

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

SFTC, LLC d/b/a SANTA FE
TORTILLA COMPANY

and

Case 28-CA-087842

YOLANDA GALAVIZ, an Individual

and

Case 28-CA-095332

COMITE DE TRABAJADORES DE
SANTA FE TORTILLA

Sophia Alonzo and David Garza, Esqs.,
for the Acting General Counsel.
Jeffrey Toppel, Esq. (Jackson Lewis),
of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Santa Fe, New Mexico, on February 26-28, March 1 and 5, 2013. Yolanda Galaviz filed the charge in Case 28-CA-087842 on August 23, 2012,¹ and the Comite de Trabajadores de Santa Fe Tortilla (the Comite) filed the charge in Case 28-CA-095332 on October 30; the Acting General Counsel (General Counsel) issued the consolidated complaint on January 31, 2013. The complaint alleges that SFTC, LLC d/b/a Santa Fe Tortilla Company (Santa Fe Tortilla) violated Section 8(a)(1) on multiple occasions. It also alleges that Santa Fe Tortilla violated Section 8(a)(3) and (1) by transferring employees Lilian Lopez and Yolanda Rivera to the corn-tortilla production line, reducing the hours of Lopez, Rivera, and Juan Lopez, discharging employees Yolanda Galaviz and Delfina Bruno, thrice suspending employee Jesus Saldana,² and twice issuing written warnings to Rivera, all because employees engaged in protected concerted union activity. Santa Fe Tortilla filed a timely answer that, as amended at the hearing, admitted the allegations

¹ All dates are in 2012 unless otherwise indicated.

² Also known as Luis Juarez.

in the complaint concerning interstate commerce and jurisdiction and the relevant supervisory and agency status; it denied committing any unfair labor practices.³

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Santa Fe Tortilla, I make the following

FINDINGS OF FACT

I. JURISDICTION

Santa Fe Tortilla, a corporation, manufactures and sells tortillas at its facility in Santa Fe, New Mexico, where it annually sold and shipped goods valued in excess of \$50,000 to points directly outside the State of New Mexico. Santa Fe Tortilla admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I conclude that the Comite is a labor organization within the meaning of Section 2(5) of the Act. Employees participate in the Comite and it exists, in part, for the purpose of dealing with an employer concerning working conditions. *Electromation*, 309 NLRB 990 (1992), enf. 35 F.3d 1148 (7th Cir. 1994).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Santa Fe Tortilla produces a variety of tortilla products, including corn and flour tortillas and most recently, tortilla chips. It has two production lines for the flour tortillas; a third production line produces the corn tortillas and tortilla chips. Santa Fe Tortilla employs about 80 persons. Kenny Kalfin is the managing member of Santa Fe Tortilla. Gustavo Terrones is plant manager and is responsible for all aspects of the production process. Alfredo Jasso is assistant plant manager.

Jesus Saldana has worked for Santa Fe Tortilla since April 2010. Saldana was diagnosed with cancer in May and shortly thereafter informed Terrones of his medical condition. Terrones replied he would do what he could to accommodate Saldana so he could continue to work; he also instructed Saldana's supervisor, Arlette de la Mora, to do anything possible to accommodate Saldana, including changing his work schedule. At some point thereafter Saldana showed Terrones some test results and images concerning his medical condition. On one occasion Saldana called Terrones and asked to be picked up from the hospital and Terrones did so.

B. Union and Concerted Activities Begin

Employees Yolanda Galaviz, Juan Lopez, Lilian Lopez, Jesus Saldana, Delfina Bruno, Yolanda Rivera, and Gustavo Abel Lopez met on August 6 and discussed working conditions at Santa Fe Tortilla. They met again the next day at a workers center, decided to form the Comite,

³ It also denied the filing and service of the charges; I conclude that the formal papers establish those facts as alleged in the complaint.

and with the help of an interpreter provided by the workers center, created a letter dated August 7. That letter was addressed to Kalfin and began:

We, workers of *Santa Fe Tortilla*, have decided to form a workers committee that will be known as *Comite De Trabajadores de Santa Fe Tortilla (CTSFT)*. By way of this letter we would like to inform you of some concerns we have with our working conditions.

The letter went on to complain about safety and lack of training; it described how Delfina Bruno and Yolanda Rivera were injured on the job. The letter indicated that the workers were unhappy with the \$8 per hour they received and asked for a wage increase. The letter complained of mistreatment of employees by Terrones and Supervisors Mariela Campos and Arlette de la Mora. In particular, the letter identified Jesus Saldana as having been mistreated by Terrones concerning his health conditions by being “forced to work in cold conditions and in the most difficult positions.” The letter indicated that Saldana was forbidden to use his own water bottle to work while other workers are allowed to do so. The letter explained how after Lilian Lopez complained about another coworker to Terrones, Terrones accused Lilian Lopez of “bad hygiene” and poor work performance. The letter described how de la Mora threatened to fire Saldana, Bruno, and Galaviz for having poorly packaged some tortillas when it was impossible to tell who among 11 workers might have made the mistake. The letter ended: “For these reasons we want to have a meeting with you as soon as possible. You may contact any member of CTSFT to decide on the details of this meeting.” The letter was signed by employees Juan Lopez, Yolanda Galaviz, Lilian Lopez, Jesus Saldana, Yolanda Rivera Ruiz, Delfina Bruno, and Gustavo Abel Lopez. Juan Lopez accompanied by Yolanda Galaviz presented the letter to Kalfin on August 8. Kalfin accepted the letter and placed it on his desk without reading it at that time. Later, however, Kalfin gave Terrones the letter and instructed him to meet with the employees individually and assess the concerns they raised. As seen below, Terrones, accompanied by Jasso, did so.

C. 8(a)(1) Allegations

The complaint alleges that about in the morning of August 8 Terrones unlawfully:

- Interrogated employees about their union concerted activities and sympathies.
- By soliciting employee complaints and grievances, promised employees increased benefits and improved terms and conditions of employment if they refrained from engaging in union or other concerted activities.
- Promised to help employees and effect changes if they refrained from engaging in union or other concerted activities.
- Threatened employees with unspecified reprisals because they had engaged in union or other concerted activities.
- Threatened employees with discharge because they had engaged in union or other concerted activities.
- Threatened to require employees to document their medical conditions unless they refrained from engaging in union or other concerted activities.

And the complaint alleges that on the same date Jasso:

- Interrogated employees about their union concerted activities and sympathies.
- By soliciting employee complaints and grievances, promised employees increased benefits and improved terms and conditions of employment if they refrained from engaging in union or other concerted activities.
- Promised to solve employees' problems if they refrained from engaging in union or other concerted activities.

Saldana was summoned to Terrones' office. Terrones told Saldana that he was surprised that Saldana accused him of mistreatment in the August 7 letter and that what had been written in the letter concerning Saldana's treatment were lies. Terrones said that he wanted to talk about the letter, but Saldana objected, saying that he wanted the entire Comite there if Terrones wanted to discuss it. Terrones responded that it was the policy of Santa Fe Tortilla to meet with employees individually and not as a group. Terrones asked Saldana what he wanted and Saldana replied that he did not want anything for himself but wanted changes for everybody. Terrones then indicated that there would be changes and that Santa Fe Tortilla would make an effort to address the concerns raised in the August 7 letter. Terrones told Saldana that Saldana had never brought a doctor's note indicating what his work restriction concerning working in cold areas. Terrones also told Saldana something to the effect that his door was always open and Saldana knew where to find him. Saldana offered to write a letter to Kalfin explaining that Terrones had not mistreated him, but Saldana never did so. Jasso did not participate in the conversation.

The facts in preceding paragraph are based on a composite of the credible portions of the testimony of Terrones, Jasso, and Saldana. Terrones and Jasso credibly denied that Terrones asked Saldana if he was the person organizing the Comite. Terrones also credibly denied that he ever told Saldana that Santa Fe Tortilla could fire him because he did not have proof from the doctor concerning his cancer. Jasso, for the most part, credibly corroborated Terrones' testimony. Jasso was subjected to extensive 611(c) interrogation by the General Counsel during which his demeanor was impressive; it seemed he was trying to answer the questions in an honest fashion. And Saldana's demeanor was not particularly convincing.

Analysis

I have concluded above that the credible evidence does not support the allegations that Terrones unlawfully interrogated Saldana concerning his union activities or sympathies, unlawfully threatened Saldana with unspecified reprisals⁴ or discharge or to require him to document his medical condition.⁵ I have also concluded that Jasso said nothing during the meeting. All those allegations are therefore dismissed. Two allegations remain: that Terrones solicited employee complaints and grievances and that Terrones promised to effect changes if the employees refrained from engaging in union or other concerted activities. In this regard I have

⁴ I conclude that there was no trace of unspecified reprisals when Terrones told Saldana that a portion of the letter contained lies; an employer is free to express its view concerning the assertions of mistreatment made by employees.

⁵ The General Counsel directs me to p. 663 of the record for support of his contention that during this meeting, Terrones instructed Saldana to provide a medical note that described his limitations. He declined to do so; Saldana never mentioned this on direct examination and the record is unclear whether this allegedly occurred at the August 8 meeting or during another conversation, described below, as part of an allegedly unlawful suspension.

concluded above that Terrones did ask Saldana what he wanted and indicated that there would be changes and Santa Fe Tortilla would attempt to address the concerns raised in the letter. I note that this case does not involve the garden-variety type of promises or solicitation of grievances where an employer, in response to organizing efforts, suddenly becomes interested in finding out the grievances that lead employees to organize. Rather, this is a case where the employees outwardly expressed their concerns and asked that they be addressed and the employer asked about those concerns and promised to rectify them if appropriate. The employees cannot voice concerns and ask that they be rectified and then complain when an employer does just that. And importantly, employees have in the past expressed grievances to Terrones and he has promised to, and has, rectified them; he did nothing more in his discussion with Saldana. I have examined the cases cited by the General Counsel; none involve the fact situation of this case although I had specifically requested the General Counsel to address this specific situation. I therefore dismiss these allegations too; the General Counsel has not established that there was any reasonable tendency to interfere with Section 7 rights given the peculiar fact pattern involved here.

The complaint alleges that about the afternoon of August 8 Terrones unlawfully:

- Interrogated employees about their union and concerted activities and sympathies.
- By soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they refrained from engaging in union or other concerted activities.
- Promised to improve employees' working conditions if they refrained from engaging in union or other concerted activities.
- By telling employees that it would never be possible for the Comite to meet with Kalfin, informed employees that it would be futile for them to select the Comite as their bargaining representative.

And that Jasso:

- Threatened employees that Santa Fe Tortilla would file a lawsuit against its employees because they had engaged in union or other concerted activities.
- Threatened employees with unspecified reprisals unless they refrained from engaging in union or other concerted activities.

Terrones and Jasso also met with Juan Lopez in Terrones' office. Juan Lopez worked for Santa Fe Tortilla from June 6 to December 18. Terrones referred to the letter and asked Lopez what his concerns were, and Lopez replied that he did not have any concerns but he was there to support his coworkers. Terrones said that what the letter said about Saldana was a lie. Lopez replied that each person wrote what they had experienced. Terrones asked if he had mistreated Lopez; Lopez answered that Terrones had not, but Campos had. Lopez said that he did not want to continue talking because he wanted to speak directly to Kalfin with the other members of the Comite present. Terrones replied that Santa Fe Tortilla speaks to employees individually and not in groups. Lopez asked if there was going to be changes and Terrones answered that there were going to be changes. Lopez asked if Terrones could promise that there would be changes, but Terrones said no. Again, Jasso said nothing of consequence during the meeting.

The facts in the preceding paragraph are a composite of the credible portions of the testimony of Terrones, Jasso, and Juan Lopez. Terrones credibly denied asking Lopez whether

he signed the letter. He also credibly denied that he asked Lopez whether he understood what was written in the August 7 letter, answering the General Counsel’s question during 611(c) examination: “Honestly, I don’t care. What I care about is the content of the letter, and not who wrote it.”

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Analysis

I have concluded that there is no credible evidence that Jasso made any statements that violated the Act or that Terrones unlawfully interrogated Lopez. So I dismiss those allegations. For reasons previously stated, I also dismiss the allegations concerning promise of benefits and solicitation of grievances. The remaining allegation is that by telling employees it would never be possible for the Comite to meet with Kalfin, it informed employees that it would be futile for them to select the Comite as their bargaining representative. First, I note that the allegation as drafted does not state a violation of the Act. This is so because the employees and the Comite do not have a Section 7 right to meet with Kalfin himself as opposed someone who Santa Fe Tortilla designates as its representative. See Section 8(B)(1)(b). But even interpreting the allegation to read that *Santa Fe Tortilla* would never meet with the Comite, the allegation falls for lack of proof. Terrones never said that; rather, he indicated that it was Santa Fe Tortilla’s policy to meet with employees individually and not in groups; the General Counsel does not challenge that policy. And there is nothing in that statement to suggest that if, in the future, the Comite became the bargaining representative of a unit of employees that Santa Fe Tortilla never recognize and bargain with the Comite. I dismiss these allegations of the complaint.

The complaint as amended alleges that about August 9 Terrones interrogated employees about their union and concerted activities and sympathies. Terrones and Jasso also met with Lilian Lopez in Terrones’ office. Terrones asked Lopez what were her concerns and how could they help. He credibly denied that he asked her why she signed the letter. Lopez told them that she felt humiliated earlier when they spoke to her after her coworkers had complained about her body odor. Terrones said that she could leave his office and Lopez then did so. These facts again are based on a composite of the credible portions of the testimony of the three witnesses’

Analysis

Because I conclude that Terrones did not interrogate Lopez about her union and concerted activities and sympathies, I dismiss this allegation of the complaint.

The complaint as amended alleges that about August 9 Terrones:

- Interrogated employees about their union and concerted activities and sympathies.
- By telling employees that it would never be possible for the Comite to meet with Kalfin, informed employees that it would be futile for them to select the Comite as their bargaining representative.
- Promised employees to effect changes if they refrained from engaging in union or other concerted activities.

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Yolanda Rivera has worked for Santa Fe Tortilla for about 6 years. Terrones and Jasso also met with Rivera in Terrones’ office. After she went to Terrones’ office, he announced that he wanted

to talk to her about the letter that had been written. Rivera replied that she could not talk about the letter unless the entire committee was present. Terrones said that what was written in the letter was a lie. Rivera said it was not a lie and that they received mistreatment on the production line. Terrones asked her to explain what was going on, so Rivera explained how Campos
 5 mistreated them by calling them ignorant and donkeys and how de la Mora asked workers inappropriate questions. Terrones replied that this was the first he had heard such things. Rivera complained that she was not allowed to go to the bathroom and that she had to do so frequently because she had diabetes. Terrones answered that she should get a doctor's note and then she would be allowed to use the bathroom as needed. Terrones also said that if she had complaints
 10 against her supervisor why she did not bring them to him. Terrones also told her that he would try and improve things at the tortilla factory. Terrones then thanked Rivera and the meeting ended. Terrones then looked into those concerns and found some to be meritorious and instructed Maria Campos that certain conduct should stop.

15 The facts in the foregoing paragraph are based on a composite of the credible portions of the testimony of Terrones, Jasso and Yolanda Rivera. Terrones credibly denied that he asked Rivera why she signed the letter; instead he asked her what her concerns were.

Analysis

20 I have concluded as a factual matter that Terrones did not interrogate Rivera about her union or concerted activities. I have also concluded that there is no credible evidence that Terrones informed Rivera that it would be futile to select the Comite as their collective-bargaining representative. And while Terrones did promise to make changes for reasons
 25 previously stated, I again conclude that such remarks are not unlawful. So I dismiss these allegations of the complaint.

The complaint alleges that about August 9 Terrones:

- 30 • Interrogated employees about their union and concerted activities and sympathies.
- Promulgated an overly-broad and discriminatory rule prohibiting employees from assisting other employees who engaged in union or other concerted activities.
- Threatened employees with unspecified reprisals unless they refrained from engaging in union or other concerted activities.
- 35 • Promised employees to effect changes if they refrained from engaging in union or other concerted activities.

Next, Terrones and Jasso met with Delfina Bruno in Terrones' office. Bruno began working for Santa Fe Tortilla on February 7, 2009; she generally worked packaging tortillas. Bruno, like
 40 Galaviz, was fired on August 17. As with the other employees, Terrones asked what her concerns were. Terrones asked her if she believed that what was written in the letter was true; she replied that she did. He then asked if she believed what the letter said about Jesus Saldana was true; she again indicated that she did. Terrones then said that Bruno should not stick her neck out for anyone because no one would stick their neck out for her. Terrones and Bruno
 45 discussed her work injury and Terrones pointed out that Bruno could have stopped the machine and avoided the injury. Bruno also described how she heard Mariela Campos asked an employee "Hey so is it true that you have a small one?" Terrones then said that by the following Monday

things were going to change and he would try and fix the problems. He said that to show his good faith he was inviting Bruno to work with his team on the corn tortilla production line. Finally, Terrones asked whether Bruno thought that creating the Comite might create an environment of hostility at work; Bruno answered that it might, but that the workers were already
 5 tired and that there did not appear to be any solution to their problems. Terrones told Bruno that there would be changes and he asked her if she wanted to continue with training to become a supervisor. He asked her whether she noticed that the tortilla machine was working a little more slowly. Bruno admitted that previously she had complained to Terrones about concerns she had with another employee; that employee was fired shortly thereafter and Bruno felt that Terrones
 10 had addressed her concerns.

The facts in the preceding paragraph are again a composite of the credible testimony of the three persons involved. Terrones credibly denied that he asked Bruno if she had signed the letter or if she had proof that Saldana was sick. He was less convincing in denying that he told
 15 her that she shouldn't stick her neck out for anyone because they would not do the same for her.

Analysis

I have concluded as a factual matter that Terrones did not interrogate Bruno about her
 20 union or concerted activities. I have concluded that Terrones did say that Bruno should not stick her neck for anyone because they would not do so for her. But nothing in that statement contained a direct or implied threat of reprisal by Santa Fe Tortilla; rather, the statement was merely an opinion as to how other employees might react if Bruno sought their support. It also fell far short of implementation of any unlawful rule that Bruno was required to obey. And while
 25 Terrones did promise to make changes for reasons previously stated, I again conclude that such remarks are not unlawful. So I dismiss these allegations of the complaint.

The complaint alleges that about the afternoon of August 9 Terrones unlawfully:

- 30 • Interrogated employees about their union and concerted activities and sympathies.
- By soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they refrained from engaging in union or other concerted activities.
- 35 • Threatened its employees with unspecified reprisals because they had engaged in union or other concerted activities.
- By telling employees that no one would assist them if they engaged in union or concerted activities, informed employees that it would be futile for them to select Comite as their bargaining representative.
- 40 • By telling employees that Santa Fe Tortilla knew who had written one of the Comite's letters, created an impression among employees that their union and other concerted activities were under surveillance.

Yolanda Galaviz had worked intermittently for Santa Fe Tortilla for several years until her termination on August 17, 2012. In addition to signing that August 7 letter, Galaviz persuaded
 45 Edgar Lopez to sign a paper indicating that he was part of a group that was looking for respect and a wage increase. Later Edgar Lopez returned, asked for the paper, and scratched out his name. Terrones summoned Galaviz to his office; Jasso again was present. Terrones invited her

to sit down because he was going to give her the meeting that she wanted. Galaviz replied that if that was the case she wanted to have the other Comite members present. Terrones said that was not going to happen. Terrones asked Galaviz what her concerns were and whether Campos and de la Mora had mistreated her. Galaviz indicated that they had mistreated her; Terrones
 5 responded that he would do all he could to resolve the problem. Terrones said that it should never have come to this, and he showed Galaviz the letter. Terrones said that “you know you signed for everyone?” He continued, saying that if she got into problems no one was going to give her any help. Galaviz replied that she signed for herself and that she and her coworkers had complaints. When Galaviz mentioned that some of her coworkers were afraid to speak because
 10 they feared punishment, Terrones assured her that there would be no punishment or favoritism there. Terrones asked if he had ever mistreated Galaviz, and Galaviz answered no, he had not, but Campos and de la Mora had done so. Terrones asked how much Galaviz was making; she answered \$8. Terrones said that he would talk to Kalfin to see if the employees could get a raise. Terrones promised that things would change. He asked whether Galaviz had already noticed any
 15 changes and Galaviz answered that the only change she noticed was that when she asked Campos and de la Mora a question they would answer the question, but they would turn their backs to her and not even greet her in the mornings any more. Galaviz complained about not being allowed to use the bathroom when needed and Terrones said that he did not want to see her chewing gum in the warehouse. Terrones said that someone told him that Galaviz was getting
 20 signatures to get him fired. Galaviz protested that this was not true and he should bring the accuser forward. She showed Terrones the paper, described above, that she asked Edgar Lopez and others to sign that dealt with the need for respect and a pay raise.

The facts in the preceding paragraph are again based on a composite of the credible
 25 portions of the testimony of the three persons present for that conversation. While I credit substantial portions of Galaviz’ testimony, I do not credit it entirely. I reach this conclusion based on my observation of the demeanor of the witnesses, the inherent probabilities, and the fact that much of Galaviz’ testimony was in response to leading questions.

30 *Analysis*

I have concluded as a factual matter that Terrones neither interrogated Galaviz concerning her union or concerted activities nor indicated to her that he knew who had written one of the Comite’s letters; I dismiss those allegations of the complaint. I have concluded that
 35 Terrones told Galaviz that if she got into problems no one was going to help her, but this was in the context of Galaviz supporting other employees. This statement was not tied to any action by Santa Fe Tortilla against Galaviz. I dismiss this allegation. I find no evidence of any threat of unspecified reprisal because of Galaviz’ union or concerted activity, so this allegation is also dismissed. I have dismissed other allegations that Terrones unlawfully solicited employee
 40 grievance and promised to adjust them for reasons previously stated and I do so again.⁶

⁶ In his brief, the General Counsel requests that I find violations of the Act that are not specified in the complaint. I decline to do so. Santa Fe Tortilla is entitled to due process. That is, it is entitled to know ahead of time what alleged violations it must defend. It is, after all, a simple matter to prepare or amend a complaint that does so.

D. 8(a)(3) Allegations.

The complaint alleges that on about August 13 Santa Fe Tortilla unlawfully transferred Yolanda Rivera and Lilian Lopez to the corn tortilla line. The records clearly show that both
 5 Rivera and Lopez had been continuously working on the flour tortilla line but that effective August 17 and 10, respectively, they both were transferred to the corn tortilla line. Rivera had worked on the flour line continuously from the beginning of her employment in about 2007. That changed on about August 13 when she was assigned to work on the corn tortilla line. According to Rivera, the corn tortilla line runs faster. She worked on the corn tortilla line until
 10 she injured her finger on December 17 and was then transferred back to the flour tortilla line. At the same time Lilian Lopez, who had been working on the flour tortilla line, was transferred to the corn tortilla line. Lopez said that working on the corn tortilla line was far more difficult because she was not trained to work on that line and that line runs faster than the flour tortilla line. Bruno worked most of the time on the flour line, but she also worked on the corn line.
 15 According to Bruno, working on the corn line “was a drastic change because the corn line runs faster [than] the tortilla line.” According to Bruno, the bags used to package the corn tortillas are small and therefore it is more difficult to package them than the flour tortillas. Bruno also indicated that it was more difficult to seal the packages of corn tortillas. I conclude that because of the differences between the corn and flour tortilla lines and the lack of recent experience that
 20 Rivera and Lilian Lopez had working on the corn tortilla line, it was more difficult for them to work on the corn tortilla line.

The facts in the preceding paragraph are based on business records and the credible portions of the testimony of Rivera, Lilian Lopez, and Bruno. De la Mora testified that working
 25 on the corn tortilla line was easier than working on the flour tortilla line. But when I questioned de la Mora about this assertion, her demeaning was entirely unconvincing and I do not credit this testimony.

Analysis

I apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to analyze this allegation. Lilian Lopez and Rivera engaged in union and protected concerted activity and Santa Fe Tortilla obviously knew this. As described
 30 below, Santa Fe Tortilla was hostile to that activity as shown by the fact that it violated the Act as a result of that activity. And the timing of the transfers, coming so quickly on the heels of the August 7 letter, is powerful evidence of an unlawful motive. I conclude that the General Counsel has met his initial burden under *Wright Line*. I now examine whether Santa Fe Tortilla has shown that it would have transferred Rivera and Lilian Lopez to the corn tortilla line even if they
 35 had not been involved in union and protected concerted activities. De la Mora testified that the reason she transferred Lilian Lopez to the corn tortilla line in August was because:
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The truth is because she was having trouble on the flour line. She couldn’t handle it. She would have a lot of tortillas fall to the floor. So I tried to move her over to the corn line because it’s a little bit easier to see if she could work there better.

45 I do not credit this testimony. In addition to de la Mora’s unconvincing demeanor, there is no evidence that de la Mora ever counseled Lopez about her alleged poor work on the flour tortilla line, and it strikes me as unlikely that Lopez would be the beneficiary of de la Mora’s

beneficence on the heels of Lopez’ criticisms of de la Mora in the August 7 letter. And why did de la Mora transfer Rivera?

5 Because some people left that used to work on the corn line, so she had experience in packing on the corn line. So I had to send her over to the corn line packing to help me out with that.

10 This testimony might have been credible if it had been backed up by business records showing when these corn tortilla line workers left. Because I do not credit this testimony, it follows that Santa Fe Tortilla has not met its burden under *Wright Line*. And the specious nature of this evidence only serves to strengthen the conclusion that Santa Fe Tortilla transferred the employees for an unlawful reason. By transferring Yolanda Rivera and Lilian Lopez from the flour tortilla production line to the corn tortilla production line because they were involved in union and other protected concerted activities, Santa Fe Tortilla violated Section 8(a)(3) and (1).
15 Because I conclude that workers on the corn tortilla line may have worked fewer hours than workers of the flour tortilla line, I shall order a make-whole remedy.

20 The complaint alleges that on about August 10 Santa Fe Tortilla unlawfully reduced the hours of Yolanda Rivera, Lilian Lopez, and Juan Lopez.⁷ Kalfin credibly testified to the following. Santa Fe Tortilla produces the tortillas according to the orders placed by its customers; it does not produce tortillas to maintain an inventory and then fill the customers’ orders from the inventory. This results in a fluctuation of the hours worked by its employees; as the orders increase or decrease so do the hours of the workers. Kalfin also credibly testified that in July Santa Fe Tortilla began demolition work at its facility to prepare for the construction of a new tortilla chip production line. The tortilla chip production began in late September. During this period of construction, Santa Fe Tortilla had to intermittently shut down the tortilla production lines, but before it did so it increased production on those lines in order to meet the needs of its customers. But Kalfin did not directly link any of the construction work to a reduction, as opposed to a fluctuation, of hours worked by Santa Fe Tortilla employees, and I
30 reject any inference that it did so. Rather, it appears that during the construction period it filled the orders placed by its customers just as it had done in the past. According to Rivera, she had been working 40-45 hours per week until after August 7 when her hours were reduced to 28-35. According to Lilian Lopez, before she joined the Comite she was working 40-50 hours per week but after joining she was working only 27 to 35 hours per week. She admitted that there was a period of time when work was slow and she worked only 34-38 hours per week, but she claims that after she joined the Comite she was given only 25-30 hours per week while every else was scheduled to work 40. I do not credit this testimony. Both Rivera and Lilian Lopez appeared to be exaggerating the hours they worked before the August 7 letter and the reduction that allegedly occurred afterwards.
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Analysis

45 I must assume that this allegation is meant to cover something other than any reduction of hours resulting from the unlawful transfer of these employees to the corn tortilla production line; I have already dealt with and remedied that violation. Before I apply *Wright Line*, above, to

⁷ In his brief, the General Counsel “withdraws” the allegation as it pertains to Juan Lopez. I dismiss that allegation for lack of proof.

analyze this allegation, I first examine whether the General Counsel has established by a preponderance of the evidence that the hours worked by Rivera and Lilian Lopez were subjected to discriminatory treatment. I have credited Kalfin's testimony concerning how the hours of all employees fluctuate based on the orders from customers. I have discredited the testimony of Rivera and Lilian Lopez concerning the amount of reduction of hours. At this point, the General Counsel has failed to show that Santa Fe Tortilla subjected these employees to any additional negative treatment, much less any negative treatment because they supported the Comite. The General Counsel relies heavily on records that Santa Fe Tortilla produced pursuant to subpoena. Those records confirm Kalfin's testimony that the hours worked by employees fluctuated, both before and after the August 7 letter. The General Counsel then compares the average hours worked per week by all employees compared to the hours worked per week by Rivera and Lilian Lopez before and after the August 7 letter. According to the General Counsel, that comparison shows that after the August 7 letter the number of times the hours worked by these employees was less than average increased after the August 7 letter. I find this analysis flawed. First of all, it does not take into account whether these employees were absent more frequently before or after the August 7 letter. It also fails to account for any fluctuation in time off for other employees before or after the August 7 letter. It fails to establish that the average hours worked by all employees can be comparable to the hours worked by the two employees. Most importantly, it fails to show any reduction of hours beyond what might have resulted from the transfer from the flour tortilla production line to the corn tortilla production line. Because the General Counsel has failed to show that Santa Fe Tortilla reduced the hours of Rivera and Lilian Lopez beyond the normal fluctuation levels, I dismiss this allegation of the complaint.

The complaint as amended alleges that Santa Fe Tortilla unlawfully suspended Saldana for 1-1/2 days of August 14. On about August 10, Terrones told Saldana that he could not go back to work until Santa Fe Tortilla received a doctor's note specifying his work restrictions. Terrones credibly explained that the August 7 letter was the first time that Saldana had complained that Santa Fe Tortilla was not adequately making accommodations due to his medical issues. Although Saldana testified that he informed Terrones about his inability to work in the cold, I credit Terrones denial that Saldana did so. This is based not only on my observation of the relative demeanor of the witnesses but also on the unlikelihood that Terrones, who admittedly bent over backwards to accommodate Saldana and ordered de la Mora to do so also, would then knowingly have him work in a cold area that conflicted with his work limitations. And I also credit Terrones' testimony that he asked for doctor's note at that time because he needed to know what limitations Saldana had on his ability to work because it just had become apparent from Saldana's complaint that Santa Fe Tortilla did not know what those restriction were. So Saldana finally presented a doctor's note dated August 14. Concerning Saldana's restrictions the note indicated:

It was [Saldana's] desire that he continue to work 40 hours per week, however, during his weeks of chemotherapy, that [sic] it may not be possible and he may have to miss work on days which symptoms of fatigue, nausea, weakness, lethargy, and vomiting are excessive. He will also need to avoid lifting over 75 lbs, high altitudes, and extreme cold and hot temperatures. Patient can work/stand for 12 hour shifts if he tolerated it.

Saldana then went back to work.

Analysis

Saldana was involved in union activity, Santa Fe Tortilla knew this, and Santa Fe Tortilla was hostile towards that activity. This, plus the timing of the request to get a doctor's note until being allowed to work, shows that the General Counsel has met his *Wright Line* burden. I now address whether Santa Fe Tortilla would have insisted on a doctor's note from Saldana before allowing him to resume work even if Saldana had not been involved in union activity. I conclude Santa Fe Tortilla has done so. The credited testimony shows that Santa Fe Tortilla made its best efforts to accommodate Saldana to the workplace restrictions resulting from his illness; it believed it had done so. Then it learned that Saldana was complaining that Santa Fe Tortilla was not accommodating Saldana to a supposed restriction about working in cold temperatures. Remember, Saldana had not informed Santa Fe Tortilla of this restriction, so how could it know about it. Under these circumstances, Santa Fe Tortilla wisely decided to require a doctor's note to identify the restriction so that it would not be caught by surprise again and not to allow Saldana to work, thereby possibly endangering Saldana's health, until he did so. Said differently, the record convinces me that Santa Fe Tortilla would have acted in the same manner if Saldana's complaint had not occurred as part of the August 7 letter. I dismiss this allegation.

On August 15, the Comite composed another letter addressed to Kalfin. This letter complained that after the workers decided to organize the Comite, Terrones and Alfredo Jasso retaliated against the organizers by asking them, "Why did you sign the letter?" The letter indicated that Terrones and Jasso told one organizer, "If we go to court to you is going to be bad." The letter indicated that they had complained to Terrones and Jasso about sexual harassment from Mariela Campos whose jokes are of a sexual nature. The letter explained that most of the members of the Comite were moved to work on a tortilla production line that was operating so quickly that it put them at risk for injury and negatively affected the quality of their work. When one worker complained of this, de la Mora replied, "[Y]ou have to learn." Finally, the letter complained that three members of the Comite had their hours reduced. The letter ended:

We are still waiting for you to set a time for a meeting with all of us to resolve these matters. We appreciate a prompt response.

This letter was signed by Yolanda Rivera, Delfina Bruno, Yolanda Galaviz, Juan Lopez, Lillian Lopez, and Jesus Saldana.

The complaint alleges that on August 17 Santa Fe Tortilla unlawfully discharged Yolanda Galaviz and Delfina Bruno. Kalfin instructed Terrones to fire Galaviz and Bruno; he did not explain to Terrones why they were being fired. On August 17, Terrones informed Galaviz and Bruno that they were fired by thanking them for having worked for Santa Fe Tortilla but it was their last day of work there. Terrones admitted that he did not know why Galaviz and Bruno were fired.

Kalfin testified that he decided to fire Galaviz because he felt "she had committed a crime" by "intimidating her fellow workers and lying to her fellow workers." Kalfin claimed Galaviz had "counterfeited documents" and had "forged somebody's signature on a document." According to Kalfin, Terrones reported to him that three or four employees had complained to Terrones concerning Galaviz':

Forgery of a document with a fellow employee’s signature, intimidating employees, lying to her fellow employees, harassing employees, asking them to sign blank documents and misrepresenting what the content of the document would be when it would be completed.

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According to Kalfin, Terrones presented him with a statement from employee Gustavo Abel Lopez, who had just recently started working for Santa Fe Tortilla, that Kalfin relied on in reaching his decision that Galaviz committed forgery, although Kalfin was not certain whether the statement “implied that or said that” and the statement did not specifically name Galaviz as the forger. Terrones claimed that he met with Gustavo Abel Lopez after receiving the August 7 letter. He asked Lopez whether he had any concerns or if he had been mistreated. Lopez responded that he had not read the letter, had not seen it before, and it was not his signature on the letter. Terrones asked Lopez to write down what he had just said and Lopez did so. However, no note from Gustavo Abel Lopez was produced by Santa Fe Tortilla during the trial. For his part, Gustavo Abel Lopez testified that it was not his signature on the August 7 letter. However, he admitted that he went to the workers’ center with the other employees and they discussed working conditions. And he admitted that he never accused any specific person of writing his name on the letter. I do not credit Gustavo Abel Lopez’ testimony that he did not sign the August letter; he was a newly-hired employee who obviously had second thoughts about signing the letter afterwards by placing blame on someone else. In any event, Galaviz credibly denied that she wrote Gustavo Abel Lopez’ name on the August 7 letter. But Santa Fe Tortilla did produce that following statements. One is written in Spanish; its English translation is⁸:

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My colleague Yolanda Galaviz at 8:50 in the morning while I was working asked me for a signature or to sign for a raise. Afterwards, I found out that it was so that we could go to my supervisor and I was not in agreement with this, and I went to ask Yolanda Galaviz to erase my signature. She told me she could not because she already delivered it to [Kalfin], and I told her that I was going to ask for it from [Kalfin] and she told me that it was a lie, that she had not delivered it, that she had it in the pocket of her robe, and then she gave it to me and I erased it.

Edgar Lopez

The next statement also written is Spanish, is translated as⁹:

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Well, in the month of August I left around 5:30 a.m. and one of my morning colleagues made a comment to me that they wanted me to meet with them because they were asking for a raise but I responded that the sheet she was carrying was blank and I could not sign anything that did not say anything and that when my colleagues signed then I would sign. But she did not come back to me and tell me anything. The worker who approached me was Yolanda Galaviz.

Orbelina Perez Barco

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⁸ I make minor changes in the translation.

⁹ I again make minor changes in the translation.

The translation of the next statement is:

The date of 8/9/12

5 Yolanda Galaviz was asking for signatures to go talk to the managers concerning a raise in salary. I did not sign it nor did I read the page and they were lies. It was not for a raise. I was on my break.

Marilyn Pineda

10 These statements obviously concern not the August 7 letter but another document, described above, that Galaviz circulated among employees and that she showed to Terrones when he spoke to her concerning the August 7 letter. Those statements strike me as unreliable hearsay and I do not credit their content.

15 Kalfin also made the decision to fire Bruno. According to Kalfin, he fired Bruno because “she was along with Yolanda Galaviz intimidating and harassing workers.” Unlike Galaviz, Kalfin did not have any written statements from employees to consider. Bruno had not received any warnings or discipline before her termination. But the General Counsel called Arlette de la Mora as a 611(c) witness and elicited from her testimony that Edgar Lopez complained to her that Bruno had forged Lopez’ signature on a document, thereby implicating wrongdoing on the
20 part of Bruno where none had prior thereto existed in the record! And continuing, the General Counsel elicited testimony from de la Mora that Marilyn Pineda complained to her that Bruno said the purpose of the letter was to have the supervisors fired. Undeterred, the General Counsel got de la Mora to admit that Marilyn Pineda also complained that Galaviz too said the purpose of the letter was to get supervisors fired! The first 308 pages of this record are consumed by this
25 type of meandering 611(c) interrogation of Santa Fe Tortilla supervisors by the General Counsel.

30 Santa Fe Tortilla typically warns and then suspends employees for infractions. For example, in September Santa Fe Tortilla suspended an employee for 3 days for threatening another employee. In October, Santa Fe Tortilla suspended an employee for 3 days for harassing another employee. The employee had been warned a week earlier that the conduct should stop but when it did not she was suspended. In November, an employee was given a verbal warning for hitting a coworker with her elbow. And Santa Fe typically talks to employees accused of misconduct to get their version of events before it disciplines employees. However, Santa Fe
35 Tortilla discharged Galaviz and Bruno without bothering to hear their version of the alleged misconduct for which they were fired.

Analysis

40 No extensive analysis is needed in these allegations. Kalfin has admitted that Santa Fe Tortilla discharged Galaviz and Bruno because they engaged in union and other protected concerted activity. There is no credible evidence that Galaviz or Bruno engaged in any disqualifying misconduct in the process of doing so. Nor is there any evidence that Santa Fe Tortilla even had a good-faith but mistaken belief that the employees had engaged in any disqualifying misconduct; after all, it did not even ask those employees their versions of the
45 alleged misconduct. By discharging Delfina Bruno and Yolanda Galaviz because they were involved in union and other protected concerted activity, Santa Fe Tortilla violated Section 8(a)(3) and (1).

The next letter was August 21. This letter claimed that members of the Comité were being retaliated against by having their hours cut. It complained that the discharges of Galaviz and Bruno were also acts of retaliation. This letter was signed by Galaviz, Bruno, Lilian Lopez, Saldana, Juan Lopez, and others. The letters continued. On October 8, the Comité prepared a letter for Kalfin listing instances of verbal abuse by Mariela Campos to Santos Treto, by de la Mora and Campos to Yolanda Rivera because work was backed up, by de la Mora to Diana Castaneda for the same reason, and by de la Mora and Campos to Juan Lopez and Saldana for not telling them it was time to change the bags. The letter also asserted that Campos was exposing Lilian Lopez and Yolanda Rivera to safety hazards by asking them to clean out tortillas from the machines. This letter ended by asking for the reinstatement of Bruno and Galaviz. This letter was signed by Juan Lopez, Galaviz, Bruno, Yolanda Rivera, Santos Treto, Lilian Lopez, and others.

The amended complaint alleges that on about September 29 Santa Fe Tortilla unlawfully issued a written warning to Yolanda Rivera. On September 29 Rivera was scheduled to work but instead called and spoke with Campos and said that she was sick and would not appear for work. Campos said fine and that she would tell de la Mora. When Rivera appeared at work the following Monday, Campos gave her write-up for not appearing at work the previous Friday. When Rivera complained that she had called in to report her illness, Campos responded that Rivera was too sick to come to work but was feeling good enough to go out dancing. Rivera did not challenge Campos' assertion that she had danced that Friday; however, there is no explanation as to how Campos came to know of Rivera's dancing. The write-up is not in the record. Rivera did not deny that she had gone dancing that Friday. On a previous occasion Rivera did not show up for work after being admitted to a hospital; Rivera's daughter called in for Rivera. Rivera was not disciplined for her absence on that occasion.

Analysis

I have already described above how Rivera was involved in union activity, Santa Fe Tortilla knew this and was hostile to that activity. Timing also supports the General Counsel's initial burden. I now turn to examine whether Santa Fe Tortilla would have disciplined Rivera even absent her union activity. I conclude it has done so. Rivera was disciplined because Santa Fe Tortilla believed she had falsely claimed to be sick; she had called in sick but was still able to go out dancing that evening and enjoy a 3-day weekend. Rivera did not deny this or explain away what otherwise appeared to be a sudden and complete recovery. Under these circumstances, I conclude Santa Fe tortilla would have at least warned an employee not to repeat this conduct. I dismiss this allegation of the complaint.

On October 10, an agent of the New Mexico Environment Department, Occupational Health and Safety Bureau visited Santa Fe Tortilla's facility. Lilian Lopez accompanied the agent during part of the inspection. The inspection resulted in a citation and notification of penalty against Santa Fe Tortilla that issued on November 13. The monetary penalty was \$3000.

The complaint as amended alleges that Santa Fe Tortilla unlawfully suspended Saldana for 5 days on October 12. Santa Fe Tortilla's policy is that employees must use two hands in order to assure that the air is pressed out of the package before it is sealed; employees were trained to do so some 20 days before the incident, described below, that led to Saldana's suspension. In October de la Mora instructed Saldana to use two hands in sealing the tortilla

packages because using one hand did not press the air out of them. The first time de la Mora asked Saldana to do this he ignored her and continued to use one hand. The second time de la Mora asked Saldana to use both hands Saldana told her that he could not seal the packages with two hands. De la Mora then reminded Saldana that 2 months earlier she had told the employees that they had to use both hands in sealing the packages to squeeze out all the air from them to which Saldana did not answer and continued to use one hand. De la Mora asked Saldana to use both hands two more times but Saldana continued using only one hand. De la Mora then instructed Saldana to change positions on the productions line but Saldana indicated that it was not time to change positions. Later that day Saldana was summoned to an office where Terrones and de la Mora were present. Terrones asked Saldana who did he think he was. Saldana answered that he did not think he was anyone. Terrones then asked why Saldana was not paying attention to what de la Mora was telling him. Saldana replied that he was not playing deaf, he was listening to her but he was busy with work. Saldana told Terrones that the tortillas were coming way too fast and they were on top of each other. Saldana was suspended for 5 days. The foregoing facts are based on a composite of the credible portions of the testimony of Saldana, Terrones and de la Mora as well as the suspension notice. There is evidence in the record that other employees had not properly sealed packages and they received only verbal warnings, but there is no evidence that those warnings were for anything other than inadvertent error and not brazen defiance of a supervisor's instruction as was the case with Saldana.

Analysis

I conclude that Santa Fe Tortilla would have suspended Saldana in any event for his repeated, brazen insubordination. I dismiss this allegation of the complaint.

The final letter from the Comite to Kalfin is dated December 3. That letter informed Kalfin that Maria Reina Pocasangre, who works the night shift, had joined the Comite. The letter claimed that workers on the night shift were mistreated and the pace of the bands on the tortilla-making machines was too fast. It indicated that Pocasangre had injured herself at work, hurting her left arm and two fingers and, despite reporting the accident to her supervisor, she received no medical treatment. The letter asserted that Lilian Lopez had her hours reduced even further after she signed a complaint to OSHA. The letter advised that Celia Gonzalez was verbally harassing members of the Comite by telling them that they were dirty people and did not know to keep the workplace clean. This letter was signed by Galaviz, Juan Lopez, Lillian Lopez, Yolanda Rivera, Bruno, Saldana, and others.

The complaint as amended alleges that Santa Fe Tortilla unlawfully suspended Saldana for 2 weeks on December 12. As indicated above, Jesus Saldana also uses the name Luis Juarez. Saldana informed both de la Mora and Terrones of this fact in a round-about manner in 2011. About a week before December 3, Saldana approached Terrones in Terrones' office. Terrones asked if he could help Saldana, and Saldana explained that he was going to start the second phase of treatment for medical condition. Terrones said that it was fine and that he needed a doctor's note indicating Saldana's restrictions. On December 3, Saldana presented Terrones with a doctor's note; however, the note used the name of Luis Juarez and not Jesus Saldana. Terrones said that the note was no good because it did not refer to Jesus Saldana and that he needed a note with the name he was using at the company. Saldana said that the doctor would not give him a note using that name and Terrones replied that it was not his problem. Terrones said that Saldana could not work there until he brought a note because he did not know what dangers to

which Saldana’s condition could expose the Company and other employees. On December 12 Saldana present a second doctor’s note to Terrones. This note was essentially the same as the earlier note, again referred to Luis Juarez and not Jesus Saldana. Saldana explained that the hospital was not going to give him a note referring to Jesus Saldana because he was registered
 5 under the name Luis Juarez. Terrones again said that he needed a note in the name of Jesus Saldana. Saldana explained that he wanted to continue working and asked if he could resign and be rehired under Luis Juarez. Terrones answered that he did not know and would have to consult with de la Mora and Jasso. Apparently Terrones said he would talk to Kalfin about the matter.¹⁰
 10 In any event Saldana again appeared at the Company on December 19 and was given a letter by Terrones that indicated:

RE: Social Security Administration–Request for Information

Dear Jesus:

On December 12, 2012, you provided us a letter from a health care provider—specifically
 15 detailing your medical condition—addressed to you in an alternative identity. We are taking receipt of this information very seriously, and therefore, at this time, we would like to provide you with the opportunity to verify your valid SSN in the United States. According to the notification, either you have provided a different identity to your doctor or another individual has sought medical attention for the ailment you claim, or you have
 20 borrowed his leave notification. So, we are not at all clear that the information you provided us during the on-boarding process (when you filled out your Form I-9 and W-4) are valid. Because we risk criminal penalties if we continue to employ you without inquiring of you further pursuant to the “constructive knowledge” provisions of the
 25 Immigration Act, we need your assistance.

The letter then described what was expected of Saldana to resolve the issue of his identity. It continued:

In the event that you fail to provide us with the requested information within 30 days, as
 30 indicated above—or at least provide us with a reason as to why you have been unable to procure the requested information that might allow us to consider granting an extension to the time allotted you to do so—we may have no choice but to terminate your employment.

Saldana was then allowed to continue working. By February 13, 2013, Saldana had not
 35 responded so Santa Fe Tortilla gave him another letter documenting the earlier letter, Saldana’s failure to respond, and giving him another 45 days to respond. This letter indicated that if he did not do so within the new time frame his employment would be terminated. The facts in this
 40 paragraph are based on a composite of the credible portions of the testimony of Saldana and Terrones.

Analysis

I have concluded in an earlier section of this decision that it was not unlawful for Santa
 45 Fe Tortilla to require a doctor’s note from Saldana describing his workplace limitations before

¹⁰ I do the best I can to sort out the facts stemming from the General Counsel confusing and unclear questions.

allowing him to resume work. Because Saldana was undergoing a different segment of his treatment regimen, for reasons previously stated I again conclude it was not unlawful for Santa Fe Tortilla to do so again. Of course, this instance has a different wrinkle. Saldana's absence from work was prolonged when he presented a doctor's note with his different name and Terrones did not accept that note. But I see nothing improper about Santa Fe Tortilla's request that Saldana resolve the issue that Saldana himself had created. I reach this conclusion despite the fact that Santa Fe Tortilla knew informally that Saldana had used another name; being presented with something in writing in another name required Santa Fe Tortilla to be sure it was carefully complying with immigration law. I dismiss this allegation.

Finally, the amended complaint alleges that on about November 26 Santa Fe Tortilla unlawfully issued a written warning to Yolanda Rivera. On November 26, Rivera wore a sweater under her smock because she felt cold. However, the sleeves of the sweater were lower than the sleeves of her smock and Santa Fe Tortilla prohibits this. Rivera knew of this rule; she had signed a document earlier that month that specifically included that rule. So on November 26 Rivera received an employee action form for having the sleeves of her sweater exposed and indicating that she should follow the policy in the future. Rivera claimed that other employees, named Mimi and Naomi, also wore sleeves hanging below their smocks so much so that they brushed against the tortilla line and became dirty. But Rivera does not know whether those employees had also been disciplined. Lillian Lopez credibly testified that she saw Marilyn, Lorena, and Celia wearing sleeves below her smock sleeves. But de la Mora finally told Celia "enough" because her sleeves were contaminating the tortillas. Lopez saw the other two employees wearing the longer sleeves about 1-1/2 months prior to the hearing. However, on at least two other occasions Santa Fe Tortilla has disciplined employees for wearing the sleeves below their uniforms.

Analysis

Although the General Counsel again meets his initial burden under *Wright Line*, I conclude that Rivera violated Santa Fe Tortilla's rules it would have given her the minor warning even if she had not been involved in union activity. I dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by:

1. Transferring Yolanda Rivera and Lilian Lopez from the flour tortilla production line to the corn tortilla production line because they were involved in union and other protected concerted activities.
2. By discharging Delfina Bruno and Yolanda Galaviz because they were involved in union and other protected concerted activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily transferred employees to the

corn tortilla line, must make them whole for any loss of earnings and other benefits. Backpay shall be with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent, having discriminatorily discharged employees, must offer them
 5 reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. The Respondent shall file a report with the Social
 10 Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

20 The Respondent, SFTC, LLC d/b/a Santa Fe Tortilla Company, Santa Fe, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- 25 (a) Discharging, transferring or otherwise discriminating against any employee for supporting Comite de Trabajores de Santa Fe Tortilla or any other union.
 (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

30 2. Take the following affirmative action necessary to effectuate the policies of the Act.

- 35 (a) Make Yolanda Rivera, Lilian Lopez, Yolanda Galaviz, and Delfina Bruno whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
 40 (b) Within 14 days from the date of the Board's Order, offer to transfer Lilian Lopez and Yolanda Rivera to their former jobs on the flour tortilla production line or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 (c) Within 14 days from the date of the Board's Order, offer Yolanda Galaviz and Delfina Bruno full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 (d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and, within 3 days thereafter, notify the

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

employees in writing that this has been done and that the discharges will not be used against them in any way.

- 5 (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 10 (f) Within 14 days after service by the Region, post at its facility in Santa Fe, New Mexico, copies of the attached notice marked "Appendix"¹² in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 10, 2012.
- 15 20 25 (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

30 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

35 Dated, Washington, D.C. June 25, 2013

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William G. KOCOL
Administrative Law Judge

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge, transfer, or otherwise discriminate against any of you for supporting Comite de Trabajores de Santa Fe Tortilla or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer transfer Lilian Lopez and Yolanda Rivera to their former jobs on the flour tortilla production line or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of this Order, offer Yolanda Galaviz and Delfina Bruno full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Lilian Lopez, Yolanda Rivera, Delfina Bruno, and Yolanda Galaviz whole for any loss of earnings and other benefits resulting from our unlawful conduct against them, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Yolanda Galaviz and Delfina Bruno, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

SFTC, LLC d/b/a Santa Fe Tortilla Company

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.