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**Constellis, LLC d/b/a Academi Training Center, LLC
and Michael Macri.** Case 05–CA–278218

May 3, 2023

DECISION AND ORDER

BY MEMBERS KAPLAN, WILCOX, AND PROUTY

On July 19, 2022, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

¹ The Respondent has excepted to the judge’s finding that the students at its Academi Training Center are not employed by Constellis, LLC. Although the Respondent correctly notes that Academi trainees are employed by subsidiaries of Academi’s parent company, Constellis, LLC, the status of Academi’s students has no effect on the judge’s findings that Michael Macri, an instructor at Academi, is not a supervisor or managerial employee. Moreover, in adopting the judge’s finding that Macri is not a managerial employee, we do not rely on his statement that to “find otherwise would leave these instructors unprotected in their efforts to concertedly petition their employers to ameliorate very dangerous working conditions. This conclusion flies in the face of the purpose for which the Act was enacted.”

The Respondent excepts to the judge’s statement that Respondent’s Exhibit 12 was “probably received . . . in error.” The Respondent, however, has not presented any argument in support of this exception; thus, we find in accordance with Sec. 102.46(a)(1)(ii) of the Board’s Rules and Regulations that this exception should be disregarded. See, e.g., *St. Paul Park Refining Co., LLC d/b/a Western Refining*, 366 NLRB No. 83, slip op. at 1 fn. 3 (2018), enfd. 929 F.3d 610 (8th Cir. 2019); *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 3 (2018).

We adopt the judge’s finding that the Respondent violated Sec. 8(a)(1) by terminating Macri. We note that the Respondent concedes in its exceptions brief that “[t]here is no doubt that [Macri] engaged in concerted activity” and again in its reply brief that “[t]here is no question that [Macri] engaged in protected concerted activities.” In adopting the judge’s finding that Macri’s protected concerted activity was a motivating factor in his suspension and discharge, we not only rely on the factors cited by the judge, but we also rely on the suspicious timing of Macri’s suspension and discharge. Macri was suspended on December 10, 2020, 1 day after engaging in protected concerted activity at a Respondent-led meeting following the appearance of new bullet ricochets. The Board has consistently found that disciplinary action that closely follows protected activity can serve as evidence of unlawful discrimination. See, e.g., *Novato Healthcare Center*, 365 NLRB No. 137, slip op. at 16 (2017), enfd. 916 F.3d 1095 (D.C. Cir. 2019); *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006), enfd. 232 Fed.Appx. 270 (4th Cir. 2007).

Macri’s status as the most vocal critic of the Respondent’s COVID-19 and Range B policies resulted in his receiving prompt discipline, in part, for his protected concerted activity. Macri challenged the Respondent’s COVID-19 personal protective equipment policy at a March 2020 meeting led by Jerry Neville, president of Constellis’s National Capital

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,¹ and conclusions and to adopt the recommended remedy and Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Constellis, LLC, d/b/a Academi Training Center, Upper Marlboro, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Make Michael Macri whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful

Region. Similarly, Macri challenged the Respondent’s Range B shooting proposal at a meeting led by Laurence James, one of Academi’s training managers, following the occurrence of new ricochets on December 9, 2020. The weight of the evidence supports the inference that the leading role played by Macri in these, and numerous other instances of protected activity, was a motivating factor in his suspension and discharge.

In analyzing whether Macri lost the protection of the Act, we find that the judge properly applied *General Motors LLC*, 369 NLRB No. 127 (2020), as extant precedent. Nevertheless, the judge also analyzed, in the alternative, whether Macri had lost the protection of the Act under *Atlantic Steel*, 245 NLRB 814 (1979). Although the *Atlantic Steel* standard was overruled in *General Motors* and therefore does not apply here, we agree with the judge that Macri would not have lost the protection of the Act under the factors set forth in *Atlantic Steel*. Because Member Kaplan agrees that the judge properly applied *General Motors*, he finds it unnecessary to pass on whether Macri would have lost the Act’s protection under the factors set forth in *Atlantic Steel*.

² We have modified the judge’s recommended Order in accordance with our decision in *Paragon Systems Inc.*, 371 NLRB No. 104, slip op. at 3 (2022). In addition, in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), we have amended the make-whole remedy and modified the judge’s recommended Order to provide that the Respondent shall also compensate the employee for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall substitute a new notice to conform to the Order as modified.

Member Kaplan acknowledges and applies *Paragon Systems* as Board precedent, although he expressed disagreement there with the Board’s approach and would have adhered to the position the Board adopted in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). Additionally, unlike his colleagues, Member Kaplan would require the Respondent to compensate the employee for other pecuniary harms only insofar as the losses were directly caused by his unlawful termination, or indirectly caused by the unlawful action where the causal link between the loss and the unfair labor practice is sufficiently clear, consistent with his partial dissent in *Thryv, Inc.*, supra.

discharge, in the manner set forth in the remedy section of the judge's decision as amended in this decision."

2. Substitute the following for paragraph 2(h).

"(h) Post at its Upper Marlboro, Maryland facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Academi Training Center at any time since December 10, 2020."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 3, 2023

Marvin E. Kaplan, Member

Gwynne A. Wilcox, Member

David M. Prouty, Member

³ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, including but not limited to discussing wages, hours and other terms and conditions of employment.

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

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

WE WILL make Michael Macri whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make Michael Macri whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Michael Macri for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of

means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Region Director may for good cause shown, a copy of Michael Macri's corresponding W-2 form(s) reflecting the back pay award.

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

CONSTELLIS, LLC

The Board's decision can be found at www.nlr.gov/case/05-CA-278218 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Oluwatosin Fadarey and Zachary Wooley, Esqs., for the General Counsel.

Kevin J. Morris, Esq. (Constellis, LLC), of Coral Springs, Florida, for the Respondent.

Lindsay A. Freedman, Esq. (Freedman Law, LLC), of Columbia, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Baltimore, Maryland on June 9 and 10, 2022. Michael Macri filed the charge giving rise to this case on June 7, 2021. The General Counsel issued the complaint on March 30, 2022.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by suspending Michael Macri on about December 10, 2020, and then discharging him on January 8, 2021.

Aside from claiming that it was privileged to suspend and discharge Macri due to his conduct, Respondent alleges that Macri

and all firearms instructors at its Upper Marlboro facility are managerial employees and/or statutory supervisors who are not protected by the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel¹ and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Constellis employs security guards. It trains these guards and guards employed by sister companies at the Academi Training Center in Upper Marlboro, Maryland. Respondent provides training to individuals who serve as security officers at federal government properties. It provides services valued in excess of \$50,000 in states other than Maryland. It 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 PRACTICES

Respondent hired Michael Macri, a former Annapolis policeman, to be a firearms and tactics instructor at its Upper Marlboro, Maryland Academi Training Center in October 2018. In that position he trained security guards employed by Constellis and its sister companies, such as Triple Canopy, in the use of firearms, batons (what I would call a night stick), pepper spray (OC), defense tactics, CPR and hazardous materials. Macri was one of 12–13 full time instructors.² Respondent also employed additional part-time or casual instructors.

The Academi curriculum consisted of 32 hours of classroom training and 4–8 hours of “dry fire,” followed by live fire at one of 2 shooting ranges A & B, which are next to each other. The targets, which hang from the ceiling move back and forth down the length of the range.

When Macri was hired in 2018, he was trained by an experienced instructor without reference to any documents. This changed when Kenneth Cooper became director of training sometime in 2019 or 2020.

The full-time firearms instructors worked in 2 teams which rotated on early and late shifts, (5:30 a.m. to about 3 p.m. and 3 p.m. to midnight). Generally, instructors taught classes in pairs, one being the lead instructor, the other being the assistant instructor. The instructors alternated serving as lead and assistant.

Classes were taught pursuant to instructions from higher level management which included a power-point presentation for classroom training and range cards which had to be strictly followed in conducting firearms training (GC Exh. 9). These instructions are in part determined by Constellis' contracts with various government agencies. Instructors were required to teach the subjects mandated by Respondent, in the order mandated by Respondent (GC Exh. 8 p. 4, GC Exh. 9).

Instructors were encouraged to suggest changes to the curriculum. There is, however, no credible evidence that any instructor could make a material change of general applicability without higher level approval. Even training director Laurence James could make only minor changes to the curriculum on his own

¹ The Charging Party joins in and has adopted the General Counsel's brief.

² The students at Academi included new hires and incumbent security guards undergoing refresher training.

(Tr. 285–286).

Instructors were allowed to tailor training to meet the needs of a particular student. They had the discretion to use certain tools to do so, such as a SIRT gun which shoots red dots to determine where rounds are going (if I recall correctly the Army calls these tracer rounds). Instructors also had some discretion in using a bonus card in scoring a particularly skilled student and adding a maneuver if the entire class was doing well.

When an instructor observed a student trainee engaged in misconduct, the instructor was required to file a “spot report,” which was reviewed by higher level management (Tr. 290–291). Particularly in the case of safety violations, higher level management did not question the spot reports and on occasion an instructor’s spot report led to the removal of a student from a class or even the student’s disqualification from training. Macri filed several of these reports. On one occasion, Michael Macri filed a spot report about a student smelling of alcohol and the student was removed from the training cycle. However, it was not Macri that decided to remove this student from the training cycle. Moreover, an instructor’s spot report recommendation was not automatically followed by Respondent (Tr. 141–142, 253–1254, R. Exh. 5, last page).

The instructors had unfettered discretion to determine when a student committed a safety violation warranting the student’s disqualification from live fire. They were required to disqualify any student who violated one of the Four Cardinal Rules of Firearms Handling. Moreover, the spot reports in the record (R. Exh. 6), reflect little if any independent judgment in making this determination. The reasons for the spot report in every case would be obvious to anyone familiar with firearms.

Whether a student passed the live fire qualification was not up to the instructor. A passing score was established by the Federal Protective Service (FPS) FPS personnel controlled all aspects of the qualification process.

The Ricochet Problem in the Firing Ranges

There was a constant problem at the Academi Training Center with bullets hitting a backstop and ricocheting back toward the instructors and students. The backstop system was designed to trap and capture bullets. Increasingly, it did not do so. The problem became much worse in the latter part of 2020 and several instructors were struck by these projectiles. The ricochet problem was particularly bad on Range B. While Respondent had taken several measures prior to October 30, 2020, to correct the ricochet problem, these were not successful.

On October 30, 2020, approximately 13 instructors, including team leads and Michael Macri, sent a letter to higher management (GC Exh. 11. It concluded):

It is our considered professional opinion that both range A and range B are long overdue for repair and in need of corrective action. It is the consensus opinion of all instructors and range personnel that the problem is not ceiling baffles, sides of the ranges or rounds striking the target carriers. Those possibilities can be definitely debunked by sound, honest evaluation of the physical evidence. The range problem rests in the backstop and lack of proper maintenance of the same, resulting in rounds striking and returning up-range behind the firing line with enough force to injure or worse.

Both ranges, but in particular range B, have become a serious liability for the company and live fire exercises undertaken there have now become a serious but correctable life hazard to both students and instructors. Furthermore, in our opinion there is no longer the possibility that a serious injury or death may occur due to the aforementioned identified problem, but a matter of when it will happen. We recommend that the computer driven target carrier system be fixed with all due haste and range B be closed until corrective action is taken.

On November 3, 2020, Kenneth Cooper, then Respondent’s Director of Training, proposed to address the problem. Rather than having targets move up and down the length of the firing ranges, the targets would remain stationary, and the shooters would shoot close to the targets and then move back from the targets as they continued shooting from a greater distance (GC Exh. 12). This proposal was either never implemented or implemented for only a few days after repairs were made to Range B in November and early December.

On November 4, Training Manager James emailed Cooper and amongst other things stated:

It is clear that all involved have accepted the fact that there is a safety concern regarding rounds coming back on Range B, whether management focuses on the low velocity rounds that are coming back past the firing line at knee level, or management focuses on the rounds that are coming back past the firing line at a possibly higher velocity and are at shoulder/head level. It would be my hope that both issues are addressed simultaneously. The Instructor Cadre are of the belief that the company is putting revenue above the safety of them and the students/incumbents we service.

...

They have expressed that directing/asking them to continue down the path of shooting prior to professional repairs is insulting. They question, if it has been acknowledged that there are safety issues, why are they being made to take students/incumbents out onto the Range prior to professional repairs being made.

(R. Exh. 11.)

Sometime in early November, Constellis Vice President John Bolen met with employees virtually to assure them that the ricochet problems were being corrected. Range B was shut down for some period in November and did not reopen until about December 9.

Additional steps taken by Respondent included placing plywood on the lower portions of the shooting booth, cleaning, and replacing rubber mats in the backstop. Some instructors, including Macri, were not satisfied with the additional steps taken. In text messages Macri and others accused Respondent of lying to the instructors (GC Exhs. 13 and 14).

Laurence James, Respondent’s training manager, Cooper’s subordinate, emailed a memo to Respondent’s employees on December 4, 2020, setting forth procedures to be followed for reporting ricochets (kickbacks) (GC Exh. 18). As of December 4, James was aware that instructors and students were still being struck by ricochets (Tr. 329).

The December 9, 2020 Meeting and Macri's Suspension and Termination

On December 9, team lead Earnest Kellogg announced that Range B was coming together, then that both ranges were up and running and then that his team was to meet with Laurence James at 2:30 that afternoon (GC Exh. 13).

The December 9, meeting took place in an open area in front of the instructors' cubicles. About 5 members of Earnest Kellogg's team were present. Laurence James started the meeting by asking the instructors how they would feel about shooting on a fixed target for the bent elbow position and then returning to the shooters booth to complete the course of fire. James also discussed what had been done to make range B safer.

Macri told James that a deformed piece of sheet metal (or angle iron) had not been replaced as James had previously promised. James denied ever saying that the metal in question would be replaced. He said he had only stated that it would be repaired. The record does not reflect that he told Macri that these repairs had been completed. They may not have been. Macri then became very upset, raised his voice and said that he was tired of being lied to.

Macri then got up and yelled this is bullshit, I am leaving.³ He then went back to his cubicle, slightly out of James' sight. While Macri walked away, James said (or yelled), you're not going to disrespect me. Macri responded something to the effect that you are not going to disrespect me by lying to me. James said he would "deal with this later". Macri responded by saying, you can hand me my walking papers. James told Macri he could assist him with that.

Macri returned to the meeting after a few minutes back at his cubicle, standing in the back of the room. When the meeting ended, Macri continued instructing students until midnight. At 5:46 p.m., his team lead, Earnest Kellogg, ordered Macri to write a statement about Macri's exchange with James. Macri did so (GC Exh. 16).

Regardless of what James had promised previously, it is uncontroverted that the ricochet problem had not been corrected by December 9, 2020, and apparently still exists today. James conceded at trial that the sheet metal part of the backstop was bent or curved and that he did not know whether this potential cause of the ricochet problem had been corrected by December 9. At some point, Training Director Cooper apparently suggested a total overhaul of the shooting ranges at Academi. The suggestion was not accepted by higher management.

Laurence James conceded at trial that he and Macri might have been talking about different parts of the backstop on December 9. James testified that there was an L-shaped piece of metal on top of one of the pieces of sheet metal that was removed by Respondent, as distinguished from six panels of sheet metal that made up a major part of the backstop. James conceded the sheet metal panels had been curved by the impact of bullets over time. He also testified that these panels were straightened, but he did not know if this occurred before or after Macri was

terminated.

James prepared a statement for his boss, Kevin Cooper on December 9, 2020, about what occurred at his meeting that afternoon (GC Exh. 3). That statement concluded:

Instructor Macri has continued to show no progress in controlling his temper nor conducting himself in a professional manner. This year, Instructor Macri has consistently lost his temper and defaced the reputation of this organization. He is willing to disrespect his students, team members as well as a member of his managerial staff. I am no longer confident that he should be placed in care of our students nor should he be representing this organization.

James then listed the following misconduct by Macri during the prior 12 months:

Imposing physical punishment (burpees) on students for being late from 15 minute breaks.

Immaturely writing over company training documents to show his disdain for the process.

Threw a chair at the wall, putting a hole in the wall because his chair was missing.

Refused to follow direction from the Director on the utilization of training cards while on the range deck.

And now this incident, Instructor Macri has consistently shown that he is not willing to follow the rules. He has become a consistent disruption to this operation and refuses to conform when confronted with his disrespectful and unprofessional actions and decisions.

Other than sending this statement to Cooper, James had no other involvement in the decision to suspend Macri and terminate him. Those officials who did have a role in making the suspension and termination decisions did not testify in this proceeding. Respondent offered no reason why they did not. The fact that Kenneth Cooper no longer works for Respondent did not preclude it from calling him as a witness, by subpoena, if necessary.

Respondent suspended Macri on December 10. It conducted an investigation of the December 9 incident and terminated Macri on January 8, 2021.

Macri's Work Record Prior to December 9, 2020

Laurence James, Respondent's training director during Macri's employment at Academi, testified that Macri was an excellent firearms instructor (Tr. 314).⁴ However, Macri had several instances of misconduct in his 2-year tenure at Academi. In December 2019, Macri had students do a burpee (squat thrust) exercise as punishment for being late to class. James informed Macri that was impermissible. James did not discipline Macri for this. However, he told Macri that he was not to impose punishment of any kind for any reason. James also told Macri that his recourse was to generate a spot report and submit it to

other than saying "this is bull-shit." I am not sure Macri's statements qualify as cursing.

⁴ James was promoted to deputy director of training operations in June 2021.

³ I discredit all evidence that Macri used the F word, particularly Earnest Kellogg's testimony at Tr. 351. The statement he gave during the Company's investigation of Macri says nothing about Macri using profanity (GC 4. James' statement also does not indicate that Macri cursed

management for review (GC Exh. 6).

Also in December 2019, Macri wrote critical comments on a company checklist.⁵ Then training manager/chief instructor Robert Edmunds emailed Macri that he was not allowed to do so (GC Exh. 8). For reasons not explained by Respondent neither December 2019 incident was memorialized by Respondent until April 7, 2020. In the absence of such an explanation, I find that the memorialization of these incidents was due in part to Macri's raising concerns about COVID precautions at an all-hands meeting a week before that (Tr. 56–57). The president of Constellis' National Capital Region was present at this meeting.

In February 2020, Macri received a verbal warning for banging a chair into a wall and denting it (GC Exh. 10). Macri repaired the damage himself.

Respondent's Progressive Discipline Policy

Respondent has a progressive discipline policy. Pursuant to that policy some offenses, including insubordination or other disrespectful conduct, may result in immediate termination. Unlike the progressive discipline policies of some other companies, no specific number or type of prior violations automatically leads to termination (R. Exh. 6). There is no evidence that insubordination or disrespectful conduct automatically results in an employee's termination. Moreover, the record does not support a finding that Macri was discharged as a result of progressive discipline. Despite all the allegations of misconduct, prior to December 9, 2020, Macri had been disciplined only for the chair incident.

Analysis

Michael Macri was an employee within the meaning of Section 2(3) of the Act. He was not a managerial employee or a supervisor of Respondent. There is no evidence to support Respondent's contention that Michael Macri was a statutory supervisor. He had no authority over other of Academi's employees. He did not assign tasks to any other employee or student. He did not hire, transfer, suspend, lay off, recall promote, discharge, reward or discipline other employees or direct them. The students he trained were not employed by Academi and many were not directly employed by Constellis. The extent to which he had authority over Constellis employees training at Academi does not make him a supervisor within the meaning of Section 2(11) of the Act. Macri's duties were routine. His tasks were carried out in conformance with management's specifications and oversight, *Oakwood Healthcare, Inc.*, 349 NLRB 686, 693 (2006).

Managerial employees, who are excluded from the protection of the Act are those who formulate and effectuate high-level employer policies or who have discretion in the performance of their jobs independent of their employer's established policy, *Wolf Creek Nuclear Operating Corp.*, 364 NLRB 1619 (2016), and cases cited therein. *Wolf Creek* was an elections case, not an unfair labor practice case. However, it is instructive since *Wolf Creek* concerned security training officers, whose duties were

very similar to the duties of firearms instructors employed by Constellis/Academi. The Wolf Creek training officers conducted training and appeared to have had a greater role in developing lesson plans or curriculum than do Constellis instructors. The Wolf Creek officers administered qualification exams. However, they also created these exams, which Constellis instructors do not. Wolf Creek officers conducted weapons training and conducted response drills and other exercises.

Although the Board has no firm criteria for determining managerial status, an employee will not ordinarily be excluded as managerial unless he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.⁶ The party asserting managerial status bears the burden of proof.

The fact that employees train or instruct other employees does not, in itself, make them managerial employees. Employees are not managerial employees if they do not exercise sufficient independent judgement in carrying out their duties, *Roofing, Metal & Heating Associates*, 304 NLRB 155, 161 (1991). This is particularly so in the instant case, in which instructors did not attend management meetings and played no role in selecting students for training or in the ultimate decision as to whether a student could continue in the program or be placed as a security guard with a federal agency.

In *Wolf Creek*, the Board found the training officers were not managerial employees citing the restrictions on their discretion. I reach the same result here. In no way were the Constellis/Academi instructors' interests more closely aligned with the individuals who ran Academi than with their fellow instructors. They did not influence the fundamental working of their employer in the way that faculty members did in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Nor was the discretion so fundamentally aligned with the essential nature of their employer's business as was the case with Yeshiva's faculty.

The Academi instructors' discretion was not only very restricted in the degree of their independence but also with regard to the scope of their discretion. The instructors' role in removing students from training for obvious and flagrant violations of safety rules does not involve sufficient independent judgement to make them either a managerial employee or a supervisor, *Veolia Transportation Services*, 363 NLRB 1879, 1886 (2016); *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989); *Southern Industries Co.*, 92 NLRB 998, 999–1000 (1950).

Particularly in the context of this case, to find otherwise would leave these instructors unprotected in their efforts to concertedly petition their employer to ameliorate very dangerous working conditions. This conclusion flies in the face of the purposes for which the Act was enacted.

Michael Macri Engaged in Protected Concerted Activity His Conduct on December 9, 2020, was a Logical Outgrowth of that Activity and is Protected

Section 7 provides that, "employees shall have the right to

⁵ GC Exh. 8 p. 4–5. Macri was apparently dissatisfied with the supplies available to him on December 19, 2021, and made notes on his checklist.

⁶ Prior Board cases strike me as not entirely consistent on this issue. However, Respondent's firearms instructors do not have managerial

functions as a layman would understand that term. Managerial status is not conferred upon rank- and-file employees simply because the nature of their work requires some judgement in applying their technical skills, *General Dynamics Corp.*, 213 NLRB 851, 857 (1974).

self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .” (Emphasis added.)

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that “concerted activities” protected by Section 7 are those “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Michael Macri engaged in concerted protected activity by complaining about Respondent’s response to COVID in March 2020 at an all-hands meeting, and by signing the October 30, 2020 letter and otherwise letting his supervisors, Laurence James and Earnest Kellogg, know that he was not satisfied with the corrective actions taken by Respondent to fix the ricochet problem on range B.

Macri’s outburst at the December 9, 2020 circle-up meeting was a logical outgrowth of his other protected activities and was itself protected by Section 7 of the Act. *Advo.Serv of New Jersey*, 363 NLRB 1324, 1357 (2016); *Tampa Tribune, (aka Media General Operations)* 361 NLRB 1324, 1325 (2007), enf. denied on other grounds 560 F.3d 181 (4th Cir. 2009); *Every Woman’s Place*, 282 NLRB 413 (1986); *Burle Industries*, 300 NLRB 498,501 (1990).

The General Counsel Met its Initial Burden of Establishing that Respondent Discharged Michael Macri in Violation of Section 8(a)(1) of the Act

In order to establish a violation of Section 8(a) (3) and/or (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee’s protected conduct was a ‘motivating factor’ in the employer’s decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002); *General Motors*, 369 NLRB No. 127 (2022).

The General Counsel established that Michael Macri engaged in protected activity, including raising COVID concerns at the all-hands meeting in March 2020 and his protest at the December 9 meeting. Respondent knew of all of this activity. The General Counsel also established that Respondent, by Laurence James, in his response to Macri, bore animus to Macri’s December 9 protest and that Respondent suspended and terminated Macri in large part due to this protest. In the absence of any adequate explanation by Respondent, I also find that Respondent bore animus towards Macri as the result of his raising concerns about Respondent’s response to his COVID concerns at an all-hand

meeting in March 2020. There is no alternative explanation for James documenting misconduct that had occurred several months previously.

Respondent has not met its Affirmative Defense Under General Motors/Wright Line

Respondent did not meet its burden of proving that it would have terminated Michael Macri in the absence of his protected activity. First of all, it took no action against instructor Julian Paige, who also accused management about lying to the instructors (GC Exh. 14, pp. 6 and 7). Thus, Respondent has not established that it terminates or even disciplines all employees who accuse management officials of lying to employees.⁷ The record shows just the opposite.

Secondly, Respondent relies totally on hearsay evidence to establish the reasons for which it suspended and terminated Michael Macri. Although Laurence James recommended Macri’s termination, he played no role in making the suspension or termination decisions. The individuals who made these decisions did not testify in this proceeding. In fact, it is not clear who participated in these decisions and who made the final determinations. What factors they considered are also not in the record.

Respondent relies on James’ testimony and a memo from Training Director Cooper to John Bolen, vice-president of operations for North America. (R. Exh. 12). Neither Cooper nor Bolen testified in this trial. Respondent’s Exhibit 12 was not even properly authenticated.⁸ The exhibit was not addressed to Laurence James nor any other witness. Although James testified as to what the document purports to be, there is no indication as to when and how he learned what it is.

The record does not establish the reasons for which John Bolen decided to terminate Macri. It does not even establish that he was the person who made the decision. Insofar as Respondent relies in part on incidents prior to December 9, 2020, it has not established that its progressive discipline policy or anything else mandated Macri’s termination.

To the extent that Cooper or Bolen relied on Respondent’s investigative report (GC Exh. 2), which was not established, they relied in part on incorrect information. That report, relates that Macri told James “you are not gonna fucking disrespect me by lying to me.” Neither Macri’s statement nor James statement, nor other statements taken by Respondent, nor James’ nor Macri’s testimony indicates that Macri used the F word in addressing James (GC Exh. 3, 4. 16, Tr. 94, 180, 270–271). In fact, all the record establishes is that Macri yelled at James that “this is bull-shit.” Indeed, it is not clear that Macri used profanity at all.

Macri did not Lose the Protection of the Act Under the Atlantic Steel Standard

Between 1979 and 2019, the criteria for evaluating whether an employee’s conduct while engaging in protected activity forfeits the protection of the Act depended in part on when and where the allegedly protected conduct occurred. In the case of direct communications between an employee and manager or supervisor, the criteria was set forth in *Atlantic Steel Co.*, 245 NLRB

⁷ In response to Team Lead Kellogg, Paige also used profanity “WTF did they put the curtains up” (GC Exh. 14 p. 3).

⁸ The Charging Party’s attorney objected to my receipt of R. Exh. 12 (Tr. 276–277). I probably received the document in error.

814 (1979). In *General Motors*, 369 NLRB No. 127 (2020) the Board abandoned this standard, holding that in such cases it will apply the *Wright Line* test. The General Counsel advocates a return to the *Atlantic Steel* criteria.

Under *General Motors* the fact that misconduct occurred in the course of protected activity is irrelevant, as is another *Atlantic Steel* factor, whether the misconduct was provoked by the employer's unfair labor practice.

In making its determination under *Atlantic Steel*, the Board balanced four factors: 1) the place of discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst and 4) whether the outburst was provoked by an employer's unfair labor practice; Also see *Overnite Transportation Co.*, 343 NLRB 1431, 1437 (2004). If the *Atlantic Steel* criteria were applied to this case, I would conclude that Macri did not forfeit the protections of the Act at the December 9, 2020 meeting and that Respondent violated Section 8(a)(1) in suspending and discharging him.

The fact that he was addressing a serious unresolved safety hazard and the manner in which he did so would not have sacrificed the Act's protection. In *Burle Industries*, 300 NLRB 498, 503-505 (1990), the Board held that in the course of protected activity an employee did not forfeit the protection of the Act in calling a supervisor a "f-g a-hole," due to the employer's failure to correct a chemical hazard.

Raising one's voice and an insolent manner, are insufficient to forfeit the protections of the Act, while engaged in protected activity, *Firch Baking Co.*, 232 NLRB 772 (1977); *Postal Service*, 251 NLRB 252, 259 (1980), enfd. 652 F. 2d 409 (5th Cir. 1981). Other factors that weigh in favor of protection are that this was a single incident, not a sustained course of action, and that Macri did not threaten James, *Cadillac of Naperville, Inc.*, 368 NLRB No. 3 (2019).

REMEDY

The Respondent, having illegally suspended and later discharged Michael Macri, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall compensate him for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings, computed as described above.

Respondent shall file a report with the Regional Director for Region 5 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Michael Macri for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey*, 363 NLRB 1324 (2016). Also, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director

may allow good cause shown, file with the Regional Director for Region 5 a copy of Michael Macri's corresponding W-2 form reflecting the backpay award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Constellis LLC, d/b/a Academi Training Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending or otherwise discriminating against any employee for engaging in protected concerted activity.

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

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

(a) Within 14 days from the date of the Board's Order, offer Michael Macri 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 Michael Macri whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

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

(d) Compensate Michael Macri for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

(e) File with the Regional Director for Region 5 a copy of Michael Macri's corresponding W-2 form(s) reflecting the backpay award as set forth in the remedy section of this decision.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and discharge and within 3 days thereafter notify Michael Macri in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(g) 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.

Within 14 days after service by the Region, post at its Upper Marlboro, Maryland, facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided

⁹ 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.

¹⁰ 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

by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 2020.

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. July 19, 2022

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of you for engaging in protected concerted activity.

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

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

WE WILL make Michael Macri whole for any loss of earnings and other benefits resulting from his discharge and suspension, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Michael Macri for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 5

allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Michael Macri for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Michael Macri 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.

WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may for good cause shown, a copy of Michael Macri's corresponding W-2 form(s) reflecting the backpay award.

CONSTELLIS, LLC D/B/A ACADEMI TRAINING CENTER, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-278218 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

