UNITES STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

INTERNATIONAL HARVEST, INC.
Respondent
and
Septival Bolt,
an Individual
and **Case Nos. 02-CA-138000**
02-CA-141056
Ashley Quezada **02-CA-143992**
an Individual

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Dated at New York, New York
this 18th day of February, 2016

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I. POCEDURAL HISTORY

On October 2, 2014, Septival Bolt filed a charge in Case No. 02-CA-138000, alleging that International Harvest, Inc. ("Respondent") terminated his employment and that of several other coworkers in order to discourage Union activities in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act ("Act"). (GC Exh. 1A).[1]

On November 18, 2014, Ashley Quezada filed a charge in Case No. 02-CA-141056, alleging that Respondent terminated her employment in retaliation for activities on behalf of the Amalgamated Industrial T&N Workers of America Local 223, AFL-CIO ("Union" or "Local 223") in violation of Sections 8(a)(1) and 8(a)(3) of the Act. (GC Exh. 1C).

On January 2, 2015, Septival Bolt filed a charge in Case No. 02-CA-143992, alleging that Respondent, through its agent Dina, promised an employee a benefit of $200 in gift card or check each month and a promotion if the employees voted against the Union. The charge further alleges that in early September of 2014, Respondent, through its agent Luis, promised an employee a wage increase if the employees voted against the Union. (GC Exh. 1E).

On July 31, 2015, following an investigation of the above allegations, the General Counsel of the National Labor Relations Board ("General Counsel"), by the Regional Director for Region 2 of the National Labor Relations Board ("Regional Director"), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Case Nos. 02-CA-138000, 02-CA-141056 and 02-CA-143992 ("Consolidated Complaint"). (GC Exh. G). The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1) and (3) of the Act by:

[1] Citations to the transcript will appear as "Tr." followed by the corresponding page and line number(s). citations to the General Counsel and Respondent exhibits will appear as "GC Exh." and "R. Exh.," respectively, followed by the exhibit number.

- Promising benefits to employees in order to discourage employees from voting for the Union;

- Terminating the employment of Septival Bolt because he concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees by requesting information on the wage rate of Respondent's employees and to discourage employees from engaging in concerted activities;

- Terminating the employment of Denroy Burrell because Respondent believed that Burrell engaged in concerted activity and to discourage employees from engaging in concerted activities;

- Terminating the employment of Ashley Quezada because she supported the union and engaged in concerted activities and to discourage employees from engaging in concerted activities.

Respondent, by its Counsel, filed an Answer to the Consolidated Complaint on August 13, 2015. (GC Exh. 1I).

The case was litigated before Administrative Law Judge Steven B. Davis on September 17, 18, 21, 25, and October 9, 2015.[2]

On January 7, 2016, Judge Davis issued a Decision and Recommended Order ("ALJD"), dismissing the Complaint in part.[3] The ALJ found that the Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by discharging its employee Ashley Quezada. The ALJ further found that Respondent violated Section 8(a)(1) of the Act by promising its employees a wage increase in

[2] During the hearing, Judge Davis accepted an amendment to the remedies portion of the Consolidated Complaint seeking an order requiring that the Respondent reimburse discriminatees for all search for work and work related expenses regardless of whether the discriminatees received interim earnings in excess of these expenses or at all during any given quarter or during the overall back pay period. (Tr. 10:18-25; 11:1-2).

Judge Davis also accepted an amendment to Respondent's answer to paragraph 4(b) of the Consolidated Complaint as follows: "Denies the allegations set forth in Paragraph 4(b), except: admits that Dina and Luis were labor relations consultants; admits that Dina was an agent of Respondent within the meaning of Section 2(13) of the Act, from approximately August 14, 2014 through and including October 2, 2014; and avers that Luis was retained to perform labor consulting and translation services for Respondent, and did so from the date in the latter half of August 2014 through and including September 17, 2014." (Tr. 330:10-18).

[3] Citations to Judge Davis's decision will appear as "ALJD," followed by the corresponding page and line number(s).

order to discourage them from voting for the Union and by promising a $200 check or gift card if the employees supported the Respondent in the election. However, the ALJ determined that the Respondent did not violate Sections 8(a)(1) and 8(a)(3) of the Act when it discharged Septival Bolt and Denroy Burrell.

II. ISSUES PRESENTED

1. Did the ALJ err in failing to find that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act when it discharged Septival Bolt?

2. Did the ALJ err in relying on case law that is inapposite to the case at bar, for the proposition that the alleged incidents of a sexual harassing nature served as legitimate grounds for Respondent to discharge Bolt?

3. Did the ALJ err in failing to find that Respondent violated Sections 8(a)(1) and (3) when it discharged Denroy Burrell?

4. Did the ALJ err in finding that George Adams only testified to two incidents of threats by Burrell?

5. Did the ALJ err in discredited Justin Young's testimony that he was aware of numerous prior instances of Burrell making threats to Adams, but issued no written warnings?

6. Did the ALJ err by incorrectly and inadvertently failing to include in his summation of the Complaint, General Counsel's allegation that Respondent discharged employees Ashley Quezada because she engaged in union activity?

7. Did the ALJ err by failing to provide a remedy that reimburses the discriminatees for all search-for-work and work-related expenses?

III. BACKGROUND FACTS

A. Respondent's Operation

This case arises in the context of a union organizing campaign that took place in Respondent's 606 Franklin Avenue, Mount Vernon, New York facility. The Respondent is engaged in the production and sale of organic and glutten free food products. (Tr. 19:12-13).

The Respondent's President is Robert Sterling. Its Chief Operating Officer, Justin Young, oversees the Respondent's entire operation including human resources, compliance with government food regulations, logistics, accounting, purchasing, sales, and customer relations. Young reports to Sterling. (ALJD 2:19-22).

Respondent's supervisors of various departments such as baking, production, and warehouse report to Young. (ALJD 2:24-25) Luz (Margo) Cordero is the supervisor of production in the main bakery and Evelyn Minier is the supervisor of production in another bakery located in a separate building. George Adams is the supervisor in the baking department. (ALJD 2:25-27)

B. The Union's Organizing Campaign

In the early summer of 2014, the Union began speaking to Respondent's employees outside of the Mount Vernon facility about the benefits of unionizing. (ALJD 2:30-40).

On August 11, 2014, the Union filed a petition to represent "all full time and regular part-time production and maintenance employees, including bakers, pickers, packers, warehouse drivers, housekeeping, machine operators, and line workers" at the Respondent's facility. (GC Exh. 48).

On Friday August 15, 2014—four days after the Union filed its petition, Respondent retained the services of National Labor Consultants, LLC ("NLC"). (GC Exh. 43). Dina Cordiano and Cesar Alarcon were the NLC consultants assigned to Respondent's facility. (ALJD 3:39-40). The ALJ credited Alarcon's testimony that immediately upon hiring Cordiano and Alarcon, Respondent revealed to them during an initial meeting that employees Septival Bolt and Ashley Quezada were among the handful of employees who were supporting and campaigning

for the Union. (ALJD 3:45-48). The ALJ also credited Alarcon that Cordiano advised Respondent to find "dirt" on those employees and that Respondent's management revealed that Bolt had been accused of sexual harassment in the past. (ALJD 3:50-52; 4:1-3). On September 17, 2014, the Union lost a representation election that was held at the Respondent's facility by a. (ALJD 7:1-2). Four votes were case for the Union, and 48 were cast against it. (ALJD 7:4)

By September 30, 2014—only two weeks after the election, Respondent had terminated the employment of Ashley Quezada, Septival Bolt and Denroy Burrell, employees who were known to, or suspected to, have supported the Union. (ALJD 21:11-14; 35:20-21; Tr. 77:23-24; 96:1-6).

C. Ashley Quezada, Septival Bolt and Denroy Burrell's Protected Activity

i. Union activity

Ashley Quezada was employed in Respondent's production department from May 2013 until September 30, 2014. (Tr. 138: 2,11). In early summer of 2014, when Local 223 representatives began campaigning outside of the Respondent's main building, Quezada was the first employee to begin communicating with the Union. (Tr.147:4-25). Quezada handed out Union authorization cards to a number of her coworkers including Bolt and Burrell. (Tr.147:17-19, 21, 25; 148:4-20; 267:22-25; 278:6-10; 336:11-23; 337:16-20). She collected signed cards from employees, attended union meetings and encouraged her fellow employees to join her. (ALJD 34:40-43). Quezada also served as the Union's observer during the September 17 election. (ALJD 35:20).

Septival Bolt[4] and Denroy Burrell were employed in Respondent's organic bakery from June 2012 until September 26, 2014. (Tr. 271:12, 16; 332: 9, 12). They were hired within weeks of one another and shortly after beginning their employment, Bolt and Burrell reached an agreement with Young whereby the two were permitted to work through their lunch breaks. (Tr. 275: 12-17; 334:25; 335: 2-13). As noted in the ALJD, it is undisputed that the two had a close friendship throughout their employment and that Respondent was aware of their relationship. (ALJD 41:5-10). Respondent granted both Bolt and Burrell raises during the course of their employment, notably, after learning that they had engaged in the type of conduct that Respondent now contends was the basis for their discharge. (ALJ 30: 38-48).

Early in the campaign Bolt signed a union authorization card. (Tr. 337:4-6). He then went on to hand out and collect signed union authorization cards from coworkers and attended a Union meeting in early August of 2014. (338:13-16, 18-21; 339:7-13, 16-21). He was also vocal in meetings with labor consultants about his support for the Union. (Tr. 158:13-14; 235:19-213; 50:15-16).).

Throughout August and September of 2014, Union representatives were present outside the facility on multiple occasions and distributed materials to employees. (Tr. 280:21-23; 354:1-4). Bolt spoke to Union representatives in front of the main building on a regular basis. (Tr. 342:2-20; 343:7-11)). At one point in August 2014, during a conversation in the Respondent's warehouse, labor consultant Dina Cordiano informed Bolt that she had observed him talking to Union representative Anthony.[5] (Tr. 344:4-8, 24).

[4] Bolt testified that he went by the name "Patrick" during his time at International Harvest. (Tr. 331:24; 332:2).
[5] Cordiano did not deny making this statement.

Burrell signed a Union authorization card, spoke with union agents outside the building, and observed Young watching at him during those conversations. (ALJD 40:49-52). In addition, he was listed on the Respondent's spreadsheet as a "fence-sitter" in the first week, a "union-cheerleader" in the second week, and a "fence-sitter" in the third week. *Id.*

ii. Bolt engaged in protected concerted activity by forming an employee committee

Around late August or early September 2014, Bolt and Cordiano had an hour long conversation in the Respondent's warehouse. (Tr. 355:10-23; 356:4). Bolt testified that during the conversation Cordiano commended him on his leadership skills and promised that if he supported the Company and helped vote out the Union she would ask Young to give him a $200 money card or check every month and talk to management about promoting him to supervisor. (Tr. 356:7-14). Cordiano also assured Bolt that once they got the Union out he and his coworkers could form a committee. (Tr. 356:18-25). During the hearing Cordiano denied having promised benefits to Bolt, however, the ALJ correctly credited Bolt's account of the conversation stating:

> I find that Cordiano made this offer. Support for this finding are the undisputed facts of Bolt's actions thereafter. He credibly testified that, based on Cordiano's offer, he abandoned his vocal and public support for the Union, formed a committee to meet with management, and announced that Quezada would be the only worker to vote for the Union, thereby publicly disavowing his previous support for the Union.
>
> I reject Cordiano's denial that she made this promise to Bolt. He gave uncontradicted testimony that shortly after the election and shortly before his discharge, Young obscenely told him that "you're not getting shit. No more committee, no raise, nothing." In telling Bolt that he would not receive a raise, Young confirmed that Cordiano offered him such a raise. (ALJD 33:31-41).

Thus, per the ALJ's decision, Bolt abandoned his support for the Union after being promised benefits by the Respondent's agent, and engaged in further concerted activity by creating the

employee committee for the purposes of negotiating terms and conditions of employment directly with the Respondent. *Id*. The Respondent's knowledge of Bolt's committee is evidenced in Young's comment to Bolt that there would be "[n]o more committee." *Id*.

D. Respondent Discharged Ashley Quezada Because she Engaged in Union Activity

The ALJ correctly found that the General Counsel proved Quezada's discharge was in violation of the Act. (ALJD 37:1-2). First, he held that Respondent's animus toward the Union was demonstrated by its unlawful promise of benefits to Quezada and Bolt in exchange for their support in the election; the extent to which it went in order to dissuade Quezada from supporting the Union; and, the timing of her termination—only two weeks after the Union election. (ALJD 35:1-25). The ALJ also noted that Quezada had been identified by Young as a union supporter and by the Respondent's agents, Cordiano and Alarcon, as a "loyal union supporter" in each of the 3 weeks that they kept records concerning employees' union sentiments. (ALJD 34:44-48).

The ALJ rejected Respondent's Wright Line defense that Quezada had been discharged due to her excessive lateness. (ALJD 37:1-2). In this regard, he noted that despite Quezada having been more than one hour late on 59 days starting from the date of her employment to the date of the petition, and despite Young having access to her time records, he did not warn her or discipline her prior to the filing of the Union's petition. (ALJD 36: 18-41).

IV. FACTS AND ARGUMENT IN SUPPORT OF EXCEPTIONS

A. The ALJ Erred in Failing to Find that Respondent Violated Sections 8(a)(1) and 8(a)(3) of the Act when it Discharged Septival Bolt (Exception 1)

The General Counsel's evidence, as found by the ALJ, shows that Bolt was a Union supporter who, even after being lured by Respondent into abandoning his support for the Union, continued to press for better terms and conditions of employment for Respondent's employees.

(ALJD 27:25-40). Indeed, the ALJ's credibility determinations and factual findings include that (a) Young received sexual harassment complaints against Bolt in 2012 and 2013 but did not discipline Bolt; (b) Bolt was a Union supporter during the initial part of the Union's 2014 organizing campaign; (c) Respondent was aware of his Union activity and, in a preliminary meeting between Respondent's managers and the labor consultants, identified Bolt as a union adherent on whom "dirt" should be found; (d) during that initial meeting, Respondent informed its agents of prior claims of sexual harassment against Bolt and it was agreed that such information could be used against him; (e) after receiving information about Bolt's past, Respondent's agent Cordiano solicited new sexual harassment complaints against him; (f) "[t]he Respondent and its consultant agents then engaged in a well-planned and well executed program to manipulate Bolt into supporting the Respondent in the election. . . and then to discharge him." (ALJD 3:17:37-40; 18:17-19; 38:33-35). As discussed in more detail infra, with respect to each of these points, where there was a dispute of fact, the ALJ credited General Counsel's witnesses and discredited Respondent's witnesses. Thus, the ALJ correctly held that Bolt engaged in protected activity of which the Respondent had knowledge, and specifically stated that General Counsel presented "a very strong prima facie case." (ALJD 38:46).

Under the established analytical framework of *Wright Line*, once the General Counsel has made a prima facie case of discrimination the burden shifts to the employer to demonstrate, by a preponderance of the evidence, that it would have taken the same action in the absence of union or other protected activity. 251 NLRB 1083 (1980), enfd. 662 R.2d 899 (1st Cir. 1981), cert. denied *455* U.S. 989 (1982). An employer does not carry its burden merely by showing that it had a legitimate basis for taking an adverse employment action. *See, e.g., T&J Trucking Co.*, 316 NLRB 771 (1995); *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th

Cir. 1991). Where the General Counsel presents a strong prima facie showing of discrimination, the Respondent's burden is substantial. *Vemco, Inc.*, 304 NLRB 911, 912 (1991). Indeed, Respondent needs to show it would have fired Bolt even if he had not engaged in the Union activity. *Fedex Freight E., Inc. & Tommy Grass*, 344 NLRB 205, 210 (2005); *In Re Buckeye Elec. Co*, 339 NLRB 334, 342 (2003).

In the instant case, the evidence overwhelmingly demonstrated that Bolt's protected activity prompted Respondent to seek a reason to discharge him. Nevertheless, despite finding that there was a "strong showing that Bolt was discharged because of his union and concerted activities," the ALJ erroneously held that Respondent's conduct did not violate Sections 8(a)(1) and 8(a)(3) of the Act. (ALJD 28:1-3; 40: 39-41). The ALJ's conclusion is entirely inconsistent with his credibility determinations and his findings of fact. Moreover, in reaching this conclusion, the ALJ failed to address critical evidence— namely, the disparity between Respondent's response to sexual harassment complaints against Bolt in 2012 and 2013 and its response to similar complaints that it solicited against Bolt after learning of his protected activity in 2014. The magnitude of the ALJ's Failure to address this dispute cannot be overstated given that Respondent's admitted past reaction to sexual harassment complaints against Bolt makes it crystal clear that but for the protected activity Bolt would not have been disciplined, let alone discharged.

The evidence shows that in 2012, Young received a sexual harassment allegation against Bolt from employee Maria Revilla. (ALJD 17: 38-39). During his testimony Young could not recall whether he had discussed the incident with Bolt or issued a written warning, yet Respondent failed to produce any written warning at the hearing. (ALJD 17:51-52). Young did, however, recall that he did not conduct an investigation in 2012 and Bolt testified that Young

had never spoken to him about the matter. (ALJD 18:28-29; Tr. 101:22-24; 465:13-15). The evidence further demonstrates that in 2013 employee Antonique Abraham communicated with Young regarding her sexual harassment complaint against Bolt. (ALJD 18:17-19). Young testified that he did not conduct an investigation into the matter at that time, and although he claimed that his reason for declining to do so was because Abraham stopped working for the company, notably, when she returned to work in 2014, no additional action was taken. (ALJD 18:30-40).

Meanwhile, after receiving the 2012 and 2013 complaints of sexual harassment against Bolt, Respondent awarded him pay raises in 2013 and 2014. (ALJD 20:47-49). Naturally, during his testimony, Young went to great pains to relieve himself of any responsibility for those pay decisions. The ALJ, however, discredited Young's testimony noting:

> In an effort to disclaim that he gave Bolt and Burrell raises in pay, Young claimed that in his absence the employees "beg and plead" President Sterling for a raise which he granted without consulting Young. In contrast, Sterling testified that "Young handles the employees that come and ask for raises." Indeed, Young testified that he is in charge of the entire human resources operation. I accordingly cannot credit Young's testimony in this regard.
>
> By denying any part in the awarding of their raises, Young attempted to show that, knowing of their misconduct, he would not have granted those raises. Rather, that Sterling did so without his knowledge. Certainly, as the head of human resources with access to their personnel files he would have known when and why the raises were given and who authorized them. (ALJD 30:38-48).

Young's dismissive attitude towards the 2012 and 2013 harassment complaints, when compared to his conduct in 2014, after learning of Bolt's Union conduct, leaves no doubt that his primary reason for discharging Bolt was Bolt's protected concerted activity.

Indeed, even the ALJ's factual and credibility findings regarding the incidents surrounding Bolt's termination support this conclusion. The ALJ credited General Counsel's

witness, Caesar Alarcon, who testified that at his first meeting with company officials Respondent identified Bolt as a Union supporter; Respondent informed Alarcon and Cordiano of a "rumor" that Bolt had engaged in sexual harassment of female workers; and that during the meeting Cordiano told Young that such misconduct would be used to get "dirt" on Bolt. (ALJD 13:5-42). Moreover, the ALJ, discrediting Respondent's witness Cordiano's testimony, concluded that just weeks after that meeting, Cordiano solicited sexual harassment complaints against Bolt during a conversation with Katrina Clay and Evelyn Minier—a conversation which the Judge held "was clearly contrived to obtain those employees' statements regarding their harassment by Bolt." (ALJD 37:44-45). In this regard, the ALJ noted:

> I credit the testimony of Alarcon. As one of the two consultants and Cordiano's colleague in their efforts to thwart the employees' organizational effort, Alarcon was one-half of the team which engaged in such activities. He provided a unique "inside" look at the strategy employed by the Respondent and its agents to build cases against those who were most active in the union campaign.
>
> Thus, as Alarcon testified, Cordiano obtained "dirt" on Bolt by initiating a conversation with Clay and Minier concerning his harassment of them. Alarcon's credibility is further supported by his testimony that it was the consultants' plan to use Quezada's relationship with Union Agent Alex to discredit her. They did that when, during Cordiano and Young's meeting with Quezada 1 week before the election, they referred to that relationship in a demeaning way. Alarcon was not at that meeting and therefore may not have known about it. But his advance knowledge of the plan bolters [sic] his credibility. (ALJD 29:5-17).

Plainly, the evidence supports that Respondent, in an effort to remove Bolt— an outspoken Union adherent, turned employee committee leader—from the facility, seized upon its knowledge of the prior sexual harassment allegations against Bolt as a surefire method to rid himself of the nuisance.

Moreover, Respondent's treatment of Quezada, which the ALJ found unlawful, was virtually identical to that of its treatment of Bolt. Respondent ignored Quezada's repeated tardiness prior to Union activity in the same way Respondent ignored allegations of sexual

misconduct against Bolt before the Union campaign. Not once, but twice, before the campaign Young was made aware of Bolt's inappropriate conduct, but did not investigate, discipline, or even warn Bolt that his employment was in danger until after becoming aware of his Union activity. The unlawful motive behind Respondent's treatment of Bolt after learning of his Union activity is made even clearer by the fact that there is no other probative evidence in the record that could possibly explain the disparity in treatment. Thus, the record evidence, as found by the ALJ, leaves no doubt that if not for Bolt's Union and other protected activity, Respondent would not have solicited complaints against him and then used those complaints as a basis to terminate his employment.

Presented with this overwhelming evidence of union animus and of Respondent's clear resolve to target and rid itself of an employee for engaging in the exact conduct the Act is intended to safeguard, it is incomprehensible that the ALJ could reasonably find that Respondent did not violate the act by discharging Bolt. The conclusion that Respondent would have fired Bolt even in the absence of his protected activity simply cannot be drawn from the ALJ's own findings of fact and credibility determinations which establish that it was, in fact, Bolt's protected activity that prompted the Respondent to solicit "dirt" against him and to treat allegations against Bolt differently after the protected activity. (*See* ALJD 3:50-52; 4:1-3; 13:9-11; 27:20-24; 37:38-42).

Rather, it is clear that the ALJ, having concluded that Bolt engaged in the conduct of which he was accused and finding that conduct reprehensible, disregarded the Respondent's clearly unlawful motive in favor of dismissing the allegations based on his own assessment of what Bolt deserved. *See Teamsters Locals 554 & 608 (Mcallister Transfer, Inc.),* 110 NLRB 1769, 1788 (1954) (Chairman Farmer, *concurring*: "Judges must resist the temptation to devise

legal precepts to accommodate their moral judgments that this conduct or that is either laudable or indefensible."). In this regard, the ALJ accepted, at face value, Respondent's contention that it had a legitimate basis for taking an adverse employment action against Bolt, but the law is clear that simply having a legitimate reason is not enough. The critical point here, is that Respondent's indifference towards Bolt, Burrell and Quezada's misconduct before the Union's campaign makes it glaringly clear that absent their protected activity they would not have been discharged. Bolt's conduct does not erase the overwhelming evidence that Respondent, in a clear effort to neutralize or punish union and concerted activity, engaged in a witch-hunt to obtain a facially legitimate reason for his discharge. Thus, the ALJ's grave error led to a decision that runs afoul of the protections guaranteed to workers by the Act and resulted in the ALJ excusing the Respondent's clear 8(a)(1) and 8(a)(3) violation.

i. ***The cases cited by the ALJ for the proposition that incidents of a sexual harassing nature are a legitimate grounds discharge are inapposite to the case at bar (Exception 2)***

The cases relied on by the ALJ in finding that Bolt's conduct provided Respondent a legitimate basis to discharge him are factually inapposite to the case at bar. In *PPG Industries*, 337 NLRB 1247, 1248(2002) the ALJ, upheld by the Board, found that there was no showing of animus as the only evidence presented in that regard was the mere fact that the employee actively supported the union drive. Similarly, in *Gallup, Inc.*, 349 NLRB 1213 (2007), the ALJ held that there was insufficient evidence of union animus and, rather, it was the Supervisor's personal dislike for the employee which motivated her treatment of him. To the contrary, here, the ALJ concluded that there was ample evidence of Respondent's animus toward the Union and employees engaged in protected concerted activities.

In *Fixtures Mfg. Corp.,* 332 NLRB 565, 566 (2000), the employees who were discharged for sexual harassment had no prior incidents of similar conduct to which the employer's response could be compared. Further, unlike the instant case, there was evidence that the employer had, in the past, discharged employees for sexual harassment. In the instant case, Respondent received harassment complaints against Bolt prior to his protected activity but took no action to discipline him.

In *Consolidated Biscuit Co.,* 346 NLRB 1175, 1181 (2006), the facts did not involve allegations of sexual harassment, but involved an employee who had been disciplined in the past for similar transgressions as those for which she was discharge. Here, Bolt was not even warned about his past conduct of harassment.

In *Allied Mechanical,* 349 NLRB 1327, 1332 (2007) the Board upheld the discharge of an employee for making obscene statements to a supervisor where the evidence established that the Employer had discharged another employee in the past for violating the same handbook provision as the union adherent. In the case at bar, there is no evidence that Respondent discharged other employees for similar infractions, however, the evidence clearly demonstrates that it failed to discipline Bolt for the same infractions prior to his Union activity.

Significantly, not a single one of these cases cited by the ALJ involve a scenario, such as here, where the employer seized upon its knowledge of prior bad conduct of a known union adherent and used that information to solicit new complaints in order to find a basis to fire him. In the instant case, the evidence demonstrates that despite Young's testimony that the Employer's sexual harassment policy was in effect in 2012 and 2013, when faced with complaints against Bolt in those years Respondent did not even bother to conduct an

investigation, more less discipline Bolt for the alleged conduct. In *Fixtures Mfg. Corp.* the Board noted that the supervisor "merely reacted to the employee complaints by issuing the written warnings to Sheall and Hoff pursuant to the policy." 332 NLRB at 566. In stark contrast, here Young and the Respondent's agent Cordiano did not merely "react" to new complaints brought against Bolt. Rather, in an effort to rid itself of an employee who had demonstrated a clear intent to implement a democratic process in the workplace, Respondent solicited complaints against him.

While there is no dispute that the Board has found sexual harassment to be a legitimate basis for discharging employees, General Counsel excepts to the ALJ's failure to address the patent difference between the conduct of the employers in the cases cited above, and that of Respondent in the case at bar. Clearly there is a distinction between an Employer who coincidently learns of a union adherent's inappropriate conduct around the same time it learns of his protected activity, and that of Respondent who, after identifying Bolt as a union supporter on whom "dirt" should be collected, solicited complaints against Bolt in an effort to find a legitimate reason to mask its true and unlawful motive for the discharge.

B. General Counsel Excepts to the ALJ's Finding that George Adams only Testified to Two Incidents of Threats by Burrell. (Exception 4)

The ALJ discussed Adams' testimony regarding only two incidents of alleged threats by Burrell— one in December 2013 and the other in August 2014, and misquoted Adams' as having stated that the first incident of threats occurred in 2013. (ALJD 23: 35-51; 24:1-6; 25:6-11). In doing so, the ALJ excluded Adams' relevant testimony that the December the 2013 incident was not the first time Burrell had threatened him. (Tr. 506:1-3). In response to Respondent counsel's question regarding the first time Adams had written up Burrell for allegedly threatening him,

Adams responded that the first time he wrote up Burrell was in December 2013. (Tr. 503: 17-23). Following this line of questioning, Adams testified that the December 2013 incident was not the first time, but that Burrell had allegedly threatened him prior to that date. (Tr. 506: 1-3). Thus, while crediting Adams' overall testimony, the ALJ inexplicably failed to find that there was conflict between Adams and Burrell from very early on in Burrell's employment.

C. The ALJ Erred in Discrediting Justin Young's Testimony That He was Aware of Numerous Prior Instances of Burrell making threats to Adams, but Issued No Written Warnings. (Exception 5)

Relying on his inaccurate account of Adams' testimony regarding the number of times that Burrell allegedly threatened him, the ALJ erroneously discredited Young's claim that he had knowledge of numerous instances of Burrell threatening Adams. (ALJD 41:25-27). As stated above, Adams testified that he had been threatened by Burrell prior to the 2013 incident. Young, in this regard, testified that Adams first complained to him about Burrell in 2012. (Tr. 460:5-8; 476:25; 477:1-6). Young also testified that over the course of Burrell's employment he overheard him making threats to Adams multiple times and claimed that on one occasion he had to get in between Adams and Burrell. (Tr. 88:22-25; 89:1-13). This error was particularly significant because the ALJ ignored evidence that demonstrates that there was conflict between Adams and Burrell from very early on in Burrell's employment and that Respondent was aware of the conflict but did not discharge Burrell until after he engaged in activity in support of the Union.

D. The ALJ Erred in Failing to Find that Respondent Violated Section 8(a)(1) and (3) when it Discharged Denroy Burrell (Exception 3)

As in the case of Bolt, Judge Davis correctly found that Burrell engaged in protected activity of which the Respondent had knowledge, and that General Counsel presented a strong prima facie case that animus toward the Union was a substantial or motivating factor in

Respondent's decision to discharge Burrell. (ALJD 41:1-14). Yet, again, notwithstanding the abundance of evidence demonstrating that Burrell's discharge was unlawful, the ALJ erroneously held that Respondent proved it would have discharged him absent his protected activity. (ALJD 40: 39-41). In reaching this conclusion, the ALJ entirely disregarded evidence of the disparity between Respondent's conduct when Adams complained about Burrell in 2012 and 2013 and its response to a similar complaint it received after learning of the Union campaign and of Burrell's protected activity.

The record is clear, based on Respondent's own admission, that Adams complained to Young about Burrell's alleged threats on a number of occasions before the Union filed its petition. (Tr. 80: 14-17; 460:5-8; 476:25; 477:1-6; 506:1-3). Further, Young testified that in addition to receiving complaints from Adams, over the course of Burrell's employment he overheard Burrell making threats to Adams, including a threat to "take him outside and beat him up." (Tr. 88:22-25; 89: 1-13). Yet, despite having knowledge of those numerous instances of threats, there is no evidence that Respondent disciplined, or in any way addressed Adams' complaints before the Union filed its petition. There is evidence, however, that like Bolt, Burrell was awarded two raises after Respondent learned of his conduct towards Adams. (ALJD 20:46-47; Tr. 321:3-15). Moreover, at the hearing, Respondent produced a warning notice authored by Young, dated December 3, 2013, which stated that Burrell threatened George Adams, did not follow his orders, and that Burrell "continues to be insubordinate." (ALJD 23:1-5). With respect to this document, the ALJ credited Burrell's denial that he received the warning and noted the following irregularities of the form:

> The date at the top of the page reads "12/3/13" with the year "13" overwritten to read "14." Similarly, the column reading "warnings previously" bears the same overwriting.

> However, in two other places on the form, at the bottom one-third, and at the end of the page, the dates of the warning are clearly written as "12/3/13." Young could not recall the specific threat made by Burrell, and his only explanation for the overwriting was that "it's the wrong date." (ALJD 23: 11-15)

The ALJ concluded from the evidence that "Young altered and overwrote the dates to make it appear that Burrell was warned in December, 2014 and ultimately discharged 1-month later allegedly for misconduct at that time, whereas he was, in fact, allegedly warned 1-year earlier and no action was taken as to this alleged misconduct." (ALJD 23: 14-17). Thus, even Respondent understood that its past conduct with respect to Burrell made its reason for discharging him suspicious and sought, by altering its own records, to make its implausible *Wright Line* defense more believable. *Sunshine Piping, Inc.*, 351 NLRB 1371, 1377-1378 (2007) (use of altered documents is proof of pretext and unlawful motive); *In Re Lucky Cab Co. & Indus., Tech. & Prof'l Employees Union*, 360 NLRB No. 43 (Feb. 20, 2014) (Falsified documentation was evidence of pretext).

The record is bereft of evidence that Burrell's conduct in 2014 was any different than the conduct Young was aware of prior to the Union campaign. In fact, Both Young's and Adams' testimony established that the comments made by Burrell were virtually identical before and after the petition.[6] (Tr. 80: 14-17). The only thing that changed was the fact that Respondent's employees were attempting to unionize the facility and, at the time the disciplinary decisions were made, "Respondent, through its agents, [had] embarked on a well-planned and well-executed program to, in Alarcon's [credited] words 'neutralize' the Union's organizing effort."

[6] Young testified that Burrell's "history of threats were, you know, I'm going to punch you in your face, I'll take you outside, you know, along those lines." (Tr. 80: 14-17). As to Burrell's 2014 incident Young testified that they were the same threats he had made before, "I'm going to beat you up, I'm going to punch you in the face. . ." (Tr. 83:2-11). Adams testified that during the 2013 incident, Burrell threatened to break his face and called him a bitch. (Tr. 504:8-9). As to the 2014 incident Adams testified that he overheard Burrell cursing him out and disrespecting him in front of other coworkers. (Tr. 506:8-19).

(ALJD 27:10-12). Indeed, at the point of Burrell's discharge Respondent was aware of Burrell's protected activity and his close relationship to Bolt, thus, it reasonably believed Burrell shared Bolt's convictions—first regarding unionization and then regarding an employee committee. (*See* ALJD 41:5-10).

The ALJ's finding that Respondent violated the Act with respect to Quezada provides further support for the inference that Union animus was Respondent's true motivation in discharging Burrell. *Feldkamp Enterprises, Inc.*, 323 NLRB 1193, 1203 (1997)(noting that the Board has long regarded an employer's adverse treatment of a union adherent as evidence which may give rise to an inference of discriminatory intent). Indeed, the overwhelming evidence that Respondent identified Bolt and Quezada as union adherents, dug up dirt based on their past discretions, and used that information to discharge them, begs the conclusion that Young similarly seized upon Burrell's past behavior as a basis to rid himself of an employee he believed to be a Union adherent.

It is apparent that, here, as with Bolt, finding Burrell's conduct reprehensible, the ALJ ignored the glaring evidence of Respondent's true motivation in favor of dismissing the allegations and based on his own assessment of what Burrell deserved. However, the fact that Respondent may have had a legitimate basis to terminate Burrell's employment is not sufficient to meet its *Wright Line* burden. The outstanding amount of evidence demonstrating Respondent's animus toward union and concerted activity as well as the stark contrast between its response to Quezada, Bolt and Burrell's misconduct before and after the protected activity cannot be ignored. Thus, Counsel for the General Counsel respectfully urges the Board to overrule the ALJ's decision which erroneously excuses the exact conduct the Act prohibits.

E. The ALJ Incorrectly and Inadvertently Failed to Include General Counsel's Allegation that Respondent Discharged Ashley Quezada because she Engaged in Union Activity in His Summation of the Complaint (Exception 6)

Finally, in paragraphs 8(a) and 8(b) of the Consolidated Complaint General Counsel alleged that Respondent discharged Quezada because she supported the Union and engaged in concerted activity. However, the ALJ incorrectly and inadvertently failed to cite that particular allegation in his summary of the Complaint. (ALJD 1:3). General Counsel requests that the Board correct the error in the ALJD.

V. REMEDY

A. The Board Should Award Search-for-work and Work-related-expenses Regardless of Whether These Amounts Exceed Interim Earnings (Exception 7)

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for the respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co*., 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment[7]; the cost of tools or uniforms required by an interim employer[8]; room and board when seeking employment and/or working away from home [9]; contractually required union dues and/or initiation fees, if not previously required while working for Respondent[10]; and/or the cost of moving if required to assume interim employment.[11]

[7] *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).
[8] *Cibao Meat Products*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).
[9] *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).
[10] *Rainbow Coaches*, 280 NLRB 166, 190 (1986).
[11] *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities Co.*, 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also N. Slope Mech.*, 286 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work[12], but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356 NLRB No. 8 at *3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners*, 361 NLRB No.

[12] *Midwestern Pers. Servs., Inc.*, 346 NLRB 624. 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

57 at *2 (Sept. 30, 2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991*, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dep 't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole…." *Don Chavas, LLC*, 361 NLRB No. 10 at *3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.[13] These expenses should be calculated separately from taxable net backpay and should be paid

[13] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co.*, 104 NLRB 514, 516 at *2 (1953).

separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp.*, 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

VI. CONCLUSION

For the foregoing reasons, General Counsel respectfully requests that the Board find that the ALJ erred in connection with the issues described above and to make the requested findings of fact, conclusions of law, and modifications to the ALJ's recommended Order. The General Counsel requests that the Board modify the remedy and Notice to Employees to conform to its findings and conclusions.

Respectfully submitted,

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February 18, 2016

UNITES STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL HARVEST, INC.
Respondent
and
Septival Bolt,
an Individual
and **Case Nos. 02-CA-138000**
02-CA-141056
Ashley Quezada **02-CA-143992**
an Individual

CERTIFICATE OF SERVICE OF:

The undersigned, Counsel for the General Counsel, hereby certifies that on February 18, 2016 she caused a true and correct copy of General Counsel's Statement of Exceptions and Brief in Support of Exceptions to be served, via electronic filing and electronic mail, addressed as follows:

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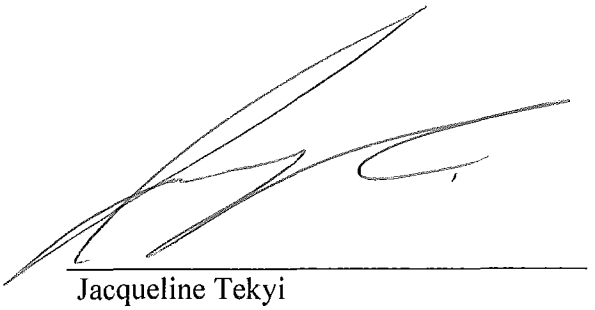

Jacqueline Tekyi

Dated this 18th day of February, 2016