

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

**SMITH'S FOOD & DRUG CENTERS, INC.
d/b/a FRY'S FOOD STORES**

and

Case 28-CA-109817

AMY PFEIFER, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF

**TO: Gary W. Shinnars, Executive Secretary
Office of the Executive Secretary**

Respectfully submitted,

William Mabry III
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004
Telephone (602) 640-2118
Facsimile: (602)640-2178
E-mail: William.MabryIII@nlrb.gov

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

**SMITH'S FOOD & DRUG CENTERS, INC.
d/b/a FRY'S FOOD STORES**

and

Case 28-CA-109817

AMY PFEIFER, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF

I. INTRODUCTION

Counsel for the General Counsel (General Counsel) files this Answering Brief to Respondent's Exceptions to the Decision of Administrative Law Judge Joel P. Biblowitz, JD (NY)-16-14, dated April 1, 2014.¹

This case, at its core, is very simple. Respondent, which operates a chain of stores and is engaged in the retail sale of grocery items and related products throughout Arizona, including the store at issue in this matter located at 20427 North Hayden Road, Scottsdale, Arizona (Respondent's store, also called Store 673), thrice denied the requests of employee Amy Pfeifer (Pfeifer), an employee represented by the United Food and Commercial Workers Union, Local 99 (Union), to have union representation during an investigatory interview. (GCX 1, 3) In addition, Respondent unlawfully advised another employee, Marie Long (Long) -- an employee and steward whom Respondent unilaterally and unlawfully selected to act as Pfeifer's representative -- that she could only act as an observer and not assist the

¹ Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores, is referred to as "Respondent." References to the Transcript of Proceedings and the Administrative Law Judge's Decision will be designated as (Tr.) and (ALJD) respectively, followed by the appropriate page numbers. References to the General Counsel's Exhibits will be referred to as (GC) with the appropriate exhibit number. References to Respondent's "Brief in Support of Exceptions to the Decision of the Administrative Law Judge" will be designated as "Respondent's Brief," followed by the appropriate page numbers. All dates are in 2013, unless otherwise stated.

employee.² The Administrative Law Judge (ALJ) found that Respondent, by so doing, and also by denying its employees the right to confer with their representative prior to the interview, violated Section 8(a)(1) of the Act. The ALJ further concluded that Respondent further violated Section 8(a)(1) of the Act by denying the employee's representative at the investigatory interview the right to speak and participate freely during the interview. The ALJ directed the appropriate remedy -- the posting of a Notice to Employees at each of its stores in Phoenix, Arizona.

Despite the ALJ's well-reasoned decision and recommended order, Respondent, by its exceptions, now simply repeats and rehashes arguments and defenses that were appropriately rejected by the ALJ. In so doing, Respondent attempts to shield itself from its obligations under the Act, throwing up one smoke screen after another. First, Respondent asks to overturn the ALJ's well-articulated credibility determinations, contrary to well-established Board precedent.

As to the merits of the case, Respondent disputes the ALJ's finding that Respondent denied Pfeifer's right to union representation during an investigatory meeting, and contrary to the credible record, attempts to excuse its unlawful conduct as being the result of some purported Union designation of Union stewards as Pfeifer's and other bargaining unit employees' sole representative. Respondent also attempts to cleanse itself of liability by falsely asserting that Long was not prohibited from participating or speaking during the investigatory meeting, despite credible evidence demonstrating otherwise. Respondent, again grasping at straws, further claims that that this allegation was improperly amended to the Complaint based on Section 10(b) of the Act. In addition, Respondent claims that because

² At the start of the hearing, General Counsel moved to amend the Complaint. That motion was granted. (GCX 1(h); Tr. 6-8)

neither Pfeifer nor Long requested to meet and confer prior to the investigatory interview, it had no duty to allow them to do so. In doing so, Respondent omits critical credible record evidence that demonstrates that Respondent did not advise Long of the purpose of the investigatory meeting before it started, and, as previously mentioned, actually prevented Long from speaking or participating during the investigatory interview. In addition, having failed to evade an unfair labor practice finding, Respondent now contends that it should not be required to post notices at stores throughout Phoenix, Arizona. Respondent also, and again, ignores the effect of its unlawful conduct, and Supreme Court and Board precedent -- as it seeks to excuse itself from its obligation to remedy its unlawful misconduct against not only Pfeifer, but all of its bargaining unit employees.

The fact is that Respondent, with its sloppy and willful disregard of Pfeifer's and other employees *Weingarten* rights, now attempts to avoid unfair labor practice findings and the standard remedies for such by using its incorrect interpretation of the law as a shield. It is respectfully suggested that the Board should reject Respondent's exceptions and instead adopt the ALJ's findings of fact, conclusions of law, and recommended order.

II. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT AND SHOULD BE REJECTED BY THE BOARD

Generally, Respondent's exceptions relate to: (a) the ALJ's credibility resolutions; (b) the ALJ's findings and conclusions that Respondent violated the Act by denying Pfeifer the representative of her choice at the investigatory interview conducted on July 16; (c) denying Pfeifer the ability to meet and confer with Long; (d) implying that Long must remain silent during the interview; (e) the ALJ's granting of General Counsel's Motion to Amend the Complaint; (f) the purportedly inadequate quantum of evidence presented by the General

Counsel and the sufficiency of Respondent's defenses; and (g) and the terms and applicability of the ALJ's recommended order.

A. Respondent's Operations and Relationship with the Union

At Respondent's store, Ronald Johns (Johns) is the Store Manager, and Sandra Lakso (Lakso) is the Assistant Store Manager. (ALJD 2; GCX 3; Tr.17) Greg Powell (Powell) is Respondent's Loss Prevention Specialist. (ALJD 1; GCX 3) Pfeifer worked for Respondent from November 2011 until July 20, 2013. Long and Donna Millis who are employed at Respondent's store, also serve as Union Stewards. (ALJD 1; GCX 3; Tr. 96)

The Union and Respondent have been parties to successive collective-bargaining agreements, the most recent of which is effective from October 28, 2012 until October 25, 2014.³ (ALJD 1; GCX 2; Tr. 18) (Tr. 93) Kaitlyn Sullivan (Sullivan), in her capacity as Union Representative, has been responsible for representing employees at Respondent's store for the past four years. (ALJD 1; Tr. 87)

B. The ALJ Properly Discredited Respondent's Witnesses and Credited General Counsel's Witnesses

Although Respondent does not specifically challenge the ALJ's credibility resolutions, throughout its exceptions, Respondent contends that the ALJ erred by failing to credit Respondent's witnesses. Respondent asks the Board to ignore its well-settled policies pertaining to its review of administrative law judge's credibility findings.

The Board's established policy is to not overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence shows that such determinations are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir.

³ Although there is not a specific contract provision concerning *Weingarten* rights in the parties' contract, the parties have recognized, of course, that under the National Labor Relations Act bargaining unit employees enjoy such rights.

1951). Weight is given to an administrative law judge's credibility determination because the administrative law judge, unlike the Board and reviewing courts, observes the witnesses and hears them testify. Credibility determinations are also based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *Medeco Security Locks, Inc.*, 322 NLRB 665 (1996), enfd. in relevant part, 142 F.3d 733 (4th Cir. 1998). Accord: *Warren L. Rose Castings, Inc.*, 231 NLRB 912, 913 (1977), enfd. 587 F.2d 1005 (9th Cir. 1978). Respondent proffers nothing that would warrant a reconsideration of the ALJ's credibility resolutions.

To the contrary, the records supports, as set forth in the ALJD, the ALJ's credibility determinations, the reasonable inferences drawn therefrom, and the ALJ's evaluation of the inherent probabilities of record testimony. It is respectfully submitted that the Board should adopt the ALJ's credibility findings and, based thereon, adopt his unfair labor practice findings, and should reject Respondent's attempt to use the discredited testimony of Respondent's Loss Prevention Specialist Powell concerning Pfeifer's request for union representation to support its exceptions.

General Counsel's witnesses should be credited when in disagreement with the testimony of Respondent's witnesses. It is notable that Long has worked for Respondent for 24 years, and is a current employee. This fact of continuing employment by Respondent may be properly weighed and considered in resolving credibility, based on the particular reliability of such witnesses. *Gold Standard Enterprise, Inc.*, 234 NLRB 618, 619 (1978), where in the Board held:

...every reason exists for finding the testimony of these employees particularly credible since both were still in Respondent's employ at the

time of the hearing and both testified in direct contradiction to certain statements of their present supervisors. The Board has long recognized that the testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken. (Footnote omitted.)

In addition, General Counsel invoked the separation of witnesses rule, Federal Rules of Evidence 615, at the outset of the hearing so Long could not hear and mimic another's testimony. Long testified truthfully and in detail, without a hint of guile, deceit, or exaggeration. As an example, Long offered foundational information and precise details of incidents involving supervisors of Respondent. Long's testimony was corroborated by that of Pfeifer, as well as Sullivan, including in regard to the role of Union Stewards at Respondent's store and their lack of training in regard to investigatory interviews.

C. Contrary to Respondent's Exceptions, the Record Fully Supports the ALJ's Finding that Respondent Unlawfully Denied Amy Pfeifer the Union Representative of her choice.

1. Facts

Respondent should prevail on its first exception only if the Board suspends belief, discounts Board precedent, and ignores the record evidence in this case. During June and July, Pfeifer, who worked as a barista at Tully's, a coffee shop located within Respondent's store, learned that a significant number of employees working at Tully's had been investigated and subsequently disciplined or discharged by Respondent. (ALJD 2; Tr. 25, 49, 90) Pfeifer anticipated that Respondent would call a meeting with her on July 16, and because she reasonably believed that the meeting could lead to discipline, started to arrange for Union representation for such meeting. Specifically, via a voice-mail message to Union representative Sullivan, she requested that Sullivan represent her if she, Pfeifer, were called in an investigatory interview. (ALJD 2; Tr. 90, 107) In response to Pfeifer's voice mail

message, Sullivan left Pfeifer a voicemail explaining that Pfeifer needed to request union representation if she felt that she was going to be disciplined and to notify Respondent that she wanted her union representative present. Sullivan also directed Pfeifer to contact her when the time came, and that Sullivan would plan to be in the area on July 16 so that, if necessary, she would be able to represent Pfeifer at the investigatory meeting. (ALJD 2; Tr. 91) As planned, on July 16 Sullivan was at Respondent's store early in the morning, then went to breakfast at a restaurant located off of the same parking lot as Respondent's store, with Union steward Donna Millis (Millis|), who is an employee employed at Respondent's store. (ALJD 2; Tr. 91) Sullivan testified that she was in the parking lot for some time, visited other stores in the area which were located near Respondent's store, and was expecting the call from Pfeifer, and was available to represent Pfeifer on very short notice at the investigatory meeting. (ALJD 2; Tr. 91)

On July 16, as discussed in more detail below, Powell interviewed Pfeifer regarding possible employee misconduct at Tully's. (ALJD 2; GCX 3) The interview took place in Store Manager Johns' office, which is located in an upstairs vestibule area in the store. (Tr. 69, 72) There is no dispute that on July 16, Powell arrived at Respondent's store for the purpose of conducting Pfeifer's investigatory interview. (Tr. 69) There is also no dispute that Pfeifer reasonably expected to be subjected to discipline as a result of this interview and was entitled to Union representation during the meeting. (ALJD 6:15-21) Accompanying Powell in this investigatory interview was Assistant Store Manager Lakso. (ALJD 2; GCX 3; Tr. 71) Pfeifer asked that she be allowed to contact Union representative Sullivan so that she could sit in on the interview. (ALJD 2; Tr. 108-109) Specifically, Pfeifer requested to make a phone call to Sullivan. Powell advised Pfeifer that she could not make the call. Pfeifer told Powell

that Sullivan was expecting her call. (ALJD 2; Tr. 109) Powell shook his head and said no. Pfeifer again requested to call Sullivan so she could be her union representative and told Powell that she believed she was entitled to a union representative. Powell again denied her request and told her that she could only have the most available union representative.

(ALJD 2; Tr. 109) At no time did Lakso or Powell indicate that there existed some type of urgency that required them to continue the investigatory interview without Sullivan. (Tr. 112)

As discussed above, Sullivan was expecting Pfeifer's call and had her cell phone with the entire day.⁴ (Tr. 92-93) Although Powell testified he did not know who Sullivan was, Store Manager Johns testified that she had been to Respondent's store to address issues concerning employees, and to represent an employee during an investigatory interview; the most recent of which was sometime in 2013. (Tr. 22) Johns further testified that other Union representatives had been at Respondent's Store to represent employees during investigatory interviews. (Tr. 33-34)

After thrice denying Pfeifer's request to call Sullivan, Powell asked Lakso who were the union stewards working at the store at the time. Powell did not say why Lakso could not contact Sullivan for the investigatory meeting, nor did he offer to discontinue the meeting in order to do so. (Tr. 112-113) Lakso advised Pfeifer that the Union stewards working at that time were Millis and Long. (ALJD 2) Pfeifer testified that Lakso called for Millis, but determined that she was gone for the day or not at work at the time. Pfeifer testified that Lakso called down to Long, but because she did not come to the office, Lakso went

⁴ Sullivan, in her capacity as a Union representative, represents all of the employees that are in the bargaining unit at Fry's and Safeway stores, enforces the collective-bargaining agreement, educates employees about the collective-bargaining agreement, provides representation for employees if they are or may be subject to discipline, and files grievances for them if they are discipline, including by meeting employers to discuss such grievances. (Tr. 87) Respondent's store is one of the 19 stores for which Sullivan has had responsibility during the past four years. (Tr. 87, 95)

downstairs to request that Long come to the office with Pfeifer and Powell. Before Long arrived, Pfeiffer objected to Long acting as a union representative by asking Powell, “are you kidding.” (ALJD 2:20; Tr. 110: 9) Pfeifer was aware that Long was inexperienced and lacked the knowledge to assist her in the investigatory meeting. (ALJD 2; Tr. 110) In response to Pfeifer’s objection and question, Powell threw his hands up and told Pfeifer that Long was going to be her union representative. (Tr. 110)

The ALJ specifically credited the testimony of Pfeifer over that of Powell. (ALJD 6:34-39) The credible record indicates that Pfeifer did not voluntarily accept Long as her representative for the investigative interview. (ALJD 6:30)

2. Discussion

By its exceptions, Respondent contends that the ALJ erred when he found Respondent denied Pfeifer the Union representative of her choice. (Respondent’s Brief at 8-9) Respondent contends that the ALJ erred by disregarding Board precedent, and concluding that Respondent was required to provide Pfeifer with the Union representative of her choice during the investigatory interview, “even when it is undisputed that Ms. Sullivan was not present” at Respondent’s Store. (Respondent’s Brief at 13)

Although the ALJ addressed Respondent’s misinterpretation of Board precedent in his decision, Respondent again misstates the holdings of the ALJD in several cases by claiming that “an employee does not have the right to select an absent representative to participate in an investigatory interview particularly when an alternative is present and available to proceed without delay.” (Respondent’s Brief at 12). Contrary to Respondent’s assertions, it is well settled under Board precedent that “the selection for an employee’s representative belongs to the employee and the union, in the absence of extenuating circumstances.” *Barnard College*, 340 NLRB 934, 935 (2003), citing *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001) enf. 338 F.3d

267 (4th Cir. 2003); *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981). The Board has also specifically held that “an employee has the right to specify the representative he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstance.” See *Anheuser-Busch, Inc.*, *supra*. Moreover, the Board has held that even though the requested representative may be temporarily engaged in other duties or tasks at the time of the request, he or she is still “available” as a representative and that the interview could have proceeded with only minimal delay. *Id.* The credible record evidence demonstrates that Respondent failed to present any evidence of extenuating circumstances that would permit Respondent to appoint Long instead of Sullivan as Pfeifer’s union representative. (ALJD 7:1-9)

In addition, Respondent misstates the credible facts by claiming that the ALJ recognized that Long was the only Union representative available at the time. (Respondent’s Brief at 13 citing ALJD 5:7-10) Contrary to Respondent’s mistaken assertion, and according to the credible record, the Powell *believed* that “Long was the only Union representative available at that time.” (ALJD 5:7-10) This discrepancy is critical, as the credible record evidence amplifies that Respondent did not know, and did not bother to determine whether Sullivan, the Union representative Pfeifer requested, was available (though based on Pfeifer’s statements about Sullivan, it should have been clear to Respondent that Sullivan was close-by and available). Moreover, as the ALJ noted, Respondent could have easily determined Sullivan’s availability by a phone call to Sullivan to determine her location at the time. (ALJD 7) While Respondent cites *Pacific Gas*, *supra*, and *Buonadonna Shoprite*, 356 NLRB No. 115 (2011) in support of its contention that Pfeifer was not entitled to have Sullivan serve as her Union representative during the investigatory meeting, it neglects to mention that in

both of these Board cases, the respective respondents knew whether the specifically requested union representative was available. Respondent cannot make such a claim in this case.

Respondent further contends that Long, who had minimal experience in terms of participating in investigatory meetings (two or three over a 20 year period), was a designated Union representative for bargaining unit employees and, accordingly, Respondent was permitted to choose her as Pfeifer's Union representative. (Respondent's Brief 13) However, Sullivan, who was credited by the ALJ, testified that Long did not "have a role in investigatory interviews." (ALJD 2:28-30) Sullivan further testified that Union representatives, such as herself, represent employees during investigatory meetings. (ALJD at 2)

Respondent's contention that it was permitted to pick and choose Long as Pfeifer's Union representative would have the Board ignore Supreme Court precedent. More specifically, pursuant to *NLRB v. Weingarten*, 420 U.S. 251 (1975), after Pfeifer requested Sullivan to be her union representative, Respondent had three choices: 1) grant Pfeifer's request for Union representation; 2) cancel the meeting; or 3) offer Pfeifer the choice of participating in the meeting without union representation. See also *Seattle First National Bank*, 268 NLRB 1479 (1984). The credible record demonstrates that Respondent decided to proceed with the investigatory meeting without acting in accordance with any of the aforementioned choices. Moreover, although Pfeifer had requested and informed Powell and Lakso that she wanted and preferred the presence of Sullivan at the investigatory interview, Respondent never advised Pfeifer that it would not proceed with the interview unless Pfeifer was willing to go forward with the interview unrepresented and without Sullivan, as

Weingarten requires to do so. See also *El Paso Healthcare System, Ltd.* 358 NLRB No. 54 (2012) (an employer violates employees' *Weingarten* rights by denying an employee the presence of a union representative of his or her choosing absent extenuating circumstances).

Contrary to Respondent's assertions, the record fully supports the ALJ's finding that Respondent unlawfully denied Pfeifer the Union representative of her choice during her investigatory interview. It is respectfully submitted that, based on the foregoing, Respondent's exceptions to the ALJ's finding should be rejected, as the ALJ properly found that Respondent denied Pfeifer's request for Union representation in violation of Section 8(a)(1) of the Act.

D. The ALJ Properly found that Respondent Unlawfully Denied the Pfeifer the Right to Confer with Long Prior to the Investigatory Interview and Long the Right to Speak and Participate in the Investigatory Interview.

1. Facts

After Pfeifer was denied her right to Union representation, as described above, it took at least ten minutes before Long arrived at the office where the interview was conducted. (Tr. 74) Long, who had been employed by Respondent for about 24 years, had been a member of the Union since about 1990. (ALJD 5) Long credibly testified that she did not know the reason she was being called to the office upstairs, and initially thought that she personally was going to be subject to some type of disciplinary action or "was in trouble." (ALJD 5:12-15)

As Long sat down, Lakso instructed her that she "was there to observe and listen." (ALJD 5:20-45; Tr. 100:12, 103:8) Pfeifer also testified that Lakso told Long that she simply needed to "sit and observe." (ALJD 5; Tr. 111:6) It is undisputed that Long did not meet with Pfeifer prior to the investigatory meeting, did not ask any questions or discuss issues

with anyone during the investigatory meeting, and did not speak during the investigatory meeting. Long credibly testified that because of Lakso's directive, she felt she could not ask any questions or make any statements. (ALJD 5; Tr. 100) After Pfeifer's interview, which lasted about 30 minutes, Respondent suspended and then subsequently terminated Pfeifer for admitting to violating company policies. (Tr. 113) Later that same afternoon Pfeifer notified Sullivan that she had been suspended. (Tr. 92)

Without rebuttal, Long credibly testified that during her employment of over 20 years, she had only sat in on two or three investigatory interviews, and her role in those meetings consisted of only being there to observe and listen. (Tr. 101-103) Long further credibly testified that although she was designated a union steward, she did not have any training on what her role would be during an investigatory meeting.⁵ (Tr. 102-03)

There is no agreement between the Union and Respondent that required Respondent to use only union stewards as representatives during investigatory interviews. (ALJD 2:43-45; Tr. 93) There is no written policy regarding circumstances when more than one representative is readily available. (ALJD 4:43-5:8)

As to the role of union stewards, Sullivan credibly testified that while union stewards are the Union's eyes and ears, and help during negotiations, union stewards are not trained to participate in investigatory meetings. (ALJ 2:28-30) Sullivan further credibly testified that union stewards do not have any role in investigatory meetings, have not been trained regarding investigatory interviews since she has been employed by the Union the past four years, and that Union representatives such as herself, who are paid by the Union, are usually responsible for representing employees at investigatory meetings. (ALJD 2:28-31; Tr. 89)

⁵ Long also testified that in her capacity as a union steward, her duties included enrolling new members and to sit in on disciplinary actions if employees requested. (Tr. 101) The most recent investigatory meeting she attended occurred about four years prior to that of Pfeifer's investigatory meeting. (Tr. 102)

2. Discussion

By its exceptions, Respondent also claims that because neither Powell nor Lakso told Long that she could not meet with Pfeifer, and because neither Long nor Pfeifer requested to confer, there is no violation of the Act. (Respondent's Brief at 19) Respondent, in its exceptions further claims that because Long was not prohibited from participating or speaking during the investigatory interview, it did not violate the Act. (Respondent's Brief at 18-19) These exceptions, without any basis, attempt to confuse and obviate rights employees enjoy during investigatory interviews under *Weingarten*.

The ALJ properly found that although Long was not made aware of what the purpose of the investigatory meeting prior to coming to the office, Pfeifer was not given the opportunity to confer with Long. (ALJD 7) The ALJ, citing *Colgate Palmolive Company*, 257 NLRB 130, 133 (1981), properly found that because Long was not familiar with the facts she needed to know in order to represent Pfeifer, that Respondent violated the Act by not allowing Pfeifer to discuss the facts with Long prior to the meeting. (ALJD 7) The Board has held that employees have a right to confer with their union representative. In *Colgate-Palmolive Company*, 257 NLRB 130, 133 (1981), the Board found that the right to representation clearly embraces the right to consultation since *Weingarten* "objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts." See also *System 99*, 289 NLRB 723, 727 (1988). In addition, before the consultation, the employee and his representative have a right to be informed of the subject matter of the investigation. *Pacific Telephone & Telegraph Co.*, 262 NLRB at 1049 (a general statement by the employer representative as to the subject matter of the interview,

which identifies the misconduct for which discipline may be imposed, will suffice). The union representative must be allowed to provide assistance. More specifically, the role of the union representative is to provide assistance and counsel to an employee who is being interrogated. *Weingarten*, 420 U.S. at 262-263, *supra*.

The credible record demonstrates that Respondent, after denying Pfeifer her choice of an available Union representative, unlawfully seized upon this circumstance to further deny Pfeifer's right to union representation by unilaterally selecting employee Long as Pfeifer's representative. Long barely had any experience in representing employees during investigatory interviews, and was completely unaware of the purpose of the investigatory meeting prior to coming to the investigatory meeting. Respondent, in its exceptions, attempts to factually distinguish *Colgate Palmolive* and impose a separate requirement on Pfeifer, i.e., that Long or Pfeifer must have asked for the chance to confer after the time that Pfeifer's *Weingarten* right attached. (Respondent's Brief at 18) However, Respondent ignores the fact that Long did not know why she was at the investigatory meeting before it commenced (as she believed she personally was the subject of the interview or discipline), never discussed any of the issues with Pfeifer prior of during the investigatory meeting, that Long had scarcely, if any experience in representing employees during investigatory meetings, and that Respondent had already denied Pfeifer's choice of representative. As the ALJ pointed out in his decision, "[r]epresentative status is more than a mere presence. The employee representatives must be familiar with the facts in order to properly represent the employee." (ALJD 7:20-22) Accordingly, it is respectfully submitted that Respondent's exception in this regard be rejected.

As to Respondent's exceptions objecting to the ALJ's finding that Long was prohibited from participating or speaking during the investigatory interview, the credible record demonstrates that this exception also lacks merit. (Respondent's Brief at 8-19) Essentially, Respondent's arguments are based on its contention that the ALJ was wrong in failing to credit Respondent's witnesses.

The ALJ properly found that because Lakso directed Long "to listen and observe," Respondent violated Section 8(a)(1) of the Act. (ALJD 7) The credible record evidence demonstrates that Lakso instructed Long to "listen and observe." The Board has held that prohibiting the union representative from speaking during the meeting unlawfully restricts the union representative's role to that of an observer. Such a limitation is inconsistent with the Supreme Court's recognition that a union representative is present to assist the employee being interviewed. *Weingarten*, supra at 260; *Southwestern Bell Telephone Co.*, 251 NLRB 612, 613 (1980), enf. denied 667 F.2d 470 (5th Cir. 1982) (union representative has no right to collectively bargain or adversarial confrontation, but cannot be ordered to remain silent); *Talsol Corp.*, 317 NLRB 290, 331-332 (1995), enfd. 155 F.3d 785 (6th Cir. 1998) (union representative cannot be made to sit silently like a mere observer). Therefore, Respondent may not totally silence a union representative during an investigatory interview. *Southwestern Bell Telephone Co.*, supra. It is respectfully submitted that Respondent's exceptions in this regard should be rejected as lacking merit.

E. The ALJ Properly Allowed The Complaint to Be Amended at Hearing.

At the hearing before the ALJ, the General Counsel moved to amend the Complaint to include an allegation that on or about July 16, Respondent denied Pfeifer her right to be represented by a Union during an investigatory interview by denying her the opportunity to

confer with Long, and by ordering Long not to speak during the investigatory interview, in violation of Section 8(a)(1) of the Act. (GCX 1(h); Tr. 6-8) Respondent, by its exceptions, claims that the ALJ erroneously granted the motion to amend the Complaint because it was barred by Section 10(b) of the Act. The record evidence demonstrates that the ALJ properly amended the Complaint.

The Board's Rules provide that a complaint may be amended during a hearing.

Specifically, Section 102.17 provides as follows:

Amendment.---Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing by the regional director issuing the complaint; as the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

In addition, the Board has repeatedly held that allegations involving events occurring more than six months prior to the filing of a charge are still considered timely if those allegations are "closely related" to the allegations made in a timely charge. *Seton Co.*, 332 NLRB 979, 985 (2000); *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1116-18 (1988). That is precisely the situation with the allegations at issue here. The additional allegations are very "closely related" to the timely filed charges and the original allegation concerning Respondent's denial of Pfeifer's right to union representation during her July 16 investigatory interview. *Letter Carriers Local 3825*, 333 NLRB 343, fn. 3 (2001) (Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated).

General Counsel's legal theory is obviously the same for all the allegations in question, as is Respondent's defense is basically the same for each allegation. (More specifically, Respondent's defense is that its supervisors did not say what is alleged, and, if they did, it is not a violation of the law in any event.) There can be little credible dispute that the allegations in the Complaint as amended are closely related. They involve the same event, the same people, the same or similar legal theories – including those based on *Weingarten*, the same Section of the Act, and are factually and legally intertwined and integrally related to one another. As such, they are, without doubt, “closely related.” *Nickles Bakery*, supra at 928; *Redd-I, Inc.*, supra at 1118; *The Earthgrains Co.*, 351 NLRB 733 (2007) (Board found that untimely-alleged allegations of threats were closely related to a timely-filed charge alleging that employee, against whom the threat was made, had been unlawfully transferred). It is respectfully submitted that Respondent's exceptions in this regard should be rejected as lacking merit.

F. The ALJ's Order Properly Required Respondent to Post Notices in All of its Phoenix, Arizona Stores

The ALJ's recommended order properly requires that Respondent post the Notice to Employees in its Phoenix, Arizona stores. (ALJD 8) It is not disputed that the Union and Respondent are parties to a collective-bargaining agreement that covers not only employees at the store at which Pfeifer, Long, and Millis are employed, but other bargaining unit employees who work at various stores throughout Phoenix, Arizona. (GCX 2:3) In addition, Powell testified that he conducts investigatory interviews at Respondent's other stores. (Tr. 81-82) Respondent should post at its other facilities wherever Respondent conducts investigatory interviews. See *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 145 (April 28, 2011) (Board found corporate-wide remedies are not reserved for recidivist only,

but are permissible and necessary to ensure that all affected employees will be informed of respondent's violation and the nature of their rights under the Act.)

Accordingly, as Respondent conducts investigatory interviews at its various stores throughout Phoenix, Arizona, it is respectfully requested that the Board affirm the ALJ's recommended order which requires Respondent to post the Notice to Employees throughout Phoenix, Arizona.

III. CONCLUSION

Based on the above and the record evidence as a whole, it is respectfully submitted that the Board should reject Respondent's exceptions and adopt the Administrative Law Judge's findings of fact and conclusions of law and recommended Order.

Dated at Phoenix, Arizona, this 13th day of May 2014.

Respectfully submitted,

/s/ William Mabry III
William Mabry III
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004
Telephone (602) 640-2118
Facsimile: (602)640-2178
E-mail: William.MabryIII@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF in SMITH'S FOOD & DRUG CENTERS, INC. d/b/a FRY'S FOOD STORES, Case 28-CA-109817, was served by E-Gov, E-Filing, and E-Mail, on this 13th day of May 2014, on the following:

Via E-Gov, E-Filing:

Gary W. Shinnars, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:

Frederick C. Miner, Attorney at Law
Littler Mendelson
Camelback Esplanade
2425 East Camelback Road, Suite 900
Phoenix, AZ 85016
E-Mail: fminer@littler.com

Ms. Amy Pfeifer
19777 North 76th Street, #2147
Scottsdale, AZ 85255
Email: apfeifer818@yahoo.com

/s/ Iliana N. Ferrance

Iliana N. Ferrance
Secretary to the Regional Director
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004
Telephone (602) 640-2151