

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MERCHANTS BUILDING MAINTENANCE, LLC

and

Case 28-CA-22660

ELIZABETH CASTRO, an Individual

and

Case 28-CA-22282

AXEL CARMONA, an Individual

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

Counsel for the Acting General Counsel (General Counsel) files this Answering Brief to Respondent’s Exceptions to the Decision of Administrative Law Judge Lana H. Parke, JD (SF)-46-10, dated November 23, 2010.¹

This case, at its core, is very simple. Respondent, a contractor providing janitorial services to the Santa Fe High School District (the District), refused to retain its employees from one school year to the next because they advocated concertedly for fair treatment and improved working conditions, including by making group complaints to both Respondent and the District. The Administrative Law Judge (ALJ) found that Respondent, by so doing, and also by threatening its employees about the consequences of their protected conduct,

¹Merchants Building Maintenance, LLC, is referred to as “Respondent.” References to the Transcript of Proceedings will be designated as (Tr.), followed by the appropriate page numbers. References to the General Counsel’s and Respondent’s Exhibits will be referred to as (GC), and (R), respectively, with the appropriate exhibit number. References to Respondent’s “Employer’s Supporting Brief to Exceptions to Recommended Decision and Order of Administrative Law Judge” will be designated as “Respondent’s Brief,” followed by the appropriate page numbers. All dates are in 2009, unless otherwise stated.

violated Section 8(a)(1) of the Act. The ALJ directed the appropriate remedy -- the reinstatement of over 20 discriminatees, backpay, and the posting of a Notice to Employees.

Despite the ALJ's well-reasoned decision and recommended order, Respondent, by its exceptions, now simply repeats and rehashes arguments and defenses that were appropriately rejected by the ALJ. In so doing, Respondent attempts to shield itself from its obligations under the Act by throwing up one smoke screen after another. First, Respondent asks to overturn the ALJ's well-articulated credibility determinations, contrary to well-established Board precedent. As to the merits of the case, Respondent disputes the ALJ's findings of animus and attempts to excuse its unlawful hiring decisions as being the result of some purported confusion regarding contract renewal it attributes to the District. Then, Respondent attempts to cleanse itself of liability by falsely asserting that the District required it to engage in more detailed background checks of its existing employees and that federal law prevented it from hiring the alleged discriminatees. Finally, having failed to evade an unfair labor practice finding, Respondent now contends that the discriminatees' backpay should be reduced by the amounts it gave employees as additional pay at the end of their employment. Respondent also, and again, relies on the federal law that it repeatedly shirked -- and the unreliable results of its concocted and sloppy efforts to appear to validate employees' eligibility status -- as it seeks to excuse itself from making whole and reinstating the discriminatees.

The fact is that it was only after its employees started to exercise their rights under the Act that Respondent, which in the past hired employees with overt disregard for their eligibility status, now attempts to avoid unfair labor practice findings and the standard remedies for such by proffering its half-baked and sloppy verification efforts as a shield. It

is respectfully suggested that the Board should reject Respondent's exceptions and instead adopt the ALJ's findings of fact, conclusions of law, and recommended order (with the correction urged by General Counsel's limited exception).²

II. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT AND SHOULD BE REJECTED BY THE BOARD

Generally, Respondent's exceptions relate to: (a) the ALJ's credibility resolutions; (b) the ALJ's findings and conclusions that Respondent violated the Act by threatening employees and by refusing to consider for rehire, and failing and refusing to rehire, a group of approximately 22 employees; (c) the purportedly inadequate quantum of evidence presented by the General Counsel and the sufficiency of Respondent's defenses; (d) and the terms and applicability of the ALJ's recommended order.

A. The ALJ Properly Discredited Respondent's Witnesses

By Exceptions 7 and 8, Respondent contends that the ALJ erred by failing to credit Respondent's witnesses. Respondent asks the Board to ignore its well-settled policies pertaining to its review of administrative law judge's credibility findings.

The Board's established policy is to not overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence shows that such determinations are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). Weight is given to an administrative law judge's credibility determination because the administrative law judge, unlike the Board and reviewing courts, observes the witnesses and hears them testify. Credibility determinations are also based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable

² On January 4, 2010, General Counsel filed limited exceptions in this matter asking the Board to include Norma Garcia as a discriminatee entitled to the full remedy provided by the ALJ to other similarly situated-discriminatees.

inferences, which may be drawn from the record as a whole. *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *Medeco Security Locks, Inc.*, 322 NLRB 665 (1996), *enfd.* in relevant part, 142 F.3d 733 (4th Cir. 1998). *Accord: Warren L. Rose Castings, Inc.*, 231 NLRB 912, 913 (1977), *enfd.* 587 F.2d 1005 (9th Cir. 1978). Respondent proffers nothing that would warrant a reconsideration of the ALJ's credibility resolutions.

To the contrary, the records supports, as set forth in the ALJD, the ALJ's credibility determinations, the reasonable inferences drawn therefrom, and the ALJ's evaluation of the inherent probabilities of record testimony. It is respectfully submitted that the Board should adopt the ALJ's credibility findings and, based thereon, adopt her unfair labor practice findings, and should reject Respondent's Exceptions 7 and 8.

B. Contrary to Respondent's Exceptions, the Record Fully Supports the ALJ's Finding that Respondent Unlawfully Threatened Employees and Harbored Animus Against Employees' Protected Concerted Activities

By Exceptions 14 through 16, Respondent contends that the ALJ erred when she found discriminatory timing inasmuch as the discriminatees' protected activity did not more closely coincide with Respondent's failure to rehire them. (Respondents' Brief at 17-18) Respondent contends that the ALJ failed to consider that employees' protected conduct occurred outside the Section 10(b) period, and also asserts that the threats found by the ALJ -- those made by Respondent's supervisor, Oscar Arellano (Arellano) -- were non-coercive and protected by Section 8(c) of the Act. Contrary to Respondent's assertions, the record supports the ALJ's reliance on the unlawful statements as evidence of animus and, in particular, the ALJ's finding that the Respondent, by Arellano, unlawfully threatened to not rehire its employees on at least two occasions.

Respondent, citing *United Kiser Services LLC*, 255 NLRB No. 55 (2010), and *Clark & Wilkins Indus.*, 290 NLRB 106 (1988), contends that Respondent's reference to employees' concerted letters cannot be evidence of a violation or animus since such concerted conduct occurred beyond the Act's six-month limitation period under Section 10(b).

Both *United Kiser* and *Clark* are readily distinguishable from the present case. In *United Kiser*, the charges in which the underlying allegations were made were themselves filed outside the Section 10(b) period. However, the charges in the instant case were timely filed. Specifically, the charges in the instant case were filed on August 27, and January 28, 2010, respectively. (GCX 1(a); 1(n)) The unlawful threats at issue were made by Respondent's supervisor, Arellano, on June 22 and in August. As a result, both unlawful threats found by the ALJ were made within the Section 10(b) period and, contrary to Respondent's assertions, were also made near in time to both the discriminatees' protected concerted activities and to Respondent's unlawful retaliation against them.

Moreover, to the extent that Respondent is suggesting that employees' protected conduct occurred outside the Section 10(b) period, thus precluding the finding of a refusal to hire violation, such a suggestion is baseless. Section 10(b) bars the issuance of a complaint on an alleged violation occurring outside the Section 10(b) period -- it does not preclude the consideration of events occurring more than six months before the filing of the charge. In any event, Respondent's assertion, even if supported by Board law, would not fit in this case. Respondent overlooks the fact that employees wrote letters and met with District officials as late as August 11 -- at times well within the Act's 10(b) period and close to Respondent's adverse actions against the discriminatees.

Respondent cites *Clark*, supra, to support its contention that there is no evidence to support a finding of animus inasmuch as Respondent's statements about the discriminatees' protected concerted activity were made many months before Respondent announced the termination of the contract with the District. (Respondent's Brief at 18) However, *Clark* does not aid Respondent. The *Clark* case actually lends support to the ALJ's finding that Arellano's statement reflects animus against the discriminatees, and violated Section 8(a)(1) by threatening to refuse to rehire employees because they had engaged in protected concerted activity. In *Clark*, the Board found that a supervisor's knowledge of employees' union activity was imputed to the respondent, and the respondent's discharge of that employee, who had engaged in union activity, was pretextual. *Clark*, supra.

In this case, although Respondent does its best to suggest that its motivation in refusing to rehire the discriminatees was lawful, the ALJ properly found that Respondent was aware of its employees' protected concerted activities and, based on employee witnesses' testimony, also found that on June 22, Respondent's supervisor, Arellano, while distributing final paychecks to employees, unlawfully threatened not to rehire employees because they engaged in concerted activities. (ALJD 15:45-16:5) Such statements "were declarations of animosity toward employees' protected activities." (ALJD 16:1-5)

As discussed above, Arellano's June 22 threats were made shortly after the discriminatees prepared their June 16 letter to Respondent complaining about their terms and conditions of employment and their June 18 meeting with District Superintendent Bobbie Gutierrez, to whom they also complained about their terms and conditions of employment.

It is respectfully submitted that, based on the foregoing, Respondent's Exceptions 14 through 16 should be rejected, as the ALJ properly found that Respondent exhibited animus against the discriminatees for engaging in protected concerted activities, and violated Section 8(a)(1) of the Act when Arellano threatened not to rehire the discriminatees because they had engaged in protected concerted activities.

C. Respondent's Exceptions to the ALJ's Conclusion that Respondent Unlawfully Failed and Refused to Consider for Rehire and Failed and Refused to Rehire the Discriminatees are Without Merit

By its Exceptions 1 through 8, Respondent excepts to the ALJ's finding that it had unlawfully failed and refused to consider for rehire and failed and refused to rehire employees in violation of Section 8(a)(1) of the Act. Respondent asserts that the refusal to consider allegations were not fully litigated; that there was insufficient evidence to establish that it violated the Act; and that it could not have failed to consider the discriminatees for rehire because they failed to reapply for employment and because they were not legally authorized to work in the United States. Respondent's suggestion that the refusal to consider for hire allegation was not properly alleged was addressed by General Counsel in his Brief in Support of General Counsel's Exceptions, filed with the Board on January 4, 2011. For such reasons set forth there, and the reasons stated below, Respondent's Exceptions should be rejected by the Board.

1. The Alleged Failure and Refusal to Rehire By Respondent Was Fully Litigated.

Respondent, in its first Exception, citing *Pergament United Sales*, 296 NLRB 333 (1989), *KenMor Electric Co.*, 355 NLRB No. 173 (2010), and *FES*, 331 NLRB 9 (2000), contends that the ALJ erred by finding a refusal to consider for rehire violation because the essential elements of such an allegation were not fully litigated. Respondent claims in

particular that the element of excluding applicants from the hiring process was not litigated. (Respondent's Brief at 10) Contrary to Respondent's assertion, the record shows that all elements of the violation were fully litigated.³

The ALJ, citing *Pergament*, supra, and *KenMor*, supra, stated that she could address the allegation and find a violation, even in the absence of a complaint allegation prior to trial, since it was been fully litigated. (ALJD 17, fn. 32) The record supports the ALJ's finding that the allegation was fully litigated. In support of her decision, the ALJ recited the following excerpt from *Letter Carriers Local 3825*, 333 NLRB 343, fn. 3 (2001):

It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. The rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of Respondent's own witnesses.

Based on the foregoing, the ALJ properly evaluated the refusal to consider for rehire allegation, and properly found that Respondent violated the Act.

As to the merits of the alleged failure and refusal to consider for rehire allegation, and in particular the Respondent's hiring practices, the ALJ noted that despite Respondent's assertions to the contrary, the record established that "neither the promised invitation to apply nor the promised work-notification was ever communicated to the [discriminatees]" and that Respondent failed to show that it "had any intention of hiring any of them had they applied." (ALJD 14:13-45; 19:2-4) As pointed out by the ALJ, this highlights

Respondent's refusal to consider any of the discriminatees for hire -- even discriminatee Valentin Estrada (Estrada), who jumped through all of Respondent's hoops to secure

³ In fact, and notably ignored by Respondent in its exceptions, Respondent admitted at hearing that it excluded the alleged discriminatees from the hiring process for the 2009 -10 school year. Specifically, Respondent's Director of Human Resources, Kathy Mora (Mora), admitted that she excluded the discriminatees (except Blanca Silva, Valentin Estrada, and Jose Pichardo) from the hiring process because of mismatched Social Security numbers. (Tr. 87-91)

employment but was not hired, even though Respondent had positions available. (ALJD 19) In fact, Estrada's experience exposes as sham the purported non-discriminatory hiring process testified to by Respondent's witnesses.

2. The Credible Record Evidence Supports the ALJ's Finding that Respondent Violated the Act by Failing and Refusing to Consider for Rehire and to Rehire the Discriminatees.

Respondent, by its Exceptions 2 through 6, contends that there is insufficient evidence to support the ALJ's findings and conclusions that it unlawfully failed to consider for rehire or to rehire the alleged discriminatees. Respondent's arguments are based on its contention that the ALJ erroneously did not credit its witnesses, including their testimony about the lack of animus and in support of Respondent's sham defense that it was required to conduct "enhanced Social Security number checks on each of the 08/09 employees as part of its 09/10 year hiring process." (Respondent's Brief at 11:4-7). Respondent exceptions lack merit. As noted above, the ALJ's credibility resolutions are well founded in the record evidence.

Although Respondent contends that no animus existed, it does not address Arellano's threats to employees, which, as discussed above, were found to be violative of Section 8(a)(1). (ALJD 15:45-16-5)

In addition, animus is also shown by the fact that Respondent went to great lengths to silence employees and prevent them from engaging in protected concerted activities. For example, the record shows that in December 2008 or January 2009, Respondent's Branch Manager, Adam Navarrette, told alleged discriminatee Silva Blanca that Respondent would pay thousands of dollars to compensate employees sexually harassed by supervisor Pete

Ybarra *and* stop employees' concerted complaints and activities -- specifically their concerted letters of complaint. (ALJD 8-9)

This was not the first time Respondent attempted to silence Silva, who was perceived by Respondent as the "ringleader" of the employees' protected conduct, with money. In November 2008, Navarrette met with Silva and offered to buy her a house, and sometime in June 2009, before the school year ended, Respondent's Vice-President Marco Ferral (Ferral) offered her three months pay to resign her employment with Respondent. (Tr. 577)

3. Respondent's Defense Based on Its Purported Non-Discriminatory Hiring Practice is Baseless.

Respondent asserts that none of the discriminatees was considered for rehire because it maintained a new hiring policy imposed by the District requiring that all employees, even its current employees, pass a Social Security Number (SSN) check, and because the discriminatees failed to apply for employment. (Respondent's Brief 12:4-8)

With regard to the alleged new hiring criteria, Respondent claims that it would have only considered for hire or have hired employees if they could demonstrate that they could legally work in the United States as required by the Immigration Reform and Control Act (IRCA). (Respondent's Brief at 11) Respondent contends that because the discriminatees proffered SSNs came back as "mismatched," that employees failed to comply with IRCA's requirements.⁴ (Respondent's Brief at 11)

⁴ IRCA prohibits the employment of undocumented workers. IRCA does not provide that it is unlawful for an undocumented worker to obtain employment or to work in the United States. However, IRCA does prohibit such a worker from tendering fraudulent documents in order to obtain employment. It makes it unlawful for a person to knowingly, "forge, counterfeit, alter or falsely make any document ... or to use, attempt to use, possess, obtain, accept or receive or to provide any forged, counterfeit, altered or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter." 8 U.S.C.A. §1324c(a)(1) and (2).

Respondent's defense was properly rejected by the ALJ. (ALJ 20-21) The record establishes that Respondent's contentions are sham in at least two ways. First, Respondent's contention that such a policy was imposed by the District is false. Specifically, at hearing, Respondent asserted that the District "would not finalize the 09/10 contract until [Respondent] implemented the background search." (Respondent's Brief at 7:22-23) However, as pointed out by the ALJ, the District had no such requirement. (ALJD 10, fn. 20)

Specifically, the District's Operational Officer, Jim Romero, contradicted Mora's testimony that an enhanced SSN check was a mandatory condition, and instead testified that, "it did not make any difference to me. I needed basically bodies at the, to clean facilities, that was, if [Respondent] was going to get the contract, that was their responsibility, not ours." (Tr. 687; 755)

Second, the idea that a SSN that comes back as mismatch requires Respondent to refuse to hire, refuse to rehire, or refuse to retain employees is simply false. The ALJ correctly points out that mismatched numbers, standing alone, is insufficient, especially in light of the evidence pointing toward an unlawful motive. As stated by the ALJ, "Respondent failed to show that the discriminatees were undocumented workers or that the Respondent refused to rehire them for that reason." (ALJD 20:45-46). Mora admitted that mismatched SSNs did not mean that an individual did not have a valid SSN, but was only an indication the individual should visit a Social Security office to resolve inaccuracies. (ALJD 11:33-34) Telling of Respondent's unlawful motive is the fact that Respondent never notified any individual concerning their respective mismatched SSN. (ALJ 11:35-37)

As to the process of verifying the discriminatees' and others' SSNs, at hearing Respondent could only provide documents that were either inexplicably undated or pertained to verifications that were conducted later than August 2009. (RX 18) In fact, the earliest dated SSN check appears to have been completed on February 19, 2010 -- well after the time when Respondent did most of its hiring for the 2009-10 school year and well after it refused to rehire the alleged discriminatees. (RX 18)

The sham nature of Respondent's defense is made even more palpable when one considers that all of the discriminatees worked for Respondent during the prior year (2008 - 09) under a District contract that also required that employees have valid SSNs. At that time, however -- a time before the discriminatees engaged in protected concerted conduct -- Respondent elected to ignore such provisions. Mora admitted that Respondent did not perform SSN checks on employees for the 2008-09 contract year, even though it was required to do so. (Tr. 778; GCX 7:page 3) Moreover, the 2008-09 contract provided that Respondent was to supply the District, every 60 days, with a current list of all employees and verify in writing that a Social Security Trace, among other investigations, had been completed before an employee began work. (GCX 7: page 3) Respondent presented no evidence that it complied with the 2008-09 contract provision. (ALJD 10:fn. 20)

Respondent's assertions of a non-discriminatory basis for its failure to rehire the discriminatees are further undermined when one considers its history of ignoring and flouting such requirements in order to get employees on the job. Respondent failed to credibly rebut the testimony of discriminatees Blanca Silva and Elizabeth Castro. More specifically, the record shows that before its employees engaged in protected conduct, its practice was to skirt the issue of applicants' legal status and to do what was required to make

it appear as though its employees were authorized to work legally in the United States. In this regard, Silva credibly testified that during the period from August to December 2008, while she was a supervisor, Respondent's supervisor Saul Mendez directed her to disregard an applicant's expired green card, to use New Mexico drivers' licenses as a form of identification, and to list an applicant as a United States citizen in certifying the applicant's I-9 form on behalf of Respondent. (Tr. 537) Such a practice is corroborated by Castro, who testified that Navarrette advised her and other employees in meetings at the beginning of the 2008-09 school year to get people to apply for work and that Respondent did not care about their SSNs. (Tr. 330)

Further evidence that Respondent's latent concern for its obligations under IRCA are sham, and its concern for SSN matches was merely to attempt to mask its unlawful motivation in refusing to retain the discriminatees, is also demonstrated, as discussed above, by Respondent's failure to adhere the provisions in its 2008-09 contract with the District. In addition, a cursory review of Respondent's I-9 forms, which Respondent is required to maintain, demonstrates that Respondent neglected to properly maintain I-9 forms during 2008, 2009, and 2010 (GCX 19 - 21, 23). Such evidence further supports the testimony of Silva and Castro about Respondent's disregard for such requirements prior to the protected conduct evident in this case.

The ALJ properly rejected Respondent's attempt to shield its unlawful conduct by using IRCA to escape its liability under the Act. It is respectfully submitted that the Board should do the same and reject Respondent's exceptions.

4. Respondent's Proffered Defenses Are Further Undermined By Its Refusal to Rehire a Discriminatee Who Did Everything That Respondent Claimed Was Required.

Respondent also contends that the discriminatees failed to apply for employment, and since they had not done so, they were not considered for hire. (ALJD 13:4-15).

However, the ALJ found that the discriminatees had, in fact, made their interest in continued employment clear to Respondent. Further, the ALJ, citing *In Re Corporate Interiors, Inc.*, 340 NLRB 732, 750 (2003), specifically rejected Respondent's contention that the act of completing a new application form was necessary and instead found that an application for employment would have been futile. (ALJD 19:4:8) The ALJ also appropriately found that Respondent had no intention of hiring the discriminatees in any event. Respondent failed to present any evidence that would warrant reversal of this finding.

In considering Respondent's defenses, it is instructive to consider the case of Valentin Estrada. This discriminatee did everything that Respondent could possibly have asked in terms of applying for employment during the 2009-10 school year, including, but not limited to, completing an application form. Despite jumping every possible hurdle placed in his way, the ALJ properly found that Respondent failed and refused to consider him for rehire or to rehire him in retaliation for his having engaged in protected concerted conduct with the other discriminatees.

Based on the foregoing, it is respectfully submitted that Respondent's Exceptions are without merit and that the credible record evidence and Board law supports the ALJ's findings in this regard.

D. The ALJ's Recommended Order Provides the Appropriate Remedy for the Discriminatees

By its Exceptions 9 through 13 and 17 and 18, Respondent, based on the alleged supervisory status of certain individuals, the purported severance agreements signed by employees, and, by Exception 18, issues related to *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), contends that the ALJ erred in finding that the discriminatees are entitled to a remedy under the Act. Respondent's exceptions, as discussed below, are without merit and should be rejected. In addition, the Supreme Court's *Hoffman* decision does not preclude a remedy in this case.

1. Hoffman Plastic Does Not Preclude a Full Remedy

Respondent, by its Exception 18, contends that it should not be required to pay backpay to the discriminatees whose SSNs purportedly came up as mismatches during Respondent's efforts to check their validity. Respondent's Brief contains the following, and no more, in support of Exception 18 (see Respondent's Brief at p. 17):

All but two of the 08/09 employees lacked valid Social Security numbers indicating such employees may be unauthorized for employment in the United States. As such, Merchants would not be liable for backpay to such employees, and Merchants could not lawfully employ such individuals. *Hoffman Plastic Compounds, Inc. v. [NLRB]*, 535 U.S. 137 (2002). Therefore, the ALJ erred in awarding any backpay or reinstatement remedies to those employees lacking valid 20 Social Security numbers. (Footnote 4: Merchants raises this argument in recognition that it is a point for compliance proceedings should the Board otherwise disagree with Merchants' position on the merits of the allegations, reinstatement, and/or backpay remedies.)

Respondent's attempt to evade the appropriate remedy for the violations found, by relying on *Hoffman*, should be rejected. Such contentions were clearly addressed by the ALJ, in her remedy section:

The Respondent's evidence, at most, shows the employees provided inaccurate SSNs for some reason. If the Respondent has evidence bearing on discriminatees' immigration status *that was unavailable at the time of its unfair labor practices*, the Respondent may argue, under the holding of *Hoffman Plastics*, 535 U.S. 137 (2002), that it should not be precluded from introducing such additional evidence at any compliance stage for the limited purpose of reducing its backpay liability. See *Concrete Form Walls, Inc.*, 346 NLRB 831 (2006). (Emphasis added.)

Respondent has failed to proffer or point to any relevant or material additional evidence that was unavailable to it, either at the time it committed the unfair labor practices or at the time of the hearing, that would warrant a different conclusion.

The fact remains that Respondent has failed to establish that the discriminatees were undocumented. Moreover, even if there are questions raised by the mismatch results, Respondent is a "knowing employer," and as such this case presents issues which are not dictated by *Hoffman*. In any event, and as found by the ALJ, Respondent did not establish that the discriminatees were undocumented or that it refused to rehire them for that reason. (ALJD 20:41-47) As a result, the Board should adopt the ALJ's recommended order which provides for an appropriate and full remedy for all discriminatees.

More specifically, even if the discriminatees whose SSNs did not match are undocumented, where an employer knowingly hires employees without regard to their immigration status, as in this case, *Hoffman* does not preclude a remedy; rather, the remedy in such a case should be as outlined in *Mezonos Maven Bakery*, 2006 WL 3196754, JD (NY)-48-06 (November 1, 2006), and *Imperial Buffet & Restaurant, Inc., d/b/a Majestic Restaurant & Buffet*, 2009 WL 2868889, JD (NY)-31-09 (September 4, 2009).

In *Mezonos*, *supra*, the issue before the ALJ was whether the seven undocumented employees were entitled to backpay, given that their employer, assuming that they were

undocumented, hired and retained them in violation of IRCA. The employees never presented false documents to their employer and did not violate IRCA; however, the ALJ found that respondent had violated IRCA “by knowingly hiring them and continuing their employment without evidence that they were“ legally authorized to work in the United States. *Mezonos*, supra, at slip op. at 18. The ALJ further found that the Supreme Court’s concerns in *Hoffman*, that an award of backpay to discriminatees would “condone criminal conduct by an employee,” and its finding that the employee in that case was a “wrongdoer,” are not applicable to the facts in the *Mezonos* case, nor are they present in the instant case. Thus, the ALJ distinguished the *Hoffman* decision and stated that these “two essential facts in *Hoffman*” were absent in the *Mezonos* case. As a result, the ALJ ordered a backpay award and found that such an award does not conflict with federal immigration law or with the Supreme Court’s decision in *Hoffman*.

In *Imperial*, the ALJ found that the respondent -- like the Respondent in this case -- attempted to play IRCA off the Act, and vice versa, in order to take advantage of undocumented workers and undermine their ability to engage in protected conduct. The discriminatees in *Imperial*, as in *Mezonos* and in the instant case, had not furnished fraudulent documents in order to become employed. Furthermore, the ALJ found that the respondent violated IRCA by knowingly hiring the undocumented employees. The ALJ in *Imperial* ordered backpay and reinstatement to the discriminatees.

The salient facts and bases supporting the remedies awarded in *Mezonos* and *Imperial* are also present in the instant case -- Respondent failed to show that the discriminatees presented false documentation or otherwise violated IRCA in their efforts to secure or maintain employment with Respondent, and the record shows that Respondent

flagrantly evaded its obligations under IRCA until such time as its employees began to exercise their Section 7 rights.

In *Hoffman*, the Court relied on the fact that the employer in that case did not violate IRCA and hired the employee at issue with no knowledge that he was undocumented. In contrast, the record shows that Respondent demonstrated utter disregard for its employees' and applicants' legal status and flouted other requirements of IRCA by its repeated failure to seek or maintain sufficient records of its employees' status.

More specifically, as of August 2009, Respondent had not verified the discriminatees' SSNs, even though they had worked for Respondent for the prior school year. (ALJD 10, fn.20) IRCA requires that employers examine documents establishing employees' eligibility to work; within three days of employment, record such information on an I-9 Form; and thereafter sign and date a certification of same. The record shows that Respondent did not comply with these requirements and did not make inquiries into employees' status at the time of hire.

In essence, it appears that Respondent, like the respondent in *Imperial*, seeks to use IRCA as both a sword and a shield. First, Respondent responds to its employees' protected conduct by rejecting their continued employment based on a fastidious and latent appreciation of IRCA's responsibilities. At the same time, Respondent shields itself from its obligations under the Act by hiding behind IRCA, attempting to avoid the specific remedies directed by the ALJ by pointing to the very same IRCA requirements that it flaunted and evaded in the past. (See the testimony of Silva and Castro (Tr. 537; 330).) Respondent presented no evidence that it ever asked the discriminatees to produce any documents which

would establish whether they were authorized to work in the United States until after it had threatened to refuse to consider the discriminatees for the 2009-2010 contract year.

Like the respondent in *Imperial*, a review of Respondent's I-9s indicates that compliance with IRCA was not a concern to Respondent, as many of them are blank, or incomplete. Only when the discriminatees complained about their terms and conditions of employment did Respondent concern itself with the requirements of IRCA.

Accordingly, based on the analysis set forth in *Imperial*, supra, which addresses a "knowing" employer like Respondent, backpay is not foreclosed by *Hoffman* in the circumstances presented in this case. The Board has not passed on the ALJ's analysis set forth in *Imperial*, i.e., that read in context, *Hoffman* does not foreclose backpay in all cases of undocumented discriminatees.

Moreover, the conditional reinstatement remedy outlined in *Imperial* is warranted in this case, even if it was shown that backpay should be tolled. *Hoffman* did not disturb the conditional reinstatement remedy contained in the order in *A.P.R.A.*, 320 NLRB 408, 417 (1995), enf. 134 F.3rd 50, 56 (2nd. Cir. 2001), a case in which the employer that had 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 1-9, including the presentation of the appropriate documents in order to allow the employer to meet its obligations under IRCA." See *Case Farms of North Carolina*, 353 NLRB No. 26, slip op p.7 (2008) (Board indicates that backpay is tolled for period when discriminatee is not lawfully entitled to work; orders conditional reinstatement of discriminatees).

Based on the foregoing, inasmuch as Respondent is a “knowing employer” General Counsel asks the Board to reject Respondent’s Exception 18 and to adopt the ALJ’s remedy providing backpay and reinstatement for all alleged discriminatees.

2. Silva and Castro Were Not Section 2(11) Supervisors When Respondent’s Committed its Unfair Labor Practices.

Respondent contends that the ALJ erred by concluding Respondent unlawfully discriminated against its employees Silva and Elizabeth Castro, because they are both Section 2(11) supervisors as defined by the Act, and not entitled to the Act’s protections.

The ALJ, based on the credible record evidence, correctly found that Silva was a Section 2(11) supervisor as defined by the Act only until December 2008, after which her supervisory duties were assumed by supervisor Jose Martinez. The ALJ found that thereafter, including at the time of Respondent’s unfair labor practices, she was an employee under the Act. (ALJD 3, fn. 5; 18, fn. 39) In fact, Respondent’s supervisor, Martinez, admitted that Silva had no supervisory authority as of early December 2008. (Tr. 667)

With regard to Castro, the ALJ found that Castro was not a Section 2(11) supervisor at any material time. (ALJD 3, fn. 5) As with Silva, Respondent failed to present evidence that would establish that Castro possessed or exercised any Section 2(11) supervisory authority. The cases cited by Respondent in support of its exceptions in this regard do not involve specific factual findings like that made by the ALJ in instant case, at times based on credibility resolutions, or admissions like those made by Respondent in this case.

Here, there is ample support for the ALJ’s finding that Silva or Castro were not Section 2(11) supervisors during material times. Respondent has failed to establish the supervisory status of these two discriminatees. The burden of proving supervisory authority

is on the party asserting it, and such proof must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 3 (2006); *Dean & Deluca*, 338 NLRB 1046, 1047 (2003) (Board found that the lack of evidence of supervisory status is construed against the party asserting supervisory status).

Respondent also contends that Castro and Silva improperly induced employees to engage in protected concerted activities at a time when they were supervisors. In support, Respondent cites cases in which the Board deals with disloyalty by statutory supervisors -- a contention not found in the instant case. Contrary to Respondent's assertions, the ALJ properly found Silva and Castro both engaged in protected concerted activities and that they were employees within the meaning of the Act when they did so. (ALJD 18:1-19) By its exceptions in this regard, Respondent, in essence, is again asking that the Board overrule the ALJ's credibility resolutions. The Board should reject Respondent's invitation to do so and sustain the ALJ's determination that Castro was never a Section 2(11) supervisor as defined in the Act, and that Silva was a Section 2(11) as defined in the Act *only* until December 2008. Accordingly, both individuals were properly found by the ALJ to be discriminatees in this matter and are entitled to the full remedy recommended by the ALJ. .

3. Respondent's Exceptions with Regard to Mariel Blanco, Randolph Campos, Carla Lopez, and Javier Silva Are Without Merit

By its Exceptions 12 and 13, Respondent claims that the ALJ improperly provided remedies for Mariel Blanco, Randolph Campos, Carla Lopez, and Javier Silva. Respondent, citing *Alaska Pulp Corp.*, 326 NLRB 522 (1988), asserts that because they left employment prior to any unfair labor practices, they should not be entitled to any remedies under the Act. Respondent's Brief at 17. Additionally, in regard to Javier Silva, Respondent, citing *Staten*

Island University Hospital, 339 NLRB 1059 (2003), *Timekeeping Systems, Inc.*, 323 NLRB 244, 248(1997), and *Clear Pine Mouldings*, 268 NLRB 1944 (1984), alleges that Javier Silva also engaged in misconduct and forfeited protection under the Act and, as a result, is not entitled to any remedies under the Act. (Respondent's Brief at 16).

The ALJ found that Respondent discriminated against Blanco, Campos, Carla Lopez, and Javier Silva, by failing and refusing to consider them for rehire and by failing and refusing to rehire them because they engaged in protected concerted activities. (ALJD 19:23-51) The ALJ further noted that in light of Respondent's August SSN verifications, it is unclear as to their employment status on June 12, and suggested that Respondent may proffer additional evidence regarding their employment status during compliance proceedings. (ALJD 19:fn. 43). Despite the ALJ's generous suggestion, Respondent has simply not established a sufficient basis for not following traditional remedies outlined in *FES*, supra. Moreover, Respondent has also failed to establish the relevance of the consideration of whether these four employees were employed on June 12, and its impact on the recommended remedy.

As to Respondent's assertion that Javier Silva is not entitled to reinstatement because of his alleged misconduct, it is well established that, if an employer claims a discriminatee is not entitled to reinstatement and full backpay, it is the employer's burden to prove that the discriminatee engaged in misconduct for which the employer would have disqualified any employee from continued or future employment. See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69-70 (1993), *enfd.* in pertinent part 39 F.3d 1312 (5th Cir. 1994). The employer must "establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied company policy and any ambiguities

will be resolved against the employer.” *John Cuneo, Inc.*, 298 NLRB 856, 857, fn. 7 (1990). The Board will not infer or assume that an employer would have disqualified an individual based on the nature of his misconduct. *John-Cuneo*, Id.

Respondent has failed to show that it discharged Javier Silva for his alleged misconduct, and has failed to meet its burden to establish that it would have disqualified Javier Silva from continued or future employment. *John-Cuneo*, supra. Respondent failed to present documentation generated at or near the time of the alleged misconduct that would indicate that he had been discharged, and was not eligible for rehire. This lack of evidence is critical, especially when viewed in the context of refusal to consider for hire and refusal to hire violations.

Moreover, Respondent fails to explain why its August SSN checks were performed on employees, such as these four individuals, including Javier Silva, if it regarded them as being no longer employed. (ALJD 17, fn. 33; fn. 34; fn.37; fn.38). While one reason appears to be that Respondent wanted to go through the charade of appearing to consider all alleged discriminatees for employment, such a notion has already been rejected by the ALJ. That being said, by including these four discriminatees in such an exercise, it is evident that Respondent had not yet come up with the defense to reinstatement it proffers at this time. However, the more likely reason Respondent performed the August SSN checks was to eliminate the discriminatees based upon their immigration status because it suspected that they were would not be able to establish work authorizations. This is further evidence of Respondent’s attempt to pit IRCA against the Act, just as did the respondents in *Mezonos* and *Imperial*.

Though the Board, based on the records itself, should categorically reject

Respondent's assertions with regard to these four discriminatees at this stage of the proceedings, the fact is that Respondent has not established sufficient grounds to go beyond what the ALJ has already provided, i.e., that the amount of backpay due to Blanco, Campos, Carla Lopez and Javier Silva should be left for compliance proceedings.

4. Respondent's Severance Agreements are Not Relevant to the Consideration of the Appropriate Remedies Under the Act

Respondent, at its Exception 17, contends that the ALJ should have considered the discriminatees' severance pay as interim earnings. Respondent cites *Arandess Management Co.*, 337 NLRB 245 (2001) and *W.R. Grace & Co.*, 247 NLRB 698, 699 fn. 5 (1980), for the proposition that the severance pay would result in a windfall for the employees and penalty against the Respondent. (Respondent's Brief at 19).

In *Arandess*, the Board affirmed the ALJ's finding that a respondent's backpay obligation was not reduced by its payment of bonuses to discriminatees pursuant to a collective-bargaining agreement. The ALJ found that backpay obligation was an independent and separate legal obligation and could not be used to reduce backpay. *Arandess*, supra at 247.

This issue was not raised by Respondent at the hearing. Respondent has failed to establish a basis for considering such payments to reduce backpay. Moreover, even if this issue had been timely raised, under the facts of this case, severance pay has no relevance or effect on the discriminatees' backpay. More to the point, the record shows that Respondent voluntarily "offered" severance settlement checks to all of its employees "that had already completed work and finished their employment period." (Respondent's Brief at 8-9). In addition, Respondent made these payments prior to the start of the 2009-2010 contract year.

Whether Respondent wishes to now have them considered as a type of severance that should offset the amount of backpay due, the fact remains that Respondent has failed to establish the facts upon which such a finding could be made.

In fact, the record shows that the “severance” payments were given to employees to ensure “the conclusion of the 08/09 contract, the employees’ employment, and Merchants’ uncertain status for future work with SFSD would conclude on a positive note” -- which is akin to a bonus. There is no windfall because backpay arises from a separate and independent legal duty.

Nevertheless, even if these severance settlement checks could be considered interim earnings, reduction of the discriminatees’ gross backpay amount would be inappropriate as Respondent seeks to reduce its liability that it created by its own misconduct. *Atlantic Limousine, Inc.*, 328 NLRB 257, 258 (1999), *enfd.* 243 F.3d 711 (3d Cir. 2001) (the burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay); *Alaska Pulp Corp.*, *supra*; (any uncertainty about how much backpay should be awarded to a discriminatee is resolved in his or her favor and against the respondent whose violation caused the uncertainty). Accordingly, the ALJ properly did not consider the severance settlement checks as a basis for reducing Respondent’s gross backpay liability, and there is no warrant to address this issue in a compliance proceeding because it has been sufficiently addressed in the ALJ’s consideration of the merits in this matter.

III. CONCLUSION

Based upon the foregoing and the record evidence considered as a whole, General Counsel respectfully urges the Board to reject Respondent’s exceptions and to adopt the

ALJ's findings and recommended order, consistent with General Counsel's previously filed limited exceptions.

Dated at Phoenix, Arizona, this 18th day of January 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF, Cases 28-CA-22660, et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 18th day of January 2011, on the following:

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