

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FOOD SERVICES OF AMERICA, INC.,
a subsidiary of SERVICES GROUP OF
AMERICA, INC.

and

Case 28-CA-063052

PAUL LOUIS CARRINGTON, an Individual

PAUL LOUIS CARRINGTON'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION

Paul Louis Carrington
1351 N Pleasant Drive Unit 1095
Chandler, AZ 85225
Telephone: (602)-909-7793
Email: pcarrin@asu.edu

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Exceptions Filed

Respondent violated *Section 8(a)(1)* of the Act by discharging both Carrington and Rubio because they had engaged in protected concerted activities with each other and with other associates, and Respondent was well aware of these activities for several months.

Paragraph 4(g) – Carrington and Rubio were engaged in protected activity which Respondent was more than aware of through increased surveillance of Rubio and Carrington’s instant message conversations with each other and other associates.

Paragraph 4(g)(1) – Bixby did interrogate Carrington about his concerted activity with Rubio and other associates.

Paragraph 4(g)(4) – Bixby led Carrington to believe that his concerted activity had been under surveillance and implied that he would be closely monitored moving forward.

Paragraph 4(h) – Manuszak did promulgate overly broad and discriminatory rules prohibiting employees from providing personal references to other employees, as well as other rules which were never found in the employee handbook or were bestowed upon associates.

Case Background

This case is no more than an employer who hastily terminated one employee for “stirring the pot” by bringing to light the severe harassment, bullying, and the other discriminatory motives of an imprudent and uncontrollable manager, and the company’s enthusiasm to terminate anyone who they knew shared these same grievances or could assist this “disruption” in her filing of an unlawful termination charge against Respondent. In an anxious attempt to veil the legitimate facts of the case and to concurrently mask their unlawful motive, Respondent was forced to concoct and embellish the baseless claim that Paul Louis Carrington (Carrington) put the company at severe financial risk when he chose to ignore Scott Bixby’s (Bixby) demand and continued to engage in protected concerted activity with his now former co-worker. The record, the evidence submitted, the nature of the work performed by the Supplier Information department, as well as the timeline of events depict the real truth about what Carrington hoped to accomplish when he sent emails to himself and Elba Rubio (Rubio) in March 2011. Additionally, Respondent had made no genuine attempt at protecting or deeming any of this information to be proprietary and confidential until well after Carrington and Rubio had officially filed separate charges with the NLRB and the EEOC several months after their terminations. (Tr. 40:11-15) This deceptive “confidentiality” defense is a textbook example of an employer who jumped the gun on disposing of employees who were well aware of unlawful activities happening within the organization, and is now rummaging around for a pretext in order to justify these unlawful terminations now that their discriminatory motives are being investigated. Respondent clearly did not fire either Carrington or Rubio for behaviors they deemed to be misconduct, but instead terminated Rubio for “stirring the pot” and

Carrington for being part of the “disruption” by aiding and continuing to associate with her even after she was unlawfully terminated.

A. Confidentiality and Non-Disclosure Allegations

The Supplier Information Department

The Supplier Information department is a data entry department at the corporate offices of Food Services of America (FSA or Respondent) located in Scottsdale, Arizona and managed by Merissa Hamilton (Hamilton). Respondent is a regional, wholesale, broadline distributor of food and foodservice related items in the Northwest. Acting only as a distributor, Respondent does not design or manufacture or procure materials for manufacturing these items. Respondent simply purchases large volumes of these items from outside suppliers (i.e. vendors) and then resells these same products in smaller volumes at a higher price to their customers. These items are not sold exclusively by the company, but are also sold by most other food distributors including Sysco and US Foodservice, and many of the same exact items can be found in warehouse clubs, as well as local grocery stores such as Safeway and even on the Internet. Respondent proudly lists its association with the Distribution Marketing Alliance (DMA) on their own website¹, which is an alliance formed by several of the smaller, regional food distributors in order to compete with the national players in the foodservice industry. Information including customers, vendors, and even pricing is shared between all members of this alliance. The unobstructed DMA alliance website proudly lists several of the major vendors and customers shared amongst the distributors making up the alliance, including Respondent.

¹ <http://www.fsafood.com>

The main responsibility of the Supplier Information department was the setting up and maintenance of FSA internal item numbers. Team members used **supplier's information** to setup these item numbers which were internal six digit numbers that only contained information that matched to that of an outside vendor's product case specifications, and these numbers were used by other departments for ordering/sales once they were setup. There had been no collective standards or policies on the setup or maintenance of these item numbers, and these FSA item numbers were setup by using publically available information found on the Internet and on the websites of these outside vendors². These websites were not password protected and these websites did not belong to or contain FSA proprietary information.

The information required for an item setup was the product's marketing description, UPC code, case pack size, case weight, case cube, and case dimensions. Carrington, Rubio, and Jeff Armbruster (Armbruster) testified that the information they were responsible for inputting into Respondent's system was publically available information which they obtained from the Internet. (Tr. 113:14-20; 146:1-19) The Supplier Information department did not add costing at the item level, delivery information, or purchasing information as this information was maintained at the branch level and was inaccessible and unknown to the Supplier Information department. This data which was keyed into the system is the property of the outside vendor and not Respondent, despite Respondent's hopeless and desperate attempt at representing other company's information to be their own. (Tr. 308:6-9)

Supplier Information Specialists

² i.e. <http://www.tysonfoodservice.com> & <http://www.lambweston.com/ProductsDetail.do?itemId=X30>

The Supplier Information Specialist role held by Carrington and Rubio is an entry level, data entry position within the Supplier Information department at Food Services of America. Besides Hamilton, employees within this production department did not partake in strategy meetings, make any hiring or firing decisions, decide which vendors Respondent purchased from, make any purchasing decisions, set pricing, or engage with Respondent's customers. Employees in this one-dimensional role were responsible for setting up outside vendor's foodservice items in the FSA data management system, and training new associates. Requests to setup these internal item numbers would come from buyers or sales personnel who worked for the Respondent, but these requests were not to contain customer information or pricing or customer preference or even the reasons as to why the item was to be setup.

Supplier Information Specialists were simply setting up internal item numbers which matched the specifications of an item manufactured by an outside vendor. Bixby testified that Respondent typically sells the same item to more than one customer validating the fact that these internal item numbers were typically not customer specific and were shared among many customers. (Tr. 464:1-7) These internal item numbers had absolutely no value outside of the FSA internal system and Guy Babbit (Babbit) testified that competitors do not have access to the internal systems used by Respondent. (Tr. 374:10-19) Bixby testified that these internal item numbers would be of no value to anyone else, yet they had been redacted by Respondent to keep up the confidentiality façade which Respondent has based its whole case off of. (Tr. 462:7-9) Respondent's own witness, Michelle Aparicio (Aparicio), even testified that "item administration", meaning item setup and maintenance, was all Carrington was responsible for while she was employed in the Supplier Information department. (247:15-248:5) Supplier

Information team members did not have any contact with Respondent's customers, and the only interaction they typically had outside of the organization was with customer service agents of vendors used by Respondent who could only provide them with item specification sheets.

Respondent's Attempted Conversion of outside Supplier's Information

Respondent has attempted to reinforce their "confidentiality" defense by representing the data of outside organizations to be their own confidential and trade secret information. Brands, UPC codes, manufacturing codes, item specification sheets, nutritional information, product formula, and case specifications are all property of their respective vendor. This information does not belong to Respondent in any way despite Respondent's claims and fraudulent decision to present specification sheets from outside vendors, including Hormel and Farmland, to be their own confidential information which is worthy of redaction. Notwithstanding that these same specification sheets can be found on these vendor's websites which anyone can freely access.³ In the face of this depraved endeavor and attempted conversion, Respondent has cast a shadow of doubt on whether Carrington and Rubio really did have any access to Respondent's trade secret information (they didn't). Had Carrington actually taken trade secret and confidential information, Respondent would not have needed to submit other company's information as if it was their own and would have been able to present their case with absolute examples of their own "trade secrets" which were allegedly stolen and how Carrington and Rubio would use this information to their benefit.

³ <http://hormelfoodservice.com/products/>

Suppliers and manufacturers in the food service industry release both printed and electronic catalogs of their products to advertise their own products, to improve logistics through enhanced information sharing as it relates to case specifications and transportation, and to amplify their own business interests. These publically available catalogs formed the basis for the Supplier Information department as it was these catalogs where the Specialists performed the bulk of their Internet research, and these public catalogs comprised the bulk of the information which Respondent has deemed to be their protectable information.

The Information Was Not Confidential

Despite the show the company and its attorney put on before, during, and after the trial in order to cloud the real reason behind Carrington's termination, the fact remains that the information which was forwarded on March 5th and March 6th was not confidential and had not been treated as such until months after Carrington was terminated. Much of the same information the company now deems to be "extremely confidential" can be found on their own website⁴, their Facebook webpage⁵, alliance websites⁶, posted on their Twitter account⁷, and is even referenced on their own employee's personal social media. None of these company maintained websites are password protected or are closed off to the general public; in other words these are publically available websites anyone with an Internet connection can access. Respondent clearly does not treat vendor and customer information to be confidential or

⁴<http://www.fsafood.com>

⁵<https://www.facebook.com/FoodServicesofAmerica>

⁶<http://www.imaforce.com> & <http://www.dmadelivers.com>

⁷<http://twitter.com/#!/fsafood>

proprietary since the names and likenesses of both are posted all over every one of their various web presences.

Bixby testified that the vendors used by Respondent are extremely confidential and would be of great value to any competitor. (Tr. 407) Unfortunately for Respondent, their top vendors are brazenly posted on their own website which anyone with an Internet connection has access to. Bixby was obviously mistaken or caught in a lie when he went on to state that Respondent does not post any of their vendors on their websites, though it does seem a bit odd that an Officer of the company would not be familiar with their own website. (Tr. 409:19-411:21) Clearly Respondent did not treat the vendors they do business with to be confidential until now, and the reason for this is that food distributors typically share the same major vendors and there is no exclusivity amongst vendors and distributors. These foodservice vendors and manufacturers compete in an open market, and obviously prefer to sell increased volumes of their products to several different customers through using a number of distributors in different regions as opposed to severely restricting their customer base to only the Northwest where Respondent does the bulk of their business. Bixby continued his bogus testimony as he testified about product formula and purchasing volumes which nobody in the Supplier Information department even had access to and product formula is undeniably the confidential data of the manufacturer and not Respondent. (Tr. 407:20-409:18) Bixby testified that customer names were confidential, overlooking that Respondent proudly boasts of their customers on their Facebook page as well as on their alliance websites. Bixby even testified that UPC codes and manufacturing product codes are also respondent's confidential data. (Tr. 417) Both these codes are typically found on the case or outer packaging of these items which are

sold to a number of other distributors and are not property of Respondent. It was clear that Bixby did not understand the business and certainly had no idea what the Supplier Information department even did, or had he decided to abhorrently misrepresent the truth in order to make it appear more likely that Carrington and Rubio would come across trade secret information in their day-to-day work (they didn't)?

Moreover, this hearing was held almost 11 months after Carrington and Rubio had been terminated, and the company had not made one move to protect this alleged sacred data which they testified could cause them immediate and irreparable harm if it fell in the wrong hands. Steve Manuszak (Manuszak) testified that the company could face great harm because of the alleged breach, yet the company sat on their rights to do anything about it and waited for almost an entire year until after Carrington and Rubio had made strides with the EEOC and NLRB. (Tr. 82:6-16) The company went as far as demanding a recess from the hearing so they could move forward with the now sudden and pressing need for an injunction hearing in order to bolster this newly created "confidentiality" defense. Their request fell on deaf ears as Respondent knew these emails had been sent for close to an entire year and chose to do nothing because they know the information is not confidential and cannot cause them any damages. Bixby later testified that not a single customer or vendor had contacted Respondent about the alleged breach further proving that Carrington had no intention of misusing or releasing any of these emails, and cementing the fact that Respondent has had zero damages. (Tr. 470:1-9)

Respondent unknowingly compounded the fact that none of this information is trade secret or could cause them any damage due to their own actions, or rather inaction. Had this information truly been confidential or dangerous to their business if it fell in the wrong hands, it would be reasonable to assume that Respondent would have improved measures to secure this data, would have trained or informed employees regarding the confidential nature of this information, and would have demanded a permanent injunction in March of 2011 immediately after the emails had been sent. Instead, Respondent knows they have suffered no damage as a result of these emails being outside of their internal system, and have only persisted that harm could be imminent in order to cast a shadow of doubt to Carrington's true intent when he sent Rubio and himself those emails. Respondent's behavior during and after the trial has been nothing more than vindictive and headline-hungry, and a desperate plea to cover up their true intention when they decided to terminate Rubio and Carrington.

Respondent's Fabricated Rules and Exhibits

Respondent invented a number of sham defenses to justify their actions including the impulsive creation of several rules which were unknown within the organization and had never even been in their own handbook. These gag rules were created to suppress concerted activity and minimize employee right's to engage their previous co-workers for any reason. What's even more revolting is the company's decision to fabricate documents in order to portray both Rubio and Carrington as serial thieves who should have known that Respondent valued any and all company emails to be trade secret (the company didn't). Through their own actions and deceit, all Respondent has done is cement the fact that they singled out and discriminated

against both Rubio and Carrington for engaging in protected activity. Both employees had raised complaints with each other, other co-workers, and management about the behavioral problems, performance issues, and treatment of certain employees within the Supplier Information department. Manuszak and Bixby both chose to ignore these employee complaints about workplace conditions which began in 2009 before Rubio had even rejoined the department, failed to do any sort of investigation, and did not act fairly or judiciously.

In order to support their deceptive confidentially defense, Respondent recklessly fabricated two of their main exhibits submitted during the hearing including the “February Dump” and the recently invented “Confidentiality Agreement” which was allegedly signed with an electronic signature. Respondent’s decision to not only fraudulently create documents, but to build the foundation of their entire testimony off these sham exhibits further proves Respondent’s discriminatory intent and sole objective of retaliating against and eliminating those who engage in concerted protected activity.

The Fabricated “February Dump”

During the trial, Respondent arrogantly produced a fictitious exhibit which they titled the “February Dump”. This exhibit was a list of hundreds of emails which Carrington allegedly stole from the company’s servers during February 2011. Interestingly, this “dump” list was not only formatted differently than the emails which Carrington had actually sent in March, but this list also illustrated that hundreds of emails had been allegedly sent in just two minutes. (Tr. 313:2-5) Interestingly Babbit had testified that the March Dump exhibit included a “Status Delivered” column, but this same column was nowhere to be found on this February dump

exhibit because these emails were never actually sent by Carrington. (Tr. 365:6-11) When confronted with doubts of the possibility of sending what looked like hundred of emails in the span of two minutes, Respondent's attorney panicked and stated it would be covered with a future witness (it wasn't). Respondent has been unable to address how hundreds of emails were sent out in just a couple minutes because none of these emails were actually sent in February and because the act of sending hundreds of emails in just two minutes is not possible.

This alleged "February Dump" was concocted by Respondent in order to paint the picture that Carrington and Rubio were serial stealers of information who had taken company emails on several occasions for personal gain but all Respondent did was destroy their own credibility through the introduction of this fictitious document. Moreover, Respondent had previously forwarded what they called comprehensive lists of the emails Carrington had sent to both the unemployment office and the EEOC, and neither list contained any of these February emails or even any mention of them. Babbit had testified that Manuszak had requested that he query emails sent to and from Rubio over the last 90 days, but for some reason Respondent made no mention of any of these alleged February emails to anyone until the hearing. Had these emails actually been sent and had Respondent truly safeguarded company emails, then they would have known about any other email breach when they responded to the NLRB and EEOC several months after the terminations took place and well before the NLRB hearing.

Counterfeited Confidentiality Agreement

Respondent produced a fabricated and unambiguous confidentiality agreement which had not been hand signed, but had been conveniently forged with only Rubio and Carrington's

typed initials. The policy in place by Respondent during the time Carrington and Rubio were employed had been to have all new or recalled associates hand sign all of the information in the "New Hire Packet" which included only an arbitration agreement, a W4 Form, a Veteran Status Form, and a New Hire Data Sheet. (EXHIBIT A) The only confidentiality agreement the company had in place at the time of Rubio and Carrington's hire was surreptitiously included in the arbitration agreement which one was required to execute as a condition of employment. This confidentiality agreement stated:

I know that I may have access to FSA confidential or proprietary information and that the unauthorized use or disclosure of that information may violate applicable law and my duties to FSA. I agree that it is impossible to measure solely in money the damages which FSA may suffer if I violate the law or my duties with regard to FSA's confidential or proprietary information. Therefore, I understand and agree that any action by FSA to protect its rights as to its confidential or proprietary information (sic) is excluded from this arbitration agreement, and that FSA retains the right to seek relief in a court from actual or threatened violation of those rights.

This overly-broad and discriminatory agreement made no mention of what information Respondent had deemed to be confidential or proprietary information, or how employees would know how or when they were accessing such information. In fact, there had been no training and there were no specific rules or standards on what is actually considered to be confidential or proprietary to the business. Hamilton solidified the fact that the company did not have any sort of set rules or guidelines on what could and could not be sent out of the company based on her testimony and since she had also taken company emails. (Tr. 241:6-16)

The idea of an electronic signature was fabricated after the March terminations once Respondent realized employees did not sign a legitimately enforceable confidentiality agreement and needed a way to reinforce their recently created sham confidentiality defense.

Respondent crafted the idea of an electronic signature since it could be easily and promptly fabricated if one was urgently requested while they were under investigation by the EEOC and NLRB. Unfortunately for Respondent, Ryan Peterson (Peterson) who was Respondent's Associate Services representative responsible for on-boarding both Carrington and Rubio in 2008, testified with certitude that he did not know of any electronic signature being used for any document within the organization. (Tr. 223:10-14; 224:10-13) Carrington and Rubio also testified that they had never seen or signed any such document, and that it had been fabricated by Respondent.

When pressed about the confidentiality agreements in place across the organization, Manuszak, Bixby, and Babbit danced around the subject and presented varied and evasive testimony. Nobody could factually explain why Carrington did not submit a new electronic signature when he was rehired in 2009 even though Manuszak had testified that all new employees had to sign these documents.⁸ (Tr. 52:7-13) Manuszak then went on to testify that the confidentiality agreement had changed since 2008, but that he did not know when it changed or why. He also admits that the confidentiality agreement at this time was signed with a signature. (Tr. 66:21-67:7) Manuszak shortly thereafter testified that there had been changes to Respondent's confidentiality agreement since the middle of 2008, but oddly Carrington who was originally hired in September 2008 and Rubio in May 2008 had allegedly electronically signed the exact same agreement. (Tr. 66:21-23) Moreover, Manuszak testified that there were even further changes to the confidentiality after 2008 but he could not recall what the changes were. (Tr. 68:1-19) This point alone is troubling for Respondent, as well as Manuszak's

⁸ Carrington was recalled in November 2009 after being laid off during a financial layoff in August 2009. A contingency of him being hired was that he was required to re-sign the arbitration agreement.

credibility, since the confidentiality agreements submitted during this hearing for Carrington and Rubio were both dated in 2008. If the agreement had actually changed at some point, why were Carrington and Rubio not required to sign the new agreement? It is frightening that Manuszak, the VP of Associate Services, testified that he had no idea as to the why or when the confidentiality agreement had changed, a document which Respondent has based their entire defense and testimony on. Unfortunately for Manuszak, the confidentiality agreement which Carrington was asked to sign upon his return in 2009 clearly stated that it was "Revised 5/05". In other words, there had not been a single change to the confidentiality agreement between May 2005 and November 2009 despite the fictitious and whimsical testimony of Manuszak.

Respondent's witnesses could not answer succinctly or with any degree of certitude when questioned because the electronically signed confidentiality agreement is a fabricated document designed only to punish those who engage in protected concerted activity and was not in place at Respondent's offices until after Carrington and Rubio had already been terminated. Anyone with access to a word processor could easily generate a new document and input anyone's typed out initials, and Respondent simply cannot establish with any degree of certainty that Rubio or Carrington were the ones who typed their initials agreeing to such an agreement or that this agreement even existed before March 2011.

Manuszak and Bixby's Bogus Policies

The rules about employee references and cell phone numbers being confidential were invented right before the trial to inflate the alleged breadth of the confidentiality breach. The major concern here is that you have two Officers of the company (Manuszak & Bixby) inventing new rules out of thin air in order to desperately defend the company's actions. Moreover,

Manuszak caught himself and he abruptly changed his testimony that the rule on references was actually only orally given and only applied to managers when he realized this rule would be illegal on its face if it applied to everyone who worked for Respondent. (Tr. 58:20-59:9) Manuszak's original goal had been to paint the picture that Respondent had actually promulgated and consistently enforced both of these rules in advance of Carrington and Rubio's concerted activity. Unfortunately for Manuszak, his bogus rules were devised in direct response to concerted activity and this point was made clear by his testimony that he had not disciplined any of the employees who clearly violated this gag rule which restricted employees from giving personal references to Rubio. The reason Manuszak had not disciplined any of his managers is because this rule does not actually exist, and he only had Rubio's emails blocked to prevent her from securing references in order to try and spitefully impede any future employment opportunities for her. (Tr. 62:13-63:12) It was clear that Manuszak had no intention of simply applying existing work rules and company procedures; instead he was formulating rules on the spot to paint a cloud of guilt over Carrington and Rubio. This capricious testimony presents further problems regarding Manuszak's credibility especially since he knew Carrington and Rubio were not managers and would have not known about either of these rules even if they had existed.

B. Discharges of Rubio and Carrington and Related Section 8(a)(1) Allegations

Rubio's Complaints to Manuszak and with Co-Workers

Respondent has made a pitiable attempt to take the attention off the real reason behind the filing of this charge by painting themselves as victims who have suffered grave

harm. However, it was their own negligence in the handling of Rubio's valid complaints about Hamilton's discriminatory behavior, constant harassment and lack of departmental standards, and the decision by a senior officer of the company to threaten Carrington's livelihood which triggered Carrington's need to take action to oppose discrimination, domination, and coercion in the workplace. Respondent has argued that any other company would have fired Carrington for his actions and have focused much of their attention on their belief that Carrington is a serial criminal. Respondent's argument misses the mark because Carrington would not have been involved if the company had acted to eliminate the egregious harassment and coercive behaviors in the workplace.

Rubio testified that she went to Manuszak when Hamilton's harassment became pervasive as she repeatedly tried to use her managerial powers to convert Rubio to Christianity. (Tr. 118:22-119:11; 220:1-11) During this face-to-face meeting with Manuszak, Rubio voiced her personal complaints and those shared by current and past members of the Supplier Information department regarding the harassing and discriminatory behavior on the part of the department's manager, Hamilton. Before her meeting with Manuszak, Rubio had frequently raised specific grievances with her coworkers where she sought their support and advice about how she should proceed since Bixby had a history of protecting Hamilton when a complaint was made against her. Rubio was clearly establishing the preliminary groundwork necessary to initiate group activity, and Rubio had even informed Manuszak that several past and current coworkers had expressed similar grievances with her regarding Hamilton's appalling behavior. See *Champion Home Builders Co.*, 343 NLRB 671, fn. 3 (2004), enf. in pertinent part 209 Fed. Appx. 692 (9th Cir. 2006).

Manuszak testified that Rubio had also brought up complaints to Phil Flentge (Flentge) about Hamilton's discrimination of her, and that the mistreatment of Flentge's son, who had worked for Hamilton in the past, had also come up during this meeting with Rubio. (Tr. 48:8-49:6) When he misspoke about Rubio only engaging Flentge about the discrimination, Manuszak was presented with General Counsel's 5 establishing that he knew full well that Rubio was not only being grossly harassed by Hamilton, but was also engaging other employees in what was happening to her and other members of the Supplier Information department. The Board has emphasized that "our definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. This email alone revealed Respondent's true intention of terminating Rubio for engaging her co-workers just weeks after she had first complained to Manuszak and well before Respondent's Aparicio defense was dreamed up. Manuszak claimed he had never even seen this email chain before, even though it was clearly sent to his work email address from Bixby on January 25, 2011. (Tr. 49:8-50:18) The reason Manuszak testifies he never saw this email is because it contradicts much of his own testimony, disproves the bulk of Respondent's pretext given for Rubio's termination, and exposes Respondent as an organization that liberally eradicates those who can expose the wrongdoings of those in management to other associates and can effectively initiate group action.

The major complaints Rubio brought up to Manuszak were religious discrimination, national origin discrimination, Hamilton's bullying, concerns over Hamilton's blatant lying which she used to antagonize her employees, and grievances regarding the overall lack of training or

standards within the department. Rubio presented ample evidence to back up these concerns including written proof of the harassment, retaliation emails and instant messages, she even relayed the stories of some of Hamilton's previous victims, and Rubio provided Manuszak with the names of those who she knew suffered similar abuse under Hamilton's reign including Justin Flentge and Monica Tostado. The Board has ruled that "complaints regarding the quality of supervision are directly related to working conditions," and these complaints helped form the basis for the protected concerted activity which Respondent was made well aware of. *Industrial Hard Chrome, Ltd.*, 352 NLRB 298, 309-310 (2008). This was not the first time a Supplier Information team member had formally complained about Hamilton's harassment and self-righteous behavior, and her complaint closely followed Armbruster's exit interview where he also presented several concerns about Hamilton's behavior and lack of professionalism.

Even though Manuszak, the Respondent's VP of Associate Services, had now been presented with absolute proof of harassment, poor management behavior, and retaliation, he still chose to do nothing with Rubio's complaint and he failed to investigate any of her documented allegations. (Tr. 147:20-24) Instead, Manuszak would refer to these complaints as "office drama" and he even informed the EEOC that he found Rubio's harassment complaint to be "innocuous", likely because he shared similar religious convictions as Hamilton and could not fathom how discriminatory it is to have a manager constantly force her personal belief system on you. Manuszak testified, "we have clear policies in our handbook regarding harassment of other associates and I would be derelict (sic) if I allowed that type of behavior to continue in the work place", but for some reason he took a back seat to Hamilton egregiously harassing her employees and simply allowed Bixby to "handle it". (Tr. 72:10-20)

Manuszak testified that he personally had verbally counseled Hamilton about her behavior, but then Bixby testified that it had been Jeff Chester (Chester) who had counseled Hamilton. (Tr. 428:2-10) The reason their testimonies don't match up is because nobody ever actually disciplined Hamilton about her harassing Rubio. This inaction allowed Hamilton the freedom to retaliate freely against Rubio despite Hamilton's bogus claim that she did not know that she was harassing Rubio and that they talked about religion all the time. (Tr. 240:6-23) The emails submitted during the hearing and to Manuszak in January 2011 proved with absolute certainty that Rubio had asked Hamilton to stop talking about religion with her repeatedly, and Hamilton continued on her inexhaustible quest to covert Rubio to Christianity; a behavior which Respondent encouraged and allowed through their gross inaction. An excerpt from one such email details that Rubio clearly kept pushing Hamilton away, but Hamilton was unrelenting even though the text of her emails proves she knew Rubio was not interested in discussing religion with her in any context.

I know what needs to be done today. I am not exalting (sic) myself. My blessings come from my repentance and acceptance of Christ. I don't think someone can stop being lost or accomplish their dreams in complete fullness without Him. The fact that everytime I mention Him you get offensive, turned off and push away tells me you know He's calling you, but your flesh refuses. He has so many great things planned for your life. He wants you to live in victory and stop being so upset all the time. He wants you to have peace and be happy. He loves you. For all this to occur you have to receive Him. You can completely disagree. You can hate me. You can keep pushing me away.

Here Hamilton openly admitted to repeatedly pushing her religion on Rubio even though Hamilton knew that Rubio was pushing her away and was not interested. Hamilton's behavior here was clearly pervasive and relentless, but somehow Manuszak's actions proved he felt Hamilton's behavior was appropriate and allowed it to continue.

Bixby had testified that Respondent decided to hire a lead position within the department so Rubio and the other Specialists would be reporting to someone else besides Hamilton. (Tr. 451:1-10) Respondent had hoped to lead Rubio and others to believe this new position had been created because Respondent realized Hamilton had personal and professional issues, and they were simply concerned for Rubio's wellbeing after she complained. Instead, the idea of this position was merely created to allow Hamilton time to hunt for a pretext while Respondent worked on hiring who would be Rubio's replacement. The decision to create this position to replace Rubio was done well before the Aparicio defense was even formulated. Any argument by Respondent that this was not the case will fail because Rubio's position was never replaced except by this "lead" and the replacement was hired (but hadn't started yet) right before her termination. Not only did the invention of this new position allow Hamilton to exterminate Rubio, but Hamilton also received a promotion out of it. Notwithstanding that all of this came shortly after Armbruster and Rubio made consecutive complaints to Associate Services regarding Hamilton's discriminatory behavior, harassment, the lack of departmental standards, her revealing of private information, and her sharing of company information with others outside the enterprise. (Tr. 150:8-25; 230:22-25; 237:14-25)

Clearly, Respondent had decided to single out Rubio for complaining about workplace conditions and discrimination, while opting not to investigate any of the fruitful complaints made against Hamilton by several employees since at least 2009. Any reason Respondent has provided for Rubio's termination can only be considered excessive and unwarranted considering the absolutely wretched behavior Hamilton was awarded for. Respondent's assertion that Rubio was fired for harassment must fail here even if it had been substantiated

(it wasn't) because Manuszak had been presented on several occasions with documented proof that Hamilton had been harassing and discriminating against her employees and nothing was done to reprimand or improve her behavior. Respondent trampled on Rubio's rights when terminating her for bringing to light the complaints of several associates to management and to other co-workers. Respondent knew she engaged others and fired her for it.

Rubio's Termination

Just moments before Carrington would be summoned into Bixby's office, he appallingly watched as Rubio was marched out of the building after her abrupt and unlawful termination which has remained unjustified to this day. Respondent's claim that Rubio's termination resulted from her harassing Aparicio remains unsubstantiated because it never happened. There was not one shred of evidence presented during the hearing which proved with any sort of certainty or credibility that Rubio was harassing or threatening Aparicio over her proven performance issues. In fact, the record actually shows that both Rubio and Carrington tried repeatedly to improve Aparicio's performance and precision. (Tr. 247:15-248:5) When their forthcoming suggestions and repeated training did not work, they went to their manager who quickly made excuses for Aparicio likely because the two shared the same religious beliefs and participated in their faith together after work hours. (Tr. 233:1-13)

Bixby testified that he decided to terminate Rubio based on an instant message conversation which Hamilton had forwarded him. This instant message was clearly protected activity where a vulnerable Rubio sought out help from anyone at Respondent who could help support and advance the formal complaint against Hamilton since Manuszak and Bixby had

essentially ignored it. At trial, Bixby tried to inflate the reason behind her firing by bringing up a chair and keyboard throwing incident which had never been brought up before to anyone, and he would later testify that he was not even in the office on the day of the alleged incident. (Tr. 429:7-432:9; 449:21-450:1) Moreover, Bixby testified that he had never disciplined Rubio for this uncorroborated incident, but now it had suddenly become a salient point in her firing? (Tr. 451:21-452:11) Bixby's shifting defenses for Rubio's termination is indicative of an animus toward her for complaining about workplace conditions and has also undoubtedly established that Respondent's asserted legitimate, non-discriminatory reason for Rubio's discharge was in fact pretextual. *Bebley Enterprises*, 356 NLRB No. 64 at p. 8 (2010). Interestingly, there was no investigation into Rubio's alleged misconduct or harassment of Aparicio and, in actuality, it was Hamilton's prodding of Bixby which led to Rubio's illegal termination despite Hamilton's counterfeit claim that she was not involved in the decision to terminate Rubio. When Respondent's witnesses were presented with questions about the timeline of events, it became glaringly obvious that their testimony was bogus since most of their testimony wavered, contradicted, and differed from the rest of their team.

At any rate, the logic behind Respondent's entire argument that Rubio was terminated for gross misconduct is hogwash since the company allowed Bixby to threaten Carrington's future at the company if he continued to engage in protected activity with Rubio, and Bixby was not immediately terminated for the very same behavior which a much lower-level employee had now been allegedly terminated for. Furthermore, any such conversations Rubio had with Aparicio were clearly the foundations of absolute protected concerted activity. Respondent can only make a claim that Rubio was harassing Aparicio if they proved she had requested Rubio to

stop and her requests continued, but the record shows that Rubio's requests were not pervasive or recurring. When Rubio engaged other co-workers in discussions about what was happening to her and had happened to other Supplier Information associates, Respondent terminated Rubio for "stirring the pot" and before the truth had a chance to come out as evidenced by Manuszak's dismay and theatrics when he was presented with General Counsel's Exhibit 5.

The Michelle Aparicio Defense

Respondent's argument that Aparicio was concerned about her future at the company because Rubio had threatened her livelihood has to fail since Rubio had zero managerial discretion over Aparicio's position and Aparicio knew this. In fact, Aparicio knew that Hamilton was out to get Rubio since Rubio had made her first complaint to Associate Services and Aparicio was also aware that Rubio had sought out legal advice beginning in January 2011 and was contemplating filing a charge against Respondent for pervasive harassment and retaliation. Respondent clearly cannot argue that Aparicio could truly believe that Hamilton, who did not hide the fact that she was out to get Rubio for making a formal complaint, would have informed Rubio if she was considering the termination of anyone in the department.

When Rubio informed Aparicio that she was worried that Hamilton was out to get them both, she was clearly speaking from the heart as she felt some sort of reprisal could be imminent. The Board has considered the perspective of the employee and has ruled that statements are not maliciously false when they were based on employees "own experiences and the experiences of other nurses as related to [employee]". *Valley Hospital Medical Center,*

351 NLRB at 1253 (2007). Seeing that Rubio had witnessed Hamilton unpredictably single out and restrain her and other Supplier Information associates over simple mistakes or incorrect decisions, Rubio truly believed that their jobs could be in jeopardy when Hamilton had complained to her about how Aparicio had not immediately responded to repeated training and coaching. Respondent's claim that Rubio persisted on a personal mission to get Aparicio fired or to get her to quit is derisory since Rubio had been the one who not only recommended her, but also spent a significant amount of her time re-training her. When an employer's reason "given is implausible, then that fact tends to prove an attempt to disguise the true, and unlawful, motive." *Keller Manufacturing Co.*, supra, citing *Capitol Records*, 232 NLRB 228 (1977). Furthermore, the Board has assumed an unlawful motive when an employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive." *J.S. Troup Elec.*, 344 NLRB 1009 (2005).

Rubio had been the employee who recommended Aparicio for her original, clerical position within the department, and she diverted much of her attention away from her own work in order to continually train and mentor Aparicio after she started. (Tr. 115:2-18) Aparicio was initially hired part-time in October 2010 after her hours had been cut with a sister company, Development Services of America (DSA). In actuality, Aparicio was being terminated and phased out from her position at DSA for continual performance issues, an issue she concealed until after she was originally hired by Hamilton. Aparicio testified that she was searching for a new job in late 2010 which was because she knew she was completely losing her part time job at DSA by the end of the calendar year which would have left her with only part time work. (Tr. 259:16-22) She was not hired full-time in the Supplier Information department

until January 2011 after Armbruster had resigned from his position at Respondent. There had been no business need for Aparicio to work full-time in the department until Armbruster had left the department on December 22, 2010, and, up until he left, Aparicio was continually concerned she would not have a chance at securing full-time employment within the Supplier Information department since the department was at capacity.

During this same time frame, Aparicio had sought out and pleaded for Rubio to help her search for jobs and improve her resume since she would need to work more hours. Fortunately for Aparicio, Hamilton did hire her full-time in January to replace Armbruster when he left as she believed Aparicio could handle his responsibilities within the department. It was not until late February 2011, that Hamilton hired another Supplier Information associate in addition to Aparicio when she realized Aparicio was not going to be able to fill Armbruster's role on her own. This came after a number of associates who relied on the items setup by the Supplier Information department had also complained about the department's overall sluggishness, further proving that Aparicio was the one on the team who was not performing up to par.

Aparicio testified that she and Rubio had been friends who had discussed workplace conditions as well as how Rubio had contemplated filing a charge of discrimination against Hamilton. (Tr. 250:15-251:25) Furthermore, Aparicio had even testified that she knew that Rubio felt that Hamilton was harassing her over religion. (Tr. 252:13-254:13) When Rubio's complaint with Manuszak was not addressed and Hamilton's retaliation grew increasingly worse, she hoped her friend would help her prove Hamilton's discrimination and mistreatment of employees to upper management since Aparicio was also aware of some of Hamilton's

behavioral issues. Aparicio testified that she did not want to be involved in Rubio's discrimination complaint because she could not be without a job. (Tr. 125:24-126:12) Rubio perfectly understood Aparicio's trepidation based on Respondent's history and did not raise the issue again with her.⁹ "Concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action". *KNTV, Inc.*, 319 NLRB 447, 450 (1995). This "invitation to group action" was concerted activity regardless of its outcome. *Circle K Corp.*, 305 NLRB 932, 933-934 (1991), *enf'd*, 989 F.2d 498 (6th Cir. 1993). "The absence of significant additional group activity does not undermine the concerted nature of the preliminary conversations because it was the direct result of management's pattern of coercion specifically designed to preclude further concerted activity by the employees." *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69 (Dec. 30, 2010).

None of the conversations Respondent submitted illustrate that Rubio was trying to disrupt the alleged "harmony" within the department; instead these conversations establish that it was actually Rubio who was perpetually worried for her own job, Aparicio's future at Respondent, and anyone else who had shared concerns over Hamilton's behavior or the complete lack of departmental policies and standards. These conversations which Respondent deemed "gross misconduct" really do nothing more than establish the desperate pleas of a battered and abused associate who was forced to seek out anyone who could and would hopefully help advance the complaints shared amongst several Supplier Information associates.

⁹ Aparicio's belief that she could lose her position for aiding Rubio further demonstrates that Respondent does have a proven history of terminating or demoting those who make complaints about management or those who assist others who have expressed grievances.

The Board has stated the protection of Section 7 must “take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses.” *Consumers Power Company*, 282 NLRB 131, 132 (1986).

It was not until after separate charges had been filed with the EEOC and NLRB, that the Aparicio defense was invented by Respondent. There was no mention to Rubio or the unemployment office (who approved her benefits) that she had been terminated for the alleged and continuous harassment of another employee. (Tr. 147:5-12) When she was terminated, Rubio had been informed by Bixby that “some of the conversations you have with other associates are not appropriate,” implying that her conversations were under surveillance and that Respondent deems protected concerted activity to be inappropriate. In fact, Rubio had not received one write-up or was ever spoken to about this alleged harassment during the entire time Aparicio had been a member of the department. Aparicio had never made any sort of request to Rubio to stop asking her to “do her work” or let her know she was upsetting her. Rubio was even responsible for fully training and mentoring new associate Alexandra Edmonds (Edmonds) who started only four days before Rubio was terminated. Clearly Respondent would not have allowed Rubio to spend the bulk of her dying days working for Respondent molding and guiding Edmonds if she truly had egregiously harassed and bullied another associate.

Bixby tried to testify that he had talked to Rubio about her alleged mistreatment of Aparicio, but, just like everything else Bixby was questioned about, he could not recount any of the details when pressed because he never actually spoke to Rubio and he cannot substantiate

these conversations. Most of Bixby's testimony had actually been hearsay or fictitious, undocumented stories which Hamilton was feeding him in her desperate attempt to eradicate Rubio from the organization. Furthermore, it is not likely for Bixby to have talked to Rubio about her alleged behavioral problems since he was only informed about Aparicio's alleged complaint just a couple days before Rubio had been terminated.

This compounds the fact that there was no investigation into the reasons behind Rubio's termination and that any explanation is purely a pretext since Rubio was actually terminated for complaining about workplace conditions with her co-workers and to management. Respondent's history of dealing with complaints about their managers and how Rubio's complaints were handled solidify the fact that Respondent and Hamilton were searching for grounds for terminating Rubio since she had first complained to Manuszak. This is evident by Rubio's testimony where she states that Hamilton was allowed to retaliate against her, that she was sent home for complaining, that the company did not take her complaint about harassment and discrimination seriously, that Manuszak failed to help her, and that she was worried about her own position after she complained. (Tr. 123:11-124:7; 125:10-23) Hamilton successfully used Aparicio as the rationale and scapegoat for terminating Rubio, an unwavering mission which Hamilton had devoted herself to since she was first made aware of Rubio's complaint.

Aparicio's Performance Issues and Preferential Treatment

Respondent knew that Aparicio had severe performance and behavioral issues, but they knew it would hurt their case to admit that Aparicio's lack of work had been a constant problem

which had forced the restructuring of the department several times in early 2011. Of course, Respondent's witnesses including Hamilton were asked to testify that Aparicio had no known performance issues since honesty would greatly hurt their case. Unfortunately for Respondent, Aparicio even testified that she did have problems with the work at times due to what she had deemed to be the meticulousness required when entering the case specifications and numerical case specification into the system (data entry) which formed the basis for the job. (Tr. 267:12-16) Aparicio went on to state that she would submit her work to Hamilton at the end of each day, which was not something anyone in the department was ever required to do or asked to do further proving that Aparicio must have been making repeated mistakes since her work needed to be checked and looked over by a manager. (Tr. 267:23-25) The record shows that both Rubio and Carrington tried to address Aparicio's performance issues with her directly several times because they knew how Hamilton typically overreacted when someone made a simple oversight. Once they realized Aparicio was not improving and did not seem to care about working as a team, Carrington and Rubio had no choice but to tell Hamilton that she wasn't keeping up with the work because it began to affect their own jobs. (Tr. 233:1-13) At this point, Aparicio's issues were affecting the team morale and the team's production had dropped significantly leading to issues which affected other departments within the enterprise. (Tr. 232:20-21) The fact that there were no performance issues or the need to grant overtime until the time frame when Aparicio took over for Armbruster solidifies the fact that it was Aparicio who had severe performance issues despite Respondent's bogus assertion that she had no performance issues. The workload in the department had also been unsuccessfully shifted around several times in February 2011 to try and conceal Aparicio's performance issues.

Had Aparicio actually been the outstanding performer Respondent had tried to make her out to be, it is not clear why she would ever feel like her position could be in danger anyhow since any levelheaded employee would know that most organizations require you to perform at some level in order to keep your job. Furthermore, Hamilton and Bixby had approved Aparicio the unheard of opportunity where Respondent would cover the expenses for an outside Biology course which was completely unrelated to Respondent's business needs. Aparicio was also afforded the opportunity by Hamilton to work a very laidback schedule in order to accommodate the time needed to take this course, and she would typically come and go as she pleased leaving Rubio and Carrington to make up the time difference. In other words, Aparicio knew she was more than safe due to the preferential treatment she was given and her lackluster concern over completing her daily tasks proved she knew she was safe under Hamilton's leadership.

Aparicio's Unfounded Allegations

Aparicio attempted to testify that Rubio allegedly began harassing her in December 2010, and she went on to testify that Rubio had been harassing her once every other day since on or about December 2010. (Tr. 258:13-19; 259:3-4) Clearly this was not the truth, as Aparicio would share personal stories about her life with Rubio as late as February 2011, including personal dialogue about her Mom's health and Rubio had also assisted Aparicio in her frantic full-time job search during this time period. Rubio frequently shared advice with Aparicio about her children's education and on applying for college and financial aid. Aparicio often vented to Rubio about her personal life while at work and would often ask Rubio for her advice and input.

Clearly Aparicio had no real grievances with Rubio until Hamilton informed her that Rubio and Carrington had made complaints regarding her performance issues.

Aparicio's testimony poses a number of credibility problems including the fact that none of this "harassment" is substantiated, this "harassment" was not brought up until Rubio and Carrington had complained to Hamilton about Aparicio's performance, and Aparicio knew that Rubio was scared for her own job during this entire time frame. Moreover, if this harassment was really occurring and especially at this magnitude, it would have seemed plausible that somebody or someone would have seen it, read it, or overheard it. At a minimum, Aparicio certainly would have kept at least some documentation of this "harassment" especially if it was as pervasive and habitual as she had testified especially since she had retained an earlier instant message conversation with Rubio where Rubio had requested her help. Aparicio, who was outspoken and candid, surely would have informed Rubio, her friend, if she truly believed that Rubio's alleged behavior had become bothersome or harassment. It is clear that any issue Aparicio may have actually raised had been by taken by Hamilton who overstated it, presented it to Bixby as severe, egregious misconduct, and used it as her "cause" for Rubio's termination.

Aparicio's overall testimony was evasive and was not given with any sort of certitude. She had to frequently revisit her affidavit in order to answer questions since many of her answers were not genuine. The credibility of Aparicio's overall testimony is unconvincing since she is still a paid employee of the Supplier Information department and she received an unwarranted raise and promotion shortly after Carrington and Rubio's March 2011 terminations. Since 2007, not a single employee in the Supplier Information department had

received a promotion or a substantial pay raise and many of these associates had at least 2-3 years of tenure within the department. This distressing reality is demonstrated by Carrington being denied a rightfully due raise and a promotion just a month before he was unlawfully terminated despite his excellent performance which Bixby had testified to.

Aparicio had already been promoted after not even being fully employed within the department for five months which seems a bit suspicious considering Respondent acknowledges she had some performance issues and compounded this at the hearing by addressing that Carrington was forced to work overtime (which he was paid for) in part to account for Aparicio's shortcomings. Rubio also attested to Aparicio's performance issues, how Hamilton had complained to both her and Carrington about Aparicio's performance, and how she was worried about both their jobs since she had recommended Aparicio and Hamilton personally blamed Rubio for her performance issues. (Tr. 132:2-133:20) Aparicio had also mentioned to Rubio that she can't be without a job, so of course her testimony is going to match whatever Respondent needs in order to keep her job and continue to provide for her kids. Furthermore, Aparicio knew full well she would be in Hamilton's good graces and could even benefit financially if she helped set up Rubio in order to get her terminated from the company since Hamilton had been openly and frantically hunting for "cause" since Rubio made her first complaint to Manuszak.

Bixby Interrogated and Threatened Carrington with Unspecified Reprisals

Bixby, a former Vice President and Officer of the company, and Carrington, a data entry clerk, generally had vague and limited interaction based on the organizational hierarchy

deployed by Respondent. Bixby had actually been Carrington's manager's manager manager, and he did not have any direct involvement in the Supplier Information department. In fact, the only meaningful communication between Bixby and Carrington took place when Carrington and other teammates had engaged in concerted activity in trying to address the appalling behavior of Hamilton beginning back in 2009. Through his own testimony, Bixby corroborated the fact that he wasn't all too involved in the Supplier Information department. (Tr. 90:1-10)

However, Bixby chose to take it upon himself to make sure the company would make a clean break by ensuring that anyone who associated with Rubio would know the ramifications of assisting and continuing to connect with her, or for continuing to engage in the protected concerted activity which he had deemed to be disruptive. Several of Carrington's previous co-workers had left the department over the years and not once had anyone in any level of management or anyone from Associate Services discussed their departure with him, and surely not an Officer of the company who had only limited dealings with Carrington up until that point. (Tr. 287:11-20)

Carrington was hardheartedly presented with two options regarding his future at the company that afternoon during his one-on-one meeting with Bixby. Carrington was told he could continue to associate himself with the "disruption", or that he could come in on Monday with a "clean slate" and continue to have a future with the company. (Tr. 277:3-9) Bixby also boasted to Carrington that it had been his personal decision to bring Carrington back after he was laid off insinuating that Carrington might owe him some sort of favor (i.e. ignoring the harassment he had witnessed and not aiding or speaking to Rubio). Carrington was also informed that his name had come up along with the "disruption" implying Respondent must

have had him under some sort of surveillance leading to this heightened scrutiny. The Board has ruled that statements made during questioning that display hostility towards continuance of union activities are more likely to be coercive. *Evergreen America Corp.*, 348 NLRB 178, 208 (2006), enf'd, 531 F.3d 321 (4th Cir. 2008). Bixby even testified that Carrington was a superb employee for Respondent, so it was not clear to Carrington why he was being granted a "clean slate" unless Respondent had some or all of his conversations under surveillance and was trying to coerce him to stay quiet by giving him another "opportunity". (Tr. 436:19-437:12)

Respondent has been unable to address what Bixby's intent was when he used what could have been Carrington's promising future at the company in order to restrain and coerce him from continuing to engage in protected concerted activity. If Rubio's firing had been with cause, it would not have seemed conceivable that Bixby felt the need to threaten and intimidate Carrington with unspecified reprisals if he continued to engage with the "disruption". The Board has considered the background of employer hostility, the nature of the information, the status of the questioner in the employer's hierarchy, the place and method of questioning, and the truthfulness of the employee's answer when determining whether questioning is unlawfully coercive. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *Manorcare Health Services-Easton*, 356 NLRB No. 39 at p. 17 (2010). Here the record establishes that Bixby intended to coerce Carrington because of his personal disdain toward Rubio for complaining about shared departmental grievances, the high-level position he held for Respondent, where this meeting took place (Bixby's office), and his reasoning behind summoning Carrington into his office. Furthermore, this meeting and subsequent questioning had to be coercive because the interaction was "neither casual nor accidental". *Manor Health*

Services-Easton, 356 NLRB No.39 at p. 18. (2010). Bixby was clearly trying to muzzle Carrington from continuing to engage in protected activity, and, simply put, there was not and cannot be any other reason behind Bixby's motivation when he called Carrington into his office that afternoon.

Carrington's Decision to Send the Emails (Protected Activity)

When Carrington left Bixby's office that afternoon he felt that any future he had at the company was over, and that his protected concerted activity with Rubio and other employees had been under surveillance. The Board has ruled that these conversations "with each other, with fellow employees, and with management, regarding their wages, hours, and working conditions, beyond question constituted protected concerted activity." *The Roomstores of Phoenix, LLC*, 2010 WL 2180784, 28-CA-22404 (April 16, 2010). Carrington knew from this point forward the company would be continuing to monitor his protected concerted activity, and that his time at the company was going to be cut short because he had been deemed part of the "disruption" since he and Rubio frequently discussed Hamilton's behavioral problems, Aparicio's preferential treatment, and other issues within the department amongst themselves and with other co-workers. Carrington went home both alarmed and disconcerted that afternoon, and he knew that he was going to have no part in the company and Bixby's attempt at covering up their discriminatory motives when they chose to terminate Rubio who had made repeated complaints about religious and national origin discrimination, departmental conditions, and the bullying tactics of their manager. (Tr. 281:25-282:4) Carrington knew he had to protect the reputation he had built for himself at the company, and that he needed to

assist Rubio in continuing her discrimination claims against the company. (Tr. 278:22-24) At this point, it truly became a matter of what is right versus what is wrong.

On the afternoon of March 4, 2011, Carrington and Rubio discussed her unlawful termination and the intimidation tactics which Bixby deployed during his separate one-on-one meeting with Carrington. Fortunately, Carrington and Rubio regularly engaged in protected, concerted activity by exchanging emails and instant messages between each other and other co-workers about the unpleasant and illicit workplace conditions in the Supplier Information department. These emails and conversations provided evidence of their strong performance, their realistic job responsibilities, the harassment Rubio endured, the education they were promised, and the preferential treatment of teammate Aparicio. Since Rubio no longer had access to these conversations and emails, their only option was for Carrington to save copies of all these emails before the company had a chance to destroy them or to find "cause" to terminate Carrington for his association with the "disruption". In *Holling Press*, 343 NLRB 301, 302 (2004), the Board stated: "In order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of 'mutual aid or protection.'" Carrington clearly sent these emails for the mutual aid of them both, and through Bixby's interrogation of Carrington, Respondent had been made aware of Carrington and Rubio's relationship and mutual workplace grievances which they had frequently discussed with each other and other associates. Additionally under the *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979) criteria, Carrington's decision to send these emails was absolutely provoked by Bixby's threats of unspecified reprisals and Respondent's other unfair labor practices.

On the morning of March 5, 2011, Carrington went to Respondent's building and undocked his laptop computer to bring it home as he had done on several occasions in the past. Nothing about Carrington's behavior was peculiar or forbidden, as employees were given 24/7 privileges to the building through a key card and there was no policy or restrictions on how, when, or where their laptop computers were to be used. (Tr. 285:23-286:4) In fact, many associates used their laptops outside of the office as personal computers and were even encouraged to take them home. Carrington forwarded himself and Rubio several hundred emails over the next 36 hours which detailed and provided evidence for a forthcoming EEOC claim (currently under investigation), the disparate treatment Carrington and Rubio endured, the preferential treatment of an employee who shared the same religious beliefs as Hamilton, information on education Respondent had promised to pay for, emails praising their work, and other emails detailing the real reason behind Rubio's termination. (Tr. 279:3-281:3) All of these emails were sent to advance the complaints of a number of past and current Supplier Information associates to the attention of management and for the mutual aid and protection of both Carrington and Rubio.

Respondent's baseless claim that Carrington and Rubio acted in concert to steal the company's "confidential and proprietary" information to advance their own career, personal, or pecuniary interests fails. This entire argument is not conceivable and is purely a pretext considering what information a Supplier Information associate actually had access to and since Respondent was the one who chose to cease the working relationship. Neither Carrington nor Rubio sought out work in the food service industry, and Carrington was unemployed for four months before he was informed of the open position at Shamrock Foods by one of Rubio's

former co-workers. The record shows that Carrington and Rubio have only submitted the emails to the EEOC and NLRB, and this fact is compounded by Respondent's witnesses' prevarication when asked about the alleged harm the company has suffered since there has been none.

The company has suffered no harm because there has been no harm, and Carrington clearly forwarded these emails for mutual aid and protection, as well as to bring to light Hamilton's persistent persecution of her direct reports. (Tr. 288:5-8) Carrington, Rubio, and any other Supplier Information associate would not even have any use or desire for any of the information obtained during their course of employment at Respondent. This entire point is established by charges filed with the EEOC and NLRB way before Respondent even began its sniveling about an alleged confidentiality breach.

No Investigation into Carrington's Alleged Misconduct

At 3:00 PM on the afternoon of March 7, 2011, Babbit had emailed Manuszak and Bixby that Carrington had sent a number of emails to Rubio and that "we are still trying to pull those emails, but the easiest solution for now is just to give you access to his mailbox. I am working on that now." By 3:30 PM, Carrington was terminated by Bixby for maintaining a relationship and communicating with the "disruption". There had been no investigation into what these emails actually contained since Babbit was still working to give Bixby and Manuszak access to those very same emails. Bixby, who made it glaringly clear to Carrington just days before that his future at the company would be in jeopardy if he continued to engage with the "disruption", took this as his opportunity to cease the protected concerted activity of yet another employee and made good on his promise from Friday afternoon. (Tr. 284:1-4)

Manuszak testified that he did not read a single email sent by Carrington when he became aware of these emails being sent on March 7, 2011. (Tr. 55:3-18) He went on to testify that Carrington was never questioned, further proving that he was terminated before Respondent had performed any sort of investigation into why the emails were sent or if it had even been Carrington who sent the emails. (Tr. 70:4-15) Babbit attempted to evade the question but finally admitted that he, too, had not read a single email sent by Carrington until after he had been terminated. (Tr. 376:21-377:8) Babbit went on to testify that he had still only cared to read 12 of the emails up until the hearing. (Tr. 380:2-13) When pressed, the only confidential information Babbit could even testify had left the organization to his knowledge was an email titled "Brand Change Presentation" but he admittedly did not know the context of the email since he had never read the email. (Tr. 378:21-383:2) All Babbit could muster up was his own personal hypothesis of what he was certain these emails had to contain (or what Respondent wanted to believe these emails contained).

It had become dauntingly clear at this point that even Babbit, a Chief Solutions Architect and key witness for Respondent, could not even define what the company believes to be confidential information and that he could really care less about the content of the emails sent by Carrington. His evasive testimony creates colossal credibility problems as does his reliance on the "Brand Change Presentation" email since this email string proves immediate and pervasive retaliation toward Rubio after she had first complained to Manuszak. Babbit went on to testify that Supplier Information might decide to move items from one brand to another in order to drive up profits, but this was certainly not a decision that anybody in Supplier Information made or would even be privy to further proving Babbit's lack of familiarity into the

Supplier Information department's responsibilities and overall lack of credibility on the matter at hand. (Tr. 383:12-384:18)

The fact that none of the information was truly confidential is driven home by the testimonies of Respondent's witnesses, who had been heavily advertised as experts within the industry. When pressed to define what information was confidential or which emails sent by Carrington had even been read or what the Supplier Information department even did, Respondent's witnesses dodged the questions and presented their self-serving testimonies about Carrington's criminal intent and how egregious his behavior was. Bixby could not even recall a single email that led him to the decision to terminate Carrington or how many emails he had reviewed, even though he was certain he had thoroughly reviewed a number of them. (Tr. 101:18-20) He went on to testify that he began reviewing these emails at 3:00 PM, coincidentally the same exact time when Babbit was still "working on a solution" to give him access to these emails. (Tr. 96:7-98:2) Manuszak ran into the same problem when asked to define what the emails contained. (Tr. 87:13-18) When presented with General Counsel's 15, Bixby testified that it was difficult to determine what is actually in the emails based on only reading the subject line. Notwithstanding the fact that he had just testified that he decided to fire Carrington from reading some 180 subject lines and not from reading the actual content of the emails. Manuszak and Babbit both could only testify to reading the email's subject lines, but they were both absolutely certain that what the emails contained was absolutely confidential. (Tr. 99:6-12; 102:24-103:2) Clearly one could not absolutely decipher the text of an email solely from the subject line, a point which Bixby even unintentionally admitted to. This point was driven home when Rubio explained how an email titled "YoCream Pricing" was actually an

email sent by Carrington to another employee of Respondent discussing the performance issues of Hamilton and Aparicio. Rubio went on to testify that there was no pricing or attachments on this email. (Tr. 158:1-17) The record shows that Respondent's reliance on only reading email subject lines proves their carelessness and sham investigation, and establishes that Carrington had been terminated without cause.

Respondent has proven through their testimony, as well as their interrogative and coercive actions that they undoubtedly knew Carrington was engaging in protected concerted activity over the last several months he was employed at Respondent. When he furthered this concerted activity by sending the emails to Rubio in March, Respondent took this opportunity and fired him for it. Any other defense was not created until after the fact and is purely a pretext since Respondent did not care to investigate Carrington's actions and simply showed him the door immediately after learning that he had continued to engage with Rubio. Under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), an employer violates Section 8(a)(1) when the discharged employee was engaged in protected activity at the time of their purported misconduct, the employer knew of the protected activity, the basis for the discharge was the employee's alleged misconduct in the course of their protected activity, and the employee was not actually guilty of the misconduct. Furthermore, the "timing of the alleged reprisals was proximate to the protected activities and that there was antiunion animus to 'link the factors of timing and knowledge to the improper motivation.'" *United Federation of Teachers Welfare Fund*, 322 NLRB 385, 392 (1996) citing *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991); *Service Employees International Local 434-B*, 316 NLRB 1059 (1995). "Since motive is critical to a finding of an 8(a)(3) violation, but since direct evidence of motive is rare, one must look to all of

the attendant circumstances to determine whether Respondent acted improperly or not.” *Keller Manufacturing Co.*, 237 NLRB 712 (1978), enf. in part, enf. den. In part without opinion, 622 F.2d 592 (7th Cir. 1980). See also, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) and *Atlantic Metal Products, Inc.*, 161 NLRB 919, 922 (1966). The boldness with which Respondent jumped at any opportunity to terminate Carrington without any sort of investigation shows an absolute animus toward him for continuing his association with the “disruption” and for his continuing engagement in protected concerted activity.

Hamilton Had Engaged In the Same Behavior Carrington Was Terminated For

Hamilton had forwarded company emails outside of the company to wrongfully and illegally make her more desirable to potential clients for her personal consulting business. She benefited financially from her misappropriation of these company emails, and the company has not terminated or disciplined her for this behavior. The Board has maintained that discipline for conduct which had been tolerated and condoned constitutes evidence of an unlawful motivation. *Air Flow Equipment, Inc.*, 340 NLRB 415, 419 (2003). Seeing that Hamilton is a manager of the company and Rubio/Carrington knew full well of her behavior, the only conclusion that can be reached is that Carrington had been terminated in order to suppress his concerted activity with Rubio seeing that he had engaged in the same behavior which his own manager and Respondent had clearly deemed to be an acceptable practice.

Respondent has argued that Hamilton sending company emails out of the company could not be as damaging as the “egregious” amount of the emails Carrington sent. Unfortunately for Respondent, they have absolute proof that Hamilton sent a report the

company paid for outside of the company to use for her own personal and financial benefit. Hamilton not only took company property for personal gain, but she also reaped the financial benefit of selling this information to outside customers. Hamilton's testimony that she wanted to learn more about the restaurant is absurd and damages any credibility she may have had. This email was sent to several outsiders of the company, including Rubio who had not yet begun her career at Respondent, further proving this was not and could not be deemed an educational opportunity for Hamilton as she had testified. In one such email which Hamilton had forwarded outside of the enterprise, Hamilton even recommended a direct competitor and she tactlessly included Respondent's entire email trail which gave confidential insider accounts on the state of Respondent's business. This candid introspective of the inner workings of Respondent is clearly not information a private company would want out in the public, and is far more damaging than anything Carrington would have even had access to or had sent to himself and Rubio. Respondent had made no attempt to investigate Hamilton's theft of these company emails and, therefore, cannot conclude with any degree of certitude that Hamilton has not taken any other emails and/or company paid reports in order to advance her own personal and pecuniary interests.

Conclusion

Respondent has argued that these terminations were lawful, but any such argument misses the mark since Rubio and Carrington were clearly engaged in protected activity for several months preceding and up until their terminations and Respondent was more than aware of this activity. An overabundance of evidence and convincing testimony helped

establish that Respondent's management team had been made acutely aware of the protected concerted activity engaged in by Carrington and Rubio well before their terminations. Furthermore, Hamilton and Bixby, one a manager and the other an Officer of the company, were both allowed to engage in the same conduct which had become the motives behind both these unlawful firings. (Tr. 233:12-236:9) Respondent needed to persuade by a preponderance of credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996). Here Respondent's handling of complaints about their managers is incongruent with the higher expectations and boundaries which they instill on their lower-level employees such as Rubio and Carrington and Respondent cannot argue or persuade otherwise.

General Counsel presented a strong *prima facie* case including the use of several witnesses who currently work for and have worked for Respondent, as well as direct evidence of Hamilton's egregious behavior toward her direct reports. Since Respondent can only avoid liability if it can prove that the same action would have been taken in absence of Carrington and Rubio's concerted activity, any such argument by Respondent simply fails. *Wright Line*, 251 NLRB 1083 (1980); *Wright Line*, 251 at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Willamette Industries*, 341 NLRB 560, 563 (2004). Respondent cannot prove otherwise because other associates have engaged in the same activity which both Carrington and Rubio had and have not faced termination, or any reprisals whatsoever for that matter. In fact, even high level managers and Officers of the company have engaged in these similar behaviors and have not been disciplined and certainly have not been terminated. The lesser discipline taken against other employees who actually committed equal or greater rule violations supports the

conclusion that animus toward protected concerted activity was the motivating factor in Respondent's decision to discipline and discharge Carrington and Rubio. Respondent simply cannot overcome this pretext analysis.

The record and evidence show that Respondent terminated Carrington and Rubio for concerted activity, and undoubtedly violated Section 8(a)(1) of the Act through the following unlawful actions:

- Promulgating and/or maintaining overly broad and discriminatory rules
- Threatening employees with unspecified reprisals if they engage or continue to engage in concerted activities
- Interrogating employees about their concerted activities
- Placing employees engaged in protected activity under surveillance
- Discharging Rubio and Carrington

Dated at Phoenix, Arizona, this 7th day of May 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul Carrington", with a long horizontal flourish extending to the right.

Paul Louis Carrington
1351 N Pleasant Drive Unit 1095
Chandler, AZ 85225
Telephone: (602)-909-7793
Email: pcarrin@asu.edu

Table of Cases

Air Flow Equipment, Inc., 340 NLRB 415, 419 (2003).

Atlantic Steel Co., 245 N.L.R.B. 814 (1979).

Bebley Enterprises, 356 NLRB No. 64 at p. 8 (2010).

Champion Home Builders Co., 343 NLRB 671, fn. 3 (2004), enf. in pertinent part 209 Fed. Appx. 692 (9th Cir. 2006).

Circle K Corp., 305 NLRB 932, 933-934 (1991), enf'd, 989 F.2d 498 (6th Cir. 1993).

Consumers Power Company, 282 NLRB 131, 132 (1986).

Evergreen America Corp., 348 NLRB 178, 208 (2006), enf'd, 531 F.3d 321 (4th Cir. 2008).

Holling Press, 343 NLRB 301, 302 (2004).

Industrial Hard Chrome, Ltd., 352 NLRB 298, 309-310 (2008).

J.S. Troup Elec., 344 NLRB 1009 (2005).

Keller Manufacturing Co., supra, citing *Capitol Records*, 232 NLRB 228 (1977).

Keller Manufacturing Co., 237 NLRB 712 (1978), (7th Cir. 1980).

KNTV, Inc., 319 NLRB 447, 450 (1995).

Manno Electric, Inc., 321 NLRB at 280 fn. 12 (1996).

Manorcare Health Services-Easton, 356 NLRB No. 39 at p. 17 (2010).

Manor Health Services-Easton, 356 NLRB No.39 at p. 18. (2010).

Meyers II, 281 NLRB at 887.

NLRB v. Burnup & Sims, 379 U.S. 21 (1964).

The Roomstores of Phoenix, LLC, 2010 WL 2180784, 28-CA-22404 (April 16, 2010), slip op. at p. 20.

Salon/Spa at Boro, Inc., 356 NLRB No. 69 (Dec. 30, 2010).

Service Employees International Local 434-B, 316 NLRB 1059 (1995).

T&J Trucking Co., 316 NLRB 771 (1995).

United Federation of Teachers Welfare Fund, 322 NLRB 385, 392 (1996) citing *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991).

Valley Hospital Medical Center, 351 NLRB at 1253 (2007).

Westwood Health Care Center, 330 NLRB 935, 939 (2000).

Williamette Industries, 341 NLRB 560, 563 (2004).

Wright Line, 251 NLRB 1083 (1980).

Wright Line, 251 at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006).

Certificate of Service

I hereby certify that a copy of PAUL LOUIS CARRINGTON'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION in FOOD SERVICES OF AMERICA, INC., a subsidiary of SERVICES GROUP OF AMERICA, INC. Case 28-CA-063052, was served via E-Gov, E-Filing and e-mail on this 7th day of May 2012, on the following:

Via E-Gov E-Filing and Served via e-mail on the following:

Richard K. Walker, Attorney at Law
Walker & Peskind, PLLC
SGA Corporate Center
16100 North 71st Street, Suite 140
Scottsdale, AZ 85254
E-Mail: rkw@azlawpartner.com



**MUTUAL AGREEMENT
for
ARBITRATION OF DISPUTES**

(PLEASE READ CAREFULLY)

Food Services of America (“FSA”) is a corporation involved in interstate commerce through wholesale distribution of food and related products. Most of FSA’s nonunion employees are in an “at will” employment relationship, meaning that they are free to resign at any time and FSA is also free to end the employment relationship. Even so, disputes about termination of employment and related claims sometimes arise. FSA is committed to resolving any such disputes and claims efficiently and effectively, while preserving due process safeguards. This commitment includes use of binding arbitration as the means of final resolution of all such disputes and claims. By this agreement, FSA agrees that it will arbitrate covered disputes and claims subject to the provisions contained herein.

In consideration for my employment with FSA, the compensation and benefits I receive based on that employment and FSA’s mutual agreement for arbitration, I, _____, SSN _____, hereby agree that any dispute and/or claim between FSA (and/or its successors and assigns) and me that underlies, arises from, relates to and/or is asserted following the termination of my employment relationship with FSA and that cannot be otherwise resolved will be submitted to final, binding arbitration in accordance with the *Code of Procedure* of the National Arbitration Forum (“NAF”) that is then in effect. This agreement governs any claims that I may have against FSA, FSA’s parents, subsidiaries, affiliates and/or joint ventures (the “FSA Parties”), any director, officer, employee, shareholder, agent or representative of any FSA Party or the respective successors and assigns of any of the foregoing or of any FSA Party, that underlie, arise from, relate to and/or are asserted following the termination of my employment relationship with FSA, including, but not limited to, claims of wrongful discharge, infliction of emotional distress, breach of contract, breach of any covenant of good faith and fair dealing, and claims of retaliation and/or discrimination in violation of any local, state or federal law. Examples of such laws include Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Americans with Disabilities Act; and state and local laws applicable to my employment.

This agreement does not affect my right to pursue workers’ compensation or unemployment compensation benefits for which I may be eligible under state law, or claims based upon an employee pension or other benefit plan, the terms of which contain an arbitration or other nonjudicial dispute resolution procedure, in which case those provisions of such plan shall apply. This agreement also does not affect my right to file and/or to cooperate in the investigation of an administrative charge of discrimination.

I understand that, although an arbitrator may not change the terminable “at will” nature of my employment with FSA or impose a just cause standard if none is required by applicable law, I may seek in arbitration any remedy or award that would be available to me through civil litigation and

that the arbitrator has authority to grant any such remedy or award. I agree that such remedies include monetary damages but do not include reinstatement unless authorized by statute. The arbitrator, not the courts, will have authority to determine whether or not a particular claim is subject to arbitration under this agreement. The arbitrator will also have authority to rule on motions presented by either FSA or me, including motions for summary judgment. However, I understand that, by agreeing to submit claims to binding arbitration, I will not be entitled to seek trial by a judge or jury on claims that are covered by this arbitration agreement.

In any matter that is presented to an arbitrator under this agreement, I agree that the location of the arbitration hearing(s) will be in the state within which I was last employed by FSA, unless another location is mutually agreed upon. I also agree that any decision by an arbitrator in a proceeding conducted pursuant to this agreement may be published by either the NAF or the arbitrator in a compilation of arbitration decisions if FSA and I so agree.

I understand that regardless of what may be provided in the NAF *Code of Procedure* then in effect the fees of the National Arbitration Forum and the arbitrator's fees will be paid by FSA. If the NAF *Code of Procedure* fails to provide a mechanism for selecting a neutral arbitrator, the arbitrator shall be selected by the parties agreeing on a mutually agreeable arbitrator, or if we are unable to reach agreement, the NAF shall provide a list of five arbitrators who are available and have no conflict with arbitrating the matter. The parties shall have the opportunity to strike two arbitrators from the list and the remaining arbitrator shall conduct the arbitration. Additionally, if the NAF *Code of Procedure* does not provide for more than minimal discovery, then the parties shall be entitled to sufficient discovery to adequately arbitrate the claim. This shall include, but not be limited to, the right for each party to take depositions, make requests for the production of documents to any party and subpoena documents from third parties. Finally, the arbitrator must, regardless of the NAF *Code of Procedure*, issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions of law on which the award is based.

I understand that the current NAF *Code of Procedure* can be found at the website of the NAF (www.arb-forum.com) or that I may request a printed copy from my branch VP of Finance or designee. I enter into this agreement freely and voluntarily in consideration for my employment with FSA, the compensation and benefits I receive based on that employment and FSA's mutual agreement for arbitration.

I know that I may have access to FSA confidential or proprietary information and that the unauthorized use or disclosure of that information may violate applicable law and my duties to FSA. I agree that it is impossible to measure solely in money the damages which FSA may suffer if I violate the law or my duties with regard to FSA's confidential or proprietary information. Therefore, I understand and agree that any action by FSA to protect its rights as to its confidential or proprietary information is excluded from this arbitration agreement, and that FSA retains the right to seek relief in a court from actual or threatened violation of those rights.

In case any one or more of the provisions of this Agreement shall be found to be invalid, illegal or unenforceable in any respect, with validity, legality and enforceability of the remaining provisions contained in this Agreement will not be affected.

This is the complete agreement of the parties on the subject of arbitration of disputes, and supersedes any oral or written understandings on the subject.

I HAVE CAREFULLY READ THIS AGREEMENT AND UNDERSTAND IT BEFORE SIGNING IT.

Associate/Employee

Date: _____

AGREED TO AND ACCEPTED ON BEHALF OF FSA:

By: _____

Date: _____



November 5, 2009

Paul Carrington
1351 N. Pleasant Dr. #1095
Chandler, AZ 85225

Dear Paul,

I am pleased to offer to you the position of Supplier Information Specialist at Food Services of America, reporting to Merissa Mastropiero. Your start date is November 9th, 2009.

The details of the offer are as follows:

- Your compensation will be an hourly rate of \$18.63.
- This is a temporary assignment that will not exceed 90 days of employment.
- You will not be eligible to receive company benefits.

This offer is contingent upon you executing a standard arbitration agreement, which I've attached, and successful completion of the drug screen and background checks.

Finally, Food Services of America is an at-will employer. As such, this letter does not constitute a guarantee or contract of employment for any duration and employment may be separated by either you or the Company with or without notice and with or without cause.

Paul, I look forward to your working with you! If you have any questions in the meantime, do not hesitate to call me.

Sincerely,

Merissa Mastropiero
Supplier Information Manager

Acceptance:

_____ Paul Carrington

_____ Date