

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PEARSON'S ENTERPRISES, INC. t/a PEARSON
HONDA

and

Case 5-CA-34173

JOHN I. GUNSOLLEY, an Individual

Stephanie Cotilla Eitzen, Esq., for the General Counsel.
Mary Elizabeth Davis and Kelley M. Wynne, Esqs.,
(Spotts Fain, PC), of Richmond, Virginia, for the Respondent.
Peter J. Eide, Esq. (Law Offices of Peter J. Eide, LLC),
of Columbia, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Richmond, Virginia, on September 16, 2008. The charge was filed on March 14, 2008, by John I. Gunsolley, (the Charging Party). The complaint was issued June 24, 2008. The complaint alleges that Pearson's Enterprises, Inc. t/a Pearson Honda (the Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) when on or about December 20, 2007,¹ it discharged Gunsolley because he engaged in protected concerted activity when he complained to other employees regarding the Respondent's denial of his leave request. The Respondent, by its answer dated July 3, 2008, denies engaging in unlawful conduct and requests that the complaint be dismissed.

On the entire record, including my credibility determinations based on the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole and, after considering the briefs filed by the counsel for the General Counsel and the Respondent, I make the following

¹ All dates are in 2007 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

5 The Respondent, a Virginia corporation, with an office and place of business in
Richmond, Virginia (the facility), where it has been engaged in the retail sale and distribution of
automobiles and providing related services. During the 2007 calendar year, a representative
period, the Respondent in conducting its business operations previously described, derived gross
10 revenues in excess of \$500,000. During the same time period the Respondent, in conducting its
business operations set forth above, purchased and received at its facility products, goods, and
materials valued in excess of \$5,000 directly from points located outside the Commonwealth of
Virginia. The Respondent admits, and I find, that it is an employer engaged in commerce within
the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Background

20 John I. Gunsolley, the Charging Party, was employed at the Respondent's facility from
March 2 until his discharge on December 20, 2007. His hours of work were from 8 a.m. to 4:30
p.m., Monday through Friday. He usually worked a 40 hour workweek, but for some
unexplained reason during April and May he worked 25 to 35 hours a week. Gunsolley was a
25 driver assigned to the parts department. He transported automobile parts and when not driving,
he stocked the parts room.

30 Steven Meade is the Respondent's parts manager and an admitted supervisor within the
meaning of Section 2(11) of the Act. During Gunsolley's employment with the Respondent
Meade was his supervisor. Before Thanksgiving Meade allowed Gunsolley's to take the Friday
after Thanksgiving off without pay.

35 During the last week in November, or the first week in December, a motorist called
Meade and complained that Gunsolley had cut in front of her. According to Gunsolley it was the
motorist who cut him off. Gunsolley asserts that another employee witnessed the incident and
confirmed Gunsolley's account. No action was taken against Gunsolley. According to
Gunsolley he asked Meade if the outcome would have been different absent his employee
40 witness. Gunsolley said that Meade indicated that, at the least, he would have issued Gunsolley
a written discipline. Thereafter, the matter would have been referred to William Biddle, the
Respondent's general manager, who could have discharged him. Gunsolley testified that
Meade's answer caused him to feel frustrated and that his job was being threatened.

45 During the last week in November Gunsolley asked for unpaid time off for the afternoon
of December 6, and the following morning, to attend a Washington Redskins football game.
Meade approved the request.

50 The parties agree that Gunsolley also requested unpaid time off on December 21. To that
end Gunsolley went to Meade's office on December 17. Gunsolley testified that Meade
announced that he was aware that Gunsolley wanted December 21 off and that Gunsolley had

taken a lot of time off for someone with his length of service. Gunsolley disagreed and stated that he had only been off one day and two half days. Meade mentioned that Gunsolley needed to arrive at work on time. Gunsolley testified that he understood that his request was disapproved and he left Meade's office.

5

B. The Incident between Gunsolley and Brent Killen

1. Gunsolley's version

10

After leaving Meade's office, Gunsolley returned to the parts department and saw Killen, a warehouse and counterperson, who works in the parts department. Gunsolley said that he told Killen:

15

I can't believe this place and the way I've been treated and other employees have been treated here. Things did not change, I'd be looking for other employment. I also told him about a situation about when I was employed the first month of my employment, where, after that, for a month and a half to two months, I was on part time, that that really hurt my finances and they didn't seem very responsive to that. And then I left to deliver the part. (Tr. 28.)

20

When Gunsolley returned he "was still a little irritated" and he reiterated the above statement to Killen, with the addition of the irate motorist incident, set forth above. (Tr. 29-32.)

25

The General Counsel then asked: "Do you recall if you said anything to Brent about the leave request that you made? Gunsolley replied "I said both times, . . . that I was frustrated that he [Meade] dumped on me, that he wasn't very responsive to my time off. (Tr. 32.)

30

Gunsolley stated that he made the forgoing comments to Killen "[b]ecause I had seen other employees be treated not so nice, and I was frustrated in my situation that these incidents happened." (Tr. 33.) Gunsolley said that Killen did not respond and Gunsolley walked away. Gunsolley stated that his voice was firm but that he did not yell, nor use profanity.

35

Later that afternoon Gunsolley claims that he made basically the same statements to "Jeff," another parts department employee. Gunsolley admits that when he spoke to Jeff he was "a little bit more composed, a little bit more calmer at the time." (Tr. 34.) Gunsolley allegedly gave Jeff more details regarding his being dumped on for asking for taking two days off and asking for a third. (Tr. 32, 34.) Additionally, when asked why he spoke with Jeff about these matters he said that "I was still frustrated about employment situations, and I didn't know if someone else had had the same situations. Gunsolley also admitted stating that "I hate this place" and "this place is ridiculous." Gunsolley testified about this conversation over the Respondent's objection. Jeff did not testify nor is there any evidence that the Respondent knew of this conversation.

40

45

2. Killen's version

50

Killen was uncertain of the date of the incident but believed that it was the "middle to end of December," around 4 p.m. Killen was working in the warehouse when there was a knock on the door. He opened it and Gunsolley entered, slamming the door behind him. Gunsolley looked very angry. Killen, who had only been employed by the Respondent since August 6,

recognized Gunsolley but they had never spoken. He asked Gunsolley what was wrong. Gunsolley replied “F—k this place, I f—king hate this place.” Gunsolley explained that he was upset because Meade would not let him have a day off to go to a Redskins game and that he was “f—king sick of it.” Killen said that he kept repeating himself and saying that the company was “f—king ridiculous.” Gunsolley said that in the spring he was going to look for new employment.

Killen testified that Gunsolley was so angry that he was shaking, while he was yelling, and cursing. Killen specifically rejected the characterization of this incident as a conversation—it was “pretty much John lashing out at me about something he was frustrated about. I didn’t really take part in it.” Killen testified that Gunsolley’s conduct made him nervous and that he felt threatened by Gunsolley’s demeanor. Killen testified that Gunsolley, who was only standing a foot away from him, is “a lot bigger than I am.” Killen kept telling Gunsolley “to speak with Steve [Meade] about it,” and eventually Gunsolley left.

Killen testified that Gunsolley only confronted him once on that day and that the sole object of Gunsolley’s ire was Meade’s refusal to give him a day off to attend a Redskins football game. Killen specifically denied that Gunsolley mentioned any other matters.

C. Killen meets Meade and Biddle

Shortly after Gunsolley left Killen Meade arrived. Meade testified that he saw that Killen was “very upset.” Killen told Meade that Gunsolley slammed the door and was yelling and cursing because Meade would not give him a day off to go to a Redskins game. Killen told Meade that Gunsolley was in close proximity to him, was pointing his finger, visibly shaking, and used the F—word several times. Just as Killen started to tell Meade about the incident general manager Biddle approached them. Biddle testified that while he was “making his rounds” of the facility someone told him that they had heard yelling and screaming coming from the back of the parts department. When Biddle arrived at the parts department he immediately went over to where Killen and Meade were standing. Biddle heard what Killen said and as soon as Killen finished speaking, Biddle instructed Meade to find Gunsolley and to find out what was going on. Meade could not locate Gunsolley that day, but summoned him to his office the next morning, December 20.

D. The December 20 meeting

Meade testified that the purpose of his meeting with Gunsolley was investigatory. Meade thought that Gunsolley was “fine” with his decision not to give him the time off and he wanted Gunsolley to explain “the outburst.” Meade testified that Gunsolley did not say much. Gunsolley kept repeating that he was upset because Meade did not give him the time off. “That was the only complaint that he gave me over and over and over again.” Gunsolley appeared agitated and stared at Meade. Meade explained that he did not give him the day off because the schedule was fixed and because of Gunsolley’s tardiness. Gunsolley repeated his question and Meade explained that he had just given him the answer and said that he did not understand why Gunsolley kept asking the same question. Gunsolley continued to stare at him. Meade testified that he could tell by his eyes that Gunsolley was angry and that he was not communicating. Meade asked him why he would “attack” an employee who had nothing to with the decision. Meade asked Gunsolley why he did not come to Meade. Gunsolley was unresponsive. Meade

testified that Gunsolley appeared to become increasingly irritated, agitated, and angry. Gunsolley was sitting in a chair with rollers on to the base. Twice Gunsolley moved his chair closer to Meade. He moved back only after Meade asked him politely, each instance, to move it away because his proximity was making Meade uncomfortable. Meade noted that Gunsolley expressed no remorse for his conduct the previous day. Gunsolley was uncommunicative, and when he did speak his voice was getting louder. Meade was becoming more uncomfortable and decided that it would be best to get out of the situation. He concluded the meeting by saying “I’ve done everything I can to try to understand what happened in the back. You’re not telling me anything.”

According to Gunsolley as soon as he sat down in Meade’s office, Meade announced “I heard that you’ve been going around talking behind my back. I overheard some of the conversation on Monday of certain people, but I want to know what you have to say about it, and I want—and I think I’m going to discharge you for this.” Gunsolley replied “Please don’t discharge me.” Meade said that “Bill [Biddle] wants me to let you go.” Gunsolley continued to ask that he not be discharged. Meade said that he would get back to him later that day, but to not count on anything. According to Gunsolley, Meade told him that his discharge was because Meade could not have employees talking behind his back. Gunsolley claims to have said nothing else at the meeting. Gunsolley admits that he slowly rolled his chair towards Meade but not in an aggressive way. (Tr. 64.) When questioned on redirect examination Gunsolley contradicts himself and claims that he was not aware he was rolling his chair and denies that he had any intent in doing so, nor was he doing it with any specific purpose in mind. (Tr. 72.)

E. Discussion

Although the parties do not argue this point, I note that there appears to be a discrepancy regarding the timeline for the forgoing events. Gunsolley contends that it was Monday, December 17, when Meade denied his request and that he spoke with Killen and Jeff. The parties agree that Gunsolley was discharged on Thursday, December 20. The complaint alleges that the incident with Killen happened on or about December 19. Meade acknowledges in his testimony, and his affidavit, that Gunsolley’s request was denied on either December 17 or 18. (Tr. 113; GC Exh. 7 at 1, L. 11.) He also believes that the incident with Killen happened the following day, December 18 or 19 (Tr. 116) and “around” December 18. (GC Exh. 7 at 1 L. 17)

Meade signed his affidavit on April 18, 2008. Two months earlier he gave evidence to the Virginia Employment Commission regarding Gunsolley’s eligibility for unemployment benefits. At that hearing he said that the incident with Killen took place on December 19. I find that the more probable timeline is with Gunsolley having his request denied on December 18, approaching Killen on December 19, and being discharged on December 20. That scenario is also consistent with Biddle’s testimony. Biddle became involved approximately the same time that Meade approached Killen which was directly after the incident with Gunsolley. Biddle immediately ordered Meade to find Gunsolley and find out what was going on. Biddle testified that he did not want Gunsolley driving a company vehicle or interacting with customers in the state of mind as reported by Killen. Meade could not find Gunsolley that day but met with him when he arrived on the morning of the next day, December 20. Additionally, in light of Gunsolley’s admitted “frustration” and need to “vent”(Tr. 73.) I do not believe that he would have, or could have, waited two days (December 17 and 18) before acting out on his frustration.

For the record to be complete an additional observation is necessary. Killen testified that Gunsolley is “a lot bigger” than I am. (Tr. 90.) Meade confirms that Gunsolley “is a big guy.” (GC Exh. 4 at 1, par. 3.) Neither statement sufficiently reflects Gunsolley’s size. Gunsolley is not just a big man, he is a huge man. He was by far the largest of the six other men at the hearing. At 6 foot 1 and 215 pounds I was the second largest. Although Gunsolley appears to be slightly under 6 foot, I believe that his weight is at least 250 pounds and perhaps nearer to 300 pounds. His physique is similar to that of a defensive lineman in the National Football League. Gunsolley is much larger than either Biddle or Meade. They both appear to be of average height and build. (R. Exh. 6.) Killen is a somewhat slight individual who does not appear to be as tall or to weigh as much as either Biddle or Meade. Thus Gunsolley’s physique is oversized when compared to most individuals, and the differential is even greater when the comparison is made between Meade and Killen.

F. Credibility Determinations

The General Counsel argues that neither Meade nor Killen are reliable witnesses. Meade testified that Gunsolley requested a half day off to go to the Washington Redskins game on December 21. Gunsolley testified that he requested the entire day off and never gave a reason for the request to any of the Respondent’s employees. Killen testified that Gunsolley said that he requested a day off to go to a Redskins game. The record establishes that December 21 was a Friday, and that the Redskins played on Sunday, December 23, in Minneapolis, Minnesota. Gunsolley states that he wanted the day off to be with his sister who was visiting. He admits that he never told anyone this reason.

According to Gunsolley, as soon as he entered Meade’s office Meade said that he had heard that Gunsolley requested Friday (December 21) off. Meade, Gunsolley says, then told him that he was concerned about Gunsolley’s tardiness, and that he was taking too much time off. Meade told Gunsolley that until Gunsolley worked on his tardiness there would be no more days off. Gunsolley argued that he had only taken two half days off and one full day and was only requesting one additional day. Gunsolley also told Meade and that the time clock was inaccurate. The meeting ended shortly thereafter.

It is possible that Meade was confused and somehow related Gunsolley’s current request with his previous request for two half days off to attend a Redskins game. When assessing Meade’s recollection of events I am mindful that he suffered a heart attack on December 7 and had only returned to work on December 11. As noted previously, it does appear that Meade had some confusion with dates. In any case the reason for Gunsolley’s request, has no relevance to the contention that he was engaged in protected concerted activity when he was complaining about Meade’s denial of his request.

Killen was an excellent witness who testified in a forthright manner without any apparent problems with recollection, especially when viewed in light of the circumstances surrounding the event about which he testified. Killen testified that when he asked Gunsolley what was wrong, the only reason Gunsolley offered was that Meade would not let him have a day off to go to a Redskins game. (Tr.78; 101.) Meade testified that Killen told him that the reason Gunsolley verbally attacked Killen was because he [Meade] was unwilling to give him a half a day off to go to the Redskins game. (Tr. 115.) It is noted that Meade erroneously attributes his “half day” belief to Killen’s statement. I credit Killen’s testimony over all others.

Killen had the demeanor of an honest witness who was earnest in his attempt to recollect the facts to the best of his ability. It certainly did not appear that Killen had any ax to grind. There is no credible evidence that Killen knew about Gunsolley's previous request for time off. In that regard I specifically reject the General Counsel's statement that "Gunsolley told Jeff, as he had previously told Mr. Killen, that he had taken two unpaid days off and that his request for a third unpaid day off had been denied," as not being supported by the record. (GC Br. at 9.)

A careful review of Gunsolley's testimony reveals that during his first alleged meeting with Killen he failed to even mention his request or its denial. (Tr. 28.) Nor does Gunsolley mention that issue during his second visit with Killen, until the General Counsel asked—"Do you recall if you said anything to [Killen] about the leave request that you had made?" Gunsolley's said: "I said both times, the time that I left and the time that I came back that I was frustrated that he [Meade] dumped on me, that he wasn't very responsive to my time off." (Tr. 29-33.) I find that response to be cursory and nonspecific. It is only later, when Gunsolley is allegedly talking to "Jeff" that Gunsolley indicates that "dumped on" is referring to Meade's comments about Gunsolley taking excessive time off. As noted previously this is the only time that Gunsolley provides any specifics about his previous request for time off. Gunsolley's claim that Meade was not responsive, i.e., not sympathetic, to his request is, to odd, considering that Gunsolley, by his own admission he told no one, the reason for his request.

Furthermore, Gunsolley testified that when he initially spoke with Killen he mentioned that when he started to work for the Respondent he initially worked less than a forty-hour week. When he returned from making his delivery, Gunsolley claims that he again spoke with Killen and repeated the exact same story. Frequently when listening to Gunsolley's words they sounded rote.

Next Gunsolley claims to have told Killen about the driving incident. As set forth above, he then only vaguely mentions the leave request and that was only after a prompt from the General Counsel. There is no evidence that Gunsolley mentioned anything about his tardiness or Meade's comments thereof. Killen credibly specifically rejected any suggestion that Gunsolley mentioned a time clock or being reported for unsafe driving. (Tr. 79.) I found Gunsolley's testimony to be generally unimpressive. Even when not sounding rehearsed his testimony was tentative, lacking detail and unconvincing. I did not find him a credible witness and I fully credit Killen testimony in all aspects. I also give very little weight to Gunsolley's statement regarding what he and Jeff discussed. Jeff was not called as a witness, and there is no evidence that the Respondent was aware that Gunsolley spoke with Jeff on this day, let alone the content of the discussion.

I find it somewhat significant that both times that Killen mentioned the football game he testified that Gunsolley spoke of not getting a day off to attend "a Redskins game." This could be construed that the request was for a game in the more distant future, in contrast to "the Redskins game" which could be the game scheduled for the coming weekend. It is also possible, perhaps to make his complaint sound more valid, that he provided Killen with that as a reason. It is also conceivable that Gunsolley's testimony—that Meade did not mention the football game, is inaccurate, and in fact Gunsolley was merely reiterating the same reason Meade claimed that he gave Gunsolley.

5 If I accept as fact that Gunsolley did not mention anything about football to Killen then it must follow that Meade, or Biddle, or both must not only have told Killen what to say, but they told him to lie about an insignificant matter. The parties agree that the request was rejected and, based on the General Counsel's theory of the case, the reason is irrelevant. Having closely
10 observed Killen, Meade, and Biddle, testify I have seen nothing that would cause me to have even the slightest bit of suspicion that either of those men would have suggested or encouraged Killen to perjure himself. Although Killen appeared to be slightly uncomfortable when testifying about the incident with Gunsolley, I find that reasonable in that he was relating what had to be a very unpleasant experience. Killen also did not appear the least bit eager to please his employer or do its bidding. Furthermore, he demonstrated no animosity towards Gunsolley or bias towards the Respondent.

15 I was also impressed with Killen's candor when testifying concerning a statement that he prepared on March 26, 2008, at Biddle's behest. When asked by the General Counsel if he received any assurances that his cooperation was voluntary or that there would not be any consequences if he choose not to participate and prepare the statement, Killen answered "no" to each question. Although a sequestration order was in effect Biddle was present in the hearing
20 room as the Respondent's representative. Notwithstanding Biddle's presence, Killen answered every question in a strong voice, without hesitation or qualification. I would generally consider Killen's answers to be viewed as adverse to the Respondent's interest. See generally *Johnnie's Poultry*, 146 NLRB 770 (1964).

25 The General Counsel marked the March 26 document, mentioned above, as General Counsel exhibit 5 for identification. The document was used to refresh Killen's recollection but was not moved into evidence. His recollection refreshed, Killen agreed with the General Counsel's statement that Biddle had requested "a written statement of what [] Gunsolley had said
30 to [Killen]?" Killen also acknowledged that the statement did not mention that he told Meade that Gunsolley used profanity. The General Counsel references "(GC-5)," as the source of Killen's statement. (GC Br. at 8 fn. 19.) Because the statement has been established by Killen's testimony I shall allow it to remain and will address it below. The reference to "(GC-5)," contained in footnote 19 on page 8 of the General Counsel's brief must be struck because that
35 exhibit was never moved into evidence. A similar fate must befall that citation, as well as the sentence preceding it, contained on page 7 of the General Counsel's brief. In that instance the General Counsel is arguing facts not in evidence. (Tr. 4, 96-100.)

40 Killen's testimony that Gunsolley used profanity is denied by Gunsolley. I initially observe that Gunsolley used the F-word several times when testifying, without any apparent uneasiness or hesitation.

45 Regarding the statement Killen prepared for Biddle, on redirect examination Killen clarified that Biddle's instruction was to write down what happened that day, a much broader request than merely what Gunsolley said. Additionally Killen was never asked why he did not include the fact that he told Meade that Gunsolley used profanity. An obvious answer to that question is that "Biddle overheard the conversation between Mr. Meade and Mr. Killen," a fact acknowledged by the General Counsel. (GC Br. at 8.) And thus Killen may have felt such a
50 statement would be redundant. Furthermore, Killen was being exposed to what sounds like an adult temper tantrum, engaged in by an individual much larger than himself. Perhaps Gunsolley's profanity may have been trumped in Killen's mind by Gunsolley's immediate

proximity, his yelling, screaming, shaking, and finger waving. In any case I do not find that Killen's failure to include Gunsolley's use of profanity in any statement detracts from his overall credibility.

5

III. ANALYSIS

10

The complaint alleges a violation of Section 8(a)(1) of the Act based on the Respondent's discharge of Gunsolley because he engaged in concerted activities with other employees, for the purposes of mutual aid and protection, by concertedly complaining about terms and conditions of employment, specifically the denial of a leave request.

15

20

25

30

35

40

Under Section 8(a)(1) it is an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act. Section 7 of the Act protects the right of employees to join and assist a labor organization, and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Board has distinguished between an employee's activity engaged in "with" another employee (which it deems concerted) and an employee's activity engaged in "solely" by and on behalf of the individual employee (which is not concerted). *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffid. in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enf. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Meyers II*, the Board explained that its objective standard of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." Id. at 887. Additionally, when an individual employee solicits other employees to engage in group action, even when such solicitations are rejected, the inability to sway coworkers does not change the concerted nature of the activity. *El Gran Combo*, 284 NLRB 1115 (1987), enf. 853 F.2d 996 (1st. Cir. 1988); *Circle K Corp.*, 305 NLRB 932 (1991). The Board has also long held, with Court approval, that for conversations between employees to be found to be concerted activity, they must look toward group action and that an employee engaged in purely personal "griping" may not claim the protection of the Act. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 833 fn. 10 (1984). See also *Mushroom Transportation Co., v. NLRB*, 330 F.2d 683 (3rd Cir. 1964) ("It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."). Accord: *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951); *Atlanta Newspapers*, 264 NLRB 878, 879 (1982).

45

50

I find that Gunsolley's conduct on or about December 19, 2007, was not concerted activity. In addition to the complaint regarding the denial of unpaid time off, that is specifically alleged in the complaint, the General Counsel adds Gunsolley's alleged complaints regarding his reduced work hours and the investigation regarding the driving complaint lodged against Gunsolley. Killen has credibly denied that Gunsolley mentioned either of those incidents. I have found Killen, in contrast to Gunsolley, to be a totally believable witness. I believe, after hearing Gunsolley's testimony and observing his demeanor when testifying, that he would say anything in order to prevail in this proceeding. In addition, even if I did credit Gunsolley's testimony regarding those incidents, I would find that each of those incidents are clearly purely

personal gripes.

5 The General Counsel relies on *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995), enf. denied in relevant part 81 F.3d 209 (D.C. Cir. 1996) to support the
 10 assertion that hours and conditions of work are inherently concerted because “they are as likely to spawn collective action as the discussions of wages.” *Id.* at 220. *Aroostook* involved employee complaints to each other. Here even if I were to credit Gunsolley, Killen did not respond at all to Gunsolley’s generalized narrative about Gunsolley’s financial strain, or
 15 Gunsolley’s unexplained conclusion that “they didn’t seem very responsive to that.” (Tr. 28.) The irony of Gunsolley’s “griping” that the Respondent reduced his hours in April and “griping” that the Respondent refused to grant him unpaid time off in December, is also noted.

15 The General Counsel contends that the concerted nature of Gunsolley’s conduct is established by Gunsolley’s testimony that he made his comments to Killen “[b]ecause I had seen other employees be treated not so nice, and I was frustrated in my situation that these incidents happened.” (Tr. 33.) Absent evidence identifying those employees and the circumstances that
 20 Gunsolley allegedly witnessed I reject the General Counsel’s conclusion that the foregoing statement is evidence that Gunsolley was seeking to initiate group action. Gunsolley does not claim that he conveyed this sentiment to Killen. In fact Killen credibly testified that the only reason Gunsolley gave for being so angry, was because Meade refused his request. Indeed, when
 25 asked by the Respondent’s counsel why he talked to Killen he replies “[m]ost part to vent, to see if anyone else had the same frustrations that I had.” The venting part of his statement is certainly consistent with Killen’s testimony. Regarding any “similar frustrations” that appears to make little sense since Gunsolley claims that he “had seen other employees being treated not so nice.” Moreover, it is inconsistent with his testimony that he did not ask either Killen or Jeff about any of their experiences while employed by the Respondent. I find Gunsolley’s testimony incredible.
 30 The only credible comment Gunsolley made, that was corroborated by Killen, regarding any future activity is Gunsolley’s “personal” decision to look for new employment in the spring.

35 The General Counsel posits that it was unnecessary for Gunsolley to ask Killen about his personal experience because a complaint about a shared work condition invites a response from the listener. Even assuming that “shared work condition” equates to terms and conditions of employment, I doubt that I would agree with that statement. In any case under the facts that I have found herein, I would not draw any conclusions based on Killen’s silence. In fact Killen was not totally silent during Gunsolley’s rant, but kept telling him to speak with Meade.

40 Being alone, in close proximity to a man who is substantially larger than you, and who appears to have lost control of his emotions, could cause an individual to feel threatened. That is exactly how Killen felt. (Tr. 94.) Killen acknowledged that Gunsolley did not have physical contact with him nor did he say anything that would lead Killen to conclude that his safety was
 45 in jeopardy. But clearly, the objective from Killen point of view, was not to do anything to change the status quo. Thus, I find that the fact that Killen did not disagree with Gunsolley, tell him to stop talking, or tell him go away, in any way detracts from Killen’s credibility.

50 Killen, as well as Meade and Biddle were totally shocked by Gunsolley’s conduct on December 19. They agreed that until then Gunsolley was a quiet individual who kept to himself. Certainly Gunsolley’s outburst, rant, temper tantrum, or meltdown, appears to be an excessive reaction to Meade’s refusal to grant him the unpaid day off. Gunsolley had at least one, and

possibly two days to seethe over this perceived injustice. Clearly, this is not an instance of “animal exuberance.” Killen, much to his obvious regret and discomfit, just happened to be in plan sight when Gunsolley “lost it.”

5 Having found that the General Counsel has failed to establish that Gunsolley was engaged concerted activity on or about December 19 as alleged in the complaint, I find that the Respondent did violate the Act when it discharged him on December 20, as alleged in the complaint. Accordingly, I recommend that the complaint be dismissed in its entirety.

10

A. Alternate Finding

15 If the Board determines that Gunsolley was engaged in protected concerted activity on December 19, I would still recommend that the complaint be dismissed. To determine whether an employee’s misconduct while engaging in protected concerted activity causes the employee to lose the protection of the Act, the Board applies the analysis set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816–817 (1979). In assessing the conduct the Board uses the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by the employer’s unfair labor practices.

20

25 Here the incident occurred in the parts warehouse which is adjacent to the parts department. The warehouse is restricted to employees but the parts department is where employees and customers go to obtain parts. The incident occurred during normal business hours. Although no customers or other employees were present in the parts department it appears that was more happenstance than design. Biddle credibly testified that when he was in the service department someone told him that there was yelling and screaming coming from the back of the parts department. In view of the location, and the fact that Gunsolley was yelling and screaming, I find this factor favors the lost of the Act’s protection. The subject matter of the outburst, the refusal to grant unpaid time off, would appear to be a term and condition of employment and would favor the Act’s protection. Regarding items (3) and (4), clearly, on balance, even if item (1) favored protection, Gunsolley’s conduct was so opprobrious, so misdirected, and so totally unjustified that a finding that his conduct lost its protected status is fully warranted. Accordingly, after balancing the factors set forth in *Atlantic Steel Co.* Ibid. I recommend that the complaint be dismissed in its entirety.

30

35

40

45

50

CONCLUSIONS OF LAW

5 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, as alleged in the complaint.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

15 ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 27, 2009

20
25
30
35
40
45

John T. Clark
Administrative Law Judge

50 _____
² 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.