

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

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VILLAGE RED RESTAURANT CORP.  
d/b/a Waverly Restaurant

And

Case No.: 02-CA-162509

MIGUEL ROMERO LARA

An Individual

And

Case No.: 02-CA-166015

MIGUEL BOTELLO GONZAGA

An Individual

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**EMPLOYER’S POST - HEARING BRIEF**

**I. INTRODUCTION**

Village Red Restaurant Corp., d/b/a Waverly Restaurant (“Employer”) respectfully submits this post-hearing brief. Four former employees, Miguel Romero Lara, Miguel Botello Gonzaga, Jesus Delgado and Justin Garcia (collectively, the “Employees”) filed an unfair labor practice charge accusing the Employer of retaliation against the Employees for filing a Fair Labor Standards Act lawsuit in Federal District Court (“the FLSA lawsuit”) to recover alleged unpaid minimum wages and overtime. The Employees allege, albeit erroneously, that the Employer terminated them from employment or caused them to quit by eliminating overtime. The Employer contends that it could not afford to continue to pay overtime to its workers after receiving the FLSA action. Therefore, it initiated a policy to reduce or eliminate overtime for the entire staff. According to the Employer, none of the Employees were terminated. They voluntarily quit their employment because they refused to continue working without being assigned overtime hours. Because the Employer increased their base salary to comply with the

minimum wage laws and decreased their hours to avoid the cost of paying overtime, the Employees actually received almost the same amount in pay from the Employer for working fewer hours. It is the contention of the Employer, that as a result of the proliferation of FLSA lawsuits, combined with ever increasing minimum and overtime rates mandated by the government, the future of restaurant employment will consist of more employees working fewer hours.

Two of the Employees, Jesus Delgado and Justin Garcia, possessed voice recordings which were played at the hearing. The recording of Jesus Delgado was not intelligible, and it is respectfully submitted that if as Delgado claimed, he had been terminated, the conversation would surely have been produced. The absence of an intelligible recording should place substantial doubt as to Delgado's claim that he was told that he was fired. The one recording of Justin Garcia was barely audible but a transcript was provided by General Counsel. The recording and corresponding transcript support the Employer and not General Counsel, however. The recording is of Garcia's next to last conversation with Serafis. It does not support Garcia's contention that Serafis fired him. It merely states that if Garcia wants to leave, he should leave. Garcia claims that the conversation with Serafis was not the final conversation. He contends that he was fired in the last conversation, which was not produced. It is very convenient for Garcia that he did not record the final conversation, during which, according to Garcia, Serafis said he was fired. A negative inference should be drawn, finding as a conclusion of fact, that if the conversation had been produced, it would prove that Serafis never told Garcia that he was fired.

#### 1. Background

Employer operates a coffee shop in Manhattan with approximately fourteen four-seat tables and six or seven counter seats. (24)\* In August 2015, eight current and former employees filed an FLSA action in Federal District Court alleging they were not paid minimum

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\* All references are to the pages of the transcripts of the hearing.

wage or overtime. (Exh. GC-2). An employee who was still working at the time the FLSA lawsuit was filed, Miguel Romero Lara, filed the first unfair labor practice charge on October 22, 2015. A second employee, Miguel Botello Gonzaga, who had also been working when the FLSA lawsuit was filed, brought a second unfair labor practice charge on December 14, 2015. (Exh. GC-1) The two charges were consolidated on March 31, 2016. (Id.). On April 14, 2016, the Employer filed an Answer to the consolidated charges denying all of the allegations. (Id.)

## **II. LEGAL ARGUMENT**

A lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is “concerted activity” protected by Section 7 of the National Labor Relations Act. *Brady v. National Football League* 644 F.3d 661, 673 (8th Cir. 2011). An employee’s lawsuit seeking a collective action under the FLSA is “concerted action” protected by Section 7 of the Act. *In re. D.R. Horton, Inc.*, 2012 WL 36274 (N.L.R.B. Jan. 3, 2012); *Brown v. Citicorp Credit Services, Inc.* 2013 WL 645942 at \*3 (D. Idaho, 2/21/13).

Section 8(a)(3) of the NLRA prohibits an employer from taking adverse action against employee to discourage the employee from engaging in collective action. But an employer violates this section of the Act only if its actions are motivated by *animus* against the protected activity. *Goldtex, Inc. v. NLRB*, 14 F.3d 1008, 1011 (4th Cir. 1994).

### 1. No Evidence of Adverse Action

To prove its retaliation claim, the General Counsel must first establish that (1) the charging employee was engaged in protected activity; (2) the employer was aware of the activity; (3) the employer took adverse action against the employees; and (4) the activity was a substantial or motivating reason for the employer’s adverse action. See *Sam’s Club v. NLRB*, 173 F.3d 233, 242 (4th Cir. 1999). *Medeco Security Locks, Inc. v. NLRB*, 142 F.3rd 733, 742 (4th Cir. 1999).

A violation of the Act may be found only if “under all the circumstances, the employer’s conduct may reasonably tend to coerce or intimidate employees.” *Alton H. Piester LLC v. NLRB*, 59, F.3d 332, 336 (4th Cir. 2010) (quoting *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1998)). The salient question is whether a reasonable employee would be intimidated or feel coerced by the employer’s actions. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997).

Where the pay remained the same for working less hours, it was not reasonable for the employees to claim they were coerced or intimidated.

The Employer does not dispute the General Counsel’s contention that the Employees were engaged in a protected activity by filing or joining an FLSA lawsuit for alleged unpaid minimum wages and overtime hours. Employer also does not dispute General Counsel’s contention that the employer was aware of the protected activity, namely that the employees had filed an FLSA action. However, General Counsel has failed to present substantial evidence in the record that the employer took adverse action against the employees.

Even if it is found that the employees were adversely effected by the employer’s actions, General Counsel has failed to present substantial evidence in the record that the employer was motivated to adversely change the employee’s terms and conditions of employment because of their having filed the lawsuit.

### **III. TESTIMONY OF THE WITNESSES**

#### **1. Justino Garcia**

Garcia testified he worked for the Employer as a waiter for twenty years, until October 31, 2015. (20) Before the FLSA lawsuit was filed in August 2015, he worked 68 hours per week, six days per week, waiting tables, except for two four-hour afternoon shifts when he worked the counter. (23) He was paid approximately \$5.50 per hour, totaling \$120.00 per week in cash. (28) He testified he also earned tips that varied from a low of \$120 on Monday and

Tuesday, to as much as \$230 on Saturday and Sunday. (29) But he shared those tips in a tip pool with the busboy and the waitresses. (28) There were two waitresses and one busboy on Garcia's shift from Monday to Friday, and three waitresses and two busboys on Saturday and Sunday. (27) Garcia did not testify how much of the tips he kept and how much he shared with the busboy and waitresses. But when asked, "And how did you divide the tip pool?" He answered, "To the busboy we gave 15 percent and the rest for all of us." (28).

Garcia testified that less than a month after the FLSA lawsuit was filed, his weekly schedule was cut to 50 hours. (40) However, his wages were doubled from \$120 per week to \$240. (43) Garcia estimated his tips remained the same on Saturday and Sunday, but decreased approximately \$10 on Thursday, \$70 on Wednesday and \$60 on Monday and Tuesday. (41) Garcia failed to state whether that was before or after the tips were pooled.

Garcia went on to testify that on or about October 10, 2015, which was after the FLSA lawsuit was filed, his hours were actually increased from 50 to 52 per week. (51).

Garcia testified that on October 13, 2015, Nick Serafis, one of his supervisors, said to him "Why don't you leave?" "I don't want to see all of you here." (58) Garcia went on to testify that he told Serafis, "If you don't want to see us, why don't you fire us." (59) Serafis responded, according to Garcia, "I cannot fire you, you can leave by yourself." (Id.).

Garcia's testimony in relating this conversation is confusing. Since Garcia's ability to understand and speak English is limited and Serafis does not speak Spanish, Garcia's testimony indicated that he misunderstood the words Serafis had spoken to him. When Garcia stated, in Spanish, what he remembered hearing Serafis say to him, in English, the translation became confused and disputed. (59) Garcia testified that even though he had heard Serafis say, "I cannot fire you," he believed that Serafis had told him that he was fired. (59)

Garcia also testified that on his way out, he heard John Captan, his other supervisor, tell him to let his lawyers know what happened because "it wasn't right." (61) But again there was a question of translation from English, which John spoke, to Spanish, which was the language

Garcia spoke and understood. When Garcia tried to say in Spanish what he had heard Captan say in English, the translation became confused and disputed. (62).

On cross-examination, Garcia testified that he acknowledged that the Employer had no knowledge of how much he earned in tips either before or after the lawsuit. (78) Garcia went on to admit that the Employer never knew that he made less tips after the lawsuit was filed as compared to prior. (82-83)

In fact, on cross examination, Garcia testified that he did not want to leave the job even though his hours were cut. Garcia went on to testify that he was not unhappy with less hours. In fact, he stated, "I was happy. That is why I accept it." (111) When asked on cross-examination, "so if you were working 50 or 60 hours you were happy, is that correct?" Garcia responded, "Yes". (Id).

At best, Garcia misunderstood what Serafis had told him. More likely, however, Garcia planned his own exit from the coffee shop. There is no other way to explain the fact that, as Garcia testified, he cooperated with Serafis by signing a document right after Serafis supposedly fired him. (104-105) Additionally, according to Garcia's testimony, he went back upstairs after supposedly being fired, and continued working. Garcia claimed Serafis told him he should not leave until Serafis had time to get someone to come to work to replace him at the counter. (59,139-140) But that, most respectfully, supports the employer's position that Garcia was not discharged but voluntarily decided to leave.

Garcia concluded his testimony by admitting that although his schedule was cut by twenty hours, his salary, including tips, was only \$100.00 less, that is \$1,000.00 compared to \$1,100.00. (129-130, 147). The fact that Garcia's wages decreased by only \$100 when he was able to work 18 hours less, makes his claim that he was forced to quit very hard to credit.

2. Miguel Romero Lara

Lara worked for the Employer making deliveries for twenty years until October 15, 2015 (101) He made the request that his hours be reduced from 72 per week to 48. (153) He testified that he had worked 72 hours per week for eighteen years and wanted to finally slow down. (Id). His schedule was thereby reduced to 48 hours as of November 7, 2014. (152.) In July 2015, still prior to the FLSA lawsuit, the son of John Captan was hired to make deliveries because Lara's schedule was cut to 40 hours. (153-154) But Lara's pay was not cut. He was paid the same for 40 hours as he had been paid for 48. (154-155) In fact, he had been paid less when he worked 72 hours. (155) Further, the tips Lara made were also the same for 48 hours as for 40 hours. (156).

Lara testified that two weeks after the FLSA lawsuit was filed, his hours were cut to 32 per week. (167) After another two weeks, his hours were cut again to 20. (168). He further testified that he was given less deliveries to make, and the dishwashers were given more deliveries. (170-171) Finally, Lara testified that on October 13, 2015 his schedule was changed to two days per week, Tuesday and Wednesday. (181).

But on cross-examination Lara admitted he told John Captan that he needed to return to Mexico sometime after August 2015. (188) As a result, Captan told him he needed to find a replacement for him. (196).

Lara went on to admit on cross-examination that there were three dishwashers and they had always been given deliveries before the FLSA lawsuit was filed. (193) Lara further admitted that he could not be present every time the dishwashers were given deliveries. (195) He acknowledged that if he was on a delivery, he could not know if a dishwasher was given an order to deliver. (Id) On continued cross-examination, Lara confessed, "To be honest.... sometimes I saw [the dishwasher making deliveries] and sometimes my co-workers told me that." (222)

Lara concluded his testimony by also admitting that he had no knowledge of whether the hours of other employees were cut or not. (225)

Lara's testimony struggles to fit what he contends are the facts into a case of retaliation. He complains he was forced to quit because his hours were cut. But his hours were cut prior to the lawsuit. In fact, the hours were decreased at his own request. Although his schedule was cut again after the FLSA lawsuit, that was because he had told the Employer he was returning to Mexico. Lara's hours were not cut because he filed the lawsuit. Rather, he filed the lawsuit because he wanted to quit, anyway.

### 3. Jesus Delgado

Employee Jesus Delgado testified that he worked as a waiter for the Employer from 2006 until October 18, 2015. (233-234) A few months prior to the FLSA lawsuit, one of his days was changed from table waiter to counter server. (235) He testified he was paid \$20 per day as a waiter and \$100 per day to work the counter. (238-239).

Delgado testified that in September 2015, after the FLSA lawsuit was filed, he was told his pay would be paid \$5.00 per hour from then on. (246) Delgado further testified that his hours were cut from 72 to 62 per week. (251) Delgado went on to testify that on October 18, 2015, his rate was increased to \$5.25 per hour, but his schedule was cut to 40 hours per week. (253).

Delgado testified that instead of agreeing to work 40 hours, he quit. (267) Nevertheless, according to Delgado's own testimony, he would have been paid \$210 for 40 hours at \$5.25 per hour. That was compared to \$200 he was paid for working 72 hours. (241, 252).

On cross-examination, Delgado acknowledged that prior to filing the FLSA lawsuit, he had worked much more than 40 hours each week without being paid minimum wage or overtime. (276) He went on to concede that after the FLSA lawsuit was filed, he was paid

minimum wage at the tipped rate, \$5.00 per hour, and his schedule was reduced, but only so far as to eliminate all of the overtime. (283)

Delgado then claimed his tips were less because he worked less hours. But Delgado then admitted that he had never told his employer how much he made in tips. (281) Delgado also said that, as far as he knew, the employer did not know how much he made in tips. (Id.).

On redirect, Delgado testified that working as a server at the counter was a less desirable position, but only because it was more stressful. (317) He did not state his tips were less at the counter. On re-cross examination, Delgado agreed that only more experienced servers could be assigned to the counter.

Delgado claims that he quit because when his hours were cut, he could not make enough money to continue. But the fact is the Employer came into compliance with the allegations in the FLSA lawsuit by raising his pay to the proper minimum wage and eliminating overtime. The fact that Delgado would have been able to work a full 40 hours is proof that the Employer wanted to eliminate overtime, not force Delgado to quit. By Delgado's own testimony, it was shown that the Employer had no knowledge that Delgado's tips suffered. The only knowledge of Delgado's wages that was known by the Employer was that Delgado was that when Delgado quit he was actually being paid \$10 more for half as many hours.

#### 4. Miguel Botella Gonzaga

Employee Miguel Botella Gonzaga testified he worked bussing tables for the Employer for twelve years, until October 31, 2015. (331) Prior to the FLSA lawsuit, Gonzaga worked six days, total 66 hours per week, and was paid \$150.00 weekly. (332). Gonzaga went on to testify that three weeks after the FLSA lawsuit was filed, his schedule was reduced to four days, Thursday to Sunday, total 44 hours per week, and he was paid \$130.00 per week. (340).

Gonzaga went on to claim that he quit two weeks later because his schedule was cut to 32 hours per week. (343) But there was no testimony as to whether his pay was also reduced

or not. In fact, on October 12, 2015, Gonzaga agreed to return to work. (352) He was given six days, total 54 hours for which he was paid \$180.00. (352-355) According to Gonzaga, after three weeks, on October 31, 2015, Captan told him that his day off was going to be changed to Sunday. (355-56) But Captan did not say if his hours would be reduced because of the change in his day off. (356).

Gonzaga testified that he did not work the next day, Sunday. (358) When he returned to work on Monday, Serafis' nephew was doing his job. (Id.) Soon after Gonzaga arrived, Serafis confronted him with a copy of the NLRB charge. (360) According to Gonzaga, Serafis told him to drop the NLRB charge if he wanted to continue working there. (363) Gonzaga testified he quit rather than do that. (364).

According to Gonzaga's own testimony, he was not terminated because of the FLSA lawsuit. In fact, he was rehired to work for the Employer after the lawsuit had already been filed. On cross-examination, he conceded that even though the lawsuit had been filed previously, he willingly returned to work "on good terms". (384)

Gonzaga testified that he was fired only after he filed the NLRB unfair labor practice charge, and not because of the FLSA lawsuit. (415-416) In fact, when asked by his own counsel, "Did he [Serafis] tell you what would happen if you did not withdraw the [FLSA] lawsuit" Gonzaga answered, "No. He did not tell me anything." (416)

Additionally, Gonzaga's contention that Serafis fired him seems contradicted by Gonzaga's own actions. Gonzaga actually stated that after he was fired, he went upstairs to the counter and finished his coffee. (398-399) Apparently, when Serafis failed to fire him because of the FLSA lawsuit, and asked him to come back after he voluntarily quit, Gonzaga filed a second charge, this time with the NLRB, got himself fired, and could now relax with a cup of coffee.

Whether or not Serafis fired Gonzaga, and the testimony clearly does not support such a conclusion, the Employer is not, of course, charged with retaliation in connection with the NLRB case, but only with retaliation in connection with the FLSA lawsuit. (GC-1).

5. John Captan

John Captan testified he is and for the past ten years has been the manager of the coffee shop. (453) He reports to Nick Serafis. (454). Prior to the FLSA lawsuit, which was filed on August 11,2015, the majority of employees at the coffee shop worked overtime. (455) The Employer did not pay overtime wages prior to August 2015 to many of the employees. (456) Because of the FLSA lawsuit, he learned that employees were required to be paid overtime. (458). He and Serafis decided to eliminate overtime hours for the entire staff. (459).

Captan testified he told Garcia that everyone's hours are going to be reduced to 40 and that all the diners are doing that. (463) Captan went on to deny he ever told Garcia to drop the FLSA law suit. (464) After the FLSA lawsuit was filed, Garcia's performance suffered, so Captan hoped that offering him money to settle the lawsuit would result in his working back at his prior excellent level. (45).

Captan testified that it was Lara who had asked for less hours. (470) Captan added that Lara had told him that his children had grown up and moved out of their house in Mexico. (470). Lara had told him that since his wife was going to leave Mexico to come to the U.S. he would be quitting his job after 20 years. (471) Because Lara started slowing down at work, Captan had his son start working and cut Lara's hours. (471). Captan testified that he told Lara that if he did not return from making deliveries quickly enough, he had to give them to the dishwashers to do because the food had to be delivered on time. (473)

Captan testified that he considered Delgado to be a friend of his. (479) But after the FLSA lawsuit was filed, Delgado treated him differently, and there was a marked deterioration in his performance. (480) Captan stated that he discussed Delgado's diminished performance

with him several times. (481). He offered to pay him to settle the FLSA lawsuit solely in the hope he would return to being the excellent worker he had been before the lawsuit. (482).

Captan testified that he told Delgado that everyone at the coffee shop was going to lose their overtime hours and would have their schedules reduced to 40 hours. (484). Delgado warned him that he would not stay if he could only work 40 hours. (486) Captan tried to talk to Serafis, but Serafis told him the decision to eliminate overtime for everyone is final. (487) On October 18, 2015, when Delgado was cut to 40 hours, he quit. (490).

Captan testified that after Gonzaga left the first time, Captan asked him to come back to work for them again. (493) The coffee shop had difficulty finding a busboy to replace him, and he was an excellent worker. (494) But a few weeks after Gonzaga returned, Captan had to let him know that everyone's overtime was being eliminated, including his. (498) After Gonzaga left, Captan learned from Serafis that Serafis had spoken to Gonzaga about the NLRB unfair labor practice charge. (499) According to Captan, Serafis said he confronted Gonzaga with the NLRB papers but did not fire him. (501).

Captan proceeded to testify as to many other employees who also had their overtime hours cut or eliminated. (502) He testified that Irene Katzadus was one of the first employees whose overtime was eliminated, from 55 to 40 hours. (504) He stated that Fernando Alanis was cut from 60 to 55 hours, (505) and that Sonuk Coolgit was cut to 40 hours, (506), as were Margarita Sanchez, (506), Yolanda Smiarkowska, and Virginia Volker (507). Captan explained that it was easier to cut the hours of the wait staff, but then the Employer began to reduce the hours of the kitchen staff as well. (507) Captan testified that after the FLSA lawsuit was filed, the Employer hired a payroll company to correct the pay practices so as to pay everyone minimum wage and overtime (570), which was not how they paid the staff prior to the FLSA lawsuit (585-586). As far as the tips which waiters and busboys make, Captan testified he never asked the employees how much they earned in tips. (592) As a result of eliminating overtime, the Employer increased the number of waiters. (593).

