# Labor Board: Employee Conduct in Response to Employer’s Unlawful Actions Not Grounds for Discharge

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An employer violated the National Labor Relations Act (NLRA) when it discharged an employee who refused to participate in a performance evaluation scheduled for discriminatory reasons, the National Labor Relations Board (NLRB) has ruled, reversing the decision of an Administrative Law Judge (ALJ). United States Postal Service, 367 NLRB No. 142 (June 4, 2019).

In this case, an employee was reinstated by a labor arbitrator who ruled in his favor on a grievance challenging his termination. On the employee’s first day back at work, which was still within the employee’s 90-day probationary period, his manager told him he would be given a performance evaluation. The employer did not have a prior practice of doing so for probationary employees.

The supervisor told the employee his “work quality” and “dependability” were “unacceptable.” The employee argued with the supervisor. The employee eventually stated he “could not take this” and left. The next day, the employer discharged the employee for “improper conduct” at his evaluation.

The employee filed an unfair labor practice charge. After a trial, an ALJ found the employer had violated the NLRA because it discriminatorily had given the employee the performance evaluation in retaliation for the employee’s grievance. Nonetheless, the ALJ recommended dismissal of the employee’s charge. The ALJ reasoned that the employee could not refuse to cooperate in the evaluation, and none of the evidence indicated the employer’s assessment of the employee’s performance was discriminatory.

The NLRB’s General Counsel appealed the decision to the NLRB, and the NLRB reversed the ALJ. The NLRB noted that the employer did not file exceptions (appeal) the ALJ’s finding that conducting the performance evaluation was unlawful. The NLRB found the employee “would not have been at that meeting but for [the employer]’s unlawful actions—specifically ordering the evaluation as retaliation for [the employee]’s protected activity.” Although the NLRB acknowledged “that there could be circumstances where an employee’s misconduct at an unlawful meeting could be so extreme as to [justify the termination],” it determined the facts in this case fell short of that standard.

The NLRB’s decision re-confirms that employee conduct — even if otherwise inappropriate (up to a point) — cannot result in discipline if it arose in response to the employer’s unlawful conduct. Employers should carefully evaluate all of the circumstances leading to an employee’s alleged insubordination or inappropriate conduct before deciding whether to discipline the employee.