Nos. 08-1153, 08-1197

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEDIA GENERAL OPERATIONS, INC.,
d/b/a THE TAMPA TRIBUNE

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Media General Operations, Inc., d/b/a The Tampa Tribune ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against the Company. The Board's Decision and Order issued

on December 28, 2007, and is reported at 351 NLRB No. 96. (JA 394-407.)[1] The Company filed its petition for review on January 24, 2008. The Board filed its cross-application for enforcement on February 19, 2008. The petition and cross-application are timely because the Act places no time limit on such filings.

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Company is headquartered and transacts business in this circuit. The Board's Order is a final order under Section 10(e) of the Act.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employee Gregg McMillen because he made a single profane and derogatory reference to a company vice president in the course of engaging in concerted activity protected by the Act.

STATEMENT OF THE CASE

Acting on charges filed by Gregg McMillen, an individual, the Board's General Counsel issued a complaint alleging, among other things, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by

[1] "JA" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

discharging Gregg McMillen because he engaged in concerted activities protected by the Act. (JA 398-99; 3-4, 5-9, 16.) The Company filed an answer admitting that it discharged McMillen, but denying that the discharge was unlawful. (JA 10-14, 17-18.)

After conducting a hearing, the administrative law judge issued a decision recommending dismissal of the complaint. The judge found that statements made by McMillen to two company supervisors constituted concerted activity protected by the Act, but included a profane description of a company vice president that caused McMillen to lose the Act's protection. (JA 398, 404-07.) The judge also found that the record failed to support the additional allegation that the Company violated Section 8(a)(1) of the Act by refusing to allow McMillen to have union representation during the meeting at which it notified him of his discharge. (JA 403-03.) The General Counsel and the Company each filed exceptions and supporting briefs, and answering briefs to the other party's exceptions. The General Counsel filed a reply brief. (JA 394.)

The Board issued its Decision and Order on December 28, 2007, affirming the judge's rulings, findings, and conclusions with respect to the dismissal of the allegation of an unlawful refusal to allow McMillen union representation. (JA 394 n.1, 403-04.) The Board reversed the judge's findings regarding the Company's discharge of McMillen, finding that it violated Section 8(a)(1) of the Act. (JA 394-

97.) The Board issued a remedial order that included a requirement that the Company offer McMillen reinstatement with backpay. (JA 397-98.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Company Vice President Barker Writes a Series of Letters Directly to Employees Asserting the Company's Collective-Bargaining Position and Criticizing the Union; The Employees Respond With a Letter to Barker Angrily Criticizing the Company's Position and Urging Barker to Sign the Union's Bargaining Proposal

The Company operates and publishes The Tampa Tribune, a daily newspaper whose approximately 110 pressroom employees are represented by Graphic Communications Conference of the International Brotherhood of Teamsters, Local 180, formerly known as Graphic Communications International Union, Local 180 ("the Union"). (JA 398-99; 5, 10.) The most recent collective-bargaining agreement between the Company and the Union expired on October 31, 2004. (JA 399; 199, 348-65.) In December, the parties began a series of negotiations for a new agreement. In the following series of letters to employees during the period between December 2004 and November 2005, Company Vice President Bill Barker described the negotiations from his point of view, blaming the Union for the lack of progress.

In the first letter, dated December 28, 2004, Barker stated that negotiations could have been completed in one day at the first bargaining session and blamed

the lack of agreement on Union International Representative Sonny Shannon's attitude during that session. (JA 399; 315.)

Barker's second letter, dated June 2, 2005, stated that during negotiations that day, and the day before, Shannon had called him a "fucking idiot," and had threatened a strike and boycott. Barker also stated that it appeared the parties would be negotiating for a long time. (JA 399; 316.)

Barker's third letter, dated September 1, alleged "unprofessional behavior" by Shannon during the meeting referred to in the June letter, and spoke of "consequences that [the employees] might face as a result of his behavior." (JA 399; 317-18.)

Barker's fourth letter, dated September 30, referred to negotiations on September 26 and 27. He criticized Shannon's behavior at those sessions, alleging statements similar to those in his June 2 letter. He also expressed concern at the slow pace of the negotiations. (JA 399; 319-20.)

Barker's fifth letter, dated November 1, discussed past and present proposed bargaining dates. He criticized Shannon's lack of availability on certain dates and stated that "[w]e at least hope, that in the future, the Union will respond more promptly." (JA 399; 323.)

Many of the employees were angered by the antiunion slant of Barker's letters. In a letter to Barker dated November 4, 25 pressroom employees

responded to Barker's November 1 letter by criticizing him and the Company's bargaining posture. The letter stated that Barker sat in a "nice, clean, quiet office, chat[ting] with people in business suits" and "go[ing] out to lunch," while the employees "work in noise so loud we need hearing protection, breathe chemical fumes and ink mist, handle hazardous . . . chemicals, and are not allowed to leave the premises for lunch . . . ." The letter added that "[t]here are no carpets or pretty pictures on our walls, just steel plate floors and various warning labels attached to presses, doors and walls. We work with equipment that can strip the flesh off our bones, and mangle us. Will a pencil sharpener or stapler do that?" The letter went on to present the employees' position on the ongoing negotiations, stating that "[y]ou get your raises, yet we are denied . . . [f]or two years now," and that "[y]ou seem to forget that there is more than one proposal on the table." Finally, the letter urged Barker to "stop playing [its negotiating] game and *sign the union proposal"* (emphasis in original) to "help us feel confident our management team is as thankful for our efforts as you say and write." The letter also complained that Barker's earlier letters contained suggestions that the employees decertify the Union. (JA 400; 329.)

In a letter dated November 9, Barker responded to the employees' letter. He stated that he appreciated their work and realized their frustration, but that the Company was "going to be as patient as necessary to get a good [c]ollective

[b]argaining [a]greement," and that the Company "believe[s] in our proposals, and we are going to persevere . . . ." Barker also stated that "third parties interfere with both our collective as well as individual successes," and added that "under a union structure," the Company could not negotiate with individual employees or a sub-group of employees "as long as you have a third party representative." (JA 400; 326-27.)

Employee Gregg McMillen received Barker's letters of December 28, June 2, September 1, September 30, and November 1. (JA 400; 125-26.) On most occasions after receiving the letters, McMillen spoke to his foreman about them, complaining that Barker always blamed the Union for the lack of progress in negotiations. (JA 400; 145-46.) McMillen also voiced his anger about Barker's letters in conversations with fellow employee Donald Hale, who also had a negative opinion of the letters. (JA 400; 176.) McMillen was one of the 25 employees who signed the November 4 letter protesting the Company's bargaining position and urging the Company to agree to the Union's bargaining proposal. (JA 399; 127-28, 329.)

B. Employee McMillen Complains to Supervisors Lerro and Bridges about Barker's Letter, Referring to Barker as a "Stupid Fucking Moron"; The Company Fires McMillen

On November 10, while working on the evening shift, McMillen learned for the first time from another employee that Barker had sent the pressmen another

letter. (JA 394, 400; 132-33.) During a lull between work tasks, he went to the pressroom office and spoke with Shift Foreman Glenn Lerro and Assistant Shift Foreman Joel Bridges. McMillen complained about the slow pace of the negotiations and about the letters Barker had been sending to the employees. He added, "I am stressed out. I heard we got another letter from Bill Barker." Lerro asked McMillen if he had read the letter yet, and Miller replied that he had not. Lerro then said that Barker's new letter was probably a reply to the employee's November 4 letter. McMillen said that he did not feel it was right for Barker to be "harassing" and "threatening us" by sending the letters. He added, in reference to Barker, "I hope that stupid fucking moron doesn't send me another letter. I'm pretty stressed and if there is another letter, you might not see me. I might be out on stress." (JA 400; 56, 75, 88-89, 112-15, 132-34.) Supervisors Lerro and Bridges did not instruct McMillen not to curse and gave him no indication that they thought his remarks called for discipline. (JA 395, 400; 60, 135.) McMillen also said that if the employees were given a 6 percent pay increase, it would still be lower than the rate of inflation. (JA 394 n.5, JA 401; 77.)

The following morning, Lerro sent an email describing that conversation to Pressroom Manager George Kerr, with copies to Production Director George Stewart and Barker. The email described McMillan's reference to Barker as a "Stupid F . . . g Moron" and his accusations that Barker was "harassing them with

these illegal letters," and that "it was against there [sic] rights to send out such trash and propaganda." (JA 395, 401; 332.) Lerro's email did not recommend any disciplinary action against McMillen; he sent the email to Kerr simply because he thought it was proper "to let him know of any incidents that happen." (JA 395, 401; 65-66, 332.)

After receiving Lerro's email on November 11, Kerr discussed the incident with Stewart and Barker, and they decided to recommend that McMillen be terminated because of what he said on November 10. (JA 395, 401; 96, 98, 261.) In making his recommendation, Kerr decided to rely on the Company's Pressroom Office Rules, specifically Rule 9. (JA 395, 401; 261-62, 330.) The preface to the Pressroom Office Rules provides that the numbered rules that follow are the Company's "principal office rules" and that "[a]ny employee who fails to maintain at all times proper standards of conduct or who violates any of the following rules" is subject to "disciplinary action, up to, and including termination." Rule 9 prohibits "[t]hreatening, abusive, or harassing language, quarreling, boisterousness, wrestling, scuffling, horseplay, disorderly conduct, fighting, violence or threats thereof, and all disturbances interfering with employees anywhere in the building." (JA 395, 401; 330.)

Later on November 11, McMillen received Barker's November 9 letter, which interfered with his sleep and caused him to take sleeping pills, oversleep,

and miss work as a "no call, no show" on his evening shift. (JA 400; 136-37.) During his November 13 shift, McMillen signed a disciplinary record for the November 11 absence, and wrote on the bottom of the document: "If [Barker] would quit writing me lieing [sic] discrimination, harassing and threatening letters through the U.S. Mail, I wouldn't have to take sleeping pills to go to sleep. Thank you Tampa Tribune for not caring about are [sic] well being." (JA 400; 139-40, 334.) McMillen then told Lerro that he was sorry if anything he said on November 10 was inappropriate, "but you know [Barker] gets to me." (JA 400; 139.)

On the morning of November 16, Lerro asked Bridges to prepare his own email about the events of November 10. The email, addressed to Kerr, contained a description similar to that in Lerro's November 11 email. It also added that McMillen had said he was insulted that Barker referred to the pressmen as "printers", and that McMillen had also mentioned wages, saying that even if the pressmen received a 6 percent increase, it would still be lower than the rate of inflation. (JA 401; 76, 86, 335.)

As of November 16, having seen Lerro's email, Stewart discussed the November 10 incident with Kerr. They decided to fire McMillen because, according to Stewart, McMillen's statement about Barker was "gross misconduct." (JA 401; 297-98.) At around 6:00 p.m., Kerr met with McMillen in Kerr's office. McMillen acknowledged that he had referred to Barker as a "stupid fucking

moron" on November 10. Kerr then told McMillen that he was terminated effective immediately. (JA 395, 401; 142-43.)

II. THE BOARD'S CONCLUSION AND ORDER

On the foregoing facts, the Board (Members Liebman, Kirsanow, and Walsh) reversed the administrative law judge's recommendation and found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging McMillen because of his concerted protected activity. (JA 394-97.) [2] The Board found that McMillen's criticism of Vice President Barker's negotiating positions and attitude constituted concerted activity protected by the Act, and that McMillen's single profane and derogatory reference to Barker during the course of that activity did not strip McMillen of the Act's protection. (JA 395-97.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Company to offer McMillen reinstatement, make him whole for any loss of earnings or benefits he suffered as a result of his unlawful discharge, remove from

[2] The Board affirmed the administrative law judge's dismissal of the allegation that the Company unlawfully refused to allow McMillen to have union representation during the meeting at which it notified him of his discharge. (JA 394 n.1, JA 403-04, 407.)

its files any reference to his discharge, and post copies of a remedial notice. (JA 397-98.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging employee Gregg McMillen because he made a single profane and derogatory reference to Company Vice President Bill Barker while engaged in the protected concerted activity of protesting Barker's conduct in a conversation with two supervisors. The Board reasonably concluded that McMillen's protest was both protected and concerted within the meaning of the Act, and that his single derogatory remark during the course of that activity was not sufficiently egregious to strip him of the Act's protection.

McMillen's activity clearly included the type of "concerted activities for the purpose of . . . mutual aid or protection" that are protected by Section 7 of the Act (29 U.S.C. § 157). He engaged in the activity as "part of an ongoing collective dialogue" (JA 395) protesting Vice President Barker's collective-bargaining attitude and positions as expressed in a series of letters written directly by Barker to McMillen and his fellow unit employees. It was also *concerted* activity, in which McMillen joined with other employees in expressing their common concerns. There is no merit to the Company's contention that McMillen's activity

was simply that of a single employee with personal grievances. An employee's individual acts are concerted where, as here, the employee brings to management's attention group employee complaints that are a continuation, or logical outgrowth, of earlier group protests.

The record fully supports the Board's conclusion that McMillen's single reference to Barker as a "stupid fucking moron" did not remove his activity from the Act's protection. It is well established that the Act permits some leeway for impulsive behavior in such situations, and the employee's conduct will remain protected unless highly egregious. Here, the Board applied the established four-part test for determining protection set forth *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), in which the Board considers (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. The administrative law judge's finding, adopted by the Board, that the place and subject matter of the discussion weigh in favor of protection for McMillen's remarks is entitled to affirmance. Initially, the Company's failure to challenge those findings before the Board raises a jurisdictional bar to judicial review by the Court. In any event, the time and place of the discussion strongly weigh in favor of protection. The nature of the outburst weighs only moderately against protection because of the surrounding circumstances, such as the remark's

single, private, non-confrontational, and non-insubordinate nature, the prevalence of other harsh and profane language in the workplace and in collective-bargaining negotiations, and McMillen's unsolicited apology and explanation. Finally, the absence of unlawful provocation by Barker weighs only slightly against protection. Barker's actions, while lawful, were sufficiently provocative to mitigate McMillen's reaction.

The Company's contentions are without merit, simply citing dozens of cases that are plainly distinguishable on their facts or involve inapplicable legal standards. There is also no basis for the Company's contention that the Board overturned or disregarded the credibility determinations of the administrative law judge. The Board properly drew differing inferences from the same credited evidence.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEE GREGG McMILLEN BECAUSE HE MADE A SINGLE PROFANE AND DEROGATORY REFERENCE TO A COMPANY VICE PRESIDENT WHILE ENGAGING IN CONCERTED ACTIVITY PROTECTED BY THE ACT

A. The Act Prohibits an Employer from Discharging an Employee in Retaliation for Engaging in Concerted and Protected Activity

Section 7 of the Act (29 U.S.C. § 157) guarantees the right of employees to engage in "concerted activities for the purpose of . . . mutual aid or protection . . . ." The right to engage in concerted activities is protected by Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 . . . ." Accordingly, an employer violates Section 8(a)(1) of the Act by discharging employees for engaging in concerted activities protected by the Act. *NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 208, 213 (4th Cir. 2005).

The Supreme Court has indicated that "mutual aid or protection" should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68 and 567 n.17 (1978). These include employee complaints to the employer about terms and

conditions of employment. *See NLRB v. Main Street Terrace Care Ctr*., 218 F.3d 531, 540 (6th Cir. 2000); *NLRB v. Mike Yurosek & Son, Inc*., 53 F.3d 261, 266 (9th Cir. 1995).

The term "concerted activities" embraces "the activities of employees who have joined together in order to achieve common goals." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984). The activity of an *individual* employee is also "concerted" as "long as it is 'intended to enlist the support and assistance of other employees.'" *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 746 (4th Cir. 1998) (quoting *Krispy Kreme Doughnuts Corp. v. NLRB*, 635 F.2d 304, 307-08 n.6 (4th Cir. 1980)). In some circumstances, "an individual employee may be engaged in concerted activity when he acts alone." *NLRB v. City Disposal Systems*, 465 U.S. at 831. Such circumstances include instances in which an individual employee "brings a group complaint to the attention of management . . . even though he was not designated or authorized to be a spokesperson by the group." *Citizens Investment Services Corp. v. NLRB*, 430 F.3d 1195, 1198-99 (D.C. Cir. 2005) (citation omitted).

In addition, an individual engages in concerted activity when he brings to management's attention complaints that arose from, or are a continuation of, earlier group activity. *See, for example, Mike Yurosek & Son, Inc.*, 360 NLRB 1037, 1038-39 (1992); *Mike Yurosek & Son, Inc.*, 310 NLRB 831 (1993), *enforced* 53

F.3d 261 (9th Cir. 1995) (employees' protests were a "logical outgrowth" of earlier group protest).

Where employees are engaged in protected activity, the Board and courts have interpreted the Act to allow them a certain degree of latitude, even when they express themselves with intemperate comments. *See, for example, NLRB v. Caval Tool Div.*, 262 F.3d 184, 191-92 (2d Cir. 2001)*; Mobil Exploration and Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 242-43 (5th Cir. 1999); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). *See* discussion at pp. 25-26, below.

This Court, in considering a petition for review, is obligated to uphold the Board's legal interpretations if they are rational and consistent with the Act. *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 273 (4th Cir. 2003). That is, "if the Board's resolution is a 'defensible construction of the statute,' it is entitled to deference, because the 'function of [effectuating] national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review.'" *Id.* (quoting *Arrow Auto. Indus., Inc. v. NLRB*, 853 F.2d 223, 237 (4th Cir. 1988) (internal quotation marks omitted)). [3]

[3] The Company asserts (Br 18) that the Board's legal conclusions are subject to *de novo* review. However, the authority on which the Company relies, *Industrial TurnAround Corp. v. NLRB*, 115 F.3d 248 (4th Cir. 1997), supports no such proposition. Instead, this Court observed that "[a]lthough we ordinarily review questions of law de novo, *the NLRB's interpretation of the Act is entitled to deference if it is reasonably defensible.*" *Id.* at 251 (emphasis supplied).

The findings of the Board as to questions of fact are conclusive if supported by substantial evidence on the record when considered as a whole. 29 U.S.C. § 160(e). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 351 (4th Cir. 2001) (citations and quotation marks omitted). This deferential standard of review is not altered merely because the Board drew different inferences and legal conclusions from the evidence than did the administrative law judge. *See American Thread Co. v. NLRB*, 631 F.2d 315, 320 (4th Cir. 1980). "The Board, not the [judge], is ultimately vested with the responsibility for determining whether an unfair labor practice has been committed." *Id*. (citing *Universal Camera Corp v. NLRB*, 340 U.S. 474, 492 (1951)). Thus, while the Board is bound to give great deference to credibility assessments based on the judge's observations of the witnesses' demeanor, the administrative law judge's other findings and conclusions are entitled "only to such weight as they intrinsically and reasonably command." *Id*. And, in a case such as this, where the disagreement between the judge and the Board turns only upon inferences drawn from the facts found and applications of the Board's interpretations of the Act, no special weight need be given to the judge's conclusions. *See NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991); *accord Laborers' Dist. Council v. NLRB*, 501 F.2d 868, 873 n.16 (D.C. Cir. 1974).

B. The Board Properly Found that the Company Unlawfully Discharged McMillen for Engaging in Protected Concerted Activity

The Board found that the Company violated Section 8(a)(1) of the Act by discharging McMillen because of a single profane and derogatory reference to Company Vice President Barker in the course of complaining to Supervisors Lerro and Bridges about the bargaining tactics and positions in Barker's letters. The Board found, initially, that McMillen's complaints to the two supervisors constituted activity that was both protected and concerted. The Board then found that McMillen's one-time use of the derogatory reference did not strip him of the Act's protection. As we now show, each of these findings is supported by substantial evidence and applicable precedent.

1. McMillen's conduct was both protected and concerted

The record fully supports the Board's finding that McMillen's November 10 statements about Barker's collective-bargaining attitude and positions were made for the purpose of mutual aid or protection and that his "expression of his opinion on these topics is a fundamental right" under Section 7 of the Act. (JA 396, 405.) Indeed, the Company does not contend that the *substance* of McMillen's protests was unprotected, but argues that they were not "concerted" activity within the meaning of the Act. As we now show, that contention has no merit and was properly rejected by the Board.

The Board properly found that McMillen's activity was concerted in nature as well as protected in substance. As shown above (pp. 16-17), an employee who brings group complaints to the attention of management may be engaged in concerted activity even when acting alone and without authorization as a group spokesman. Here, the record fully supports the Board's finding (JA 395), in agreement with the administrative law judge (JA 404-05), that McMillen's November 10 conversation with Lerro and Bridges in the pressroom was concerted activity despite the fact that he went there alone and without such authorization. As the Board noted (JA 395), McMillen's conduct was "concerted because it was part of an ongoing collective dialogue between Barker and the unit employees about the substance and process of the contract negotiations."

McMillen's statements regarding Barker's letters began well before November 10. After receiving all five of Barker's letters beginning the previous December, McMillen complained about their contents to his foreman. McMillen joined the more than 25 bargaining-unit employees who angrily protested the tone and substance of Barker's letters. The November 4 employee letter to Barker strongly protested the employees' dirty and dangerous working conditions, the absence of a wage increase, and Barker's suggestions that the employees decertify the Union, and urged him to sign the Union's collective-bargaining proposal. McMillen's November 10 complaints to Lerro and Bridges that Barker's letters

were "harassing" and "threatening," and that a six percent wage increase would be inadequate, continued his earlier protest of Barker's attitude and wage-rate position.

It is beyond argument that such employee protests are entitled to the protection of the Act. Barker himself initiated that dialogue by discussing the employees' collective interests in letters, directed to all of them, that stated the Company's position on negotiations affecting their wages and working conditions, and criticized the Union that represented them collectively. McMillen's negative reaction to those letters and his complaints to his foreman were as a member of the collective bargaining unit. McMillen continued to act concertedly by joining a group of 25 employees in writing to Barker on November 4 protesting his attitude and position on the negotiations.

In light of this background, McMillen's November 10 comments to Lerro and Bridges were as concerted as his earlier actions and continued his protests. The Board and courts have consistently held that "individual employee action may also constitute concerted activity if it represents either a 'continuation' of earlier concerted activities or a 'logical outgrowth' of concerted activity." *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999), and cases cited; *Every Woman's Place*, 282 NLRB 413, 413 (1986), *enforced mem.*

833 F.2d 1012 (6th Cir. 1987). *Accord Reynolds Elec., Inc.*, 342 NLRB 156, 165 (2004).

Moreover, McMillen's November 10 comments to Lerro and Bridges were even more specifically concerted. As the Board observed (JA 395), the comments "were directly motivated by Barker's November 9 letter to all employees, which responded to the employees' plainly concerted group letter of November 4." [4] The language used by McMillen also demonstrates that he was protesting Barker's and the Company's attitude toward the employees as a group rather than toward him as an individual. As the Board noted (JA 395, JA 395 and n.11), and as shown above (p. 8), McMillen described the letters as harassing "us", and, in a subsequent reference to the Barker letters, sarcastically thanked the Company "for not caring about 'our' well being."

There is no merit to the Company's contentions (Br 15, 22-24, 25-29, 37-38) that McMillen's remarks to Lerro and Bridges were not concerted activity because he allegedly "acted alone," "spoke on his own behalf" without being asked to by other employees, and was on a "personal mission" to register a "personal gripe." As just discussed, acting alone without authorization does not undermine the

[4] As the Board noted (JA 395 n.9), the fact that McMillen had not yet received Barker's November 9 letter at the time of the conversation does not make his complaint about it any less concerted, because Lerro told McMillen that Barker's letter was probably a response to the employee's November 4 group letter (p. 8, above). Moreover, McMillen referred to it as "another" letter while complaining that Barker's previous letters had been "harassing" and "threatening." (*Id*.)

concerted nature of an employee's actions where, as here, his protests involve a continuation of activity that was in concert with other employees and on behalf of collective concerns.

The Company errs in its reliance (Br 22, 24, 27) on *Meyers Industries*, 268 NLRB 493 (1984) ("*Meyers I*"), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *on remand Meyers Industries*, 281 NLRB 882 (1986) ("*Meyers II*"), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). In direct contradiction to the Company's argument, the Board in *Meyers II* "reiterate[d] [that] . . . its definition of concerted activity in *Meyers I* encompasses those circumstances where . . . [an] individual employee [ ] bring[s] truly group complaints to the attention of management." 281 NLRB at 887. As shown above, that is precisely what McMillen was doing here.[5] There is also no merit to the Company's contention (Br 27-28) that the Board's rejection (JA 395 n.10, JA 405) of the Company's reliance on *K-Mart Corp.*, 341 NLRB 702 (2004), is inconsistent with *Meyers I*. As the Board noted and as shown above, the record refutes any conclusion that McMillen acted "solely by and on behalf of . . . himself." *Meyers I* at 497.

[5] The Board (JA 394, 395) adopted the administrative law judge's finding (JA 404-05) that McMillen's activities were concerted within the meaning of *Meyers I* and *Meyers II*.

The Company also errs in its reliance (Br 29) on *TNT Logistics of North America, Inc. v. NLRB*, 413 F.3d 402, 407, 409 (4th Cir. 2005). Indeed, the Court there found that the employee in question *was* engaged in protected concerted activity. 413 F.3d at 407-08. Noting the Act's "broad definition of protected concerted activity" and the strict standard of review imposed by Section 10 of the Act (pp. 16-18, above), the Court found the employee's activity concerted rather than personal, despite the fact that it came "very close to blurring th[e] distinction" between the two. *Id*.

The Company's lengthy quotes (Br 22-24) from *Every Woman's Place*, 282 NLRB 413, 414-15 (1986), *enforced mem*. 833 F.2d 1012 (6th Cir. 1987), undermine, rather than support, its argument. The quoted language requiring designation and specific authorization by a "protected group" is from the *dissent* in that case, which was rejected by the Board panel majority and the Sixth Circuit, and by the consistent line of Board and court cases cited above at pp. 16-17. The Company has cited no authority or policy that would compel the overruling of those precedents.

Finally, there is no merit to the Company's reliance (Br 26-28) on the Board's decision in an unrelated and inapposite case involving the Company – *Media General Operations, Inc. d/b/a The Tampa Tribune*, 346 NLRB No. 38, 2006 WL 268752 (2006). There, the Board found, on readily distinguishable facts,

that employee Richard Baños's complaint was not concerted because it only concerned his disagreement with his supervisor's criticism of his decision to shut down a press line. The Board relied on the fact that Baños "was speaking only for himself," and that there was "no evidence that Baños was raising the[e] issue on behalf of his coworkers, or that his coworkers even shared [the] belief " that led to his complaint. *Id*. at *4. None of those factors are present here.

2. McMillen's single use of a profane and derogatory reference to Vice President Barker was insufficient to strip him of the Act's protection

The Board and this Court have consistently construed the Act to permit employees engaged in protected activity "some leeway for impulsive behavior," so that not every impropriety that occurs in the context of such activity "necessarily places the employee beyond the protection of the statute." *J. P. Stevens & Co. v. NLRB*, 547 F.2d 792, 794 (4th Cir. 1976); *accord Union Carbide Corp.*, 331 NLRB 356, 356, 360 (2000), *enforced* 25 Fed. Appx. 87 (4th Cir. 2001); *Fairfax Hosp*., 310 NLRB 299, 300 and n.7, *enforced mem*. 14 F.3d 594 (4th Cir. 1993). Thus, as this Court has emphasized, even "imprudent" employee conduct will remain protected unless it is "unlawful, violent, in breach of contract, or indefensible," *NLRB v. WACO Insulation, Inc*., 567 F.2d 569, 599 (4th Cir. 1977) (citing *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 17 (1962)), or where employee conduct is '"so egregious . . . or of such character as to render the

employee unfit for further service."' *Anheuser Busch, Inc. v. NLRB*, 338 F.3d 267, 280 (4th Cir. 2003) (quoting *Consumers Power Co*., 282 NLRB 130, 132 (1986)). *Accord NLRB v. Air Contact Transport, Inc*., 403 F.3d 206, 211 (4th Cir. 2005).

Determining whether an employee's activity retains the protection of the Act requires the Board to balance the competing interests of the employer and the employee, and to assess the entire context in which the allegedly flagrant conduct took place. *See United States Postal Serv. v. NLRB*, 652 F.2d 409, 412 (5th Cir. 1981). To those ends, the Board looks to four factors laid out in *Atlantic Steel Co*., 245 NLRB 814 (1979): "(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." *Id*. at 816. The Board bears primary responsibility for striking the balance between the *Atlantic Steel* factors, "and its determination, unless arbitrary or unreasonable, ought not be disturbed." *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 243 (5th Cir. 1999); *cf. Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 423 (4th Cir. 1999) (striking the proper balance between the employee's protected rights and the employer's interests is a matter that falls "squarely within the specialized expertise of the Board").

Applying the four-part *Atlantic Steel* test here, the Board found, on balance, that McMillen's remarks to Lerro and Bridges on November 10 "retained the

protection of the Act despite his profane and derogatory remark about Barker." (JA 397.) The Board "adopt[ed] the judge's unchallenged findings with regard to the first two factors of the test," agreeing with the judge that the place of the discussion and the subject matter of the discussion each "weigh in favor of protection for McMillen's remarks." (JA 396.) The Board reversed the judge's finding with regard to the third factor, finding that McMillen's remark "weighs only moderately against his retaining the Act's protection." (*Id*.) The Board adopted the judge's finding that "the fourth factor weights slightly against McMillen retaining the Act's protection." (*Id*.) As we now show, the Board's conclusion that McMillen's remarks were protected is based on a reasonable balancing of the *Atlantic Steel* standards and is entitled to affirmance by the Court.

a. The Board's findings that the location and subject matter of McMillen's remark weigh in favor of their protection under the Act are not subject to challenge before the Court and, in any event, are reasonable

The Board's findings that the first two *Atlantic Steel* factors -- the location and subject matter of McMillen's remarks -- favor the Act's protection are entitled to affirmance by the Court. As a threshold matter, the Company's challenges (Br 35-38) to those findings are not before the Court because of the Company's failure to challenge them before the Board. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that "[n]o objection that has not been urged before the Board . . . shall be

considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This statutory provision represents "a jurisdictional bar to judicial review of issues not raised before the Board." *NLRB v. HQM of Bayside, LLC,* 518 F.3d 256, 262 (4th Cir. 2008) (citing *Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 665-66 (1982)). *See also* 29 C.F.R. § 102.46(b)(2) (providing that "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived").

As the Board noted (JA 396), the administrative law judge's findings that location and subject matter favored protection are "unchallenged." The Company's two exceptions to the judge's decision (JA 390-91) fail to challenge, or even mention, those findings, dealing instead with two wholly unrelated matters.[6] The Company's failure to object to these two critical *Atlantic Steel* findings is not excused by the fact that the judge's decision recommended dismissal of the allegation that McMillen's discharge was unlawful. For the judge made his dismissal recommendation solely on the basis of the third and fourth factors -- the offensive nature of McMillen's remark and the lack of unlawful company provocation. The Company ignored the judge's findings regarding the first and

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[6] One exception only challenged certain language underlying the finding that McMillen's activity was *concerted*, and another challenged certain hypothetical observations regarding the alleged "refusal of union representation" allegation that was dismissed by the judge and is not before the Court. (JA 394 n.1, JA 404 n.2.)

second factors despite the inescapable prospect that, if the Board reversed the judge on the two other factors, it would have been vulnerable to a finding of unlawful discharge. The Company's failure to object to these findings was compounded by its failure to challenge them in its answering brief to the General Counsel's brief in support of exceptions.

The Company's failure to present its arguments to the Board is not excused by the fact that the administrative law judge issued a decision favorable to the Company by dismissing the complaint on other grounds. Although an argument or issue not raised before the Board may be considered by the court of appeals under "extraordinary circumstances," 29 U.S.C. § 160(e), this Court has determined that prevailing before the administrative law judge does not satisfy that demanding statutory standard. *See NLRB v. Cast-A-Stone Prods. Co.*, 479 F.2d 396, 397-98 (4th Cir. 1973) (per curiam); *see also NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 825-27 (8th Cir. 2000); *Production Workers Union, Local 707 v. NLRB*, 161 F.3d 1047, 1054-55 (7th Cir 1998); *NLRB v. GAIU Local 13-B*, 682 F.2d 304, 311-12 (2d Cir. 1982).

In any event, the record fully supports the Board's finding (JA 396, 405) that the first two *Atlantic Steel* factors "weigh in favor of protection for McMillen's remarks." As the Board noted in discussing the "place" of the discussion, and as shown above, McMillen's single remark was made in an office away from the

working area of the pressroom, with only Supervisors Lerro and Bridges present. There is no evidence that any rank-and-file employee overheard it. (JA 394.) Thus, the remark "could not have affected workplace discipline or undermined Barker's authority." *Id*. The Company's contention therefore ignores the distinction between this type of private isolated statement away from other bargaining unit employees, and the cases it relies upon (Br 30-35, 48-49, 52-54, 57) involving in-your-face confrontations with supervisors in working areas, and additional elements such as insubordination, intimidation, and repetitive misconduct. [7]

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[7] *See Cellco Partnership, d/b/a Version Wireless*, 349 NLRB No. 62, Slip op. 3, 2007 WL 965980 *3-4 (2007) (employee repeatedly cursed supervisor on working time in working area, where likely to be heard by other employees, undermining authority and affecting workplace discipline); *Waste Management of Arizona*, 345 NLRB 1339, 1340 (2005) (employee cursed repeatedly and loudly before witnesses, refused supervisor's repeated requests to move discussion into office, made threats toward supervisor, and was terminated in part for his refusal to follow orders); *Daimler Chrysler*, 344 NLRB 312, 316-18 (2005) (employee cursed repeatedly in front of many other employees, called supervisor an "asshole" to his face, and physically approached supervisor in an intimidating manner); *Trus Joist MacMillan*, 341 NLRB 369, 372 (2004) (employee called supervisor names to his face in front of other managers, repeated his comments after being warned to stop, made sexually insulting gestures and statements to supervisor, and was terminated for insubordination); *Aluminum Co. of America*, 338 NLRB 20, 20-21 (2002) (employee's "several-minute tirade" was repeated, sustained, and very public); *Piper Realty*, 313 NLRB 1289, 1289-90 (1999) (employee's cursing directly at supervisor was heard by other employees and occurred in the course of his refusal to perform work assignment and to obey instructions to leave supervisor's office); *NLRB v. Mini Togs, Inc*., 980 F.2d 1027, 1031, 1033-34 (5th Cir. 1993) (employee's obscenities directed at other employees upset them, causing two to threaten to quit); *NLRB v. Consolidated Diesel Elec. Co*., 469 F.2d 1016, 1025 (9th

The record also supports the Board's finding (D&O 3, 12-13) that the subject matter of McMillen's discussion weighs in favor of protection. As the Board noted and as shown above, McMillen was complaining to Lerro and Bridges about the Company's bargaining tactics and positions and the letters Barker was sending to the employees expressing them. These letters had led to concerted complaints by McMillen and other employees, and McMillen's expression of his opinion to Lerro and Bridges was a continuation of that protected concerted activity. See discussion at pp. 19-25, above.

b. The Board's finding that the nature of McMillen's remark weighs only moderately against their protection under the Act is reasonable

In applying the third prong of the *Atlantic Steel* test, the Board found that McMillen's single reference to Barker as a "stupid fucking moron" "weighs only moderately against his retaining the Act's protection." (JA 396-97.) That finding is supported by the record and is neither arbitrary nor unreasonable.

Cir. 1972) (employee cursed insubordinately at supervisor in work area in the presence of other employees); *Sullaire P.T.O., Inc. v. NLRB*, 641 F.2d 500, 501 (7th Cir. 1981) (employee used vulgar language on two occasions in direct confrontation with employer official in the presence of other employees); *NLRB v. Red Top, Inc.*, 455 F.2d 721, 725-26, 728 (8th Cir. 1972) (employees were insolent, insubordinate and intimidating, threatening supervisor and pounding on his desk); *North American Refractories Co.*, 331 NLRB 1640, 1642, 1643 (2000) (employee angrily approached his supervisor and called him a "stupid mother fucker").

It is well established that the Act does not require employees to soft-pedal to management their complaints about their terms and conditions of employment. Rather, employees are generally privileged to use "accusatory language [that] is stinging and harsh," *CKS Tool & Engineering*, 332 NLRB 1578, 1586 (2000), or display a "certain amount of salty language or defiance," *American Telephone & Telegraph Co. v. NLRB*, 521 F.2d 1159, 1161 (2d Cir. 1975). Such protection is simply a reflection of the fact of industrial life that "[b]oth labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Linn v. Plant Guards Workers*, 383 U.S. 53, 58 (1966). [8] Recognizing these workplace realities and the circumstances involved in McMillen's remark, the Board reasonably found that the nature of the outburst was "intemperate," but "not so opprobrious as to cause him to lose the Act's protection."

In a number of cases, the Board has considered surrounding circumstances and held that impulsive uses of angry epithets in reference to high-ranking management officials nonetheless retained the protection of the Act. *See NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1029-30 (6th Cir. 1974) (referring to the employer's president as a "son-of-a-bitch" was not "so outrageous as to justify

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[8] As this Court has recognized, "[t]here would be nothing left of [Section] 7 rights if employees were subject to the threat of discipline every time those rights were "exercised . . . in a way that was somehow offensive to someone." *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 354 (4th Cir. 2001).

discharge"); *Stanford Hotel*, 344 NLRB 558, 558 (2005) (employee called general manager a liar and a "fucking son of a bitch" to his face); *Care Initiatives, Inc.*, 321 NLRB 144, 150, 151-53 (1996) (calling the employer a "son of a bitch" and a "dirty bastard"); *Severance Tool Industries*, 301 NLRB 1166, 1167 169-70 (1991) (calling company president a "son of a bitch").

Here, the Board carefully analyzed the circumstances surrounding McMillen's profane remark about Barker and reasonably found that, while intemperate, it weighed only moderately against retention of the Act's protection. As the Board noted (JA 396), it is significant that McMillen's statement was only *about* Barker. The insult was not directed at Barker to his face, and there were "no other confrontational aspects to it, such as physical conduct or threats."[9]

[9] These circumstances make the remark readily distinguishable from numerous cases cited by the Company. See pp. 30-33, 34 n.7, above. See also *Paramount Min. Corp. v. NLRB*, 631 F.2d 346, 347 (4th Cir. 1980) (employee directed vulgar threats at fellow employee and touched him in an intimidating way); *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511, 512 (5th Cir. 1971) (employee's shouted obscenities, vulgar hand signs, and threat of physical harm directed at fellow employee); *Foodtown Supermarkets, Inc.*, 268 NLRB 630, 631 (1984) (employee said "you son of a bitch" to company president); *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 513 (5th Cir. 1968) (employee jumped up while company president was meeting with employees and loudly accused him of being "no better than Castro"); *Lutheran Social Service of Minnesota*, 250 NLRB 35, 37, 38 (1981) (employee engaged in repeated profanity and constant complaints, "not some isolated flash of anger").

Moreover, as the Board observed, while the remark was disrespectful, "it was not insubordinate in regard to production or work assignments, nor did it serve to directly challenge Barker's managerial authority."[10]

The fact that Barker was a company vice president occupying a high-level position does not bolster the Company's contention that McMillen's remark deserves less protection. As the Board noted (JA 397), Barker was not only performing a specific role as a negotiator regarding the employee's contractual terms and conditions of employment, but also he chose to criticize the Union in letters aimed directly at the employees. In these circumstances, his criticisms "reasonably triggered a response directed at him" so that his position could not "shield him from ill-tempered rejoinders." *Id.* [11]

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[10] These factors make this case readily distinguishable from those cases cited by the Company (Br 30) that involve direct attacks on managerial authority. *See NLRB v. Soft Water Laundry, Inc.*, 346 F.2d 930, 936 (5th Cir. 1965) (employee engaged in loud and profane vituperation, attacking supervisor's authority in presence of other employees); *Farmers Co-Operative Co. v. NLRB*, 208 F.2d 298, 301 (8th Cir. 1954) (employee told company manger that "you sons of bitches can't get by with" questioning him about threats to his fellow employees). *See also* cases cited at pp. 30-34, above. And while McMillen made his remark in the presence of Lerro and Bridges, they were supervisors rather than fellow employees, and therefore members of management that McMillen was criticizing because of Barker's bargaining positions, not his authority to adhere to them.

[11] The private and isolated nature of McMillen's remark also distinguishes this case from those cited by the Company (Br 51-52, 53) involving widespread ridicule of the employer. *See Timpte, Inc. v. NLRB*, 590 F.2d 871,873 (10th Cir. 1979) (employee distribution of defamatory literature that lampoons company officers and other officials and holds them up to "ridicule and contempt"); *Maryland*

Finally, the passing and impulsive nature of McMillen's lone remark is underscored by his unsolicited contrition and attempt to explain it. As the Board noted (JA 395 n.6, 396) and as shown above (p. 10), McMillen apologized for the remark "spontaneously and at his own initiative" *before* he became aware that he was being considered for disciplinary action, and explained that he was just showing his frustration with Barker's negotiating positions.

The Company's contention (Br 44-47) that it justifiably fired McMillen on the basis of the allegedly unprecedented nature of his remark is unpersuasive. As the Board noted (JA 396 n.16), the Company's evidence "does not clearly establish how atypical his remarks were in the context of the pressroom work environment, which the evidence reflects was the locus of considerable profanity." *Id.*[12] The record includes testimony by several witnesses that cursing by employees, including McMillen, was a common practice in the pressroom, both inside and outside the presence of supervisors. (JA 403; 54, 78, 195-99, 223-25.) Indeed,

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Drydock Co. v. NLRB, 183 F.2d 538, 540 (4th Cir. 1950) (distribution of "insulting and defiant" literature that "scurrilously lampoons the officers of the company").

[12] There is no merit to the Company's contention (Br 15, 41-44) that the Board's findings regarding the history of profanity in the pressroom overturned or disregarded the credibility determinations of the administrative law judge. To the contrary, the Board did not question the credibility of the witnesses, but found that their credited testimony did not clearly establish the Company's contention that McMillen's remark was atypical. (JA 396 n.16.) As discussed above at p. 18, a judge's credibility assessments are entitled to deference by the Board, but his other inferences, findings and conclusions are not. Here, the Board properly drew differing inferences from the credited evidence.

supervisor Lerro, on one occasion, had himself called his supervisor a "fucking idiot." (JA 396 n.16, JA 403; 228-29.)

Finally, the record strongly undermines the Company's contention (Br 44-46) that McMillen's remark was unprotected because it was egregious or violated written company rules or policies. As the Board noted (JA 396 n.16), it is not evident that Lerro or Bridges perceived the remark as egregious. As shown above, neither of them responded to the remark by telling McMillen not to curse or by indicating that his remark called for discipline. Moreover, Lerro's email to company officials Kerr, Stewart, and Barker describing the remark did not recommend any disciplinary action, but routinely reported it under the broad category of "any incidents that happen." Indeed, as the Board pointed out (JA 396), at no time between McMillen's November 10 remark and his November 16 discharge was he "informed that his remark deserved any sort of official response or discipline, let alone termination."

The Company's claimed reliance (Br 44-46) on certain sections of its pressroom rules and employee handbook is misplaced. Pressroom rule 9 (JA 30) requires employees to "refrain from offensive language" on occasions when they are "in the presence of visitors," thus failing to prohibit it at other times and implicitly recognizing its prevalence in the pressroom. And while employee handbook rule "b" (JA 40) broadly prohibits "loud, profane, or indecent language

and name-calling," there is no evidence, and no contention by the Company, that any other employee has ever been discharged, or even disciplined, for violating that or any similar rule or policy.

c. The Board's finding that an absence of unlawful provocation by the Company weights only slightly against the remark's protection is reasonable

The Board found (JA 396) that the absence of unlawful company provocation of McMillen's remark weighed against its protection under the fourth prong of the *Atlantic Steel* test. The panel majority, however, reasonably found that the provocation in Barker's letters, while not unlawful, tended to "mitigate the egregiousness" of McMillen's remark to a level supporting its finding that it weighed only *slightly* against his retaining the Act's protection. As the majority noted, Barker's hints that the pressroom employees should decertify the Union may have reasonably and not unexpectedly provoked McMillen. The majority's finding that lawful provocation may be considered as a mitigating factor is neither arbitrary or unreasonable.

d. The Company's remaining contentions are without merit

The Company cites inapposite cases in which courts have upheld an employer's right to discharge employees for misconduct that is *unrelated* to any protected concerted activity. *See Chemvet Labs, Inc. v. NLRB*, 497 F.2d 445, 452 (8th Cir. 1974)(noting employer's right to discharge for cause "especially where no

concerted activity is involved"); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 752-53 (4th Cir. 1949)(employee's activity not concerted). In the instant case, by contrast, McMillen's remark was made in the context of protected concerted activity. As such it was part of the *res gestae* of his protected conduct and remained protected unless it exceeded acceptable limits. *See Beverly Health & Rehabilitative Services*, 346 NLRB No. 111, Slip op. 5, 2006 WL 1288581*5 (2006); *Anheuser-Busch, Inc. v. NLRB*, 338 F. 3d 267, 280 (4th Cir. 2003). Cases involving alleged misconduct unrelated to statutory activities have no place in the Court's review.[13]

There is also no basis for the Company's contention (Br 55-57) that the court's remand in *Felix Industries, Inc., v. NLRB*, 251 F.3d 1051 (D.C. Cir. 2001), is "persuasive authority" supporting its arguments. First, that case involved a clearly distinguishable outburst, including the kind of direct confrontation with a

[13] Equally inapposite are cases cited by the Company (Br 48, 50, 51, 52, 55) involving completely different analyses and findings requiring a showing of employer knowledge and antiunion animus in order to establish a discharge for *union* activity under Section 8(a)(3) of the Act (29 U.S.C. § 158 (a)(3)). *See Vulcan Basement Waterproofing, Inc. v. NLRB*, 219 F.3d 677, 685, 687 (7th Cir 2000); *NLRB v. Eldorado Mfg. Corp.*, 660 F.2d 1207, 1212 (7th Cir. 1981); *NLRB v. Consol. Diesel Elec. Co.*, 469 F. 2d 1016, 1019, 1021 (4th Cir 1972); *NLRB v. Garner Tool & Die Mfg., Inc.* 493 F.2d 263, 267 (8th Cir 1974). Those cases turned on the absence of employer knowledge and/or animus. These factors are not at issue here, where the Company undisputedly discharged McMillen for a remark he made, and the only issues are whether the remark was made as a part of protected concerted activity, and, if so, whether it was sufficiently egregious to strip him of the Act's protection.

supervisor and rank insubordination that characterizes the other cases relied upon by the Company, but is absent from the instant case. The employee directly confronted his supervisor by telephone, calling him a "'f---ing kid' no less than three times, and insisting that [he] need not listen to him." 251 F.3d at 239-40.

Moreover, the court's remand to the Board in *Felix* supports, rather than undermines, the Board's decision here. The court there disagreed with the Board's finding that the nature of the employee's outburst *did not weigh* in favor of his losing the Act's protection. The court therefore remanded the case to the Board to determine whether the employee's statements "weigh *enough* to tip the balance in that direction." *Id*. at 240 (emphasis supplied). In the instant case, as shown above, the Board did not find that the nature of the outburst failed to weigh in favor of loss of protection. It found that it *did* weigh in favor of that loss, but only *moderately* in light of the surrounding circumstances. (JA 396-97). Thus, the Board's "tip the balance" analysis here is precisely the kind of analysis contemplated by the court in *Felix*.

Finally, the Company errs in its reliance (Br 30, 39) on *Media General Operations, Inc., d/b/a Winston-Salem Journal v. NLRB*, 394 F.3d 207 (4th Cir. 2005) ("*Winston-Salem Journal*"). There, the employee interrupted a supervisor who was conducting a meeting with employees, loudly calling him a racist. When the supervisor later told him that his "unacceptable" behavior would get him sent

home if repeated and told him to go back to work, the employee defied his instructions, again called him a racist, and was suspended and told to go home. As he was leaving, he called the supervisor a "b_ _ _ _ _ d" and a "redneck son-of-a-b_ _ _ h." 394 F.3d at 209. The Court also found that the employee's conduct was neither "concerted activity" nor "union activity" protected by the Act, and that his words were offensive and his actions insubordinate as well. *Id*. at 211-13. Thus, *Winston-Salem Journal* differs in virtually every relevant respect from the instant case, where the single private remark, away from other employees, was not an unprotected personal public confrontation, and lacked the repetition, defiance, and insubordination that undermines the employer's authority.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

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May 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1153, **Caption:** Media General Operations, Inc. v. NLRB

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEDIA GENERAL OPERATIONS, INC., d/b/a THE TAMPA TRIBUNE	*	
Petitioner/Cross-Respondent	*	Nos. 08-1153, 08-1197
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 12-CA-24770
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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Dated at Washington, DC
this 30th day of May, 2008