

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

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FRESH & GREEN'S OF WASHINGTON DC, LLC	)	
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Respondent,	)	
	)	
and	)	Case 5-CA-065595
	)	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 400	)	
	)	
Charging Party.	)	
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**RESPONDENT FRESH & GREEN'S REPLY BRIEF  
TO THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF**

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**Dated: August 1, 2012**

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## **I. SUMMARY OF REPLY ARGUMENT**

The Acting General Counsel's answering brief unsuccessfully attempts to support the erroneous conclusion reached by the Administrative Law Judge ("ALJ") that Maria Yliquin was selected for the reduction in force in September 2011 because of her union activities. The Acting General Counsel repeatedly attempts to characterize Yliquin's termination in terms that are not supported by the record evidence. He ignores the undisputed fact that Yliquin and Amireh were terminated as part of a chain-wide reduction in force that impacted a total of 47 employees. As such, the Acting General Counsel highlights the error made by the ALJ when the ALJ ignored mostly undisputed evidence that Yliquin was one of six employees at the Washington, D.C. store selected for the reduction in force for legitimate reasons wholly unrelated to her conduct as a shop steward.

The Acting General Counsel also attempts to deflect from the ALJ's clear error of restricting the introduction of relevant evidence at the hearing regarding Sally Crabbe, the other shop steward at the store. However, the Acting General Counsel does not and cannot refute that the ALJ refused to permit relevant evidence regarding Crabbe's shop steward activities, and then speculated that Yliquin was more aggressive than Crabbe as a shop steward in finding a violation of the Act. The ALJ cannot restrict evidence regarding Crabbe's steward activities – evidence that was crucial to Respondent's defense to the allegation that Yliquin was terminated for her union activities – and then reject Respondent's defense based on insufficient evidence.

Further, the Acting General Counsel does not refute the numerous undisputed facts cited by Respondent which establish the absence of union animus by Respondent and Huffman in this case. The Acting General Counsel attempts to side-step these undisputed facts in his answering brief, but he cannot, since under *Wright Line* he must show that animus against union activity was the motivating factor in Respondent's challenged conduct. The ALJ clearly erred by

ignoring the overwhelming record evidence in reaching the conclusion that Yliquin was selected for the reduction in force because of her shop steward activities.

For the reasons set forth herein and in Respondent's Exceptions to the ALJ's Decision and Brief in Support of its Exceptions, the ALJ's conclusion that Yliquin was discharged in violation of the Act should not stand.

## **II. ARGUMENT<sup>1</sup>**

### **A. The Acting General Counsel Fails To Rebut The Fact That The ALJ Erred By Finding That Yliquin Engaged In Protected Conduct When She Did Not**

The Acting General Counsel's answering brief begins with an attack on Huffman's reasons for terminating Yliquin. But it is the Acting General Counsel's initial burden to establish that Yliquin engaged in protected conduct, and that Respondent's animus towards such conduct was a motivating factor in her termination. *See Tasty Baking Co.*, 330 NLRB 560, 561 n.2 (2000) (holding "to establish a violation under Section 8(a)(3), the General Counsel must show that animus against the union activity was a motivating factor in the respondent's conduct ...."); *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980). The Acting General Counsel fails to rebut the fact that the ALJ seriously erred by finding that Yliquin engaged in protected conduct when she did not.

As discussed in Respondent's exceptions brief, the ALJ found that Yliquin engaged in protected conduct when she allegedly tried to resolve: (1) a brief lapse in health insurance coverage for employees; (2) a payroll error that resulted in certain employees not receiving pay for a thirty-minute lunch period; and (3) the store's failure to initially post a work schedule by seniority. The ALJ relied solely on Yliquin's alleged involvement with these three issues, in her

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<sup>1</sup> References to the ALJ's decision will appear as "ALJD" and references to the hearing transcript will appear as "Tr. \_\_". References to exhibits introduced at the hearing will appear as "GC Ex. \_\_" for the Acting General Counsel Exhibits or "R. Ex. \_\_" for Respondent Exhibits. References to the Acting General Counsel's Answering Brief will appear as "GC Brief."

capacity as a shop steward, in finding that she engaged in protected conduct. Notably, the Acting General Counsel does not deny that Yliquin never raised the health insurance issue with Huffman or any other manager at the Company. Therefore, there is no dispute that the ALJ erred by finding that Yliquin engaged in protected conduct by attempting to correct this issue. ALJD at 6, lines 31-35, 48-52; at 7, line 1.

The Acting General Counsel claims that the record supports the ALJ's finding that Yliquin complained about the pay error issue on behalf of other employees. However, Huffman credibly testified that Yliquin only complained about *her* paycheck. Tr. 234-235. That Yliquin was a shop steward does not automatically convert any and all of her dealings with her employer into union activity. *See The Tampa Tribune*, 346 NLRB 369, 370 (2006) (employee's actions "do not automatically constitute 'union activity' simply because he also happens to be a union steward or official").

Further, while Huffman believed that the manner in which Yliquin approached Huffman about her paycheck was disrespectful, the record reflects that Huffman did not single out Yliquin for raising the issue itself. Huffman testified, without contradiction, that approximately 16 other employees were impacted by the payroll error and that she spoke with each of them to assure them that the issue would be corrected the next pay cycle. Tr. 234-237. Indeed, *before* Yliquin approached Huffman, the issue had already been identified and fixed. Tr. 234-235. Aside from Yliquin's self-serving testimony, there was not a single witness presented by the Acting General Counsel or the Charging Party who asserted that Huffman was upset at them for the payroll error. The notion that Huffman would be upset at the impacted employees for the Company's payroll error simply does not make sense, and is clearly contradictory to the evidence in the

record of Huffman's respectful treatment of employees. Tr. 81-82, 184, 214-215, 220, 222, 231-234, 252-253, 258-259.

As further evidence of Huffman's credible testimony, Huffman admitted that Yliquin initially approached her about the issue with a work schedule not being posted by seniority. Tr. 249-251. Even though the problem was caused by Fresh & Green's computer system, Huffman's reaction was to fix the schedule immediately. There is absolutely no evidence that Huffman bore any animus towards Yliquin for raising this issue, which was also brought up by ten other employees, including Crabbe. *Id.* The testimony by the Charging Party's representative, Richard Wildt, that Huffman was upset about Yliquin "riling up" employees about the problem with the schedule is plainly unbelievable. Tr. 151-152. Yliquin herself did not testify that Huffman reacted adversely to her for raising this issue, and that testimony undoubtedly would have been elicited by counsel for the Acting General Counsel or the Charging Party had it been true. Tr. 61. Wildt clearly made up this self-serving testimony, and the ALJ provided no rationale for relying on it. For the reasons set forth in Respondent's exceptions brief and herein, Wildt's testimony should not be credited.<sup>2</sup>

Just as the ALJ correctly concluded that there was no evidence that Huffman resented or retaliated against Amireh for his alleged protected conduct, ALJD at 7, lines 29-30, the ALJ should have reached the same conclusion with respect to Yliquin. The record evidence equally fails to establish that Yliquin was retaliated against for her alleged protected conduct.

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<sup>2</sup> The Acting General Counsel's claims that Huffman did not deny Wildt's testimony and that Huffman was not asked by Respondent's counsel about her discussion with Wildt regarding Yliquin are simply wrong. The record establishes that Huffman and Wildt had a single conversation about Huffman's concerns with Yliquin's behavior, and that Huffman's version of the discussion is vastly different than Wildt's version. Tr. 151-152 (Wildt), 240 (Huffman). Huffman candidly testified on direct examination that she spoke with Wildt "a long time ago," clearly before the store was operated by Fresh & Green's, and asked Wildt to talk to Yliquin about how she spoke to Huffman and others. Tr. 240. As explained above, the ALJ erred by relying on Wildt's testimony.

B. The Acting General Counsel Points To No Evidence That Supports The ALJ's Finding That Yliquin Was An "Aggressive" Shop Steward

The Acting General Counsel does not deny that Yliquin was involved in only a single grievance as a shop steward when the store was operated by SuperFresh. However, he attempts to support the "aggressive" shop steward label given to Yliquin by the ALJ by claiming that Yliquin engaged in a "great deal of union activity."<sup>3</sup> GC Brief at 11. The Acting General Counsel's claim is clearly not supported by the record. The Acting General Counsel relies on Yliquin's involvement in the pay error and work schedule issues discussed above; however, both of these issues were raised by several employees, including the other shop steward, Crabbe. Tr. 243-244, 248, 250-251. He also points to Yliquin's telling Huffman about other employees allegedly drinking on the job (not protected conduct, nor relied on by the ALJ); Yliquin's participation in the June 2011 Union "rally" (attended by 50 other employees); and Yliquin's handing out of Union authorization cards (no evidence of Company knowledge, and Company had already expressed its intent to recognize and bargain with the Charging Party prior to opening the store).

The Acting General Counsel also relies on Wildt's self-serving, baseless description of Yliquin as being an "aggressive" shop steward. Wildt's conclusory opinion of Yliquin is of no relevance, and his independent knowledge of Yliquin's union activities cannot be imputed to Respondent in any event.

The record evidence clearly does not support the ALJ's conclusion that Yliquin was an "aggressive" shop steward. And, as discussed below, there is no evidence that Yliquin was any

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<sup>3</sup> The Acting General Counsel asserts that he has no burden of showing that Yliquin was an "aggressive" shop steward. Yet, he does not and cannot deny that the ALJ's ultimate conclusion that Respondent violated the Act hinges on the ALJ's finding that Yliquin was "aggressive" as a shop steward. ALJD at 6, lines 47-48; at 7, lines 1-3, 14-15. As explained herein and in Respondent's exceptions brief, the ALJ's clearly erred in reaching this conclusion.

more aggressive than Crabbe, the more senior shop steward at the store.

C. The Acting General Counsel Does Not Refute That The ALJ Excluded Relevant Evidence Regarding The Union Activities Of The Other Shop Steward

The Acting General Counsel does not deny that the ALJ shut down testimony regarding the shop steward activities of Crabbe, nor does he claim that such evidence is irrelevant. He advances several arguments against Respondent's contention that the ALJ violated Respondent's due process rights, however, none of which are compelling.

The Acting General Counsel initially argues that he is not required to show that the Company retaliates against all protected conduct in order to prove his allegation that Yliquin was retaliated against for her union activity. GC Brief at 9-10. Certainly, however, evidence establishing that Yliquin was no outlier with respect to her union activity undermines the assertion that Yliquin was terminated due to animus toward such activity. *See, e.g., Hyatt on Union Square*, 265 NLRB 612, 616 (1982) (affirming discharge of one of 22 shop stewards, who was also one of a number of employees on union's negotiating committee, active in strike, and one of the union's representatives on safety committee, as the General Counsel failed to establish that employer was hostile toward employees who engaged in such activities). The ALJ obviously felt the need to attempt to distinguish Yliquin from Crabbe, the senior shop steward at the store, who was not selected for the reduction in force. The ALJ committed serious error by denying the admission of evidence on this crucial issue, and then speculating that Yliquin was more aggressive than Crabbe.

The Acting General Counsel conveniently leaves out of his answering brief the part of the record where the ALJ made it crystal clear that he was not going to entertain any testimony regarding the comparison of Crabbe's and Yliquin's steward activities.

MR. BEATTY: Well, he's already testified that Ms. Yliquin was aggressive. I'd like to know if Ms. Crabb [sic] was equally as aggressive.

JUDGE BIBLOWITZ: Look, I'm not going to litigate the aggressiveness of the shop stewards. It's a subjective thing. And we could spend days. Sustained.

Tr. 159.

Given the ALJ's definitive ruling on this issue at the hearing, it was shocking to see that his decision was replete with references to Yliquin as an "aggressive" shop steward. But it was even more shocking that the ALJ then speculated that Yliquin was more aggressive than Crabbe in rejecting Respondent's defense that the store's retaining of Crabbe undermined the Complaint allegations. Respondent's due process rights were clearly violated by the ALJ, and his decision should be overturned on that basis alone.<sup>4</sup>

Despite the ALJ's crucial error, the record evidence shows that there was no material difference between the shop steward activities of Yliquin and Crabbe. Crabbe was the more senior shop steward, Tr. 71, 156, 243, and it is uncontradicted that Crabbe raised grievances and other employee issues with Huffman, including the issues regarding the lapse in health insurance and the work schedule after the store became Fresh & Green's. Tr. 248, 250-251. The ALJ clearly erred by speculating that Crabbe may not have been as aggressive as Yliquin while serving as a shop steward. ALJD at 7, lines 6-9.

D. Huffman's Reasons For Selecting Yliquin For The Reduction In Force Were Legitimate And Unrelated To Her Union Activities

The focus of much of the Acting General Counsel's brief is on Huffman's reasons for selecting Yliquin for termination. The Acting General Counsel's arguments are misplaced,

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<sup>4</sup> The Acting General Counsel also cites to an objection by Respondent's counsel during the hearing to a question by the Acting General Counsel to Wildt about whether Crabbe was as aggressive as a shop steward as Yliquin. GC Brief at 10; Tr. 159. The Acting General Counsel's question was improper, as it would have elicited another biased, conclusory opinion by Wildt. As such, the ALJ was correct in sustaining Respondent counsel's objection.

however, because he ignores the undisputed fact that Yliquin (and Amireh) were terminated as part of a chain-wide reduction in force precipitated by an unexpected drop in sales at all of the eight stores. The reduction in force impacted 47 employees, all of whom were terminated pursuant to a 90-day probationary period in the collective bargaining agreements. Tr. 187-188; R. Ex. 1. But for the unexpected low sales, the Company and its employees would not have been in the unfortunate situation of a reduction in force. Indeed, Huffman testified that the selection process was “very difficult.” Tr. 224.

Huffman credibly testified that Yliquin was selected for the reduction in force because of issues with her workplace behavior. Specifically, Yliquin was disrespectful toward management, vendors and co-employees, and Huffman provided examples of each. Tr. 234-235, 237, 272. Notably, most of Huffman’s testimony regarding Yliquin’s behavioral issues was undisputed. The Acting General Counsel sets forth various arguments as to why Huffman’s reasons for selecting Yliquin for the reduction in force should not be credited. However, they all miss the mark.<sup>5</sup>

For example, the Acting General Counsel claims that Huffman’s testimony is inconsistent because Huffman denied terminating Yliquin for raising the pay error issue while also citing to Yliquin’s behavior during their discussion on that issue as an example of Yliquin’s disrespect toward management. GC Brief at 3. Yliquin’s raising of the pay error issue itself, however, is clearly distinct from Yliquin’s disrespectful behavior toward Huffman. *See, e.g., Sys-T-Mation, Inc.*, 198 NLRB 863, 864 (1972) (affirming discharge of prime union organizer for his attitude toward the company, notwithstanding employee’s complaint over his raise, as there was no evidence of anti-union animus or disparate treatment of union advocates).

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<sup>5</sup> The Acting General Counsel also curiously argues that if Huffman admitted to discharging Yliquin for engaging in protected conduct (which Huffman clearly did not), such admission would be proof of a Section 8(a)(1) violation. GC Brief at 15. There is no dispute, however, that this case is governed by *Wright Line*.

In addition, that Huffman did not warn or discipline Yliquin for her disrespectful or other workplace behavior is of no consequence. Again, Yliquin was terminated as part of a reduction in force where the criteria used at all stores was overall job performance. The fact that Huffman did not discipline Yliquin, despite Yliquin's behavioral issues, undercuts the assertion that Huffman was out to get Yliquin due to her union activities. *See, e.g., Hyatt on Union Square*, 265 NLRB at 616 ("If the [employer] were trying to set up [shop steward] for discharge it is most unlikely that the [steward's] evaluation [issued a month and a half before the steward's discharge] would have been so favorable.").

Similarly, that Huffman recommended that Yliquin (and Amireh) could be considered for rehire shows that Huffman bore absolutely no animus towards Yliquin. Tr. 254; R. Ex. 14-15. The Acting General Counsel asserts that Huffman's checking of the rehire box for Yliquin is inconsistent with Huffman's reasons for selecting Yliquin for termination. GC Brief at 4-5. That Yliquin's issues with her workplace behavior did not rise to the level to warrant discipline or make her ineligible for consideration to be rehired does not mean that her behavior did not warrant her being selected for the reduction in force.<sup>6</sup> What it does demonstrate, however, is that Huffman bore no animus against Yliquin for being a shop steward.

As discussed in Respondent's post-hearing brief and exceptions brief, Huffman's decisions for selecting Yliquin for the reduction in force are well-supported by the record evidence. These reasons, most of which were undisputed, were legitimate and clearly unrelated to Yliquin's protected conduct.<sup>7</sup> *See Posados de Puerto Rico Associates*, 247 NLRB 1421, 1422

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<sup>6</sup> The Acting General Counsel points out that Huffman checked the "do not rehire" box for employees terminated post-September 2011 for job performance issues, such as no call/no show and repeated absences. Tr. 260-261; R. 5-6. But, this simply further highlights the different circumstances under which Yliquin and Amireh, and the 45 other employees, were separated from the Company as part of a reduction in force.

<sup>7</sup> As such, the ALJ's finding and the Acting General Counsel's assertion that an unlawful motive can be inferred from the Company's stated reasons for selecting Yliquin for the reduction in force are incorrect.

(1980) (“It is [] fundamental that an employer may discharge an employee for any reason or no reason except where motivated by the employee’s union or other protected activity.”).

Huffman’s business judgment in selecting Yliquin (and Amireh) for the reduction in force was clearly reasonable, and therefore should not be rejected. *See Colombian Distribution Servs., Inc.*, 320 NLRB 1068, 107-1071 (1996) (ALJ did not find employer’s rationale to be so unreasonable to warrant a substitution of his business judgment for that of the employer). In this case, those judgments were close calls that were difficult for Huffman to make. Further, it is apparent that the Charging Party was going to contest every name Huffman placed on the reduction in force list, regardless of the employee’s involvement in union activities. In sum, none of the six employees were chosen because they engaged in union activities.

### **III. CONCLUSION**

Given the lack of evidence of any union animus on the part of Huffman or the Respondent, the absence of any disparate treatment of Yliquin due to her status as a shop steward, and no independent Section 8(a)(1) violations, the Acting General Counsel has not shown by a preponderance of the evidence that Yliquin was selected for the reduction in force because of her union activities. As such, the Respondent respectfully urges the Board to reverse the ALJ’s decision in accordance with its Exceptions and to dismiss the Complaint in its entirety.

Respectfully submitted,

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Dated: August 1, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 1, 2012, a copy of the foregoing Respondent Fresh & Green's Reply Brief To The Acting General Counsel's Answering Brief, which was filed today via the Board's E-Filing System, were served on the following by electronic mail:

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