

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

FRESH & EASY NEIGHBORHOOD MARKET, INC.

and

Case 28-CA-064411

MARGARET ELIAS, an Individual

**THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files the following Brief in Support of Exceptions to the Decision of Administrative Joel P. Biblowitz [JD(NY)-14-12] (ALJD), issued on April 23, 2012, in the above captioned case. As set forth in the General Counsel's Exceptions, filed under separate cover, the General Counsel excepts to the following findings of the Administrative Law Judge (ALJ): (a) the ALJ's failure to find that Respondent violated Section 8(a)(1) of the Act by orally promulgating and maintaining an overly-broad and discriminatory rule prohibiting employees from obtaining statements from their coworkers regarding allegations of sexual harassment (ALJD 11); (b) the ALJ's failure to find that Respondent interrogated the Charging Party Margaret Elias (Elias), in violation of Section 8(a)(1) of the Act (ALJD 11); and (c) the ALJ's holding that Elias was not engaged in protected, concerted, activity when she asked coworkers to sign statement regarding a note written on a white board in the employee break room that contained sexual innuendo. (ALJD 11). In all other respects, the findings of the ALJ are appropriate, proper, and fully supported by the credible record evidence.

I. OVERVIEW

This case involves a Respondent's over-reaction, in late August 2011, to one of its employees engaging in protected concerted activity, its subsequent interrogation of the employee, and promulgation of a rule designed to end the employee's protected concerted activity, all in conflict with the Section 7 of the Act.¹ Specifically, after the Charging Party Margaret Elias witnessed that someone had changed a message in the employee break-room to contain sexual innuendo, she circulated a petition amongst her coworkers regarding the written statement. In direct response to Elias' actions, Respondent told Elias she was prohibited from obtaining witness statements or signatures from co-workers regarding the incident in question, and also interrogated her regarding her actions.

In dismissing these Complaint allegations, the ALJ failed to properly consider and discuss the record evidence and/or extant case law. The ALJ erred when he incorrectly found that Elias was not engaged in protected concerted activity, and failed to fully address the General Counsel's allegation that Respondent interrogated Elias. Reversal of the ALJ's findings do not require changes to the credibility resolutions made by the ALJ, as the facts are essentially not disputed. The credible evidence cited by the ALJ in his decision shows that, in fact, Elias's conduct was protected concerted activity, and that Respondent's efforts to restrain Elias violated Section 8(a)(1) of the Act.

¹ Counsel for the Acting General Counsel will be referred to as "General Counsel." Fresh & Easy Neighborhood Market, Inc., will be referred to as "Respondent." The General Counsel's and Respondent's Exhibits will be designated as "GCX" and "RX" respectively, followed by the appropriate exhibit number(s). References to the transcript, and the Administrative Law Judge's Decision will be designated "Tr." and "ALJD" respectively, followed by the appropriate page number(s). All dates are in 2011 unless otherwise stated.

II. FACTUAL BACKGROUND

A. Respondent's Business Operation

The Respondent, a Delaware corporation, operates a chain of supermarkets in California, Arizona, and Nevada. The store at issue in this matter is located at 7127 East Shea Boulevard, Scottsdale, Arizona (Shea store). (GCX 1(e)) Jeff Lang (Lang) is Respondent's district manager, and Monyia Jackson (Jackson) is the corporate employee relations manager, who works out of Respondent's corporate office in El Segundo, California. (GCX 7) At the store level, the manager of the Shea store is Bruce Churley (Churley), who has been employed by Respondent since October 2009. (ALJD 3) Team Leader Mike Anderson (Anderson), who occasionally acts as store manager, has worked for Respondent since October 2010. (ALJD 3) Elias, who has worked for Respondent for a year and a half, Victoria Giro (Giro), who worked for Respondent from April 2010 until December 2011, Krista Yates (Yates), who has worked for Respondent for two and half years, and Gary Hamner (Hamner), all work at the Shea store, and report to the Churley. (ALJD 3)

B. Background

1. Elias' Sexual Harassment Complaint

On August 26, following store manager Churley's instructions, Elias wrote a reminder note regarding cashier training on the large whiteboard (about 4 x 6 feet), located in the employee break room. (ALJD 6) The training was specifically referred to as "TIPS" training, which is related to the sale of alcoholic beverages in the store. When Elias went back to the employee break room the following day, she saw her note on the white board had been altered; the word "TIPS" had been changed to "TITS" and a cartoon was drawn underneath the altered message. Elias believed the cartoon depicted "a worm pissing on [her] name." (ALJD 5) Offended by this conduct, and believing other employees would also be offended, Elias

contacted Team Leader Anderson and requested to file a sexual harassment complaint.

(ALJD 5-6)

Elias showed Anderson the whiteboard in the break room, and in response to her request to file a sexual harassment complaint, he asked “what for?” (ALJD 7; Tr. 39:3-4) Elias then became upset and left the break room, and Anderson then notified Churley about what had occurred, telling him that Elias wanted to file a sexual harassment complaint. (ALJD 7; Tr. 39) According to Anderson, Churley directed him to take a picture of the whiteboard, which he did; Anderson then placed the camera in the office for Churley’s review. (ALJD 7; Tr. 39-40; GCX 5)

Elias testified that, based on Anderson’s visible disinterest in addressing her complaint, on August 26, she copied what was written on the whiteboard on a separate white piece of paper, and asked Anderson along with employees Krista Yates and Victoria Giro to join her in support of her complaint by signing and acknowledging that they witnessed the altered wording on the whiteboard.² (ALJD 7-8; GCX 6) All three signed the statement. (ALJD 7-8) Elias testified that the purpose behind her complaint was that she was offended, and believed that her fellow female coworkers were also offended, and “that if we were to file a harassment charge that it wouldn’t happen again.” (Tr. 122; 155:22-25)

Churley testified that when he arrived at the store later that evening on August 26, he reviewed the picture of the whiteboard that Anderson had taken, and found that it was offensive. (Tr. 19) Churley spoke to Anderson, who alleged that Elias was insisting that employees sign a statement regarding the whiteboard incident. (Tr. 29) According to Churley, the next day he spoke to Yates and Giro, who both told him that they felt forced to sign Elias’

² The ALJ found that, after Elias’ coworkers signed the statement, Elias added the following to the document: “Someone changed the Board to ‘TITS’ instead of ‘TIPS’ and put a worm pissing on my name. This has been on the Board since I got here at 2PM.”

statement about the whiteboard. (ALJD 7; Tr. 29-30) Based on his conversations with Anderson, Yates and Giro, Churley sent an email to District Manager Lang, with a courtesy copy to Jackson. (ALJD 7; Tr. 31; RX1)

Anderson was the acting store manager on August 26 when Elias approached him to sign her statement. According to Anderson, the statement drafted by Elias was truthful; he felt as though he was forced sign the statement, as Elias was very upset, and did so hoping to calm Elias down and prevent the situation from escalating. (ALJD 7, 10; Tr. 43:5-6; 44) Anderson, admitted that Elias had never threatened him before, did not tell Elias that he felt threatened. (Tr. 43)

Yates testified that Elias was upset about whiteboard, was looking for witnesses, and wanted to file a complaint. (ALJD 7; Tr. 91; 93) Yates admitted that the statement Elias had her sign was truthful, but felt uncomfortable with signing the statement; Yates eventually signed the document to “diffuse the escalating situation.” (ALJD 8; Tr. 91, 95) The next day, Yates called Respondent’s HR department “hotline,” and filed a complaint that Elias bullied her into signing the statement, and further told Jackson about her encounter with Elias. (ALJD 8) A few days later, Churley asked her if there was anything she wished to discuss with him. (Tr. 112) Although Yates told Churley there was nothing she wanted to discuss, Yates testified that Churley asked her if there was any room at the bottom of the statement that she signed for Elias, which would have enabled Elias to write additional comments; Yates replied there was.³ (Tr. 112)

Giro testified that on August 26, Elias was visibly upset and approached her regarding the changed wording on the whiteboard, and wanted Giro to sign her statement regarding the

³ The ALJ erred by finding “Churly asked her if there was anything that she wanted to talk to him about and she said that there was.” (ALJD 8) Yates’ testimony is clear, she told Churley “no, that I was fine;” but he continued questioning her anyway. (Tr. 112)

changed wording on the whiteboard. (ALD 7; Tr. 61) While the ALJ found that Elias never told Giro that she wanted to file a complaint about the whiteboard incident at the time she asked her to sign the statement, this finding is error. Regarding Elias' request that Giro sign her statement, Giro testified:

Q [by the General Counsel]: So you knew at that point she [Elias] wanted to file a complaint?

A [Giro]: She had mentioned that and I told her I didn't think that was fair, I thought she should talk to Bruce. She said he had all day to deal with it.

(Tr. 61). Giro's testimony also comports with the written statement she submitted to Respondent regarding the incident, where she states that, when Elias asked her to sign her statement, Elias "said she was going to file 'Sexual Harassment.'" (R. 3) Clearly the ALJ erred.

Giro believed that the changed wording on the whiteboard was inappropriate. (ALJD 7; Tr. 61; 76) Giro signed the statement, and testified that it accurately reflected what was on the whiteboard. (Tr. 74; 83) Elias did not "force" or "threaten" Giro into signing the statement; their discussion was "very heated" and "uncomfortable," as the conversation was taking place near customers. (ALJD 7) Giro signed the statement in order to be a "witness as to what was on the whiteboard." (ALJD 7) The next day, Giro told Churley that, although the change on the whiteboard was inappropriate, she felt intimidated into signing the statement.⁴ (ALJD 7; Tr. 77)

⁴ According to Giro, examples of Elias being "intimidating" include: Elias not always being in the mood to respond to someone saying "hello;" and Elias asking Giro, with respect to her schedule, "isn't it nice that you get what you want?" (Tr.79; 80:10-24)

Jackson testified that she became involved in this matter after she had received two separate emails from Churley regarding Elias. (ALJD 8-9) The first email, received on August 26, concerned Elias wanting to file a sexual harassment complaint over the changed wording on the whiteboard. (ALJD 8; Tr. 165-166; RX 1) Jackson advised store management that she would investigate the claim. The second email concerned Elias allegedly demanding statements from Anderson, Yates, and Giro. (ALJD 9; Tr. 167)

On August 27, Jackson received two complaints against Elias via Respondent's Ethics Point telephone; one from employee Gary Hamner and the other from Yates.

Hamner is the employee who had actually changed the whiteboard statement, and drew the offending cartoon Elias was complaining about.⁵ He was now claiming that Elias had used profanity against him, and had allegedly been smoking narcotics behind the store building. (ALJD 9; Tr. 167-169) Yates' complaint concerned Elias yelling and screaming about sexual harassment in the break room and her demanding a signed statement from her. (ALJD 9; Tr. 169; RX 6) On August 30, Jackson began her investigation into Yates' complaint about Elias by speaking to, and taking statements from, Yates and Anderson, and also speaking to Hamner. (Tr. 169-171; RX 2; 4) Jackson also told Churley to obtain a statement from Giro. (Tr. 171; RX 3)

2. Jackson's August 31 telephone conversation with Elias

On August 31, just four days after Elias asked about filing a sexual harassment complaint, Jackson called the store to speak with Elias. (Tr. 122; 171-174) Elias took the call in the empty break room, believing the phone call was about her sexual harassment complaint; however she soon realized otherwise. (Tr. 122) Jackson advised Elias that Hamner had filed a complaint against her for using profanity toward him on August 26. (ALJD 8; Tr. 123) Elias

⁵ At the conclusion of its investigation into the whiteboard incident, Respondent disciplined Hamner. (ALJD 11)

denied the allegation, and suggested that Jackson review the surveillance (ALJD 8) Jackson retorted by telling Elias not to tell her how to do her job and that the video tape would not disclose what was said. Elias agreed, but told Jackson that the video tape would disclose that Elias did not say anything to Hamner. (ALJD 8; Tr. 123)

Jackson asked Elias why she felt that she had to obtain the signatures of the employees to here statement, and then told Elias not to obtain any further statements so she could conduct an investigation. (ALJD 9, 10) Jackson told Elias that she could talk to employees and ask them to be witnesses, but regarding the investigation to allow her to complete it. (ALJD 9, 10). According to Jackson, Respondent found that only the complaint filed by Elias had merit. Neither the complaint by Yates, alleging that Elias had threatened employees into signing the statement, nor Hamner's complaint, alleging that Elias had used profanity against him, had any merit. (Tr. 187)

Because she had not receiving any notice from Respondent regarding the status of the investigation, on September 3, Elias restated her complaint, and asked about the status of the matter. (Tr. 125; GCX 7) On October 13, Jackson responded to Elias, advising her that inappropriate conduct did occur and that Respondent took corrective action. (RX 5)

III. ARGUMENT

A. The ALJ erred in finding that Elias was not engaged in protected concerted activity.

1. Legal Standard

The ALJ erred when he found that Elias was not engaged in protected concerted activity when she sought the signatures of her co-workers in support of her sexual harassment complaint. Section 7 of the Act provides workers "the right to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). Pursuant to

Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. An employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities. Board law supports General's Counsel's contention that the ALJ's finding that Elias did not engage in protected concerted activity is erroneous.

In addition, the Act protects employees who engage in individual action which is "engaged in with the objective of initiating or inducing group action." *Mushroom Transportation Co. v. NLRB*, 330 F.3d 683, 685 (3d Cir. 1964); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). Moreover, an employee need not first solicit other employees' views for his activity to be concerted. See *Whittaker Corp.*, 289 NLRB 933, 933-934 (1988) (employee was engaged in concerted activity where, not having had a chance to meet with any employee beforehand, he made a comment in protest as a spontaneous reaction to the employer's announcement that no annual wage increase would be forthcoming).

In *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. 989 F.2d 498 (6th Cir. 1993), the Board found that an employee had engaged in protected, concerted activity, despite the views of fellow employees that she had "acted in bad faith to protect herself against discharge for poor work." The Board observed that "[e]mployees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one." *Id.*; *Astro Tool & Die Corp.*, 320 NLRB 1157, 1161-1162 (1996)(Board found that an employee had engaged in protected concerted activity when she raised concerns shared by other employees who had not themselves complained).

The Board has further found concerted activity when it involves a speaker and listeners. *El Gran Combo*, 284 NLRB 1115 (1987) (employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted).

The Board has long recognized that alleviating unlawful discrimination in the workplace is in the interest of all employees. See *Tanner Motor Livery, Ltd.*, 148 NLRB 1402, 1404 (1964); *Kysor Industrial Corp.*, 309 NLRB at 237 fn. 3 (1992); *Tradesmen International, Inc.*, 332 NLRB 1158 (2000), enf. denied, 275 F.3d 1137 (D.C. Cir. 2002). Employees have a protected right to discuss their sexual harassment complaints, and other issues concerning their terms and conditions of employment, amongst themselves. e.g., *Phoenix Transit System*, 337 NLRB 510, 513 (2002).

2. Analysis

a. Elias' was engaged in concerted activity.

In the present case, Respondent admitted Hamner's altering the wording on whiteboard was inappropriate, and even disciplined Hamner for doing so. Elias, offended by Hamner's conduct, believed that other female co-workers would also be offended (Giro did find the altered wording inappropriate), and not wanting this behavior to continue, asked to file a sexual harassment complaint. Elias engaged in classic protected concerted activity by discussing the whiteboard incident with coworkers, and requesting that they sign a statement she prepared in the pursuit of filing a sexual harassment complaint with Respondent. See *Ellison Media Company*, 344 NLRB 1113, 1113-14 (2005) (employee engaged in protected concerted activity when she discussed filing a sexual harassment complaint)

In the present case, it is clear that, by soliciting coworkers to sign her statement, Elias' conduct was concerted. Contrary to the ALJ's finding, Elias' conduct was undertaken for the

purposes of mutual aid or protection, and by prohibiting Elias from taking witness statements Respondent violated Section 8(a)(1). The credible record evidence indicates that both Elias and Giro were offended by the altered wording on the whiteboard, Giro further testified that she signed the statement because she saw Yates and Anderson had signed it, she believed it accurately reflected what was on the whiteboard, and Elias told Giro that she wanted to file a sexual harassment complaint when she asked her to sign the statement. Furthermore, Churley admitted the altered wording was inappropriate, and Respondent disciplined Hamner because he acted contrary to Respondent's policy in altering the wording. Consequently, Elias' sexual harassment complaint and her request to obtain signatures was for the mutual aid of other employees, despite the fact that not all of them agreed with her methods or that the altered wording on the whiteboard was offensive. See *El Gran Combo*, 284 NLRB 1115, 1117 (1987) (employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted).

The record evidence demonstrates that Respondent knew Elias discussed with coworkers concerns about filing a sexual harassment complaint, which is an important terms and conditions of their employment. See *Triangle Electric*, 335 NLRB 1037, 1039 (2001); *Tradesman International*, supra. Jackson, Churley, Anderson, and Giro all admitted that Elias informed them that she wanted to file a sexual harassment complaint, and that Elias had also discussed this with other employees.

b. Holling Press was wrongly decided, and should be overturned.

In finding Elias' conduct was not concerted, the ALJ relied upon *Holling Press*, 343 NLRB 301, 302 (2004), holding that Elias was not engaged in concerted activities for mutual aid and protection. However, *Holling Press* was wrongly decided, and the General

Counsel asks the Board to overturn the decision. In *Holling Press*, the Board found that an employee was not engaged in concerted activity, for mutual aid and protection, when she asked a coworker to serve as a witness in connection with her sexual harassment complaint against a leadman, because the complaint was individual in nature, and there was no evidence that any other employee had similar problems – real or perceived. *Id.*

However, the Board’s decision in *Holling Press* goes against well established precedent, and should be overturned. When employees invoke the protection of statutes benefiting employees, their actions are for the purpose of “mutual aid and protection,” this includes resorting to administrative agencies and judicial forums. *Meyers II*, 281 NLRB at 887; *Eastex, Inc., v. NLRB*, 437 US 556, 565 (1978). Accordingly, Elias’ invoked the statutory protections (both state and federal) against sexual harassment, by asking Giro to sign her statement about the whiteboard, telling her that “she was going to file sexual harassment.” (R. 3; Tr. 61) Therefore, Giro’s conduct was concerted, for mutual aid and protection, and the ALJ erred in finding otherwise. To the extent that *Holling Press* dictates otherwise, the General Counsel asks that *Holling Press* be overturned.

B. The ALJ erred in finding that Respondent did not violate the Act when it unlawfully promulgated an overly-broad and discriminatory rule.

The ALJ also erred when he failed to find that Respondent violated the Act by prohibited Elias from obtaining signatures or statements from coworkers in support of her sexual harassment complaint. (ALJD 11)

1. Legal Standard

Central to the protections provided by Section 7 of the Act, is the employees’ right to communicate to coworkers about their wages, hours, and other terms and conditions of employment. The Board and courts have long recognized the importance of employees’

freedom in communication to the free exercise of organization rights. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972). This right to freedom of communication is not limited to organization rights, “for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities.” *Phoenix Transit System*, 337 NLRB 510, 513 (2002) (citing *Container Corporation of America*, 244 NLRB 318, 322 (1979)). An employer’s rules prohibiting Section 7 activity are a violation of the Act, even if such rules have never been enforced. *Franklin Iron & Medal Corp.*, 315 NLRB 819, 820 (1994).

In *The NLS Group*, the Board applied the *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) standard for determining whether an employer’s maintenance of a work rule violates Section 7 of the Act. 352 NLRB 744, 755 (2008) (two member Board decision) adopted by full Board 355 NLRB 1154 (2010) enfd. 645 F.3d 475 (1st Cir. 2011). If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if: (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights. *Id.*

Employees have a right to discuss amongst themselves matters that are discussed during an employer’s investigation. *Phoenix Transit System, Inc.*, *supra*. In deciding whether a rule prohibiting an employee from discussing matters that arise during an investigative interview is a violation, the Board determines whether the employer’s asserted business justifications for the prohibition outweighs employees’ Section 7 right to discuss such terms and conditions of

employment. *Cello Partnership*, 349 NLRB 640, 658 (2007) citing *Caesar's Palace*, 336 NLRB 271, 272 (2001).

2. Analysis

In the present case, record demonstrates that, contrary to the ALJ's finding, Respondent violated the Act. More specifically, Jackson admitted that she knew Elias wanted to file a sexual harassment complaint, that she was aware that Elias had discussed filing this complaint with other employees, and that Elias had obtained signatures in support of her filing a sexual harassment complaint. (Tr. 187) Jackson further admitted that she told Elias not to obtain statements from employees, and also admitted the allegations that Elias had made threats to employees in order to obtain the signatures lacked merit. (Tr. 187) As such, the ALJ erred by not finding that Respondent violated Section 8(a) (1) the Act when Jackson told Elias not to obtain signatures or written statements from employees. *NLS Group*, supra.

The credible record evidence further demonstrates that the rule Jackson promulgated to prevent Elias from obtaining signatures explicitly restricts Section 7 activity. Alternatively, if it the rule is not viewed as having explicitly restricting Section 7 activity, the rule also would also be violative because: employees would reasonably construe the language of the rule to prohibit Section 7 activity; the rule was promulgated in response to Elias engaging in protected concert activity by obtaining signatures; or the rule was applied to restrict Elias' exercise of Section 7 rights. *NLS Group*, supra.

Elias had a right to discuss the sexual harassment complaint with other employees during Respondent's investigation. *Phoenix Transit System*, supra. Here, because the rule prohibits employees from obtaining signatures or statements in support of matters that arise during an investigative interview, employees would reasonably construe the rule to prohibit

Section 7 activity. *Phoenix Transit System*, supra at 510 (rule, originally promulgated during the course of an investigation, prohibiting employees from engaging in protected concerted activity in relation to a sexual harassment investigation is a violation of Section 8(a)(1); *NLS Group*, supra.

The ALJ found that Jackson's prohibition was not unlawful, but meant to "to prevent further disruptions at the store." (ALJD 11:38-39) However, Jackson never proffered such a reason. The only reason Jackson gave in her testimony regarding the prohibition was that Respondent wanted to conduct the investigation regarding Elias' sexual harassment complaint because employees were uncomfortable being approached by Elias. (Tr. 173) Board law has never allowed for such a blanket prohibition against employees engaging in concerted activities, and only allows for such a prohibition in limited, egregious circumstances. For example, in *Caesar's Palace*, 336 NLRB 271 (2001), the Board found the employer did not violate the Act by instructing employees to not discuss an on-going drug investigation, as there where there was a legitimate concern about employees being in danger, evidence being destroyed, and testimony being fabricated. None of these considerations are present in this matter. A year later, in *Phoenix Transit System*, 337 NLRB 510, 510 (2002) the Board affirmed its established policy, and found that an employer violated the Act by prohibiting employees from discussing their sexual harassment complaints among themselves.

Here, Respondent had no legitimate business justification for its prohibition. Elias' solicitation for witness signatures or statements is analogous to the solicitation of union authorization cards or union membership. The ALJ failed to view Respondent's alleged legitimate business justification in its proper context. More specifically, the Board has held that an employee's subjective belief that union solicitation constitutes harassment cannot,

without more, deprive that solicitation of the protection of the Act. *Nicholas County Health Care Center*, 331 NLRB 970, 982-983 (2000). In addition, the Board has held that Union solicitations do not lose their protection simply because a solicited employee is the subject of persistent solicitation and feels “bothered,” “harassed” or “abused” by them. *Frazier Industries, Co.*, 328 NLRB 717, 718-719 (1999). Accordingly, that ALJ erred when he failed to find that Respondent violated the Act by promulgating the rule.

Alternatively, Jackson’s directive to Elias should have been viewed as an unlawful oral re-promulgation of Respondent’s unlawful no solicitation/distribution policy. The Board previously found Respondent’s solicitation/distribution rule violative. See *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 85 (January 31, 2011) (*Fresh & Easy I*) and *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 145 (April 28, 2011) (ALJD 2; GCX 2; 3).

Specifically in *Fresh & Easy I*, Respondent’s solicitation/distribution policy, which it has maintained in handbook distributed to employees (Handbook) at its facilities across the United States, declares the following:

Knowing When Solicitation is OK [at page 13]

We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation of team members during working time for any purpose.... We also prohibit the distribution of literature during working time or on Company premises for any purpose.... And keep in mind that violations of this policy could lead to discipline – they could even cost you your job. (GCX 1(e); GCX 4:13)

Although Respondent claimed it had revised the solicitation/distribution policy by defining “working time,” the ALJ found that it had not been adequately disseminated to employees and accordingly was violative of the Act. (ALJD 9) The revised policy also defined solicitation as “any written or verbal request asking for donations, help or support for any cause) and prohibited solicitation for any purpose in any selling areas of the facility during business hours on in working areas when associates are on working time. (ALJD 4:39-44)

Elias sought to assistance and support from employees by soliciting their respective signatures or statements. Jackson's directive that Elias not obtain signatures or statements from employees in support of her sexual harassment complaint closely mimics Respondent's unlawful solicitation/distribution policy, and likewise--Jackson's directive is also violative of the Act.

C. The ALJ Erred by not finding Respondent Unlawfully Interrogated Elias

During the course of events, Respondent not only promulgated an overly broad and discriminatory rule prohibiting Elias from obtaining statements or signatures from co-workers regarding sexual harassment complaints, but Jackson also interrogated Elias because she engaged in protected concerted activity. The ALJ erred by not reaching the merits of the interrogation allegation, and by failing to find a violation.

1. Legal Standard

In considering communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

Although interrogation is not per se unlawful or objectionable, the test is whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984). In evaluating the "totality of the circumstances," the Board considers such factors as whether the interrogated employee is openly and actively engaged in protected activity, the background of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, the truthfulness of the reply, whether a

valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances against reprisals. *Rossmore*, supra, at 1178 fn. 20; *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). See also, *Medcare Associates, Inc.*, 330 NLRB 935, (2000) (to determine whether an interrogation occurred, the Board looks at the history of employer hostility; the nature of the information sought; the identity of the questioner; the place and method of the questioning; and the truthfulness of the reply).

2. Analysis

Here, Jackson's questions to Elias regarding whether she had a statement that she asked employees to sign, and why Elias had employees sign the statement—clearly is unlawful interrogation. (Tr. 172)

The first *Bourne* factor relates to how Respondent deals with concerted activity. Here, Jackson's questioning takes place against a background of hostility. In addition to Respondent's unlawful overly-broad and discriminatory handbook rules, other events contributed to hostility against Elias and her engaging in protected concerted activity. More specifically, supervisors Churley and Anderson had both reported to Respondent that Elias had threatened employees with regard to Elias obtaining signatures for her statement, Yates filed a similar claim against Elias with Respondent, and Hamner lodged a claim against Elias regarding profanity. All of these complaints, which were later determined by Respondent to be meritless, combined to place Elias in an unfavorable light. Under these circumstances, Jackson, who had received all of these negative complaints about Elias, interrogated Elias, whom she had never met or spoken to before Elias had engaged in protected concerted activities.

The second *Bourne* factor, the nature of the information sought, involves an attempt to have Elias confirm the identity of employees involved in the discussion about the sexual harassment complaint, the identity of employees who signed Elias' statement, and the purpose of the statement. The questioner was Jackson, Respondent's Employee Relations Manager from the corporate office. As to place and method of interrogation, unbeknownst to Elias, Jackson had already scheduled previous interviews with the other employees involved, and called Elias at the store while she worked. There was nothing informal about Jackson's questions and remarks, she wanted answers and she wanted them immediately. During one part of their conversation, Jackson told Elias, who had made a reasonable suggestion regarding the viewing of the surveillance tapes, to not tell her how to do her job. Jackson wanted to know about the statement and its purpose, to support her sexual harassment complaint. As to the truthfulness of the reply, Elias answered truthfully.

When viewed under the "totality of the circumstances" test it is clear that the interrogation set forth above violated the Act. Jackson violated Section 8(a) (1) of the Act by interrogating and threatening Elias. *Miller Electric Pump & Plumbing*; supra; *Rossmore*, supra; *Shamrock Foods Co.*, 337 NLRB 915, 918 (2002)(Board affirmed administrative law judge's finding that employer violated Section 8(a)(1) of the Act by questioning an employee as to identity of employees who had signed authorization cards or who were engaged in union activity).

IV. CONCLUSION

It is respectfully submitted that the record amply demonstrates that Respondent has violated Sections 8(a) (1) of the Act as alleged. The General Counsel urges the Board to issue an appropriate remedial order requiring Respondent to: 1) post an appropriate notice; and 2) and provide whatever other relief the Board deems just and necessary to remedy Respondent's violations of the Act.

Dated at Phoenix, Arizona, this 21st day of May 2012.

Respectfully submitted,

/s/ William Mabry III

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CERTIFICATE OF SERVICE

I hereby certify that a copy of THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in FRESH & EASY NEIGHBORHOOD MARKET, INC., Case 28-CA-064411, was served by E-Gov, E-filing, and via email on this 21st day of May, 2012 on the following:

Via E-Gov, E-Filing:

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