

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

**DON CHAVAS, LLC d/b/a
TORTILLAS DON CHAVAS**

and

Case 28-CA-063550

MARIELA SOTO, an Individual

and

Case 28-CA-067394

ANAHI FIGUEROA, an Individual

BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS

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I. INTRODUCTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, the Acting General Counsel (General Counsel) files this Brief in Support of Exceptions to the Decision of Administrative Law Judge Christine E. Dibble, JD-04-13, issued on February 15, 2013. Other than what is excepted to herein, the findings of the Administrative Law Judge (ALJ) are appropriate and proper.

The ALJ erred in dismissing the allegation that Respondent transferred Anahi Figueroa (Figueroa) to the evening shift to force her to quit, in violation of Section 8(a)(1). In her decision, without considering other independent violations of Section 8(a)(1), the ALJ concluded that the record was devoid of evidence that Respondent continued to harbor animus against Figueroa's protected activity. The Board should reverse the ALJ's legal and factual conclusions, and find that in transferring Figueroa from the morning to the night shift in September, Respondent forced Figueroa to quit, a violation of Section 8(a)(1) of the Act.

II. FACTS

Figueroa set herself apart from other workers at Respondent's tortilla factory by daring to voice shared complaints to the owner of the company, Jesus Arturo Olguin (Olguin). It is clear that Respondent perceived Figueroa as troublemaker; an individual unwilling to conform to the subpar working conditions in the factory, especially the obnoxious conduct of the owner's son and supervisor, Adrian Olguin (Adrian). (ALJD at 5 – 6, 9; Tr. 471, 472 - 483)

During her employment with Respondent she was subject to aggressive outbursts from Adrian. The first occurred July 4, after Soto had complained to Olguin about Adrian's sexual advances towards women in the factory. (ALJD at 10) Adrian confronted Figueroa and Soto, snapping his fingers at them, shouting that they could "fuck off" and that he did not give a fuck if they sued him for sexual harassment. (ALJD at 10; Tr. 484, 581) To remove Soto from the workplace, Respondent transferred her to a night shift, knowing she could not work that shift. (ALJD at 16 - 17) The second incident Figueroa experienced with Olguin occurred a few months later, on September 4. Figueroa and her co-workers complained to Adrian that the factory was excessively hot and that they could not work with the short staffing that existed that day. (ALJD at 11 - 12) Figueroa, along with Pineda, demanded that Adrian resolve the short staffing to avoid working in the strenuous heat. (Id; Tr. 495 - 496) Their fortitude was met by Adrian's profane outburst. (ALJD at 12) Pineda and Figueroa walked out of the factory, and later Olguin called and threatened to fire them if they did not immediately return to the factory. (Tr. 374, 443, 496, 531)

Despite having lost her job for protesting the conditions in the factory, Figueroa was brave enough to protest's Adrian's conduct when she returned to work at the factory two weeks later. Around mid-September, Figueroa accepted to work the morning shift at the factory, Friday

through Monday from 4:00 a.m. to 4:00 p.m. (Tr. 497 – 98, 533, 535) On Monday, toward the end of her shift, she complained to Olguin of Adrian unbagging tortillas she had packaged. (Tr. 501) Olguin responded that not even he could control Adrian. (Tr. 501)

Figueroa had not been scheduled to work until the following Friday, and reported to work the morning shift that day. (ALJD at 13 – 14) She attempted to call Olguin when she learned from workers in the factory that she had been abruptly transferred to the night shift. (Tr. 501-503) At 8:00 a.m., she spoke on the telephone to Adrian. (Tr. 506) Figueroa questioned why he had changed her shift knowing she could not work the night shift because she had to care for her daughters. (Tr. 506) Adrian said he didn't know it was his dad's decision. (Tr. 506) Respondent never contacted Figueroa again, and never told her that she would be back on the morning shift. (Tr. 514)

Figueroa had consistently worked the morning shift from Friday through Monday with the exception of a total of four days that she worked in the evening while her mother was ill. (ALJD at 13, Tr. 76, 512, 542) She found it was too difficult for her to work that shift, and told Adrian that she preferred to work the morning shift to care for her daughters at night. (Tr. 507, 511)

III. ARGUMENT

A. The ALJ erred in finding the record lacked evidence that Respondent continued to harbored animus against Figueroa's concerted activity, a motivating factor in the decision to transfer her to the night shift Section 8(a)(1). [Exceptions No. 1, 2]

In dismissing the General Counsel's allegation that Respondent caused the discharge of Figueroa in September 2011, the ALJ overlooked Respondent's prior unfair labor practices and animus against workers who voiced complaints. (ALJD at 21) Animus against an employee's protected activity may be proven short of direct evidence; it can be inferred from the record as a

whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Here, the ALJ did not take into consideration Respondent's similar action of transferring Soto, to cause her discharge, in response to her protected activity. (ALJD at 16 – 18) The ALJ also failed to consider that Olguin had threatened and fired Figueroa two weeks earlier; circumstantial evidence which is sufficient to show requisite animus against Figueroa. (ALJD at 18 – 19) See also, *Tama Meat Packing Corp. v. NLRB*, 575 F.2d 661, 662-663 (8th Cir. 1978) (evidence adduced in 1975 unfair labor proceedings to establish animus in 1976 discharge proceeding was proper because of close proximity in time and because the animus in the prior adjudication was supported by other evidence of animus in the case pending); *NLRB v. Clinion Packing Co.*, 468 F.2d 953, 954 (8th Cir. 1972) (evidence of employer's prior unfair labor practice could be used to demonstrate animus in pending case because all the activities complained of in the prior and pending case occurred within approximately a 1-year period and there was other evidence of animus in the case pending).

Moreover, the ALJ did not consider other instances in the record showing Respondent's animus against Section 7 activity. For instance, Adrian telling Figueroa and Soto to "fuck off" because they complained against his sexual conduct, is further circumstantial evidence of Respondent's discriminatory animus. (Tr. 484) *Meritor Automotive, Inc.*, 328 NLRB 813 (1999), citing *American Packaging Corp.*, 311 NLRB 482 (1993) ("[i]t is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful.")

In addition to not considering the other independent violations, discussed above, the Judge also erred by not considering the timing of Figueroa's prior concerted activity and complaint to Olguin in relation to the time Respondent transferred her to work the night shift;

this is circumstantial evidence of Respondent's discriminatory motive for transferring Figueroa. *Adco Electric*, 307 NLRB 1113, 1128, (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993) (evidence of suspicious timing support an inference of unlawful motive); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). In the instant case, Respondent transferred Figueroa days after she once again complained to Olguin about Adrian's conduct, which inevitably reinforced to Olguin that his son's conduct would continue to create issues with the workers, and that Figueroa was a worker who could not be trusted in the workplace to keep quiet about working conditions. The timing of Respondent transfer of the outspoken and bold employee, who dared to go on strike weeks earlier, is no coincidence. Respondent transferred Figueroa to underscore that it did not want employees speaking up against the company or complaining against Adrian.

The transfer of Figueroa, viewed alongside the environment Respondent created, is sufficient for the General Counsel to prove its burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd.* 662 F.2 899 (1st Cir. 1981). Figueroa dared to protest Adrian's conduct; she protested the poor conditions in the factory – by going on strike because of those poor conditions; Respondent was aware of her concerted activity; Respondent repeatedly harbored animus against workers who complained; and Respondent's reasons for transferring her to the afternoon shift are pretext.

Accordingly, the General Counsel has proven its burden that Respondent transferred Figueroa to the night shift knowing she had to care for her daughters. *E & L Plastics Corp.*, 305 NLRB 1119, 1124 (1992) (past union activities of employees supported a finding of illegal animus). Furthermore, Respondent knew that she could not report to work that shift. It is

undisputed that Figueroa told Adrian that she could not work the evening shift, after trying to do so a total of four days in her employment, because of her daughters. (Tr. 507, 511) Respondent knew that by assigning Figueroa to quit, she would be put in an indefensible situation.

Respondent did not, and cannot, show that it would have transferred Figueroa to the night shift, absent her concerted activity. *American Licorice, Co.*, 299 NLRB at 148 – 149; *Baker, Harold W., Co.*, 71 NLRB at 60-61. Accordingly, Respondent violated 8(a)(1) of the Act by transferring Figueroa to a shift she could not work, forcing her to quit.

Dated at Albuquerque, New Mexico, this 29th day of March 2013.

Respectfully submitted,

/s/ Sophia Alonso

/s/ John T. Giannopoulos

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S EXCEPTIONS in DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS, Cases 28-CA-63550, et al. was served by E-Gov, E-Filing, and E-Mail on this 29th day of March, on the following:

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