, this justification outweighs the rule's infringement on employee's rights." *Id.*

In the present case, the Board engaged in no further analysis and merely affirmed the ALJ's conclusion that Fresenius violated Section 8(a)(1) of the Act when it encouraged Grosso not to discuss the EEO investigation during its pendency. (JA 862 n.1). The Board's conclusion, however, is unsupported by substantial evidence of record and is contrary to its precedent on this issue.

In this case, the Company's substantial and legitimate interest in maintaining the confidentiality of the Grosso investigation outweighed Grosso's rights to discuss the investigation. The Board concluded that the circumstances in *Caesar's Palace* were different from the circumstances of the instant case. (JA 700). However, both *Caesar's Palace* and this case involve an employer protecting the safety of its employees. Further, just as in *Caesar's Palace,* Fresenius had a legitimate and substantial business interest in protecting the safety of the female employees who complained about the comments on the newsletter so as to ensure that they would not suffer any retaliation.[6]

The manager testified that he encouraged Grosso not to talk to other employees about the investigation because:

> three women complained that they felt threatened and that they didn't feel safe, and I didn't want Mr. Grosso trying to talk to them and make them feel more threatened. My experience is that when there are issues like this and somebody is saying that somebody else made a

[6] An employer will be held liable for retaliation if an employee is harassed by coworkers for complaining about discrimination. *See Richardson v. NY State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999).

> threat, that to allow or not encourage the person not to talk to other employees it can make the threat worse. Because now they're approaching people and trying to conduct their own investigation. I also wanted to preserve the sanctity of the investigation.

(JA 348). The female employees who complained to management indicated that they felt afraid due to the threat contained in Grosso's comments. (JA 172, 209, 227). In fact, one such employee was so concerned about confidentiality that she felt uncomfortable submitting a written statement of her complaint when management informed her that confidentiality could not be guaranteed. (JA 49). The women were justifiably afraid of Grosso due to the comments he wrote on the newsletters, and Fresenius thereby sought to protect them from harm. Therefore, the strong employer interests supporting the confidentiality request in the present situation are analogous to the strong employer interests in *Caesar's Palace*.

The Board indicated that the circumstances of this case are more comparable to those in *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 N.L.R.B. 176 (1997), *enf.*, 200 F.3d 230 (5th Cir. 1999). (JA 700). However, the *Mobil Oil Exploration* case is distinguishable for several reasons, each of which the Board overlooked. First, the employer there had no interest in protecting the safety of its employees, as did Fresenius here. In *Mobil Oil Exploration*, the employer's sole interest in confidentiality was "to avoid alerting others about the investigation" which was determined to be a very minimal business interest. *Id.* at 178. In contrast, Fresenius had a compelling interest in ensuring the safety of its female

employees who had complained about the comments and indicated they were afraid for their safety due to the "R.I.P." or "death" threat.

Further, unlike in *Mobil Oil Exploration*, where the Board found that the employee's conduct which was held to violate the employer's confidentiality directive was itself protected concerted activity because the employee was discussing his views on union leadership while also discussing the investigation – here, there was no finding that Grosso was engaged in protected concerted activity while violating the employer's confidentiality request. *Id.* at 177-79. Whereas the employer in *Mobil Oil Exploration* twice directed the employee to keep the investigation confidential, Fresenius management never formally **directed** Grosso to keep the investigation confidential. Instead, management merely encouraged Grosso not to discuss the investigation with other employees, as the Company would "prefer that [he] not talk about it." (JA 78). Finally, in *Mobil Oil Exploration*, the employer not only disciplined but **terminated** the employee for discussing the investigation which the employer had directed the employee, on multiple occasions, to keep confidential. *Id.* at 176-77. Here, Fresenius never accused Grosso of violating the confidentiality request and never even disciplined, let alone terminated, Grosso for discussing the investigation with other employees. Thus, reliance on the *Mobil Oil Exploration* case is misplaced.

The Board's decision also indicates that it misunderstood the nature of the suspension imposed on Grosso on September 22, 2009 to be **disciplinary** and that such misunderstanding was a material consideration in finding that the Company violated the Act by requesting that Grosso keep the investigation confidential during its pendency. Specifically, the Board indicated that the request for confidentiality was given while Grosso was suspended and this rendered the request equivalent to a "directive with a threat of **discipline**" even though no threat of discipline was ever issued. (JA 885) (emphasis added). Similarly, the Board's recommended remedy requires the Company to post a notice stating that the Company will cease and desist from "[t]elling its employees that they cannot talk with other employees their [sic] **discipline**." (JA 705) (emphasis added). However, the substantial evidence of record demonstrates that the suspension imposed on Grosso was **investigatory**, not disciplinary, consistent with the Company's Corrective Action Policy. (JA 53, 447-49). Therefore, since management requested that Grosso keep the investigation confidential without threatening or imposing any discipline whatsoever, the request was neither a "directive with the threat of discipline" nor a prohibition on discussing discipline.

In addition to the Company's substantial business interests in keeping the investigation confidential, the purported infringement of Grosso's Section 7 rights was slight – he was merely **encouraged**, not mandated, to keep the investigation

confidential **from other employees** during its pendency, which lasted for only **three days**. (JA 296). Fresenius adopted no confidentiality rule or directive. Therefore, the substantial evidence of record and the application of prior precedent demonstrates that the Company did not violate Section 8(a)(1) of the Act by encouraging Grosso not to discuss the investigation with other employees during its pendency.

IV. The NLRB's Order Is Invalid Because, in the Absence of a Lawful Quorum, the Board Lacked Statutory Authority to Adjudicate the Charges Against Fresenius.

In the alternative, this Court should vacate the Board's Order as void because it was issued without a lawful quorum of three Board members. *See* 29 U.S.C. § 153(a); *see also New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010).

The Board last had a lawful quorum on January 2, 2012. *See* NLRB Office of Public Affairs, *White House Announces Recess Appointments of Three to Fill Board Vacancies* (Jan. 4, 2012), http://www.nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies (last visited Jan. 25, 2013) ("**Recess Appointment Press Release**").

On December 15, 2011, President Obama nominated Members Block and Griffin for two Board vacancies, but the Senate has not yet confirmed these nominees. *See* U.S. Const. art. II, § 2, cl. 2; NLRB Office of Public Affairs,

President Obama Nominates Two to NLRB (Dec. 15, 2011), http://www.nlrb.gov/news/president-obama-nominates-two-national-labor-relations-board (last visited Jan. 25, 2013).

Although the Senate was in session, on January 4, 2012, President Obama attempted to "recess" appoint Block and Griffin. *See* Recess Appointment Press Release. The "Recess Appointments Clause," U.S. Const. art. II, § 2, cl. 3, which has historically been defined by the "Adjournment Clause," provided no authority for these appointments. *See* U.S. Const. art. II, § 2, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other adjourn for **more than three days** . . .") (emphasis added). Because the Senate did not adjourn in January 2012 for "more than three days," it never went into "recess," and thus the recess appointments were invalid. *See* 158 Cong. Rec. S1 (Jan. 3, 2012) (indicating that the first session of 112th Congress concluded on December 30, 2011, and the second session began January 3, 2012); 158 Cong. Rec. S11 (Jan. 20, 2012) (indicating that Congress continued holding pro forma sessions every three days until January 20, 2012).

CONCLUSION

For the foregoing reasons, this Court should grant Fresenius' Petition for Review on all issues and deny the Board's Cross-Petition for Enforcement.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because this brief contains **13,970** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that today I caused to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit the foregoing OPENING BRIEF FOR PETITIONER/CROSS-RESPONDENT FRESENIUS USA MANUFACTURING, INC. by using the appellate CM/ECF system. In addition, I filed eight copies of the same by sending it by Federal Express Overnight Delivery to:

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Clerk of the Court
United States Court of Appeals
for the District of Columbia Circuit
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I also caused to be served a copy of the same by CM/ECF and by Federal Express Overnight Delivery to the following counsel of record, listed below:

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January 25, 2013

STATUTORY ADDENDUM

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The "Adjournment Clause":

> Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

U.S. Const. art. I, § 5, cl. 4.

The "Appointments Clause":

> The President . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint, . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law . . .

U.S. Const. art. II, § 2, cl. 2.

The "Recess Appointments Clause":

> The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

U.S. Const. art. II, § 2, cl. 3.

Excerpt from the Administrative Procedure Act:

> The reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case . . . reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C.§ 706.

Section 7 of the NLRA:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

Section 8(a)(1) of the NLRA:

It shall be an unfair labor practice for an employer—

. . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

29 U.S.C. § 158(a)(1).

Section 8(a)(3) of the NLRA:

It shall be an unfair labor practice for an employer—

. . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a)(3).

Section 10(c) of the NLRA:

> . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .

29 U.S.C. § 160(c).

Title VII of the Civil Rights Act of 1964:

> It shall be an unlawful employment practice for an employer—
>
> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C.§ 2000e-2(a)(1).

EEOC Preamble:

> The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of title VII of the Civil Rights Act of 1964 . . .

29 C.F.R. § 1601.1.

EEOC "Purpose or Effect" Rule:

> . . . verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. 1604.11(a).

EEOC "Employer Liability" Rule:

> 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) knows 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).

EEOC Authority:

> These regulations are prepared pursuant to the Equal Employment Opportunity Commission's obligation and authority under sections 1-303 and 1-304 of Executive Order 12067 . . .

29 C.F.R. § 1690.104.

> These procedures will govern the conduct of such agencies in the development of uniform standards, guidelines and policies for defining discrimination, uniform procedures for investigations and compliance reviews . . . The goals of uniformity and consistency are to be achieved with the maximum participation and review on both an informal and formal basis by the relevant Federal agencies and, finally, by the public.

29 C.F.R. § 1690.105.

N.Y. Human Rights Act:

> It shall be an unlawful discriminatory practice:
>
> . . . For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

N.Y. Exec. Law § 296(1)(a).