Case Farms of North Carolina, Inc. ***and*** **Western North Carolina Workers' Center.** Cases 11–CA–21378 and 11–CA–21379

September 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On September 28, 2007, Administrative Law Judge John H. West issued the attached decision. The General Counsel and the Respondent each filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The complaint in this case alleges that the Respondent violated Section 8(a)(1) of the Act by discriminatorily discharging employees Luz Rodriguez and Evodia Dimas a/k/a Claudia Zamora[2] because they engaged in the protected concerted activity of complaining to the local press about employees' working conditions. The judge concluded that Rodriguez' discharge was unlawful, but that Dimas' discharge was not. We conclude that the Respondent violated the Act by both discharges.[3]

I. FACTS

A. The Work Stoppage

The Respondent operates a poultry processing plant with a predominately immigrant work force. Employees wear latex gloves when handling the poultry. Prior to October 27, 2006,[4] the Respondent provided each employee unlimited latex gloves at no cost. On that date, it limited each employee to three free pairs per day. Employees requiring gloves beyond that number would have to pay 50 cents a pair.

The same day, over 250 employees, including Rodriguez and Dimas, commenced an in-plant work stoppage to protest the glove policy change. The Respondent repeatedly told the employees to return to work or leave the plant. When they did neither, the Respondent summoned police, who peacefully escorted the employees off the premises.

The employees then gathered at a nearby church to discuss their concerns. While there, Rodriguez and Dimas spoke to newspaper reporters about the work stoppage and a range of employee grievances in addition to the glove policy. On Sunday, October 29, the local newspaper published an article about the work stoppage. Rodriguez and "Zamora" (Dimas) were quoted by name. The article described Rodriguez as the employees' spokesperson. It also reported Zamora as saying that "workers are routinely told to ignore notes from doctors about work restrictions when they've been injured on the job." No other employees were named in the article.

All employees who walked out were permitted to return to work with no discipline on Monday, October 30. That morning, Human Resources Manager Victoria Soto King received an e-mail copy of the newspaper article from a company public relations official. King discharged Dimas at the end of the day, allegedly in response to an injury accommodation request. King suspended Rodriguez on October 31 and discharged her 3 days later, allegedly for misconduct on the production line.

B. The Discharge of Dimas/Zamora

Dimas began working for the Respondent in 1999. She was terminated for 3 consecutive days of unexcused absence in October 2003. Terminated employees can apply for rehire after 30 days. If rehired, they return to work as new probationary employees. Dimas was rehired on that basis on February 6, 2004.

In early 2006, the Social Security Administration advised the Respondent that Dimas was using an invalid social security number. In September, Dimas provided the Respondent with new identification documents, including a matching social security number, falsely identifying her as Claudia Zamora.[5]

On Friday, September 8, 2006, the Respondent discharged Dimas. On Monday, September 11, it rehired the same person as "Claudia Zamora." Zamora's job application was prepared in part by King, who admit-

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] As discussed below, Dimas was employed under the false identity of Zamora from September 11, 2006, until her discharge on October 30, 2006. She will be identified by her true name of Dimas, except when context requires reference to Zamora.

[3] There are no exceptions to the judge's dismissal of an allegation that the Respondent violated Sec. 8(a)(1) by threatening to report employees to the Immigration and Naturalization Service and his denial of the General Counsel's motion to amend the complaint to allege that the Respondent violated Sec. 8(a)(1) by conditioning employees' continued employment on their abstention from future concerted activity.

[4] All subsequent dates are in 2006, unless otherwise stated.

[5] At the hearing, Dimas admitted the falsification. She also admitted that she was not authorized to work in the United States when she started working for the Respondent in 1999.

tedly knew Dimas/Zamora (hereinafter Dimas) during her prior employment with the Respondent. Dimas went back to work in the same job with the same supervisor. The Respondent classified Dimas as a new probationary employee at entry-level pay, but in less than a month it raised her pay to the $8 hourly wage previously earned by Dimas, near the Respondent's top hourly rate of $8.25. The payroll change notice for that raise, signed by King, includes the remark "had previous poultry experience." The Respondent's orientation presentation, prepared by King for new hires, states that the starting hourly wage rate will be $7.30, with a raise after 2 weeks to $7.55, and another raise at the end of the 90-day probationary period to $7.90.

During October, Dimas went several times to the Respondent's medical station, complaining of pain in her left shoulder, arm, and wrist. Raul Herrera, the Respondent's newly hired safety director, oversaw the medical station assisted by a plant aide. The plant aide generally gave Dimas medication to relieve the pain and swelling, and she returned to work.

On October 26, Dimas left work early because of continuing pain in her left arm. On her own initiative, she went to a local clinic where she was examined by a physician's assistant known as "Dr. Mike." Although Dr. Mike often examined employees sent to him by the Respondent's safety department, he was also Dimas' personal medical provider. Dr. Mike gave her a prescription note, using the name "Claudia Zamora," that recommended "light work or no work [left] arm for one week."

Dimas did not present the medical note to the Respondent on October 27 due to the work stoppage. On October 30, Dimas presented the note to her supervisor, who instructed Dimas to take it to the Respondent's medical station. Herrera gave Dimas a sling and sent her back to work with instructions for her supervisor to assign her tasks requiring use of her right arm only.

Herrera had only been hired in early October. Knowing only of an employee named Claudia Zamora, he did not know about her prior work history as Dimas, which included a multiweek work restriction due to left shoulder pain incurred on the job in February 2005. He testified that, after he gave her the sling, she gave him the personal medical note from the clinic visit to Dr. Mike that the safety department had not scheduled. When doing so, Dimas said her arm had been hurting for quite some time. Herrera testified that this prompted him to investigate. He discovered that Dimas (Zamora) had only recently been hired. He summoned her to his office, where he asked her to draft a statement describing how and when the injury occurred and why she believed it was work related.[6] In her statement, Dimas said that "[t]he pain began when I was about eight (8) months doing the second cut. . . . I started work the 6th of February, 2003."[7] Noting that the statement described an injury preceding Dimas' September 11 rehiring date, Herrera referred the case to the human resources department for evaluation. Meanwhile, Dimas returned to her restricted duty work assignment.

In the late afternoon, Herrera took Dimas to Human Resources Manager King's office, where King and Corporate Human Resources Director Armando Campos were waiting. King testified that she informed Dimas that "I didn't have a job for her because she had a restriction, and that was a restriction noted on a personal doctor's note." When Dimas protested, King said, "Claudia, you're a probationary employee. You do not qualify for a leave. If you had been more than—here more than 90 days, I had options for you, but I don't. I can't accommodate you[r] restrictions and, therefore, I don't have a job for you."[8] King has admitted that Dimas did not verbally request a leave of absence.

It is undisputed that probationary employees are not entitled to take a leave of absence for any reason, including medical. Both King and Herrera testified about different procedures and policies for work- and nonwork-related injuries and for handling personal doctors' notes. King testified that work-related injuries are handled by the safety department, under Herrera's direction, and nonwork-related injuries are handled by human resources, under King's direction. King acknowledged that when new employees began work at the plant, they often experienced pain in their arms and wrists from repetitive motions.

King said that she has advised supervisors not "to even look at" any personal doctor's note presented to them by an employee, but to refer that employee instead to human resources. Counsel for the General Counsel asked King on cross-examination what she would do if an employee presented her a note from a personal doctor seen during the weekend for a work-related injury. King said she would not consider the note, but would send the employee to Herrera to take over. She further testified that, even if the employee was probationary, Herrera might

[6] Although Herrera indicated that employees were routinely asked to give a written statement about how and when they were injured, the Respondent could produce only one other example of such a statement from its files.

[7] In fact, as previously stated, the Respondent first hired Dimas in 1999 and rehired her in 2004. Dimas obviously erred in her statement that this later event was in 2003.

[8] Dimas similarly testified that King told her she was unable to give her leave because she was a new employee. Campos did not testify in this proceeding.

then send that employee to a company doctor because the injury was alleged to be work related.

Herrera testified that the aches and pains of all employees who come to the medical station for attention are initially treated as work related pending further evaluation. "[I]f we are not a hundred percent certain that it's work related or non-work related, just to help the employee and their health as we help them out at the time the injury happened. Once we figure out if the injury happened at work, or it happened outside work, then we evaluate what route we're going to take." Work-related injuries, including those suffered by probationary employees, have been accommodated by work restrictions or by moving the employee to a different work area. In fact, Herrera indicated that new employees generally rotate through different areas of the plant in their department.

According to Herrera, "When it's not a work related injury and we have documentation stating that it's not, then we send it over to the Department of Human Resources to handle the situation." However, at least one probationary employee, Alisha Rutherford, received a restricted duty assignment for a nonwork-related injury.

C. The Discharge of Rodriguez

On October 31, Rodriguez was working next to employee Dominique Johnson deboning chickens. Johnson was to make a cut; Rodriguez would do a followup cut. Johnson was not making her cut properly, so that Rodriguez could not further process the product. Rodriguez returned the chicken to Johnson to rework it by throwing it on the table in front of Johnson.

Johnson left the production line to complain to King about the incident. After interviewing Johnson, Rodriguez, and two other witnesses about what had happened, Human Resources Manager King concluded that Rodriguez had thrown the chicken. She suspended Rodriguez until November 3 while King did a "job review" to determine the appropriate discipline for throwing product. King testified that since she assumed her position as plant human resources manager, there was a zero tolerance policy for throwing anything, including product. However, she also testified that the most important item in a job review is precedent, i.e., what the Respondent has done in similar situations.

The record contains documentation of the discharges of three employees for throwing product while involved in horseplay. King admitted that Rodriguez was not engaged in horseplay. Three other employees were not discharged for workplace throwing incidents. Employee Marcelino Bulux received a verbal warning when he threw and hit a coworker with pieces of ice. Employee Juan Garza received a written warning when he picked up an employee and threw him on the production line where chicken is transported.[9] Employee Cynthia Garza received no discipline for hitting another employee in the face with a chicken. Consistent with these examples, Rodriguez' supervisor, Raymondo, testified that he may give a warning to an employee for throwing items.

Although King testified about the importance of precedent and suspended Rodriquez for 3 days pending an investigation to determine how her conduct should be treated, she did not examine previous cases of employees throwing things. Rather, she relied on the representations of higher-management officials. General Manager Charles Rigdon told King that "throwing product has always been termination, period." Corporate Human Resources Director Armando Campos told King that, "if throwing product meant termination, then Rodriguez should be terminated." Based on this information, King terminated Rodriguez on November 3. Neither Ridgon nor Campos testified, and there is no evidence that either reviewed past incidents.

II. THE JUDGE'S DECISION

The judge analyzed the unlawful discharge allegations under the *Wright Line*[10] test for discriminatory motivation. Under that test, "the General Counsel bears the burden of proving by a preponderance of the evidence that animus against protected conduct was a motivating factor in the adverse employment action. If the General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer's knowledge of that activity, and animus against protected activity, then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity." *North Carolina License Plate Agency #18,* 346 NLRB 293, 293 (2006), enfd. mem. *NLRB v. Griffin,* 243 Fed. Appx. 771 (4th Cir. 2007), citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2006).

The judge found that the General Counsel established both that Dimas and Rodriguez engaged in protected concerted activity when they served as employee spokespersons in complaining about working conditions to the local newspaper,[11] and that the Respondent was aware of this activity when it discharged them. The

[9] This incident occurred during King's tenure as human resources manager.

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

[11] The judge found that this activity should be treated separately from the group employee work stoppage in protest of the new glove policy. He concluded that speaking to the press was protected concerted activity even if the work stoppage itself was unprotected. See fn. 11, infra.

critical question for the judge was whether the General Counsel had shown that animus against the employees' protected concerted activity was a motivating factor in the Respondent's decision to discharge them. He rejected the General Counsel's argument that the timing of the discharges soon after the Respondent learned about the newspaper article supported an inference of discriminatory motivation. The judge found that intervening events precipitated by the employees themselves—Dimas' presentation of the medical note and Rodriguez' chicken-throwing—dictated the timing of the Respondent's actions.

For Dimas, the judge found that other circumstantial evidence relied on by the General Counsel failed to prove that her discharge was motivated by animus against her for speaking to the press. The judge rejected the argument that treating "Zamora" as a probationary employee was pretextual, emphasizing that Dimas and the Respondent completed her hiring on this fictional basis before she engaged in protected activity. The judge also rejected the General Counsel's claim of disparate treatment in the Respondent's handling of Dimas' medical situation, absent "evidence that Respondent ever accommodated an employee based on a note that the employee obtained from her own personal physician." Finally, the judge found that the Respondent's interpretation of Dimas' personal medical note as requesting a leave of absence was not unreasonable, even though the note did not mention such a leave and Dimas did not verbally request one. Although he found that Dimas' discharge was not unlawful, the judge further observed that the Supreme Court's decisions in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002), would in any event preclude reinstatement or backpay for Dimas because of her admitted use of a false social security number to obtain her job and a false identity to retain it.

The judge reached a different conclusion with respect to Rodriguez. He noted that King testified that precedent was the most important factor in assessing Rodriguez' conduct, but that King had not independently reviewed prior personnel decisions regarding throwing product. He also found that the General Counsel proved a "blatant" disparity between the Respondent's treatment of Rodriguez and its treatment of other employees who threw product or other items. Even without any independent violations of the Act, the judge found that the evidence showing a failure to investigate and disparate treatment warranted the inference of a motivation to discriminate against Rodriguez for engaging in protected activity. In light of the evidence of disparate treatment, the judge further found that the Respondent failed to meet its *Wright Line* rebuttal burden of showing that it would have discharged Rodriguez even in the absence of her protected activity.

III. ANALYSIS

We affirm the judge's findings that Rodriguez and Dimas engaged in protected concerted activity[12] and that the Respondent unlawfully discharged Rodriguez for this activity soon after King learned about it. However, we disagree with his rejection of the timing factor as circumstantial evidence supporting the General Counsel's initial *Wright Line* showing of discriminatory motivation for both discharges. We also conclude, contrary to the judge, that the General Counsel has proved that the Respondent discharged Dimas in retaliation for her role in the same protected activity, and that the asserted reasons for the discharge were pretextual.[13]

A.

It is well established that discriminatory motive may be demonstrated by circumstantial evidence based on the record as a whole.[14] "To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union [or other protected concerted] activity." *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. mem. 184 Fed. Appx. 476 (6th Cir. 2006). The Board frequently finds that the timing factor supports an inference of animus and discriminatory motivation,[15] particularly where an employer simultaneously dis-

[12] The protection of Sec. 7 of the Act may encompass employee communications about labor disputes with newspaper reporters. See, e.g., *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995). Inasmuch as we agree with the judge that this activity by Rodriguez and Dimas was severable and independent from the work stoppage, we need not pass on the Respondent's exceptions to the judge's failure to find that the work stoppage lost the protection of the Act.

[13] The General Counsel has excepted to the judge's questioning of Dimas' credibility because she obtained and retained her job on fraudulent bases. However, we agree with the judge that the legality of Dimas' discharge can be determined without resolving the credibility of her testimony. We therefore do not rely on the judge's discussion in fn. 15 of his opinion of Dimas' credibility and of *Double D Construction Group*, 339 NLRB 303 (2003).

[14] E.g., *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992).

[15] E.g., *State Plaza Hotel*, 347 NLRB 755, 755 (2006), citing *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). The Board has stated that in some cases timing alone is sufficient to show that animus against protected activity is a motivating factor in a discharge. E.g., *Sears, Roebuck & Co.*, 337 NLRB 443, 443 (2002). In the present case, however, we find that the timing of the discharges at issue is just one of several circumstantial factors demonstrating discriminatory motivation.

charges multiple employees for unrelated reasons.[16] That is the situation in the present case.

King learned on October 30 that Dimas and Rodriguez had voiced complaints about employee working conditions to the local press. She terminated Dimas the same day, and she suspended Rodriguez, later to discharge her, the very next day. The discharge and suspension in less than 48 hours of the only two individuals identified in the newspaper article is strong evidence of an unlawful motive. See, e.g., *Dickens*, *Inc.*, 352 NLRB 667, 667 1 fn. 3 (2008) (concluding that timing of employee's discharge 2 days after his protected activity supported finding of unlawful motivation); *Sawyer of Napa, Inc.*, 300 NLRB 131, 150 (1990) (inferring antiunion motivation from discharge of two employees only 2 working days after learning of their union sympathies).

Contrary to the judge, that inference of unlawful motivation is not negated merely because actions by Rodriguez and Dimas occurring after their protected activity assertedly precipitated their discharges. The Board "does not find that the timing factor necessarily favors a respondent whenever the discipline is imposed . . . immediately following the alleged infraction. An employer might wait for a pretextual opportunity to discipline an employee for engaging in protected activity." *Naomi Knitting Plant,* supra at 1282 fn. 18. The Board evaluates all the circumstances of a particular case to determine whether the timing of the employer's actions suggests that it seized an opportunity to mask its true motivation. This case-by-case approach explains why the judge erroneously relied on *Woodruff & Sons*, 265 NLRB 345 (1982), affd. mem. *Scurek v. NLRB,* 717 F.2d 1480 (D.C. Cir. 1983), to support his timing analysis here.

In *Woodruff & Sons*, the employer discharged alleged discriminatee Scurek immediately after he caused major damage to his truck and a few days after he voiced pay complaints and filed an assault charge against his supervisor. The employer had repeatedly warned Scurek for reckless driving and for necessitating numerous major repairs to his truck. There was no showing of disparate treatment in discharging Scurek for this final incident in a sustained history of misconduct. Further, the employer had tolerated frequent pay complaints from other employees, and had actually adjusted Scurek's pay in response to his recent complaint. Under those circumstances, the Board concluded that no inference of unlawful motivation should be drawn from the timing of Scurek's discharge relative to his pay complaint and assault charge a few days earlier.[17]

By contrast, this case presents none of the countervailing circumstances upon which the Board relied in declining to infer discriminatory motivation from timing in *Woodruff & Sons,* supra. There is no evidence that Rodriguez or Dimas had any history of misconduct. Further, there is strong evidence that the Respondent treated both more harshly than similarly situated employees.[18] And, unlike the employer in *Woodruff & Sons*, the record here establishes that the Respondent targeted, rather than tolerated, the only two named employees who spoke to the press about employees' concerns.

We thus find it appropriate to rely on the timing factor, in addition to the other evidentiary factors relied on by the judge, in affirming his conclusion that the General Counsel met his initial *Wright Line* burden with respect to Rodriguez, and that the Respondent failed to show that it would have discharged her in the absence of protected activity.

B.

For the reasons just stated, we also find that the timing of Dimas' discharge particularly supports an inference of unlawful motivation, in conjunction with the unlawful discriminatory discharge of Rodriguez for engaging in the same protected activity.[19] We also disagree with the judge's analysis of the Respondent's asserted reliance on Dimas' probationary status and her presentation of a personal medical note to justify her discharge. As discussed below, the Respondent did not consistently treat Dimas as a probationary employee, leading us to conclude that the Respondent seized on her probationary status as a pretext to discharge her. Even if it had consistently treated Dimas as a probationary employee, we find that the Respondent's handling of her medical situation constituted disparate treatment.

[16] E.g., *Knoxville Distribution Co*., 298 NLRB 688 fn. 1, 696 (1990), where the Board found a violation in the simultaneous discharges of three employees for unrelated reasons 1 day before a union meeting.

[17] Moreover, even assuming that the employer was motivated in part to discharge Scurek because of his pay complaint, the Board found this complaint to be unprotected activity because of "the opprobrious manner in which he voiced the complaint." 265 NLRB at 345.

[18] Although the judge found a "blatant" disparity in the Respondent's treatment of Rodriguez, we need not rely on this characterization of the evidence. At least where the General Counsel proves animus based on multiple factors, including disparate treatment, it is not necessary that the proven disparity be blatant. E.g., *Alstyle Apparel*, 351 NLRB 1287 (2007) (evidence of disparate treatment indicates shift leader Ly's discharge was motivated by union activities rather than his tolerance of horseplay on the work floor).

[19] See *Frye Electric*, 352 NLRB 345, 350 (2008), and cases cited there (discriminatory discharge of one worker is a factor to consider in weighing whether the contemporaneous discharge of a second coworker, who engaged at the same time in the same protected activity, was discriminatory).

The Respondent's defense requires us to accept the multiple propositions that Dimas: (1) was properly treated as a probationary employee with a nonwork-related injury; (2) could not be accommodated for her injury like other probationary employees because she had visited a physician's assistant on her own; and (3) could not be retained because the physician assistant's note implicitly asked for a leave of absence. Any one of these propositions is questionable. Collectively, they cannot stand.

It is not for the Board to question the per se legitimacy of the Respondent's discharge and immediate rehiring of Dimas as a new probationary employee in September 2006. It is within our purview, however, to consider that the Respondent did not treat her as an ordinary newly hired or rehired employee. First, it rehired Dimas as "Zamora" without any break in employment, contrary to the policy that terminated employees must wait 30 days before applying for rehire. Second, it assigned her to her prior workstation and supervisor, rather than rotating her within her department as Herrera indicated was the custom for new employees. Finally, within 30 days of Dimas' hiring as Zamora, she received a pay raise in excess of what new employees were told they could receive only at the completion of their 90-day probationary period. King authorized this raise based on "previous poultry experience" gained, as King well knew, during Dimas' tenure with the Respondent. Those departures from the Respondent's standard personnel practices occurred before Dimas' protected complaints to the press.

By contrast, when Dimas later presented Dr. Mike's note prescribing an injury accommodation, King insisted that Dimas had to be treated as a newly hired probationary employee who could not be accommodated or granted a leave of absence for an obvious work-related injury. King took this strict view of Dimas' probationary status only hours after learning of Dimas' protected activity, including her specific complaint about the Respondent's failure to honor doctors' notes prescribing work restrictions for job-related injuries. The Respondent's prior reliance on Dimas' actual work history when treating "Zamora" differently from the usual newly hired or rehired probationary employee raises the question why it refused to acknowledge that history when handling her medical situation on October 30. Had it done so, the work-related nature of Dimas' injury would have been recognized and accommodated.

Nor are we impressed by the Respondent's argument that its treatment of Dimas resulted from the fact that she went to Dr. Mike on her own and presented a personal physician's note. Herrera testified that this action essentially preempted him from sending her for a medical evaluation to determine if her injury was work related. King, however, testified that an employee, even if probationary, who did what Dimas did would be referred to Herrera, who might then send the employee to the company doctor for an evaluation. In any event, King knew that Dimas' injury was related to her work with the Respondent, and there was nothing to the contrary in Dr. Mike's note. Thus, even if the Respondent could legitimately disregard Dimas' personal medical note, there appears to be no legitimate reason why the Respondent was precluded from accommodating Dimas' work-related injury, as it did with other employees.

This is so even if the Respondent had consistently treated Dimas as a probationary employee. Dimas had been to the medical station with complaints about work-related pain *since she was hired as Zamora*, with no inquiry into the timing or source of her injury until after she engaged in protected activity. The injury she suffered was typical of those incurred by probationary employees engaged in repetitive motion work. Further, it is undisputed that the Respondent frequently treated such injuries, for probationary and permanent employees alike, by giving them temporary restricted work assignments. In at least one recorded instance, the Respondent even gave a restricted duty assignment to probationary employee Rutherford for a *nonwork*-related injury. Accordingly, Dimas' presentation of a personal medical note does not explain the Respondent's actions.

Finally, even if the Respondent could reasonably have regarded Dimas as a probationary employee with a nonwork-related injury, we disagree with the judge that the Respondent could reasonably have interpreted Dr. Mike's note as requesting a leave of absence. The note said nothing whatsoever about a leave of absence, and Dimas never asked for one. Like many similar notes in the record, it prescribed restricted work duty. Moreover, King never asked Dimas whether she was requesting a leave of absence, or whether she was willing to return to work without any restriction and deal with her pain, just as Dimas had done after other recent visits to the medical station.[20]

Based on the foregoing, we find that the Respondent's reliance on Dimas' limited work history as "Zamora" and her personal medical note as the basis for discharging her was pretextual. "It is . . . well settled . . . that when a respondent's stated motives for its actions are found to

[20] Dimas' situation is distinguishable from those of other terminated probationary employees cited by the Respondent. Each of those employees presented notes that specifically requested leaves of absence for medical conditions. Furthermore, those conditions precluded any possibility of an immediate return to work, with or without restricted duties.

be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). In any event, we find that the Respondent's disparate treatment of Dimas' injury, whether or not she was legitimately regarded as a probationary employee, precludes the Respondent from establishing its *Wright Line* defense. Accordingly, we conclude that the Respondent violated Section 8(a)(1) of the Act by discriminatorily discharging Dimas for engaging in protected concerted activity.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, we adopt the judge's recommended backpay and reinstatement remedy for the unlawful discharge of employee Luz Rodriguez. In addition, having found that the Respondent also unlawfully discharged employee Evodia Dimas a/k/a Claudia Zamora, we shall include in our remedial order conditional provisions for reinstatement and backpay.

Contrary to the judge, and consistent with Board practice, we shall order the Respondent Employer to offer Dimas reinstatement subject to the condition that she presents, within a reasonable time, INS form I–9 and the appropriate supporting documents proving legal immigrant status. See *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 415–417 (1995), affd. 134 F.3d 50 (2d Cir. 1997).

In *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002), the Supreme Court held that the Immigration Reform and Control Act of 1986 (IRCA) precluded the Board from awarding backpay to any discriminatee who is not "lawfully entitled to be present and employed in the United States." *Hoffman*, supra at 1281, citing *Sure-Tan,* supra at 883. Accordingly, the Board is obligated to toll backpay for any part of the backpay period during which the discriminatee is not lawfully entitled to be in the United States. E.g., *Tuv Taam Corp.,* 340 NLRB 756, 760–761 (2003). As the Board has explained, however, it is usually premature to address such matters at the merits stage of a case. We decline to do so here, leaving to compliance the determination of what, if any, backpay may be due to Dimas consistent with *Hoffman*. See, e.g., *Domsey Trading Corp.*, 351 NLRB 824, 829 (2007) (remanding for further litigation in compliance about six discriminatees "whose authorization status during the backpay period, and consequent entitlement to a backpay remedy, remain[ed] uncertain").

Any backpay owed to Dimas shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[21] In addition, the Respondent shall be ordered to remove from its files and records any and all references to the unlawful terminations of Dimas and Rodriguez, and to notify them in writing that this has been done.

ORDER

The Respondent, Case Farms of North Carolina, Inc., Morganton, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activities, or to discourage employees from engaging in such activities.

(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.

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

(a) Within 14 days from the date of this Order, offer Luz Rodriguez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer Evodia Dimas a.k.a. Claudia Zamora full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed, provided that she completes, within a reasonable time, INS form I-9, including the presentation of the appropriate documents, in order to allow the Respondent to meet its obligations under the Immigration Reform and Control Act of 1986.

(c) Make Rodriguez and Dimas whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, with interest, in the manner set forth in the amended remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discharges of Rodriguez and Dimas/Zamora and, within 3 days thereafter, notify them in writing that this has been

[21] The General Counsel seeks compound interest computed on a quarterly basis for any monetary amounts owing to the discriminatees. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham,* 352 NLRB 516 fn. 1 (2008), citing *Rogers Corp*., 344 NLRB 504 (2005).

done, and that the unlawful discharges will not be used against them in any way.

(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.

(f) Within 14 days after service by the Region, post at its facility in Morganton, North Carolina, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 11, 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. 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 October 30, 2006.

(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.

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 or otherwise discriminate against you because you engage in protected concerted activities, or to discourage you from engaging in such activities.

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 the Board's Order, offer Luz Rodriguez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, make a conditional offer of reinstatement to offer Evodia Dimas a/k/a Claudia Zamora, offering her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, provided that she completes, within a reasonable time, INS form I-9, including the presentation of the appropriate documents, in order to allow us to meet our obligations under the Immigration Reform and Control Act of 1986.

WE WILL make Rodriguez and Dimas whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful discharge of Rodriguez and Dimas and, WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful discharges will not be used against them in any way.

CASE FARMS OF NORTH CAROLINA, INC.

Rossetta Lane, Esq., for the General Counsel.
Charles Roberts III, Esq. (Constangy, Brooks & Smith, LLC), of Winston-Salem, North Carolina, for the Respondent.
Francisco Risso, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Morganton, North Carolina, on July 16, 17, and 18, 2007. The charges in Cases 11–CA–21378 and 11–CA–21379 were filed by Western North Carolina Workers' Center on No-

[22] 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."

vember 2, 2006.[1] A consolidated complaint was issued on March 30, 2007. It alleges that Case Farms of North Carolina, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by threatening employees with calling immigration and by terminating employees Claudia Zamora and Luz Rodriguez because the employees engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such concerted activities for the purpose of collective bargaining or other mutual aid or protection. Respondent denies violating the Act as alleged in the above-described complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent on September 17, 2007,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a North Carolina corporation, processes poultry at its facility in Morganton, where it annually sells and ships from its Morganton plant, products valued in excess of $50,000 directly to points outside the State of North Carolina. The Respondent 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.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

On October 27, a number of Respondent's employees engaged in a work stoppage. Before October 27, the employees were provided with an unlimited number of latex gloves daily by the Employer. The employees had been placing the gloves in trash containers when they went on break or to the restroom, and they were given a new pair of gloves, at no charge to them, when the returned to the work area. Before October 27, the employees had complained that the quality of the gloves had fallen off. Also, customers complained that they were finding pieces of the latex gloves in the product and they advised Respondent that they would not continue to purchase Respondent's product unless the problem was remedied. Respondent purchased better latex gloves which cost more and Respondent decided to only provide three pairs of these gloves to the employees daily. If an employee required more than three pairs of gloves on a given day, the employee had to pay 50 cents to Respondent for each additional pair of gloves. The employees received notification of the change in policy on October 27.

Members of management spoke to the employees on October 27 telling them to go back to work or leave the plant. The employees did neither. The message was repeated during the morning and eventually the employees were advised that the police were going to be summoned. Subsequently, the police arrived and the employees were escorted off Respondent's property.

Miguel Cua, who is a human resource supervisor, testified that on October 27 there was a work stoppage beginning at 8:15 a.m., and he and Armando Campos, Respondent's human resources director, went down to the production floor to find out what was going on; that the employees complained about the change in the glove policy; that the employees were told that the new glove policy was not going to be changed; that management decided to give the employees time to cool off; that later the employees were asked again to go back to work but the employees said that they were not going back to work until the Company changed the glove policy back to the old policy; that the employees were informed that the policy was not going to be changed back and they had 10 minutes to go back to work; that a second warning was given to the employees who were told to go back to work or leave; that the employees refused; that after the third attempt to get the employees to work or leave, management told the employees that if they did not work or leave they were trespassing and management would call the police; that the police had the employees leave the Respondent's property; that by about 11:30 a.m. more than 250 employees had left the plant; that during the 3-hour period he did not say anything about calling Immigration; and that he addressed the employees as a group.

On cross-examination, Cua testified that during the work stoppage management told the employees "don't yell, don't yell, be calm" (Tr. 478); that there was no violence when the police came; and that the employees left when they were told to by the police.

When called by counsel for the General Counsel, Victoria Soto King, Respondent's human resource director, testified that Respondent had been having a problem with the latex gloves it used for some time; that eventually a vendor of a better quality latex glove was located; that the better latex gloves cost the Respondent more and it was decided to give Respondent's employees three pairs per day and after that the employees would have to pay for the additional pairs of gloves they used; that she thought the cost to employees for additional gloves was 45 cents a pair; that employees have to purchase the files they use to sharpen their knives; that on October 27, the employees engaged in a walkout because they were not going to get as many free gloves as they used to; that she arrived at the plant at about 11:30 a.m. on October 27; that the police arrived at the plant and removed more than 250 employees on October 27; and that later that day when the employees returned to the plant to pick up their paychecks she told the employees that she did not understand why they had to walk out.

A newspaper article (GC Exh. 2) (R. Exh. 13 is the computerized copy of the newspaper article) was published on Sunday, October 29, about the walkout and two employees who spoke to representatives of the press about the reasons for the walkout, viz. Zamora and Rodriguez, were named in the published article. As here pertinent, the newspaper article reads as follows:

[1] All dates are 2006, unless otherwise indicated.

[2] Counsel for General Counsel's unopposed motion for an extension of time to file briefs from August 23 to September 17, 2007, was granted.

More than 100 workers at Case Farms walked off the job Friday morning after what they call a months-long attempt at correcting problems inside the factory.

Company officials say the incident Friday was caused by new gloves introduced into the work area. . . . .

Workers say the gloves aren't their only problem.

. . . .

"We've been talking for several months about problems at the plant, but the company hasn't responded to our needs," says spokesperson Luz Rodriguez, through interpreter Francisco Russo, director of North Carolina Worker's Center.

Thursday, the company announced that each worker would get three pair of gloves that should last them the entire day, she says.

The workers were told that they would be charged 75 cents for each additional pair, she says.

She says workers normally use six or seven pairs a day because the gloves break.

There was no limit on gloves before Friday, Rodriguez says.

. . . .

Gloves aren't the only reason workers say they decided to stage a strike.

Pregnant women used to be able to take 13 weeks off when they had their babies but the company now expects new mothers to come back in a month, Rodriguez says.

"It had to do with a lot of things,' she says. 'We decided to say, No more.'"

Claudia Patricia-Zamora says the workers at Case Farms are routinely told to ignore notes from doctors about work restrictions when they've been injured on the job.

. . . .

Rodriguez testified that she worked at Respondent from October 9 until the 31; that she cut and deboned chicken legs using a knife or scissors in area 1145; that on October 27 when she arrived at work at 8 a.m. she was given three pairs of gloves for the day and if she needed more, she would have to pay for them; that in the past she was able to get as many pairs of gloves as she needed during the day; that she then went to the ladies locker room where the ladies were talking about a strike or work stoppage; that she and the other ladies went to the work area; that all of the workers were standing; that she told the workers that if they stick together maybe the Company would reduce the price a little bit of the gloves; that Supervisor "Chepino" (Jose Hernandez) asked her why she was screaming at the people, yelling at the people, and she told him that she was not yelling but rather she was simply defending the employees' rights as workers; that the employees in area 1145 decided to go to area 1110; that when she was in area 1110 Campos came and spoke to the employees; that Campos asked her why she was yelling or screaming, she told Campos she was not screaming or yelling she was just simply defending the employees' rights and defending her coworkers because it was not just what the Company was doing to them, it was not fair; that Campos then told her that what she was doing was not right, if she had a problem, she should go to the office and talk to him, and it was her fault that the people had stopped working in area 1110; that then-Supervisor Miguel (Rodriguez did not know his last name) came and told the employees to leave the Company and the police were coming; that employees told Miguel that they were not afraid of the police and Miguel said, "Well, if you're not afraid of the police, then don't make us call—have to call Immigration" (Tr. 157); that then the police came and the employees went to the cafeteria; that then the police made the employees leave Respondent's property; that the employees went to a local church and she was chosen to speak to the press; that she told the press that it was not fair what the Company was doing because the Company was charging the employees for everything; that she returned to the plant later that day to pick up her paycheck; that King told the employees, "Aren't you—aren't you ashamed to come pick up your check after you—after what you have done? Why did you make such a scandal for a pair of gloves? Why did you force us to call the police?" (Tr. 160 and 161); that an employee said that they had only come for their paycheck and they did not want to hear what King had to say; that King then said, "[W]ell, be quiet, and if you don't want to work here, leave. You are a dog, or it could be a bitch. I don't—it's the same word in Spanish" (Tr. 161); and that then King told the employees to be quiet and leave and "not to force her to call the police or immigration because I will send you back to your country" (Id).

On cross-examination, Rodriguez testified that on October 27 at about 8 a.m. there were about 300 employees who were not working at that time; that 3 hours later, or about 11 a.m., the employees were finally made to leave the plant; that only once did Campos and Cua ask the employees to either leave the facility or go back to work; and that at some point Miguel or some other supervisor told the employees that if they did not leave the plant the police were going to be called.

King testified that about 90 percent of Respondent's employees at the involved plant are Hispanic, with 89 percent of Guatemalan descent; that in 2006 the employees began complaining about the latex gloves, indicating that they were thinner than they had been using and that the finger tips were no longer rough which made it more difficult to hold the product; that a customer complained that it was finding pieces of the yellow latex gloves on the product and it indicated that if Respondent wanted the customer to buy the product, Respondent would have to make sure that the extraneous material was not on the product; that it was decided to use blue latex gloves; that the employees indicated that the new gloves were of the same thickness of the gloves they used before they became thinner; that it was decided that three pairs of the new gloves would be supplied to employees each day and if the employees needed additional gloves they would have to pay 50 cents for each pair; that on Thursday, October 26 she posted a notice to employees advising them that if they needed more than three pairs of gloves a day, it would cost them 50 cents a pair[3]; that when she

[3] See p. 8 of R. Exh. 5, which indicates, inter alia, that starting on October 27 every production employee will recrive three pair of gloves every morning at no cost to them—blue for the leg debone personnel and the new better yellow gloves for the employees in the rest of the

arrived at the plant on October 27 at about 11 a.m. she saw the police cars around the plant and Campos told her what was going on; that on the afternoon of October 27 when the employees returned to the plant to pick up their paycheck, she asked them "why did you leave, why did you feel that you had to stop like that" (Tr. 336); that some employees told her that they were not there to talk about issues, they were there just to pick up their paycheck; that she then told the employees present "[w]hen you come back on Monday, you're going to get your three pairs of better yellow gloves you wanted. If you want to work, come to work. But if you don't want to work, don't even bother coming" (Tr. 337); that she did not say to the employees don't make me call Immigration or I'm going to call Immigration, and she did not call the employees dogs or bitches in Spanish; and that she did not ask employees "are you ashamed to pick up your paychecks." (Tr. 396.)

On October 30, Respondent's employee known at that time as Zamora went to the medical or first aid station in Respondent's plant, and presented a note (GC Exh. 3) from Table Rock Family Medicine which is dated "10–26–06" and which prescribed "Light work or no work . . . [concerning left] arm for one week." Zamora is actually an alias for Evodia Gonzalez Dimas. Dimas had worked for Respondent since 1999. However, the Social Security Administration (SSA) advised Respondent by letter that the social security number that Dimas was using was not a valid social security number for her. Subsequently, Dimas provided Respondent with identification (a permanent resident card) as Zamora and a social security card for Zamora, who had a different birth date than the one originally provided to Respondent by Dimas (R. Exh. 6). On September 8, Respondent terminated Dimas (R. Exh. 12) and on September 11, Dimas was hired and received orientation as a new employee named Zamora (R. Exhs. 16 and 14). When Dimas went to Respondent's medical station on October 30 posing as Zamora, she was still a probationary employee since Zamora had not completed her 90-day probationary period. On October 30, Dimas posing as Zamora complained to the medical assistant in Respondent's plant about her left arm and shoulder. The Respondent had not sent Dimas to the clinic from which she had the medical note. Zamora was referred to Respondent's human resource department. Dimas posing as Zamora was advised that since she was a probationary employee, Respondent would not accommodate her request. Dimas posing as Zamora was terminated on October 30.

When called as a witness by the General Counsel, King testified that Ken Wilson, in public relations at Respondent, e-mailed her a copy of the newspaper article about the work stoppage in which Dimas, referred to in the article as Zamora, and Rodriguez were quoted (R. Exh. 13); that Raul Herrera, who began working for Respondent on October 9, 2006, is Respondent's safety manager and is responsible for Respondent's medical station and workers' compensation, met with her about Zamora's complaint regarding her left arm; that Dimas a/k/a Zamora had worked for Respondent since 1999; that on Friday, September 9, Dimas brought to Respondent identification documentation as Zamora; that on the following Monday Dimas began working as Zamora; that when Dimas was hired as Zamora, she was given new employee orientation, a different employee number, a new employee seniority date, her job and her supervisor remained the same but Dimas' pay was reduced to that of a starting employee; that when a new employee begins working at Respondent they often experience pain in their arms and their wrists from the repetitive motion of the work; that Herrera will work with the employees for a couple of weeks to alleviate the pain until they get better; that sometimes Herrera has to move the employee to a different job where they are not using that particular part of their body for a couple of weeks; and that Herrera does this for all employees, including new employees.

When called as a witness by the General Counsel, Herrera testified that when an employee comes to the medical station complaining about an ache or pain the situation is evaluated; that everything is treated as work related initially just in case; that new employees especially experience aches and pains; that if a new employee complains about an ache or pain, they can, after evaluation, be used in different areas of the plant within their department for a while so that they are not aggravating the injury; that in October Zamora, who worked on the deboning line, came to the medical station and told him that she was experiencing pain in her left shoulder, arm, and wrist; that on October 30, Zamora presented him with a note from the Table Ridge Family Medicine clinic, which is one of the clinics which Respondent refers its employees to, calling for light duty or no work for left arm for 1 week (GC Exh. 3, a Table Rock Family Medicine note, indicates "Light work or no work . . . [see left] arm for one week"); that in this instance Respondent had not referred Zamora to the clinic; that Zamora had been in the plant aid office several times complaining about this pain in her shoulder, arm, and wrist, and most of the time Respondent would give her some medication that would help relieve the swelling and pain; that on October 30, when Zamora came to him with the medical note he told her that he would help her and he gave her a sling for her arm; that at the time of her evaluation he told Supervisor Jose Hernandez to give Zamora a job where she did not have to use her left arm; that 95 percent of the time he has employees who come to him with an injury or pain of some sort write a statement about it; that he could only recall one other time when he had an employee, Antonio Jackson, draft a statement regarding how he was injured; that he did not tell Zamora individually when she came to the medical station that there are better ways to take care of a problem than a work stoppage; that on October 27, as part of the management team speaking to employees engaged in the work stoppage, he did tell all of the assembled employees together that there is a better way to take care of problems than a work stoppage; that his office did not schedule Zamora's appointment at the clinic; that at the time he did not know Zamora under any other name; and that when he determined that the injury was not related to workers' compensation he sent Zamora to human resources.

In her examination of Herrera, counsel for the General Counsel introduced General Counsel's Exhibits 4 through 19,

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departments, and that if the employees need more gloves other than the three free pairs provided daily, they must buy them at their own expense which will be the price of 50 cents per pair.

which show that Respondent gave light duty to a number of employees who suffered an injury, pains, aches, or cysts. Some of these employees who were given light duty had not yet completed their probationary (90 days) period and some of these were given light duty after Zamora was terminated. Indeed, one of the probationary employees who received light duty after Zamora was terminated had a nonwork-related injury.

Dimas testified that she began working at Respondent in January 1999; that in September 2006 when she changed her identification from Dimas to Zamora she did not miss any work in that she changed her identity on Friday and on Monday she was called Zamora; that when she became Zamora her job and supervisor, Pedro Shank, did not change but she was paid less for doing the same work; that she worked on a deboning line, cutting chicken legs with a knife or scissors; that when she works with scissors if the chicken leg was not cut properly by the person on the line ahead of her using the knife, she returns the chicken to the person who originally had the responsibility of making the necessary cut with the knife; that she uses her right hand for the knife and scissors and she wears a metal glove on her left hand; that on October 26, she had to leave work early because her left arm hurt her a lot; that she went to see "Doctor Mike," who is a physicians assistant at Table Ridge Family Medicine clinic; that the physicians assistant asked her if Respondent had sent her and she told him no; that prior to seeing the physicians assistant she told the nurses aide in the plant that she was going to the doctor because her arm hurt a lot; that the nurses aide told her that she would have to speak with King and she did speak with King but she could not remember exactly when; that on October 27, she participated in the work stoppage over Respondent's new policy regarding work gloves; that she was also upset about Respondent's policies regarding absences and doctor notes; that she overheard Rodriguez, who was a new employee, tell her coworkers not to be afraid because management would not do anything to them; that Supervisor Hernandez and Campos then told Rodriguez to be quiet and they asked her why she was screaming so much ; that the employees were told to go to the cafeteria, that the police would be summoned, and the police did come to the plant; that many of Respondent's employees left Respondent's property and met at a church; that newspaper people came to the church and she spoke with them through an interpreter; that later in the day on October 27 she and other employees went back to Respondent's plant to get their belongings and their paychecks; that while they were at Respondent's plant, King told the employees that if they wanted to go back to work on Monday the work was there but the new policy regarding the gloves would remain the same; that on October 30, she told Supervisor Hernandez that she had to go to the nurses station; that at the nurses station she spoke with Nurse Morgan and Herrera; that Herrera told her that he had spoken with King, they decided to take her case, they were willing to help her, and he had a present for her, namely a sling; that she gave Herrera the note she had from the Table Ridge Family Medicine clinic; that she told Herrera that Dimas went to the clinic and not Zamora; that Herrera then said that he did not like it when people played with him; that Herrera put her arm in the sling, and he told her not to take it off for any reason and that the doctor's note would be respected; that Herrera told Hernandez to put Zamora on a job where she would be using only one hand; that she picked up chicken legs which had fallen between the lines and she placed them in a box; that she worked for 2 hours and then went on a break; that she worked for 30 minutes more picking up chicken legs off the floor when Herrera told her to go to his office; that Herrera told her that he was new at Respondent and needed her to help him so he could help her; that he asked her to draft a statement indicating when she started work and when her arm started hurting her; that while she was writing the statement (GC Exh. 22),[4] Herrera said that the employees committed a grave error when they stopped work on October 26; that she told Herrera that she realized that but she did not like the way King treated her; that she spoke with Herrera for about 2 hours; that she told Herrera that ever since King and Campos came to Respondent changes were made, they were not made in favor of the employees but rather they were made in favor of the Company; that she went back to work and about 5:30 or 6 p.m. Hernandez told her to go to King's office; that it was just her and King in the office but Campos came in at one point; that King told her that she had discussed the matter with Herrera and she would have to let her go because she could not work with just one hand and they did not have work for her with just one hand; that she told King that she was willing to do any other work even if it did hurt her; that King told her that she could not do anything for her; that she asked for a termination slip and King said she was not going to give it to her; that King called and told Herrera to accompany Dimas to get her belongings; that during her employment with Respondent she once took a leave of absence for 4 months; and that when King discharged her King did not tell her that she could reapply to work at Respondent's plant in 30 days.

On cross-examination, Dimas testified that the birth date of Zamora was different than the one she originally gave when she originally went to work for Respondent in 1999 (R. Exh. 1);[5] that the social security number she gave to the Respondent in 1999 was given to her by a friend; that she was not authorized to work in the United States in 1999; that she was never terminated by the Respondent before October 2006; that in September 2006 King told her that she would have to be terminated as Dimas and rehired as new employee Zamora; that she signed an employment application as Zamora; that her pay was reduced; that she bought the papers so that she could work as Zamora; that on October 27, Hernandez told employees to go back to work about three times; and that on October 30, even though she was not asking for a leave of absence, King told her that she could not give her a leave of absence because she was a new employee.

On redirect, Dimas testified that she gave her Zamora papers to Campos and not King; that while she signed the Zamora

[4] In here statement, Dimas indicated that the metal glove she wore on her left hand for the half day that she used the knife weighed a lot when it was full of grease or fat.

[5] R. Exh. 1 includes copies of the resident alien card, the social security card, and the State of North Carolina DMV Identification card Dimas gave to the Respondent in 1999 when she was first hired.

application (GC Exh. 23), she did not fill it out; that King filled out the Zamora application and King asked her to sign it; that while she worked as Dimas at Respondent, her job was changed for 1 week to accommodate a thumb she cut at home; and that she regretted changing her name to Zamora "because it didn't do me any good." (Tr. 148.)

King testified that the probationary period is 90 days; that probationary employees do not receive any benefits and they are not eligible for any kind of medical or personal leave; that since 2004 when someone applies for a job Respondent has telephoned the SSA to check that there is a match with the social security number given, the name, and the birth date; that periodically, Respondent gets letters from SSA indicating that there are certain mismatches; that she prints two copies of the letter, gives one to the employee involved, and has the employee sign the other copy to show that the employee was given the letter; that the SSA letter indicates that the employer cannot assume that the individual in question is illegal and the employer cannot take adverse action against the involved employee; that she gave such a letter to Dimas and Dimas subsequently gave new documentation to Campos[6]; that she did check the social security number to make sure that it belong to somebody named Zamora; that Dimas was terminated on September 8, 2006 (R. Exh. 12); that Dimas, under the name Zamora, was hired on September 11, 2006 (R. Exhs. 14, 15, and 16); that late in the afternoon of October 30, 2006, Herrera told her "[t]hat Evodia had a personal doctor's note that I needed to deal with" (Tr. 352); that for anything work related the nurses station would schedule a doctor's appointment; that she has advised supervisors that any other doctor's note should be referred to human resources; that the Respondent does "not contemplate personal doctor's note restrictions [regarding light duty or proposed restricted duty] at all, none" (Tr. 353); that Respondent allows light duty or restricted duty in work-related, workers' compensation cases; that if employees who are not probationary come to her with a note proposing a personal restriction that employee can take medical leave or personal leave; that it is best that employees who have not finished their probationary period and who have a proposed personal restriction, that they just quit and come back when they are better; that anyone can reapply after 30 days; that she understood that Zamora's appointment was not one that either Herrera or his office scheduled; that she called Zamora to her office and told her that Respondent did not have a job for her because she had a restriction in her personal doctor's note; that Campos and Herrera were in her office at the time; that she told Zamora that if she had been there more than 90 days she would have options but Respondent could not accommodate her restrictions, and, therefore, Respondent did not have a job for her; that on Monday morning, October 30, she did see Zamora's name in the newspaper article emailed to her by Wilson (R. Exh. 13), but that had nothing to do with Zamora's termination; that she probably printed a copy of the e-mail but she did not have a copy of the actual newspaper itself; and that she has had other employees since she has been at Respondent within their probationary period who had personal restrictions that she has been unable to accommodate. King sponsored Respondent's Exhibits 28 [A probationary employee, Carlos Algarin, could not work until his next medical evaluation and he was not eligible for leave of absence (LOA).]; 29 (A probationary employee, Marie Vincente, could not work in a cold environment and she was not eligible for LOA), and 30 (A probationary employee, Ronald Romero, could not work until his next medical evaluation and he was not eligible for LOA).

On cross-examination, King testified that she was employed with Respondent when Algarin requested a leave of absence; that Algarin was requesting to be out of work completely, the doctor told Algarin that he could not work until his next medical evaluation, and she did not know how long it would be until Algarin's next medical evaluation; and that Romero was asking to be out of work until his further medical evaluation and he was not asking for any type of special accommodations; that Vincente was requesting a restriction not to work in a cold area and the doctor did not give a particular time frame that she was not supposed to work in a cold environment; that as memorialized by General Counsel's Exhibit 25, Dimas a/k/a Zamora received a probationary increase in pay back up to $8 an hour after she had been working at Respondent for less than a month as Zamora; that Dimas a/k/a Zamora never requested a leave of absence; that she did not review Dimas' personnel file before testifying at the trial herein; that there are documents in Dimas' personnel file which indicate that she received leave of absences throughout her employment; that Dimas is not an argumentative employee and she did anything she, King, asked her to do; and that when Dimas a/k/a Zamora brought the medical note on October 30 she would have been eligible for a leave of absence if she had not been a probationary employee.

When called by the Respondent, Herrera testified that he was called to the nurses station about 8:15 a.m. on October 30; that at the time Morgan was in charge of the nurses station; that Morgan told him that Respondent was treating Zamora for what is called evaluation; that he knew about it the week before; that he asked Zamora what was wrong; that he told Zamora that he had something to help her out and he gave her a sling to immobilize her arm; that he told Zamora that she was going to have to wear the sling throughout the day; that he called Hernandez

[6] Dimas gave Campos a permanent resident card and a social security card, R. Exh. 6. The permanent resident card has the picture of Dimas on it but it has the name of Claudia Patricia Zamora with a birth date of December 6, 1981. The card also indicates that the holder has been a resident since April 20, 2001. The social security card bears the name of Claudia Patricia Zamora. The documentation that Dimas originally gave to the Respondent, R. Exh. 1, includes a resident alien card, and a State of North Carolina identification card. Both the Dimas resident alien card and the State of North Carolina identification card give Dimas's birth date as November 1, 1979. The numbers on the two social security cards Dimas gave to Respondent at different times are not the same. In other words, with the documentation Dimas gave to the Respondent in September 2006, as far as Respondent was concerned, she changed her name, birth date, and social security number. The numbers of the new social security card bear no resemblance whatsoever to the old social number. Indeed, the old one began with the number 5 while the new one began with the number 6. King testified that she did not ask Dimas about these changes and Campos did not testify at the trial herein. With the changes, Dimas incredibly reversed the aging process by over 2 years. Yet, no one at Respondent saw fit to ask her how she accomplished this feat?

and told him that he needed to find a job where Zamora could use one arm; that after he gave Zamora the sling and told her that she would be working under restrictions, she told him that here arm had been hurting for some time and she gave him a medical note; that neither he nor the nurse scheduled that medical appointment; that for workers' compensation injuries either he or the nurse schedules the doctor's appointment; that he checked how long Zamora had worked for Respondent and discovered that she had not been there very long; that he had Zamora come to his office and he asked her to draft a statement regarding what caused the injury, how, when, and why it happened; that Zamora gave him her statement (GC Exh. 22 translated at Tr. 123–124); that he sent Zamora back to work and he then reviewed her statement; that the statement showed differences in time, it showed differences in when her injury happened, when she reported it, and how long she had been injured (The statement reads in part as follows: "The pain began when I was about eight (8) months doing the second cut. . . . I started working on the 6th of February 2003. . . ."); that when he looked at Zamora's hire date again he realized that there was an issue and he brought the note back to human resources so they could evaluate it; that in his conversations with Zamora that day he did not say (1) anything about the walk out that had occurred on the previous Friday; (2) employees had made a grave error; (3) we've taken your case per Victoria; and (4) I have a gift for you; that Zamora did not say it is not Christmas; that he was present when Zamora was terminated; that King told Zamora that she was not eligible for LOA and the Respondent did not accommodate any personal restrictions; that he walked Zamora out of the plant; that as he escorted her out, she threw the sling in his face, said that he cheated her out of her job, and called him "bentetol" which means stupid or something like that; that regarding some injuries he did not know whether they were work related or nonwork related and he works with the employee until it is determined whether the injury is work related or not; that with respect to General Counsel's Exhibit 4, (a) Donald Gene Allen had nonwork-related injury and he received 5 days on job restriction; (b) Antonio Rico Jackson had a nonwork-related injury and was given 8 days job restriction; (c) Dorothy Gladden had a nonwork-related injury and had other recordable cases; and (d) Janice Elaine Jordan had a nonwork-related injury and was given 8 days on job restriction; that Allen, Jackson, Gladden, and Jordan were all provided restricted duty while he was setting up appointments for Respondent to determine whether their injuries were work related or not; that Zamora was different because she gave him a personal note and

> Because the red flag again. If we—If I - if I don't have any red flags on a—on an injury, once again we treat all injuries as they were work-related and then we go from there. With Claudia Zamora, there was a red flag. There was a date of hire, then an injury date, and that's what caused for me to investigate. [Tr. 504.]

On cross-examination, Herrera testified that Morgan is not a registered or licensed practical nurse but rather she is a CNA (apparently meaning a certified nursing assistant); that Zamora came to the nurse's station with a pain in her left shoulder, arm, wrist, and hand; that after she gave him a written statement he escorted Zamora to King's office; that he told King what was going on; that King did not tell him at that time that Zamora had worked since 1999 at the plant as Dimas; that he was on the plant floor on October 27 during the work stoppage; that he was part of the group of managers who were trying to calm things down; that he and the other managers were telling employees "don't yell, don't yell, calm down" (Tr. 510); that after several attempts to get the employees to go back to work, the employees were told that the authorities were going to be called; and that he never sent Zamora to the doctor to be evaluated for her arm because she never gave him the opportunity to because Zamora went to the doctor first.

Respondent experienced mechanical problems on line 16 in the deboning department on October 31, 2006. The employees on that line, who were not experienced employees, were moved to line 12 in the deboning department. Among them were Rodriguez, who had been hired by Respondent just a couple of weeks before that, and employee Dominique Johnson, who had been hired in March 2006. As here pertinent, Rodriguez and Johnson were positioned on the line so that Johnson first made a cut with a knife and then Rodriguez, using only scissors, engaged in a followup procedure. Johnson was not making the cut properly which meant that Rodriguez could not further process the product moving to her from Johnson. Indeed, Johnson's failure to do her job properly affected not only Rodriguez ability to perform her job but it affected at least one other employee beyond Rodriguez on the line, namely Pedro Luis Ronda, who also worked with scissors. Rodriguez returned the product to Johnson to rework it. Rodriguez did this on more than one occasion. Johnson and Rodriguez then exchanged words and Johnson, without permission from a supervisor, walked away from the line. Human resources then became involved in this matter. Johnson, Rodriguez, and Rhonda were interviewed, and they gave written statements to human resources. Respondent's Exhibits 20, 24, and 22, respectively. Supervisor Daniel Raymundo also gave a written statement to human resources with respect to what he allegedly witnessed. (R. Exh. 21.) Rodriguez, who testified that she cannot read in English, signed a statement written in English by King. (GC Exh. 25.) The statement indicates that Rodriguez threw product. Rodriguez was terminated. Respondent takes the position that Rodriguez was terminated for throwing product when she gave Johnson back the product to rework or cut properly. According to Respondent, throwing product warrants termination.

Johnson did not testify at the trial herein.

When called by counsel for the General Counsel, King testified that Johnson was discharged in 2007 for absences; that Johnson was a tall and heavy set woman; that Johnson was not a Hispanic employee and she did not speak Spanish; that Johnson had to be coached a lot because the other employees thought she was rude; that Johnson did not get along with the other employees; that Johnson came across as a bully, she intimidated other workers, and was disrespectful toward supervisors; that Johnson was often late for work and sometimes she forgot to clock in; that Johnson refused to do what a United States Department of Agriculture inspector directed her to do; that on October 31, Johnson came to her office; that prior to

Johnson coming to her office neither Supervisor Raymundo nor Supervisor Hernandez told her that there was a problem on the involved line; that Johnson told her that Rodriguez, who was making a cut following the cut Johnson was making, told Johnson that she did not know how to cut the chicken right; that Johnson gave a statement to her and in it Johnson indicated that she told Rodriguez that nobody was going to tell her that she could not cut the chicken right; that Johnson told her that the other employee had cussed at her in English; that Johnson, who was using a knife at the time, told her that she told Rodriguez "to come and fuck her up," (Tr. 46); that when Johnson left the line she did not tell her supervisor that she was leaving; that employees do not need to get permission to leave a line to see her if they feel threatened or intimidated even if a supervisor is present on the line; that Rodriguez was a new employee and she was learning the job a the time of her discharge; that she did not recall any employee being issued a warning for walking off the line without permission during the time she worked at the involved plant; and that an employee can be disciplined for using profane language in the plant.

Rodriguez testified that when she came to work on Tuesday, October 31, her line was not running and her supervisor told her that she was being sent to another line; that the supervisor on the line she was sent to was Raymundo; that her task was to remove the fat from the chicken with scissors and remove the bone; that to her right there was a lady who was new to the job and she could not do the work; that Johnson was to the right of the new employee; that the new employee next to her was moved by Raymundo because she could not do the work; that she took the new employee's place next to Johnson and there was a boy on her other side;[7] that Johnson, who is a tall women and was using a knife, was not doing her job correctly; that Supervisor Raymundo was temporarily taking an employee's place on the line; that she told Raymundo to tell Johnson to do her job right because she could not work if Johnson was not doing her job right; that Raymundo did not pay any attention to her the first time; that she told Raymundo the second time to tell Johnson to do her work correctly because she could not do her job if Johnson did not do her work correctly; that then she saw Raymundo speaking to Johnson but she could not hear what was said since she was wearing earplugs; that she pushed the chicken which was piling up in front of her back to Johnson; that then Johnson threw a piece of chicken at her which hit her stomach; that Johnson looked at her with an ugly face, said some ugly things, and wanted to hit her with the knife she was holding; that Johnson raised the knife; that she ran behind the boy next to her; that Raymundo called someone on the radio and then told Johnson to go with him; that about 5 minutes later Hernandez told her to leave the line and stay in a room with a supervisor; that she told the supervisor what had happened and she was sent back to work; that later she was called to go off the line and she went to an office with Cua; that she was then sent to take her break; that she then went to King's office; that King told her, "[Y]ou are new and you already have problems with the employers—employees," (Tr. 171); that she explained to King what had happened and King gave her a yellow sheet of paper to write out a statement; that she wrote out what happened and she signed it (GC Exh. 24);[8] that King then told her that everything that she "wrote on that paper was pure lie" (Tr. 173); that she told King that everything that she wrote was the truth, that she did not like to use lies, and she only liked to work with the truth; that King continued to say that everything that she had written was a lie and she should tell the truth; that King then told her that she was suspended and the Company was going to look for witnesses; that she told King that she should go get witnesses; that King told her that she had talked badly—used bad language to the black lady and that she had thrown chicken at the black lady; that she told King that she should review the video tape; that she then went to the office with Miguel for 20 minutes; that she then returned to King's office; that Campos and Miguel were present, in addition to King; that King told her "to sign a paper [GC Exh. 25] that said that I had abused a Company objects [sic] and that I threw chicken," (Tr. 175); that while she cannot read English, she signed the document which was written in English;[9] that King made her sign the document; that King then told her that she was suspended for a few days because she had thrown company objects and the Company wanted to find out what happened; that initially she refused to give King the company ID; that King said, "[G]ive me the ID so I don't have to be forced to call the police. She told me to give her the ID, I told her no, and she said don't make me have to call the Immigration and I can send you—so I'll send you to your country," (Tr. 177); that she then gave King the company ID; that she saw a newspaper on King's desk which was about the work stoppage because the picture in the paper was of a man showing the glove; that she returned to King's office on November 3; that, in addition to King, Campos and Miguel were present; that King told her that there was no work for her; that she asked King if they were getting rid of her because of the work stoppage; that King told her that she "didn't have the right to ask that question because I was only a worker there," (Tr. 179); that she repeated the question and King gave the same response; and that she did not throw chicken at the black lady.

On cross-examination, Rodriguez testified that during orientation one of the policies that was reviewed was that throwing product was strictly prohibited; that she understood that any

[7] At one point Rodriguez testified that the boy was on her right hand side and Johnson was on her left hand side (transcript page 164).

[8] The English translation reads as follows:

10-31-06

Today Tuesday

Something happens in the line that had a problem with the black lady. It started when she was in the third cut, she was not doing the chicken properly. For that reason I told her to make the chicken right but she started to yell at me in the line and raised a knife at me and she wanted to hit me and started strongly insulting me.

Only that happened today.

Luz Cordona Rodriguez

When I told her to calm down she screamed and threw the chicken at me. (stomach)

[9] In the "NATURE OF THE INCIDENT" portion of the form the following appears: "Throwing product and cursing at another employee. Luz is being suspended pending investigation. She will return on Friday 9am (11–3–06) for job review."

employee who threw product would be terminated; that she did not know that there was a mechanical problem on her original line on October 31; that she was having a problem with the work of the black lady and the lady next to her; that while she complained to Raymundo about the black lady she did not complain about the other lady who was new and not doing her job correctly; that the other lady who was new was, like herself, Hispanic; that the new lady next to her was using scissors and doing the same job she was doing; that since the new lady next to her was not doing her work correctly, it meant that both legs were coming to her, Rodriguez, to further process; that Raymundo was across from her and the black lady was to her right; that the Hispanic lady who was new and not doing her job correctly was between her and the black lady up until the time that Raymundo removed her; that she spoke to Raymundo across the line about the black lady not doing her job correctly; that when she was in King's office King called Miguel by radio and Miguel came to King's office; that by the time Miguel came to King's office King had already told her that she was being suspended; that she did not want to give back her ID because she did not do anything wrong, she did not throw any chicken; that she did not tell King and Miguel that she had thrown any product; that she picked up the chicken because it was piled up, and she handed the chicken to the black lady; that she took five pieces of chicken and put it where the black lady was working; that she did not pick up the chicken but rather she pushed it to the black lady who was working next to her; and that at no time did she actually lift the chicken off the table.

Subsequently, Rodriguez testified that she saw the plant floor on the video monitor in King's office; that she saw a newspaper in King's office regarding the work stoppage and not an 8-1/2 x 11 printed e-mail sheet of paper; that King did translate into Spanish what she had written in English on General Counsel's Exhibit 25; that King did not translate into Spanish the handwriting at the top of General Counsel's Exhibit 25, namely "throwing product and cursing at another employee"; that King simply told her to sign the paper acknowledging that she had thrown product; that before she signed General Counsel's Exhibit 25 King told her that the document indicated that she had thrown product; that King told her that she had abused the Company; and that King did not tell her that she had thrown product, King told her that she had abused the Company, or taken advantage of the Company.

On recross, Rodriguez testified that King told her that General Counsel's Exhibit 25 said that she had thrown an object of the Company; that King did not explain what General Counsel's Exhibit 25 said but rather King simply told her that she had abused the Company; that King told her that she had thrown an object of the Company, had abused company property, and had used bad language; that King told her to recognize that she had abused the Company and to sign the document (GC Exh. 25); and that she understood when she was signing the document that she was being suspended for 3 days and being asked to come back on November 3.

On redirect, Rodriguez, who is about 5-feet tall, testified that she always did what King told her to do.

Raymundo testified that he supervises lines 11, 12, 13, and 14 in the leg debone department, which is department number 1145; that on Tuesday he saw a discussion, an argument between Rodriguez and Johnson; that at the time he was working on line 11 taking the place of a worker who went to the rest room; that neither Rodriguez nor Johnson, both of whom work on line 16, normally work for him; that there was a mechanical problem that day with line 16 so Rodriguez and Johnson were moved to line 12; that the employees working on line 12 face the employees who work on line 11, and the line runs between these two tables; that Johnson was working with a knife and Rodriguez was working with scissors; that there was one employee between Johnson and Rodriguez and while he could recall that the person was a new employee, he could not recall the employee's name; that he did not remove the employee who was working between Rodriguez and Johnson from the line that day; that neither before nor during her argument with Johnson, did Rodriguez say anything to him about the performance of either Johnson or the new lady who was working between her and Johnson; that he noticed that Johnson was passing the legs with a bad cut; that he saw Rodriguez take down the leg with the bad cut from the hook and "throws it to Dominique" (Tr. 208); that "the line comes from there, there was a person in the middle, then she takes it—the person in the middle takes it and throws it" (id); that Luz threw it with a side arm motion approximately 3 yards; that while he demonstrated with a pen, standing up, that the object was held in his right hand and was thrown in a side arm motion across his chest to his left, Johnson was actually to the right of Rodriguez, and, therefore, the product would have had to be thrown in the opposite direction than he demonstrated; that Rodriguez would have had to return the product to her right to Johnson; that when Rodriguez threw the leg in front of Johnson she started to argue; that Johnson told Rodriguez, "[C]ome on, push me" (Tr. 212); that Rodriguez said something in English to Johnson; that he saw Rodriguez throwing the chicken leg two times; that the argument or discussion between Johnson and Rodriguez occurred when Rodriguez threw the leg the second time; that he did not see Johnson throwing any product that time of day; that Johnson left the line after the argument; that he called Hernandez who went to look for Johnson; that Hernandez called him and told him to take Rodriguez to human resources; that 5 or 10 minutes later he was asked to come to human resources and King asked him to write what he had seen;[10] that he did not verbalize to King what

[10] The statement, which is in Spanish, was received as R. Exh. 21. As translated it reads as follows:

> I was in Line 11 helping the person that asked me a favor to help because of the need of having to go to the bathroom. The people that are on Line 12, Artora moved them from Line 16 to Line 12. I only saw—I only saw that Ms. Dominique stopped passing the legs - stopped passing the legs badly cut and stopped passing - and stopped passing the leg without a cut and the other lady took or lowered the leg from the hook and threw it on the table of the line where the lady Dominique does the third cut. Dominique raised her voice and the other answered the same in a raised voice, and Dominique got angry—got angrier, raising her hands saying hit me or push me with a knife in the - in the hand. I didn't see if Dominique threw something of chicken—some part of the chicken to the woman because I was working. Daniel Raymundo. [Tr. 221 and 222.]

he had seen; that King then asked him to go back to the line and ask the employees if they saw what happened; that he spoke to five employees and only one, Ronda, said that he saw what happened; that he talked to Ronda in human resources with King present; that Ronda gave King a written statement and he told King what he saw; that Ronda told King that Johnson was doing a poor job and that Rodriguez "threw the legs back" (Tr. 216); that Ronda did not say whether he saw Johnson throw anything; that there are video cameras that point toward the lines 11 and 12, but the cameras are far from those lines in that they are in front of line 1 and beyond; that there are monitors in King's office that show "I think from Line 1 to Line 8" (Tr. 217); and that line 1 is closer to the camera than lines 11 and 12 are.

On cross-examination, Raymundo testified that Johnson is a big women, very tall, and very heavy; that when an employee leaves the line they are supposed to get someone to relieve them; that the employee has to have permission to leave the line or they can get a warning; that Ronda was next to Rodriguez on the line; that he did not know the name of the women who was working between Johnson and Rodriguez, she still worked for the Respondent, but she told him that she did not see what happened; that he saw the legs that Rodriguez was taking down from the hook and they were not cut the way they were supposed to be cut by Johnson; that "after Johnson sent a leg through that wasn't properly cut, Rodriguez picked it up and put it back in front of Ms. Johnson to do the right cut" (Tr. 228); that Rodriguez was trying to do her job and if Johnson was not doing her cut correctly, Rodriguez could not do the correct cut; that Rodriguez, who was using scissors, could not correct the mistakes Johnson, who was using a knife; that Rodriguez should have taken the product down and shown him the bad work that Johnson was doing; that he was not watching Johnson and Rodriguez, "I wasn't really looking because I was working for someone" (Tr. 229); that Joint Exhibit 1 is his diagram of lines 11 and 12 and who was working where on the day in question; that hooks and a conveyor belt for the finished product move between lines 11 and 12; that the employees are about 2 feet from each other on lines 11 and 12; that he was approximately 3 feet from Johnson and at that distance he could tell that Johnson's cut was improper "[b]ut I was working, so I couldn't see specifically the cut that Ms. Johnson was doing" (Tr. 238); that when Johnson raised her voice he called over to Johnson to calm down but in that moment she left the line; that he did not go to where Johnson and Rodriguez were on line 12 because he was working as relief on line 11; that in the affidavit he gave to the National Labor Relations Board (the Board) he did not indicate that he called Hernandez but he did call Hernandez; that when Johnson got angry she turned to face Rodriguez holding the knife up pointing toward the ceiling and she told Rodriguez to come hit her; that when the employee who he was relieving came back to the line he took the employees from line 12 to work somewhere else; that Johnson did not ask permission to leave the line; that all the other employees on line 11 stopped working; that he did not give Johnson a warning for walking off the line or for not making good cuts; that King did not ask him if he saw Johnson throw product; that he told King that Rodriguez gave the chicken back to Johnson to make the right cut; that Johnson returned to the line about 30 or 40 minutes after her confrontation with Rodriguez; that Rodriguez never returned to the line; that he heard King ask Ronda if he saw Rodriguez throw product; and that King did not ask Ronda if he saw Johnson throw product.

On redirect, Raymundo testified that in his affidavit to the Board he did indicate that Hernandez came over to the line and talked to him after about 2 minutes; that when he testified on cross-examination that Rodriguez "put" or "laid" the product back in front of Johnson he meant "[s]he threw it" (Tr. 251) in the manner he demonstrated earlier; that other employees have been terminated for throwing product; and that he did not know of anyone who has thrown product who did not get terminated.

On recross, Raymundo testified that with respect to the employees who were terminated for throwing product, two of them were playing and a chicken landed on another employee; that the employees were throwing chicken at each other and the chicken hit the floor; that when the employees who are using the scissors on line 12 are finished their cut they place the product on the conveyor belt; and that Rodriguez did not place the product back in front of Johnson but rather Rodriguez threw it in front of Johnson.

Subsequently, Raymundo testified that an employee using scissors is expected to process about six chickens a minute and while he was performing this function on line 11 he was not attempting to engage in any supervisory functions; that notwithstanding that his attention was focused on the continuously moving line he was working on, he noticed that there was a problem on the next line "[b]ecause you could see and hear that they were raising their voices" (Tr. 256); that he heard raised voices the second time; that he was aware of the first time because "I noticed when Ms. Luz [Rodriguez] threw the chicken in front of Dominique [Johnson]" (id.); that while he was working on line 11 as relief he was performing a dual function in that he was acting both as an employee processing chickens and at the same time he still wore the supervisory hat in that he was watching other employees; that before the incident Rodriguez did not speak or attempt to speak to him about what was going on as far as the performance of Johnson was concerned; that he wore earplugs on October 31, 2006, when he was working on line 11; that the fact that he was wearing ear plugs and the fact that there is "noise everywhere" (Tr. 257) makes it difficult to hear what is being said at the next table over; that he did not see Rodriguez go behind Ronda during the incident with Johnson; and that Rodriguez turned to face Johnson, and Rodriguez backed up but she did not go behind Ronda.

On further redirect, Raymundo testified that he is not able to do more than six chickens a minute with scissors; and that he was about 6 feet from Johnson when the incident occurred.

Ronda testified that he recalled the incident between Johnson and Rodriguez; that he was working on line 12 that day next to Rodriguez, trimming legs; that Johnson was next to Rodri-

After the statement was translated, it was submitted that instead of "stopped passing the leg" what was written meant "allowed to pass the legs that were badly cut and allowed to pass one leg that was not cut." Tr. 222. The interpreter testified that she translated as she saw it written.

guez;[11] that Johnson was passing legs badly cut; that Rodriguez threw the leg on top of the table; that Johnson stopped and got angry; that Johnson said something in English, which he did not understand and Rodriguez responded with two words in English which he did not understand; that he then told Raymundo what was going on and about 10 minutes later Raymundo came and got both Johnson and Rodriguez; that about 20 minutes later Raymundo asked him if he saw what happened and he told Raymundo that he did see what happened; and that Raymundo asked him to go upstairs to King's office to tell her what happened; that he told King that the black lady had passed the legs poorly cut; and that he also told King:

> [Johnson] passed the first leg and then she passed the second leg, and that's where Luz took the leg and threw it on top of the table. And then the lady—the black lady stopped, turned to look at Luz, and Luz looked back at her. They both looked at each other. And the black woman started to speak, say things in English, and Luz responded some things also. [Tr. 267.]

Ronda further testified that during the incident in question Johnson had a chicken leg in her hand and she threw it on top on the table because she was angry; that the black lady placed the knife, which she had in her hand, on top of the table; that he told King what happened, King wrote out a statement, he reviewed it, and then he signed the statement (R. Exh. 22); and that the statement is accurate.

On cross-examination, Ronda testified that when chicken that was badly cut came to Rodriguez she threw it normally but she threw it; that Rodriguez did not throw it strongly, "[s]he threw it normally, like slowly" (Tr. 277); that when the other leg came Rodriguez threw it softly on the table in front of Johnson; that after he is finished trimming the leg he throws it on the conveyor belt; that when the leg is poorly cut, he takes the leg and gives it to the person who was supposed to cut so that they can cut correctly; that he places the leg on the table in front of the person who was supposed to make the proper cut with the knife; that when Johnson became angry she put her knife on the table and she turned to face Rodriguez; that 20 minutes later both Johnson and Rodriguez left the line; and that when he spoke with King she asked him if he saw Johnson throw chicken.

Subsequently, Ronda testified that after Johnson and Rodriguez had the verbal exchange he called Raymundo and told Raymundo what was going on, and "when . . . [Raymundo] saw it they [Johnson and Rodriguez] were arguing" (Tr. 283); that he whistled at Raymundo who was on the other line ["either Line 11 or Line 10" (id.)] and he called Raymundo; that at the time Raymundo was talking and teaching the work to other workers; that when he called Raymundo he saw what was happening and Raymundo came immediately to line 12; that he told Raymundo that the black lady was not working well; that when he told Raymundo this Johnson and Rodriguez had already argued; that the black lady was still on the line when he spoke with Raymundo; that Raymundo said that he would take care of it and then Raymundo spoke with the black lady; that he could not hear what Raymundo said to Johnson; that he could not remember if the black lady continued to work on the line or if Raymundo took them off the line; that he thought that Rodriguez tried to get Raymundo's attention with respect to Johnson not doing her job properly; that on October 31, 2006, he had two conversations with Raymundo, namely when he told Raymundo Johnson was not doing her job properly and when Raymundo asked him if he saw what happened; that there are no vertical partitions dividing the table that he and the other employees were working at on line 12; that the long table is a flat surface where eight employees work; that there is nothing between one employee and another employee working at the table on line 12; that he told King that he saw the black lady throw chicken on top of the table; and that King only asked him if Johnson had thrown a leg or a piece of meat; and that during the exchange Rodriguez did not attempt to get behind him so that he would be between her and Johnson.

On recross, Ronda testified, "I told her [King] that Luz first threw a chicken leg and then the black lady threw also a chicken leg." (Tr. 292.)

King testified that she tells employees that if they feel intimidated in any way, if they have a problem of any kind, they should come and see her and they will not get in any trouble; that it does not matter if they are on the line when they want to come to see her; that this has happened before and after October 31, 2006; that Respondent's Exhibit 2 is the employee handbook; that Good Manufacturing Practices are rules which are United States Department of Agriculture regulated and which were developed basically for food safety; that Respondent's Exhibit 3 is a Power Point presentation Respondent shows to all of its employees; that page 12 of Respondent's Exhibit 3 indicates that "[t]hrowing product or any other item is PROHIBITED," and that "[a]ny person that violates this rule will be terminated immediately";[12] that Respondent's Exhibit 4 is the Power Point orientation presentation; that during her orientation Rodriguez signed on October 13, 2006, a Spanish rendition of "Good Manufacturing Practices & Operation Sanitation Procedures" which includes, inter alia, "23. Throwing product or any other item is PROHIBITED. Any person who violates this rule will be terminated immediately," Respondent's Exhibit 19; that on the morning of October 31 she became aware of a problem between Rodriguez and Johnson when Johnson, a large black lady who had had problems with Hispanic employees in the past, came to her office and told King her version of what happened between her and Rodriguez; that Johnson's "version of the story was apparently Luz [Rodriguez] wasn't happy with her cuts, and she started throwing the meat back at her. . . . and by the second time when she threw meat back at her . . . they engaged in . . . [a] verbal confrontation" (Tr. 366); that she had Johnson write a statement about

[11] At this point, counsel for the Respondent asked "[d]o you recall if there was another lady in between Luz and Dominique" to which Ronda replied, "[y]es, there were. But I don't remember who they were." Tr. 265.

[12] This entry includes a picture of a chicken wing on the floor and a drawing of person throwing a pencil, both of which have an X over them.

what happened;[13] that she then asked that Rodriguez be brought to her office; that Rodriguez "made it out to be that Dominique was the only one that had thrown product at her, that had cussed her out, that she wasn't doing her job right. . . . [Johnson] was not doing her job right and she was just giving it back to her" (Tr. 368); that Rodriguez gave a written statement, General Counsel's Exhibit 24, which is described above; and that Raymundo

> told me he was right in front of them; that he saw the whole thing; that he saw Luz throwing the—in fact throwing the product at Dominique, and confirming the first story I heard that they had a verbal confrontation; that they had looked at each other, had faced each other, and that there was no physical contact. And he didn't see Dominique throw any product. [Tr. 369.]

King further testified that Raymundo gave a written statement (R. Exh. 21); that she asked Raymundo to find out if any other employee saw what happened and he brought Ronda to her office; that Ronda told her that he saw Luz get mad at Dominique for not doing her job right and throwing the product back at her; that she asked Ronda if he saw Dominique throw product at Luz "and he told me no" (Tr. 371); that she helped Ronda write out a statement by asking him again what happened and he dictated while she wrote; that she gave the statement to Ronda, he read it, she asked him if there were any changes, he said, "[N]o," and Ronda signed the statement; that at no point during her conversation with Ronda did he say anything about Johnson having thrown product; that she sent Ronda back to work, called Rodriguez back into her office, and told her that she was going to have to suspend her for throwing product; that while throwing product calls for immediate termination, she suspended Rodriguez so she could discuss the matter with Campo since she was not the one who makes the final decision about terminations; that when she told Rodriguez that she was suspended for throwing product Rodriguez asked her if Dominique was going to be suspended; that she prepared a document memorializing the suspension and she read the document in Spanish to Rodriguez word for word, and then had Rodriguez sign the document; that she told Rodriguez to come back the following Friday for a job evaluation; that she did not tell Rodriguez that her version of the event was all lies; that she did not call Rodriguez any names; that Rodriguez was suspended because there had to be preparation for the job review, "[y]ou have to look at whether the employee's probationary or not. . . . previous work history . . . ., attendance . . . ., precedence, what has the Company done before, [and] consistency in any—in any human resource department is always the key" (Tr. 377 and 378); that she "was pretty much told by Armando [Campos] and Charles who had been there for over 10 years now (apparently referring to Charles Rigdon, who is the Respondent's general manager and who is located in Morganton); and that throwing product has always been termination, period. So there was no question in my mind then that Luz was going to be terminated" (Tr. 378); that Respondent's Exhibit 23, which is a payroll change notice that she prepared for Rodriguez dated November 3, 2006, gives as the reason for termination "Misconduct"; that misconduct could be anything; that she met with Rodriguez on Friday, November 3, 2006, and she had Raymundo present because Rodriguez had been so ugly toward her when she suspended Rodriguez; that Cua came into the meeting later because he was the one who was going to have to walk her out; that at the November 3 meeting she asked Rodriguez if she remembered that during orientation she was told that throwing product calls for termination and Rodriguez said, "[Y]es"; that she then told Rodriguez that she was terminated; that Rodriguez allegedly said, "[T]ell me that you're suspending me because I'm with the Union" (Tr. 380); that she told Rodriguez that she was being terminated for throwing product; that Rodriguez again said, "[T]ell me you're terminating me because I'm with the Union"; that she told Rodriguez that her job was being terminated; that Rodriguez left with Cua; that she has two monitors in her office, with one showing the outside view of the front and back of the property, and the other one showing nine different views from nine different cameras inside the plant; that she did not have anything pointing out to leg debone; that there is a video tape for the nine cameras which only records what she has on the monitors; that there is a monitor in Plant Manager Doug Hatley's office which is facing line 1 leg debone but it would not be able to catch anything in the middle of the leg debone lines; that other employees have been terminated for throwing product, Respondent's Exhibits 24 (Luis Aguilar), 25 (Juleo Tomassini for "throwing chicken down a drain"), 26 (Raynaldo Moralez), and 27 (Jeronimo Say); and that she did not say, "[Y]ou've only been here a little while and you're already causing problems" either during her interview meeting with Rodriguez or her suspension meeting with Rodriguez.

On cross-examination, King testified that when the line is running and an employee leaves the line without permission, this causes the line to stop; that if an employee feels intimidated enough to cry, the employee has the right to stop the line anytime the employee wants to come to talk to her; that employees are routinely issued warnings for leaving the line without permission, for cussing, and for not cutting the chicken properly; that she was not working in the plant when the incident covered by Respondent's Exhibit 26 occurred, she did not review the documents in this employee's personnel file before she testified herein, and there are no documents in the employees personnel file to reflect what the circumstances were surrounding the throwing product incident by Moralez (Tr. 407); that on General Counsel's Exhibit 31, which is a copy of a computer record

[13] R. Exh. 20. The statement, which was not offered for the truth of the matter asserted therein, reads as follows:

> 10-31-06
>
> 2nd cutter was not properly cutting and it was resulting in me getting behind and that 2nd cutter threw the 2nd leg at me. I said what are you doing. She said you can't cut. I said you ain't about 2 [sic] tell me I can't cut. She said Fuck you. I said come and fuck me up. I raise[d] my arms, she walk toward me with the scissors in her right hand. I backed up. The 1st cutter said what's going on. She turned back facing the cutting board. I walk[ed] off the line throw[ing] my cutting glove into the sink. Christian stop[ped] me and said where are you going. I said I' m not working no more. I come 2 [sic] Victoria['s] office cause things was going to . . . [escalate].

Johnson did not testify at the trial herein.

of Moralez' termination, the reason given for the action is "Horseplay/throwing product"; that Moralez' payroll notice (R. Exh. 26), just indicates throwing product; that she was not employed at the involved facility when the incident covered by Respondent's Exhibit 27 occurred, she did not review the documents in that personnel file before she testified at the trial herein, and General Counsel's Exhibit 30 which is a copy of a computer record of say's termination, gives as the reason for the action "Horseplay/Throwing product"; that she was not employed at the involved facility when Aguilar was discharged for throwing product, she did not review his file before she testified at the trial herein, and, therefore, she did not know the circumstances under which he was discharged; that she was not employed at the involved facility when Tomassini was discharged for "throwing chicken down the drain" (R. Exh. 25), and she did not review his file for any notes concerning the circumstances of him putting the product down the drain before she testified at the trial herein; that she would describe what is alleged to be Tomassini's act as destruction of company property; that Rodriguez denied throwing the product at Johnson but Rodriguez said that she threw the product at the table; that after she suspended Rodriguez she did speak to a couple of the employees who were working near Rodriguez and Johnson when the incident occurred but they denied seeing anything and there was no need to put anything in the file for it; that she did not remember which employees she spoke with regarding what they witnessed; that she did not recall whether she said anything about speaking to the other employees when she gave her affidavit to the Board; that the prohibition against throwing product refers to the throwing of anything; that General Counsel's Exhibit 29, which refers to employee Marcelino Bulux who is still employed at Respondent, indicates that Bulux threw a handful of ice at another employee hitting him on his side; that General Counsel's Exhibit 28 is a disciplinary report, a written warning, for Juan Garza dated "3–22–07" for engaging in horseplay where he picked up another employee and threw the other employee (partially on the belt where product is transported which could result in line shutdown); and that Cynthia Garza is still employed by the Respondent notwithstanding that she was involved in an incident where she hit another employee in the face with chicken neck with the head still attached (GC Exh. 26). Counsel for Respondent stipulated (a) there was nothing in Cynthia Garza's file that would reflect any discipline, and (b) with respect to General Counsel's Exhibits 34 and 35, both of which are copies of computer records and both of which give as the reason for termination "Horseplay/Throwing product," that there is nothing else other than what is in this record that would reflect the circumstances of the incidents involving Aguilar and Tomassini, respectively.

Subsequently, King testified that she did not review the video for the one camera that faced the leg debone department because there was no way that it would have recorded what happened between Rodriguez and Johnson since you could barely see lines 1 and 2; that she has told employees that they can just walk away from the line if they feel intimidated without asking permission or speaking to a supervisor; that she herself did not do an independent review to look at prior personnel decisions regarding throwing product but rather she asked Campos and Rigdon what Respondent had done before with incidents of throwing product; that she personally did not look at the personnel files of other employees who were terminated for throwing product; that there are two cameras in the leg debone department; that she did not know if the cameras in the leg debone department can be adjusted so that they take in more than lines 1 and 2; that she did not look at the cameras but rather just at the monitor; and that she did not review any tapes.

On recross, King testified that she assisted counsel in formulating Respondent's response to the unfair labor practice charges; that in the response it is indicated that "Respondent admits that it maintains a number of security cameras on premise and, in fact, there are three in what is generally referred to as the Leg Debone area" (Tr. 451); that she told employees that they could walk away from the line if they are upset or intimidated; that she did not have a meeting where she told all the employees this, it was just a practice that everybody knows from previous incidents when people had walked off the line to come and talk with her; that Campos, Yolandra Cardinez, and Hernandez told her that there had been other discharges for throwing product in the past; that Campos told her, for Rodriguez' job review, that if throwing product meant termination, then Rodriguez should be terminated as that was the past practice; that Campos did not have any documents with him during this conversation to show that other people had been discharged for throwing product, and he did not give her any specific examples of discharges for this conduct; and that she never looked in the documents for examples until she was responding to the unfair labor practice charges.

Cua testified that King called him to her office and told him that he had to walk someone out who she suspended; that he went to King's office; that he overheard King telling Rodriguez that she "needed to sign her statement, whatever she been told her, but she relayed Company policy, and just sign here. . . . she . . . started reading to her, and then said, 'Here. Sign it right here.' And she signed it, and then I walked her out" (Tr. 468); that on Friday, November 3, he was present for the whole meeting when Rodriguez was informed that she was being terminated; that during the November 3 meeting King told Rodriguez that she was terminated for throwing product and this was something that was explained during orientation; and that Rodriguez told King two times that she was terminating her because she protested the day the employees stopped working.

Subsequently, Cua testified that 23 chicken legs a minute are processed on line 11 in leg debone; and that the individual employee working on line 11 is expected to individually process 23 chicken legs a minute.

Analysis

Paragraph 6 of the complaint alleges that on October 27 Cua and King threatened employees with calling immigration.[14]

[14] Counsel for the General Counsel's motion to correct the complaint to correctly spell the surname of the human resource supervisor identified therein is granted. The name Miguel Cua will be substituted for Miguel Puac. Counsel for the General Counsel also makes another motion for the first time in her brief, namely to amend the complaint to allege that Respondent violated Sec. 8(a)(1) of the Act by conditioning continued employment with Respondent on a waiver of the right to

The General Counsel on brief, contends that it is a violation of the Act to threaten employees with calling the Immigration and Naturalization Service (INS or Immigration) when employees engage in union or protected activity, *Precision Concrete,* 337 NLRB 211 (2001), enfd in relevant part at 334 F.3d 88, 93 (D.C. Cir. 2003), and *Westchester Iron Works Corp.,* 333 NLRB 859 (2001); that it is more than probable that Cua made this violative threat; that King's denial that she threatened to call Immigration is not credible in that throughout the trial King's testimony was inconsistent and often contradicted Respondent's other witnesses; that King had a propensity to form testimony to suit Respondent's case; and that Rodriguez was a credible and forthright witness.

Respondent on brief, argues that both Cua and King denied threatening to call Immigration on October 27 and the evidence offered by the General Counsel simply is not credible; that the only witness offered in support of this allegation is Rodriguez, who is a most unimpressive witness; that no other employee supported Rodriguez' testimony; that although there were at least 50 other employees in the vicinity when King was speaking to employees when they came back to get their paychecks, including Rodriguez' friends, Edgar and Martha, no other employee supported Rodriguez' dramatic testimony that King told the employees "not to force her to call the police or [I]mmigration because I will send you back to your country" (Tr. 161); that Rodriguez' testimony about these threats has the ring of being contrived in that in both instances she alleges that Cua said, "[D]on't make us call—have to call Immigration" (Tr. 157) and King allegedly said, "[N]ot to force her to call the police or Immigration" (Tr. 161); that the similarity of these alleged statements indicates fabrication; that Rodriguez in general was contradicted and incredible in numerous respects; that Rodriguez admittedly lied when she was asked for her company ID on October 31; that while Rodriguez testified that she knew no English at all (Respondent cites transcript page 200 where Rodriguez testified, "I don't even know how to speak English." But at transcript pages 149 and 150, at the outset of her testimony, Rodriguez was asked if she spoke English and she replied, "No, a little bit."), Ronda and Raymundo testified that Rodriguez uttered at least two words in English during her confrontation with Johnson; that while Rodriguez testified that she hid behind Ronda during her confrontation with Johnson, Ronda, and Raymundo testified that this was not the case; and that the employees' work stoppage had become unprotected at the time the threats were allegedly were made and consequently, even if, assuming arguendo, they were made, they did not violate the Act.

I do not believe that counsel for the General Counsel has demonstrated by a preponderance of the evidence that Cua and King threatened to call Immigration on October 27. Counsel for the General Counsel produced only one witness to support these allegations. That witness, Rodriguez, is one of the two alleged discriminatees in this proceeding. She has a monetary interest in the outcome of this proceeding. Her testimony is not corroborated albeit there were many, many people present when the statements were allegedly made. Additionally, it is not clear why King, on October 27 when she was telling the employees that the glove policy was going to be enforced on Monday, October 30, and the employees had to make up their minds whether they wanted to work on Monday, would tell the employees to leave and not to force her to call Immigration. There is no allegation that the employees were engaged in a sit down strike when they came back to the facility in the afternoon to pick up their paycheck. Indeed it appears that it was just the opposite. At least one employee, according to Rodriguez' own testimony, told King that they had come to pick up their paycheck and they did not want to hear what King had to say. In other words, it has not been shown that the employees wanted to do anything other than get their paychecks and get out of Respondent's facility. As pointed out by Respondent, Rodriguez admittedly lied about her company ID I believe that Rodriguez also lied under oath about what she said in English to Johnson during their confrontation on October 31. I believe that the two words that Ronda and Raymundo heard Rodriguez say to Johnson during this confrontation were "Fuck you." (See R. Exh. 20 which was not received for the truth of the matter asserted.) A threat to call Immigration is a very serious charge. Counsel for the General Counsel has not produced sufficient evidence to warrant a finding that this threat was made by either Cua or King on October 27.

Paragraph 7 of the complaint alleges that Respondent terminated Zamora on October 30 and Rodriguez on October 31 because they engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such concerted activities for the purpose of collective bargaining or other mutual aid or protection.

With respect to Dimas (a/k/a Zamora), the General Counsel on brief contends that the evidence establishes a prima facie violation under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis) in that (a) Dimas was

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engage in future concerted activity when King on October 27 told employees that when they return to work on October 30 the glove policy put into effect on October 27 would still be implemented, and that if they did not want to work under that policy "don't even bother coming." According to her own testimony, what King said was as follows:

> Look, look guys, this is what you wanted, you got what you wanted. When you come back on Monday, you're going to get your three pairs of better yellow gloves you wanted. If you want to work, come to work. But if you don't want to work, don't even bother coming. Let's not go through this again. [Tr. 337.]

It does not appear that with this language Respondent, by King, was conditioning continued employment on a waiver of the right to engage in future protected concerted activity. What King was saying was that the policy was not going to change, if they wanted to work with the new policy that was fine, but if they did not want to work on Monday they should not bother coming to work. It does not appear that King was either explicitly or implicitly telling the employees that to be able to go to work on Monday they had to waive their right to engage in future protected concerted activity. Additionally, whether this language in the circumstances existing here is a violation of the Act is first being brought up on brief after the close of the trial. Does counsel for the General Counsel believe that Respondent has had sufficient notice that the lawfulness of this language would be at issue? Counsel for the General Counsel's Motion to further amend the complaint is denied.

engaged in protected concerted activity when she participated in the walkout and when she acted as spokesperson and talked to newspaper reporters; (b) there is no question that Respondent knew Dimas's role since King testified that Wilson e-mailed her the newspaper article in which Zamora's (Dimas) name appears; and (c) the timing of the discharge one working day after Dimas' protected activity and the pretextual reasons given for the discharge demonstrate Respondent's motivation to rid itself of Dimas and send a clear message to its remaining employees; that the reason given by Respondent for the discharge is pretextual because Respondent treated Dimas as a probationary employee in October 2006 even though Dimas had worked for Respondent since 1999, except for 4 months; that Dimas' immigration status is not relevant to whether Respondent unlawfully discharged her because the Act protects statutory employees who are undocumented aliens, *Sure Tan, Inc. v. NLRB,* 467 U.S. 883 (1984), and *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002); that an administrative law judge cannot base his decision to discredit an employee solely on the employee's use of a false social security number to obtain employment, *Double D Construction Group,* 339 NLRB 303 (2003);[15] to the extent that the discharge of Dimas is based on credibility, the testimony of Dimas should be credited over that of Respondent who cannot be found to be without fault in the acceptance of a new name, social security number, and birth date from an employee whom they had employed since 1999; that King cavalierly testified that she had no right to question Dimas about her new documentation notwithstanding that she knew that Dimas had worked for Respondent since 1999; that regardless of whether Dimas was a new probationary employee or a senior employee employed at Respondent since 1999, Respondent failed to treat Dimas in the same manner as other injured employees and instead seized upon a reason to discharge her; that while King told Dimas that she could not receive a leave of absence, Dimas was not asking for a leave of absence; that Dimas was requesting light duty for 5 days; that Respondent did not even attempt for Dimas to go to a company doctor to determine if her pain, a type of pain commonly associated with the repetitive nature of the work, was work related; that Respondent's medical records and OSHA records establish that Respondent has accommodated both work and nonwork-related injuries for employees in their probationary period (i.e., probationary employee Alisha Rutherford was given light duty after she sustained a nonwork-related injury (GC Exhs. 4 and 18) and beyond their probationary period (In addition to Rutherford, counsel for the General Counsel gave 14 examples of Respondent's approach in her brief.); and that, even though Dimas did not ask for a leave of absence, those cases cited by Respondent where it did not grant probationary employees a leave of absence are distinguishable.

With respect to Dimas (a/k/a Zamora) and Rodriguez, Respondent on brief argues that the complaint by implication concedes that the October 27 protest was unprotected in that it is not alleged that calling in the police was a violation of the Act; that the General Counsel effectively concedes the unprotected "tresspassory" (R. Br. 21) nature of the job action; that an employer can terminate leaders of an unprotected job action without violating the Act; that while discussing employee grievances with the press may in certain circumstances constitute protected activity, this particular newspaper article cannot be divorced from the unprotected work stoppage itself; that because the activities of Dimas and Rodriguez were not legally protected the unlawful discharge allegations fail as a matter of law; that the General Counsel failed to establish animus toward either the work stoppage or the newspaper article; that Dimas and Rodriguez were terminated solely for independent interven-

[15] That case is distinguishable. There the employee did subsequently acquire his own valid social security number, and not long after his termination, he provided information to the Respondent in order to correct his own record. There, the majority of the Board concluded that the judge's discrediting of the employee was based solely on his use of a false social security number to obtain employment; and that this amounted to a disqualification of the employee for his conduct. Here, Dimas did not acquire her own valid social number when she received the SSA letter. Rather she went out and purchased a whole new identity, namely a new false name, a new false social security number (card), a new false permanent resident card, and a new false birthday. R. Exh. 6. And then she gave her new documentation to the Respondent to keep her job. As pointed out in *Hoffman Plastics*, supra, this is a crime. While she worked for Respondent under her new identity, she never attempted to correct the record. When she testified at the trial herein her remorse for using the identity of another person consisted of her testifying, "I didn't want to be without employment, and now I regret doing it because it didn't do me any good." Tr. 148. Forgetting the legal technicalities for the moment, common sense would dictate that if a person is willing to commit a crime to get a job, then commit a serious crime to keep the job, consideration must be given to the fact that the person would commit a crime (intentionally, falsely testifying under oath about material facts) to get back at those who, from her viewpoint, took that job away from her. As noted above, Herrera testified that when he escorted Dimas out of the facility she told him that he "cheated her out of her job." Tr. 500. Dimas did not testify on rebuttal to deny making this statement. By law, she did not have the legal right to hold that job in the first place. Here, no matter what the outcome, under *Sure Tan, Inc.*, supra, and *Hoffman Plastic,* supra, there will be no reinstatement or backpay for Dimas. To resolve whether she was unlawfully terminated I do not have to, and I do not, rely on her credibility. This determination was made at the time of her testimony and took into consideration her demeanor (lack of remorse for committing a crime and she conveyed the distinct impression while testifying at the trial herein the job was what mattered the most), the weight of the respective evidence can be determined without including a consideration of Dimas' lack of credibility and it does not affect her credibility or the lack thereof, established or admitted facts are what they are in that they do not rehabilitate this witness, and one would have to, in determining inherent probabilities and reasonable inferences drawn from the record as a whole, take into consideration that witness Dimas committed a serious crime to get her job (false social security number), she admittedly committed a very serious crime to keep her job (As pointed out in *Hoffman Plastic,* supra, it is a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents.), and her only remorse in the end is that she regretted doing it because "it didn't do me any good." Tr. 148. It is one thing to use a nonvalid social security number. It is quite something else to buy another person's identity. To treat such conduct lightly could be misconstrued as encouraging a practice which has become widespread, namely identity theft, which practice can have a devastating effect on its victims, even if limited to just trying to straighten out social security records and the ramifications which flow therefrom.

ing events that occurred early the following week; that the General Counsel has failed to make a prima facie showing sufficient to support an inference that the protected conduct was a motivating factor in the employer's decision to terminate these two employees; that there must be some evidence of employer animus directed at the employee's protected activity; that an employer may act on the reasonable belief that an employee committed the offense charged; that the issue is whether the employer's belief as to the facts was honestly held and whether these facts (as believed) were such that the employer likely would have been motivated to act as it did; that while the timing of the two terminations brings into question an inference of animus, the timing actually favors Respondent, close timing between protected activity and termination may go a long way toward establishing animus when there is no apparent intervening cause for the termination, but when there is such an intervening cause and the termination follows shortly thereafter, the timing factor favors the employer, *Woodruff & Sons, Inc.,* 265 NLRB 345, 347 (1982); that this is not one of those rare cases in which the Board can infer animus "from evidence of blatantly disparate treatment" (R. Br. 27), *New Otani Hotel & Garden,* 325 NLRB 928 (1998); that although counsel for the General Counsel attempted to show disparate treatment she fell short of establishing "blatant disparity" (Id.); that while Respondent sometimes accommodated alleged workers' compensation injuries that later turned out to be nonwork related, Respondent did so only while the cause of the condition was being investigated and only when the safety department was supervising and directing the employee's medical care; that *"[t]here is no evidence that Respondent ever accommodated an employee based on a note that the employee obtained from her own personal physician"* (Id. at 28, emphasis added); that Respondent treated Dimas (a/k/a Zamora) as a probationary employee since September 2006, long before the work stoppage; that there is no showing of blatant disparity regarding Dimas; that with respect to Rodriguez, there is zero tolerance for throwing product, two coworkers and a supervisor told King that they observed Rodriguez throwing product, whether she actually did is immaterial, and Respondent clearly believed in good faith that she had thrown product; that whether Johnson threw product is not clear; that Raymundo did not see Johnson throw product; that Johnson denied throwing product (This would be hearsay since Johnson did not testify at the trial herein.); that while Ronda testified that he saw Johnson throw product and he told King about this, the statement he signed does not indicate that Johnson threw product and he testified that the statement was accurate and it contained everything he told King; that Johnson was terminated a few months after her confrontation with Rodriguez for attendance problems and there was no reason for King not to terminate her over her October 31 confrontation with Rodriguez, if Johnson did in fact throw product; that there is insufficient record evidence upon which to base a finding of unlawful motivation; that counsel for the General Counsel has not shown animus; that assuming arguendo that the General Counsel established a prima facie case, Respondent carried its *Wright Line*, supra, burden in that Respondent's standard practice regarding probationary employees who are medically restricted for personal reasons is to terminate their employment, subject to reapplying and being rehired after 30 days; that Dimas was treated consistently with this practice; that Rodriguez was terminated consistently with Respondent's policy and practice of terminating employees who throw product; and that assuming arguendo that Dimas was unlawfully terminated, she is not eligible for the standard reinstatement and backpay remedy since the decisions in *Sure Tan, Inc.,* supra, and *Hoffman Plastic,* supra, hold that the Board is without power to award reinstatement or backpay to an alien.

Regarding the arguments made by Respondent with respect to Dimas (a/k/a Zamora), the fact that it did not specifically take any action against Dimas for her role in what Respondent describes as an unprotected job action demonstrates that Respondent was not relying on this at the time of her termination. The same would apply with respect to Rodriguez. Both Dimas and Respondent played the system. Neither one came into this proceeding with clean hands. Dimas committed crimes to get and keep her job with Respondent. Respondent accommodated Dimas notwithstanding that any reasonable person would have asked what was going on when a person changes their name, social security number, and their birth date, making them more than 2 years younger than previously represented. If the situation at hand were approached in terms of the equities involved, one might ask why Respondent did not treat Dimas as a senior employee on October 30. In my opinion, Respondent knew exactly what was going on with respect to her employment status. But Dimas herself created the situation when she gave Respondent the fraudulent documentation. The fiction of Dimas being a probationary employ was put in place in September 2006, long before the October 27 work stoppage. And it was put into place effectively at the behest of Dimas as a means of her keeping her job. So from a labor law standpoint, the fact that Dimas on October 30 was a probationary employee could not have been unlawfully motivated. Respondent took advantage of the situation. But Dimas put in play the means by which Respondent was able to take advantage of the situation, and this was done long before the work stoppage. Under *Wright Line*, supra, Dimas engaged in protected concerted activity. Even if one takes the position that the work stoppage lost the protection of the Act because the employees refused to leave the Company's premises resulting in the police being summoned, there is still the newspaper article in which Dimas (a/k/a Zamora) aired a grievance of Respondent's employees. It has not been shown that anything occurred with respect to the newspaper interview which would cause Dimas to lose the protection of the Act. The interview occurred away from Respondent's property and while its focal point might have been the reasons for the work stoppage, the interview can and should be treated separately from the walkout. Therefore, Dimas engaged in protected activity and the Respondent knew about it before she was terminated. But has counsel for the General Counsel shown animus on the part of Respondent? Has counsel for the General Counsel shown that the termination was unlawfully motivated? Counsel for the General Counsel cites four factors, namely (a) the timing of the discharge just 1 workday after the work stoppage; (b) the pretextual reasons given by Respondent because Respondent treated Dimas as a probationary employee; (c) the assertion that Dimas was treated disparately; and (d) Dimas did

not ask for a leave of absence and this was King's reason for terminating Dimas. Dimas herself chose the timing in that she was the one who presented Respondent on October 30 with a situation it had to resolve. No inference of animus or unlawful motivation can, therefore, be drawn from the timing alone. With respect to counsel for the General Counsel's contention that the reason given by Respondent for Dimas's termination is pretextual because she should not have been treated as a probationary employee on October 30, one has to accept the fact that Dimas had been treated as a probationary employee since September 2006 or, in other words, for some time before October 30. That was the status occasioned by Dimas's own use of fraudulent documentation when she changed her name, social security number, resident alien card, and birth date. She participated in this fiction long before the work stoppage. When this fiction began it had nothing to do with animus or unlawful motivation on the part of Respondent toward Dimas's protected activity. Consequently, no weight can be given to the contention that treating Dimas as a probationary employee on October 30 was pretextual. As Respondent argues on brief (1) while Respondent sometimes accommodated alleged workers' compensation injuries that later turned out to be nonwork related, Respondent did so only while the cause of the condition was being investigated and only when the safety department was supervising and directing the employee's medical care; and (2) there is no evidence that Respondent ever accommodated an employee based on a note that the employee obtained from her own personal physician. It has not been shown by the record herein that these arguments of the Respondent are false. Finally, counsel for the General Counsel finds fault in the fact that albeit Dimas did not verbally ask for a leave of absence on October 30, King approached her request in that manner. As noted above, Dimas' doctor's note (Actually the note was from a physician's assistant at Table Rock Family Medicine clinic.) reads, "Light work or no work . . . [see left] arm for one week." For King to interpret the note as asking that Dimas be given a week off from work does not appear to be unreasonable. The record considered as a whole does not warrant any inference of animus or unlawful motivation on the part of Respondent. The Respondent did not violate the Act in terminating Dimas (a/k/a Zamora).

With respect to Rodriguez, the General Counsel on brief contends that but for Rodriguez' participation in the work stoppage Respondent would not have discharged Rodriguez; that when Rodriguez participated in the work stoppage and spoke to newspaper reporters on behalf of the participating employees who were protesting Respondent's change in the glove policy, she was engaged in concerted activity that is protected by the Act; that King admits that she saw the newspaper article in which Rodriguez was quoted as the spokesperson of the employees who engaged in the work stoppage; that the first requirements of *Wright Line*, supra, are met, namely that the employee engaged in activity protected by the Act and the Respondent had knowledge of that participation; that Respondent's unlawful motive in discharging Rodriguez because of her protected activities is established by the suspicious timing of the discharge, the one-sided investigation of the events leading to the discharge, and the disparity between Respondent's treatment of Rodriguez and of other employees involved in similar incidents; that Raymundo testified that he could give a warning for throwing product but he was not involved in the decision to discharge Rodriguez; that the disparity in the treatment of Johnson and Rodriguez is a result of Rodriguez' involvement in the work stoppage and her designation as a spokesperson for the other employees; that while King testified that precedence is the most important factor considered by Respondent, prior to Rodriguez' discharge she did not conduct an independent review to look at prior personnel decisions regarding throwing product nor did she personally examine the personnel files of other employees terminated for throwing product; that she relied on the representation of top management that Respondent had a precedence of discharging employees who throw product; that King asserts that Campos stated that if throwing product meant termination then Rodriguez should be discharged but he did not provide King with any documents to show King that other employees had been terminated for similar conduct; that Respondent did not present one instance of discharge of an employee who returned poorly cut chicken to an employee on the line either by tossing it on the table in front of the employee or by any other method; that the examples cited by Respondent involve situations where the employee who was discharged was engaged in horseplay and/or the sponsoring witness was unable to testify about the circumstances surrounding the discharge; that Rodriguez was not engaged in horseplay; that counsel for the General Counsel presented evidence that Respondent failed to discharge or even suspend employees whom it accused of throwing items in the plant, namely (a) Gerra, who is presently employed at Respondent, hitting another employee in the face with a chicken neck with the head still attached, and (b) Buluz, who is presently employed at Respondent, receiving a verbal warning for throwing ice and hitting another employee with it; and that the timing of the discharge of Rodriguez, the sham investigation into the chicken throwing incident, and the disparity of Respondent's treatment of Rodriguez establish that Respondent discharged Rodriguez because of her protected concerted activity or participating in a work stoppage and of speaking to the press on behalf of employees.

Respondent's arguments regarding Rodriguez are set forth above.

As pointed out by counsel for the General Counsel on brief, that the first requirements of *Wright Line*, supra, are met, namely that Rodriguez engaged in activity protected by the Act and the Respondent had knowledge of that participation. As noted above, counsel for the General Counsel goes on to contend that Respondent's unlawful motive in discharging Rodriguez because of her protected activities is established by (1) the suspicious timing of the discharge; (2) the one-sided investigation of the events leading to the discharge; and (3) the disparity between Respondent's treatment of Rodriguez and of other employees involved in similar incidents. Again, the employee Rodriguez dictated the timing in that she admittedly got into a confrontation with Johnson on October 31. Rodriguez herself presented the Respondent with a situation that it had to resolve. The timing is not suspicious, and it should not reasonably lead to the conclusion that animus or unlawful motivation should be

inferred based on this. The investigation of the incident was not one-sided. King spoke with and had written statements from Johnson, Rodriguez, Raymundo, and Ronda. If Ronda's testimony had not been equivocal about whether he advised King that he saw Johnson also throw product, this conclusion might be different. But in view of his testimony that his written statement was accurate and complete, and the written statement does not mention Johnson throwing chicken, I do not believe that it can be concluded that Respondent's investigation of the incident was one-sided. But as pointed out by the General Counsel on brief, while King testified that precedence is the most important factor considered by Respondent, prior to Rodriguez' discharge she did not conduct an independent review to look at prior personnel decisions regarding throwing product nor did she personally examine the personnel files of other employees terminated for throwing product. Instead, King relied on the representation of top management that Respondent had a precedence of discharging employees who throw product. King asserts that Campos stated that if throwing product meant termination, then Rodriguez should be discharged but he did not provide King with any documents to show King that other employees had been terminated for similar conduct. As the General Counsel points out on brief, Respondent did not present one instance of discharge of an employee who returned poorly cut chicken to an employee on the line either by tossing it on the table in front of the employee or by any other method. The examples cited by Respondent involved situations where the employee who was discharged was engaged in horseplay and/or Respondent's sponsoring witness was unable to testify about the circumstances surrounding the discharge. I agree with the General Counsel that Rodriguez was not engaged in horseplay. Additionally, counsel for the General Counsel presented evidence that Respondent failed to discharge or even suspend employees whom it accused of throwing items in the plant, namely Gerra and Buluz. And finally, Raymundo testified that he has given written warnings to employees for throwing items. Since counsel for the General Counsel has demonstrated that there was no real investigation of the precedent involving throwing product and there is a blatant disparity between Respondent's treatment of Rodriguez and the treatment of other of its employees involved in throwing product or other items, she has shown that an inference should be drawn that animus regarding protected activity and unlawful motivation on the part of Respondent caused Rodriguez' termination. I believe that this finding is warranted notwithstanding the fact that there is no other finding of an independent violation of the Act.

Respondent argues that even if counsel for the General Counsel meets her burden under *Wright Line* and has made a prima facie showing sufficient to support an inference that the protected conduct was a motivating factor in the termination of Rodriguez, the Respondent has shown that it had a legitimate business reason for Rodriguez' termination. It is pointed out by the Respondent that if an employer establishes legitimate grounds for adverse action and there is no evidence of similarly situated employees being treated more favorably, the employer has carried its *Wright Line* burden. Respondent argues that Rodriguez was terminated consistently with policy and practice. I do not agree with Respondent's argument. Counsel for the General Counsel demonstrated that this is not the case in that she showed similarly situated employees being treated more favorably. Counsel for the General Counsel has shown blatant disparate treatment.

Can one reach the conclusion that an adverse inference should be drawn with respect to Rodriguez and not with respect to Dimas even though both employees were engaged in the same concerted activity? I believe that such an approach is appropriate. The situations of Dimas and Rodriguez can be viewed differently based in whether counsel for the General Counsel met her burden of proof under *Wright Line* regarding them individually. Respondent's treatment of Rodriguez vis-a-vis other of Respondent's employees warranted an inference of animus and unlawful motivation. In my opinion, counsel for the General Counsel did not make that showing regarding Dimas. And I do not believe that the fact that counsel for the General Counsel succeeded in Rodriguez' situation carries over to Dimas.

CONCLUSIONS OF LAW

By terminating Rodriguez on October 31 (actually on Nov. 3) because she engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such concerted activities for the purpose of collective bargaining or other mutual aid or protection, Case Farms of North Carolina, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W.*

Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[16]

[Recommended Order omitted from publication.]

[16] On brief, counsel for the General Counsel requests that the interest be compounded. She points out that his is not currently the Board practice. Unless and until the Board changes its practice, the current Board practice will be applied. Counsel for the General Counsel also requests that (a) the notice be posted in Spanish and English, and (b) Respondent be required to hold group meetings with employees in which an official of the Board can read the notice to employees in Spanish and English. The request to require that the notice be posted in Spanish and English is reasonable under the circumstances of this case, and such request will be granted. No need has been shown herein for the granting of the request to hold group meetings with employees in which an official of the Board can read the notice to employees in Spanish and English, and such request is denied.