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Media General Operations, Inc. d/b/a Winston-Salem Journal and John W. Mankins. Case 11–CA–19339

January 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On October 9, 2002, Administrative Law Judge George Carson II issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

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

The judge found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by suspending and thereafter discharging employee John Mankins for engaging in protected activity, and that it did not violate Section 8(a)(1) by threatening Mankins with discipline for engaging in protected activity. In dismissing those allegations, the judge concluded that Mankins' manner of protest about the unfair treatment by a supervisor was not protected, and that the Respondent lawfully warned, suspended, and ultimately discharged him for insubordination. The General Counsel excepts, arguing that Mankins was engaged in protected concerted activity, that his conduct did not lose the protection of the Act, and that he was suspended, threatened, and discharged for his protected activity. We find merit to the General Counsel's exceptions.

Background

The Respondent is a daily newspaper whose press employees have been represented by the Graphic Communications International Union, Local 318-C, AFL–CIO (the Union) since the 1930s.¹ Employee John Mankins worked for the Respondent from 1985 until his discharge on December 19, 2001.² At the time of his discharge, Mankins was the Union's vice president and was assistant chairman³ on his shift.

¹ On October 18, 2001, the Union prevailed in a decertification vote, 13–9, in the unit of pressmen to which Mankins belongs.

² All dates are in 2001 unless otherwise indicated.

³ A chairman performs duties similar to that of a steward, and the assistant chairman fills in when the chairman is unavailable.

In July Mankins started raising concerns about fellow employee Ricky Smith. Specifically, Mankins complained to his supervisor, Danny Leonard, that Smith had spent a lot of time talking to Leonard in Leonard's office and was neglecting his duties. Mankins repeated his concern to Union President Velt Penley and Union Secretary Keith Vestal. On November 7, Penley and Vestal raised the issue with the Respondent's president, Jon Witherspoon, and with the Respondent's production director, Sam Hightower. In addition, during the latter half of the year, several other employees complained to Mankins that Smith was neglecting his duties, and employee Anthony Mitchell complained about Smith to both Mankins and Vestal.

On December 14, just after the third shift began at 9 p.m., Leonard called the press crew together for a short meeting. Leonard told the employees that their performance the night before had not been good and that their teamwork needed improvement. Mankins interrupted him and told him that Leonard did not treat everyone equally. It was clear to those present (with the exception of Smith and employee Staci LeClear) that Mankins was referring to Leonard's alleged favoritism towards Smith. Mankins was loud and agitated when he spoke about the allegedly unfair treatment. He called Leonard a racist and stated that the newspaper was a racist place to work.⁴ Leonard told Mankins to raise the issue with Hightower. Leonard took one more comment from an employee, who complained that some employees were carrying an unfair workload. Leonard then ended the meeting and the crew returned to work.

About an hour later, Leonard asked Mankins to come to his office. Leonard told Mankins that "his behavior on the floor was very unacceptable," that it "would not be tolerated," and that "if he ever displayed it again that he would be sent home." Leonard told Mankins to go back to work. On his way out of the office, Mankins loudly called Leonard a racist, and said the paper was racist, too. Leonard then suspended Mankins by telling him to go home.

As Mankins proceeded from Leonard's office to the locker room, by the most direct route, he walked through a room called the Quiet Room. The Quiet Room is approximately 24-feet long and 18-feet wide, and contains equipment used to set up the presses. It has one door near the supervisor's office, another door at the opposite end of the room, and another door entering into the Press Room. As Mankins exited at the far end of the Quiet Room, Leonard entered on the near side by his office and

⁴ Leonard and Smith are white, and Mankins and the majority of the press crew are black.

said something inaudible. Mankins called Leonard “a bastard red-neck son-of-a-bitch.” Employee Smith, who had just then entered the Quiet Room, heard the latter part of the statement, i.e., everything except “bastard.”

Leonard then called Hightower and told him what had happened. On December 19, the Respondent terminated Mankins. The termination letter stated that Mankins’ conduct had been “disrespectful of Mr. Leonard’s position and authority and represent[ed] serious insubordination that cannot be tolerated.”

The judge found that Mankins was suspended and terminated for insubordination, and not for engaging in protected concerted activity. The judge assumed that Leonard understood that Mankins was engaged in protected concerted activity when he spoke up at the meeting, but found that Leonard called Mankins into the office because of the manner in which Mankins spoke, not because of the issues that he raised. The judge then found that, by warning Mankins that he would be sent home if he displayed such behavior again, Leonard did not unlawfully threaten Mankins, because Leonard limited his comments to the manner of Mankins’ protest.⁵

The judge next found that the Respondent lawfully suspended Mankins for disruptive behavior after Mankins called Leonard a racist outside of Leonard’s office. In so finding, the judge concluded that Mankins’ suspension was a direct result of his disruptive behavior, and was not because of any protected activity.

Lastly, the judge found that Mankins lost the protection of the Act by his outburst in the Quiet Room, and was therefore lawfully discharged for insubordination. The judge applied the test set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), in which the Board enumerated the factors to be balanced in determining whether an employee’s concerted protected activity loses the protection of the Act due to opprobrious conduct. These factors are (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by unfair labor practices. *Atlantic Steel*, supra at 816. The judge found that each *Atlantic Steel* factor weighed in favor of Mankins losing the protection of the Act, specifically: (1) the Quiet room was an area regularly used by employees; (2) the outburst was not part of any discussion; (3) Mankins loudly called Leonard a “bastard, redneck son-of-a-bitch,” partially overheard by employee Smith; and (4) Mankins was not provoked by anything Leonard said, or by any unfair labor practices.

⁵ The General Counsel moved to amend the complaint to allege that Leonard’s warning constituted a threat in violation of Sec. 8(a)(1), but in light of his analysis on the merits of the allegation, the judge denied the motion.

Contrary to the judge, we find that Mankins engaged in protected activity when he initially spoke up at the crew meeting, and that he never lost the protection of the Act during his subsequent statements to Leonard. Thus, the Respondent violated the Act when it threatened, suspended, and ultimately discharged Mankins for engaging in protected activity.

Analysis

Our analysis begins with a consideration of Mankins’ conduct at the crew meeting. We find that Mankins’ comments at that meeting constituted protected concerted activity.⁶ Indeed, it is well settled that an employee engages in protected activity by speaking up to management about the allegedly unfair treatment employees have received. *Churchill’s Restaurant*, 276 NLRB 775, 777 fn. 11 (1985). Here, in response to Leonard’s criticism of the performance of the press crew, Mankins raised a concern about the Respondent’s alleged favoritism towards certain employees. Mankins was the Union vice president and assistant chairman at the time of his protest, and in that role spoke up about the concerns shared by his fellow employees. The record thus establishes that Mankins was engaged in protected concerted activity by speaking up at the crew meeting. See *Continental Pet Technologies*, 291 NLRB 290, 291 (1988) (finding a letter accusing supervisor of favoritism and racism to be concerted protected activity unless “pursued in a manner that strips [it] of the Act’s protection.”)

Having found that Mankins engaged in protected activity by speaking up at the crew meeting, we next consider whether he lost the protection of the Act by the manner in which he acted at the crew meeting. We do so by applying the *Atlantic Steel* factors, and find that Mankins did not lose the Act’s protection by the manner in which he spoke. The first factor, the place of the discussion, weighs in favor of protection of Mankins’ conduct because the conduct occurred during a crew meeting called to voice concerns about the employees’ performance and their teamwork. This was an appropriate place for Mankins to raise the issue of unfair treatment of crew members. See *American Steel Erectors*, 339 NLRB No. 152 (2003) slip op. at 4 (voicing employee concerns during a public meeting weighs in favor of keeping the protection of the Act); see also *Churchill’s Restaurant*, supra (finding protected employee’s repeated interruptions of a management meeting where such interruptions questioned employer’s attitude toward Mexican employees). Indeed, after Mankins spoke up, Leonard solicited other comments, and one other employee raised similar con-

⁶ The judge suggested, but did not conclusively find, that Mankins engaged in protected concerted activity at the crew meeting.

cerns about some crew members carrying unfair work loads.

The second factor, the subject matter of the discussion, also weighs in favor of protection of Mankins' conduct. Leonard was criticizing the employees' performance, and Mankins replied that the Respondent generally, and Leonard in particular, had not treated the employees fairly. As noted above, Mankins was reiterating a point that had been repeatedly raised by employees and union officials over the past few months. Mankins' statements at the crew meeting were therefore a continuation of the previous discussions that he and other union officials had with management about these complaints.

The third factor, the nature of the conduct, weighs in favor of protection of Mankins' conduct as well. Although Mankins interrupted Leonard and called him a racist, this conduct was not so inflammatory as to lose the protection of the Act. Indeed, the Act allows a certain degree of latitude to employees when engaged in otherwise protected conduct, even when employees express themselves intemperately. See *CKS Tool & Engineering*, 332 NLRB 1578, 1586 (2000) (finding protected "accusatory language [that] is stinging and harsh"). Accordingly, although the accusation of racism is serious, the statement is not so outrageous as to weigh in favor of losing the protection of the Act.

The fourth factor, the provocation by unfair labor practices, does not weigh in favor of protection. There is no contention or finding that Mankins' was provoked by any unlawful conduct.

The overall balancing of the four factors favors protection of Mankins' conduct. Thus, the factors of place, subject matter, and nature of conduct favor protection, while only the factor of provocation by unfair labor practices does not. Accordingly, we find that Mankins did not lose the protection of the Act by his conduct during the crew meeting.

Having found that Mankins' conduct during the meeting was protected, we further find, contrary to the judge, that the Respondent violated Section 8(a)(1) of the Act when Leonard told Mankins that his conduct at the meeting was "unacceptable," "would not be tolerated," and that if Mankins repeated it, he "would be sent home." Plainly, Leonard threatened Mankins with discipline for engaging in protected concerted activity. *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984), enf. mem. *NLRB v. Fair Mercantile Co.*, 767 F.2d 930 (8th Cir 1985).⁷

⁷ We find that the judge erred in denying the General Counsel's motion to amend the complaint to allege the warning as unlawful. In determining whether amendments to the complaint should be allowed outside the Sec. 10(b) 6-month period of limitations, the Board consid-

We also find, contrary to the judge, that the Respondent violated the Act by suspending Mankins after Mankins called Leonard a racist outside of Leonard's office. Applying *Atlantic Steel*, we find that Mankins did not lose the protection of the Act. The first factor, the place of the discussion, favors protection of Mankins' conduct because Mankins' comments occurred outside of Leonard's office and no other employee heard them. Cf. *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994) (finding comments to supervisor unprotected, in part, because they were overheard by other employees "who clearly were shocked" by them). The second factor, the subject matter of the discussion, also favors protection, as it was a continuation of the complaint that Leonard showed favoritism to other employees. The third factor, the nature of the outburst, also favors protection. Although Mankins again called Leonard a racist, this remark, in context, concerned Leonard's treatment of employees, and was not so egregious as to cost Mankins the protection of the Act. See *CKS Tool & Engineering*, supra at 1586. This is especially so when reviewed with the fourth factor, the provocation by unfair labor practices. As described above, Mankins' comments concerning Leonard's racism were a direct response to Leonard's unlawful threat that Mankins' protected expression of concern about unequal treatment of crew members was unacceptable and would not be tolerated. Leonard's threat to quell any further protected activity was likely to provoke a defiant response from Mankins. See *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849-850 (2001) (employee's purported insubordination did not forfeit Act's protection where employer's unlawful conduct provoked employee's insubordination). Thus, we find that Mankins did not lose the protection of the Act by his conduct outside of Leonard's office. We therefore find that the Respondent violated Section 8(a)(3) for suspending Mankins for having engaged in protected concerted activity.

Finally, we find, contrary to the judge, that Mankins did not lose the protection of the Act for his comments in the Quiet Room, and accordingly find that the discharge

ers whether the new allegations (1) involve the same legal theory as the prior ones, (2) arise from the same factual situation or sequence of events, and (3) whether the Respondent would raise the same or similar defenses. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). Applying these factors, we find that the allegation that the Respondent unlawfully threatened Mankins with discipline arose from the same factual situation presented by the other allegations, and involved the same legal theory, i.e., that Mankins engaged in protected conduct by voicing his concerns at the crew meeting. In addition, the Respondent's defense, that Mankins was insubordinate, is the same. Accordingly, this allegation is closely related to the allegations of unlawful suspension and discharge, and we grant the motion to amend the complaint.

violated Section 8(a)(3) of the Act. The first *Atlantic Steel* factor, the place of the discussion, weighs against protection of Mankins' conduct because the outburst occurred in the Quiet Room, a room containing equipment used to set up the presses. The record contains little evidence concerning the nature and use of this room, certainly nothing to indicate that it is a room where employees are supposed to be quiet. Nevertheless, it does appear to be a work area, and thus, the factor of place of discussion weighs against protection of Mankins' conduct. However, it weighs only slightly against protection because only one other employee was present during the outburst, and that employee heard only the last half of Mankins' statement.

The second factor, the subject matter of the discussion, weighs in favor of protection of Mankins' conduct, because the comments constituted a continuation of his protest of Leonard's alleged unfair treatment, which now included the unlawful threat and suspension. Mankins' encounter with Leonard in the Quiet Room occurred within minutes of Mankins' second exchange with Leonard where Leonard unlawfully first threatened and then suspended Mankins. Indeed, Mankins was in the process of leaving the facility because of the suspension when he entered the Quiet Room, which was directly on route to the locker room. In these circumstances, Mankins' remark on seeing Leonard again was a continuation of his earlier exchange.

The third factor, the nature of the outburst, weighs against protection, as it is more inflammatory than Mankins' previous outbursts. It was not, however, so outrageous as to cost him the protection of the Act, because the outburst was provoked by the Respondent's unlawful warning and suspension of Mankins (the fourth factor). The outburst in the Quiet Room occurred just minutes after the unlawful threat and suspension which, as noted above, angered Mankins considerably. This factor, when considered together with the subject matter of the discussion, i.e., Mankins' protest of Leonard's unfair treatment of the employees, clearly outweighs the nature of Mankins' outburst and the fact that it was partially heard by one employee. Thus, we find that Mankins did not lose the protection of the Act and that his discharge violated Section 8(a)(3) as alleged.

Our dissenting colleague argues that Mankins lost the protection of the Act when the outburst occurred in the Quiet Room. The dissent states that Mankins was no longer engaging in protected activity at the time of his outburst. We disagree. The interval between the discussion outside of Leonard's office, at which Mankins was unlawfully suspended, and the outburst in the Quiet Room was momentary and far too short to find that

Mankins had ceased his protected activity. There was no cooling-off period between the two incidents; one happened immediately after the other. Mankins referred to his allegation of racist treatment of employees in each exchange, and there is no meaningful distinction between the two incidents. Thus, the record amply demonstrates that the subject matter of the outburst was a continuation of Mankins' protected activity.

We also do not agree with the dissent's analysis of the third factor, the nature of the outburst. Our colleague ignores the context of Mankins' language, i.e., Leonard's provocative behavior. A careful consideration of all the relevant circumstances here leads inescapably to the conclusion that Mankins' outburst, although intemperate, was not so opprobrious as to cost him the protection of the Act.

Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by threatening Mankins with discipline, and that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Mankins.

ORDER

The National Labor Relations Board orders that the Respondent, Media General Operations, Inc. d/b/a Winston-Salem Journal, Winston-Salem, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against employees because they have engaged in protected activities.

(b) Threatening employees because they have engaged in protected activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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 John Mankins 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 John Mankins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any references to Mankins' suspension and discharge, and within 3 days thereafter notify him in

writing that this has been done and that the suspension and discharge will not be used against him in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Winston-Salem, North Carolina, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 December 14, 2001.

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

Dated, Washington, D.C. January 30, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

⁸ 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."

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by threatening Mankins with discipline for engaging in protected activity, and violated Section 8(a)(3) by suspending Mankins for engaging in protected activity. Contrary to my colleagues, however, I agree with the judge that Mankins lost the protection of the Act for his outburst in the Quiet room, and he was lawfully discharged therefor.

The record shows that when Mankins' outburst occurred, he was passing through the Quiet Room. His previous confrontation with Leonard had ended and he was on his way home. As Mankins was walking out of the Quiet Room, Leonard entered the Quiet Room on the opposite end, about 24 feet away. Although Leonard uttered something when he entered the room, Mankins admittedly did not know what was said or whether it was directed at him. Nor does the record reveal what Leonard said. Despite this, Mankins verbally accosted Leonard, calling him a "bastard red-neck son-of-a-bitch." Employee Smith entered the Quiet Room just as Mankins was finishing his epithet.

My colleagues find, from these facts, that Mankins' statement was protected by the Act. I disagree. In my view, a careful balancing of the *Atlantic Steel*¹ factors shows that Mankins lost the protection of the Act by his opprobrious conduct.

As the majority concedes, the first *Atlantic Steel* factor, the place of the discussion, weighs in favor of Mankins losing the protection of the Act. The outburst occurred in the Quiet Room. Although the record does not fully describe the function of the room, the room appears to be a place for the storage of equipment. As the name "Quiet room" would suggest, it is not a place for an outburst. And yet, that is precisely what Mankins did in that room. His outburst occurred in the presence of another employee.

Contrary to my colleagues' contention, the second *Atlantic Steel* factor, the subject matter of the discussion, also weighs in favor of Mankins losing the protection of the Act. At the time that Mankins entered the Quiet Room, the prior discussion about employee concerns had ended. Indeed, there was no discussion at all in the Quiet Room.

The third factor, the nature of the outburst, also weighs against Mankins. When Leonard entered the room, Mankins started swearing at his supervisor, stating that Leonard was a "bastard red-neck son-of-a-bitch." This outburst was highly offensive and insubordinate, and was not protected. Concededly, the Act allows employees some leeway in their use of intemperate language, pro-

¹ 245 NLRB 814, 816 (1979).

vided that the use is incidental to protected concerted activity, or “part of the *res gestae*.” *Thor Power Tool Co.*, 148 NLRB 1379 (1964), *enfd.* 351 F.2d 584 (7th Cir. 1965); *Atlantic Steel*, *supra*, at 816. However, the protected activity in this case, i.e. the discussion, had ended. Further, even if the remark was part of the *res gestae* of the protected activity, it exceeded the bounds of protection. Employees who engage in abusive conduct exceed the protections of the Act. See *Volt Information Sciences*, 274 NLRB 308 fn. 6 (1985) (employee’s protest exceeded the protections of the Act by shouting in the presence of other employees, disrupting operations, and refusing to leave the premises). Significantly, Leonard was Mankins’ supervisor, and responsible for directing the entire press crew. Plainly, the Act does not require a supervisor to tolerate such serious insubordination from employees under his supervision. “Indeed, a contrary result in this case would mean that any employee’s offhand complaint would be protected activity which would shield any obscene insubordination short of physical violence.” *Atlantic Steel*, 245 NLRB at 817.

Concededly, the fourth *Atlantic Steel* factor, provocation by unfair labor practices, weighs in Mankins’ favor, but it is insufficient to outweigh the other three factors. Neither the nature nor the context of the Respondent’s unfair labor practices was so provocative as to have excused Mankins for his verbal abuse of his supervisor in such an outrageous manner. As noted above, Mankins’ outburst occurred neither in the same place nor in the same discussion where he was threatened and suspended; it occurred later in the Quiet Room. The highly abusive and offensive nature of Mankins’ outburst cannot be excused simply as a response to the Respondent’s earlier unfair labor practices. This was simply a vulgar and insubordinate attack.

In finding that Mankins was provoked by the earlier unfair labor practices, my colleagues contend that there was no cooling off period. Concededly, there was only a short period between the warning/suspension and the outburst. However, as noted above, the outburst was temporally removed to some extent, and was physically removed as well. Indeed, Leonard engaged in no provocative behavior in the Quiet Room where the outburst occurred. To the contrary, it was Mankins who initiated the confrontation in the Quiet Room. Finally, the one night suspension and the warning, in response to employee conduct which approached the line of misconduct, were not egregious unfair labor practices.

In sum, Mankins engaged in outrageous misconduct. The place of the discussion, the subject matter of the discussion, and the nature of his outburst all weigh in favor of Mankins losing the protection of the Act. To the

extent that the fourth *Atlantic Steel* factor, the provocation by unfair labor practices, weighs in Mankins’ favor, it is insufficient to overcome the other factors. The unfair labor practices were not so egregious as to provoke the outrageous outburst that occurred, and there was a break in time and place between them and Mankins’ verbal assault in the Quiet Room. Accordingly, I find that Mankins lost the protection of the Act by his outrageous conduct in the Quiet Room, and that his discharge therefor did not violate Section 8(a)(3) and (1) of the Act.

Dated, Washington, D.C. January 30, 2004

Robert J. Battista, Chairman

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 suspend, discharge, or otherwise discriminate against our employees because they have engaged in union activities.

WE WILL NOT threaten our employees because they have engaged in protected 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 of the Board’s Order, offer John Mankins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits

resulting from our discrimination against him, less any net interim earnings, plus interest.

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

MEDIA GENERAL OPERATIONS, INC. D/B/A
WINSTON-SALEM JOURNAL

Lisa R. Shearin, Esq., for the General Counsel.

Glenn E. Plosa, Michael A. Betts and L. Michael Zinser, Esqs.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Winston-Salem, North Carolina, on August 19 and 20, 2002, pursuant to an amended complaint that issued on July 26, 2002.¹ The complaint, as amended, alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by suspending the Charging Party, John Mankins, on December 14, and discharging him on December 19, because of his protected concerted activities and union activities.² The Respondent's answer denies any violation of the Act. I find that the evidence does not establish that the Respondent violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following³

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Media General Operation, Inc. d/b/a Winston-Salem Journal (the Company), is a Delaware corporation with facilities located in Winston-Salem, North Carolina, where it is engaged in the publication of the Winston-Salem Journal, a daily newspaper. During the past 12 months, the Company purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of North Carolina. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Local 318-C, Graphic Communications International Union,

AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The Union, since sometime in the 1930s, represented employees in three units at the Company including the pressmen. The Union was recently decertified in two of the units. On October 18, the status of the Union as the collective-bargaining representative of the pressmen was confirmed when the Union won a decertification election by a vote of 13 to 9. The pressmen operate the large printing presses upon which the newspaper is printed. After the newspaper is printed, it is folded. One of the pressmen operates the folder machine. The main production shift for pressmen begins at 9 p.m. and ends at 5 a.m., 7 days a week. Employees have different days off thereby assuring a full complement of employees each day.

Samuel Hightower became the production director on January 1, 2000. Hightower had previously worked for the Austin American Statesman in Texas where he had a workplace philosophy of "fairness, dignity, and respect." He introduced this philosophy at the Company when he assumed his duties as production director.

B. Facts

Charging Party John Mankins was employed by the Company as a pressman from 1985 until he was terminated on December 19. At the time of his termination Mankins was Vice President of the Union and Assistant Chairman on his shift. Tom Keller was the Chairman. Mankins reported to Supervisor Danny Leonard who reports to the press room manager. Leonard denied that the Union had informed him that Mankins was a member. He did not deny that he was aware that Mankins was the assistant chairman. I find that Leonard was aware that Mankins was the assistant chairman. Notwithstanding the foregoing, the record is devoid of any evidence of animus by the Respondent towards employee union activity.

In June Mankins was counseled by Director of Human Resources Randall (Randy) Nofle and former Pressroom Manager Kevin Garris regarding attendance and having a negative attitude towards "both the Company and supervision." Mankins admitted the counseling but denied receiving a letter dated June 7 confirming the conversation that noted that the Company "is dedicated to treating its employees with fairness, dignity and respect and we expect you to be part of the team in the press room."

In July, Mankins noticed that employee Ricky Smith, referred to as Smitty, was often in the office or away from his job on the floor. Smith was regularly assigned to operate the folder. Leonard, corroborated by Union President Ve It Penley and Secretary Keith Vestal, testified that the job of folder operator is the most technically demanding job of

¹ All dates are in 2001 unless otherwise indicated.

² The charge was filed on January 17, 2002, and was thereafter amended on February 17, and March 26, 2002.

³ The General Counsel's Opposition to the Respondent's Petition to Revoke Subpoena, tendered with General Counsel's brief, is a portion of R. Exh. 1 and is received.

pressmen. Leonard pointed out that the most intensive work period for the folder operator is near the end of the shift.

Several employees, including Anthony Mitchell, complained to Mankins about Smith “not carrying his part of the load.” Mitchell confirmed that he complained to Mankins as well as to both Chairman Keller and Union Secretary Vestal regarding Smith not pulling his weight, that he was often “talking on the floor and in the office” rather than “working with the group of us.” Mankins recalls informing Leonard of the employees’ concerns in July, stating that the crew was complaining about Smith and that he, Leonard, was a part of it. Mankins recalls that Leonard replied, “do your job and I will do mine.” Mankins mentioned the problems with Smith to Union President Penley and Secretary Vestal. He understood that they reported the situation to “higher management,” but did not know with whom they met or what the conversation involved.

Union President Velt Penley and Secretary Keith Vestal met with Sam Hightower and Company President and Publisher Jon Witherspoon on November 7. The meeting concerned a matter that had arisen after the Union won the decertification election. Penley also raised with Witherspoon and Hightower the complaint that Leonard was not being responsive to complaints made by the “chairmen” regarding Smith not being on the job. Neither Keller nor Mankins were identified as the chairmen to whom Penley was referring. In the course of the meeting, Vestal recalls that he and Penley also reported an allegation that Smith had, after the decertification election, stated to Mankins and Anthony Mitchell that they “had better watch their backs.” Hightower said that he would come to the shift and inform everyone that “there would be no retaliation against anybody who voted Yes or voted No, and also that he was going to talk to Danny [Leonard] about the situation with Ricky [Smith].”

On the evening of December 14, shortly after 9 p.m., Supervisor Danny Leonard spoke with the crew of pressmen. Those present included Mankins, Smith, Anthony Mitchell, Mona McCall, Stacy LeClear, Antonio Scales, and Bobby Powell. Leonard criticized the employees for a “lack of effort the night before,” telling the employees that they could have done better. According to Mankins, Leonard “went on and on.” Mankins denied that he interrupted Leonard but admitted that he spoke up and stated that, if Leonard was going to critique the people, he needed to do it to “everybody the same way.” Leonard replied that he did. Mankins responded that he did not, that “there is a man that you do not ever tell nothing to do. He makes mistakes like everybody else, he is in your office all the time, you are out on the floor taking him away from his work, but you never say anything to him.” Mankins recalls that he named Ricky Smith. Leonard told Mankins that he needed to take that up with Production Director Sam Hightower. Mankins said he would. Leonard dismissed the crew saying, “go to work.”

Mankins is African American. Leonard and Smith are Caucasians.

Supervisor Leonard testified that he did address the crew with regard to a need to “improve the teamwork.” He was interrupted by Mankins who stated that a white employee, Donnie Davis, who was not present on December 14, had received preferential treatment in that someone had been assigned to work with him on the folder. Mankins continued, stating that Leonard was a racist and “this was a racist Company.” He accused Leonard of “showing whites preferential treatment,” referring to Smith. Leonard testified that he tried to continue, but that Mankins was “very agitated” and was “talking loudly.” He decided to discontinue the meeting. He asked if there were any other problems and “I had a few to speak up that some of the work was not being distributed even[ly].” He recalled that employee Staci LeClear, who is Caucasian, complained that some employees were “carrying an unfair work load.” After this Leonard told the crew to go to work.

Anthony Mitchell does not recall that Mankins stated Smith’s name, only that he looked in Smith’s direction. He testified that he did not hear Mankins use the word racist.

Employee Mona McCall recalls that Mankins began arguing with Leonard at the crew meeting, claiming that that certain people were being shown favoritism with respect to training and with respect to an individual, whom she understood to be Smith, spending too much time in the office. She acknowledged that employees had been complaining that Smith spent too much time in the office. Contrary to Mankins, McCall testified that, when addressing Leonard, Mankins did call him a racist. McCall, who is African American, testified that later, Mankins stated to her that “he had said things he wished he had not said.”

Employee Ricky Smith recalled that Mankins interrupted Leonard, saying that white employees received preferential treatment. Smith testified that Mankins was “getting louder and louder” and that he called Leonard a racist.

Employee Staci LeClear recalls that Leonard spoke to the employees “about how the night before didn’t go so smooth,” and that Mankins became upset regarding “the placement of employees and training.” According to LeClear, Mankins was yelling and Leonard was trying to calm him down. In the course of the exchange, Mankins stated that Leonard “was a racist in the way that he placed different employees in their positions and the training. [a]nd that the Journal was a racist place to work.” Mankins also mentioned “[c]ertain people being in the office,” but LeClear did not recall that he mentioned any name. Leonard told the employees to get to work.

I credit Leonard, as corroborated by McCall, Smith, and LeClear, that Mankins did refer to Leonard using the term racist and that he stated that the Journal was a racist place to work.

About an hour later, Leonard asked Mankins to come to his office. According to Mankins, Leonard began the con-

versation by saying that he knew that Mankins was “going to bring that up, because you [Mankins] came back the other day and looked in the office and Smitty and I were in there.” Mankins testified that Leonard then told him that, if he tried “that little stunt” again, he would send him home. Mankins asked if he was referring to Smith not working, and Leonard repeated that if he tried that little stunt again, he would send him home. Mankins asked if Leonard was finished. Leonard stated that he could contact Hightower if he wanted to. Mankins testified that he left to return to the work floor, but when he reached the door of the office, he turned and said, “You are what you are.” Leonard told him to go home.

Leonard testified that, after giving Mankins time to get “calmed down,” he called him to the office where he informed him that “his behavior on the floor was very unacceptable. That with the present management of the Company the fairness and dignity and respect went both ways. That his action on the floor would not be tolerated. If he ever displayed it again that he would be sent home.” According to Leonard, Mankins repeated that the Journal was a racist company and that he [Leonard] would never change. Leonard informed Mankins that “if he had problems then he needed to take it to the upper office, [a]nd that being our meeting was getting nowhere that he could go on back to work.” Mankins went out the door. He again began to get loud, “hollering” that Leonard was a racist, that the Company was racist. Leonard felt that Mankins was “going to continue this the remainder of the night” and that his conduct “would disrupt the workforce.” He directed Mankins to go home.

Mankins admits that, after being dismissed from the meeting, he stopped at the door, turned, and stated, “You are what you are.” I find it extremely unlikely that this comment would have provoked Leonard to immediately send Mankins home. Mankins had already referred to Leonard as a racist at the crew meeting but had not been sent home. Consistent with the testimony of Leonard, I find that Mankins did not calm down and, as he was exiting the office into the hallway that led to the production floor, he loudly stated that Leonard was a racist and the Company was racist. It was at this point that Leonard told Mankins to go home.

Upon being told to go home, Mankins took the shortest route to the locker room, through the Quiet Room. The Quiet Room contains equipment used to set up the presses. It is approximately 24 feet long and 18 feet wide. It has three doors, one near the supervisor’s office, through which Mankins entered, a door at the opposite end, through which Mankins would exit, and a door on the side that opens directly onto the Press Room. As Mankins opened the door to exit the Quiet Room, Leonard was entering. Mankins observed Leonard and states that he heard Leonard say something, but he does not recall what. He admits that, at that point, he “muttered,” “racist son-of-a-bitch.” Mankins did not include this admitted statement in his initial Charge of

Discrimination filed with the Equal Opportunity Commission on February 4, 2002. Leonard testified that, as he was entering the Quiet Room, he observed Mankins opening the door on the opposite side of the room. Mankins turned towards Leonard and said, “bastard” and “redneck son-of-a-bitch.” As he said this, Leonard noticed that employee Ricky Smith had begun to enter the Quiet Room from the Press Room. Smith testified that he heard Mankins say “redneck son-of-a-bitch.” Mankins continued to the locker room Leonard called Hightower.

Hightower confirmed that Leonard called and reported that Mankins had become disruptive during a crew meeting, calling him a racist, and that he had called Mankins into the office and informed him that there would be no more outbursts. Leonard reported that, as Mankins was leaving the office, he called him a racist again, that Leonard then told Mankins to go home, and that, as Mankins was leaving through the Quiet Room, he called him a bastard rednecked son-of-a-bitch. He noted that employee Smith heard that comment.

On Monday, December 17, Mankins called Hightower and stated that he needed to talk to him about what had happened. Hightower agreed and a meeting was set for 3 p.m. Director of Human Resources Nofle met with Hightower and Mankins. Mankins gave his account of what occurred and referred to incidents involving former employees Joseph Gibson, Harold “Butch” Hicks, and Thorne Collins. He did not request a representative of the Union and stated that “he was a man and he could talk for himself, that he did not need anybody . . . to be with him.” Hightower and Nofle both testified that Mankins initially denied using the word racist or uttering any profanity. Nofle recalls that, later in the meeting, Mankins stated that “whatever I said I said as I was leaving.” At the hearing, when asked whether he had denied using the word racist or racism, Mankins answered, “not in that context.”

Hightower investigated the incident, speaking with Anthony Mitchell, Antonio Scales, Staci LeClear, Bobby Powell, and Ricky Smith. Scales, LeClear, and Smith reported that they had heard Mankins use the term racist at the crew meeting and Smith confirmed hearing Mankins call Leonard a redneck son-of-a-bitch. Although Mitchell testified that he did not hear Mankins use the term racist at the crew meeting, Hightower testified that Mitchell told him that Mankins said “you seem like a racist.” Employee Powell said he did not hear anything, he “tuned them out.” Hightower met with Witherspoon and recommended that Mankins be terminated for gross insubordination.

On December 19, Mankins met with Hightower, Nofle, and Union President Penley. Penley tried to say something about past indiscretions, but Nofle stated that they “did not want to hear about that, just what happened that night.” Hightower told Mankins that he was being terminated and handed him a letter informing him that his misconduct “was

disrespectful of Mr. Leonard's position and authority and represents serious insubordination that cannot be tolerated."

A grievance was filed on Mankins' behalf, but he had no independent recollection of signing a grievance. Although Vice President of the Union, Mankins admitted that he did "not know the procedure of what they do or anything else they do." He noted that, when dealing with upper management, Union President Penley, "the higher officer . . . will do it." By letter dated January 2, 2002, Director of Human Resources Nofle advised the Union that the Company denied the grievance and that it was not arbitrable since the collective-bargaining agreement between the parties had expired on April 8, 2000.

At a joint standing committee meeting regarding the grievance, Penley argued that termination was too harsh a punishment for the offense. Director of Human Resources Nofle recalls that Penley began to refer to an incident that had occurred at least 7 or 8 years previously and that he stated that they were there to talk about the night of the 14th. Nofle recalls that at this meeting, unlike the meeting on December 17, Mankins acknowledged that he used the work racist, admitting that he had said, "racist son-of-a-bitch," rather than "redneck son-of-a-bitch." Mankins testified that African Americans do not use the term "redneck."

Following this meeting, on January 17, 2002, Penley requested arbitration and on January 22, 2002, the Company denied the request referring the Union to its letter dated January 2, 2002.

Thereafter, Mankins met with Company President and Publisher Witherspoon. Since Hightower had consulted with Witherspoon prior to terminating Mankins, Witherspoon would have been aware of the situation. Mankins told Witherspoon that "other people have cussed out supervisors before . . . [and] have not been reprimanded." According to Mankins, he informed Witherspoon that he had heard Joseph Gibson say, "Danny, you are a damned liar" and "fuck you, Danny," that he had heard Harold "Butch" Hicks tell Leonard that he was a "damned liar, sorry ass boss man, stupid son-of-a-bitch," and that Thome Collins called Leonard a "damned liar—he said it a lot." A few days after this meeting, Mankins called Witherspoon who told him that the Company was "just going to stick with what we got."

The General Counsel presented two witnesses whose testimony partially corroborated Mankins' testimony regarding employees directly cursing Leonard. Anthony Mitchell testified that he recalled overhearing employee Gibson say "fuck you, Danny" to Leonard and employee Hicks saying, "fuck Danny, . . . you do it yourself." Mitchell was unaware of any occasion upon which an employee had directly cursed a supervisor since Hightower became production director. Employee Michael Miller, who works in a different department but whose work sometimes takes him to the Press Room, recalled an occasion upon which Gibson stated to Leonard that he was "a damn liar" and an occasion upon

which Hicks stated to Leonard that he was "about the dumbest damn supervisor he's ever seen." He placed the incidents involving Gibson and Hicks in 1999, prior to Hightower becoming Production Director.

Union Chairman Thomas Keller recalled incidents when Gibson and Hicks were cursing, but they were not directly cursing Leonard to his face. The only incident that he recalled where an employee spoke directly to Leonard occurred 4 or 5 years ago when a former employee, Scott Jones, called him "a dumb ass." Chairman Keller acknowledged that there has been no cursing of supervisors "in a long time."

The employees alleged to have cursed Leonard all are former employees. Collins' employment ended on March 21, 2000, Jones' employment ended on March 29, 2000, Gibson's employment ended on December 2, 2000, and Hicks' employment ended on March 28, 2001. Every employee who appeared in this proceeding, other than Mankins on December 14, testified that they had never directly cursed a supervisor.

Union Secretary Keith Vestal recalled two separate occasions upon which employees Butch Hicks and Joe Gibson had been cursing. Leonard told Hicks to stop, but Hicks continued and Leonard called him into the office. Hicks asked Vestal, his union representative, to accompany him. Leonard informed Hicks that "he needed to calm and down or he was going to have to go home." Vestal repeated to Hicks, "just calm down or they are going to send you home." Hicks calmed down and returned to work. Regarding Gibson, Vestal recalled an occasion when Gibson did not like where Leonard had put him and was protesting, but "it was in different language." Leonard called Gibson to the office, and he asked Vestal to accompany him. Gibson was so mad he "would not even sit down." Vestal asked Leonard, "if we could get him to calm down, could we go on back . . . to work." Leonard replied that if Vestal could get him to calm down he could return to work, otherwise he was "going to send him home." Gibson calmed down and returned to work. On both of these occasions, Vestal stated that the employees were not cursing at Leonard, they were cursing "about Danny [Leonard]."

Leonard denied that any employee had ever previously directly cursed him.

Vestal's testimony establishes that, on occasions when the conduct of an employee on the floor became disruptive, it was Leonard's practice to call that employee into the office to discuss the employee's behavior privately. Mankins' report that employee Collins directly called Leonard a damned liar is uncorroborated. The incident relating to Jones, who according to Keller called Leonard "a dumb ass," occurred four or five years ago and is also uncorroborated. Both Mitchell and Miller acknowledged that they had been requested by Mankins to testify on his behalf. Although that fact does not render their testimony unbelievable, in view of Vestal's testimony, a direct admission by

either Gibson or Hicks, neither of whom testified, would be far more persuasive evidence that they cursed at, rather than about, Leonard. I find that the recollection of Mankins, Mitchell, and Miller regarding Gibson and Hicks cursing at Leonard to be mistaken. I credit Union Secretary Vestal's straightforward testimony that Gibson and Hicks cursed about, not at, Leonard. In the absence of corroboration of the alleged incidents involving Collins and Jones, I credit Leonard's testimony that no employee had previously directly cursed him.

Supervisor Reggie Moore was, in 1999, in charge of the night shift in the Press Room. He recalled an occasion when Mankins interrupted him as he was speaking to the crew, and that he informed Mankins that "no one talks while I'm talking, and . . . just to be quiet." Mankins complied. Moore, an African American, was a pressman prior to becoming a supervisor and held several offices in the Union including president. He testified that he considers Leonard to be a friend and not racist. Although Moore does not use the term redneck, he acknowledged having heard another African American use that term.

The issues before me relate only to the National Labor Relations Act. The issue of discrimination because of race was presented to the Equal Employment Opportunity Commission pursuant to a complaint filed by Mankins on February 4, 2002.

C. Contentions, Analysis, and Concluding Findings

Counsel for the General Counsel argues that Mankins was engaged in protected concerted activity and union activity and that, therefore, the Company's motive is not material; i.e., the absence of evidence of animus does not preclude finding a violation of Section 8(a)(3) of the Act. Citing *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), Counsel notes that the Act is violated where "it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis for the discharge was an alleged act of misconduct in the course of that activity, and the employee was not, in fact, guilty of that misconduct." Counsel then cites various cases in which employees, in the course of engaging in protected activity, engaged in conduct that either was provoked or was not so egregious as to remove them from the protection of the Act and argues that this is such a case.

I agree with Counsel that a *Wright Line* analysis is not applicable in this case. It is properly analyzed under the criteria of *Atlantic Steel Co.*, 245 NLRB 814 (1979). See *Felix Industries*, 331 NLRB 144 (2000), enf. denied and case remanded 251 F.3d 1051 (D.C. Cir. 2001). There is, however, no evidence that Mankins was engaged in activity on behalf of the Union on December 14. No grievance regarding training or favoritism had been filed or was pending, and Mankins did not advise Leonard that he was seeking to file a grievance. Mankins was not familiar with the formal grievance procedure, admitting that he did "not

know the procedure of what they do," that "the higher [Union] officer . . . will do it."

With regard to the allegations relating to protected concerted activity, it is well established that concerted protests regarding the manner in which job assignments are made and "possible favoritism of other employees" is protected activity. *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984). I need not speculate as to whether Leonard's subjective belief that Leonard showed favoritism to Smith, or to Smith and other Caucasian employees, stands objective scrutiny since, whether he was correct or incorrect, testimony establishes that the issues he raised were matters of concern to some employees. Although there is no evidence that Mankins' conduct at the crew meeting on the evening of December 14 was orchestrated rather than a spontaneous outburst, he had previously complained about Smith to Leonard and Penley and Vestal mentioned to Witherspoon and Hightower on November 7 that employees had expressed concerns regarding Ricky Smith not being on the job. Leonard acknowledged that employee LeClear, a Caucasian employee, also complained at the crew meeting about inequitable workloads; thus, it is arguable that Leonard had reason to believe that Mankins was engaged in concerted activity. Assuming that Leonard concluded that Mankins conduct was concerted, I find that Leonard's calling Mankins into his office resulted from the manner in which he spoke, not the issues that he raised. LeClear was not called to the office.

Counsel for the General Counsel, in her brief, has moved to amend the complaint to allege that Leonard's comments to Mankins in the office violated the Act. In support of this motion she cites an excerpt from Leonard's testimony in which he acknowledged that he informed Mankins "that 'his behavior [at the meeting] was very unacceptable' and 'if he ever displayed it again he would be sent home.'" Counsel asserts that this was a threat directed at protected activity. Leonard's complete testimony, as set out above, was that he informed Mankins that "his behavior on the floor was very unacceptable. That with the present management of the Company the fairness and dignity and respect went both ways. That his action on the floor would not be tolerated. If he ever displayed it again that he would be sent home." Leonard thereafter informed Mankins that "if he had problems then he needed to take it to the upper office, [and] that being our meeting was getting nowhere that he could go on back to work." I find no threat related to protected activity in the foregoing statements. The reference to fairness and dignity and respect going both ways establishes that Leonard was referring to the manner in which Mankins had expressed himself by loudly interrupting him and calling him a racist. His invitation that Mankins raise his concerns with higher management obviates any inference that his comments were intended to squelch his complaints rather than the disruptive manner in which he had raised his complaints. The motion to amend the complaint is denied.

Leonard did not plan to send Mankins home because of his outburst in the crew meeting. In *Churchill's Restaurant*, 276 NLRB 775 (1985), cited by the General Counsel, the respondent's manager discharged an employee who accused him, in a meeting, of being "prejudiced against Mexicans." The Board held that the evidence established that the discharge was motivated by the protected concerted activity of criticizing the Respondent for its alleged discriminatory treatment against Hispanics" and that the comment was not "so offensive as to threaten plant discipline." *Id.* at 777 and fn. 11. In the instant case, it is undisputed that, when the meeting in the office ended, Mankins was returning to the plant floor. Mankins made no claim that he was speaking on behalf of anyone other than himself when, after being sent back to work with no formal discipline whatsoever being taken against him, he admits stopping at the door and making an unsolicited comment. I have credited Leonard's testimony that, upon leaving the office, Mankins loudly called him a racist and accused the Company of being a racist company. Leonard supervised a number of African-American employees. He was concerned that the conduct Mankins exhibited was "going to continue" and "would disrupt the workforce." He directed that Mankins go home. Leonard's direction that Mankins go home, effectively suspending him, was a direct result of his disruptive behavior, not union activity and not suspected concerted activity. See *Avondale Industries*, 333 NLRB 622, 636-637 (2001). I shall recommend that the 8(a)(1) and (3) allegations relating to the suspension of Mankins on December 14 be dismissed.

Mankins proceeded to the locker room through the Quiet Room. Leonard entered the Quiet Room as Mankins was exiting it. Upon observing Leonard, Mankins turned and said "bastard" and "redneck son-of-a-bitch." He spoke loudly enough for Leonard and Smith, who was entering the Quiet Room from the Press Room, to hear him. Although Mankins testified that, when Leonard entered the Quiet Room, he heard him say something, he did not recall what Leonard said. Thus, Mankins' response was not provoked by any comment by Leonard.

The Respondent, citing *Atlantic Steel Co.*, *supra*, argues that Mankins was terminated for insubordination, calling Leonard a "bastard, red-necked son-of-a-bitch" to his face, a statement overheard by another employee. The Board, in *Atlantic Steel*, noted that it was unaware of any decision that "held that an employee's use of obscenity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. To the contrary, the Board and the courts have recognized . . . that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act."

In *Atlantic Steel*, the Board set out the factors to be considered when determining whether an employee had "crossed that line" and ceased to engage in protected con-

duct. Those factors are: (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.

In the instant case: (1) Mankins' comment was made in the Quiet Room, a portion of the production area that was regularly used by employees. (2) Mankins outburst was not part of any discussion. The discussion in the office regarding Mankins' disruption of the crew meeting had ended. (3) Mankins admits that he "muttered" the words "racist son-of-a-bitch." I have found that he said "bastard, redneck son-of-a-bitch" loudly enough to be heard by Leonard across a 24 foot long room and that the latter portion of his outburst was heard by employee Smith who was entering the Quiet Room. (4) The comment was made when Mankins saw Leonard entering the Quiet Room. It was not provoked by any comment made by Leonard or by any unfair labor practice. It did not occur in the course of discussion regarding a grievance. No grievance was pending and Mankins had not sought to file a grievance.

In *North American Refractories Co.*, 331 NLRB 1640 (2000), the Board, in the absence of exceptions, adopted the decision of the administrative law judge. Although not precedent since there were no exceptions, the case is instructive in view of the similar factual situation. In that case, as in this case, "the use of swear words, . . . [was] commonplace in the shop," but there was a distinction between "such talk" and "angry use of those words, directed at . . . a supervisor, in attack fashion." *Id.* at 1642. Although the discharged employee had been engaged in concerted activity "ordinarily protected under Section 7 of the Act," the administrative law judge found, "[b]y the manner in which Rand [the employee] proceeded, a profane, vulgar attack directed at his supervisor, his conduct lost the protection of the Act it otherwise would have enjoyed. Federal labor law simply does not provide a shield against the consequences of such insubordinate behavior." *Id.* at 1643.

Mankins was insubordinate. Vestal's testimony establishes that employees cursed about, not at, supervisors and that Leonard was not a supervisor who made an issue of spontaneous outbursts on the floor. His practice was to call the offending employee into his office to deal privately with the situation. Mankins was not disciplined for his initial spontaneous outburst. After being asked, in the office, to cease his disruptive conduct, Mankins was sent back to the job. Mankins again loudly proclaimed that Leonard was a racist and the Company was racist. Leonard sent him home. As Mankins was leaving the Quiet Room he saw Leonard entering and said "bastard, redneck son-of-a-bitch" loudly enough for Leonard and Smith, who was entering the Quiet Room from the Press Room, to hear him. Hightower investigated the report that Leonard made, and he and Witherspoon determined that the conduct that Mankins exhibited could not be tolerated. See *Aluminum Co. of America*, 338 NLRB No. 3 (2002).

Assuming, as I have in this decision, that Leonard suspected that Mankins was engaged in concerted activity at the crew meeting, there is no probative evidence that any action taken against him was in retaliation for that activity rather than his disruptive conduct. Mankins was not engaged in protected activity when he called Leonard a bastard and son-of-a-bitch. The comment was not made in response to any statement by Leonard. It was made when Mankins saw Leonard entering the Quiet Room. Even if Mankins' "bastard . . . son-of-a-bitch" comment, whether modified by the word "redneck" or "racist," the word Mankins admits saying, had been uttered in the course of protected concerted activity, that vulgar personal attack "crossed [the] line" and ceased to be protected activity. See *Atlantic Steel Co.*, supra. The Respondent's termination of Mankins for insubordination was not in retaliation for, motivated by, or related to any union activity or suspected con-

certed activity. I shall recommend that the 8(a)(1) and (3) allegations relating to the termination be dismissed.

CONCLUSIONS OF LAW

The Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The complaint is dismissed.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.