United States Postal Service *and* Larry Thurman Pretlow II. Case 05–CA–180590

June 4, 2019

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On September 14, 2018, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions[3] only to the extent consistent with this Supplemental Decision and Order.[4]

This case is before the Board following remand to the Administrative Law Judge.[5] In his prior decision and again on remand, the judge dismissed the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging the Charging Party, employee Larry Pretlow. For the reasons stated below, we reverse.

Background

Pretlow was a city carrier assistant at the Respondent's Engleside location in Alexandria, Virginia when the Respondent discharged him by notice dated February 26, 2015. Pretlow filed a grievance challenging his discharge under the collective-bargaining agreement between the Respondent and the National Association of Letter Carriers. Pretlow prevailed in arbitration; the arbitrator ordered his reinstatement and directed that he complete the remainder of his 90-day probationary period.[6] On May 4, 2016, Pretlow's first day back at work, his manager, Shakeel Khan, told him that he would be given a performance evaluation. Although such evaluations were required under Postal Service regulations, the Respondent had no prior practice of conducting performance evaluations for probationary employees at this location.

On June 8, 2016, Pretlow's supervisor, Rebar Chergosky, told him that he was going to have his evaluation that day and led him to a private office where Khan and Union Steward Dwayne Martin joined them. At the meeting, Chergosky told Pretlow that his "work quantity" was "unacceptable." Pretlow loudly protested and began to argue with Khan, at which point Martin took Pretlow out of the room to allow him to calm down. When Pretlow and Martin returned, Chergosky resumed the evaluation presentation and told Pretlow that his "dependability" was also "unacceptable." Pretlow again protested loudly and, stating that he "could not take this," again left the room. The meeting ended. The Respondent discharged Pretlow the following day for "improper conduct" at his evaluation.

The General Counsel alleged that the Respondent violated Section 8(a)(3) and (1) by discriminatorily scheduling Pretlow's performance evaluation and by discharging him. On August 1, 2017, the judge issued his initial decision. He dismissed the complaint in its entirety but only made findings as to the discharge allegation. He found that the General Counsel met his initial burden to show that Pretlow's protected activity was a motivating factor for the Respondent's decision to discharge him, but he concluded that the Respondent had met its burden under *Wright Line*[7] to show that it would have fired Pretlow for his conduct at the evaluation meeting. The judge found no evidence that the Respondent's "adverse assessment of Pretlow's work quantity and dependability was discriminatorily motivated," and, further, found that Pretlow was "not privileged to refuse to cooperate in the evaluation and prevent its completion." He did not address the complaint allegation that the performance evaluation itself was unlawful.

On March 15, 2018, the Board remanded the case to the judge with instructions that he make a finding on the performance evaluation allegation and to "reconsider Pretlow's discharge in light of his findings and conclusions regarding the performance evaluation allegation." 366 NLRB No. 39, above, slip op. at 1.

In his decision on remand, the judge found that the Respondent violated Section 8(a)(3) and (1) by discrimina-

[1] Chairman John F. Ring is recused and took no part in the consideration of this case.

[2] The General Counsel's request that we strike portions of the Respondent's answering brief is moot given our disposition of the case.

[3] In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by giving Larry Pretlow a performance evaluation on June 8, 2016.

[4] We have amended the judge's conclusions of law and remedy and modified the judge's recommended Order consistent with our findings. We shall substitute a new notice to conform to the Order as modified.

[5] 366 NLRB No. 39 (2018).

[6] In relevant part, the arbitrator found that the Respondent intentionally delayed discharging Pretlow until he became a regular carrier to bar him from having access to the grievance procedure under the collective-bargaining agreement, and he found that the stated reason for his discharge did not occur.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

torily giving Pretlow the evaluation, but again recommended dismissal of the unlawful discharge allegation. Although he found that the Respondent had unlawfully scheduled the evaluation, he reiterated his prior finding that there was no evidence that the negative assessment of Pretlow's performance was discriminatorily motivated. Because Pretlow only protested the substance of the evaluation, rather than the scheduling of it, he was not "provoked" by the Respondent's unlawful discrimination and was not privileged to refuse to cooperate in the evaluation.

Discussion

As noted above, there are no exceptions to the judge's finding that the Respondent violated Section 8(a)(3) and (1) by giving Pretlow a performance evaluation. We agree with the General Counsel, however, that the discharge was also unlawful. The Board has long held that employers should not be "permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline."[8] Here, the Respondent asserts that it discharged Pretlow because his conduct prevented it from completing its evaluation of his work performance. However, because the Respondent initiated the evaluation in retaliation for Pretlow's prior grievance and arbitration, the evaluation itself was unlawful.

Under *Wright Line*, once the General Counsel produced evidence sufficient to support an inference that the discharge was discriminatory, as he did here, the burden shifted to the Respondent to show that it would have discharged Pretlow even absent his protected activity. The Respondent, however, did not make such a showing. Although the record establishes that Pretlow was loud and argumentative at the meeting, and that this conduct prevented completion of the evaluation, it also establishes that Pretlow would not have been at that meeting but for the Respondent's unlawful actions—specifically, ordering the evaluation as retaliation for Pretlow's protected activity.[9] Accordingly, the Respondent here "created its own barrier to satisfying its burden of proof."[10]

Under the facts of this case and in light of the precedent cited herein, we cannot agree with the judge that this conduct amounted to dischargeable insubordination.[11] Accordingly, we find that Pretlow's discharge violated Section 8(a)(3) and (1).

Amended Remedy

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged Larry Pretlow, we shall order it to offer him full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the Respondent will also be required to compensate Pretlow for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years. *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate Pretlow for search-

[8] See *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 3 (2003) (applying *Wright Line* to find that employer unlawfully discharged employee who made false statements that were triggered by and elicited during an unlawfully motivated investigation meant to retaliate against his protected activity).

[9] We disagree with the judge's implication that only the timing of the evaluation, without regard for the discriminatory purpose of the evaluation itself, was unlawful, and that because Pretlow only protested the substance of his evaluation, he was not "provoked" by the discrimination against him. The Respondent's discriminatory purpose in scheduling the evaluation just after Pretlow's reinstatement is inseparable from its broader discriminatory motive—either to lay the groundwork for a second discharge or to incite a negative response. That discriminatory motive is inherent in the entire course of the Respondent's conduct, including Pretlow's termination. Further, contrary to the judge's finding that the Respondent would not have expected Pretlow's reaction to the evaluation, Khan testified that the evaluation was conducted in a back office because of "the way [Pretlow] behaves and the way he goes off." We also do not rely on the judge's statement that Pretlow should have expected a formal evaluation at some point during his employment. Pretlow had no reason to expect that he would be subject to disparate treatment or evaluated for a discriminatory purpose on the heels of his postarbitral reinstatement.

[10] *AdvancePierre Foods,* 366 NLRB No. 133, slip op. at 27 (2018) (quoting *Supershuttle*, 339 NLRB at 2). We readily acknowledge that there could be circumstances where an employee's misconduct at an unlawful meeting could be so extreme as to enable an employer to satisfy its *Wright Line* rebuttal burden. Based on the credited testimony regarding the meeting, however, we find that this is not such a case.

[11] See *Bozzutto's*, 365 NLRB No. 146, slip op. at 4 (2017) (finding that the respondent unlawfully discharged an employee for refusing to attend a meeting that "was an outgrowth of the [r]espondent's earlier unlawful warning" against the employee's protected concerted activity).

for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The Respondent, the United States Postal Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily scheduling performance evaluations or otherwise discriminating against employees for filing grievances or engaging in other protected concerted activity.

(b) Discharging or otherwise disciplining employees because they filed a grievance.

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

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

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

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

(c) Compensate Larry Pretlow for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

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

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

(f) Within 14 days after service by the Region, post at its Engleside facility in Alexandria, Virginia, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 4, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily schedule performance evaluations or otherwise discriminate against you because you filed a grievance or engaged in other protected concerted activity.

WE WILL NOT discharge or otherwise discipline you because you filed a grievance.

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

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

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

WE WILL compensate Larry Pretlow for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

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

UNITED STATES POSTAL SERVICE

The Board's decision can be found at https://www.nlrb.gov/case/05-CA-180590 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Katrina Ksander and *Stephen P. Kopstein, Esqs.,* for the General Counsel.
Mark Wilson, Esq., for the Respondent.

DECISION AFTER REMAND

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. I issued a decision in this matter on August 1, 2017 dismissing the complaint which alleged the Respondent discriminatorily issued Charging Party Larry Pretlow a performance evaluation and then discriminatorily discharged him. On March 15, 2018, the Board unanimously remanded the case to me with direction to make findings and conclusions as to whether Pretlow's protected activity was a motivating factor in Respondent's decision to give him the performance evaluation and if so, whether Respondent would have given Pretlow the performance evaluation even absent his protected activity. The Board also directed me to reconsider Pretlow's discharge in light of my findings and conclusions regarding the performance evaluation allegation. In a footnote, the Board also directed me specifically to determine whether the testimony of Pretlow's supervisor, Shakeel Khan, is credible as to his assertion that he gave a performance evaluation to Pretlow, but not to other probationary employees, because Khan had only recently learned that a performance evaluation was required for probationary employees.

Finally, the Board directed me to evaluate both allegations in accordance with *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).[1] This case was tried in Washing-

[1] In order to prove a violation of Sec. 8(a) (3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus of hostility towards that activity, and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus, and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence. Once the General Counsel has made initial showing of discrimination, the burden of

ton, D.C. on May 31 and June 1, 2017, and upon my reopening of the record on July 2, 2018. Larry Thurman Pretlow, II, filed the charge on July 21, 2016. The General Counsel issued the complaint on March 21, 2017.

The General Counsel alleges that Respondent, the United States Postal Service, violated Section 8(a)(3) and (1) of the Act by giving Pretlow a 30-day performance evaluation on June 8, 2016, and then terminating his employment on June 9, 2016, because Pretlow filed a grievance about his prior termination in February 2015 on which he prevailed in arbitration.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent, which has its headquarters in Washington, D.C., provides postal services throughout the United States, including from its Engleside post office in Alexandria, Virginia. The Board has jurisdiction over Respondent pursuant to Section 1209 of the Postal Reorganization Act. The National Association of Letter Carriers (NALC), which represented the Charging Party, is a labor organization within the meaning of Section 2(5) of the Act.

The Postal Service hired Larry Pretlow in March 2013 as a city carrier assistant (CCA). He began working in the District of Columbia but was transferred to Alexandria, Virginia, a few months later. On February 21, 2015, the Postal Service, while Pretlow was working out of the Engleside branch post office, converted him to full-time regular status. Five days later, on February 26, 2015, it terminated his employment. At the time of Pretlow's termination Shakeel Khan was the manager of the Engleside post office in Alexandria. Khan was also the manager when Respondent fired Pretlow in 2016. Although Khan is not mentioned in the arbitration award discussed below, he played some role in Pretlow's 2015 termination (Tr. 105–106).[3]

Pretlow filed a grievance pursuant to the collective bargaining agreement between the NALC and the Post Office. Tobie Braverman, an arbitrator, conducted a hearing of Pretlow's grievance on April 8, 2016. On April 22, 2016, Arbitrator Braverman issued an award ordering Pretlow's reinstatement. She also ordered that Pretlow would have to serve the remainder of the 90-day probationary period that is required for employees who are converted from CCA to regular status.

The Arbitration Award

According to the arbitration award, Pretlow's 2015 termination arose out of a dispute with Supervisor Shari Hearns on February 14, 2015.[4] Pretlow threatened to file an EEO charge. Then, according to Pretlow, Hearns threatened him by saying that her sons would take care of him. Pretlow called the Postal Inspection Service's National Law Enforcement Communications Center (NLECC) and alleged that Hearns had threatened his life. Hearns also reported their confrontation. A Postal Inspector credited Hearns' account. However, the Postal Service did not take disciplinary action against Pretlow as a result of his February 14 argument with Hearns. It fired him for falsely stating to the Inspection Service that his life was in danger on three occasions. This apparently referred to the three occasions on which Pretlow contacted the Inspection Service; February 14 or 15 [the day he came a regular carrier] February 21 and 23, 2015.

On February 27, 2015, the Postal Service terminated Pretlow for making false statements to the Inspection Service that his life was in danger.

Under the terms of the collective-bargaining agreement between NALC and the Postal Service, a regular carrier has a 90-day probationary period during which time that carrier is not permitted access to the grievance procedure. CCAs do have such access. The Arbitrator concluded that the Postal Service delayed disciplining Pretlow until he became a regular carrier to prevent him from having recourse to the grievance procedure. She also found that the Postal Service had failed to meet its burden of proving that Pretlow had made false statements, the offense for which he was terminated.

Arbitrator Braverman ordered the Postal Service to reinstate Pretlow with full backpay. She ordered that he would remain in probationary status until he completed the remainder of his 90-day probationary period. She also admonished Pretlow for being insubordinate to Hearns on February 14 and urged him to be more cooperative with management upon his return to work.

Pretlow's return to work on May 4, 2016

Larry Pretlow returned to work at the Engleside Post Office on May 4, 2016. On his first day back at work he met Post Office Manager Shakeel Khan and local union president Andre Washington. Khan informed Pretlow that his performance would be evaluated since he was a probationary employee. This is consistent with the Postal Services' regulations that had been in force for several years prior to 2016 (R. Exh. 10). Khan and Pretlow initialed a blank evaluation form (Postal Service form 1750).

Postal Service rules require that a probationary employee be evaluated within 30 days of the beginning of the probationary

persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[2] The General Counsel did not call Pretlow as part of its direct case. In my 22 years as an NLRB judge I cannot recall another instance in which the General Counsel did not call the Charging Party as a witness when the termination of that individual was the principal issue in the case.

[3] Khan's testimony regarding his role in the 2015 termination is confusing (Tr. 105–106). He testified that he initiated the termination but also suggested that his role was somewhat ministerial.

[4] Hearns was deceased by the time of the arbitration hearing and Pretlow did not testify about the circumstances of his dispute with her in this proceeding. Thus, I rely on the arbitrator's award for background as to the events resulting in the 2015 termination. However, I do not rely on the arbitrator's decision to credit Hearns' account of the February 14 confrontation. Therefore, I find the admonishment to Pretlow in her decision about the unacceptability of refusing to obey or arguing with a supervisor's instructions is irrelevant except insofar as it affected the conduct of manager Shakeel Khan in 2016.

period. This evaluation must be documented on a Postal Service form PS 1750 (R. Exh. 10). While Respondent states that PS forms 1750 from Engleside that predate Pretlow's termination existed, it did not produce any pursuant to the General Counsel's subpoenas-with the possible exception of Princess Reynolds and Aleese Borum (Exh. R-20). The reason it gives for nonproduction, unauthorized destruction of documents by the Postmaster, was not given prior to the initial hearing in this matter.

I find that Respondent has not established that it performed any evaluations on Engleside employees that were documented on a PS 1750 prior to scheduling Pretlow for such review on May 4, 2016. Even if it did give such an evaluation to Princess Reynolds and Aleese Borum, I find that it was not a regular practice to perform a PS 1750 evaluation of any employee prior to June 8, 2016.

I also do not credit Shakeel Khan's explanation as to how he knew that Pretlow was required to have such an evaluation. He testified that he was not aware that he was supposed to do an evaluation of a CCA who had been converted to regular status until a managers' meeting a few months prior to June 8, 2016 (GC Exh. 8 (Tr. 136–137). At the initial hearing, Khan could not recall precisely when this meeting took place (Tr. 137–138).[5] At the remand hearing he testified that the meeting probably occurred in April. Khan testified that the evaluation requirement for recently converted regular carriers was something that was news to other managers (Tr. 136).[6] Respondent could have proffered testimony from other managers who attended the same meeting, to corroborate Khan's testimony. It did not do so either at the initial hearing or the remand hearing. Instead it relied solely on Khan's self-serving testimony, which I again decline to credit.

On May 31, Pretlow took offense at some conduct by Khan. It is not exactly clear what transpired. However, Khan apparently felt that Pretlow could not finish his delivery route on time. According to Pretlow, Khan publicly ridiculed him for needing extra time or help to finish his route. He complained in writing about this to the Assistant Postmaster on June 1, Exh. R-4. Khan testified that he generally tried to avoid interaction with Pretlow because Pretlow blamed him for the 2015 termination and because he "knew the way he goes off" (Tr. 127).

June 8, 2016 performance evaluation

On the afternoon of June 8, after Pretlow had finished his route, he was approached by his immediate supervisor, Rebar Chergosky. She informed him that he was going to have his evaluation that afternoon. Chergosky and Pretlow went to a private office in the back of the post office where they were joined by Shakeel Khan and Chief Union Steward Dwayne Martin. Of the conflicting versions of what occurred I find that of Martin most credible since of all the witnesses he had the least at stake in the outcome of this proceeding.[7]

Chergosky started reading from the evaluation form, which had 6 categories in which the employee was to be rated outstanding or satisfactory or unacceptable or not observed. Chergosky told Pretlow that his work quantity was unacceptable. Pretlow loudly objected. Shakeel Khan and Pretlow began to argue loudly. Martin testified that there was no screaming, no threatening and no finger pointing. However, Martin took Pretlow out of the room to calm him down.

After they returned, most likely after Chergosky told Pretlow his dependability was unacceptable, Pretlow loudly protested again.[8] Pretlow and Khan began to argue again. Martin testified that Pretlow did not scream, bang on doors (as Khan testified), or otherwise behave in a bizarre manner. Pretlow stated that "he could not take this." Then he left the room again (Tr. 145). Martin then suggested that the meeting be terminated (Tr. 147–148). The evaluation was not completed. With respect to how the meeting ended, I find Khan's account more plausible than Pretlow's.[9]

After the meeting ended, on June 8, Reber Chergosky prepared a termination letter for Pretlow with input from Khan and Respondent's labor relations staff.[10] The letter (GC Exh. 4, states:

> This is to advise you that your employment is being terminated during your probationaryperiod, effective immediately. The reason for this action is your improper conduct.
>
> You were recently converted to a full-time, regular letter carrier position with a 90-dayprobationary period. On June 8,

[5] His testimony is that the meeting occurred a few months prior to June 2016.

[6] In the published version of my decision attached to the Board's March 15, 2018 decision, there is material missing from the decision as I issued it, see the Board's website for my August 17, 2017 decision.

The complete sentences are as follows, with the omitted language in bold:

> Given evidence that no other probationary regular carrier was given an evaluation prior to Pretlow, this is something on which one **would expect more specificity. Khan testified that the evaluation requirement was something that was news to other managers,** Tr. 136.

[7] Respondent argues that I should not have credited Martin because he was afraid of Pretlow. Pretlow had threatened to sue the Union, had alleged that Martin and Union President Washington were "in cahoots with management," and complained to the Union that Martin had not satisfactorily done his job as steward. Pretlow filed a "CB" charge against the Union which apparently related to his June discharge and Martin's conduct (Tr. 81–83).

[8] Dependability is the third category on the form. Rebar gave Pretlow a satisfactory rating on the second category, work quality.

[9] As noted earlier, the General Counsel did not call Pretlow, the Charging Party, as a witness. Respondent called Pretlow as a witness as part of its case. I do not regard Martin's testimony at Tr. 83–84 to be inconsistent with Khan's at 145. I conclude that it is Pretlow's behavior that prevented the meeting from being concluded.

[10] Chergosky and Khan testified that Chergosky made the decision to terminate Pretlow. I am very skeptical that this is true except in the most technical sense. Chergosky had been a supervisor for only a couple of months. It is clear that she consulted with Khan and Henry Baer from Respondent's labor relations department, in making the termination decision. Given Khan's intimate involvement with the events surrounding Pretlow's discharge, I infer that his opinion was determinative. I also do not credit Chergosky's testimony that she was considering terminating Pretlow for poor performance prior to the June 8 meeting. That testimony is completely self-serving and unsupported by any documentation. Moreover, it is inconsistent with Khan's testimony at Tr. 142 that he did not anticipate terminating Pretlow prior to the evaluation meeting.

> 2016, when Supervisor Reber Chergosky began conducting your 30-day evaluation, you became disruptive and rude, raising and shaking your hands. Your union steward, Dwayne Martin, was present for the evaluation and asked for a few minutes to talk to you. Martin took you out of the room, and upon your return a few minutes later, your behavior became even worse. Your attitude was negative, and your body language was aggressive. When I began to discuss your attendance and dependability, you began waiving your hands and speaking loudly. You were threatening, saying, "You're in trouble already! I know people in high places!" I had to end the evaluation due to your hostile and threatening behavior.

Based on your improper conduct, it has been determined that it would be best not to retain your employment as a letter carrier.

July 9 termination

Respondent pulled Pretlow's time card before he arrived for work on July 9. He was told to report to the office in the back of the post office. Martin, Khan, Chergosky, and Henry Baer from Respondent's labor relations department were present. Chergosky tried to present the termination letter to Pretlow. He began screaming, crying and rolling around on the floor. Ultimately, somebody called an ambulance and Pretlow was transported off the premises.

Analysis

The filing of a grievance is a right protected by the Act, *Yellow Transportation, Inc.* 343 NLRB 43 (2004). It is thus a violation of Section 8(a)(1) to discriminate against an employee for filing a grievance or prevailing in an arbitration.

To establish a 8(a)(1) or 8(a)(3) violation based on an adverse employment action[11] where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). The General Counsel generally satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, animus against the activity and sufficient grounds for inferring discriminatory motive. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The Board directed me to evaluate both allegations in accordance with *Wright Line,* supra. The General Counsel has analyzed this case under *Atlantic Steel,* 245 NLRB 814, 816 (1979). I do not believe I would reach a different result under *Atlantic Steel,* but I think that analysis is best (or only) suited for a situation in which the alleged discriminatee was disciplined or discharged for misconduct related to protected conduct. That was not the case with regard to Pretlow. Moreover, Pretlow's conduct was not merely an "outburst," it constituted insubordination in effectively refusing management's direction to participate in a performance evaluation.

In this case the General Counsel has met his initial burden. Respondent knew that Larry Pretlow had filed a grievance and had prevailed. Animus and discriminatory motivation can be inferred from the timing of Pretlow's performance evaluation and his second discharge immediately upon his return to work following the arbitrator's award. Thus, the question becomes whether Respondent meet its burden of proving nondiscriminatory motivation in giving Pretlow a performance evaluation on June 8 and firing Pretlow on account of his conduct at the June 8 performance evaluation.

The General Counsel relies heavily on the proposition that the June 8 evaluation was a "set-up" arranged to allow Respondent to terminate Pretlow for filing a grievance and prevailing. Respondent has failed to prove that it conducted the type of performance review that is documented on a PS 1750 for any employee at the Engleside Post Office prior to June 8. To the extent that Shakeel Khan testified to the contrary I do not credit his testimony. Respondent was able to produce Form 1750s from other locations prior to this date, but none from Engleside.[12] Thus, Respondent has not met its burden of proving that Pretlow was not treated disparately in scheduling him for a performance review on his first day back to work or for giving him a performance review 30 days later.

Heeding the directions from the Board, I find that the General Counsel met its burden under *Wright Line* that Pretlow would not have been given a performance evaluation 30 days after his return to work-absent his protected activity, solely on the timing of the evaluation. I also conclude on the basis on this record that Respondent did not meet its burden that it would have given the performance evaluation after 30 days absent its animus towards his filing and prevailing on his grievance. Based on the General Counsel's prima facie case, I conclude that the *timing* of the June 8 review was motivated in part by Khan's animus towards Pretlow. Further, I infer that Khan's animus was at least in part due to Pretlow's protected activity in grieving his 2015 discharge and prevailing. Thus, I find that Respondent violated the Act, as alleged, in giving Pretlow a performance evaluation on June 8, 2016.

Postal Regulations required that Respondent give Larry Pretlow a performance review at 30 days after the beginning of his probationary period. These regulations had been in force for years prior to June 2016. However, there is no credible evidence that management at the Engleside branch abided by these regulations prior to scheduling Pretlow for a review.

On the other hand, I find that it likely that at some time after his return to work, Pretlow would have been given a formal evaluation. I base this on the fact that management gave such evaluations to at least three other employees after Pretlow's discharge. There is no basis for concluding that these evaluations were given to provide Respondent cover for giving Pretlow a formal evaluation.

The General Counsel also argues that the discriminatory motive in terminating Pretlow is suggested by the fact that the evaluation was conducted in a backroom office at the Post Office. I disagree because I credit Shakeel Khan's testimony that Respondent met with Pretlow in the back room because of

[11] For purposes of this decision, I assume that discriminatorily scheduling an employee for a performance evaluation can be an "adverse action."

[12] With the two possible exceptions noted earlier.

Pretlow's hypersensitivity to criticism. This hypersensitivity was exhibited by Pretlow with regard to Khan's assignment of other carriers to assist Pretlow on his route on May 31. Had management given Pretlow a review in an open working area, such as those management gave to carrier assistants (Tr. 55).

Despite the suspicious background for the *timing* of the June 8 evaluation, there is no question that Pretlow did not cooperate in the evaluation and did not allow Respondent to complete it. I would also note that on May 4, when Khan informed Pretlow that this evaluation would take place, he did not object or assert that Respondent was discriminating against him in performing an evaluation during his probationary period. Moreover, there is nothing in this record that would lead one to conclude that Respondent's managers should have anticipated Pretlow's outburst in reaction to his performance evaluation.

The General Counsel argues that Respondent cannot rely on Pretlow's behavior on June 8, because it provoked his reaction. I disagree. There is no evidence on which I can base a conclusion that Respondent's adverse assessment of Pretlow's work quantity and dependability was discriminatorily motivated. He was not privileged to refuse to cooperate in the evaluation and prevent its completion. Therefore, I conclude that Respondent met its burden of establishing its affirmative defense (that it would have fired Pretlow for his conduct on June 8 absent his protected activity) and did not violate the Act in terminating his employment on the basis on his behavior at the evaluation.

The General Counsel contends that Respondent cannot incite employee misconduct by engaging in an unfair labor practice and then rely upon the provoked misconduct for an adverse employment action.[13] However, the employee's misconduct must be evaluated by comparing the seriousness of employer's unlawful conduct with the extent of the employee's reaction, *Kolkka Tables & Finnish-American Saunas,* 335 NLRB 844, 849 (2001); *Caterpillar, Inc.,* 322 NLRB 674, 678 (1996); *Trus Joist Macmillan,* 341 NLRB 369 (2004).

In this case, I find that Respondent was entitled to terminate Pretlow for insubordination because scheduling him for a performance evaluation does not rise to the level of a "provocation." From the record, it appears that Pretlow did not object to the performance evaluation until Respondent advised him his performance was unsatisfactory. The fact that he was having the evaluation did not "provoke" him. Assuming arguendo that the scheduling of the performance evaluation was a "provocation," I conclude that it was such a minimal provocation that Respondent was entitled to terminate Pretlow for insubordination for refusing to cooperate in it.

Employees should have no expectation that their job performance will not at some point be evaluated by their employer. They should have no expectation that they will not be told their performance is substandard if that is the case. Postal Regulations require such an evaluation. There is no evidence that Respondent's assessment of Pretlow's performance was discriminatory (i.e., that his performance was not sub-standard). Moreover, Respondent's "provocation" is de minimis or close to it when compared to the types of provocations that the Board has, in past, excused insubordination. For example, in *Paradise Post,* 297 NLRB 876 fn. 2 (1990), the employer refused to pay the discriminatee part of the salary that he had earned. In *Brunswick Food and Drug,* 284 NLRB 663 (1987), the employer called the police to break up a lawful union meeting. Respondent's conduct in giving Pretlow a performance evaluation, even if discriminatory and/or motivated in part by his filing and prevailing on his grievance, is not comparable and I find it does not excuse his insubordination at the evaluation. I therefore conclude that Respondent did not violate the Act in terminating Pretlow.

Citing *Supershuttle of Orange County,* 339 NLRB 1, 3 (2003); and *Kiddie, Inc.,* 294 NLRB 840 fn. 3 (1989), the General Counsel contends that since the performance evaluation was unlawful, Pretlow's conduct cannot form the basis of a lawful termination. I find these cases distinguishable. The investigations conducted in those two cases were undertaken with a motive to find a basis for terminating the discriminatees. As the Board stated in *Supershuttle,* Respondent's reasons for the termination in that case were pretextual. That is also evident in *Kiddie.*

In this case, I find no reason to conclude that the Postal Service did not terminate Pretlow for his insubordination in the evaluation, as opposed to terminating him for filing and prevailing in his grievance. I also distinguish those cases on the basis that an investigation into potential misconduct of a known union supporter is different than a performance evaluation that every employee, particularly a probationary employee, should expect in some manner at some time.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(3) and (1) in giving Larry Pretlow a performance evaluation on June 8, 2016.

2. Respondent did not violate the Act in terminating Larry Pretlow for his insubordination at the June 8, 2016 performance evaluation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, the United States Postal Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from scheduling performance evaluations because an employee filed a grievance over a prior termination.

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

[13] This argument is set forth in the General Counsel's March 30, 2018 response to the Postal Service motion regarding reopening the record, as opposed to its posttrial brief.

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

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

(a) Within 14 days after service by the Region, post at its Engleside, Alexandria, Virginia facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 2016.

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

Dated, Washington, D.C. September 14, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT schedule you for a performance evaluation because you filed a grievance under your collective-bargaining agreement.

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

UNITED STATES POSTAL SERVICE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-180590 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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