UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BOZZUTO'S, INC. **Respondent** **and** **UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 919** **Charging Party**	**Case Nos. 01-CA-115298** **01-CA-120801** **July 23, 2015**

RESPONDENT'S EXCEPTIONS TO THE
DECISION AND RECOMMENDED ORDER OF
THE ADMINISTRATIVE LAW JUDGE

The Respondent, Bozzuto's, Inc., ("Bozzuto's") hereby files the following Exceptions to the Decision of the Administrative Law Judge ("ALJ") in accordance with the rules and regulations of the National Labor Relations Board ("Board").

I. Interrogation

1. Bozzuto's excepts to the ALJ's failure to consider whether Clark's single "offhand and somewhat innocuous comment" satisfied the General Counsel's burden to prove coercion or interference. (ALJ 8:18-23)

II. Discipline and Discharge of Patrick Greichen

1. Bozzuto's excepts to the ALJ's failure to consider or find that Greichen behaved as a "hot head" who would "rant" and be difficult to control and that comments from others described his "scary" and "erratic" behavior. (Tr. 160, 163-164, 435, 438, 460, 711, 877-878, R-21)

2. Bozzuto's excepts to the ALJ's failure to find or consider that Clark did not mention unions at the October 1, 2013 disciplinary meeting with Greichen or at any time in 2013 to him. (Tr. 858)

3. Bozzuto's excepts to the ALJ's failure to find or consider that other employees had received discipline for behavioral conduct similar to Greichen's prior to union organizing. (R-4)

4. Bozzuto's excepts to the ALJ's consideration of Bozzuto's lawful communications to employees as evidence of anti-union animus in violation of Section 8(c) of the Act. (ALJ 6:19-20)

5. Bozzuto's excepts to the ALJ's finding that on October 8, 2013, Greichen complained that a selection time was "incorrect" (ALJ 4:43-44) when the evidence showed that Greichen said he complained to "anybody and everybody" that Bozzuto's was "purposely changing the standards on a daily basis in order to screw the associates." (ALJ 5:15-17)

6. Bozzuto's excepts to the ALJ's finding that Greichen said he "couldn't attend the meeting and that he felt he was being harassed" (ALJ 5:39-40) when Greichen testified that he did not want to hear what management had to say and that he wanted to protect his Department of Labor wage claim. (Tr.848, 885)

7. Bozzuto's excepts to the ALJ's failure to acknowledge and consider the content of Greichen's surreptitious tape recording of his interactions with management that resulted in his termination on or about October 8, 2013. (R-12)

8. Bozzuto's excepts to the ALJ's failure to acknowledge and consider the irrefutable evidence that on October 8, 2013,Bozzuto's several times attempted to

convince Greichen to avoid the infraction of insubordination by attending the meeting during work hours about issues that he had raised and Bozzuto's representation that he would not be discharged by attending the meeting. (R-12)

9. Respondent excepts to the ALJ's failure to acknowledge and consider that Greichen had attended four meetings with management about work conditions prior to October 1, 2013 and in addition had himself scheduled two meetings with Clark about non-work subjects and sent Clark a gift, showing no hesitation or fear of meeting with Clark. (Tr. 236-237, 435-439, 857, R-45)

10. Bozzuto's excepts to the ALJ's failure to acknowledge and consider unrefuted testimony that Clark, the decision-maker about Greichen's employment status, did not know that Greichen was a union supporter and that nothing was said about unions or union organizing insofar as the purpose of the meeting on October 8, 2013. (Tr. 71-72, 106, 842-843)

11. Bozzuto's excepts to the ALJ's failure to find that Bozzuto's had terminated other employees for insubordination prior to union activity. (R-44)

12. Bozzuto's excepts to the ALJ's failure to conclude that the irrefutable evidence demonstrated that Greichen had been terminated for cause. (R-12)

13. Bozzuto's excepts to the ALJ's conclusion that the October 8, 2013 meeting would not have occurred but for the October 1, 2013 meeting. (ALJ6:35-37) .

14. Bozzuto's excepts to the ALJ's failure to acknowledge or consider that Section 10(c) of the Act prohibited Greichen's reinstatement because Greichen was terminated for cause. (ALJ 6:28-30)

15 Bozzuto's excepts to the ALJ's conclusion that while Greichen's refusal to attend the meeting was insubordination, his discharge was unlawful. (ALJ 6:28-60)

16. Bozzuto's excepts to the ALJ's failure to conclude that Greichen would have been fired for his conduct on October 8, 2013 even if he had not been involved with the union. (-44)

17. Bozzuto's excepts to the ALJ's conclusion that only "threatening" behavior loses protection of the Act. (ALJ 6:39-40)

18. Bozzuto's excepts to the ALJ's failure to require the General Counsel to prove that anti-union animus was the motivating factor in Greichen's discharge.

III. **Discipline and Discharge of Todd McCarty**

1. Bozzuto's excepts to the ALJ's finding that after Greichen left, McCarty was the sole active union supporter. (Tr.106, 278)

2. Bozzuto's excepts to the ALJ's failure to acknowledge and find that two of McCarty's deficiencies for production occurred months before any union activity and that on each of those corrective actions McCarty made comments about the discipline. (R-6; R-7)

3. Bozzuto's excepts to the ALJ's failure to acknowledge and consider that McCarty had photographic evidence of changes to his production data in January 2014 but did not ever provide it to Bozzuto's for reasons he did not explain. (Tr. 649, 939)

4. Bozzuto's excepts to the ALJ's failure to acknowledge and consider that If McCarty had provided the photographic evidence to Bozzuto's, Bozzuto's could have investigated and found out who made the changes and avoided disciplining McCarty. (Tr. 200, 896, 939)

5. Bozzuto's excepts to the ALJ's finding that Bozzuto's determined that a supervisor had changed McCarty's production numbers. (ALJ 7:43-44) Bozzuto's could not determine with certainty who made the computer changes. (Tr. 368,569)

6. Bozzuto's excepts to the ALJ's conclusion that because there was evidence that McCarty was a union activist, that Bozzuto's was aware of his union activity, and that the reasons for his suspension and discharge were false, Bozzuto's violated the Act. (ALJ 8:4-8) In drawing this conclusion, the ALJ ignored undisputed evidence that McCarty on multiple occasions self-identified as the lead organizer and could have avoided discipline and discharge by merely giving the photographic evidence to Bozzuto's.

7. Bozzuto's excepts to the ALJ's failure to acknowledge and consider that upon being given the photographic evidence by the NLRB Agent several months after McCarty's discharge, Bozzuto's promptly conducted an investigation which required reviewing hundreds of transactions to conclude that McCarty should be offered reinstatement and make whole relief. (Tr. 562, 566, 571-573)

8. Bozzuto's excepts to the ALJ's failure to acknowledge and consider that other employees had been terminated for production deficiencies and that the General Counsel's effort to provide evidence of selective enforcement had failed. (R-45, Tr. 962-1003)

III. <u>Conclusions of Law</u>

1. Bozzuto's excepts to the ALJ's conclusion of law that it violated the Act by:

(a) Clark unlawfully interrogating Todd McCarty with a single "offhand and somewhat innocuous comment" (ALJ 8:21-24);

(b) disciplining Todd McCarty in January 2014 for failing to meet production standards (ALJ 8:7-14);

(c) discharging Todd McCarty in February 2014 for failing to meet production standards (ALJ 8:7-14);

(d) disciplining Patrick Greichen on October 1, 2013 (ALJ 6:25-26);

(e) discharging Patrick Greichen on October 8, 2013, even accepting Bozzuto's contention that his refusal to attend a meeting constituted insubordination (ALJ 6:28-30);

2. Bozzuto's excepts to the ALJ's failure to follow the requirements of Section 8(c) of the Act that lawful communications cannot be the basis for finding anti-union animus. (ALJ 6:19-20)

3. Bozzuto's excepts to the ALJ's failure to follow the requirement of Section 10(c) of the Act in ordering reinstatement and back pay for an employee discharged for cause, especially where the ALJ accepted that Greichen's refusal to attend a work meeting constituted insubordination. (ALJ 6:28-30)

IV. <u>Remedy</u>

1. Bozzuto's excepts to the ALJ's proposed 0rder in section 1. (b) (ALJ 14:42-43);

2. Bozzuto's excepts to the ALJ's proposed Order insofar as Patrick Greichen in section 2(a)-(e) (ALJ 15:8-28)

3. Bozzuto's excepts to the ALJ's proposed Order insofar as Todd McCarty in Section 2(a) (c)-(e) (ALJ 15:8-28)

2. Bozzuto's excepts to the Notice provisions consistent with the exceptions raised above (ALJ Appendix).

Respectfully submitted,
Bozzuto's, Inc.

By ***/s/***

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VII. CERTIFICATE OF SERVICE

This is to certify that on July 23, 2015 the undersigned emailed a copy of the foregoing Exceptions of Respondent as follows:

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