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

INTERNATIONAL HARVEST, INC.	:	
	:	
Respondent	:	
	:	
and	:	**Case Nos. 02-CA-138000**
	:	**02-CA-141056**
	:	**02-CA-143992**
SEPTIVAL BOLT	:	
	:	
Charging Party	:	
	:	
and	:	
	:	
ASHLEY QUEZADA	:	
	:	
Charging Party	:	
	:	

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

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International Harvest, Inc. ("International Harvest" or the "Respondent"), by its undersigned counsel, submits this Brief in Answer to General Counsel's Exceptions to the Decision of Administrative Law Judge Steven B. Davis.

I. PRELIMINARY STATEMENT

The Exceptions and Brief in Support of Exceptions in this case rely on a remarkably slanted and selective rendition of the facts, most disingenuously by arguing that there was equivalence between two inappropriate remarks Charging Party Septival "Patrick" Bolt made—one in May 2012 and another in the summer of 2013—and the later egregious and pervasive sexual harassment that caused his discharge.[1] As the ALJ noted in referring to the evidence of sexual harassment that came to light in the few weeks immediately prior to the September 22, 2014 discharge of Bolt: "Respondent relied on all the evidence of repeated instances of gross sexual harassment in deciding to discharge Bolt." (ALJD 39:10-11)[2] Moreover, in commenting on Mr. Bolt's threat to "rape" employee Evelyn Minier, which Respondent learned of shortly before discharging Mr. Bolt, the ALJ noted that "that serious threat was only the latest and yet the most egregious instance of his [Mr. Bolt's] sexual harassment of employees." (ALJD 39: 14-19)[3] (emphasis added).

In view of these findings, the fact that General Counsel seeks the reinstatement of

[1] As discussed below, General Counsel does not describe any of the instances of sexual harassment in its Brief, as if all instances of sexual harassment, be it an inappropriate remark or quid pro quo harassment is precisely the same. No case law from any forum as ever signed on to such an absurd standard.

[2] The ALJ"s Decision is cited as "ALJD" followed by the page and line numbers.

[3] This finding by the ALJ, in and of itself destroys General Counsel's equivalence argument. As will be discussed below, General Counsel makes a demonstrably false statement regarding the ALJ, accusing him of failing "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 supposedly "similar" complaints that it solicited against Bolt after learning of his protected activity in 2014." As will be demonstrated below, and as the ALJ implicitly found, the complaints (and the harassment) were not "similar." General Counsel is implicitly arguing, at least with regard to the instant Exceptions, that all sexual harassment is the same, whether it is a one-time inappropriate remark on the one hand, or a series of disgusting, threatening remarks on the other. As reflected in the ALJ's Decision, he recognized that a disparity in the severity and pervasiveness of improper conduct justifies a disparity in discipline.

Mr. Bolt shows a callous disregard for the safety of the employees Mr. Bolt harassed, as well as the safety of other female employees. But perhaps this should not be surprising since, based on Ms. Minier's Board Affidavit, at the investigative stage of this case the Region did not even ask Ms. Minier (as noted one of the harassed employees) for a description of the harassment, even though Counsel for the General Counsel called her as a witness. (Tr. 429, 449)[4]

With regard to the discharge of Charging Party Denroy Burrell, General Counsel seeks to overturn a credibility finding of the ALJ concerning testimony of Justin Young, Respondent's Chief Operating Officer, who was called as a witness by both General Counsel and Respondent. ALJ credibility findings are, of course, not generally reviewable. Moreover, there is nothing in the record that would provide any grounds for departing from this general rule. As will be discussed below, it is apparent that General Counsel attacks the credibility determination at issue solely because the determination refutes General Counsel's claim that Respondent tolerated multiple threats of the kind that caused Mr. Burrell's discharge until after Mr. Burrell engaged in protected concerted activity during the union organizing drive that ended in Respondent winning the election by a vote of 48 to 4.

In view of the foregoing, Respondent asks that the Board overrule the Exceptions and adopt the ALJ's Decision.

II. RESPONDENT'S POSITION WITH REGARD TO THE EXCEPTIONS ASSERTED BY GENERAL COUNSEL

General Counsel presents seven Exceptions for adjudication. Below we set forth each Exception in italics, followed by Respondent's position with regard to the Exception:

1. *The ALJ erred in failing to find that Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Septival Bolt. In reaching this conclusion the ALJ ignored or generally disregarded evidence of the disparity in Respondent's response to sexual harassment complaints*

[4] Citations to the transcript appear as "Tr. ," followed by the page number.

raised against Bolt prior to Bolt's protected activity and its response to similar complaints after it learned of Bolt's protected activity.

Respondent's Position: The earlier conduct referred to in this Exception were two statements that were mild in comparison to the egregious and pervasive sexual harassment that caused Respondent to discharge Mr. Bolt. The disparity in response was caused solely by the difference in the severity of the misconduct, and the fact that prior to the egregious harassment that caused the discharge Respondent, as found by the ALJ, and contrary to General Counsel's claim, had warned Mr. Bolt that sexual harassment violated Respondent's harassment policy and would not be tolerated. Respondent did not discharge Mr. Bolt for his protected activity.

2. *The ALJ erred in relying on case law that is inapposite to the case at bar, for the proposition that alleged incidents of a sexual harassing nature served as legitimate ground for Respondent to discharge Bolt? (ALJD 39:34-52)*

Respondent's Position: Given the egregious nature of the sexual harassment, the case law relied on by the ALJ was appropriate.

3. *The ALJ erred in failing to find that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act when it discharged Denroy Burrell. In reaching this conclusion the ALJ ignored or generally disregarded evidence of the disparity in Respondent's response to allegations of threatening conduct raised against Denroy Burrell prior to his protected activity and its response to an identical allegation after it learned of Burrell's protected activity.*

Respondent's Position. The discharge was for threatening a supervisor, not because of Mr. Burell's concerted activity, and did not violate the Act in any way. Respondent warned Mr. Burrell with regard to the previous threat and, notwithstanding the warning, Mr. Burrell threatened Respondent's head baker, George Adams, for a second time and was discharged. The ALJ found that except for these two threats Burell's conduct constituted complaints about Mr. Adams's "close supervision" and "close monitoring" of Mr. Burell. (ALJD 41:18-21, 31)

4. *The ALJ erred in finding that George Adams only testified to two incidents of threats by Burrell.*

Respondent's Position. The ALJ did not find that George Adams only testified to two incidents of threats by Mr. Burrell. The ALJ found that "Burrell threatened his supervisor on two occasions which prompted his discharge" (ALJD 28:11-12) and that there were "at least two

confrontations involving threats by Burrell to hit Adams." (ALJD 41:23-24 The ALJ made it clear that he was skeptical that there were any additional threats (as opposed to Mr. Burrell simply making it apparent that he did like being supervised by Mr. Adams).

5. *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.*

Respondent's Position. The ALJ wrote that he discounted "Young's exaggerated testimony that Burrell threatened Adams more than 5 times, and then 20 times . . . ." There is no reason to second guess this credibility determination, except for the fact that Counsel for the General Counsel obviously disagrees with the ALJ's determination, which, of course, is insufficient to overturn a credibility finding.

6. *The ALJ erred by incorrectly and inadvertently failing to include in his summation of the Complaint, General Counsel's allegation that Respondent discharged employee Ashley Quezada because she engaged in union activity. (ALJD 1:3).*

Respondent's Position. This was obviously just an oversight, since the ALJ explicitly found that Ms. Quezada was discharged because of her union activity. Accordingly, Respondent does not object to the modification of the Decision General Counsel requests to correct this oversight.

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

Respondent's Position. As required, the ALJ followed established Board law in fashioning a remedy. Respondent urges the Board not to adopt the position advocated by General Counsel.

III. PROCEDURAL HISTORY AND BACKGROUND FACTS PERTINENT TO RESPONDENT'S ANSWER TO GENERAL COUNSEL'S EXCEPTIONS

A. Procedural History

The procedural history set forth in General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge is an accurate description of how this case arrived at the Board. Accordingly, Respondent does not suggest any additions or other modifications.

B. Pertinent Background Facts

1. Septival Bolt

a. Inappropriate Comments in 2012 and 2013

In May of 2012 a former employee of Respondent, Maria Revilla, complained to her supervisor, Ms. Minier, that Mr. Bolt made an inappropriate comment, asking her whether when she was a child if she had a "big butt" like she had at the time of the comment. (GC 20; Tr. 401)[5] Ms. Minier then spoke to Mr. Bolt and told him that the question he asked Ms. Revilla was inappropriate. (Tr. 446; ALJD 16:38-51) Ms. Minier informed Mr. Young, and thereafter, as the ALJ found, Mr. Bolt and Ms. Revilla were "separated and worked in different areas of the facility." (ALJD 17:37-47; Tr. 401; GC 20)

In the summer of 2013, Antoinique Abraham, another former employee, complained that Mr. Bolt:

> . . . made an inappropriate comment about being able to see my nipples through my production coat. I felt disgusted and disrespected and did not know how to respond. I proceeded to inform my supervisor, Margo, and manager, Justin [Young], about this incident to ensure that it wouldn't happen again. (GC 7)

Mr. Young spoke to Mr. Bolt and, as described in the ALJ's Decision, "explained to him Respondent's sexual harassment policy and what the Respondent expected of him." (ALJD 19: 4-6. Tr. 459-460) Mr. Young also took steps to ensure that Mr. Bolt and Ms. Abraham did not have further contact in the work place. (Tr. 468) In addition, he issued Mr. Bolt a written warning, and gave him another copy of the Respondent's Employee Handbook provision regarding sexual harassment. (GC 3)

[5] General Counsel Exhibits are cited as "GC" followed by the exhibit number.

b. <u>The Egregious Sexual Harassment That Caused Respondent To Discharge Mr. Bolt Was Far More Severe And Pervasive Than Mr. Bolt's One-Off Comments To Ms. Revilla And Ms. Abraham</u>

Unlike the two one-off inappropriate comments Mr. Bolt made in 2012 and 2013, the sexual harassment that came to light in late August and early September 2014 was egregious and pervasive as the following discussion will demonstrate:

Although Ms. Minier testified as part of General Counsel's case, her testimony demonstrated both how serious and sustained Mr. Bolt's sexual harassment was. She testified very credibly about the harassment, confirming that Mr. Bolt made a comment about raping her. (GC 11; GC 49(b), 73:20-25, 74:1-4; Tr. 441-442) She also expressed regrets that she had not complained about the harassment prior to Mr. Young asking her about it in late August 2014 ("I regret that now because I should have.") (Tr. 436-37)

After her testimony, counsel for the Respondent reviewed Ms. Minier's affidavit, and read the entire affidavit, which consisted of two sentences (other than the beginning and ending boiler plate) into the record. The content of the affidavit demonstrates that the Region's investigation into the alleged harassment was not very thorough:

> I did not report to International Harvest Mr. Bolt's inappropriate comments until Mr. Young asked me to describe the comments after he called me to a meeting. This meeting occurred after I mentioned the comments to a labor consultant in a conversation with her. (Tr. 449)

Since Board affidavits always consist of answers to specific questions asked by the Board agent taking the affidavit, it is apparent that the Board agent did not ask about the harassment, its seriousness or its duration. Had the Board agent actually questioned Ms. Minier about the specifics of the alleged harassment, he/she would have learned that Ms. Minier had previously warned Mr. Bolt about harassment (in 2012), and repeatedly asked him to stop his inappropriate comments about her sexuality. The Board agent taking the affidavit would also

have learned that there was a witness to Mr. Bolt's harassing comments to Ms. Minier and of her failed efforts to persuade Mr. Bolt to stop his inappropriate behavior.

The witness to the harassment of Ms. Minier was the very pro-union Milton Jiminez. Had the Board agent learned this he/she presumably would have interviewed Mr. Jiminez. But having truncated the interview with Ms. Minier, the Board agent never learned that Mr. Jiminez was a witness to Mr. Bolt's sexual harassment of Ms. Minier, and, consequently, the Board agent had no reason to interview Mr. Jiminez.

At the hearing, Mr. Jiminez testified that he was known in the run-up to the election as a union supporter because of his frequent very public contact with the organizers. (Tr. 518-519), and also testified to the following with regard to the harassment of Ms. Minier:

> Q [By Mr. Cooper] Directing your attention to August of 2014, the month before the election, were you in the warehouse at some point speaking with Ms. Minier about shipments?
> A Yes.
>
> Q During the conversation did Mr. Bolt come in and begin speaking to Ms. Minier?
> A Yes.
>
> Q Did you hear what he said to her?
> A: Yes.
>
> Q Please tell us what he said to her and describe her reaction, if any.
> A Well, what he say was if I fuck you the way that I want to fuck you, you will not like women's no more in your life. After that you will only want straight men's. Want to make her believe – want to make her feel . . . uncomfortable. She don't like men's. He already know that, she already told him a couple of time before, but he just don't care about it.
>
> Q What, if anything, did she say to him when he said that?
> A . . . I don't like men's, you're very disrespectful and I already told you don't even touch me because I really don't like you.
>
> Q . . . Did you ever say anything . . . to Patrick at that moment or later that day?

A I told him like, come on, how you going to say that to somebody that you already know they don't like men? That's pretty offensive. It's a woman. And besides that you're in a place to work to say that. And he just said, oh, don't worry, I'm used to tell her that.

Well, yeah, she told me that – you're used to tell her that, but she told you that she don't like that. She already told you a couple of times that she don't like the way that you're talking to her, don't even look at her.

Q Did Justin Young ever ask you about this incident?
A Yes.

Q What did you tell him?
A Exactly what happened. (Tr. 519-521)

At Mr. Young's request, Mr. Jiminez wrote a statement on September 22, 2014, just prior to Mr. Bolt's discharge, concerning the incident he had witnessed. (ALJD 15:50-52; GC 17; Tr. 521) As the following excerpt from Mr. Jiminez's written statement makes clear, Ms. Minier had tried, without success to get Mr. Bolt to cease his inappropriate conduct:

> Evelyn and I was talking . . . then Patrick came . . . and start talking to Evelyn directly. His words "You look so beautiful and that today – Evelyn stop him right away and told him "Patrick, you know . . . I am a lesbian, I don't like man's I like woman's, so please, stop talking to me like that." Patrick left and Evelyn . . . was telling me . . . she don't like that, [that] she feels really uncomfortable, [that] she's tired of telling him to stop talking to her in that way and then Patrick comes again and tells her, his words, "I will take you and lick your whole body and eat you down there for hours and after that you will beg me to f*c# you . . . [6]

At the hearing, Counsel for Respondent asked Mr. Jiminez for a description of Mr. Bolt's behavior toward women at Respondent's facility. Mr. Jiminez responded: "Well, for me personally as a predator." When asked to explain what he meant by "predator," Mr. Jiminez testified that Mr. Bolt only sees "what is over here and down there." Judge Davis then stated that: "The witness put his right hand on his chest." And Mr. Jiminez finished his description by

[6] Mr. Bolt went on to say that the experience he was suggesting would make her "straight." (GC-17)

stating:

> Yeah, let's just say he sees straight to the woman's titty and then the part below and that's it. He don't have face, he don't have color, he don't have shapes, he just all thinking about that. (Tr. 52)

Former employee Katrina Clay also spoke to Mr. Young in late August 2014 about Mr. Bolt's sexual harassment. Like Ms. Minier, Ms. Clay was called as a witness by Counsel for the General Counsel. Her testimony on direct demonstrated that she was a victim of sexual harassment by Mr. Bolt for at least 18 months (Tr. 223-225), basically corroborating an August 28, 2014 written statement in which she stated that the harassment had gone on for "the past year and eight months." (GC-10) General Counsel Exhibit 10 also reflects that Mr. Bolt told Ms. Clay:

> . . . the size and length of his penis and the description around the area. Patrick[7] then proceeded to alert me of the hidden places around the building where he can do things to me.

Nor was this a one-time incident. In response to a question from an Unemployment ALJ about when Mr. Bolt talked about the size and length of his penis, Ms. Clay testified that it "was over and over and over again. It wasn't like a steady one time; it would be over and over again." (GC 49(a), 18:19-25; Tr. 409) On cross examination Mr. Bolt admitted that he talked to Ms. Clay about the size of his penis. (Tr. 409)

Ms. Clay unsuccessfully asked Mr. Bolt to stop harassing her. As she testified at Mr. Bolt's unemployment hearing:

> Q [By Unemployment ALJ] So how do you think that Mr. Bolt should have known that his conduct wasn't welcome toward you . . .
>
> A . . . I told him repeatedly. And even if he didn't get the fact that I was saying that, someone telling him to stop and get away from them, that should be more than enough. He's – I

[7] Mr. Bolt was known as Patrick at Respondent's facility.

> mean, he's older than my father. (GC-49(a), 14:7-15; Tr. 408)

Not only was Ms. Clay unsuccessful in her efforts to persuade Mr. Bolt to stop harassing her, Ms. Clay's mother was also unsuccessful when she told Mr. Bolt to stop harassing her daughter. (GC-49(a), 9:15-25, 10:1-17; Tr. 407)

In addition to telling Mr. Bolt to stop the harassment, Ms. Clay testified that she asked her supervisor, Ms. Minier, to stop sending her to Mr. Bolt's work area ("I spoke with Evelyn and let her know that I don't want to go to that building. I felt uncomfortable"), a request that Ms. Minier honored. (Tr. 219) This testimony corroborated Ms. Clay's Board affidavit in this case, where she stated that:

> Almost every time I'd run into Patrick he has said an inappropriate sexual remark to me. I did not tell my supervisor or manager about these remarks because I thought it was just better to keep a distance from him. What made Patrick's behavior in August upsetting to me was that it had to do with my personal phone number. Patrick's behavior was now leaving the workplace and following me home. This upset me so much that after Richard [a co-worker of Ms. Clay] told me what Patrick said ["that Patrick was in the building talking about oral sex between Patrick and me"], the next time I was asked to help out in Building 1, I told Evelyn that I didn't want to be around Patrick. She told me I didn't have to go to the other building. (Tr. 230-231)

The ALJ explicitly credited:

> the testimony of employee witnesses Clay, Minier, and Jiminez, and the written statements of Abraham and Revilla concerning the sexual harassment committed by Bolt. Their accounts, set forth above, are too vivid, detailed, and specific in their offensiveness to be untrue. Certainly, the comments made by Bolt made a lasting impression on them. (ALJD 28:29-32.

More importantly, the ALJ made it clear that it was the conduct that came to light shortly before the discharge was especially egregious, as the follow excerpt from his decision shows:

> Specifically, Bolt's threat to rape Minier only 2 weeks before her disclosure of that threat . . . was recent enough in her memory, not that she could forget it, to accurately describe to . . . Young. His further comments to Minier about her sexual preference, corroborated by witness Jimenez, were equally outrageous and offensive. (ALJD 28:34-37)

Moreover, the ALJ was explicit that he:

> cannot credit Bolt's denial that he made those comments to the women, or that he sexually harassed those women. His explanation, as recorded in Young's August 19 memo, was that he 'joked with Minier and Clay about Minier's sexual preference,' and 'how I can make her like men in a joking way.' (ALJD 28:45-48)

IV. ARGUMENT AND FACTS IN SUPPORT OF RESPONDENT'S ANSWER TO GENERAL COUNSEL'S EXCEPTIONS

A. Respondent Discharged Mr. Bolt Because He Was Guilty Of Serious Sexual Harassment

The facts set forth above concerning Mr. Bolt's behavior demonstrate the seriousness and pervasiveness of his sexual harassment of Ms. Minier and Ms. Clay. Moreover, as the testimony of Mr. Jiminez establishes, Mr. Bolt's harassing conduct was not limited to Ms. Minier, Ms. Clay, Ms. Abraham and Ms. Revilla.

The hearing testimony also demonstrates a point apparently missed by Counsel for the General Counsel. Not discharging Mr. Bolt for his inappropriate comment to Ms. Revilla in 2012 and to Ms. Abraham in 2013 does not indicate a laxness towards harassment that was suddenly ratcheted up in 2014 because of Mr. Bolt's union activities. The isolated inappropriate comments in 2012 and 2013 brought counseling in 2012 and an explicit written warning in 2013, wholly appropriate responses. As for the suggestion at pages 10 and 11 of General Counsel's Brief in Support of Exceptions that Mr. Young basically ignored the complaints of harassment in 2012 and 2013, it was explicitly rejected by the ALJ ("The argument that Young did not take action on any complaint is rejected.") (ALJD 39:15) Even more startling, and equally disingenuous is General Counsel's statement at page 10 of the Brief in Support of Exceptions

that: "The ALJ's conclusion [that the discharge of Bolt did not violate 8(a)(1) and (3)] is entirely inconsistent with his credibility determinations and his findings of fact." On contrary, the conclusion is wholly consistent with the ALJ's credibility determinations and findings of fact, as the above discussion of Bolt's harassment of Ms. Minier and Ms. Clay establishes.

Consistent with the dictates of the Wright Line decision, the ALJ also made clear his reasons for concluding that Respondent met its Wright Line burden of proof that it would have discharged Mr. Bolt even he had not engaged in protected concerted activity.

> . . . I find that the Respondent has met its substantial burden of proving that it would have discharged Bolt even in the absence of his union and concerted activities.
>
> First, the Respondent has a clear and broad harassment and sexual harassment policy. Bolt signed an acknowledgement that he received that policy in May 2014. There is no doubt that Bolt violated that policy on several occasions in an egregious manner, and that pursuant to that policy his conduct constituted valid grounds for his discharge.
>
> As set forth above, I credit the testimony of employees Clay and Minier concerning their being victimized by Bolt's harassment, and the testimony of Jimenez as a witness to his harassment. I also credit the written statements of Abraham and Revilla as to Bolt's sexual harassment of them.
>
> The Respondent relied on all the evidence of repeated instances of gross sexual harassment in deciding to discharge Bolt.
>
> * * *
>
> The argument that Young did not take action on any complaint is rejected. As to the threat to rape Minier, Young was notified of that threat shortly before Bolt's discharge. That, of course, was one reason among many instances of sexual harassment which resulted in Bolt's discharge. However, that serious threat was only the latest and yet the most egregious instance of his sexual harassment of employees. (ALJD 38:47-51; ALJD 39:1-19.)

Thus, it is apparent that the ALJ found that what Mr. Young learned in late August and early September 2014 about Mr. Bolt's harassment of Ms. Minier and Ms. Clay was

many degrees more serious than the isolated instances of harassment in 2012 and 2013. Moreover, the contrast between those isolated instances of harassment and the evidence of egregious and pervasive harassment that Mr. Young learned of in late August and early September of 2014 justified the discharge. Counseling at first, then a written warning, and finally discharge when Respondent was, for first time, confronted with evidence of egregious and pervasive sexual harassment, belies General Counsel's claim, at page 10 of its Brief, that Respondent's meted out harsher discipline in 2014 for "similar" conduct that brought lesser discipline in 2012 and 2013. Moreover, given the vast difference between the 2012-2013 isolated inappropriate comments, and the egregious sexual harassment that actually caused the discharge, and given that General Counsel chose not to describe any of Mr. Bolt's inappropriate conduct in its Brief, it is astonishing that General Counsel could write, at page 13 of the Brief that:

> 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 possible explain the disparity in treatment.

To have retained Mr. Bolt as an employee after learning of the egregious sexual harassment in late August and early September 2014 would have been highly irresponsible. Not only would it have put Respondent's employees at significant risk of future harassment, it would have placed Respondent in an enormously vulnerable legal position. It was, accordingly, a wholly justified decision when Mr. Young concluded that Respondent had no choice but to discharge Mr. Bolt.

The great disparity between the isolated comments in 2012 and 2013, and the evidence of egregious harassment that came to light in late August and early September 2014, puts to rest General Counsel's claim that "the ALJ ignored or generally disregarded evidence of

the disparity in Respondent's response to sexual harassment complaints raised against Bolt prior to Bolt's protected activity and its response to similar complaints after it learned of Bolt's protected activity." The ALJ did not ignore or disregard the disparity in Respondent's response. He made clear that he understood what made that disparity in discipline appropriate: the disparity in the severity of the misconduct when he highlighted the fact that the threat of rape was learned of shortly before Respondent discharged Mr. Bolt, and that the threat was "the latest and yet the most egregious instance of his sexual harassment of employees."

But the threat of rape and the other egregious sexual harassment that Respondent learned of shortly before discharging Mr. Bolt, and that was testified to at the hearing, is, as noted, nowhere to be found in General Counsel's Brief. By not describing the nature of the harassment that came to light in late August and September 2014, and by not describing the inappropriate comments in 2012 and 2013, General Counsel is able to write, apparently with a straight face, that "it is incomprehensible that the ALJ could reasonably find that Respondent did not violate the [A]ct by discharging Bolt." With all due respect, it is not incomprehensible if you are forthcoming about the nature of the sexual harassment, and if you take seriously the Wright Line test. By failing to consider the egregious nature of the harassment compared to the earlier harassment, General Counsel essentially ignores the Wright Line test.

General Counsel's effort to distinguish the cases the ALJ cited as support for the proposition that sexual harassment is grounds for discharge misses the point. The ALJ cites those cases solely to show that sexual harassment has been held by the Board to be grounds for discharge. General Counsel treats those cases as meaning that only in the absence of union animus can sexual harassment be grounds for discharge. But that is not what those cases held. There is nothing in those cases that says that sexual harassment can only be used to justify a

discharge if there is no union animus. Once again, the dictates of Wright Line are conveniently ignored by General Counsel.

Finally, it is instructive to consider General Counsel's effort to distinguish Fixture Mfg. Corp, 333 NLRB 565 (2000). General Counsel notes that in that case:

> 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.

The fact is Mr. Bolt, likewise, had no prior incidents of similar conduct. Crude comments about an employee's "big butt" and about being able to see an employee's nipples underneath her uniform are not similar to a threat of rape, repeatedly talking to an employee about the size of one's penis, or boasting that having sex with him will turn a lesbian into a heterosexual, especially given that Ms. Clay and Ms. Minier both asked Mr. Bolt to stop his harassing behavior.

As to the claim that "Respondent received harassment complaints against Bolt prior to his protected activity but took no action to discipline him," as noted, that claim was explicitly "rejected" by the ALJ.

In sum, whether or not Respondent bore animus against Mr. Bolt because of his union and other protected concerted activity, his egregious sexual harassment, which came to light in the few weeks before Respondent discharged him, would have resulted in the termination

of his employment. As the ALJ correctly held, Respondent met its Wright Line burden.[8]

B. General Counsel's Disparate Discipline Argument Regarding Denroy Burrell Is Also Inconsistent With The ALJ'S Findings

The ALJ found "that Burrell threatened his supervisor on two occasions which prompted his discharge," (ALJD 28:11-12) and that "Respondent has met its burden of proving that it would have discharged Burrell even in the absence of his union and concerted activities." (ALJD 41:43-45) The ALJ reached this conclusion based on the following analysis:

> The evidence established that Burrell threatened Adams with physical harm simply because Burrell objected to Adams' close supervision. Bolt and Burrell both testified as to Burrell's intolerance of Adams' watching him so closely and reporting his work performance to Young.
>
> Evidence from Bolt and Burrell established that there were at least two confrontations involving threats by Burrell to hit Adams. Adams reported these confrontations which nearly became physical but for Bolt's stepping between them.
>
> * * *
>
> Burrell violated the Respondent's harassment policy prohibiting threats and harassment. Written warnings were issued to him. Adams did not provoke Burrell's threat to hit him. Burrell simply objected to his supervisor's close monitoring—which is a supervisor's right to do. His discharge did not violate the Act.

Excepting to these findings, General Counsel alleges that:

[8] General Counsel argues that the ALJ "disregarded the Respondent's clearly unlawful motive in favor of dismissing the allegations based on his own assessment of what Bolt deserved," citing a concurring opinion by then Board Chairman Farmer in Teamsters Locals 554 & 608 (Mcallister Transfer, Inc), 110 NLRB 1769, 1788 (1954). This is truly grasping at straws, since the situation Chairman Farmer was referring to 72 years ago did not arise in a Wright Line context, and differs markedly from the instant case. The Farmer concurrence accused the two Board members who signed on to the plurality opinion of having "characterize[d] the 'hot cargo' provision of the contract [at issue] as being contrary to public policy," leading Chairman Farmer to state that "Judges must resist the temptation to devise legal precepts to accommodate their moral judgments . . . ." This, of course, is not what ALJ Davis did. Rather, he carefully followed the precepts of Wright Line, meaning that once he found that Respondent had animus towards Mr. Bolt he assessed whether Mr. Bolt's conduct would have resulted in his discharge pursuant to Respondent's Harassment Policy, and in view of previous Board decisions involving harassment and other misconduct, even in the absence of the protected activity. This is precisely the analysis Wright Line requires. Not, as the General Counsel implicitly is arguing, that the Wright Line analysis ends once animus is found.

> the ALJ ignored or generally disregarded evidence of the disparity in Respondent's response to allegations of threatening conduct raised against Denroy Burrell prior to his protected activity and its response to an identical allegation after it learned of Burrell's protected activity.

To support this allegation General Counsel argues that there were many instances where Mr. Burrell threatened head baker Adams, but that it was only the threat that occurred after Mr. Burrell engaged in union activities that resulted in discharge. As part of this claim, General Counsel argues that the ALJ "erred in finding that George Adams only testified to two incidents of threats by Burrell." In addition, General Counsel argues that 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."

General Counsel's claims are flawed in a number of ways:

First, the ALJ did not find that George Adams only testified to two incidents of threats by Mr. Burrell. The ALJ found that "Burrell threatened his supervisor on two occasions which prompted his discharge" (ALJD 28:11-12) and that there were "at least two confrontations involving threats by Burrell to hit Adams." (ALJD 41:23-24)

Second, the ALJ made it clear that he was skeptical that there were any additional threats: "In this regard I discount Young's exaggerated testimony that Burrell threatened Adams more than 5 times, and then 20 times . . . ." (ALJD 41:25-26) General Counsel seeks to have this credibility determination overruled, but points to nothing that would justify a deviation from the normal Board practice of not second guessing credibility determinations in the absence of record evidence that shows the ALJ's credibility determinations to be fundamentally flawed. Standard Dry Wall Products, 91 N.L.R.B. 544 (1950) ("The Board's established policy is not to overturn an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect."). No such finding can be made here.

See, e.g., International Union of Electrical Radio and Machine Workers, AFL-IO, Local 745, 263 N.L.R.B. 700 (NLRB 1982) (finding it inappropriate for the Board to "embark on a needless departure from [the Standard Dry Wall Products] standard to reject findings of credibility by an Administrative Law Judge who heard the testimony, observed witnesses' demeanor, and witnessed their cross-examination."). Mere disagreement with an ALJ's credibility determinations, without more, simply is insufficient to justify second guessing them.

With regard to the claimed disparity in discipline, General Counsel's argument collapses in the face of the ALJ's finding that there were two instances of threats, rather than General Counsel's claim that there were numerous ignored threats. Consistent with the ALJ's finding, Mr. Adams did not document in writing numerous threats; he only documented the two threats found by the ALJ.

As the ALJ found, Respondent warned Mr. Burrell with regard to the first threat. Unfortunately, notwithstanding the warning, Mr. Burrell threatened Mr. Adams for a second time and was discharged. This is not a disparity of treatment. First came the warning that threats would not be tolerated. When the second threat occurred, the disparity of treatment was justified by the disparity in the circumstances. An employee who threatens a supervisor may get lucky and only get a warning. An employee who ignores the warning and repeats the threat can no longer expect to get lucky. He should expect to get fired, and that is what happened to Mr. Burrell.

As was the case with regard to Mr. Bolt, Respondent met its Wright Line burden. General Counsel's disparate discipline argument is simply inconsistent with the ALJ's findings.

V. RESPONDENT'S ANSWER TO REMEDIES SOUGHT BY THE GENERAL COUNSEL

General Counsel asks the Board to adopt more extensive remedies than is the

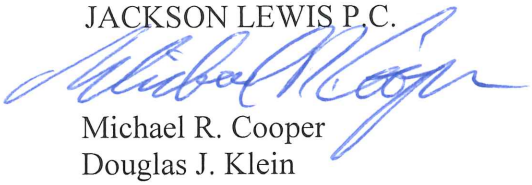
Board's current practice. It is Respondent's position that the Board's current practice is 16consistent with the salutary purposes of the Act, and should be continued. If, however, the Board concludes that more extreme remedies should be adopted in cases like the instant case, Respondent requests that a new policy/practice be adopted prospectively.

VI. CONCLUSION

As the foregoing demonstrates, Respondent satisfied its burden under Wright Line with regard to the discharge of both Mr. Bolt and Mr. Burrell. Accordingly, the ALJ's Decision should be affirmed and adopted by the Board in its entirety.

Respectfully submitted,

JACKSON LEWIS P.C.



Michael R. Cooper
Douglas J. Klein

Dated: March 17, 2016