

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

MEZONOS MAVEN BAKERY, INC.

and

Case No. 29-CA-25476

PUERTO RICAN LEGAL DEFENSE
AND EDUCATION FUND

Emily De Sa, Esq., Brooklyn, NY,
for the General Counsel.

Lloyd Somer, Esq. New York, NY,
for the Respondent.

*Washington Square Legal Services, Inc.,
Mayra Peters-Quintero, Esq.,
Tsedeye Gebreselassie, David Peterson, Hannah Roman,
and Heding Yang, Law Students*, New York, NY, and
Marielena Hincapie, Esq., National Immigration Law Center,
Los Angeles, CA, for the Charging Party.

SUPPLEMENTAL DECISION

STEVEN DAVIS, Administrative Law Judge: The general question presented is whether undocumented workers who are not legally authorized to work or be present in the United States but are nevertheless covered and protected by the National Labor Relations Act (Act) are entitled to a backpay remedy.

The specific issue to be decided is whether undocumented workers who have not engaged in fraud or criminal activity in violation of the Immigration and Reform Act of 1986 (IRCA) in obtaining or continuing their employment are entitled to backpay where their employer, in violation of that statute, hired and retained them knowing that they were undocumented.

Procedural Background

Based upon a charge filed on March 5, 2003 by the Puerto Rican Legal Defense and Education Fund (Charging Party), a complaint was issued on April 23, 2003 alleging that Mezonos Maven Bakery, Inc. (Respondent) discharged certain employees on February 12, 2003 because they concertedly complained to it concerning their supervisor's behavior toward them.

Thereafter, on February 2, 2005, based upon a Settlement Stipulation executed by all parties, the Board issued its Decision and Order [unpublished] directing the Respondent to cease and desist from discharging employees because they complained to it about working conditions or because they otherwise attempted to improve their working conditions. The Respondent was ordered to offer unconditional reinstatement to Jose Antonio Quintuna Bermeo, Antonio Gonzalez, Luis Marcelo Gonzalez Hurtado, Francisco Javier Joya, Christian Palma, Miguel Quintuna, and Jose Armando Sax-Gutierrez "except that Respondent may avail itself of a compliance proceeding and therein attempt to establish that one or more of the

alleged discriminatees is not entitled to an unconditional offer of reinstatement.” The Respondent was also directed to make the employees whole for any lost wages and other benefits “except that if the amounts, if any, due to the employees are not agreed to, a compliance proceeding will be commenced to litigate the amount of back pay due, if any, to said employees.”¹

The Respondent’s counsel stated here that the language concerning the availability of a compliance proceeding was included in the Stipulation pursuant to his intention to raise a defense that the employees were not entitled to reinstatement or backpay pursuant to the Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002).

On March 15, 2005, the United States Court of Appeals for the Second Circuit entered its judgment enforcing the Board’s Order. On July 28, 2005, the Regional Director issued a Compliance Specification (Specification) setting forth the backpay owed for the seven employees, and further asserting that backpay for six of the employees continues to run in the absence of a valid offer of reinstatement. Backpay was tolled for the seventh employee, Miguel Quintuna, who had already been reinstated.

The Respondent’s answer to the Specification states that it could not make a valid offer of reinstatement to the employees or pay them backpay because it believed that they were not legally authorized to work in the United States pursuant to *Hoffman*, but even if it was required to do so, it offered them reinstatement in 2003, asking them at that time for proper documentation, but none presented the required documents. The Respondent therefore concluded that they were not legally authorized to work in the United States and refused to reinstate them.

Prior to the opening of the hearing, the Charging Party filed a Motion in Limine in which it asked that I exclude all inquiries into the employees’ documented status. The Respondent filed an Opposition, and I issued an Order denying the Motion.

A hearing was held before me on January 31, February 1 and 2, 2006 in Brooklyn, New York. During the hearing, the Respondent sought to examine the employees about their documented status. Counsel for the Charging Party objected on the ground of their Fifth Amendment privilege against self incrimination. I adjourned the hearing and, pursuant to Section 102.31(c) of the Board’s Rules and Regulations, filed with the Board a Recommendation that it issue an order requiring the employees to testify concerning these matters.

While the Recommendation was pending before the Board, counsel for the General Counsel moved to amend the Specification or her theory thereof to eliminate the issue of whether the discriminatees were documented. She stated that for the purposes of this proceeding she “will proceed on the assumption that the discriminatees are undocumented. We have decided not to contest the issue of [the discriminatees’ documented] status in this proceeding for the purposes of expediting this matter.” Counsel for the General Counsel also moved that I withdraw my Recommendation to the Board. Counsel for the Charging Party responded that it took no position on the motions. Counsel for the Respondent objected to the

¹ According to the General Counsel, three other employees named in the Order, Angel Bermeo, Marcos Bermeo, and Blanca Uruchina have elected not to participate in this proceeding.

motions. I granted the motions and withdrew my Recommendation to the Board.

The hearing was resumed and closed on August 8, 2006. On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed
5 by all parties, I make the following:

I. Findings of Fact

A. The Respondent's Failure to Request Documentation during the Employees' Employment

Shaye Lieberman functions as the Respondent's president, running the operation and handling employee-related issues. His wife owns the business, and Alex Izhak, the Respondent's manager and admitted supervisor, reports to Mr. Lieberman.

Of the approximately 20 production workers employed by the Respondent, the seven employees involved here were employed the longest – including Joya and Miguel Quintuna for eight years and Jose Bermeo for five years. The seven employees made bread in the Respondent's wholesale bakery. They worked 65 to 75 hours in a six-day work week. None
15 received pay at a higher rate for working more than 40 hours per week. They were discharged on February 12, 2003.

Lieberman testified that he knew that the Respondent is legally required to verify that its workers are lawfully entitled to work in the United States by examining evidence of identify and employment eligibility and completing INS Form I-9 which must be completed and signed by the employee and the employer within three days of the employee's hire. He stated that, consistent with such understanding, when the seven employees were hired he asked each for documentation which would support the completion of the I-9 form. They did not provide such documentation at their hire. He stated that he asked them for such documentation three or four
25 times thereafter during the course of their employ. Each time they said that they would produce the papers but did not. He conceded that none presented any fraudulent documents concerning their immigration status.³

Lieberman stated that although none presented any of the required documents, he permitted them to work. Lieberman did not terminate them after three days of work, he did not receive a receipt for the application of such documents from any of the employees, and they were not discharged after 90 days of work for not presenting the actual documents, as required by IRCA. In contrast, the Respondent's other approximately 11 workers presented the documents required by the I-9 form at the time of their hire.

Contradicting Lieberman's testimony, the seven employees testified consistently that when they were hired they were not asked to produce such documents as a social security card, birth certificate, passport, driver's license or any other documents, and none presented any of

² The General Counsel's unopposed motion to correct the transcript is hereby granted as set forth in G.C. Exhibit 14.

³ Lieberman also hired another employee, Marco Bermeo, without receiving documentation of his immigration status. Lieberman later sponsored him for a visa. Thereafter, Bermeo was discharged with the seven employees and was an alleged discriminatee but elected not to participate in this matter. Lieberman subsequently rehired Bermeo but did not ask for or receive documentation of his immigration status because of his sponsorship filing.

the above documents on his own to the Respondent. However, four employees, Jose Antonio Quintana Bermeo, Antonio Gonzalez, Luis Marcelo Gonzalez Hurtado, and Francisco Javier Joya were asked for certain documentation during their employment, as will be discussed below. The other three workers were not asked for documentation during their hire. None were
 5 asked to sign any paperwork either at hire or during their employment.

I cannot credit Lieberman's testimony that at the time of the hire of the seven employees he requested valid documentation to support their documented status. Thus, the seven employees each credibly testified that none was asked for such documentation by Lieberman or
 10 anyone else at the time of their hire. In addition, the four employees who were asked for documentation during their employment presented papers which should not have been accepted but were, such as passports and a photo identification card from countries other than the United States. Moreover, regardless of whether the employees were asked for
 15 documentation and did not produce it, the Respondent violated IRCA by hiring them and continuing to employ them without receiving the proper documentation.

B. The Requests for and Offers of Reinstatement

1. The Facts

The Specification alleges that the backpay period for Jose Antonio Quintana Bermeo, Antonio Gonzalez, Luis Marcelo Gonzalez Hurtado, Francisco Javier Joya, Christian Palma, and Jose Armando Sax-Gutierrez, begins on February 12, 2003, the date of their discharge, and continues to run in the absence of a valid offer of reinstatement. The Specification also asserts
 20 that the backpay period for Miguel Quintana begins on February 12, 2003 and terminates on March 5, 2003, the date he was reinstated by the Respondent. The General Counsel argues that no valid offer of reinstatement has been made to any of the employees.

The Respondent's answer states that it could not make a valid offer of reinstatement to the employees because it believed that they were not legally authorized to work in the United States. The answer further states that even if the Respondent was required to make an offer of
 30 reinstatement, it did so in 2003 when it told them that they would be reinstated upon their presentation of proper documentation establishing their identification and eligibility to work in the United States. However, none presented proper documentation and it therefore concluded that they were not legally authorized to work in the United States and refused to reinstate them.
 35

The issues therefore are whether the Respondent was required to make offers of reinstatement to the employees and if so, whether it has made valid offers.

One or two weeks following their discharge on February 12, 2003, the employees visited the Respondent in two consecutive weeks in order to obtain their pay for the period that they worked until their discharge. They received their pay without incident, but they did not request, and were not offered reinstatement at those times.
 40

None of the employees received any letters from the Respondent offering them reinstatement. In March, 2003, an appointment was made with the Respondent by counsel for the Charging Party or by a workers group, either Asociacion Tepeyac De New York or the Latin American Workers Project, for the men to return to the plant and meet with the Respondent in order to attempt to obtain reinstatement. The workers returned to the plant twice for that
 45 purpose.
 50

Regarding the first meeting, Lieberman testified that he received a letter from Asociacion

Tepeyac pursuant to which he agreed to meet only with Jared, a representative of one of the workers' groups. After making this appointment but prior to the arrival of the workers, the charge in the underlying case was filed on March 5 and Lieberman was served with a copy of the charge. When the seven employees arrived with Jared, Lieberman refused to meet with the workers as a group. Lieberman stated that although he was interested in having the men return to work, he refused to speak to them at that time, did not offer them reinstatement, and admittedly sent the workers away, telling them to contact him and that he would meet with them individually. He did not ask them for any contact information which would enable him to contact them later. ⁴

Lieberman's testimony is somewhat different than that of the employees. They stated that when they arrived with Jared at the shop in March, 2003, manager Izhak said that he did not wish to speak to Jared, but would speak to the workers. The employees insisted that Jared be present as he was needed to translate what was being said. Izhak refused to speak to the men with Jared and they left.

About one week later, pursuant to an appointment with the Respondent, the men returned with Oscar and Javier from the above worker organizations. Izhak asked them to go to the office one at a time.

Lieberman testified that at the meetings with the seven employees he offered to reinstate each of them if they produced proper documentation as to their immigration status. He stated that the seven employees "triggered" a wage and hour investigation undertaken by the New York State Attorney General in which their wages and hours were subject to examination. That investigation began in 2003 at about the same time as the instant Board case. Lieberman conceded that the employees here caused him "a lot of trouble." However, he denied asking the seven employees for immigration documentation in retaliation for the filing of the charge with the Board.

Each of the seven employees testified that at their meetings, Lieberman had no forms with him for them to fill out, they were not asked to sign anything, and he took no notes. Each employee's version of his meeting with Lieberman is set forth below.

Jose Antonio Quintuna Bermeo

Jose Antonio Quintuna Bermeo stated that about three years after his hire in April, 1998, manager Izhak asked him for identification. Bermeo gave him a copy of his passport which was issued by a country other than the United States. Izhak said that that was enough.

At the March, 2003 interview, Lieberman asked Bermeo what he was doing there. Bermeo asked to be reinstated. Lieberman told him that he must bring a "social security, I don't care whether it's real or fake," and that he could return to work if he presented that document. Lieberman did not state a deadline within which it had to be submitted. Bermeo asked Lieberman why he was asking for that document now inasmuch as he did not request it when he began work. Lieberman answered that all the employees who work downstairs have social security numbers and "papers." Bermeo reminded him that he worked upstairs, and Lieberman replied that "positions are taken upstairs too." Lieberman then said that this is his country and

⁴ In this connection, the employees did not give their home address or phone number, if they had one, to the Respondent during their employ, and they were not asked to supply that information.

his business and he could do as he pleased.

5 Thereafter, Bermeo did not present the requested documents. However, a few weeks later he returned to the plant with dischargee Antonio Gonzalez and met with Izhak. Gonzalez asked to be reinstated, and was told that all vacant positions had been filled. When Bermeo persisted, Izhak told him that he should bring a social security number, and he would be reinstated. Bermeo asked why he asked for such documents now and not when he was hired. Izhak then said that he should "drop the lawsuit and then my position will be there for me." (On March 5, 2003, a charge was filed alleging the unlawful discharge of the night shift employees).
10 Bermeo protested that he knew nothing about a lawsuit. Izhak said that he would think about it and asked Bermeo to call him the next day.

15 The following day, Bermeo called and identified himself to the secretary who shortly thereafter informed him that Izhak was not present. Izhak did not return the call. Bermeo placed calls in the following two days but was told on each occasion that Izhak was not there. Bermeo did not present a social security card or number thereafter.

Antonio Gonzalez

20 Antonio Gonzalez stated that about two years after he was hired in February, 2000, manager Izhak told him to bring in "any type of identification ticket." Thereafter, Gonzalez showed Izhak his passport from another country. Izhak said that it was "enough."

25 At his interview with Lieberman in March, 2003, Gonzalez was asked if he wanted to return to work. Gonzalez said he did. Lieberman told him to return within two days with his social security number. Gonzalez replied "o.k. That was fine." Lieberman asked if he understood and Gonzalez said he did.

30 Gonzalez did not return with the number but about one month later he visited the shop with Jose Antonio Quintana Bermeo, another dischargee. Bermeo asked Izhak if he could be reinstated and was told that he could not return because new employees had taken his job.

35 Gonzalez did not return to the plant and did not contact the Respondent thereafter because he believed that the Respondent did not act in good faith because (a) Lieberman spoke in an "upset" manner and did not say that he had a job for him even if he brought his social security card and (b) he was told by a friend who was a current employee that new employees had been hired and were performing the same work he had been doing.

Luis Marcelo Gonzalez Hurtado

40 Luis Marcelo Gonzalez Hurtado stated that eight days after he began work in March, 2002, Izhak asked him for an identification card, and also asked if he had a passport. Hurtado gave him his passport which was issued by a country other than the United States.

45 In March, 2003, Hurtado met with Lieberman accompanied by co-workers Palma and Jose Antonio Quintana Bermeo. Lieberman asked them what they wanted. They asked whether it was possible to obtain reinstatement. Lieberman replied that if they presented a social security card and an identification card they could return to work, but if they could not present those documents they could not be employed there. He did not set a deadline for the production of
50 those documents. The men asked why he requested those papers, and Lieberman replied that it was a new rule or new law.

The workers then asked whether the employees currently employed had presented those documents. Lieberman said they had. The three men then requested that Lieberman prove that those then employed had produced their papers, asking to be shown their social security cards and identification cards. Lieberman then reacted in a "strange way" and told them to leave. Hurtado did not thereafter present the documents requested, nor did he return to the Respondent's premises or attempt to contact it.

Hurtado testified that following the meetings that day, he learned from the other six employees that all of them had been asked to present social security cards and identification cards.

Francisco Javier Joya

Francisco Javier Joya stated that about five years after his hire in 1995, Izhak asked him to present identification. Joya showed him a military photo identification card from a country other than the United States.

At his March, 2003 interview, Lieberman asked him what he wanted, and Joya responded that he wanted reinstatement. Lieberman told him to bring in a social security number and he would be reinstated the next day. Joya replied that he had been employed for seven years and "for the first time you are asking for a social security number." Lieberman repeated that if he brought a social security card he would be working tomorrow.⁵ Joya replied "let's leave it at that," answering in that way because he believed that Lieberman's offer was not a "real" job offer since he had a sarcastic "facetious" grin as if he was making fun of him. Joya did not present a social security card or number thereafter.

Christian Palma

Palma, who was hired in June, 2002, was interviewed in March, 2003 by Lieberman. Palma was accompanied by co-worker Javier Joya who translated.

Lieberman asked Palma if he brought "the papers." Palma asked "what papers?" Lieberman replied "social security, passport, license, identification from his country," adding "it didn't matter if it was false." Palma answered that he did not have those documents with him at that time, and Lieberman said that "there is nothing I can do." Palma never brought such documents to the Respondent. He did not contact the Respondent thereafter about obtaining reinstatement essentially because Lieberman did not say that he would be reinstated, and while he spoke to Palma he was smiling which Palma interpreted as an attempt to humiliate him.

Palma stated that although he went to this interview believing that he would be offered reinstatement, Lieberman did not make such an offer.

Miguel Quintuna

Quintuna began work in 1995. He was late arriving at work on February 12, 2003 and was not present when his co-workers were discharged. He was told by Izhak that his fellow employees were not needed and were fired. Quintuna's brother, Jose Antonio Quintuna Bermeo, was one of those fired. Izhak warned Quintuna that if he left he could not return.

⁵ Joya testified inconsistently that Lieberman did not say when he could return to work if he presented a social security card.

Nevertheless, Quintuna left the premises without working that night.

5 When Quintuna picked up his last paycheck in late February, he was asked by Izhak whether he wanted to return to work. Quintuna asked if there was any problem, and Izhak said there was none. Quintuna asked to think about it and the following day called Izhak and said that he would return to work. He was reinstated on March 5.⁶ When he came back to work he was not asked for any documents such as a social security card, birth certificate or passport, and he did not present any such documents on his own.

10 About one month after his return to work, Lieberman approached Quintuna at his work station and asked him where his brother was. Quintuna said that he was at home. Lieberman then grasped Quintuna's shirt or lapels and shook them back and forth saying: "I don't want to see your brother because if he comes here he's going to cause trouble for me." Lieberman then lightly tapped Quintuna on both cheeks, saying "I do not want your brother anymore," or "tell
15 your brother not to come again to the bakery."⁷ Quintuna said that he would speak to his brother. Quintuna continued to work for the Respondent until about August, 2004.

20 The Charging Party argues that Lieberman's lack of good faith in asking the former employees for proof of documented status is shown by his reinstating Quintuna without asking for such proof. It asserts that the Respondent was thus motivated to reinstate him and not the other workers because Lieberman regarded his brother and the others as troublemakers. In this connection, both Quintuna and Marcos Bermeo who was also reinstated told Lieberman one day after the walkout that they did not want to leave work, but had been threatened to do so by other workers.⁸ The implication is clear that the Respondent was not interested in reinstating
25 troublemakers – those who asserted their rights under the Act.

Lieberman testified that he did not ask Quintuna for documentation upon his rehire because he "sponsored" him for a visa during his employ.⁹ I was not cited to any authority holding that the Respondent is relieved of its obligation to verify the employee's documented status upon rehire because he is being sponsored for a visa.
30

Jose Armando Sax-Gutierrez

35 Sax-Gutierrez began work in September, 2002. He attempted to obtain reinstatement in February, 2003 before his co-workers returned to the plant for that purpose. Sax-Gutierrez went to the plant two weeks after his discharge and told Izhak that he needed his job back. Izhak replied that he would need identification, and asked that he call the next day. The following day Sax-Gutierrez called, identified himself and asked the secretary to speak to Izhak. She said that she would get Izhak, but five minutes later she told Sax-Gutierrez that Izhak did not know who
40 he was.

⁶ The Respondent's answer admits the Specification's allegation that he was reinstated on March 5.

45 ⁷ Quintuna's pre-trial affidavit did not mention that he was struck by Lieberman, but it did state that Lieberman was "very upset." Quintuna did not protest his treatment and continued to work thereafter without seeking medical attention, filing a police report or bringing a lawsuit.

⁸ Lieberman's affidavit. C.P. Ex. 2, par. 11.

50 ⁹ I sustained an objection to questions of Quintuna about the Respondent's alleged sponsorship based on his Fifth Amendment refusal to answer questions, Rule 102.31(c), but permitted the Respondent to make an offer of proof.

At his interview with Lieberman in March, 2003, Sax-Gutierrez said that he needed his job. Lieberman replied that he needed a social security number, but did not say when it had to be supplied. Sax-Gutierrez did not answer, but left because he believed that Lieberman “ignored” him by not looking directly at him when he spoke to him. Sax-Gutierrez did not present a social security card or contact the Respondent thereafter because he believed that Lieberman was making fun of him by ignoring him, as Izhak had, as described above.

2. Analysis and Discussion

The only alleged offers of reinstatement made by the Respondent occurred shortly after the discharges of the employees in February, 2003 at a time when it was not legally obligated to make such alleged offers. The Board’s Order, issued two years later, in February, 2005, directed the Respondent to make offers of reinstatement. It did not make any such offers at that time, but relies on the meetings it had with employees two years earlier to support its belief that they were undocumented because they did not present any documentation after being asked to do so, and for that reason refused to reinstate them.¹⁰

I credit the testimony of the employees concerning their versions of the meetings with Lieberman. Most of the testimony was uncontroverted. In addition, they testified consistently concerning what was asked of them.

Hoffman did not disturb the conditional reinstatement part of the order in *A.P.R.A.*, 320 NLRB 408, 417 (1995), enf. 134 F.3rd 50, 56 (2nd Cir. 2001) in which the employer that hired employees knowing that they were undocumented was required to offer immediate and full reinstatement to the workers “provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents in order to allow the employer to meet its obligations under IRCA.”

It is first questionable whether the Respondent’s alleged offers of reinstatement in March, 2003 afforded them the “reasonable time” under *A.P.R.A.* to produce valid immigration documents, particularly since the evidence does not permit a finding that it intended to keep its offer open for a “reasonable period of time” or that it so informed the discharges. *County Window Cleaning Co.*, 328 NLRB 190, 199-200 (1999). In this regard, Lieberman told Gonzalez to return within two days with his social security number. He told Joya to bring a social security card the next day, and when told by Palma that he had no papers with him, said that there was nothing he could do. The implication is that if Gonzalez, Joya and Palma did not present such documentation at that time they would not be reinstated. In this connection I am aware that Lieberman did not set a deadline with Bermeo, Hurtado and Sax-Gutierrez for the presentation of their documents.

The assumption applied in this case that the seven employees were undocumented at the time of the hearing does not answer the question concerning the Respondent’s obligation, first to validly offer reinstatement and then to leave those offers open for a reasonable time within which they must present proof of documentation. Those obligations have not been met.

An employer’s offer of reinstatement must be specific and unequivocal in order to toll backpay. *Midwestern Personnel Services*, 346 NLRB No. 58, slip op. at 1 (2006); *A-1 Schmidlin Plumbing Co.*, 313 NLRB 191, 192 (1993). An employer is relieved of its duty to reinstate only

¹⁰ The Respondent does not claim that it had no contact information for the discharges. It could have communicated with their representatives as had been done two years earlier.

when a proper offer is made and unequivocally rejected by the employee. *L.A. Water Treatment*, 263 NLRB 244, 246 (1982). If an offer of reinstatement is not a bona fide offer, or one made in good faith, or “designed to prevent reinstatement” it will not toll backpay. *Murray Products, Inc.*, 228 NLRB 268, 269 (1977). The employer bears the burden of proving that a
5 reinstatement offer was valid. *Marlene Industries Corp.*, 234 NLRB 285, 288 (1978). Any ambiguity in the explanation of the offer is construed against the employer. *A.P. Painting & Improvements, Inc.*, 339 NLRB 1206, 1208 (2003).

10 Counsel for the General Counsel argued at hearing that the offers of reinstatement were not valid for two reasons. First, although she concedes that an employer is required to demand proof of documented status in order to fulfill its obligation under IRCA, she argues that the Respondent did not make its request for documents for that reason. Rather, she argues that the demand was made for an illegitimate purpose – because the Respondent believed that the employees were undocumented it requested the documents knowing that they could not be
15 produced, thereby ensuring that the employees could not be reinstated.

20 The General Counsel further argued that for an employer to legitimately make a demand for immigration documentation, the purpose of the request must be because it sought to comply with the requirements of IRCA – that it hire employees lawfully entitled to work in the United States. Here, however, by conditioning reinstatement upon providing proof of documented status, the Respondent’s true motive was not to comply with the provisions of IRCA.

25 The General Counsel asserts that the Respondent’s lack of good faith is demonstrated in its permitting employees Marco Bermeo and Miguel Quintuna to return to work without presenting any proof of their documented status. If the Respondent was sincere in its efforts to comply with IRCA it would have asked them to present proof of documentation prior to reinstating them. I agree with the General Counsel. Lieberman’s argument that it did not do so because it “sponsored” them for a visa was not supported by any evidence that it was relieved of its obligation to demand documentation because it sponsored them. It should also be noted
30 that the Respondent demonstrated no interest in complying with IRCA prior to the filing of the charge inasmuch as it did not discharge any of the employees when they failed to present documentation at their hire or during their employment.

35 The Respondent’s lack of good faith is also demonstrated by Lieberman’s telling Bermeo that he must present a “social security” which could be real or false, and his telling Palma that he should present certain documentation and he did not care if it was false.¹¹ It should also be noted that Lieberman asked Palma to present identification from a foreign country which is not among the documents listed on INS Form I-9 as an acceptable demonstration of identity or work eligibility. *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999).
40

The Respondent’s lack of good faith is further shown in Bermeo’s testimony that the Lieberman claimed that he had filled all vacant positions and therefore none were available, and in Izhak’s avoiding the calls of Bermeo and Sax-Gutierrez.

45 Bermeo also gave uncontradicted testimony that when he requested reinstatement, admitted supervisor Izhak told him that all positions had been filled and that if he wanted

50 ¹¹ In this connection I am aware that Hurtado testified that he was told that Lieberman asked all the employees to present a social security card and identification card, valid forms of identification, but I find for the reasons set forth above, that the offers of reinstatement were not valid.

reinstatement he should “drop the lawsuit.” An offer to reinstate an employee conditioned on his withdrawal of a charge is not valid and constitutes a refusal to reinstate. *Midwest Hanger Co.*, 221 NLRB 911, 914 (1975); *Amsterdam Wrecking & Salvage Co.*, 196 NLRB 113, 116 (1972). Such comments undermine and contradict the Respondent’s claim that it would reinstate the employees if they presented proper documentation.

In addition, Lieberman’s comment to Quintuna that he did not want his brother Jose Bermeo to return to work because he would cause “trouble” for the Respondent is further evidence that the Respondent had no intention of reinstating the dischargees. As set forth above, Quintuna and Marcos Bermeo, both of whom were reinstated, were identified by Lieberman as unwilling participants in the walkout.

I accordingly find and conclude that valid offers of reinstatement have not yet been made to the seven employees, and that backpay has not been tolled. The remainder of this Decision deals with whether the employees are entitled to backpay, and the calculations of the proper amount of backpay due them.

C. Undocumented Workers as Employees and the Backpay Remedy

The principal issue here involves the statutory rights of undocumented workers who are prohibited from entering the United States and working here but who are nevertheless employed by willing employers. Although undocumented workers are provided the same rights under the Act, the Respondent, relying on *Hoffman*, argues that the remedies available to them do not include backpay.

1. The State of the Law Prior to *Hoffman*

A brief history of the state of the law as it relates to the coverage by the Act of undocumented workers, and whether backpay is an appropriate remedy will help in the analysis of these issues.

It has consistently been held that undocumented workers are “employees” within the meaning of Section 2(3) of the Act and that they are entitled to its protections. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 891 (1984); *Concrete Form Walls, Inc.*, 346 NLRB No. 80, slip op. at 3 (2006). In finding that undocumented workers are protected by the Act, the Supreme Court in *Sure-Tan* noted that the Immigration and Nationality Act (INA) did not make it unlawful for an employer to hire an undocumented worker and that the employment relationship between an employer and an undocumented worker was not illegal under the INA. The Court observed that the “application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.” It held that the “Board’s enforcement of the NLRA as to undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigration laws...” 467 U.S. at 894.

The Court stated that “if an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter this country in violation of the federal immigration laws.” 467 U.S. at 893-894. The Court further noted that “if undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a

comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.” 467 U.S. at 892. In this respect, the Supreme Court recognized that “[a]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.” 467 U.S. at 892.

The Court noted that compliance proceedings must take into consideration “the objective of deterring unauthorized immigration that is embodied in the INA.” 467 U.S. at 903. The Court held that in order to be eligible for backpay, employees must be available for work. It found that the *Sure-Tan* employees were not available for work “during any period when they were not lawfully entitled to be present and employed in the United States.” Since the undocumented workers were deported after being reported to the INS, the Court considered them unavailable for work and rejected their backpay awards because they were based on a conjectural six-month period that was beyond the statutory authority of the Board to make. The Court further held that any other award without the “lawfully present” requirement would provide workers with an incentive to re-enter the country illegally in violation of the INA.

Justice Brennan wrote for the dissent in arguing that “once employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their ‘incentive to hire such illegal aliens’ will not decline, it will increase. And the purposes of both the NLRA and the INA that are supposedly served by today’s decision will unquestionably be undermined.” 467 U.S. at 912.

The Court did not decide whether an undocumented worker who is not deported and remains in the United States after being terminated in violation of the Act is considered available for work and therefore entitled to backpay. In this respect, both the Second Circuit and the Ninth Circuit Courts of Appeals interpreted *Sure-Tan* as applying only to awards of backpay to undocumented workers who have left the country, and held that when those workers remain in the United States after their illegal termination, they are entitled to backpay. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3rd 50, 56 (2nd Cir. 2001); *Local 512, Warehouse & Office Workers’ v. N.L.R.B. (“Felbro”)*, 795 F.2nd 705, 719-720 (9th Cir. 1986).

The *Felbro* court noted that it was “improbable” that providing backpay to undocumented workers who continued to work during the backpay period would encourage illegal entry or re-entry to the United States. “Indeed, equalizing the backpay liability for unlawful acts against undocumented and American workers could deter employers from hiring undocumented workers and thus marginally reduce illegal entry to the United States.” 795 F.2nd at 720. It concluded that awarding backpay to undocumented workers “promotes the underlying aims of the NLRA and does not detract from the purposes of the INA.” 795 F.2nd at 722.

However, the Seventh Circuit Court of Appeals in *Del Ray Tortilleria, Inc. v. N.L.R.B.*, 976 F.2nd 1115, 1119 (7th Cir. 1992) reached the opposite result, holding that inasmuch as undocumented workers had no right to be present in the United States and therefore had no right to employment, they suffered no harm in not being awarded backpay.

IRCA, enacted in 1986, for the first time made the employment of undocumented workers illegal. The statute “‘forcefully’ made combating the employment of illegal aliens central to ‘the policy of immigration law.’” *Hoffman*, 535 U.S. at 149 (2002). It sought to accomplish that goal by deterring the employment of undocumented workers by imposing penalties on those who hire them.

Accordingly, IRCA placed the burden on employers to verify that their employees possessed certain qualifying documentation in order to be legally employed in the United States. IRCA provides for sanctions against employers of undocumented workers as the
 5 “principal method of eliminating the job opportunities that entice unskilled, illegal immigrant labor to the United States.” *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3rd 50, 56 (2nd Cir. 2001).

IRCA sought to deny employment to those who are not lawfully present in the United States or who are not lawfully authorized to work in the United States. The statute made it
 10 unlawful for an employer to (a) knowingly hire an undocumented worker (b) fail to verify that a prospective employee possesses certain qualifying documents and (c) continue to employ someone having learned that he is unauthorized to work in the United States. If an applicant for employment cannot present the required documents, the applicant cannot be hired. An employer that violates IRCA is subject to fines and criminal prosecution. However, an employer
 15 presented with documentation which “reasonably appears on its face to be genuine” has established an affirmative defense that it has not violated IRCA with respect to such hiring.

Significantly, IRCA does not make it unlawful for an employee to obtain employment or work in the United States. The only employee conduct made unlawful by IRCA is that he or she
 20 cannot tender as proof of documented status fraudulent documents including those which are forged or counterfeit or documents of other persons. Accordingly, the seven employees here did not violate IRCA by working in the United States even if they were undocumented.

The legislative history notes that IRCA was “not intended to limit in any way the scope of the term ‘employee’ under the Act or the scope of the rights and protections stated in Sections 7
 25 and 8 of that Act” and was “not intended to ‘limit the powers’ of the Board to remedy unfair practices committed against undocumented employees.” *A.P.R.A.*, 134 F. 3rd at 56.¹²

In *A.P.R.A.*, the employer violated IRCA by hiring employees who it knew were
 30 undocumented and then violated the Act by firing them for their union activities. The Second Circuit Court of Appeals adopted the Board’s reasoning that precluding a backpay remedy “would increase the incentives for employers to hire undocumented aliens... and would frustrate the objectives of IRCA and the NLRA by undermining the deterrent effect of the monetary penalties imposed by IRCA. Many employers ... might well consider the fines to be a
 35 ‘reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefits of union avoidance.’” *A.P.R.A.*, 134 F.3rd at 57.

The *A.P.R.A.* court observed that “IRCA demonstrates a Congressional intent to punish the employers of illegal aliens, not to grant them any additional reward for their illegal actions.”
 40 The Board’s additional remedy of reinstatement was awarded to the employees “provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents in order to allow the employer to meet its obligations under IRCA”. Backpay was awarded from the dates of their discharges to the earliest of the following: their reinstatement by the employer, subject to compliance with the employer’s normal obligations
 45 under IRCA, or their failure after a reasonable time to produce the documents enabling the

¹² The Board has stated that “we recognize that threats involving immigration or deportation can be particularly coercive. Such threats place in jeopardy not only the employees’ jobs and working conditions, but also their ability to remain in their homes in the United States.” *North Hills Office Services*, 346 NLRB No. 96, slip op. at 4 (2006), citing *Smithfield Packing Co.*, 344 NLRB No. 1, slip op. at 9 (2004).

employer to meet its obligations under IRCA to verify their eligibility for employment in the United States.

2. The Effect of *Hoffman*

5

Thereafter, the Supreme Court decided *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 149 (2002). In that case, employee Jose Castro fraudulently presented to his employer upon his hire the birth certificate of another person. The employer learned of his undocumented status for the first time at a Board compliance hearing following his unlawful discharge.

10

In denying a backpay remedy, the Court held that federal immigration policy as set forth in IRCA forecloses the Board from awarding backpay to an undocumented worker who has never been legally authorized to work in the United States. The Court held that the Board's backpay remedy conflicted with the policies of IRCA which was outside the Board's competence to administer.

15

The Respondent relies on *Hoffman* in arguing that no backpay is due to the seven discriminatees here because it believed that they were undocumented since they failed to present documentation upon being offered reinstatement in February, 2003. The Respondent attempts to successfully play both statutes against each other – discharging employees in violation of the Act and then arguing that no backpay is due because the dischargees are undocumented, a fact it was aware of for up to eight years.

20

25

Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain. *Rivera v. Nibco, Inc.*, 364 F. 3rd 1057, 1072 (9th Cir. 2004).

30

It is significant that the two essential facts in *Hoffman* (a) that Castro criminally violated IRCA by presenting fraudulent documents to his employer and (b) that employer Hoffman did not violate IRCA but hired Castro with no knowledge that he was undocumented are absent here. The reverse is true in this case. The seven employees did not present fraudulent documents to the Respondent and did not violate IRCA, but the Respondent violated IRCA by knowingly hiring them and continuing their employment without evidence that they were documented.

35

40

Therefore, the Court's express concern that awarding backpay would condone criminal conduct by an employee is not applicable here. Accordingly, the Court's emphasis that the employee was the wrongdoer while the employer was innocent of wrongdoing is not a factor here.

In contrast, in failing to verify its employees' documentation and continuing to employ the seven discriminatees with knowledge of their undocumented status, the Respondent is the wrongdoer while the employees are innocent of violating IRCA. Thus, the Respondent should not be permitted to evade its liability for backpay. Just as the Court denied a remedy to the wrongdoing party, employee Castro who presented fraudulent immigration documents, here the Respondent is the sole wrongdoer since it violated IRCA in hiring the workers without obtaining

45

50

proof of their documented status. Accordingly, the Respondent should not be rewarded for knowingly and intentionally violating IRCA and the Act.

Justice Breyer's dissent in *Hoffman* poses the question presented here:

5

Were the Board forbidden to assess backpay against a *knowing* employer – a circumstance not before us today, this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious. 535 U.S. at 155 (emphasis in original)

10

The majority opinion did not disavow or disapprove of Justice Breyer's hypothetical observation.

15

Where an employer knowingly violates IRCA a holding denying backpay provides the employer with an incentive to violate that statute. It would know that it could avoid a monetary award of backpay simply by hiring undocumented workers in violation of IRCA. The knowing employer cannot claim that it would not have hired the undocumented worker had it known of his undocumented status, or that it would have terminated him when it learned of his undocumented status. Accordingly, no conflict between the two statutes exists in this case since the Respondent knowingly violated IRCA and the employees did not.

20

Justice Breyer's concern is consistent with IRCA's express language which prohibits an employer from knowingly hiring an undocumented worker, failing to verify that he possesses qualifying documents, and continuing to employ him having learned that he is unauthorized to work in the United States. Thus, the main object of IRCA is to deter employers from knowingly hiring and continuing to employ such workers. A denial of backpay here would encourage employers to hire undocumented workers.

25

30

It is important to note that prior to *Hoffman*, the Board consistently held that IRCA did not preclude the award of backpay to employees whose employer hired them knowing that they were undocumented. *A.P.R.A.*, 320 NLRB 408 (1995), enf. 134 F.3rd 50, 56 (2nd Cir. 2001); *Met Food*, 337 NLRB 109 (2001); *Regal Recycling, Inc.*, 329 NLRB 355 (1999); *County Window Cleaning Co.*, 328 NLRB 190, fn. 2 (1999), where the Board stated that "it is clear that undocumented aliens are employees under Sec. 2(3) of the Act and, thus, are entitled to the protections and remedies of the Act."

35

40

In his dissenting opinion in *Hoffman*, Justice Breyer stated that nothing in IRCA prohibits an award of backpay to undocumented workers. He noted that the purpose of backpay awards includes deterrence – discouraging employers from violating the Act, and that by denying a backpay award the wrongdoing employer benefits from his violation of both the Act and IRCA while the employee achieves no remedy. Such a result "increases the employer's incentive to find and to hire illegal-alien employees." 535 U.S. at 155.

45

Thus, according to Justice Breyer, *Hoffman* accomplishes what the *Sure-Tan* Court sought to avoid: employers benefiting by hiring undocumented workers thereby creating incentives for more workers to enter the country illegally, forming a subclass of workers with few remedies thereby weakening labor conditions and protections for all workers. 535 U.S. at 157.

50

Justice Breyer observed that according to the legislative history of IRCA, the "general purpose of [the statute] is to diminish the attractive force of employment, which like a 'magnet' pulls illegal immigrants toward the United States." *Hoffman*, 535 U.S. at 155, 156. The

“willingness of many illegal immigrants to accept low wages and substandard conditions makes them attractive to some employers who are ready to ‘exploit [them as a] source of labor’ often to the detriment of United States workers whose wages are depressed or whose jobs are lost.” *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3rd at 55-56 (2nd Cir. 2001).

5

“A policy of *applying* the labor laws must encompass a policy of *enforcing* the labor laws effectively. Otherwise, ‘we would leave helpless the very persons who most need protection from exploitative employer practices.’” *Hoffman*, dissenting opinion, 535 U.S. at 156. (emphasis in original) Justice Breyer also described backpay as the only tool in the Board’s “remedial arsenal” which is meaningful, and that by prohibiting an award of backpay, employers could flout the labor laws “at least once with impunity.” He further stated that “the backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay.” 535 U.S. at 154. Thus, although undocumented workers are protected by the Act they should not be disqualified from sharing in the same remedies as workers who are documented.

10

15

Accordingly, in enacting IRCA Congress believed that the continued enforcement of worker protection laws including the Act for documented and undocumented workers would remove the economic incentive for employers to hire undocumented workers. In the legislative history, set forth above, which stated that IRCA was “not intended to ‘limit the powers’ of the Board to remedy unfair practices committed against undocumented employees,” it is clear that Congress sought to complement rather than replace the remedies provided by the Act with the sanctions provided by IRCA. Its intent in enacting IRCA was that such workers continue to be protected by the Act. Where employees are protected by the Act they must also benefit from its remedies, otherwise the Act’s protection is a meaningless promise. A backpay remedy here is appropriate to make whole the employees who are innocent of any violations of IRCA.

20

25

It is clear that a backpay remedy here will effectuate the policies of the Act while at the same time be compatible with IRCA. Section 10(c) of the Act provides that the Board shall provide such remedies including “reinstatement of employees with or without backpay, as will effectuate the policies of this Act.” The Supreme Court has recognized that Section 10(c) vests in the Board “the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review.” *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 898-899 (1984). “The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board’s authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 236 (1938).

30

35

In *N.L.R.B. v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969), the Supreme Court stated:

40

The legitimacy of back pay as a remedy for unlawful discharge ... is beyond dispute, and the purpose of the remedy is clear. A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice.

45

The purpose of a backpay remedy is remedial – an aid in repairing the harm to employees. The main purpose of awarding backpay is to make employees whole for losses caused by their employer’s unfair labor practices. An award of backpay vindicates the policy of the Act and may deter similar illegal conduct of other employers in the future.

50

5 Monetary penalties are effective in deterring future conduct, and without them, employers have more, not less incentive to hire undocumented workers. Non-monetary remedies including a cease and desist order and the posting of a notice do not make the employee whole for his wrongful discharge. By denying a backpay remedy, an employer has an incentive to increase its employment of undocumented workers by removing any real remedy for violating the Act, thus undermining the purpose of the Act and the effectiveness of its monetary remedies.

10 A backpay award also serves to deter the commission of future unfair labor practices by preventing wrongdoers from benefiting from their unlawful conduct. *Rutter-Rex*, above, 396 U.S. at 265. An award of backpay “does not create an additional incentive for unscrupulous employers to employ illegal aliens ... and helps to ensure that employers who comply with IRCA do not suffer a competitive disadvantage for their obedience to the law.” *A.P.R.A.*, 134 F. 3rd at 15 57. On the other hand, in being awarded backpay, employees do not receive compensation for entering the United States without authorization. Rather, they are being made whole for the Respondent’s unlawful act in discharging them. If a backpay remedy is equally applied to undocumented as well as documented workers, employers will have no incentive to hire undocumented workers because there will be no benefit to unlawfully firing an undocumented worker.

20 It would be anomalous to hold that undocumented workers are not entitled to backpay despite the well-settled principal that they are employees under the Act who are intended to be protected by it. A right is meaningless if it cannot be enforced. If they are covered by the Act such protection must be accompanied by a meaningful backpay remedy. Justice Breyer noted that denying undocumented workers backpay “undermines the public policies that underlie the Nation’s labor laws.” 535 U.S. at 160. A backpay award serves to fulfill the promise of the Act made more than seventy years ago that a remedy is available for employees covered and protected by it who are victims of discrimination while at the same time innocent of wrongdoing. The Board “honors our responsibility to protect the rights of those covered by the Act.” *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 1 (2006).

30 An award of backpay which would serve to deter employers from knowingly hiring undocumented workers outweighs any unjust enrichment of the undocumented worker who remains in the United States illegally. In this regard, undocumented workers who have been unlawfully discharged from jobs in this country have already made the decision to unlawfully enter and remain here in order to work. It is too speculative to contend that people will enter the United States illegally only to obtain backpay in the event that they are illegally discharged.

40 The *Hoffman* majority noted that Castro could not mitigate damages as he is required to do by legally seeking interim employment following his discharge. However, as demonstrated in this hearing, the seven undocumented workers all obtained employment following their discharges. It is a fact that once in the United States, although here illegally, undocumented workers will find a way to work and will find employers willing, if not eager to employ them.

45 If a backpay remedy is denied, the seven employees would be held responsible for the Respondent’s violation of IRCA. Denying an award of backpay would punish the employees, benefit the wrongdoer, condone the employment of undocumented workers and place the risk associated with such employment on the employees instead of the employer. However, by requiring the employer to pay backpay to undocumented workers, the employer will have no

50

incentive to hire undocumented workers because there will be no benefit in violating the Act.¹³

Enforcement of the Act enhances the mission of IRCA. Imposing a backpay award on an employer which violates the Act serves the same purpose as fining an employer for employing an undocumented worker. Both sanctions discourage employers from hiring undocumented workers. Awarding backpay to such workers will not impinge upon the nation's immigration policy – it will enhance it. Such actions would help to deter the unlawful activity that both the Act and IRCA seek to prevent. Employers that knowingly violate both IRCA and the Act should have penalties imposed under both statutes. An award of backpay would create no conflict between the two statutes where, as here, the Respondent seeks to benefit from its violation of IRCA while at the same time the employees have not violated that statute.

I accordingly find and conclude that the seven employees are entitled to backpay.

D. Backpay Calculations

1. Gross Backpay and Backpay Period

The Specification alleges and the Respondent admits that, except for its *Hoffman* defense, the gross backpay figures and the way in which they were calculated are accurate. The Respondent stipulated that for the seven employees it (a) maintained no payroll records during their employment which would show the days and hours they worked or their rates of pay (b) paid them in cash and no deductions were made on their behalf for federal, state or city taxes or for social security and (c) did not issue W-2 forms during their employment with it.

The reinstatement remedy established in *A.P.R.A.* relating to the unlawful discharge of undocumented employees knowingly hired by their employer in violation of IRCA was not disturbed by *Hoffman* and applies here. Backpay was awarded from the dates of their discharges to the earliest of the following: their reinstatement by the employer subject to compliance with the employer's normal obligations under IRCA, or their failure after a reasonable time to produce the documents enabling the employer to meet its obligations under IRCA to verify their eligibility for employment in the United States. As set forth above, I have found that no valid offers of reinstatement have been made to any of the seven employees. Accordingly, their backpay continues to run for all seven workers except Miguel Quintuna who has already been reinstated.

The Specification alleges that the backpay period for Jose Antonio Quintuna Bermeo, Antonio Gonzalez, Luis Marcelo Gonzalez Hurtado, Francisco Javier Joya, Christian Palma, and Jose Armando Sax-Gutierrez, begins on February 12, 2003, the date of their discharge by the Respondent, and continues to run in the absence of a valid offer of reinstatement. The Specification also asserts that the backpay period for Miguel Quintuna begins on February 12, 2003 and terminates on March 5, 2003, the date he was reinstated by the Respondent.

2. Interim Employment

¹³ “[E]very case citing *Hoffman* since it was rendered has either distinguished itself from it or has limited it greatly.” *Cano v. Mallory Management*, 760 N.Y.S. 2nd 816, 818 (N.Y.S.C. 2003); See also *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2nd 295, 321-324 (D.N.J. 2005); *Singh v. Jutla*, 214 F. Supp 2nd 1056, 1061-1062 (N.D. CA 2002); *Zeng Liu v. Donna Karan Intl., Inc.*, 207 F. Supp 2nd 191 (S.D.N.Y. 2002); *Balbuena v. IDR Realty LLC*, 6 N.Y. 3rd 338, 350-360 (Ct. Appeals 2006).

5 The Specification, which was issued on July 28, 2005, contains interim earnings figures only through the first quarter of 2005, ending on March 31, 2005. Evidence concerning interim employment and earnings from that date to the date of the hearing was testified to by the employees. I have revised and updated the interim earnings and backpay amounts through the fourth quarter of 2005 based on the employees' testimony in January and February, 2006, and I have set forth such revised backpay calculations in appendices at the end of this Decision. In some cases, the testimony of the employees differs from the Specification. I have attempted to reconcile the differences as discussed below.

10 Hurtado and Joya were paid by check by their interim employers, but did not retain copies of the checks or check stubs. The other five employees were paid in cash and received no written documentation such as pay receipts of their hours worked or earnings received from their interim employers. None of the seven employees provided written documentation of their interim earnings to the Regional Office, and none kept any written records of his search for interim employment.

Jose Antonio Quintuna Bermeo

20 Bermeo testified that following his discharge he found it difficult to search for work because he had to attend meetings with the Charging Party's attorneys in an effort to obtain reinstatement. He stated that he was so engaged about twice per week, with his first meeting one week after his discharge which consumed three to four hours. That day he did not search for interim employment.

25 Bermeo looked for work at about three bakeries and was told that no jobs were available because it was the slow season. He could not recall any of the names of the bakeries but gave the street names for two of the companies. He also stood at a location where contractors pick up day laborers but he was not selected for such work. During the period of time that he was not employed he paid his rent from his savings.

30 Bermeo became employed at Verrazano Tile in about April, 2003. He testified that his weekly starting salary was \$410 with no overtime. Six months later, in October, 2003, his salary was increased to \$520 at which time he received another \$50 per week in overtime pay. Later he received a raise to \$600 per week. Although he did not testify as to when he received that raise, the Specification states that it began in January, 2005 and I accept that date. He further testified that his wage was increased to \$720 per week. He did not know when he received that raise but he said that it was in 2005, "a long time" before the February, 2006 hearing. Based on the facts concerning his history of wage raises, I find that he received the increase to \$720 in July, 2005, six months after the January, 2005 raise.

45 Bermeo remained employed at Verrazano at the time of the hearing. He lives in Brooklyn and traveled to work in Staten Island by bus when he began work at Verrazano, but beginning in October, 2005 was driven to work by a co-worker.

50 The Specification states that Bermeo earned \$420 per week plus \$50 per month overtime while employed at Verrazano Tile. In January, 2004 his salary was increased to \$520, and in June, 2004 he no longer received overtime pay. In January, 2005 his salary was increased to \$600 per week.

There is thus a discrepancy concerning interim earnings between Bermeo's hearing testimony and the Specification. Although the Specification states that Gonzalez initially earned

5 \$420 per week and \$50 per month overtime, he testified that his starting salary at Verrazano was \$410 per week with no overtime. Using those figures, he thus testified to receiving less interim earnings than set forth in the Specification. However, inasmuch as the General Counsel has admitted a higher interim earnings figure as set forth in the Specification and has not amended that figure, and no notice has been given the Respondent that such a figure is incorrect, the Respondent had no opportunity to rebut the interim earnings as testified. *Laredo Packing Co.*, 264 NLRB 245, 248 (1982). Accordingly, I will retain the Specification's higher interim earnings figures of \$4715 and \$5610 and thus lower net backpay as set forth in the second and third quarters of 2003.

10 Bermeo testified that he began earning \$520 per week plus \$50 per week overtime in October, 2003 through December, 2003. (fourth quarter of 2003). This conflicts with the Specification's statement that he began earning \$520 in January, 2004. I will rely on his hearing testimony as the most accurate account of his interim earnings where he testified to higher interim earnings than that set forth in the Specification. See *Local 294, Teamsters*, 208 NLRB 445, 449 (1974). This finding is supported by the fact that he kept no record of his interim earnings. Accordingly, I shall revise the Specification's calculations to state that he received higher interim earnings, as follows: For the fourth quarter of 2003 his interim earnings were \$7410. ($\$520 \times 13 \text{ weeks} + \$50 \times 13 \text{ weeks}$).

20 According to his testimony, Bermeo continued to be paid \$520 per week for the 2004 calendar year and \$50 per week overtime only through June, 2004.¹⁴ Accordingly his interim earnings continued to be \$7410 per quarter through the second quarter of 2004. However, in the third and fourth quarters of 2004, his interim earnings were \$6760 due to the loss of overtime pay. ($\$520 \times 13 \text{ weeks}$).

25 According to Bermeo's testimony, he received a weekly wage of \$600 in January, 2005, and later earned \$720 per week. As set forth in the Specification, inasmuch as his interim earnings exceeded his gross backpay for the first quarter of 2005 at his wage of \$600, he is not entitled to backpay from the first quarter of 2005 and thereafter.

30 I have reduced Bermeo's interim expenses in the fourth quarter of 2005 by \$312 consistent with his testimony that he was driven to work by a co-worker and no longer used public transportation. He did not testify that he reimbursed the co-worker for his travel expenses. In any event, his interim earnings in that quarter exceeded his gross backpay even without the reduction so that he is entitled to no backpay for that quarter.

Antonio Gonzalez

40 Following his discharge, Gonzalez looked for work for two months before he became employed. His search was done by walking in Brooklyn two to three days per week for two to three hours each day. He did not look for work at the New York State Department of Labor, employment agencies, on the internet or in newspapers.

45 Gonzalez testified that he began work at All Type Auto Repair in about March, 2003. He worked 40 hours per week and his initial salary was \$60 per day for five days' work, or a total of \$300 per week. He was employed at All Type at the time of the hearing. In about September, 2004, Gonzalez received a raise of \$5 per day, earning a total of \$305 per week.

50 ¹⁴ In this respect, I accept the Stipulation's statement that he stopped receiving overtime pay in June, 2004. He did not testify differently.

The Specification states that Gonzalez' initial salary was \$250 per week and in late December, 2003 he received a raise to \$275. On January 1, 2005, his weekly salary was increased to \$300.

5

There is thus a discrepancy concerning interim earnings between Gonzalez' hearing testimony and the Specification. Although the Specification states that Gonzalez initially earned \$250 per week and was ultimately raised to \$300, he testified that his starting salary was \$300 per week and he received a \$5.00 raise in September, 2004. For the reasons set forth above, I rely on his hearing testimony as opposed to the Specification's statements. Accordingly, I will revise the computations consistent with his testimony to set forth that Gonzales' interim earnings were higher than set forth in the Specification. They consisted of \$3900 per quarter (\$300 per week x 13 weeks) from the second quarter of 2003 through the third quarter of 2004, and \$3965 per quarter (\$305 per week x 13 weeks) from the fourth quarter of 2004 through the fourth quarter of 2005.

10

15

Luis Marcelo Gonzalez Hurtado

Hurtado testified that he immediately searched for work by daily visiting employment agencies in Jackson Heights, Queens. He did not recall the names of those agencies. He first made such visits once per week. His first job following his discharge was at a restaurant where he worked for one week as a dishwasher in about May, 2003. He did not like that job and quit. He worked eight hours per day, six days per week, and earned \$7.00 per hour. That position is not reported in the Specification and I shall accordingly increase his interim earnings for the second quarter of 2003 by \$336.

20

25

Hurtado next worked in about June, 2003 at a demolition company in Queens whose name he does not recall. He testified that he earned \$7.00 per hour and worked there 45 hours per week for two to three weeks.

30

The Specification states that Hurtado worked at the demolition company only 24 hours per week and earned \$7.50 per hour. According to the Specification, he worked at that job for nine weeks, earning a total of \$1620.00. At hearing, he explained the difference in his hours by stating that his working hours varied – some weeks he was employed 24 hours per week and other weeks 45 hours. Based on his testimony and the lack of documentary evidence, I find that he worked 24 hours per week for six weeks at \$7.50 per hour and that he worked 45 hours per week for three weeks (consistent with his testimony) at a rate of \$7.00 per hour.

35

Accordingly, the Specification will be revised to state that for the second quarter of 2003, Hurtado received higher interim earnings, earning a total of \$2361.00. That figure is the sum of \$1080 (\$7.50 x 24 hours x 6 weeks) and \$945 (\$7.00 x 45 hours x 3 weeks) plus \$336 for his one week's work as a dishwasher.

40

Hurtado testified that thereafter, he had two periods of employment with the same construction/demolition company in Queens. In his first period of employment, which was for the month of September, 2003, he worked six days per week earning \$60 per day. In his next period of employment he worked for 10 hours per day for 3 days per week, earning \$7.00 per hour. Earnings for both companies are accurately contained in the Specification.

45

Hurtado testified that he next became employed in a bakery where he was employed at the time of the hearing. When he began work in about April, 2004, he earned \$360 for a six day week, but by the time of the hearing his salary was increased to \$68 per day for a six day week.

50

He did not know when his wage was increased, and indeed testified that he did not receive a raise in pay. However, it is likely, as he testified, that inasmuch as he worked there for ten months by the time of the hearing he did receive a raise to \$68 per day. Accordingly, I shall revise the Specification to state that his interim earnings in the fourth quarter of 2004 were \$5304, which is higher than that set forth. (\$68 per day x 6 days x 13 weeks).

Francisco Javier Joya

Joya first began looking for work about three or four weeks after his discharge, but explained that he did not look for work because he could not find a job. He searched for work in Brooklyn by applying in person at bakeries, but did not look for work elsewhere.

Joya eventually worked as a day laborer three or four days a week for three to four weeks earning \$70 per day. He also worked in construction at Breant Company where he earned \$8.00 per hour by check and worked 35 to 40 hours per week. He was employed there for about 1½ months. He left because he did not like construction work.

In about May, 2003, Joya became employed by Panificio Bakery where he worked five to six days per week and was paid \$90 per day. He worked there for three to four months. Panificio was sold to Reliable Bakery and he was transferred to that company. He began at a daily salary of \$75 and worked seven days per week, then in mid April, 2004, he worked six days, and in early October, 2004, he resumed working seven days per week. In 2005 he received a raise to \$80 per day.

Inasmuch as the 2005 pay raise is not reflected in the Specification, I shall revise it to state that in each quarter in 2005, Joya's interim earnings were \$7280. (\$80 x 7 days x 13 weeks).

Christian Palma

Palma testified that following his discharge on February 12, 2003, he immediately searched for work four to five days per week by looking in help-wanted ads in *El Diario*, a Hispanic language newspaper. He called certain advertisers including about four to five car washes and one company which cleaned offices. The ads for car washes resulted in four job interviews but by the time he was interviewed the company had already hired the one or two workers needed. His afternoons were spent doing personal errands. He also asked his friends if they knew whether any jobs were available.

Palma responded to an ad placed in *El Diario* by Car Spa and was hired in about April, 2003 where he continued to work at the time of the hearing. He is employed from 8:00 a.m. to 6 or 7:00 p.m. six days per week, or about 50 to 60 hours per week. Palma testified that his initial wage was \$5.00 per hour and he received a 50 cent raise in June or July, 2003, after which his wage was reduced in August, 2004 for two months to \$5.00 per hour, but later his wage was raised to \$5.50. He received another 50 cent raise in about October, 2005. His wage from September, 2005 to the date of the hearing was thus \$6.00 per hour.

The Specification states that Palma earned \$5.50 per hour based on a 55 hour work-week plus \$25 in tips six days per week. It further states that in March, 2004, his work-week was reduced to 45 hours and his tips reduced to \$15 per day, but he continued to work six days per week. On May 10, 2004, his work-week was reduced to 37 hours, but his tips and days of work remained the same. In July, 2004, his salary was reduced to \$5.00 per hour and his weekly hours of work were increased to 44½, and his tips and days of work remained the same.

Thus Palma testified that he received a wage of \$5 to \$15 per day and \$30 to \$35 per week in tips, but the Specification is based on his earning a wage of \$25 and \$15 per day in tips, six days per week. I will not disturb the Specification's figures in this regard particularly since his testimony is self-contradictory. Thus, although the Specification states that his lowest daily tip total was \$15 he testified that it was only \$5.

Palma testified that from the second quarter of 2004 through the fourth quarter of 2005, his wage varied from \$5.00 to \$6.00 per hour. In August, 2004, he received \$5.00 per hour for two months and then \$5.50 from October, 2004 to October, 2005 when he received \$6.00.

Thus, in the second quarter of 2004, according to his testimony, he earned \$5.50 per hour. His interim earnings that quarter were \$5102.50. ($\$5.50 \times 55 \text{ hours} \times 13 \text{ weeks} + \$15 \text{ daily or } \$90 \text{ weekly tips} \times 13 \text{ weeks}$). I shall revise the Specification accordingly to set forth higher interim earnings.

In two months of the third quarter of 2004 his interim earnings, according to his testimony, was \$2920. ($\$5.00 \text{ per hour} \times 55 \text{ hours} \times 8 \text{ weeks} + \$90 \text{ weekly tips} \times 8 \text{ weeks}$). In the third month, he earned \$5.50 per hour for a total of \$1570 for that month. The total interim earnings for the third quarter are thus \$4490. I shall revise the Specification accordingly to set forth higher interim earnings.

From October, 2004 to October, 2005, according to his testimony, Palma earned \$5.50 per hour. Accordingly, from the fourth quarter of 2004 to the third quarter of 2005, his quarterly interim earnings were \$5102.50. ($\$5.50 \times 55 \text{ hours} \times 13 \text{ weeks} + \$90 \text{ weekly tips} \times 13 \text{ weeks}$). I shall revise the Specification accordingly to set forth higher interim earnings.

Palma testified that he earned \$6.00 per hour from October, 2005 to the date of the hearing. Accordingly, his interim earnings in the fourth quarter of 2005 were \$5460. ($\$6.00 \text{ per hour} \times 55 \text{ hours} \times 13 \text{ weeks} + \$90 \text{ weekly tips} \times 13 \text{ weeks}$). I shall revise the Specification accordingly.

Miguel Quintuna

The Specification states that the backpay period begins on February 12, 2003 when Quintuna was discharged, and ends when he was reinstated on March 5, 2003. Accordingly, \$1,320 in backpay is sought for that two week period which consists of \$7.50 per hour for 40 hours per week plus 32 hours of overtime at time and one-half for 32 hours per week.

No evidence was presented that Quintuna searched for employment during that period and it is not alleged that Quintuna received any interim earnings. Although the Respondent suggested that Quintuna returned to work earlier than March 5, no evidence has been adduced to support that claim. The only evidence presented was that the Respondent made an offer of proof that it sponsored Quintuna for a visa during his employ. Such efforts included Quintuna retaining an attorney who contacted the Respondent, and Lieberman signed a sponsorship document for Quintuna.

Once the General Counsel has satisfied his burden to show the gross amount of backpay to which Quintuna is entitled, the Respondent has the burden to produce evidence that would mitigate its liability. It was thus the Respondent's burden to show that Quintuna unreasonably failed to mitigate damages. *Ferguson Electric Co.*, 330 NLRB 514, 518 (2000). It has not done so. Accordingly, the net backpay is \$1,320.00. ($\$7.50 \times 40 \text{ hours} \times 2 \text{ weeks} +$

\$11.25 x 32 x 2 weeks).

Jose Armando Sax-Gutierrez

5 Sax-Gutierrez began his search for interim employment one week after his discharge, by visiting various companies in Brooklyn such as fruit stands and fish stores. He did not search for work in newspapers, on the internet or at employment agencies. He paid his rent with help from his family.

10 Although the Specification shows that he had no earnings for that period of time, he stated that he worked about three hours in two days in March, 2003 doing construction work. He earned \$60 for ½ day's work, and I shall add \$60 to his interim earnings for that quarter.

15 In April, 2003, Sax-Gutierrez searched for work five days per week for ½ day at a time by walking to prospective employers. He spent the other half of the day resting because he was tired from walking.

20 Sax-Gutierrez testified that he began work at Lekactov Bakery in early May, 2003 where he was employed three to four hours per day two to three days per week, earning \$5.50 per hour. Then in June, 2003, he worked three hours per day three days per week. He first worked full time for Lekactov in September, 2003, and at times worked overtime, earning \$6.00 per hour. In 2004, he worked 8 to 10 hours per day three to four days per week, or about 40 to 50 hours per week. He received a raise to \$6.50 per hour in December, 2004. In 2005 he worked 25 11 to 12 hours per day or 60 to 65 hours per week for 5½ days per week. In December, 2005 he received a raise to \$7.50 per hour, earning \$450 to \$475 per week with overtime pay for work performed 11 to 12 hours per day, 5½ days per week.

30 The Specification states that Sax-Gutierrez began work at Lekactov Bakery in early May, 2003, earning \$5.00 per hour and working a 60 hour week. In early June, 2003, he received a raise to \$6.00 per hour. One year later, in early June, 2004, his weekly hours of work decreased to 40. In early December, 2004, he received a wage increase to \$6.50 per hour.

35 Sax-Gutierrez' testimony regarding his interim earnings at Lekactov from the start of his work there through the fourth quarter of 2004 is essentially the same as that set forth in the Specification. Accordingly, I will not disturb the Specification's statements concerning his interim earnings for that period of time.

40 However, he testified that in 2005 he worked 60 hours per week. Accordingly, I cannot accept the Specification's statement that in the first quarter of 2005 he worked only 40 hours per week. I therefore find that based on his testimony he worked 60 hours per week from the first quarter to the fourth quarter of 2005. Thus, from the first quarter of 2005 through the fourth quarter of 2005, his interim earnings were \$5070 per quarter. (\$6.50 x 60 hours x 13 weeks). I shall revise the Specification accordingly to set forth higher interim earnings.

45 3. Analysis and Discussion

50 "The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer." *NLRB v. Mastro Plastics Corp.*, 354 F.2nd 170, 178 (2nd Cir. 1965). The Respondent has the burden of adducing evidence that would mitigate its liability, including the burden of establishing the amount of any interim earnings that are to be deducted from the backpay amount due. *Ferguson Electric*, above.

5 “To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. It is the respondent’s burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work. The discriminatee must put forth an honest, good-faith effort to find interim work; the law does not require that the search be successful.” Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. *Millennium Maintenance & Electrical Contracting*, 344 NLRB No. 62, slip op. at 2 (2005); *Glenn’s Trucking Co.*, 344 NLRB No. 41, slip op. at 1 (2005); *Cassis Management Corp.*, 336 NLRB 961, 968 (2001).

10 It is well settled that the reasonableness of a discriminatee’s efforts to find a job and thereby mitigate loss of income resulting from an unlawful discharge need not comport with the highest standard of diligence. He need not exhaust all possible job leads. Rather, it is sufficient that the discriminatee make a good-faith effort. In determining the reasonableness of this effort, the discriminatee’s skills, experience, qualifications, age, and labor conditions in the area are
15 factors to be considered. The Respondent’s obligation to satisfy its affirmative defense is to show a “clearly unjustifiable refusal to take desirable new employment.” *Ferguson Electric*, above at 518.

20 None of the employees kept written records of their interim employment, and none provided written documentation to the Regional Office. Certain employees could not recall the names or addresses of the companies they visited in seeking work. However, the Board has held that employees are not automatically disqualified from backpay because of their poor record-keeping or uncertainty as to memory or exaggeration. *Cibao Meat Products*, 348 NLRB No. 5, slip op. at 1 (2006), citing *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966), *enfd.* 395
25 F.2d 241 (1st Cir. 1968).

30 Applying the above principles, I find that each of the seven employees engaged in a reasonably diligent, good faith search for work. The evidence establishes that they made a good faith effort to find interim employment by visiting prospective employers, searching newspaper advertisements and asking friends for job leads. Their interest in working is amply illustrated by the fact that each found permanent employment within one or two months after their discharge at jobs at which they worked at the time of the hearing. Thus, they continued to work in those jobs for nearly three years.

35 Thus, despite the fact that Bermeo attended meetings with counsel immediately after his discharge, he did engage in a diligent search for work at bakeries and with contractors. He then became employed with Verrazano Tile in April, 2003 at which he was employed for nearly three years at the time of the hearing.

40 Similarly, Antonio Gonzalez sought work diligently in Brooklyn for two months before he became employed at All Type Auto in about March, 2003. He too remained employed by that company at the time of the hearing. Although he did not look for work at government or private agencies, on the internet or in newspapers, the Board has held that not reading or responding to newspaper advertisements does not establish a failure to search for work. *S.E. Nichols of Ohio*,
45 258 NLRB 1, 11 (1981). The question, ultimately, is whether he diligently searched for work. I find that he did.

50 Hurtado visited employment agencies, worked as a dishwasher, found work with various construction/demolition companies, and then became employed at the bakery for which he worked at the time of the hearing.

Joya also looked diligently for work at bakeries, worked as a day laborer and then in

construction, and finally at a bakery. Although he left a job in the construction field because he did not like such work, backpay is not tolled because he quit that employment. Inasmuch as construction work was not substantially equivalent to his job as a baker with the Respondent, Joya was not obligated to remain in such work. *Ryder System*, 302 NLRB 608, 609 (1991).

5

Palma searched for work each day by searching newspaper ads and calling advertisers and asking friends. He found permanent work in a car wash. As set forth above, the Respondent has not met its burden of proving that Miguel Quintana did not engage in a diligent search for work. Sax-Gutierrez immediately inquired about work from stores in Brooklyn, worked in construction and found permanent work at a bakery in May, 2003 at which he was still employed at the time of the hearing.

10

The evidence convinces me that the Respondent has not affirmatively established that any of the discriminatees failed to make a reasonably diligent search for equivalent interim employment. Based on their diligent searches for work, their success in finding work, and the fact that they remained employed at such jobs for nearly three years at the time of the hearing, I find and conclude that the Respondent has not met its burden that any of them failed to make a diligent search for work.

15

20

Based upon the above, I issue the following recommended¹⁵

ORDER

The Respondent, Mezonos Maven Bakery, Inc., its officers, agents, successors, and assigns, shall make the employees named in the attached Appendix whole by paying to them the sums set forth in the column entitled Net Backpay for each of the employees, with interest on such amounts to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

25

30

Dated, Washington, D.C., November 1, 2006.

35

 Steven Davis
 Administrative Law Judge

40

45

¹⁵ 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.

50

Appendix 1
Jose Antonio Quintuna Bermeo

<i>Year</i>	<i>Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Interim Expenses</i>	<i>Net Interim Earnings</i>	<i>Net Backpay</i>
2003	1 st	4,004.00			0.00	4,004.00
2003	2 nd	7,436.00	4,715.00	165.00	4,550.00	2,886.00
2003	3 rd	7,436.00	5,610.00	260.00	5,350.00	2,086.00
2003	4 th	7,436.00	7,410.00	273.00	7,137.00	299.00
2004	1 st	7,436.00	7,410.00	273.00	7,137.00	299.00
2004	2 nd	7,436.00	7,410.00	273.00	7,137.00	299.00
2004	3 rd	7,436.00	6,760.00	273.00	6,487.00	949.00
2004	4 th	7,436.00	6,760.00	273.00	6,487.00	949.00
2005	1 st	7,436.00	7,800.00	312.00	7,488.00	0.00
2005	2 nd	7,436.00	7,800.00	312.00	7,488.00	0.00
2005	3 rd	7,436.00	7,800.00	312.00	7,488.00	0.00
2005	4 th	7,436.00	7,800.00	0.00	7,800.00	0.00
Total:		85,800.00	77,275.00	2,726.00	74,549.00	\$11,771.00

Appendix 2
Antonio Gonzalez

<i>Year</i>	<i>Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Interim Expenses</i>	<i>Net Interim Earnings</i>	<i>Net Backpay</i>
2003	1 st	3,123.75			0.00	3,123.75
2003	2 nd	5,801.25	3,900.00	165.00	3,735.00	2,066.25
2003	3 rd	5,801.25	3,900.00	260.00	3,640.00	2,161.25
2003	4 th	5,801.25	3,900.00	273.00	3,627.00	2,174.25
2004	1 st	5,801.25	3,900.00	273.00	3,627.00	2,174.25
2004	2 nd	5,801.25	3,900.00	273.00	3,627.00	2,174.25
2004	3 rd	5,801.25	3,900.00	273.00	3,627.00	2,174.25
2004	4 th	5,801.25	3,965.00	273.00	3,692.00	2,109.25
2005	1 st	5,801.25	3,965.00	312.00	3,653.00	2,148.25
2005	2 nd	5,801.25	3,965.00	312.00	3,653.00	2,148.25
2005	3 rd	5,801.25	3,965.00	312.00	3,653.00	2,148.25
2005	4 th	5,801.25	3,965.00	312.00	3,653.00	2,148.25
Total:		66,937.50	43,225.00	3,038.00	40,187.00	\$26,750.50

Appendix 3
Luis Marcelo Gonzalez Hurtado

<i>Year</i>	<i>Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Interim Expenses</i>	<i>Net Interim Earnings</i>	<i>Net Backpay</i>
2003	1 st	2,793.88			0.00	2,793.88
2003	2 nd	5,188.63	2,361.00		2,361.00	2,827.63
2003	3 rd	5,188.63	4,680.00		4,680.00	508.63
2003	4 th	5,188.63	2,310.00		2,310.00	2,878.63
2004	1 st	5,188.63	2,310.00		2,310.00	2,878.63
2004	2 nd	5,188.63	3,240.00		3,240.00	1,948.63
2004	3 rd	5,188.63	4,680.00		4,680.00	508.63
2004	4 th	5,188.63	5,304.00		5,304.00	0.00
2005	1 st	5,188.63	5,304.00		5,304.00	0.00
2005	2 nd	5,188.63	5,304.00		5,304.00	0.00
2005	3 rd	5,188.63	5,304.00		5,304.00	0.00
2005	4 th	5,188.63	5,304.00		5,304.00	0.00
Total:		59,868.81	46,101.00		46,101.00	\$14,344.66

Appendix 4
Francisco Javier Joya

<i>Year</i>	<i>Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Interim Expenses</i>	<i>Net Interim Earnings</i>	<i>Net Backpay</i>
2003	1 st	4,856.25	1,160.00	54.00	1,106.00	3,750.25
2003	2 nd	9,018.75	5,580.00	195.00	5,385.00	3,633.75
2003	3 rd	9,018.75	6,930.00	260.00	6,670.00	2,348.75
2003	4 th	9,018.75	6,825.00	273.00	6,552.00	2,466.75
2004	1 st	9,018.75	6,825.00	273.00	6,552.00	2,466.75
2004	2 nd	9,018.75	6,000.00	273.00	5,727.00	3,291.75
2004	3 rd	9,018.75	5,850.00	273.00	5,577.00	3,441.75
2004	4 th	9,018.75	6,825.00	273.00	6,552.00	2,466.75
2005	1 st	9,018.75	6,825.00	312.00	6,513.00	2,505.75
2005	2 nd	9,018.75	7,280.00	312.00	6,968.00	2,050.75
2005	3 rd	9,018.75	7,280.00	312.00	6,968.00	2,050.75
2005	4 th	9,018.75	7,280.00	312.00	6,968.00	2,050.75
Total:		104,062.50	74,660.00	3,122.00	71,538.00	\$32,524.50

**Appendix 5
Christian Palma**

<i>Year</i>	<i>Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Interim Expenses</i>	<i>Net Interim Earnings</i>	<i>Net Backpay</i>
2003	1 st	2,793.88			0.00	2,793.88
2003	2 nd	5,188.63	940.00		940.00	4,248.63
2003	3 rd	5,188.63	5,882.50		5,882.50	0.00
2003	4 th	5,188.63	5,882.50		5,882.50	0.00
2004	1 st	5,188.63	5,307.50		5,307.50	0.00
2004	2 nd	5,188.63	5,102.50		5,102.50	86.13
2004	3 rd	5,188.63	4,490.00		4,490.00	698.63
2004	4 th	5,188.63	5,102.50		5,102.50	86.13
2005	1 st	5,188.63	5,102.50		5,102.50	86.13
2005	2 nd	5,188.63	5,102.50		5,102.50	86.13
2005	3 rd	5,188.63	5,102.50		5,102.50	86.13
2005	4 th	5,188.63	5,460.00		5,460.00	0.00
Total:		59,868.81	53,475.00		53,475.00	\$8,171.79

**Appendix 6
Miguel Quintuna**

<i>Year</i>	<i>Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Interim Expenses</i>	<i>Net Interim Earnings</i>	<i>Net Backpay</i>
2003	1 st	1,320.00			0.00	1,320.00
Total:		1,320.00	0.00	0.00	0.00	\$1,320.00

**Appendix 7
Jose Armando Sax-Gutierrez**

<i>Year</i>	<i>Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Interim Expenses</i>	<i>Net Interim Earnings</i>	<i>Net Backpay</i>
2003	1 st	2,793.88	60.00		60.00	2,733.88
2003	2 nd	5,188.63	2,940.00		2,940.00	2,248.63
2003	3 rd	5,188.63	4,680.00		4,680.00	508.63
2003	4 th	5,188.63	4,680.00		4,680.00	508.63
2004	1 st	5,188.63	4,680.00		4,680.00	508.63
2004	2 nd	5,188.63	4,440.00		4,440.00	748.63
2004	3 rd	5,188.63	3,120.00		3,120.00	2,068.63
2004	4 th	5,188.63	3,220.00		3,220.00	1,968.63
2005	1 st	5,188.63	5,070.00		5,070.00	118.63
2005	2 nd	5,188.63	5,070.00		5,070.00	118.63
2005	3 rd	5,188.63	5,070.00		5,070.00	118.63
2005	4 th	5,188.63	5,070.00		5,070.00	118.63
Total:		59,868.81	48,100.00		48,100.00	\$11,768.81