

MUNGER CHADWICK, P.L.C.

National Bank Plaza
333 North Wilmot, Suite 300
Tucson, Arizona 85711
Telephone: (520) 721-1900
Facsimile: (520) 747-1550

John F. Munger [*jfmunger@mungerchadwick.com*]
Arizona State Bar No. 003735

Attorneys for Defendant Don Chavas, LLC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

<p>In Re the Matter of:</p> <p>MARIELA SOTO, an individual, AND ANAHI FIGUEROA, an individual,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS, an Arizona limited liability company,</p> <p style="text-align: center;">Defendant.</p>	<p>Case No.: 28-CA-063550</p> <p style="text-align: center;">28-CA-067394</p> <p style="text-align: center;">RESPONDENT'S ANSWERING BRIEF</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Defendant DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS (“Don Chavas”) hereby submits its Answering Brief. This Brief is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The decision of the ALJ, finding that Respondent did not violate section 8(a)(1) of the Act is fully supported by the record. Said another way, based on the record evidence, there is no way the ALJ could have found otherwise. The evidence is clear that at the time of her shift change, Figueroa was not engaged in concerted activity and any prior alleged violations of the Act do not demonstrate that Respondent continued to harbor discriminatory animus towards Figueroa because she was rehired by Respondent. Accordingly, the Board should find that Respondent did not violate the Act by transferring Figueroa to another shift. General Counsel has not met its burden under the *Wright Line* test.

II. FACTS

During the weekend of September 4, 2011, Figueroa and Pineda were fired from Don Chavas when they engaged in a walk-out to protest the lack of a fourth worker. Figueroa returned to work for Respondent approximately two weeks later. Figueroa continued working the morning shift Friday through Monday.

Approximately a week later, she arrived at work for the morning shift but was informed that she had been transferred to the evening shift. Figueroa questioned Adrian about the shift change and was informed that it was Jesus Olguin's decision. She made no attempt to contact Jesus Olguin and thereafter failed to show up for the shift. Figueroa quit her job and thereafter brought charges with the National Labor Relations Board seeking reinstatement and financial compensation after having quit her job.

III. ARGUMENT

General Counsel argues that the ALJ failed to take into consideration Respondent's alleged prior violations of the Act concerning Soto and Figueroa. General Counsel also argues that the ALJ erred in not considering other instances on the record of animus against Section 7 activity as well as failing to

consider the timing of Figueroa's prior concerted activity and complaints to Respondent. GCB at 4.¹ General Counsel's argument fails for several reasons. First and foremost, at the hearing, General Counsel alleged that Figueroa was transferred for complaining to Respondent that Adrian Olguin had unpacked her tortillas. TR:501:2-5. Figueroa presented no other instances of complaints or grievances after being rehired. Accordingly, there can be no violation of the Act because Figueroa did not engage in concerted activity.

Second, the prior alleged violations of the Act alone are insufficient to demonstrate an employer's discriminatory animus, additional and more immediate evidence is required. In this case, the additional evidence could only be Figueroa's complaint about the unpacking of her tortillas, the only complaint alleged subsequent to her rehiring, which is clearly not concerted activity.

Finally, all of the prior alleged violations of the Act and instances of alleged employer animus against Section 7 activity, do not provide additional circumstantial evidence that Respondent harbored any discriminatory animus towards Figueroa. Subsequent to all of this alleged conduct, Respondent rehired Figueroa. If Respondent truly wanted to punish Figueroa for speaking out against Adrian, it would not have rehired her. Respondent's rehiring of Figueroa is direct evidence that Respondent in fact harbored no discriminatory animus towards Figueroa.

A. FIGUEROA DID NOT ENGAGE IN CONCERTED ACTIVITY WHEN SHE COMPLAINED ABOUT ADRIAN UNPACKING HER TORTILLAS

To establish an independent violation of section 8(a)(1), the government must show, *inter alia*, that the employee engaged in concerted activity. *Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995). To be concerted activity, the employee must be engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself. *Manimark Corp. v. NLRB*, 7

¹ References to the Transcript are designated as (TR). References to the ALJ's decision are designated as (ALJD). References to General Counsel's Brief in Support of its Cross-Exceptions are designated as (GCB).

F.3d 547, 551 (6th Cir. 1993); *Meyers Indus. Inc., II*, 281 N.L.R.B. 886, 887 91986); *Meyers Indus. Inc.*, 268 N.L.R.B. 493, 497 (1984).

Here, the record clearly reflects that General Counsel presented evidence of only one complaint by Figueroa subsequent to her being rehired by Respondent, that Adrian Olguin was unpacking tortillas she had previously packed. TR 501:2-5. This complaint was brought only on her behalf and in no way shape or form involved any other employee. This is not concerted activity. General Counsel apparently does not dispute and presents no arguments against the ALJ's finding that this was not concerted activity. Accordingly, the Board should adopt this finding that Figueroa's complaints about Adrian Olguin unpacking her tortillas are not concerted activity. Because there is no concerted activity, there can be no violation of the Act.

Instead, General Counsel argues that prior alleged unfair labor practices involving Soto and Figueroa and the timing of Figueroa's shift change are circumstantial evidence which demonstrates Respondent's continued discriminatory animus towards Figueroa. For the reasons below, this argument also lacks merit.

B. THE PRIOR ALLEGED UNFAIR LABOR PRACTICES ALONE ARE INSUFFICIENT TO ESTABLISH DISCRIMINATORY ANIMUS ON THE PART OF RESPONDENT

General Counsel's theory is, to put it lightly, far-fetched.² General Counsel argues that prior alleged unfair labor practices concerning Soto and Figueroa, coupled with the timing of her shift change

² It should be pointed out that General Counsel's entire theory was devised by the ALJ Christine Dibble. Despite finding against General Counsel on this single count, the ALJ, nevertheless, articulated a theory upon which General Counsel might prevail on appeal. Specifically, the ALJ's decision states the following:

The General Counsel could possibly overcome this deficit [Figueroa's unpacking complaint is not concerted activity] by presenting persuasive evidence that, upon her return, Respondent continued to harbor discriminatory animus against Figueroa such that her transfer and subsequent termination were motivated by her prior concerted protected activity (activity that occurred before her discharge on September 4). However, the record is devoid of such evidence. The record contains minimal testimony or other evidence to support the General Counsel's case on this issue. ALJD 21:30-35.

Not surprisingly, this is exactly General Counsel's theory on appeal.

are circumstantial evidence which demonstrates that Respondent continued to harbor discriminatory animus against her. GCB at 3-5. This argument has no merit whatsoever and is not supported by the evidence.

To support its proposition that the ALJ erred in considering past occurrences, General Counsel relies on two cases which do not advance its argument: *Tama Meat Packing Corp. v. NLRB*, 575 F.2d 661 (8th Cir. 1978) and *NLRB v. Clinton Packing Co.*, 468 F.2d 953 (8th Cir. 1972).

In *Clinton Packing*, the court held that evidence of prior unfair labor practices was **relevant**, not dispositive, in determining whether the employer's subsequent conduct violated the act. *Clinton*, 468 F.2d at 954. Likewise, in *Tama*, the court held that prior adjudications of violations of the act, by themselves are not sufficient evidence to support a finding of present animosity; it must be coupled with present and more immediate evidence to support a finding of animosity. *Tama*, 575 F.2d at 662-63.

It is curious that General Counsel would cite these cases to support its argument. As argued above, the record clearly reflects that subsequent to being rehired, Figueroa did not engage in concerted activity. Therefore, General Counsel's evidence of Figueroa complaining about Adrian unpacking her tortillas cannot serve as a basis for an 8(a)(1) violation. The only evidence General Counsel could in theory rely on are these past occurrences, which pursuant to *Tama* and *Clinton Packing*, cannot support a finding of discriminatory animus absent some more recent, immediate, and compelling evidence.

General Counsel's reliance on prior occurrences, therefore, is unavailing.

Moreover, the prior alleged violations of the act are not circumstantial evidence that Respondent continued to harbor discriminatory animus towards Figueroa. Subsequent to the July events involving Soto, Figueroa, and Adrian and the September events where Figueroa walked out, Respondent rehired Figueroa. If Respondent actually harbored any desire to retaliate against Figueroa for those past occurrences, it would not have rehired her.

Accepting General Counsel's argument that the past occurrences demonstrate Respondent's continued animosity requires accepting the absurd proposition that Respondent continued to harbor animus against Figueroa despite having rehired her after her walkout. Because Respondent rehired Figueroa, it is clear that it harbored no animus against Figueroa. If it had, then it would not have rehired her.

Finally, General Counsel's argument that the timing of the shift change only weeks after her walkout somehow demonstrates that Respondent wished to punish Figueroa for exercising her section 7 rights is preposterous. What the evidence does reflect is the fact that Respondent rehired Figueroa shortly after she abandoned Respondent and her co-workers on September 4, 2011. If anything, Respondent rehiring Figueroa shortly after is direct evidence that Respondent did not harbor any discriminatory animus against Figueroa.

The record here speaks for itself. Figueroa did not engage in concerted activity after being rehired, and the fact that Respondent rehired Figueroa despite the prior alleged unfair labor practices is direct evidence that Respondent did not harbor any discriminatory animus against her for those past occurrences.

IV. CONCLUSION

The record speaks for itself. The ALJ could not have found that Respondent transferred Figueroa in retaliation for her concerted activity because subsequent to being rehired, she did not engage in any concerted activity. Nor do any of the prior alleged unfair labor practices demonstrate that Respondent continued to harbor discriminatory animus against Figueroa. The fact that she was rehired by Respondent demonstrates the exact opposite; that Respondent harbored no animus towards Figueroa at all or else it would not have rehired her. For these reasons, General Counsel's cross-exceptions should be denied and the Board should find that Respondent did not violate the Act by transferring Figueroa.

RESPECTFULLY SUBMITTED this 12th day of April, 2013.

MUNGER CHADWICK, P.L.C.

/s/ John F. Munger
John F. Munger
Attorneys for Defendant

CERTIFICATE OF SERVICE

RE: MARIELA SOTO, an individual, AND, ANAHI FIGUEROA, an individual,
Plaintiffs
vs.
DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS, an Arizona limited
liability company, *Defendant*
CASE NO.: 28-CA-063550 / 28-CA-067394

I hereby certify that a copy of **RESPONDENT'S ANSWERING BRIEF** in the above referenced case was served VIA EMAIL or REGULAR MAIL on this 12th day of April, 2013, on the following:

Via Email

Honorable Mary M. Cracraft
Associate Chief Administrative Law Judge
National Labor Relations Board
Administrative Law Judge Division
901 Market Street, Suite 300
San Francisco, CA 94103-1779
Email: Mary.Cracraft@nlrb.gov

Via Email

Paul R. Irving
Sophia J. Alonso
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004
Email: Paul.Irving@nlrb.gov
Email: Sophia.Alonso@nlrb.gov

Via Email

Nicholas Brown
Secretary to the Deputy Regional Attorney
National Labor Relations Board
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004
Email: Nicholas.Brown@nlrb.gov

Via Regular Mail

Ms. Mariela Soto
1120 East Ganley Road, Trailer #7
Tucson, AZ 85706

Via Regular Mail

Ms. Anahi Figueroa
114 West Laguna Street, Apt. 18
Tucson, AZ 85705

/s/ Sally Flores

Sally Flores, Paralegal
Munger Chadwick, P.L.C.
333 North Wilmot, Suite 300
Tucson, Arizona 85711
Telephone: 520-721-1900/Facsimile: 520-747-1550
saflores@mungerchadwick.com