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Plaza Auto Center, Inc. and Nick Aguirre. Case 28–CA–022256

May 28, 2014

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

This case is before the Board on remand from the United States Court of Appeals for the Ninth Circuit for the Board to reapply the four-factor *Atlantic Steel* test¹ for determining when an employee's outburst during protected activity costs the employee the protection of the Act. See *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286 (9th Cir. 2011). We find, for the reasons set forth below and in full consideration of the terms of the Court's remand, that employee Nick Aguirre did not lose the protection of the Act by his outburst and, accordingly, that the Respondent unlawfully discharged him for engaging in protected concerted activity.²

I. FACTS AND PROCEDURAL HISTORY

As recounted by the Court in its opinion (664 F.3d at 289–291), the Respondent sells used cars in Yuma, Arizona, and is owned by Tony Plaza (Plaza). The Respondent has two sales managers, Juan Felix (Felix) and Gustavo MacGrew (MacGrew), and an officer manager, Barbara Montenegro (Montenegro). The Respondent hired Charging Party Nick Aguirre (Aguirre) as a salesman at the end of August 2008, and fired him on October 28, 2008. During his brief tenure in the Respondent's

¹ *Atlantic Steel Co.*, 245 NLRB 814 (1979).

² On August 16, 2010, the National Labor Relations Board issued its Decision and Order in this proceeding, finding that the Respondent violated Sec. 8(a)(1) of the Act by telling employees that they could quit or leave the Respondent's employ if they did not like the Respondent's policies and/or procedures and by discharging employee Nick Aguirre for engaging in protected concerted activity. 355 NLRB 493, 496 (2010).

The Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the Ninth Circuit and the Board filed a cross-application for enforcement. On December 19, 2011, the Court issued its decision granting the Respondent's petition for review in part, enforcing the Board's Order in part, and remanding the case to the Board. 664 F.3d at 289.

By letter dated May 30, 2012, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. Thereafter, the Respondent and the Acting General Counsel filed statements of position.

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

The Board has reviewed the entire record in light of the court's remand, which constitutes the law of the case.

employ, Aguirre spoke with his fellow employees and managers about the Respondent's policies concerning breaks, restroom facilities, and compensation.

On his first day on the job, Aguirre worked at a tent sale conducted in a parking lot of a Sears store. During his shift, when Aguirre inquired about bathroom facilities, Manager Felix pointed to the Sears store and a gas station across the street. In a sales meeting the following week, Aguirre asked whether salespeople could take a break to use the bathroom and eat a meal during tent sales. Felix responded, "you're always on break buddy . . . you just wait for customers all day." Felix also told Aguirre that he was free to leave at any time if he did not like the Respondent's policies.

During the Respondent's next tent sale in mid-September, Aguirre spoke with other salespeople about the Respondent's compensation policy. They informed Aguirre that salespeople were paid a straight commission with no draw or guaranteed minimum. In other words, salespeople were not paid the minimum wage and had to rely solely on their sales commissions. Aguirre also raised the issue of a system for salespeople to alternate bathroom breaks, but when Aguirre asked Felix for a break to use the bathroom and get something to eat, Felix refused, reiterating that the salespeople were "always on a break."

At the next sales meeting, an employee other than Aguirre raised the issue of compensation. Sales Manager MacGrew responded that if employees did their jobs correctly and followed all of the procedures, they would make money. Sometime thereafter, Aguirre sold a vehicle listed on the Respondent's "flat list"—a list of vehicles that carried a special commission because they were difficult to sell. A similar vehicle was listed on the "flat list" with a commission of between \$1000 to \$2000. To Aguirre's surprise, however, he received a check for only \$150. His fellow employees agreed that it was unfair. Aguirre confronted Felix about the size of the check, but Felix responded that the commission was low because Aguirre had given the vehicle away almost for free.

At another sales meeting, Plaza informed the salespeople that he was going to deduct the repair costs for a damaged vehicle equally from all salespeople's paychecks if no one admitted responsibility. Aguirre responded that it would be unfair to charge only the salespeople instead of all employees who had access to the vehicle. Plaza then spoke about employee negativity and stated that he had a stack of applications from prospects whom the Respondent could easily hire as salespeople.

In October, at another tent sale, Aguirre asked Felix which vehicles would produce a good commission;

Aguirre thought that the Respondent was stealing money from him in calculating his commissions. Felix responded that Aguirre was welcome to go elsewhere if he did not trust the Respondent. Around the same time, Aguirre obtained information relating to the Respondent's compensation system from Arizona's wage and hour agency. Aguirre told his coworkers that the agency advised him that the salespeople were entitled to the minimum wage as a draw against commissions and that he intended to speak with the Respondent's Office Manager, Montenegro, about this issue.

On October 28, Aguirre asked Montenegro whether the Respondent's salespeople were entitled to a minimum-wage draw. Montenegro responded that the Respondent did not pay minimum wage and that Aguirre should work elsewhere if he wanted a minimum wage job. Aguirre informed Montenegro that he had spoken with the state wage agency about a draw and asked her to look into the issue, perhaps by asking Plaza.

Later that afternoon, Felix informed Plaza that Aguirre complained about everything all the time and wanted to know Respondent's vehicle costs because he did not trust the Respondent's calculation of his sales commissions. Felix then called Aguirre into Felix's office to meet with Felix, MacGrew, and Plaza. At the beginning of the meeting, Plaza had no intention of firing Aguirre. Plaza began the meeting by telling Aguirre that he was "talking a lot of negative stuff" that would negatively affect the sales force and that he was asking too many questions. Aguirre responded that he had questions about vehicle costs, commissions, and minimum wage. Plaza told Aguirre that he had to follow the Respondent's policies and procedures, that car salespeople normally do not know the dealer's cost of vehicles, and that he should not be complaining about pay. Plaza twice told Aguirre that if he did not trust the Respondent, he need not work there. At that point, Aguirre lost his temper and in a raised voice started berating Plaza, calling him a "fucking mother fucking," a "fucking crook," and an "asshole." Aguirre also told Plaza that he was stupid, nobody liked him, and everyone talked about him behind his back. During the outburst, Aguirre stood up in the small office, pushed his chair aside, and told Plaza that if Plaza fired him, Plaza would regret it. Plaza then fired Aguirre.³

³ After the Respondent discharged Plaza, the State agency contacted the Respondent concerning minimum wage requirements. According to Montenegro and Plaza, the Respondent then "corrected the issues regarding the minimum wage," and now provides its salespeople with a minimum wage draw against commission.

Following an evidentiary hearing, Administrative Law Judge Lana H. Parke issued a decision finding that the Respondent had violated Section 8(a)(1) several times by inviting Aguirre to quit in response to his protected protests of working conditions. Applying *Atlantic Steel*, however, the judge concluded that although Aguirre was otherwise engaged in protected activity during the October 28 meeting with management, he lost the protection of the Act by his "belligerent" behavior of repeatedly reviling the Respondent's owner Plaza "in obscene and personally denigrating terms accompanied by menacing conduct and language." 355 NLRB at 504 fn. 24, 506.

The Acting General Counsel filed exceptions to the judge's dismissal of the complaint allegation that the Respondent unlawfully discharged Aguirre. The Board's original decision concluded that Aguirre's conduct was not so severe as to cause him to lose his statutory protection. In reaching that conclusion, the Board⁴ found that all four *Atlantic Steel* factors, including the nature-of-the-outburst factor, weighed in favor of protection. Accordingly, the Board held that the Respondent had violated Section 8(a)(1) by discharging Aguirre. 355 NLRB at 496.

The Respondent filed a petition for review, and the Board filed a cross-application to enforce, the Board's Order in the United States Court of Appeals for the Ninth Circuit. The Court agreed with the Board that three of the four *Atlantic Steel* factors—the place of the discussion, the subject matter of the discussion, and employer provocation by unfair labor practices—supported the Board's conclusion that Aguirre's outburst did not cost him the protection of the Act. See *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d at 292–295. However, the Court concluded that the Board had "erred in its initial assessment" that the nature-of-the-outburst factor weighed in favor of protection. *Id.* at 296. After reviewing Board precedent, the Court found that Aguirre's obscene and personally denigrating remarks to Plaza, which the Court found were also insubordinate, counted against his retaining the Act's protection. *Id.* at 293–294. Accordingly, the Court found it "necessary to remand this matter to the Board to allow it to properly consider whether the nature of Aguirre's outburst caused him to forfeit [the Act's] protection." *Id.* at 294.

The Court also directed that in rebalancing the *Atlantic Steel* factors on remand, the Board should either adopt the judge's additional findings that Aguirre's behavior was "belligerent," "menacing," and "at least physically

⁴ Chairman Liebman and Member Pearce; Member Schaumber dissenting.

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aggressive if not menacing” in the small room where the outburst occurred or “reject, with a reasoned explanation,” those additional findings. *Id.* at 295. The Court found that the Board’s decision was “internally inconsistent” in its treatment of the judge’s findings regarding the October 28 outburst. *Ibid.* In particular, the Court found that while the Board stated that it was adopting the judge’s credibility and factual findings regarding the October 28 meeting, the Board actually had rejected the judge’s findings that Aguirre’s conduct was “belligerent,” “menacing,” and “at least physically aggressive if not menacing.” *Ibid.* The Court noted that the Board had also stated that it would have reached the same result even if the nature-of-the-outburst factor weighed against retention of the Act’s protection, but concluded that it could not be certain that the Board would have reached the same result if the Board had adopted the judge’s additional belligerence finding. *Ibid.*⁵

The Court’s opinion thus makes clear that before rebalancing the *Atlantic Steel* factors, we must first determine the nature of Aguirre’s outburst, namely whether it solely involved obscene and denigrating remarks that constituted insubordination, or whether it also was menacing, physically aggressive, or belligerent. After carefully reviewing the decision and record in light of the parties’ submissions and the Court’s opinion, we first conclude, as discussed below, that Aguirre did not engage in menacing, physically aggressive, or belligerent conduct. Second, after rebalancing the *Atlantic Steel* factors as directed by the Court, we conclude that Aguirre did not lose the protection of the Act, even though the nature of his outburst weighs against protection by virtue of Aguirre’s use of obscene and personally denigrating language. The remaining three *Atlantic Steel* factors compellingly favor Aguirre’s retaining protection.

II. ANALYSIS

*A. Judged Under the Applicable Legal Standard,
Aguirre’s Outburst Was Not Menacing,
Physically Aggressive, or Belligerent*

The administrative law judge found that there were two critical issues regarding what happened during the October 28 meeting. 355 NLRB at 504. The first was whether the Respondent fired Aguirre before or after his outburst. Based on her credibility determinations, the

⁵ The Court enforced the Board’s finding (355 NLRB at 496, 506) that the Respondent violated Sec. 8(a)(1) by telling employees that they could quit or leave the Respondent’s employ if they did not like the Respondent’s policies and/or procedures. See *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d at 295–296.

judge found that the outburst occurred before the discharge. *Ibid.*

The second critical issue for the judge concerned the circumstances and manner of Aguirre’s outburst. 355 NLRB at 504. The judge first found that during the course of the meeting, Aguirre used profane and derogatory language toward Plaza. *Ibid.* The judge further found that Aguirre’s behavior was “at least physically aggressive, if not menacing.” The judge explained the basis for that further finding as follows (355 NLRB at 504 fn. 24):

In finding Mr. Aguirre’s behavior to be belligerent, I rely on credited testimony that in the course of his outburst and prior to the discharge, Mr. Aguirre rose from his chair, pushed it aside and said that if he was fired, Mr. Plaza would regret it. As noted earlier, Mr. Aguirre admitted to menacing language—“You’ll get what’s coming to you”—although in a different context.

In assessing the nature of Aguirre’s conduct, we emphasize that we accept all of the judge’s credibility determinations (355 NLRB at 504 & fn. 24), in particular, that (1) Aguirre’s outburst occurred before, rather than after, the Respondent fired him; (2) Aguirre told Plaza that if he were fired, Plaza would regret it; and (3) Aguirre rose from his chair and pushed it aside in the small room where the outburst occurred.

The question remains, however, whether that conduct was menacing, physically aggressive, or belligerent. As the United States Court of Appeals for the District of Columbia Circuit has observed, settled precedent tasks the Board with “using an objective standard,” rather than a subjective standard, to determine whether challenged conduct is threatening. *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 29 fn. 2 (D.C. Cir. 2011), *enfg.* 355 NLRB 708 (2010). Accordingly, Plaza’s testimony that he feared for his safety and the safety of his employees as a result of Aguirre’s conduct is not determinative. *Id.* at 28–29 & fn. 2. And because the question of whether Aguirre engaged in menacing, physically aggressive, or belligerent conduct is judged under an objective standard, there simply is no merit to the Respondent’s suggestion that any Board determination to the contrary necessarily would amount to overturning the judge’s credibility determinations.

We believe that the Board and court decisions in *Kiewit Power Constructors* are instructive regarding the role a judge’s credibility determinations play in determining the nature of an employee’s outburst. *Kiewit* involved employee protests against their employer’s enforcement

of a “break-in-place” policy, which the employees believed required them to take their breaks in dirty and unsafe areas. 355 NLRB at 715–717. A superintendent testified that when he began distributing warning notices and told employees that they would be written up yet again if they violated the policy later the same day, employee Judd replied in an angry voice, “I’ve been out of work for a year. If I get laid off it’s going to get ugly and you better bring your boxing gloves.” *Id.* at 716–717. Employee Bond then said, “Yeah, I’ve been out of work for eight months, it’s going to get ugly.” *Id.* at 717. The superintendent also testified that he believed that both employees were physically threatening him. *Ibid.* The employer subsequently fired the two employees, claiming they had physically threatened the superintendent. *Id.* at 717–718. However, the employees denied saying anything about boxing gloves or that things would get ugly if they lost their jobs over the break issue. *Id.* at 717. Instead, according to the employees, they merely said that there would be “consequences” or “repercussions,” and that when they used those words, they merely intended to convey the notion that the union would not stand for the warnings or the employer’s break-in-place policy. *Id.* at 719.

The administrative law judge concluded in large part that the case “ultimately boil[ed] down to which of the sharply conflicting versions” of the employees’ responses to the warnings should be credited. *Id.* at 720. The judge credited the superintendent’s version both as to what was said and how he perceived the employees’ comments; found that the employees had angrily made outright threats; and, applying *Atlantic Steel*, found that the discharges were lawful. *Ibid.*

On appeal, the Board did not reverse the judge’s credibility determination that the employees had in fact made the statements attributed to them by the superintendent. Nor did the Board reverse the judge’s decision to credit the superintendent’s testimony that he felt threatened. *Id.* at 708 fn. 1, 710–711. Nevertheless, the Board found that the statements did not constitute physical threats. *Id.* at 710. The Board reasoned in part (*ibid.*):

Although intemperate, they were not unambiguous or “outright” . . . threats of physical violence. To the contrary, the employees’ prediction that things could “get ugly” reasonably could mean nothing more than that the Respondent’s continuation of the disciplinary enforcement of its break-in-place policy would engender grievances or a labor dispute. Judd’s additional remark that Watts had ‘better bring [his] boxing gloves’ is more likely to have been a figure of speech, emphasize

ing employees’ opposition to the break-in-place policy, rather than a literal invitation to engage in physical combat.

Nothing about the context of this incident suggests that the remarks portended physical confrontation. There is, for instance, no evidence that either Judd or Bond made any accompanying physical gestures or movement towards Watts. In fact, there is no evidence that they said or did anything further. Moreover, although Watts testified that he subjectively perceived the remarks to be a personal threat, he made no response to them at the time and did not even mention the incident to Steward Potter as they walked to the location of the next electrician crew.

Based on this analysis, we find that the statements by Judd and Bond were ambiguous and, in the absence of any accompanying conduct, cannot be construed as unprotected physical threats. We therefore find that this factor weighs in favor of the employees’ conduct retaining the protection of the Act.

The District of Columbia Circuit, with one judge dissenting, enforced the Board’s order. *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d at 22. The court concluded that the Board was not unreasonable in concluding that the employees’ statements were not physically threatening. *Id.* at 28. The court began by stating what it thought was obvious: no one thought that the employees were literally challenging their superintendent to a boxing match. *Ibid.* The court then pointed out that once it was acknowledged that the employees were speaking in metaphor, the meaning of the words was a matter of context and they were to be judged under an objective standard. *Id.* at 28–29 & fn. 2. Writing for the majority, Circuit Judge Griffith emphatically rejected the dissent’s suggestion that the Board had disregarded the administrative law judge’s credibility determinations in concluding that the statements did not constitute physical threats:

The dissent seems to suggest that an employer’s subjective perception of an employee’s statement is dispositive. See Dissenting Op. 34–35 (noting that “Watts testified that he felt threatened”); *id.* at 35 (describing “how the words were perceived”). On this basis, the dissent characterizes the NLRB as disregarding the ALJ’s credibility determination. *See id.* But the NLRB did no such thing. It merely held that the comments were objectively not a threat. And that is consistent with how the NLRB has read the Act in past cases. *See Shell Oil Co.*, 226 N.L.R.B. 1193, 1196 (1976) (up-

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holding ALJ finding that the subjective perception of a supervisor, although taken into account, is not dispositive on whether an employee loses the protection of the Act), *enforced*, 561 F.2d 1196 (5th Cir.1977). It was not arbitrary or capricious for the NLRB to determine whether the remarks were threatening using an objective standard rather than relying solely or primarily on the subjective perceptions of Watts.

Id. at 29 fn. 2. See also *Media General Operations, Inc. v. NLRB*, 560 F.3d 181, 185 (4th Cir. 2009) (The determination of the nature of the outburst is not properly a ‘credibility determination’ made by the ALJ[.]).

In short, determining the nature of Aguirre’s conduct requires us to make an assessment of the credited evidence under the applicable objective standard. Regrettably, we failed to make this explicit in our prior opinion.

Applying the applicable objective standard, we conclude, based on all the evidence, that Aguirre’s conduct was not menacing, physically aggressive, or belligerent. In the first place, we find that Aguirre’s statement—that if he were fired, Plaza would regret it—was not a threat of physical harm in the circumstances of this case. It is beyond peradventure that Aguirre’s “regret it” statement did not explicitly refer to physical harm in any way. Rather, that statement was ambiguous on its face. Moreover, there is no credited evidence that Aguirre had committed any violent acts, had attempted to commit any violent acts, or had threatened to commit any violent acts during his tenure with the Respondent. 355 NLRB at 495. Plaza admitted that Aguirre’s disciplinary record was spotless. Aguirre did not hit, touch, or attempt to hit or touch Plaza in any way after uttering the remarks. And, as the prior Board panel majority explained (*ibid*), “In the context of Aguirre’s recent inquiry to a State agency regarding the employees’ entitlement to a minimum wage draw against commissions, it seems clear that Aguirre was threatening legal consequences.” Indeed, the Respondent implicitly agrees that such an interpretation is reasonable because it stated in its opening brief to the Ninth Circuit that Aguirre’s filing an unfair labor practice charge with the Board constituted “[m]aking good on his threat upon his termination.” (2010 WL 6201305 *2.) See *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d at 24, 28–29 (upholding Board’s finding that employees’ statements—that “things would ‘get ugly’ if they were disciplined” and that “the supervisor had ‘better bring [his] boxing gloves’”—did not constitute threats of physical harm, but only expressed vocal resistance to a policy they thought was unfair and unsafe); *NLRB v. Southwestern Bell Telephone Co.*, 694 F.2d 974, 975–977 (5th Cir. 1982) (steward’s repeated state-

ments—that he would see supervisor fry—found to be ambiguous).

The judge concluded that Aguirre’s statement was “menacing” when Aguirre stood up, pushed his chair aside and uttered the “regret it” statement. The apparent basis for her conclusion was that Aguirre did not immediately qualify his statement by telling Plaza that he simply meant that he would contact the proper authorities to get his job back if Plaza fired him. This is evident from the judge’s analysis of Aguirre’s testimony that Plaza would get what was coming to him if Plaza did not give Aguirre his final paycheck. There the judge reasoned that the paycheck statement, if uttered, would actually be “menacing” because “Aguirre did not in any way qualify his warning” to Plaza when he uttered it. 355 NLRB at 500 & fn. 13. The judge then referenced Aguirre’s “admit[ting] to [that] menacing language” when the judge found that Aguirre’s actual statement—that if he got fired, Plaza would regret it—was menacing. 355 NLRB at 501 fn. 17, 504 & fn. 24.

The judge’s reasoning is flawed. It is often the case that an employee who utters an ambiguous statement does not contemporaneously qualify his statement. And, as shown, ambiguous employee statements that are not contemporaneously qualified do not necessarily constitute physical threats. Given that Aguirre had no history of threatening or violent behavior and had informed the Respondent’s office manager that very morning that he had contacted a State agency regarding his belief that the Respondent’s salespeople were entitled to a minimum wage draw against commission, we find, as did the prior Board panel majority (355 NLRB at 495–496), that Aguirre “was threatening legal consequences,” rather than making a threat of physical harm.

As for the judge’s finding that Aguirre rose from his chair and pushed his chair aside (355 NLRB at 504 fn. 24), we conclude that this conduct, viewed objectively, was not menacing, physically aggressive, or belligerent. As an initial matter, we conclude that in the small office where the Respondent chose to hold the meeting, it likely would have been difficult for Aguirre to stand up without pushing his chair aside.⁶ See *Alton H. Piester, LLC*, 353 NLRB 369, 369, 374 (2008) (employee’s conduct in ris-

⁶ Both Plaza and Manager MacGrew described the room where Aguirre’s outburst occurred as “really small.” Four people (Aguirre, Plaza, and Managers MacGrew and Felix) were present in that office when the outburst occurred. Felix and MacGrew rose when Aguirre rose, and Office Manager Montenegro, whose office is located next to Felix’s office and who was in her office for the entire meeting between Aguirre and Plaza, testified that she heard a shuffling of chairs (plural) just prior to the end of the meeting.

ing and taking a step towards secretary not egregious under *Atlantic Steel*, because it would have been difficult for the employee to move without approaching the secretary given the small size of the office), enfd. 591 F.3d 332, 334–335, 337 fn. 3 (4th Cir. 2010). As shown, Aguirre had no history of violent or threatening behavior. There is no evidence that Aguirre tried to hit Plaza, or even made a fist, as he rose and pushed his chair aside. And Respondent’s contemporaneous actions further undermine any claim that Aguirre’s conduct was menacing, physically aggressive, or belligerent. Although Manager Felix testified that he and Manager MacGrew rose from their chairs when Aguirre got out of his chair because they thought Aguirre was about to hit Plaza, Felix admitted that he and the other manager made no effort to restrain Aguirre. Moreover, the Respondent did not immediately remove Aguirre from its property after firing him, and Aguirre proceeded to speak with employees at the facility, asserting that he had been fired for contacting the State agency.

In fact, Plaza did not even mention Aguirre’s conduct in rising from his chair and pushing it aside (or Aguirre’s “regret it” statement), let alone characterize such conduct as menacing, physically aggressive or belligerent, in his contemporaneous written description of Aguirre’s outburst or in his subsequent position statement. Instead, both documents merely refer to Aguirre’s use of profanity. Cf. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 fn. 13 (2005) (employer’s hearing testimony that employee’s conduct was intimidating was supported by the employer’s written account of the employee’s outburst). Nor is there evidence that Respondent filed a complaint with the police about Aguirre’s conduct. Cf. *Starbucks Coffee Co.*, 354 NLRB 876, 878 (2009) (in evaluating whether employee’s misconduct cost her protection of the Act, Board notes that manager had filed a police report concerning the incident), reaffirmed and incorporated by reference, 355 NLRB 636 (2010), enfd. in relevant part, 679 F.3d 70, 82 (2d Cir. 2012). And, as the prior Board panel majority noted (355 NLRB at 496), the judge found the Respondent discharged Aguirre for his verbal attack, not for any physical conduct. Indeed, when called as a witness by Respondent’s counsel, Plaza testified he fired Aguirre “[f]or the verbal abuse he used on me,” and that he would not have fired Aguirre otherwise.

Having explained why we have rejected the judge’s conclusion that Aguirre was menacing, physically aggressive, or belligerent (664 F.3d at 295), we now turn to rebalancing the *Atlantic Steel* factors as directed by the Court.

B. Aguirre’s Outburst Did Not Cost Him the Protection of the Act

The Court’s remand specifies that we must rebalance the *Atlantic Steel* factors in light of its holding that the nature-of-the-outburst factor weighs against protection—even absent a finding of belligerence—by virtue of Aguirre’s obscene and denigrating language, which the Court found was also insubordinate. 664 F.3d at 289, 293–296. And upon further consideration, we concur with the Court’s finding, which in any event is the law of the case, that the nature-of-the-outburst factor weighs against protection. As the Court (and prior Board panel) found, Aguirre stated in a manager’s office that Plaza was a “fucking mother fucking,” a “fucking crook,” and an “asshole,” and told Plaza that he was “stupid,” nobody liked him, and everyone talked about him behind his back, after Plaza twice indicated that Aguirre could quit if he did not like the Respondent’s policies, and that Aguirre should not complain about working conditions. 664 F.3d at 294–295; 355 NLRB at 494–495 fns. 8 & 9. We find that Aguirre’s obscene and denigrating remarks must be given considerable weight because Aguirre targeted Plaza personally, uttered his obscene and insulting remarks during a face-to-face meeting with Plaza, and used profanity repeatedly. Moreover, there is evidence that Respondent did not tolerate employees cursing at management (though we note that there is also evidence that Manager Felix had used obscene language when dealing with employees). Cf. *Wal-Mart Stores, Inc.*, 341 NLRB 796, 807–808 (2004) (employee retained the protection of Act notwithstanding his use of profanity where employee used the profanity to describe the employer’s policy and its effects rather than to describe a member of management), enfd. 137 Fed.Appx. 360 (D.C. Cir. 2005); *Tampa Tribune*, 351 NLRB 1324, 1326 (2007) (intemperate language—referring to vice president as a “stupid fucking moron”—weighs “only moderately” against protection in part because employee did not insult official to his face), enforcement denied, 560 F.3d 181 (4th Cir. 2009); *DaimlerChrysler Corp.*, supra, 344 NLRB at 1329 (although outburst was fairly brief, employee uttered profanity more than once, and although profanity was common at the plant, there is no evidence that profanity was commonly targeted at management).

However, the fact that the nature-of-the-outburst factor weighs against protection does not require us to find that Aguirre lost the protection of the Act. Thus, “[i]t is possible for an employee to have an outburst weigh against him yet still retain [the Act’s] protection because the other three [*Atlantic Steel*] factors weigh heavily in his favor.” *Kiewit Power Constructors Co. v. NLRB*, 652

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F.3d at 27 fn. 1. Accord *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001) (Board “is correct” in observing that it may deem conduct protected as a result of its overall balancing of the four factors even if the nature-of-the-outburst factor weighs against protection). Indeed, the Court has remanded this case for us to rebalance the factors in light of its holding that the third *Atlantic Steel* factor weighs against protection, rather than simply outright denying enforcement of the Board’s order.⁷ Our task is to “carefully balance” the factors to determine whether in the particular circumstances present, Aguirre’s outburst caused him to lose the protection of the Act. *Atlantic Steel Co.*, supra, 245 NLRB at 816. This in turn requires consideration of the policies underlying the *Atlantic Steel* factors.

The *Atlantic Steel* balancing test presupposes that “not every impropriety committed during [otherwise protected] activity places the employee beyond the protective shield of the [A]ct.” *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). This is so because “[t]he protections [that] Section 7 affords would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses” (*Consumers Power Co.*, 282 NLRB 130, 132 (1986)), and that the language of the workplace “‘is not the language of ‘polite society.’” *Stanford Hotel*, 344 NLRB 558, 564 (2005) (citation omitted). Thus, the employee’s right to engage in concerted activity permits “some leeway for impulsive behavior.” *NLRB v. Thor Power Tool Co.*, 351 F.2d at 587. Still, the right to engage in concerted activity is not absolute and must be balanced against the employer’s need to maintain order and respect in its establishment. See *Thor Power Tool Co.*, 148 NLRB 1379, 1389 (1964), enf’d, 351 F.2d 584, 587; *Caterpillar, Inc.* 322 NLRB 674, 677 (1996).

Rebalancing the *Atlantic Steel* factors with the relevant policies in mind, we conclude that Aguirre did not lose the protection of the Act even though he used obscene and denigrating language. Careful consideration of the four factors reveals that the three factors weighing in favor of protection outweigh the one factor weighing against protection. Initially, it bears noting, as the Court recognized (664 F.3d at 293), that the subject matter of the meeting (factor two of *Atlantic Steel*) during which the outburst occurred favors Aguirre’s retaining the Act’s

protection: the subject matter concerned Aguirre’s concerted complaints relating to terms and conditions of employment, including the Respondent’s compensation policies governing its salespeople. Thus, holding that the outburst did not cost Aguirre the protection of the Act serves the Act’s goal of protecting the exercise of Section 7 rights.

Moreover, we find that the first *Atlantic Steel* factor—the place of the discussion—weighs heavily in favor of protection here. As the Board’s discussion in *Atlantic Steel* makes clear,⁸ the location where the outburst occurs is very significant in balancing the employee’s right to engage in Section 7 activity “against the employer’s right to maintain order and discipline” in its establishment. *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d at 292. An employer’s interest in maintaining order and discipline in his establishment is affected less by a private outburst in a manager’s office away from other employees than an outburst on the work floor witnessed by other employees. Accordingly, we have “regularly observed a distinction between outbursts under circumstances where there was little if any risk that other employees heard the obscenities and those where that risk was high.” *NLRB v. Starbucks Corp.*, 679 F.3d at 79. Accord *Media General Operations, Inc. v. NLRB*, 560 F.3d at 187 (“In balancing the *Atlantic Steel* factors, the Board has in general found that remarks made in private are less disruptive to workplace discipline than those that occur in front of fellow employees.”).

We conclude that affording the Act’s protection to Aguirre here serves the Act’s goal of protecting Section 7 rights without unduly impairing the Respondent’s interest in maintaining order and discipline in its establishment because the outburst was not witnessed by, and was not likely to be witnessed by, other employees. Thus, Aguirre’s outburst occurred in a closed-door meeting in a manager’s office away from the workplace; the Respondent chose the location of meeting in the manager’s office where the outburst occurred; and no employee overheard Aguirre’s obscene and denigrating remarks to the owner.⁹

We also conclude that affording the Act’s protection to Aguirre will further the Act’s goal of protecting Section 7 rights without unduly impairing the Respondent’s legitimate interest in maintaining workplace discipline and order for the additional reason that the Respondent pro-

⁷ In view of the foregoing, we reject the Respondent’s contention that the law of the case doctrine compels the Board to find that Aguirre lost the protection of the Act.

⁸ *Atlantic Steel Co.*, supra, at 816.

⁹ The Court rejected (664 F.3d at 292–293) the Respondent’s argument that Aguirre requested the meeting in order to humiliate the owner in front of other managers, and that the place of the discussion therefore should weigh against protection.

voked Aguirre's outburst. Accordingly, we find that the fourth factor weighs heavily in favor of protection here, because the Respondent engaged in extremely provocative acts notwithstanding that the Respondent did not curse at Aguirre. As the prior Board panel majority noted (355 NLRB at 494), at least twice during the meeting at which the outburst occurred, Plaza indicated that Aguirre did not need to work for the Respondent if Aguirre did not care for the Respondent's policies. Telling an employee who is engaged in protected concerted activity that he may quit if he does not like the employer's policies is an implied threat of discharge, because it suggests that continuing to engage in such protected activity is incompatible with continued employment. See e.g., *Alton H. Piester, LLC v. NLRB*, 591 F.3d at 336 (The Board has often found employers' statements to be unlawfully coercive when they have invited employees to quit their jobs in response to employees' Section 7 conduct.); *McDaniel Ford, Inc.*, 322 NLRB 956, 962 (1997) ("[A]n employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that . . . engaging in . . . concerted activities and their continued employment are not compatible, and implicitly threaten[s] discharge of the employees involved.")¹⁰ And a discharge is "the industrial equivalent of capital punishment." *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1209 (7th Cir. 1987) (citation omitted).

In addition to twice stating that Aguirre did not need to work for the Respondent if he did not like the Respondent's policies, Plaza also refused to deal with the substance of Aguirre's complaints about working conditions.¹¹ Indeed, Plaza "admitted telling Aguirre at the meeting that he should not complain about the Respondent's pay structure,"¹² and thereby reiterated its hostility to Aguirre's exercise of his Section 7 rights. Plaza's repeated suggestions that Aguirre quit and the Respondent's refusal to engage on the merits invited a strong response: Aguirre had told the Respondent's office manager that very morning that he had contacted a State

¹⁰ We note that the Court found "well supported" the prior Board panel majority's conclusion that the fourth *Atlantic Steel* factor favored protection because Aguirre's outburst "was contemporaneous with both Plaza's censure of Aguirre's protected activities as 'a lot of negative stuff' and Plaza's unfair labor practice of suggesting that Aguirre could work elsewhere if he did not like the company's policies." 664 F.3d at 295. We reaffirm the prior Board panel majority's conclusion (355 NLRB at 495 fn. 9) that the judge erred in concluding that Aguirre's outburst occurred "[w]ithout extreme provocation from overt hostility or antagonism from [Plaza]."

¹¹ 355 NLRB at 494, 495, 496 fn. 12.

¹² 355 NLRB at 495 fn. 8.

agency about the Respondent's refusal to provide a minimum wage draw against commissions and had asked her to look into the matter, perhaps by speaking to Plaza about it. Board precedent makes clear that outbursts are more likely to be protected when the employer expresses hostility to the employee's very act of complaining than when the employer has indicated a willingness to engage on the merits. Compare *Felix Industries, Inc.*, 339 NLRB 195, 196–197 (2003) (finding it relevant that employer did not merely reject employee's request for contract payments, but expressed astonishment and anger that employee was even making an issue of the matter, and thereby expressed hostility towards employee's choice to exercise his Section 7 rights), adopted by 2004 WL 1498151 (D.C. Cir. 2004) and *Overnite Transportation Co.*, 343 NLRB 1431, 1437 (2004) (it was only after supervisor had refused to discuss the matter that steward brought up the subject of whether supervisor had committed wartime atrocities) to *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 15, 18 (2013) (employee's profane outburst weighs against protection in part because employee had previously been made aware that the problem he was complaining about would likely be resolved in a few days).

Moreover, the facts in this case persuade us that Aguirre's outburst would not have occurred but for the Respondent's provocation, which included threats of discharge. Thus, as the Court noted,¹³ Aguirre's outburst occurred contemporaneously with Plaza's twice suggesting that Aguirre could quit if he did not like the Respondent's policies, Plaza's censure of Aguirre's protected activities as a lot of negative stuff, and Plaza's telling Aguirre that he should not complain about Respondent's pay structure, all of which made clear that he would not engage in the merits of Aguirre's complaints. Further, there is no evidence that Aguirre had ever engaged in any even remotely similar misconduct during his tenure in the Respondent's employ, and, as the Court concluded,¹⁴ there is no evidence that the outburst was premeditated. Indeed, Plaza initially admitted at the hearing that he did not think that Aguirre wanted to meet with him on October 28 so that Aguirre could curse at him. See *Felix Industries, Inc.*, 339 NLRB at 196–197 (absence of prior similar misconduct coupled with timing of outburst supports conclusion that outburst would not have occurred but for supervisor's expression of hostility towards employee's protected conduct).¹⁵

¹³ 664 F.3d at 295.

¹⁴ 664 F.3d at 292–293.

¹⁵ Our dissenting colleague faults us for concluding that the first and fourth *Atlantic Steel* factors weigh "heavily" in favor of protection here.

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In sum, we find that the three factors weighing in favor of protection outweigh the one factor against protection, and that this conclusion strikes a proper balance between an employee's right to engage in Section 7 activity and an employer's right to maintain order and discipline in its establishment in the particular circumstances of this case. Holding that Aguirre retained the protection of the Act despite his outburst protects his right to engage in Section 7 activity without unduly impairing the Respondent's legitimate interest in maintaining order and discipline in its workplace. The outburst occurred during a discussion of key working conditions (wages) in a manager's office outside the presence of other statutory employees, and was a spontaneous reaction to the Respondent's serious, unlawful provocations by an employee who had never previously engaged in similar misconduct. See, e.g., *Stanford Hotel*, 344 NLRB at 558–559 (employee did not lose Act's protection by calling general manager "a liar" and "a bitch," and angrily pointing a finger at him and then repeating that he was a "fucking son of a bitch;" outburst occurred in context of employee's asserting a fundamental right, was a direct and temporally immediate reaction to employer's threats of discharge, and occurred in a relatively secluded room away from the employee's normal work area); *Felix Industries, Inc.*, supra, 339 NLRB at 195–197 (employee did not lose Act's protection by insubordinately referring to supervisor as a "fucking kid" three times in a telephone call in which employee asserted his contract rights where surrounding circumstances make clear that outburst would not have occurred but for employer's serious provocation, including a threat of termination for engaging in protected activity); *Caterpillar, Inc.*, 322 NLRB at 676–677 (employee, who was a union representative, did not lose Act's protection by calling supervisor a "mother-fucking liar," gesturing at supervisor with his finger and saying, "You motherfucker. I'll deal with you on the outside," where outburst was a spontaneous and impulsive reaction to supervisor's falsely denying during a grievance meeting that he had threatened to discharge the employee, and where employee had no history of violence).¹⁶

But the Court's remand requires us to rebalance the *Atlantic Steel* factors which the dissent concedes are not to be evaluated on a purely numerical basis

¹⁶ Contrary to our dissenting colleague's suggestion, we by no means hold that the Act mandates tolerance of profane outbursts whenever they are somehow connected to protected concerted activity. For example, this would have been a much different case had Aguirre's outburst occurred on the work floor in the presence of statutory employees and had it not occurred contemporaneously with and been provoked by Respondent's serious unfair labor practices.

The cases cited by the Respondent in its position statement following the Court's remand do not compel a different result. For example, in *Carleton College v. NLRB*, 230 F.3d 1075, 1077, 1081 (8th Cir. 2000), the court found that the employee, a college professor, was unfit for further service because he was unwilling to commit to acting in a professional manner. Moreover, the court found there that the employee's behavior was not unlawfully provoked and that the place of the discussion—a private meeting with a dean in the rarefied air of a university setting—did not weigh in favor of protection. In *Media General Operations, Inc. v. NLRB*, supra, 560 F.3d 181, the court found that an employee's outburst cost the employee the Act's protection, emphasizing that the outburst could not be found to be provoked where the employer had not committed any unfair labor practices (the employee had not even read the employer's lawful newsletter concerning collective-bargaining negotiations which the General Counsel claimed had prompted the outburst) and the outburst was not impulsive. *Id.* at 187–189. In *DaimlerChrysler Corp.*, supra, 344 NLRB 1324, three of the *Atlantic Steel* factors did not weigh strongly in favor of protection as they do here. Thus, a Board majority found there that the employee's profanity, involving more than a single spontaneous outburst, cost him the protection of the Act because the outburst occurred in front of other employees, thereby heavily implicating the employer's interest in maintaining discipline, and because the outburst was not provoked by employer unfair labor practices. *Id.* at 1329–1330. Similarly, in *Trus Joist MacMillan*, 341 NLRB 369 (2004), a Board majority found that an employee's outburst cost him the protection of the Act where only one factor favored protection. The Board majority emphasized that the employer's unlawful acts occurred 3 days prior to the employee's outburst and that the employee had planned to embarrass the assistant plant manager in front of others, thereby undermining his future effectiveness. *Id.* at 370–372. Here, conversely, three factors strongly weigh in favor of retaining the Act's protection, and Aguirre's outburst was a spontaneous reaction to the Respondent's highly provocative and unlawful statements.

C. Contrary to Our Dissenting Colleague, We Have Not Failed To Apply the Law of the Case

Our dissenting colleague claims that we have failed to abide by the law of the case. In his view, the judge's finding that Aguirre's conduct was menacing, physically aggressive, or belligerent was a pure credibility finding, which the Board's decision in *Standard Dry Wall Products* precludes us from reversing unless a clear prepon-

derance of the evidence convinces us that it is incorrect. In support of his contention, our colleague relies on the Court's statement (664 F.3d at 296) that "the Board should give full effect to the ALJ's factual and credibility findings, including the finding that Aguirre's behavior was menacing or at least physically aggressive in that small room, unless 'the clear preponderance of *all* the relevant evidence convinces' the Board that they are incorrect. *Standard Dry Wall Products*, 91 N.L.R.B. 544, 545 (1950), *enfd.* by 188 F.2d 362 (3d Cir. 1951)." (Emphasis in original.)

We disagree with our colleague. *Standard Dry Wall Products* and settled Ninth Circuit precedent make clear that while the "clear preponderance of the evidence" standard governs Board review of an administrative law judge's *credibility* determinations, that standard does not apply to a judge's factual findings or the judge's derivative inferences or legal conclusions. Instead, *Standard Dry Wall Products* holds that the Board is to "base [its] findings as to the facts upon a *de novo* review of the entire record[.]" *Standard Dry Wall Products, Inc.*, 91 NLRB at 545. And the Ninth Circuit has long recognized that the Board is free to draw different derivative inferences and conclusions from the evidence than did the administrative law judge. See *NLRB v. Tischler*, 615 F.2d 509, 511 (9th Cir. 1980); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078–1079 (9th Cir. 1977) (noting that deference is owed to the Board's derivative inferences and ultimate conclusions from the evidence, where the Board does not disturb judge's demeanor-based credibility determinations). Yet, under the dissent's strictly literal interpretation of the Court's statement that "the Board should give full effect to the ALJ's *factual and* credibility findings . . . unless 'the clear preponderance of all the relevant evidence convinces' the Board that *they* are incorrect." (664 F.3d at 296) (emphasis added and deleted in part and citation omitted), the Board would be obligated to adopt the judge's factual findings (in addition to the judge's credibility determinations) unless a clear preponderance of the evidence convinces us that they are incorrect.

Moreover, contrary to the dissent's claim, that single sentence cannot be read literally and in isolation from the rest of the Court's decision. In focusing solely on that single sentence, our dissenting colleague ignores that elsewhere in its opinion, the Court charged the Board with providing a *reasoned* explanation for rejecting the judge's belligerence finding, which we have now done.¹⁷

¹⁷ See *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d at 295 (Accordingly, we remand this case to the Board to re-balance the *Atlantic Steel*

That "reasoned explanation" formulation used by the Court to describe the Board's task on remand fully comports with applicable law and with rest of the Court's opinion because it accounts for the possibility that the Board could accept the administrative law judge's credibility determinations yet still reject the judge's ultimate belligerence finding.

Indeed, the Court's statement—that the judge's belligerence finding was "essentially a credibility finding" (Id. at 295)—is properly understood as reflecting the fact that, as footnote 24 of the judge's decision makes clear, the judge would not have found that Aguirre engaged in menacing, physically aggressive, or belligerent conduct before his discharge if the judge had not made the three credibility determinations set forth above: namely (1) that Aguirre's outburst occurred before, rather than after, the Respondent fired him; (2) that Aguirre told Plaza that if he were fired, Plaza would regret it; and (3) that Plaza rose from his chair and pushed it aside in the small room where the outburst occurred. 355 NLRB at 504 & fn. 24.

We readily agree that *Standard Dry Wall Products* would have precluded us from reversing those three credibility determinations unless a clear preponderance of the evidence had convinced us that they were incorrect. But those credibility determinations, which we have accepted, do not automatically require a finding that Aguirre's outburst was menacing, physically aggressive, or belligerent any more than did the administrative law judge's credibility determinations in *Kiewit Power* automatically require a finding that employees Judd and Bond were physically threatening their superintendent when they angrily said that things would get ugly and that the superintendent had better bring his boxing gloves. This is so because the determination of whether credited conduct is menacing, physically aggressive, or belligerent is not a pure credibility determination. Rather, that determination requires an assessment of the credited conduct under the applicable "objective standard." And, for the reasons set forth above, we believe that when judged in context under the applicable objective standard, Aguirre's outburst was not menacing, physically aggressive, or belligerent.

In sum, we do not read the Court's opinion as precluding us from rejecting, with a reasoned explanation, the judge's belligerence finding, particularly when language in the Court's opinion discussing its remand permits us

factors as discussed in this opinion. In doing so, the Board should either (1) reject, with a reasoned explanation, the administrative law judge's credibility and factual findings regarding the October 28 meeting, or (2) adopt those findings in their entirety, including the finding regarding belligerence.)

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to do that very thing and when the only sentence relied on by our colleague is interpreted by him in isolation and in a manner contrary to well-settled law. See *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1404–1405 (9th Cir. 1993) (based on a “thorough reading of [appellate court’s prior] decision as a whole” as well as preexisting case law, appellate court rejects claim that district court had no choice but to order an accounting pursuant to a remand that had instructed the district court to “order an accounting” and to award damages and other relief as appropriate), cert. denied, 510 U.S. 815 (1993).

Accordingly, having concluded that Aguirre’s outburst did not cost him the protection of the Act, we reaffirm our prior finding that the Respondent violated Section 8(a)(1) by discharging Aguirre.

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(1) by discharging employee Nick Aguirre because he engaged in protected concerted activity, we shall order the Respondent to offer Aguirre immediate 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 and privileges previously enjoyed. We shall also order the Respondent to make Aguirre 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 for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, the Respondent shall compensate Aguirre for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. The Respondent shall also be required to expunge from its files any and all references to the discharge, and to notify Aguirre in writing that this has been done and that the discharge will not be used against him in any way. The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). Finally, we shall substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Plaza Auto Center, Inc., Yuma, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) 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 Nick Aguirre 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 Nick Aguirre whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the Amended Remedy section of this Supplemental Decision.

(c) Compensate Nick Aguirre for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Aguirre, it will be allocated to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the loss of employment 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 Yuma, Arizona facility copies of the attached notice marked “Appendix.”¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 28, 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

¹⁸ 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.”

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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 October 28, 2008.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 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. May 27, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting.

Today my colleagues find a clearly justified employee discharge to be unlawful. In so finding, they reverse critical credibility findings in contravention of *Standard Dry Wall*¹ and they fail to apply the law of the case set by the United States Court of Appeals for the Ninth Circuit in its opinion remanding this matter to us.² This alone would merit a vigorous dissent. Even if we were considering the discharge issue de novo, however, my colleagues' analysis of the permissible range of profane and insubordinate conduct by employees toward management is cause for disagreement. Their approach implies that such misbehavior is normative, or at least that the Act mandates tolerance of it whenever profane and menacing outbursts are somehow connected to protected concerted activity. I disagree. By this standard, employees like Nick Aguirre will be permitted to curse, denigrate, and defy their managers with impunity during the course of otherwise protected activity, provided that they do so in front of a relatively small audience, can point to some

¹ 91 NLRB 544, 545 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

² *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286, 294 (9th Cir. 2011).

provocation, and do not make overt physical threats. In my view, few, if any, employers would countenance such behavior in the absence of protected activity. I do not believe they must act so differently when the confrontation involves protected activity. Indeed, the abnegation of the Respondent's right to discharge Aguirre in the circumstances of this case runs counter to the overarching policies of promoting industrial peace and labor relations stability under our Act and impedes effective enforcement of other employment laws. I would therefore affirm the judge's finding that employee Aguirre's conduct at the October 28, 2008 meeting with his managers lost the Act's protection.

I. Background

In the first few weeks of employment with the Respondent, car salesman Nick Aguirre frequently spoke with coworkers and supervisors about working conditions and compensation. Aguirre was convinced (and was ultimately justified) that his commission and payment structure did not comport with state law requirements. On October 28, 2008, he asked Office Manager Barbara Montenegro why salespeople on commission did not receive a minimum wage. Later that same day, Manager Juan Felix informed the dealership's Owner, Tony Plaza, that Aguirre always complained about everything and inquired about the Respondent's vehicle costs because he did not trust the Respondent's calculation of his sales commissions. Felix then called Aguirre into Felix's office to meet with Felix, Manager Gustavo MacGrew, and Plaza. At the beginning of this meeting, Plaza had no intention of firing Aguirre. Plaza told Aguirre that he was "talking a lot of negative stuff" that would decrease the morale of the sales force and he was asking too many questions. Aguirre responded that he had questions about vehicle costs, commissions, and minimum wage. He also asked repeatedly whether Plaza was firing him, to which Plaza responded in the negative. Plaza told Aguirre that he had to follow the company's policies and procedures, that automobile salespeople normally do not know the dealer's vehicle costs, and that he should not be complaining about pay. Plaza twice told Aguirre that if he did not trust the company, he need not work there.

Aguirre became angry. In a raised voice, he berated Plaza and cursed him multiple times, calling him a "fucking mother fucking [sic]," a "fucking crook," and an "asshole." Aguirre also told Plaza that he was stupid, nobody liked him, and everyone talked about him behind his back. During the outburst, Aguirre stood up, pushed his chair aside, and told Plaza that he would "regret it" if he fired Aguirre. After this outburst, Plaza fired him.

II. THE COURT'S REMAND SUPPLIES
THE LAW OF THE CASE

The issues are narrowly drawn at this stage of litigation, more narrowly than my colleagues suppose them to be. It is undisputed that Aguirre was engaged in protected concerted activity when voicing his complaints, that the analysis of whether he lost the Act's protection by misconduct at the October 28 meeting is governed by the Board's four-factor test in *Atlantic Steel Co.*, 245 NLRB 814 (1979), and that evidence relevant to three of those factors—place of discussion, subject matter of discussion, and provocation by unfair labor practices—weighs in favor of finding that Aguirre retained the Act's protection. What remains in dispute is whether the nature of Aguirre's outburst weighed against protection to such degree making his discharge lawful. It is to this point that the Ninth Circuit's opinion and remand instructions are controlling.

In addressing the nature-of-outburst factor in the Board's initial decision, a panel majority reversed the judge's express findings that Aguirre's behavior in cursing and derogating Plaza was “belligerent,” “menacing,” or “at least physically aggressive if not menacing.” Although summarily rejecting the General Counsel's exceptions to the judge's credibility resolutions,³ the majority nevertheless rejected the judge's descriptive terms as “unexplained and unsupported characterizations.”⁴ Then, stating that “Aguirre's outburst, while vehement and profane, was brief and unaccompanied by insubordination, physical contact, threatening gestures, or threat of physical harm,” the majority concluded the nature of his outburst did not exceed permissible bounds and that this *Atlantic Steel* factor, as well as the other three, weighed in favor of finding Aguirre's conduct protected.⁵

On review, the Ninth Circuit expressly and specifically disagreed with the foregoing analysis. First, the court rejected the Board's view that Aguirre's personal denigration of Plaza with obscene and insulting language weighed in favor of protection, holding instead that the nature of this outburst counts against Aguirre's retaining protection.⁶ Next, the court considered the Board's alternative argument that Aguirre retained the Act's protection under the *Atlantic Steel* test even if the nature-of-outburst factor weighed against protection.⁷ In this respect, the court found the Board's reasoning was “internally inconsistent.” 664 F.3d at 295. It rejected the

Board's distinction between the judge's factual “findings” and her “characterizations” of the evidence, concluding that the Board actually had *disregarded* her factual findings. In particular, the court determined that the judge's findings that Aguirre's conduct was “belligerent,” “menacing,” or “at least physically aggressive, if not menacing” were “essentially a credibility finding: the only evidence regarding the nature of the outburst was the competing testimony of Aguirre and [the Respondent's] witnesses. The administrative law judge expressly determined that Aguirre's testimony was incongruous and ‘not as believable’ as the [Respondent's] witnesses' testimony, and she did not credit Aguirre's account of the October 28 meeting where it conflicted with the accounts of the three [Respondent] supervisors. Thus, it was precisely because the administrative law judge gave more credence to the testimony of the [Respondent's] witnesses that she found the outburst was physically aggressive and menacing.” *Id.* Also relying on the judge's credibility-based findings as to what transpired at this meeting, the court noted that Aguirre had directed obscene insults at Plaza during an exchange that was not brief, and, in the court's own view “was, in fact, insubordination.”⁸

Uncertain whether the Board's inconsistent logic had influenced the Board's alternative holding that Aguirre retained statutory protection even if the nature of his outburst weighed against retention, the court concluded with the following specific remand instructions:

For the foregoing reasons, we remand to the Board for proper balancing of the *Atlantic Steel* factors in light of our conclusion that the Board erred in its initial assessment that the nature of Aguirre's outburst weighs in favor of protection. As we have explained, under the Board's own precedents, obscene, degrading, and insubordinate comments may weigh in favor of lost protection even absent a threat of physical harm. In addition, the Board should give *full effect* to the ALJ's factual and credibility findings, including the finding that Aguirre's behavior was menacing or at least physically aggressive in that small room, unless “the clear preponderance of *all* the relevant evidence convinces” the Board that they are incorrect. *Standard Dry Wall Prods.*, 91 N.L.R.B. 544, 545 (1950), *enforced by* 188 F.2d 362 (3d Cir.1951).⁹

³ *Plaza Auto Center, Inc.*, 355 NLRB 493, 493 fn. 1 (2010).

⁴ *Id.* at 495 fn. 7.

⁵ *Id.* at 496.

⁶ *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d at 294 (9th Cir. 2011).

⁷ 355 NLRB at 496 fn. 12.

⁸ *Id.* at 293. The court thereby disagreed with the Board's statement that Aguirre's outburst was “unaccompanied by insubordination.” 355 NLRB at 496.

⁹ *Id.* at 296 (italics for emphasis and in original).

III. THE MAJORITY FAILS TO APPLY
THE LAW OF THE CASE

Having accepted the court's remand, we must observe its opinion as the law of the case, especially in regard to our error in assuming the nature-of-outburst factor favors protection and our failure to give full effect to the judge's factual findings. The majority does not do so. The court has made clear its view that the (1) the administrative law judge's factual finding that Aguirre engaged in physically aggressive, menacing, or belligerent behavior is a credibility finding, not a separable characterization of credited evidence, and (2) that finding can be rejected only on the basis of the *Standard Dry Wall* clear preponderance-of-the-evidence test. Yet my colleagues make no attempt whatsoever to rationalize their reversal of the judge on this basis. They do not and cannot refer to record evidence that preponderates in favor of finding Aguirre's conduct was somehow more benign than the judge found it to be. Instead, they claim not to be reversing the judge at all, artificially separating her actual credibility findings from an "objective" assessment of the nature of the conduct so found. This is precisely the false dichotomy between the judge's "factual findings" and "characterizations" of the evidence made in the Board's original decision that *was expressly rejected by the court*. However, the majority goes further afield this time around in its "objective" attempts to refute the finding that Aguirre was belligerent.¹⁰ In sum, the majority here has failed to apply the law of the case on a critical point by failing to give full effect to the judge's credibility-based findings that cannot be reversed under *Standard Dry Wall*.

Having failed to affirm the judge's complete credibility findings, my colleagues never actually address the alternative issue presented by the court in its remand instructions. They consider only whether Aguirre's "obscene and denigrating" conduct weighs against retention of the Act's protection under the third *Atlantic Steel* fac-

¹⁰ If relevant to the credibility determination that the court directed us to make, I would speak at some length about my colleagues' dubious determination that no reasonable person would view as belligerent the conduct of an angry man who, in the course of loudly spewing invective at his employer, rises from his chair and states that if he is fired the employer would regret it. I find imaginative, but unpersuasive, the speculation that Aguirre was not "objectively" belligerent because he had no history of violence, he did not hit anybody, he had to push his chair back in order to stand in a small room, no manager sought to restrain him, and everyone present during the incident must have understood that his "regret" statement referred only to legal action.

tor.¹¹ Concluding that it did, they nevertheless find that the evidence for the three other factors weighs in favor of continued protection. Indeed, they rebalance the original Board majority's weighting of those factors by stating that the place-of-discussion and provocation factors now weigh "heavily" in favor of protection. Consequently, they conclude that Aguirre's outburst did not cost him the Act's protection and that the Respondent violated Section 8(a)(1) of the Act by discharging him.

Absent grounds for reversing the judge's credibility findings, the rebalancing analysis that the majority *should* have made, as required by the court, was whether Aguirre lost the Act's protection under *Atlantic Steel* because the nature of his outburst was obscene *and* belligerent *and* insubordinate *and* not brief. Contrary to my colleagues, the court's opinion and remand instructions to rebalance the *Atlantic Steel* factors do not grant latitude to now somehow discover and assign *additional* weight to factors one and four than was originally assigned by the Board in findings affirmed by the court.

My colleagues fail to reconcile their embellishment of the initial Board majority's conclusions as to the weight assigned *Atlantic Steel* factor one with precedent that does not find this factor "heavily" favors protection in a similar private office setting. See, *The Tampa Tribune*, 351 NLRB 1324, 1335 (2007), enforcement denied on other grounds, 560 F.3d 181 (2009). Further, the majority's approach in now reweighing "heavily" both factors one and four is essentially anachronistic, implicitly assuming that the same events frozen in the past and by the law of the case can now illogically grow more significant and persuasive through reimagination.

To repeat, the court directed us to engage in "a proper balancing" in light of its conclusion "that the Board erred in its initial assessment that the nature of Aguirre's outburst weighs in favor of protection."¹² It did not permit our "heavily" reweighing of other factors to then offset this error.

Engaging in the more limited rebalancing directed by the court, I reach the same conclusion that the administrative law judge did based on the same factual findings that should now apply from the initial phase of this proceeding. The nature of Aguirre's outburst was so egregious as to outweigh the other *Atlantic Steel* factors and cause him to forfeit the Act's protection. The final outcome of the *Atlantic Steel* balancing test is not "determined simply by counting the number of factors favoring

¹¹ The majority acknowledges the court's finding that Aguirre's conduct was "insubordinate," but makes no further mention of this in the analysis.

¹² *Plaza Auto Center, Inc.*, 664 F.3d at 296.

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and disfavoring protection.” *The Tampa Tribune*, supra at 1327 fn. 19. The Board has found that the nature-of-the-outburst factor alone may carry enough weight to cause forfeiture of the Act’s protection. *Trus Joist MacMillan*, 341 NLRB at 371–372. We should assign it determinative weight in the extreme circumstances of this case.

IV. EVEN UNDER THE MAJORITY’S FACTS AGUIRRE’S CONDUCT LOST THE ACT’S PROTECTION

Although not germane to the proper analysis of the issues remanded, I feel obliged to dissent further from my colleagues’ conclusion that Aguirre’s conduct remained protected even under the facts as they find them. They accept, as they must, the court’s finding that the nature of Aguirre’s outburst weighed against statutory protection. Further, they purport to give this factor “considerable weight” because the outburst was an obscene and denigrating, face-to-face, *ad hominem* attack against a senior manager and business owner in a workplace where such conduct had previously resulted in an employee’s firing by the owner. Nevertheless, they find that the three other *Atlantic Steel* factors favoring retention of protection weighed more in the balance, resulting in the conclusion that Aguirre’s discharge was unlawful.

Notwithstanding the descriptive terms used, it seems that my colleagues pay no more than lip service to the concept that an employee engaged in protected concerted activity may be disciplined for verbal misconduct other than physical threats. This is a troubling continuation of the prior Board’s implicit mindset, notwithstanding the Ninth Circuit’s admonition that our own precedents clearly recognize “that an employee’s offensive and personally denigrating remarks alone can result in loss of protection.” See, e.g., *Indian Hills Care Center*, 321 NLRB 144, 151 (1996) (Among the specific types of conduct that could exceed the protection of the Act are vulgar, profane, and obscene language directed at a supervisor or employer, even though uttered in the course of protected concerted activity.).¹³

It is well established that “although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer’s right to maintain order and respect.”¹⁴ The standard is “some leeway,” not substantial leeway, not maximum leeway, and certainly not unrestrained freedom. In excusing Aguirre’s conduct because

it occurred in a private management office, involved matters of employment, and was to some extent provoked by unlawful suggestions that he look elsewhere for work (suggestions coupled with repeated denials that he was being fired), I find that my colleagues go well beyond the reasonable amount of leeway required for the protection of Section 7 activity.

First, the majority’s analysis implies that, as an administrative law judge once misstated, “the use of vulgarities and obscenities is a reality of industrial life.”¹⁵ The Board is out of touch here. The reality of the modern workplace is that employees do not typically curse each other and their superiors like characters in a Scorsese film.¹⁶ It is entirely reasonable, and to a great extent legally necessary, for many employers to insist that employees engage each other with civility rather than personally directed f-bombs even on matters where opinions differ sharply and emotions flare.¹⁷ There is no evidence that profane outbursts like Aguirre’s were common at Plaza Auto Center.¹⁸ Accordingly, in assessing whether profanity in the course of Section 7 activity is so opprobrious as to warrant loss of protection under *Atlantic Steel*, it is incumbent on the Board to give meaningful consideration to the context of this particular workplace. It is certainly not our mandate to define deviancy down by federalizing a right to extreme profanity in every national workplace regardless of its existing norms or customs. For example, a small family business managed accordingly with “small town values” should not be required by the Act to have the same workplace culture as a dockyard or movie set.

Second, whatever the workplace context with respect to the frequency of swearing, there is a major distinction to be drawn between that conduct and “repeated, sustained, ad hominem profanity” that amounts as well to insubordination when directed towards management.¹⁹ This is the conduct in which Aguirre engaged. The notion that such conduct is somehow less offensive because it occurs within the confines of a private managerial of-

¹³ *Coors Container Co.*, 238 NLRB 1312, 1320 (1978).

¹⁴ According to a report in Variety Magazine’s online edition, Scorsese’s “Wolf of Wall Street” set the all-time U.S. cinematic f-word record, using it 560 times. <http://variety.com/2014/film/news/wolf-of-wall-street-breaks-f-word-record-1201022655>.

¹⁵ See *Laborers Local 872*, 359 NLRB No. 117, slip op at 3 (2013) (distinguishing screaming and profane conduct in a business setting from same conduct in dockside or construction setting).

¹⁶ See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (Elliott’s profanity far exceeded that which was common and tolerated in his workplace).

¹⁷ Id. at slip op. 3 fn. 10, recognizing “the legitimate distinction between expletives expressed generally and those directed at individuals.”

¹³ Id. at 293–294.

¹⁴ *Piper Realty Co.*, 313 NLRB 1289, 1290, fn. 3 (1994), citing *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enf. 148 NLRB 1379 (1964).

fice makes no sense. Aguirre's profane and demeaning personal attack on Plaza may have been less disruptive of office productivity and discipline (although I doubt that), but it was no less offensive to Plaza's dignity simply because it took place behind closed doors. To hold otherwise, as my colleagues effectively do, is essentially to subordinate the third *Atlantic Steel* factor (nature of outburst) to the first (place of discussion) in the balancing test.

Third, in the modern, extensively regulated workplace, it is essential for an employer to proscribe profane behavior that could under other employment laws be viewed as harassing, bullying, creating a hostile work environment, or a warning sign of workplace violence. The Board is not an "überagency" authorized to ignore those laws in its efforts to protect the legitimate exercise of Section 7 rights in both unrepresented and represented workforces.²⁰ The holding here that a profane, sustained, ad hominem attack on a senior manager in the work force must be tolerated because of the connection to Section 7 activity unnecessarily impedes employers' ability to deal with such conduct if engaged in by one worker against another.²¹

Finally, the unwarranted extension of protection to the type and degree of misconduct shown by Aguirre deserves our own statutory policy of encouraging "industrial peace" and labor relations stability. Even in the unrepresented workplace, where employees often lack the same access to formal grievance resolution procedures as they would have in a collective-bargaining regime, the Board must be careful to set rational norms for self-help attempts to exercise Section 7 rights. At a certain point, if an employee is unable to achieve a desired goal, he or she should turn to the proper government authority for resolution of the problem. That course of action was readily available to Aguirre, who could have kept his extreme advocacy concerning commissions and minimum wages in the playing field of proceedings before the proper federal and state agencies. The risk that an

²⁰ See *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) (Board must refrain "from effectuat[ing] the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.")

²¹ See "Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers Who Wish to Ban Bullying," 22 Temp. Pol. & Civ. Rts. L. Rev. 355, 373-376 (2013). The author discusses the adverse impact of the Board's high standard for unprotected "opprobrious" misconduct on employer enforcement of antiharassment and antibullying rules, noting in particular the impediments to enforcement created by the original Board decision in this case as well in *Fresenius USA Mfg., Inc.*, 358 NLRB No. 138 (2012). I note that I share in this opinion the critical views expressed by dissenting former Member Hayes in *Fresenius*. *Id.* at slip op. 13.

employee could instead lawfully launch into a profane, personally abusive rant in the course of continued discussion with management *can only discourage the willingness of management to have any discussion about working conditions at all.*

In sum, for the reasons stated above, the result here should be the same under a proper application of the Ninth Circuit's remand instructions and under the facts as my colleagues find them. The Respondent lawfully discharged Aguirre for opprobrious conduct that warrants removal of the statutory protection he would otherwise enjoy. The complaint should be dismissed. I respectfully dissent from my colleagues' failure to do so.

Dated, Washington, D.C., May 28, 2014

Harry I. Johnson, III,

Member

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 discharge any of you for engaging in protected concerted activities.

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.

WE WILL, within 14 days from the date of the Board's Order, offer Nick Aguirre 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 Nick Aguirre whole for any loss of earnings and other benefits resulting from his discharge,

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less any net interim earnings, plus interest compounded daily.

WE WILL compensate Nick Aguirre for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Aguirre, it will be allocated to the appropriate calendar quarters.

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

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The Board's decision can be found at www.nlr.gov/case/28-CA-022256 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W. Washington, D.C. 20570, or by calling (202) 273-1940.

