

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**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

**GENERAL COUNSEL'S POST-HEARING BRIEF TO THE
ADMINISTRATIVE LAW JUDGE**

Julie R. Ulmet, Esq.
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
(212) 776-8650
Julie.Ulmet@nlrb.gov
Counsel for the General Counsel

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I. STATEMENT OF THE CASE

The Complaint in this case alleges that Respondent Village Red Restaurant Corporation d/b/a Waverly Restaurant (“Respondent” or “Waverly”) unlawfully retaliated against four of its employees because those employees filed a federal lawsuit against Waverly alleging violations of the Fair Labor Standards Act. Respondent first retaliated against the four employees, Justino Garcia (“Garcia”), Miguel Romero Lara (“Romero”), Jesus Delgado (“Delgado”), and busboy Miguel Botello Gonzaga (“Gonzaga”) (collectively, the “discriminatees”) by reducing their hours, thus causing a reduction to their income. These reductions to the discriminatees’ hours and income constituted the constructive discharge of Gonzaga, Romero, and Delgado. Respondent then discharged Garcia because of his protected activity, telling him that he appeared to be unhappy at Waverly since he had brought a lawsuit against the restaurant, and so he should not continue working there. Respondent permitted Gonzaga to return to work, in exchange for his promise to withdraw the FLSA lawsuit. When Gonzaga failed to make good on the promise, and instead commenced a second action against Respondent, the instant NLRB case, Respondent again discharged Gonzaga. This time, Respondent fired Gonzaga by offering the Hobson’s choice of continued employment or continued participation in NLRB and other protected, Section 7 activities. Gonzaga chose to proceed with this case, and was constructively discharged a second time.

While Respondent has made bare assertions that after the discriminatees filed the FLSA suit, it began an across-the-board effort to reduce employees’ hours and come into compliance with applicable laws, its payroll records in fact make abundantly clear that the four discriminatees were the only employees who experienced any changes to in their working conditions. Thus, Respondent cannot satisfy its burden of proving a legitimate business reason

for its adverse actions, and instead its claimed defenses are evidence of a pretext that add to the abundant evidence of animus in this case.

II. STATEMENT OF THE FACTS

A. Background

Waverly Restaurant is a 24-hour diner located in Greenwich Village, Manhattan, New York. Waverly is run by principal Nick Serafis and manager John Captan. The parties stipulated that both Captan and Serafis are supervisors of Waverly for purposes of Section 2(11). (Tr., 18).¹ Serafis controls all decision-making for the restaurant, while manager John Captan handles much of the record-keeping, payroll, and other day-to-day operations. (Tr., 459, 532:25-533:6 (Captan explains his various job duties)).

The four discriminatees in this case are all long-term employees of Waverly. Waiter Justino Garcia (“Garcia”) worked at Waverly for nearly thirty years, from May 1987 until his discharge on October 13, 2015. (Tr., 22). Delivery-man Miguel Romero Lara (“Romero”) worked at Waverly for more than twenty-five years, from 1990 until he was discharged in October 2015. (Tr., 151). Waiter Jesus Delgado (“Delgado”) worked at Waverly for nearly a decade, from February 2006 through October 2015. (Tr., 233). Finally, busboy Miguel Botello Gonzaga (“Gonzaga”) worked at Waverly for more than fifteen years, from 2000 through his discharge on November 2, 2015. (Tr., 331).

¹ References to “Tr., _” refer to the transcript in this case, followed by the page, and where appropriate, line numbers. References to “R. Ex. __” and “GC Ex. __” refer to Respondent’s and General Counsel’s exhibits, respectively.

B. The Employees Engage in Protected Activity

On August 11, 2015,² the four discriminatees, through counsel, filed a lawsuit against Waverly in the United States District Court for the Southern District of New York, alleging violations of the Fair Labor Standards Act and New York Labor Law (the “FLSA suit”). (GC Ex.2; Compl. ¶ 5 admitted in Answer ¶ 5).

In addition to Garcia, Romero, Delgado, and Gonzaga, there were four other plaintiffs in the FLSA suit. They were former employees Valente Garcia, Franklyn Perez, Delfino Tlacopilco, and an employee named Luis Magaña who left Waverly in September 2015. (Tr., 32-38).

C. Waverly Retaliates Against and Ultimately Discharges the FLSA Plaintiffs

1. Justino Garcia

For three years prior to bringing the FLSA lawsuit, Garcia worked a regular schedule of around 71 hours per week, earning \$120 per week or \$20 per day in wages from the restaurant and around \$1000 in tips each week, as set forth in further detail in Table 1. (Tr., 23-24, 27-28, 29-31; *see also* R. Ex. 1 (line 12 shows Garcia’s wages and hours); Tr., 631:13 (Captan corroborates Garcia’s testimony about his pre-lawsuit schedule)).

Within a few weeks of filing the lawsuit, Waverly took action to decrease Garcia’s hours. (Tr., 39). Manager John Captan informed Garcia that his hours would decrease to fifty hours per week, as set forth in detail in Table 1. (Tr., 39-40). As a result of working the decreased hours, Garcia earned about \$200 less in tips per week.

Around the end of September, shortly after this schedule change, Garcia had a conversation with Captan. (Tr., 43-44). In that one-on-one conversation, Captan told Garcia that

² All dates hereafter refer to 2015, unless otherwise indicated.

“he didn’t know what we were doing and to drop [] the lawsuit.”³ (Tr., 44). During that conversation, Captan discussed with Garcia how much money he could expect to earn from the lawsuit, and that it would be paid over a long period of time. (Tr., 44-45). Captan also informed Garcia that if the plaintiffs agreed to drop the lawsuit, Captan would convince Serafis to give them each \$6,000. (Tr., 46). Garcia responded that he told Captan he could not agree to this offer. (Tr., 46).⁴

On Saturday, October 10, as Garcia was leaving work after his shift, owner Serafis stopped him and told him not to come to work on Sunday and Monday. The elimination of these two days effectively reduced his workweek even further to just 33 hours. (Tr., 50). On Monday morning, Garcia received a phone call from manager Captan. (Tr., 51-52). In that conversation, Captan informed Garcia of certain additional changes to his schedule. Under this schedule, Garcia would work a total of 52 hours, including two full days as a counterman. Captan did not provide any explanation for the change, other than to say that these were the boss’s orders, referring to Serafis.

On Tuesday, October 13, Garcia’s next day at work, Serafis called Garcia down to his office in the basement of the restaurant. (Tr., 54-60). In a fairly lengthy conversation, Serafis played a sort of cat-and-mouse game with Garcia, apparently trying to prod and provoke Garcia into quitting his job at Waverly, and when Garcia refused to take the bait, Serafis fired him. Serafis began the conversation by confirming that Captan had conveyed the new schedule to Garcia, and asking Garcia if the new schedule was ok with him. When Garcia replied in the

³ The transcript text, “to drop off the lawsuit,” appears to be an error based on the overall context. Indeed, Garcia subsequently clarified that the statement used by Mr. Captan was to “drop the lawsuit,” not “drop off” the lawsuit. (Tr., 44).

⁴ Garcia’s testimony about this conversation is substantially corroborated by Captan’s testimony that he discussed with Garcia the possibility of settling the FLSA case. (Tr., 465).

affirmative, Serafis asked, “Why [do] you insist [on] staying here?” (Tr., 57). Garcia said he stayed because he was working. Serafis asked Garcia if he was happy, and when Garcia again replied in the affirmative, Serafis said, “I don’t believe that you are happy.” (Tr., 57). When Garcia asked Serafis why he thought that Garcia wasn’t happy, Serafis answered that it was because the employees had filed a lawsuit.

Serafis next said, “Why don’t you leave?” elaborating, “I don’t want to see all of you here.” (Tr., 58).⁵ Garcia responded, “If you don’t want to see us why don’t you fire us?” to which Serafis answered he could not fire the employees, but they could leave on their own. (Tr., 59). At this point, Garcia told Serafis that “if you want[,] I can leave.” Serafis said that he wanted to Garcia to leave after his replacement came in to work later that morning.⁶ (Tr., 59).

Garcia returned to work, and when counterman Jose arrived at ten o’clock that morning, manager Captan told Garcia to go downstairs. (Tr., 60). Garcia accompanied Captan to Serafis’s office, and Serafis gave Garcia an envelope containing his pay for the hours he had

⁵ Following Garcia’s testimony on this point, a discussion took place on the record regarding the translation of Garcia’s testimony. Garcia had testified in Spanish that Serafis said that he didn’t want to see “ustedes” anymore, the Spanish plural second-person pronoun, which does not have a precise corollary in English, in which “you” is used as both the singular and plural second-person pronoun. (Compare <https://en.wiktionary.org/wiki/ustedes> and <https://en.wikipedia.org/wiki/You>). The Judge correctly overruled Respondent’s objection to General Counsel’s attempt to clarify the translation.

⁶ John Captan testified, over General Counsel’s objection, that Serafis told him about a conversation he had with Garcia on Garcia’s last day in which, according to Captan, Serafis assigned Garcia a new schedule of forty hours. (Tr., 463). Captan’s testimony about statements Serafis made to him is inadmissible hearsay that cannot be admitted for the truth of whether Serafis in fact made any such statements to Garcia. Notably, Serafis himself did not testify about a conversation with Garcia on October 12, despite being called to the stand in Respondent’s case. Captan’s testimony on this point cannot establish what occurred in the conversation between Garcia and Serafis, and thus, Garcia’s testimony about this conversation is unrefuted and should be credited. Moreover, Serafis’s failure to testify about this conversation himself warrants an adverse inference that his testimony would not have been favorable to Respondents. However, General Counsel acknowledges that the ALJ will need to resolve a credibility dispute between Garcia and Captan regarding Captan’s testimony that Garcia told him that he was quitting because his schedule was reduced. (Tr., 463). For the reasons set forth in the Credibility section, below, Garcia’s testimony should be credited over Captan’s inconsistent testimony.

worked that week. Serafis asked Captan to accompany Garcia out of the restaurant, and to make sure that he didn't take anything that wasn't his. Serafis also asked Captan to escort Garcia out the back door, not the main entrance. (Tr., 61). Finally, Serafis added that he didn't want to see Garcia around his business, and if Garcia gave him any problems, "it's going to be worse for all of you." (Tr., 63).

After Captan walked Garcia out the back door, Captan suggested that Garcia tell his lawyers "what happened because what happened here wasn't right," adding that what happened "was against the law."⁷ (Tr. 61-62).

2. Miguel Romero Lara

Delivery man Miguel Romero Lara testified that for about eighteen years, he worked a schedule of 72 hours a week, until November 2014 when he asked Nick Serafis to reduce his hours. (Tr., 152-53). At that time, Romero began working a 48-hour per week schedule, until the restaurant reduced his schedule to forty hours in July 2015, just before the lawsuit was filed. (Tr., 153). According to Romero's testimony, the restaurant changed his schedule to give some work to John Captan's son, who started working as a delivery man in the evenings at that time. Waverly paid Romero \$210 per week for both the 48-hour and 40-hour per week schedules and he did not experience a significant reduction in tips between these two schedules. (Tr., 153. *See also* R. Ex. 1 (line 21 shows Romero's hours and wages)). Further detail of his schedule and earnings before the lawsuit are provided in Table 2. While working this schedule, Romero estimated that he made about 35-40 deliveries per day, and he had some other duties around the restaurant when he was not out on a delivery run.

⁷ It should be noted that General Counsel does not suggest that this statement be admitted as a legal conclusion, although it is a non-hearsay admission against interest by a party opponent.

At the end of August 2015, a few weeks after the lawsuit was filed, manager Captan told Romero that Serafis had decided to make some cuts to his work schedule. (Tr., 162-64). Under this new work schedule, which is set forth in detail in Table 2, Romero's hours were reduced from forty to thirty-two per week. Romero worked this new schedule for about two weeks, at which time Captan told him that his schedule would be further reduced. (Tr., 164-65). Under this second set of schedule changes, Waverly halved Romero's work schedule to just twenty hours per week. With this change, Romero experienced a reduction in both his pay from the restaurant – from \$210 per week to \$125 per week – and his tip income – from about \$480 to about \$380. (Tr., 167, 169).

Romero explained that his tips diminished not only due to the reduced hours, but also because Serafis assigned one of the dishwashers, Alexander, to make more deliveries after the lawsuit. While Alexander previously made about three-to-four deliveries per day, after the lawsuit, Alexander began to make ten-to-twelve deliveries per day.⁸ (Tr., 159-60, 171). On an occasion when Romero complained about this, Serafis said that he had personally sent Alexander to make the delivery, and told Romero that dishwashers “have to make deliveries too.” (Tr., 178, 173).

On Saturday, October 10, Serafis directed Romero not to come to work on Sunday or Monday, even though he had previously worked on those days of the week. (Tr., 179-180). When Romero came to work on Tuesday, October 13, Captan confirmed that Serafis had indeed assigned him a new schedule in which he would work just two days per week, Tuesdays and Wednesdays. (Tr., 180-81). Romero worked that day, and when he returned to work on

⁸ While Respondent attempted to raise questions about Romero's personal knowledge of this information, Respondent did not refute the testimony through its own witnesses, even though the assignment of deliveries should be within the personal knowledge of Respondent's witnesses and reflected in Respondent's documents. Accordingly, Romero's unrefuted testimony on this issue should be credited.

Wednesday, October 14, he confirmed with Captan that his schedule would be only two days per week. Captan responded in the affirmative, adding that Serafis had found a man to replace Romero on weekends. (Tr., 181). On Thursday, October 15, Romero went to Waverly one last time, to confirm again that they could not give him additional hours and his schedule would be the newly-assigned two days per week. When Captan again confirmed this, Romero told him that he could not work for the restaurant for only two days per week. Captan paid him for the time he'd worked that week, and encouraged him to move forward with the lawsuit. (Tr., 183).

Romero testified that he left Waverly because he simply could not support himself working just two days per week. Although he never worked this schedule, a comparison with the weeks he did work reveals that the maximum he could hope to earn in tips on Tuesdays and Wednesdays would be about \$140 (but likely lower since he would now work three fewer hours per day than he did under his prior schedule), which combined with Waverly's salary of \$60 for two days, would gross a maximum of \$200 per week. This amount represents a reduction of about 70% from his income before the lawsuit.

3. Jesus Delgado

Waiter Jesus Delgado worked around 72 hours per week before the lawsuit, earning between \$930 and \$1210 per week. (Tr., 236-239; *see also* R. Ex. 1 (line 13 shows Delgado's wages, hours, and work assignments); Tr., 630-31 (Captan corroborates Delgado's testimony about his schedule before the lawsuit)). As set forth in more detail in Table 3, Delgado worked five days per week as a waiter, for which Waverly paid him \$20 per day, and one day per week as a counterman, for which Waverly paid him \$100 per day.⁹ (Tr., 238, 242). This difference in wages reflected the difference in tips Delgado could expect to receive in each position: he

⁹ This testimony is corroborated by Captan's testimony and Respondent's financial records. (Tr., 585:583, R-1 (line 13)).

earned \$100 to \$150 in tips per day as a waiter, but only \$30 to \$60 in tips per day as a counterman. (Tr., 237, 239).

In early September, Delgado had a conversation with manager Captan. (Tr., 245). In that conversation, Captan told him that a new schedule would be coming, and Captan was driving himself crazy because there would be a lot of changes day-by-day. (Tr., 245:20). A few days later, Captan told Delgado that Serafis was going to pay him \$5 per hour going forward. (Tr., 246).

As Captan had described, Delgado experienced frequent and erratic changes to his schedule around this time. Delgado explained that in September 2015, Serafis changed his schedule multiple times each week for a period of about six weeks. (Tr., 250). During that period, Serafis would often advise Delgado at the end of one shift that his shift the following day was cancelled. As a result, Waverly reduced Delgado's schedule from about 72 to 75 hours before the lawsuit to about 55 to 62 hours during September 2015, as shown in detail in Table 3. (Tr., 251).

On September 28, Delgado had a conversation with Captan in which Captan offered him money to leave the FLSA suit. (Tr., 247). Captan asked Delgado if his lawyers had indicated how much money he could expect to receive in the lawsuit.¹⁰ (*Id.*)

In October 2015, Serafis assigned Delgado a new schedule. Under the new schedule, Delgado would work three days as a counterman and one day as a waiter. Serafis stated that Delgado would be paid \$5.25 per hour. (Tr., 252). A few days later, Delgado spoke with Serafis a second time. This time, Delgado made a tape recording of the conversation, a transcript of which was entered into evidence as General Counsel Exhibit 4. In that conversation, Serafis told

¹⁰ This testimony is substantially corroborated by Captan's testimony that he discussed settlement with Delgado. (Tr., 481-83).

Delgado that he was assigned yet another new schedule, this time working four days as a counterman, for a total of forty hours per week, at a rate of \$5.25 per hour.¹¹ (Tr., 253; GC Ex. 4). In that conversation, Serafis made clear his intentions in changing Delgado's schedule. Serafis asked, "You insist on staying here?" and when Delgado answered in the affirmative, Serafis asked, "Why you want to stay with this, with this hours?" (GC Ex. 4). When Delgado did not take the bait, Serafis stated, "if you want to go, go, you don't have to stay," and followed up with, "Cause there's no money for you."¹² (GC Ex. 4). Delgado did not respond to these entreaties, other than to agree that he would come to work as scheduled. (GC Ex. 4).

Three days later, on October 18, Delgado decided that he could not afford to continue working at Waverly with his current hours and work assignment. (Tr., 270). That day, he went to the restaurant and told Serafis that it was going to be his last day of work. (Tr., 267). Delgado testified that Serafis paid him for the time he had worked and told Delgado that if he bothered Serafis's business, "he will bother me too."¹³ (Tr., 267:8).

¹¹ Captan testified that the Employer's records do not indicate, and he could not recall, whether Delgado worked as a counterman or a waiter for the weeks of September 7 and subsequent weeks. (Tr., 599:23, 606:24). Serafis also did not testify about Delgado's work assignments at this time. Therefore, Delgado's testimony about his work assignment as a counterman is unrefuted and should be credited.

¹² Serafis's attempts to explain these statements make little sense in the context of the conversation and in the context of the evidence in the case, and should not be credited. (*See* Tr., 661-662.)

¹³ John Captan testified, over General Counsel's objection, that Serafis told him about a conversation he had with Delgado on Delgado's last day in which, according to Captan, Serafis assigned Delgado a new schedule of forty hours and Delgado told Serafis he was quitting as a result. (Tr., 490). As discussed in relation to Captan's similar testimony regarding Justino Garcia, Captan's testimony about statements Serafis made to him is inadmissible hearsay that cannot be admitted for the truth of whether Serafis in fact made any such statements to Delgado. Notably, Serafis himself did not testify about this discussion with Delgado, aside from making specific denials (in response to leading questions) about certain statements captured on tape recording. Captan's testimony on this point cannot establish what occurred in the conversation between Delgado and Serafis, and thus, Delgado's testimony about his conversations with Serafis is unrefuted and should be credited. Moreover, Serafis's failure to testify about this conversation himself warrants an adverse inference that his testimony would not have been favorable to Respondents.

Before the lawsuit, Delgado worked about 72 to 75 hours per week, which generated an income of wages and tips of around \$930 to \$1210 per week. Under this schedule, Delgado worked one day as a counterman, but the \$100 in wages that Waverly paid him that day made up for the lower tips. As a waiter, Delgado earned, on weekdays, a total of \$120-170 and, on weekends, a total of \$220-270, in daily wages and tips. As a counterman, Delgado earned a total of \$130-160 in wages and tips. In contrast, the final schedule and work assignment to which Delgado was assigned before he quit did not account for the diminished tips he earned as a counterman. Serafis told Delgado that Waverly would pay him \$5.25 per hour for four days, ten hours each, as a counterman. The \$52.50 he would earn each day is roughly half of the \$100 per day that Waverly previously paid him when he worked as a counterman. Assuming that his tips remained the same as in his prior work as a counterman, these changes would result in a weekly income of \$330-450 – in other words, resulting in take-home pay about two-thirds lower than he earned prior to the FLSA lawsuit.

4. Miguel Gonzaga

For twelve years prior to the lawsuit, busboy Miguel Botello Gonzaga (“Gonzaga”) worked a schedule of 9:00 a.m. to 8:00 p.m., six days a week. (Tr., 332. *See also* R. Ex. 1 (line 15 shows Gonzaga’s wages and hours); Tr., 631 (Captan corroborates Gonzaga’s testimony about his schedule)). Waverly paid him \$150 per week, or \$25 per day, and he received 15% of the tip pool at the end of each shift. (Tr., 332-33).

In late-August, three weeks after the lawsuit was filed, manager Captan informed Gonzaga that his schedule was going to change. (Tr., 338). Under this new schedule, Gonzaga would work four days a week, with Mondays, Tuesdays, and Wednesdays off. (Tr., 338). With both reduced wages and tips, this set of changes resulted in a reduction in his take-home pay of

about 24%. (See Table 4, below). Gonzaga worked this schedule for two weeks (Tr., 339:14), after which time Captan informed him of a second set of changes to his schedule. (Tr., 343:19). In that conversation, Captan informed Gonzaga that his new schedule would be eight hours a day, for four days a week. (Tr., 347). Gonzaga responded by telling Captan that he could not continue working with these additional reductions because he would be unable to support his family on the income he would earn under such a schedule. (Tr., 349-50).

After working elsewhere for about a month, on October 12, Gonzaga returned to work at Waverly. In September, Captan had called Gonzaga and invited him to return to Waverly if Gonzaga agreed to drop the lawsuit against the restaurant. (Tr., 352). In that conversation, Gonzaga assented, telling Captan that he would agree to “leave the lawsuit” if any of the others withdrew as well. (Tr., 352). Ultimately, when Gonzaga not only did not drop the FLSA suit but instead was part of a second action against Waverly, this time filed with the NLRB, Waverly fired him.

When Gonzaga returned to Waverly, he was assigned to a schedule substantially similar to his original, pre-lawsuit schedule, with combined wages and tips totaling just a bit less than his prior earnings. (See Table 4).

On Saturday, October 31, Captan approached Gonzaga as he was about to leave and instructed him not to report to work on the following day. (Tr., 356). Captan informed Gonzaga that Serafis had said that he would now be off on Sundays. Captan added that he was going to speak to Serafis to “know what he’s going to be doing with” Gonzaga, and that he hoped Serafis would not “do the same as he did to the others.” (Tr., 357).

On Monday, November 2, when Gonzaga reported to work prior to the time his shift started, he observed that another employee, Nick’s nephew, was already performing the busboy

duties. (Tr., 358). Gonzaga sat at the counter drinking a cup of coffee, and Serafis arrived and called him down to his office. In that conversation, Serafis showed Gonzaga a copy of the NLRB charge in this case (GC Ex. 1(a); *see* Tr., 36-61), asking Gonzaga why he “was in another lawsuit.”¹⁴ (Tr., 362). Serafis offered to give Gonzaga money “under the table.” (Tr., 362). Gonzaga responded that he did not file the lawsuits to “damage” Serafis, but because he was seeking “justice.” (Tr., 363). Serafis was then more explicit, as Gonzaga testified, telling him in no uncertain terms, “If I want to keep my job[,] drop the lawsuit and I will keep my work – my job.” (Tr., 363:17). Gonzaga did not accept this offer, instead leaving the meeting and returning to drink his coffee at the counter. Gonzaga understood clearly that Serafis had told him that he had to withdraw the lawsuits in order to keep his job, and that by rejecting this proposal, Gonzaga was instead fired. (Tr., 366:12 (“Q: ... why did you leave Waverly on November 2nd? A: ... Because the owner already told me that I had to sign the two lawsuits already and I would – I will keep my job.”¹⁵))

When Gonzaga observed John Captan walking out of the restaurant, Gonzaga followed him out.¹⁶ They spoke outside the restaurant, and Captan told Gonzaga that what Serafis had done “wasn’t right” and encouraged Gonzaga to speak to his attorneys. (Tr., 364).

¹⁴ Gonzaga’s testimony is corroborated by Captan’s testimony (which is hearsay but should be credited as an admission) that Serafis told him that “he asked Miguel [Gonzaga] that he received another lawsuit and he ask him what is this? Why are you here working?” (Tr., 499:16; *see also* 501:15 (Serafis told Captan that “when Miguel came to work I asked him, hey, Miguel, what is, you working here and you suing the place?”)). Aside from these admissions, Captan’s testimony about Serafis’s report of his conversation with Gonzaga is non-admissible hearsay. (Tr., 499-501).

¹⁵ It appears from surrounding testimony that when Gonzaga referred to “sign[ing]” the lawsuit, he was referring to signing some sort of settlement or release to effectively withdraw the lawsuit. *See* Tr., 401:23 (“A: . . . he told me if I don’t sign out the – if I don’t withdraw the lawsuit I would be fired;” Tr., 352 (“A: I would sign if one of the others will sign too. Q: Okay. What would you sign? What are you referring to? A: To – you know, to leave the lawsuit.”))

¹⁶ Captan’s testimony about his conversation with Gonzaga on his last day of work is not inconsistent with Gonzaga’s testimony. Even if Captan mentioned to Gonzaga something about his hours, it would not

D. Respondent's Payroll Records Corroborate General Counsel Witnesses' Testimony

Respondent's payroll records corroborate the testimony of the four employees about their hours and wages both before and after the lawsuit. The only payroll records in evidence are in the form of a handwritten ledger maintained by manager John Captan, which he refers to as the "Red Book" and was entered into evidence as Respondent's Exhibit 1.¹⁷ Captan explained that the Red Book contains a single column for writing the names of Waverly's employees, which only permits up to twenty-five¹⁸ names, so when an employee's employment is terminated, Captan erases that name with white-out and writes a new employee's name over it.¹⁹ (Tr., 511-513). Thus, in order to identify the records for the four discriminatees here, it is necessary to cross-reference the Red Book with Captan's testimony. Captan testified that the following rows contain the relevant entries for the four discriminatees during the times that they were employed at Waverly:

- Justino Garcia is on line 12, which now reads "Margarita" (515)
- Jesus Delgado is on line 13, which now reads "Mauricio" (519)
- Miguel Gonzaga is on line 15, which now reads "Patsas" (521)

nullify the fact that Gonzaga had already spoken to Serafis. Captan's claim that Gonzaga was drinking his coffee and "then he got up and he told me then I have to quit" is consistent with Gonzaga's testimony that he understood from the conversation with Serafis that if he did not withdraw the lawsuit, he could not keep his job at Waverly, and thus understood that he would "have to quit", as he told Captan. (Tr., 498).

¹⁷ The Judge correctly rejected admission of another form of payroll records, Respondent's Exhibit 2, for all the reasons established on the record at Transcript, 531-541, and explained by the Judge at 540-541.

¹⁸ Respondent's Exhibit 1 appears to contain thirty-two names.

¹⁹ In case it is not clear from the record, General Counsel notes that, based on the undersigned's review of the original Respondent's Exhibit 1, the left-hand column containing the list of employees remains visible even when the pages are turned, and there is not a separate employee list for each week. Thus, when Captan explained that the book allows only a single column for writing a limited number of employees' names, he was referring to a single list *for the entire year* of payroll records contained in the book.

- Miguel Romero is on line 21, which now reads approximately “Kwstas,” containing some Greek characters (between Alexandro and Virginia) (522)

The Red Book corroborates the four employees’ testimony about their wages and hours, both before and after the lawsuit. As noted throughout the Fact section, this exhibit corroborates the employees’ testimony about their pre-lawsuit wages and hours: Garcia worked six days a week, earning \$120 per week; Delgado worked five days as a waiter and one as a counterman, earning \$200 per week; Gonzaga worked six days a week, earning \$150 per week; and Romero worked six days a week, earning \$210 per week. (R. Ex. 1).

Next, Respondent’s Exhibit 1 shows that beginning the week ending September 7, Waverly began calculating the rate of pay for all four discriminatees by the hour, not the day. The Red Book corroborates the employees’ testimony that their rate of pay changed after the lawsuit. (Tr., 599 (Delgado), 608:1 (Garcia), 615:18 (Gonzaga); 616:14 (Romero)).

Furthermore, as Captan admitted, the Red Book also shows that no other employee experienced a change in their rate of pay at this time. (Tr., 620:2, 620:21-621:9). In fact, Captan admitted that for all other employees at Waverly, they did not begin receiving an hourly wage rate until 2016. (Tr., 643:13-644:6).

Next, as Captan admitted, Respondent’s Exhibit 1 shows that all four discriminatees experienced a reduction in their hours starting the week ending September 7. As he admitted, the Red Book shows that on September 7, each of the discriminatee’s hours was reduced. (Tr., 634-2 (Garcia experienced a reduction from 72 to 50); 634:14 (Delgado experienced a reduction from 70 to 53); 635:1 (Gonzaga experienced a reduction from 66 to 38); 635:9 (Romero experienced a reduction from 48 to 30)).

Moreover, Captan admitted that the Red Book does not show a reduction in hours for any other employee the week ending September 7 or 14 (with a single exception whose hours decreased only for a short period of time). (Tr., 635:16, 637:10).

Further detail about the hours and wages reflected in Respondent's Exhibit 1 is discussed in Section IV, D., below. As detailed there, the Red Book demonstrates that the four discriminatees were the only employees who experienced reductions in their hours or pay.

III. CREDIBILITY OF WITNESSES

A. The Judge Should Credit General Counsel's Witnesses

The Judge should credit the testimony of General Counsel's witnesses. As noted throughout the Fact section, General Counsel witnesses' testimony was corroborated by tape recordings, Respondent's own documentary evidence, and even by the admissions of Respondent's witnesses.

General Counsel's witnesses testified candidly and honestly. Faced with challenging and, at times, combative cross-examination, the witnesses remained calm and composed, did not argue or become defensive, and continued to tell their versions of events consistently throughout their testimonies. This applied to both material facts and less material facts on which Respondent vigorously attempted to challenge witnesses' credibility on cross examination. For example, Respondent repeatedly asked Justino Garcia about the timing of Serafis's statement that he was discharged and why he returned to work that morning if he had been discharged (Tr., 139-145), implicitly and explicitly encouraging the witness to admit that "the logic to what [he was] saying" did not make any sense. (Tr., 141:12). Garcia calmly and consistently explained that in the first of two conversations, Serafis communicated to him that he was discharged (Tr., 139:7) and that in that same conversation, Serafis directed him to return to work until his replacement arrived. (Tr., 139:21; 140:2; 140:9; 141:10).

Jesus Delgado faced the most hostile questioning by Respondent. For example, when Delgado gave answers that were unfavorable to Respondent, Respondent's counsel said, "are we having trouble with my questioning?" and then added with condescension during a discussion involving arithmetic, "So sir, I know you said you didn't go to school here in the United States, but you do have high school you said in Mexico?" (Tr., 279, 280). Despite this combative examination, Delgado remained calm and collected, and answered questions on cross-examination forthrightly. More importantly, he did not waiver and continued to answer the questions consistently despite these provocations. In particular, when Respondent repeatedly attempted to persuade Delgado to change his testimony on how much he was paid before the lawsuit, he continued to patiently explain that he earned \$200 per week because he was paid \$20 per day for five days as a waiter and \$100 for one day at the counter. (Tr., 279-281).

For his part, Miguel Romero testified consistently that he requested a reduction in hours in 2014, not in July 2015 as Respondent repeatedly suggested. (Tr., 189:7; 189:14; 190:1; 190:8).

Finally, and most materially, Miguel Gonzaga testified consistently under cross-examination, as well as on direct and re-direct, that Serafis presented him with a clear choice that the only way to keep his job was to withdraw the lawsuit: "the owner was telling me if I want to keep the job I have to withdraw the lawsuit." (Tr., 399:21-25 (cross). *See also* 401:23 (cross); 363:17 (direct); 415:5-16 (re-direct)).

General Counsel's witnesses testified through a Spanish translator about conversations that occurred in English, but Respondent did not present any evidence questioning their ability to understand those statements. Thus, their testimony should be credited. *See, e.g., Deep Distributors of Greater NY*, 29-CA-147909, 2016 WL 2621333 (May 6, 2016) (crediting

witnesses' testimony about statements made in English even though "their primary language was Spanish and they testified through an interpreter"). Of course, had Respondent challenged their ability to understand the English statements, General Counsel would have then had the witnesses testify about those conversations and statements in English to the best of their abilities. Since their credibility was not challenged in this regard, such questioning was not necessary. Accordingly, their testimony about these conversations should be credited.

B. The Judge Should Not Fully Credit Respondents' Witnesses

The limited testimony of each of Respondent's witnesses was almost entirely vague and conclusory, and should not be credited, except to the extent that they made admissions in their testimony. *See, e.g., Addicts Rehab. Ctr. Fund, Inc.*, 330 NLRB 733, 746 (2000) (crediting the testimony of unreliable respondent witnesses "only when such testimony constitutes an admission against Respondent's interest").

Both Captan's and Serafis's testimonies were largely elicited through leading questions. While General Counsel acknowledges that in certain instances, such questions are appropriate to refute specific statements in the testimony of General Counsel's witnesses, here, leading questions were not limited to such instances. (See, e.g., Tr., 465:19, 475:13, 484:14, 494:21, 558:5, 559:9, 651:19, 658:1, 660:8, 666:18). Accordingly, Captan's and Serafis's testimonies should be accorded less weight, and these witnesses should be found less credible, where their testimony was elicited through leading questions.

Both Captan and Serafis made sweeping and general claims about Waverly's efforts to reduce all employees' hours to 40 hours per week that are inconsistent with both the documentary evidence (as set forth in detail below, see Section IV.D.) and Captan's other more specific testimony. (Tr., 487:23, 459:20, 560:22, 561:4 (Captan); Tr., 658:3, 666:2, 668:165

(Serafis)). Captan also presented related testimony about reductions in hours for specific employees which was elicited through leading questions and should not be credited. (Tr., 558:5, 651:19).

As set forth in Section IV.D. below, much of Captan's testimony about employees' work schedules after the FLSA suit was inconsistent with, and wholly contradicted by, the documentary evidence that he claimed to summarize in his testimony. Where Captan's testimony is inconsistent with the documentary evidence, the documentary evidence should be credited over his testimony.

IV. ARGUMENT

A. Legal Standard

1. Wright Line Discharge Analysis

An 8(a)(1) allegation where motive is at issue is analyzed under the Board's *Wright Line* test. *Saigon Grill Restaurant*, 353 NLRB 1063, 1065 (2009) (citing *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), and approved by *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983)). Likewise, a discharge alleged under Section 8(a)(4), which provides that it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act," is also analyzed using a *Wright Line* analysis to determine the respondent's motivation. *American Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002).

Under *Wright Line*, the Board's General Counsel, in his prosecutorial role, must first show, by a preponderance of the evidence, that the employee engaged in protected activity, that the employer had knowledge of that activity and had animus against such activity, and that the activity was a motivating factor in the employer's decision to discipline the employee. *United Rentals, Inc.*, 350 NLRB 951 (2007); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). The

General Counsel may rely on circumstantial as well as direct evidence to carry its burden of showing both employer knowledge of protected activity and unlawful motivation. *See, e.g., Dlubak*, 307 NLRB 1138, 1155 (1992), *enfd.* 5 F.3d 1488 (3rd Cir. 1993); *Abbey's Transportation Services*, 284 NLRB 698, 700-01 (1987), *enfd.* 837 F.2d 575 (2nd Cir. 1988). The employer's adverse action is evaluated in the context of all of the surrounding circumstances, including the timing of the action, disparate treatment, and inconsistent or shifting reasons proffered for the discipline. *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995). *See also American Cyanamid Co.*, 301 NLRB 253 (1991); *Abbey's Transportation Services*, 284 NLRB at 700. Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." *General Films*, 307 NLRB 465, 468 (1992).

Once the General Counsel has established that protected conduct was the motivating factor for the employer's action, the burden shifts to the employer to produce evidence establishing that the employer would have taken the same action even in the absence of protected activity. *Septix Waste, Inc.*, 346 NLRB 496 (2006); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

2. Constructive Discharge and "Hobson's Choice" Discharge

A constructive discharge is technically not a discharge but rather a quit or resignation that the Board treats as a discharge because of the circumstances in which it occurs. *ComGeneral Corp.*, 251 NLRB 653, 657 (1980), *enfd.* 684 F.2d 367 (6th Cir. 1982). The elements of a traditional constructive discharge claim are: (1) the burdens imposed upon the employee must cause, and be intended to cause, a change in the employee's working conditions so difficult or

unpleasant as to force him to resign, and (2) those burdens were imposed because of the employee's protected activities. *Georgia Farm Bureau Mut. Ins. Companies*, 333 NLRB 850, 851 (2001) (citing *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976)). The General Counsel need not prove that the employer "intended to cause" the employee to resign if the employer reasonably could have foreseen that its action would have resulted in a forced resignation. See *American Licorice Co.*, 299 NLRB 145, 148-49 (1990) (when employee informed employer that she needed to transfer to another shift because she could not afford child care, the employer reasonably should have foreseen that refusing to grant the employee's transfer request would force her to resign). The Board will find a constructive discharge in these circumstances because "it can be reasonably inferred that such a large reduction in income would impair an employee's ability to meet living expenses to such an extent that employee would be compelled to seek alternative employment." *Consec Sec.*, 325 NLRB 453 (1998) ("reduction of [employee's] wages by nearly 25 percent clearly meets this test").²⁰ Thus, the Board found a reduction of 28% to constitute a constructive discharge, explaining at a time when the minimum wage was \$3.35 per hour,²¹ "[a] 28-percent reduction in an employee's pay must be viewed as a shock condition for anyone, but particularly for someone earning less than \$6 an hour." *Kime Plus, Inc.*, 295 NLRB 127, 146 (1989). See also *Holiday Inn of Santa Maria*, 259 NLRB 649, 662 (1981) (finding a constructive discharge based on 17% reduction in earnings from \$4.33/hour to \$3.60/hour where minimum wage at the time was \$2.90/hour).

²⁰ The Board noted that "[e]vidence concerning the actual impact of the reduction on the employee's livelihood is not required" but rather, it is "a reasonable inference that a reduction of income in the magnitude of 25 percent would impair an employee's ability to earn a living to such an extent that the employee would be forced to seek alternative employment." *Consec Sec.*, 325 NLRB at 455 n.4.

²¹ See History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 – 2009, available at <https://www.dol.gov/whd/minwage/chart.htm>.

A second type of constructive discharge arises when an employer presents an employee with “the Hobson’s choice of resignation or continued employment conditioned on the relinquishment of rights guaranteed by Section 7 of the Act.” *White-Evans Service Co.*, 285 NLRB 81, 81 (1987). The Board has emphasized that an employer need not “literally” or “explicitly” present the dilemma to an employee. *Titus Electric Contracting, Inc.*, 355 NLRB 1357, 1358 (2010) (finding Hobson’s Choice constructive discharge even though employer “did not explicitly threaten” employee with discharge if he continued to exercise Section 7 right); *Intercon I (Zercom)*, 333 NLRB 223, 224 (2001) (finding Hobson’s Choice constructive discharge even though employer “did not literally state” the dilemma). An employer violates the Act so long as its conduct leads an employee to “reasonably believe” or infer that continuing to engage in Section 7 activity is incompatible with continued employment. *Intercon I (Zercom)*, 333 NLRB at 224.

B. The Evidence Demonstrates that Respondent Reduced the Hours of and Discharged the Four Employees Because of Animus Toward their Protected Activities

1. The Employees Engaged in Protected Activities

The Board has long held that the filing of a lawsuit by a group of employees is protected activity. *Deep Distributors of Greater NY*, 29-CA-147909, 2016 WL 2621333. *See also Beyoglu*, 362 NLRB No. 152 (July 29, 2015); *Saigon Grill Rest.*, 353 NLRB at 1065; *Trinity Trucking & Materials Corp.*, 227 NLRB 792 (1977) (“the filing of a civil suit by a group of employees is protected activity unless prompted by malice or bad faith”), *enfd. mem.* 567 F.2d 391 (7th Cir. 1977) *cert. denied* 438 U.S. 914 (1978); *Le Madri Restaurant*, 331 NLRB 269, 275-276 (2000) (“It is well settled that the filing of a civil action by employees is protected activity unless done with malice or in bad faith”). There is no evidence or assertion here that the

employees' participation in that lawsuit would lose protection by being undertaken in "malice or in bad faith." *Id.*

Here, it is undisputed that the four discriminatees were each named plaintiffs in the FLSA suit against Waverly. The suit was filed on August 11, and there is no dispute that at some point in August, the suit and the employees' participation in it became known to Respondent.

2. The Record is Replete with Evidence of Respondent's Animus Toward the Employees' Protected Activity

The evidence shows that Respondent reduced the employees' hours, and discharged each employee, either directly or constructively, because of its animus toward the employees' protected activities. The record contains voluminous evidence of Respondent's animus toward the employees' protected activity of filing first, the FLSA suit, and second, the NLRB charges.

First, Serafis made numerous direct statements of animus toward employees' involvement in the FLSA suit. In the "cat and mouse" conversation on October 13, Serafis asked Garcia, "Why [do] you insist [on] staying here?" and whether he was happy, and admitted that he asked these questions because the employees had filed the FLSA suit. (Tr., 57). Serafis made similar statements to employee Delgado in a conversation recorded on tape. (GC Ex. 4). In that conversation, Serafis asked Delgado, "You insist on staying here?" and specified, "Why you want to stay with this, with this hours?" Serafis continued on this theme stating, "if you want to go, go, you don't have to stay," and followed up with, "Cause there's no money for you." (GC Ex. 4). This conversation is especially notable for how Serafis clearly conveyed his intentions in reducing employees' hours, asking Delgado why he would want to continue working at Waverly "with [these] hours," and suggesting that Delgado might want to quit because "there's no money for you" if he stayed at Waverly.

Serafis told Garcia, “I don’t want to see all of you here.” (Tr., 58) and later repeated that he didn’t want to see Garcia around his business, and if Garcia gave him any problems, “it’s going to be worse for all of you.” (Tr., 63). Similarly, Serafis also told Delgado that if he bothered Serafis’s business, Serafis would “bother” Delgado too. (Tr., 267:8).

The record also contains statements by Captan that reflect the animus Respondent, and Serafis in particular, bore toward employees’ involvement in the FLSA case. The evidence in the case suggests that while Serafis was the individual who bore the most animus toward the employees’ involvement in the FLSA case, Captan acted as a sort of intermediary who admitted to Serafis’s animus.

First, Captan admitted that Serafis was taking retaliatory action against the employees when, on October 31, he told Gonzaga that he was going to speak to Serafis to “know what he’s going to be doing with” Gonzaga, and that Captan hoped Serafis would not “do the same as he did to the others.” (Tr., 357).

Captan also attempted persuade employees to drop the FLSA lawsuit. Around the end of September, Captan told Garcia that “he didn’t know what we were doing and to drop [] the lawsuit.” (Tr., 44). He told Garcia that if the plaintiffs agreed to drop the lawsuit, Captan would convince Serafis to give them each \$6,000. (Tr., 46). Similarly, on September 28, Captan offered Delgado money to leave the FLSA suit. (Tr., 247). Finally, around the same time, Captan called Gonzaga to invite him to return to Waverly only if Gonzaga agreed to drop the lawsuit against the restaurant. (Tr., 352).

Moreover, according to the employees’ unrebutted testimony, Captan told the employees that it was his personal view that Serafis was not treating them fairly – an admission that Waverly’s actions toward the employees was motivated by animus. On Garcia’s last day of

work, Captan suggested that Garcia tell his lawyers “what happened because what happened here wasn’t right,” and “was against the law.” (Tr. 61-62). On Romero’s last day of work, Captan encouraged him to move forward with the lawsuit. (Tr., 183). On Gonzaga’s last day of work, Captan told Gonzaga that what Serafis had done “wasn’t right” and encouraged Gonzaga to speak to his attorneys. (Tr., 364).

The extensive evidence of animus demonstrates Respondent’s unlawful motivation in taking various adverse actions against the employees.

C. Respondent Unlawfully Reduced the Hours of, and Discharged Each Discriminatee

1. Justino Garcia

Before the FLSA suit, Garcia worked a 71-hour week, and earned a total of \$1080-1130 per week. In the first set of changes after the lawsuit, beginning in late-August, he was assigned to a schedule working 50 hours per week, in which he earned slightly less money, ranging from \$1000 to \$1060. In Respondent’s proposed second set of changes, Garcia would have worked 33 hours per week, earning a total of \$720 to \$760 per week in tips and wages. These reductions to his hours and wages were unlawfully motivated and not warranted by any legitimate business reason.

On October 13, Respondent then discharged Garcia. Although Respondent claims that Garcia quit, Garcia’s testimony makes clear that Serafis fired him.²² In their conversation that day, Serafis encouraged Garcia to quit, and when he refused to do so, Serafis told Garcia that he

²² If the Judge credits Respondent’s testimony that Garcia quit (which General Counsel believes would not be warranted), the evidence would show that such a quit would have been a constructive discharge. Garcia’s income declined by around 30% due to the changes Respondent made to his schedule on October 10, a percentage well beyond the range of those the Board has found to constitute constructive discharge. *Consec Sec.*, 325 NLRB 453 (25%); *Kime Plus, Inc.*, 295 NLRB at 146 (28%); *Holiday Inn of Santa Maria*, 259 NLRB 662 (17%).

wanted him to leave, and did not want to see him anymore. Serafis told Garcia to leave as soon as his replacement came in later that morning.

The ample evidence of animus demonstrates that Waverly fired Garcia because of his protected activity of participating in FLSA suit.

2. Miguel Romero

Immediately prior to the FLSA suit, Romero worked a 40-hour week, and earned a total of \$640-690 per week. In the first set of changes after the lawsuit, beginning in late-August, he was assigned to a schedule working 32 hours per week, and in September, he was assigned to a schedule working just 20 hours per week. In the final set of schedule changes proposed by Waverly, Romero was assigned to work just eight hours per week, which would have resulted in a weekly income between \$185 to \$200 in both tips and wages. First, the evidence shows that these reductions to his hours and wages were unlawfully motivated and not warranted by any legitimate business reason.

But more importantly, Respondent's severe reductions to Romero's wages and hours undoubtedly constituted a constructive discharge. The Board has found that reductions to an employee's income were sufficient to foreseeably force him to resign where the wages were reduced by 25 percent, *Consec Sec.*, 325 NLRB 453, 28 percent, *Kime Plus, Inc.*, 295 NLRB at 146, and 17 percent. *Holiday Inn of Santa Maria*, 259 NLRB 662. In this case, Romero experienced a reduction to his income of more than 70 percent – a reduction substantially exceeding the amounts found to constitute a constructive discharge in prior cases. The Board has opined that a “28-percent reduction in an employee's pay must be viewed as a shock condition for anyone, but particularly for someone earning less than \$6 an hour.” *Kime Plus, Inc.*, 295 NLRB at 146. It is doubly the case that a 70-percent reduction would be viewed as a “shock

condition” for anyone, but especially for someone who previously earned around \$16 per hour in New York City (more than fifteen years after the *Kime* Board expressed concern about a \$6/hour wage in Arkansas, a less expensive place to live.)

Furthermore, the record evidence shows that Serafis made certain statements admitting that the reduction in hours was *intended* to cause employees to quit. In a statement made on tape to Delgado, Serafis said “Why you want to stay with this, with [these] hours?” and suggested that Delgado might want to quit because “there’s no money for you” if he stayed at Waverly. (GC Ex. 4). These admissions of Respondent’s intent in reducing the employees’ hours should be interpreted as applying with equal force to the other discriminatees, including Romero.

In any case, between these statements, the 70-percent reduction in Romero’s income, and the voluminous evidence of Respondent’s animus toward participation in the FLSA suit, the record evidence clearly establishes that Respondent intended to cause Romero’s resignation, and at least reasonably could have foreseen that its actions would cause his resignation. Thus, Respondent constructively discharged Romero.

3. Jesus Delgado

The evidence also shows that Respondent constructively discharged Jesus Delgado. Before the lawsuit, Delgado worked 72 to 75 hours per week, earning a total in wages and tips of \$930 to \$1210 per week. After the FLSA suit, Respondent reduced his hours first to about 52 hours per week, and then to forty hours per week. The evidence shows that these reductions to his hours were unlawfully motivated and not warranted by any legitimate business reason.

More importantly, these hours reductions, along with changes in Delgado’s work assignments, resulted in drastic decreases to his income, constituting a constructive discharge. In the final schedule and work assignment to which Delgado was assigned before he quit, Delgado

was assigned to work full-time as a counterman, but his pay did not account for the diminished tips he earned as a counterman.²³ Serafis told Delgado that Waverly would pay him \$52.50 per day as a counterman, roughly half of the \$100 per day that Waverly previously paid him when he worked as a counterman (and roughly half of what Waverly paid other countermen (Tr., 581-82)). Thus, the final schedule Serafis assigned to Delgado before his forced resignation would have caused more than a 60-percent reduction in his income. Again, such a reduction in well-beyond the range of reductions that the Board has found to constitute constructive discharges. *Consec Sec.*, 325 NLRB 453 (25%); *Kime Plus, Inc.*, 295 NLRB at 146 (28%); *Holiday Inn of Santa Maria*, 259 NLRB 662 (17%).

Serafis made clear to Delgado that the reduction in hours and wages was intended to cause him to resign, challenging Delgado to explain why he would want to continue working at Waverly with these reduced hours and when there was “no money” for him at Waverly. (GC Ex. 4).

These statements demonstrate that Respondent intended to cause Delgado’s resignation when it reduced his hours and assigned him to work full-time as a counterman without compensating him for that work in the same amount it had previously and continued to do for other employees working in that position. Furthermore, the record evidence demonstrates that when Respondent reduced Delgado’s hours from 72 to 40, and caused a 60-percent reduction in his wages, it reasonably could have foreseen that its actions would cause his resignation. Thus, the evidence demonstrates that Respondent constructively discharged Delgado.

²³ Captan admitted that waiters make higher tips than any other category of employee in the restaurant. (Tr., 563).

4. Miguel Gonzaga

Miguel Gonzaga has the most complicated set of facts and legal violations committed against him of the four discriminatees. General Counsel alleges that based on the unlawful reduction in his hours, Respondent constructively discharged Gonzaga in September 2015. After Gonzaga returned to work in October, Respondent then discharged him through a “Hobson’s Choice” discharge in violation of Section 8(a)(4) because the discharge was based on forcing Gonzaga to choose between continued employment and pursuing a case with the NLRB. Serafis’s statements to that effect in the course of discharging Gonzaga also constituted independent 8(a)(1) threats.

Prior to the FLSA suit, Gonzaga worked 66 hours per week, earning a total of \$590 to \$610 per week in wages and tips. In late-August, Respondent reduced his hours to forty-four per week, resulting in a decrease in his weekly income of about 24-percent. In early-September, before he quit, Respondent proposed to further reduce his hours to 32 hours per week. This schedule constituted less than half of the hours he worked before the lawsuit, and presumably would have reduced his income by around 50-percent as well. His rejection of that schedule constituted a constructive discharge. In any event, even the reduction in hours he actually experienced, resulting in a 24-percent reduction in income, was legally sufficient to constitute a constructive discharge. *Consec Sec.*, 325 NLRB 453 (25%); *Kime Plus, Inc.*, 295 NLRB at 146 (28%); *Holiday Inn of Santa Maria*, 259 NLRB 662 (17%).

When Captan offered to permit Gonzaga to return to Waverly, his return was conditioned on withdrawing the FLSA suit. After a few weeks on the job, Respondent discovered that not only had Gonzaga failed to make good on his promise to withdraw the FLSA suit, but he had in fact commenced a second action against Waverly, this time alleging violations of the NLRA. Serafis then presented him with “a Hobson’s choice of resignation or continued employment

conditioned on the relinquishment of rights guaranteed by Section 7 of the Act.”²⁴ *White-Evans Service Co.*, 285 NLRB at 81. Here, Serafis told Gonzaga that if he wanted to “keep his job[,] drop the lawsuit.” (Tr., 363:17. *See also* Tr., 366:12; 401:23 (Gonzaga testified consistently about the choice Serafis presented to him)).

Accordingly, Respondent’s first discharge of Gonzaga constituted a traditional constructive discharge, in which the reduction in his hours motivated by animus was intended to cause him to quit, and Respondent’s second constructive discharge of Gonzaga was intended to force Gonzaga to choose between continued employment and exercising his rights under the Act – and Gonzaga chose to continue exercising and enforcing his rights under the Act.

D. Respondent’s Defenses are Pretextual and Respondent is Unable to Satisfy its Burden of Demonstrating a Legitimate Business Justification for the Discharges

As often happens in cases involving retaliation against employees who brought a lawsuit against their employer under other employment laws, “Respondent has a facially appealing defense” that it took certain actions in order to come into compliance with the FLSA. *Tito Contractors, Inc.*, 5-CA-119008, JD–63–14 at *24, 2014 WL 5682509 (N.L.R.B. Div. of Judges, Nov. 4, 2014). However, “the policy and protection provided by the National Labor Relations Act does not allow the employer to substitute ‘good’ reasons for ‘real’ reasons when the purpose of the discharge is to retaliate for an employee’s concerted activities.” *N. Carolina Prisoner Legal Servs., Inc.*, 351 NLRB 464, 469 n.17 (2007) (citing *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969)). “Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for taking the action in question;

²⁴ While Board cases on the “Hobson’s choice” have arisen in the 8(a)(3) context, this logic should easily be applied to the rights protected in Section 8(a)(4) to enforce Section 7 rights through participation in Board proceedings. Alternatively, Serafis’s statements to Gonzaga may be viewed as asking Gonzaga to choose between continued employment and continued participation in protected, concerted activities included in Section 7.

rather it must show by a preponderance of the evidence that the action would have taken place even without the protected conduct.” *N. Carolina Prisoner Legal Services*, 351 NLRB at 469 n.17 (citing *Hicks Oil & Hicksgas*, 293 NLRB 84, 85 (1989), *enfd.* 942 F.2d 1140 (7th Cir. 1991)).

Waverly’s defense to this case appears to be that, prior to the filing of the FLSA suit, its managers were entirely ignorant of their relevant legal obligations (*see, e.g.*, Tr., 458), and only after the lawsuit did they make efforts to comply with applicable wage and hour laws. This is certainly a “facially appealing defense.” However, it is a defense that is wholly unsupported by all available evidence. The record evidence illustrates that, after FLSA suit, the only employees who experienced any changes in their terms and conditions of employment were the FLSA plaintiffs who are alleged discriminatees in this case.²⁵ Nor is Respondent’s defense saved by its witnesses’ assertions that they found it challenging to make these across-the-board changes in all employees’ terms and conditions of employment, and that this process remains ongoing to this day. The evidence is clear that, at all relevant times, the only employees whose hours were reduced were the four involved in this case, and moreover, that those four employees experienced all sorts of changes that bore little relation to FLSA compliance. Respondent’s

²⁵ At the time that the FLSA suit was filed, one additional employees, Luis Magaña, was still employed at Waverly. Magaña was never alleged as a discriminatee, and the record evidence reflects that he quit in September 2015, shortly after the FLSA suit was filed. (Tr., 35). Thus, no assumptions should be drawn from his absence from this case. However, Respondents did not attempt to refute statements by General Counsel witnesses that Magaña had also experienced a reduction in hours. (Tr., 87-88, 93, 132, 210, 216). There is scant evidence about Magaña in the record. His hours cannot be ascertained through Respondent’s payroll records because there is no record evidence indicating on which line of Respondent’s Exhibit 1 his name appears, based on Captan’s regular practice, his name was likely erased or whited-out of R-1 and replaced with an unknown other employee. (*See* Tr., 511-513). However, evidence about his hours is in the personal knowledge, custody and control of Respondent, and their failure to produce any such evidence suggests that such evidence would not be favorable to Respondent. Thus, on the question of whether Respondent in fact targeted *all* FLSA plaintiffs who remained current employees in September 2015, the example of Magaña cannot help General Counsel’s case due to the lack of evidence, but more importantly, Respondent cannot attempt to use him as a counter-example in its defense.

failure to mount a convincing defense is all the more striking where the evidence demonstrates that “there is no question that Respondent bore tremendous animus towards the protected activity of its employees.” *Tito Contractors, Inc.*, 5-CA-119008, JD-63-14 at *25.

The first problem with Respondent’s defense is that the evidence clearly demonstrates that in September and October 2015, the four discriminatees were the only employees who experienced any changes in their hours, wages, and wage rates. On direct examination (elicited largely through leading questions), John Captan attempted to identify employees who also experienced reductions in their hours in September 2015, as reflected in Respondent’s Exhibit 1, which he refers to as the “Red Book”. (Tr., 547 *et seq.*) However, even the examples he identified in his testimony are not borne out by a review of the documentary evidence. In certain instances, his testimony entirely mischaracterizes Respondent’s Exhibit 1, calling his credibility into question. In other instances, a more complete review of the Red Book shows that any supposed decreases did not actually represent a change in those employees’ regular work schedules.

First, Captan identified Ruben Sanchez (R. Ex. 1, line 6). While Captan correctly characterized the Red Book as showing that Sanchez worked a 6-day week on September 7, and thereafter worked 5-day weeks for a period of time, this fact is less than persuasive when the preceding weeks are examined. In fact, Sanchez worked a five-day week for 23 weeks between January and August of 2015, and a six-day week during only eleven weeks in that period. Accordingly, the evidence cannot support a conclusion that Waverly reduced Sanchez’s regular schedule in September 2015.

Next, Captan pointed to Kumar Ashok (R. Ex. 1, line 17), who was later identified as a night waiter (Tr., 576). The Red Book shows that, between January and August 2016, Ashok

regularly worked six-day weeks (24 weeks), with some five-day weeks (eight weeks), and two seven-day weeks. Between September and December, Ashok worked a six-day week during twelve weeks and a five-day week during four weeks. The evidence again fails to support Respondent's assertion that Waverly reduced Ashok's regular schedule in September 2015.

Next, Respondent points to Franky Javier (R. Ex. 1, line 19). While Respondent points out that between September 7 and 14, his hours decreased from four days to one day, immediately thereafter his schedule and pay increased for the remainder of the year. The Red Book shows that Javier earned \$50 or \$70 during most weeks between January and July 2015, and \$90 per week in August. From September to December his wages fluctuated but by November, he consistently exceeded \$150 per week in wages. In fact, Javier is the only employee whose hours were consistently shown in hours, not days, throughout 2015. A review of all 2015 records shows that from January to August, Javier regularly worked 24 hours per week, but beginning in October, he regularly worked more than 30 hours per week. Thus, after October 5, both his hours and his wages increased.

Captan testified that Shah Bhuiyan (R. Ex. 1, line 23), another night waiter (Tr., 577), worked four days per week starting September 28. (Tr., 549:25). This assertion is absolutely untrue and entirely inconsistent with Respondent's Exhibit 1. In fact, Shah Bhuiyan's hours, shown on line 23 of the Red Book, were 6 days and 5 days per week for every week between September and December 2015, and there was not a single week when he worked four days per week. Moreover, Bhuiyan's hours were also five or six days per week every week that year prior to September 2015 (with 2 exceptions and a vacation week), and thus Respondent's Exhibit 1 demonstrates that Waverly did not reduce Bhuiyan's hours in September 2015.

Captan next testified about employee David Garcia (Tr., 550; R. Ex. 1, line 24), admitting that after just one week of hours reduced to a five-day week, Captan returned Garcia's hours to their previous six days per week. However, Garcia had worked less than six days per week on at least five occasions that year before September, rendering suspect the claim that Garcia's five-day week on September 7 was due to Respondent's purported effort to reduce hours across the board and not mere happenstance. (R. Ex. 1 (Garcia worked 0, 4 or 5 day-weeks on columns headed 2/16, 4/20, 7/20, 7/27, and 8/10)).

Next, Captan testified that he attempted to decrease the hours of an employee named Emerson (R. Ex. 1, line 26), reducing him to five and four days on September 7 and 14, respectively, but that "he came back to five" because Waverly "couldn't keep him on four." (Tr., 552). In fact, Respondent's Exhibit 1 shows that after September 14, Emerson worked *six* days per week every single week through December 2015. Moreover, between January and August 2015, Emerson had worked less than a six-day week on at least twelve occasions. Thus, Respondent's Exhibit 1 shows that after September 2015, Emerson's average weekly hours actually *increased*.

Sanchez, Ashok, Javier, Bhuiyan, Garcia, and Emerson are the employees who Respondent identified, in its case in chief, as examples of employees supporting its defense. A review of additional examples further illustrates that only the discriminatees in this case experienced a reduction in hours beginning in late-August 2015. Since Respondent claims that members of the kitchen staff were more difficult to replace than the "front of the house" tipped employees, the most appropriate comparators are the other tipped employees.

First, Captan identified Sunok Gulti (R. Ex. 1, line 28), a night busboy, as the only other busboy. (Tr., 575). The Red Book shows that from January to August, Gulti worked six-day

weeks on all but six weeks, when he worked both five-day and seven-day weeks, thus maintaining an average regular schedule of six days per week. From September to December, Gulti worked six-day weeks on all but three weeks. In other words, he experienced no change whatsoever in his work schedule after the lawsuit. Furthermore, Gulti's rate of pay remained constant before and after September 2015: \$150 for a six-day week, or \$25 per day, unlike the discriminatees here who Respondent converted to an hourly wage.

Daytime counterman Jose Rosas (R. Ex. 1, line 11; see Tr., 581-82) worked six days during most weeks January to August, earning \$570 per week or \$95 per day. Beginning September 14, he was given a slight raise and began earning \$100 per day when he worked as a counterman. However, as Captan confirmed, the records reflect that for a few weeks beginning October 19, Rosas started working some shifts as a waiter. (Tr., 622). His rate of pay remained the daily rate, with records in October continuing to show that he was paid a higher daily rate for counterman work than waiter work. (Tr., 623). During this time, he continued to work six, or even seven, days per week.

Nighttime counterman Freddy Garcia (R. 1, line 18; Tr., 581-82) worked a regular schedule of about six days per week between January and August 2015, with some five-day weeks and other slight variations recorded in the Red Book. In September 2015, he continued to work his regular six-day a week schedule. Whereas throughout 2015, he earned \$690 for a six-day week (\$115 per day), starting on October 12, the Red Book reflects that he earned \$720 for a six-day week, suggesting that he received a slight raise to \$120 per day. He continued to work six days during most weeks until the end of 2015.

Thus, at the same time as Respondent was cutting the discriminatees' hours and claiming that they were trying to cut hours and contain costs across the board, both the daytime and nighttime countermen experienced wage *increases*.

As noted above, night waiters Ashok and Shah did not experience reductions in hours in September 2015.

Gulti, Rosas, Garcia, Ashok, and Shah were the only other tipped employees that Captan identified as working at the same time as the four discriminatees in this case.²⁶ (Tr., 574-586). Thus, while Respondent claimed that it had difficulty reducing the hours of kitchen staff, the record evidence shows that Respondent did not even *attempt* to reduce the hours of the employees working in the same tipped, front-of-the-house positions as four discriminatees here.

Respondent also asserts that its current policy is to “reduce everybody down to 40 hours,” claiming that this is a lengthy, on-going process which it could not complete in September and October 2015. (Tr., 494). However, even if true, Waverly’s subsequent conduct cannot compensate for its earlier unlawful actions in September and October 2015, and this testimony should not be afforded any weight.²⁷ *See, e.g., Metro. Transp. Servs., Inc.*, 351 NLRB 657, 663 (2007) (respondent’s “after the fact” promulgation of certain policies was an effort to “concoct a basis” for discharging a union supporter, and thus failed to satisfy *Wright Line* burden and was instead evidence of pretext). For the same reason, Respondent’s Exhibit 3 should not be

²⁶ Captan testified that Waverly hired new waiters, but they were all hired after the discriminatees here were discharged, so these employees are not appropriate comparators. (*See* Tr., 594-597 (testifying that while Waverly hired more waiters “after the lawsuit,” Captan could not identify any new waitstaff hired before November 2015 (Tr., 596:6)). Based on this fact, Respondent cannot try to argue that the reduction in hours was because Respondent was spreading work to other employees to reduce overtime hours because the overall number of waiters in the workforce did not expand in September or October 2015. (*See also* R. Ex. 1 (showing a constant workforce of 32 employees throughout 2015)).

²⁷ Furthermore, much of this testimony was elicited through leading questions, rendering it less than credible regardless of whether it has any relevance to proving Respondent’s defense. (*See, e.g.,* Tr., 494:21).

accorded any weight because it only shows employees' hours after January 2016, a time period which has no relevance to the issue in this case of whether the hours of other employees were reduced in September and October 2015. It is worth emphasizing that this evidence is especially meaningless given that Respondent has failed to proffer any evidence showing that it began such a process in September 2015, since there is no evidence that any other employees experienced reduced hours at that time. To the extent that the evidence shows that Respondent changed its practices in 2016, such changes are an entirely new policy unrelated to the discriminatory reductions in hours that Respondent applied solely to the four discriminatees in September 2015.

Respondent also made bare assertions about the state of its business (*see, e.g., Tr.*, 497) which should not be credited or given any weight because these are matters about which Respondent should have documentary evidence, and its failure to provide any such evidence renders the testimony less than credible. *Alterman Transp. Lines, Inc.*, 308 NLRB 1282, 1293 (1992) (respondent's "vague, generalized references to a 'loss of business'" fail to satisfy its burden when it failed to "prove with precise, probative, convincing testimony and specific documentation" that the adverse actions were "attributed to clear, specific economic factors").

Respondent claimed that it reduced the hours of the discriminatees in order to cut its costs while it came into compliance with the FLSA. This argument makes little sense when examined closely. First, Respondent did not decrease the discriminatees' hours to forty per week, but rather to various hours both above and below forty. As described in the Fact section and the accompanying Tables 1-4 in further detail, Respondent did not reduce these employees' hours to any regular schedule closer to forty hours per week, but instead, to hours that varied widely and changed frequently. In order to comply with the FLSA, there was no legitimate business need to reduce Garcia's hours to thirty-three per week, Romero's hours to twenty and then eight per

week, or Gonzaga's hours to thirty-two per week, and certainly no need to make erratic changes multiple times each week to Delgado's schedule. (Tr., 50, 164, 180, 342, 251; Tables 1-4). Additionally, Miguel Romero was already working just forty hours a week before the lawsuit, so there was no need to reduce his hours below forty to deal with any FLSA compliance issues. Moreover, Respondent failed to provide any explanation for reducing Jesus Delgado's wages for hours worked as a counterman to approximately half of his previous counterman wage and half of the wages of other countermen.

Furthermore, if Respondent's true motive was to come into compliance with wage and hour laws, while containing costs in the process, they have not demonstrated why it would make sense to begin such a process with the Restaurant's *lowest* paid employees. Respondent explained that an "important" reason why the restaurant, in its claimed defense, cut hours was to save money once they realized they had to pay overtime wages. (Tr., 641:1-8). However, it thus does not make any sense that the only employees whose hours were cut were those making the *lowest* wages, with no effort reflected in evidence to reduce the hours of the highest-paid employees. While Waverly paid the discriminatees here between \$120 and \$200 each week, Waverly paid weekly wages of around \$800 to the grillmen; \$900 to the chef, and \$600 to the chef's helper. (Tr., 588-590).

It is worth addressing Respondent's that, for certain discriminatees, it actually increased their wages to the lawful minimum wage, and it cannot be Respondent's fault if the discriminatees experienced an overall reduction in income based on tips paid to them by customers. Respondent was fully aware that tipped employees, and waiters to the greatest degree, relied on tips to make a livable (and legal) wage. (Tr., 563 (admitting that waiters earned highest tips of all job classifications); 572, 592 (waiters relied on tips); 593 (Captan was aware of

waiters' income because he used to be a waiter, noting that waiters used to make \$1500 per week total, now they make "a little less"). Thus, it was entirely foreseeable to Respondent that a reduction in hours would severely impact the take-home pay of tipped employees.

In addition to its primary defense that it reduced the hours of the discriminatees in order to comply with its FLSA obligations, Respondent also suggested certain ancillary defenses and explanations regarding each employees' alleged discharge. These assertions were all refuted by the four discriminatees' credible testimony and further suggest a pretextual shifting defense.

First, Respondent attempted to suggest that some employees' work performance declined after the lawsuit. However, Romero stated that Captan never expressed dissatisfaction with his work performance. (Tr., 206). Delgado also testified that his supervisors never complained about his work performance. (Tr, 300). It is difficult to see the relevance of the work performance of employees who undisputedly quit.

Next, Respondent suggested that they told the discriminatees that they were making across-the-board reductions in hours. As a preliminary matter, Captan's limited testimony on this point – which failed to rebut all testimony by General Counsel witnesses – was given only in response to leading questions, and should not be credited.²⁸ However, Delgado testified that Captan never told him that Waverly was reducing everyone's hours across the board (Tr., 286,

²⁸ It is worth setting out some of the testimony in full to demonstrate how Captan's testimony was given only after a series of repeated, leading questions:

Q: Now, did you ever have a conversation on this date where you told him that everybody's hours were going to be reduced?

A: What date?

Q: Yes. Did you also say to him that across the board, or words to that effect, everybody's hours were going to be –

A: Oh, yeah. I'm sorry. Now I recall. Yes, I did.

Q: .. can you elaborate on that?

A: ... I said to Christo that things change now, we have to pay the overtime and sooner or late[r] all across the board we're going down to 40 hours.

301, 385) or that they were reducing hours because without these cuts they could not afford to comply with wage and hour laws (Tr., 283. 301). Likewise, Gonzaga testified that Captan did not tell him they were trying to reduce all employees to 40 hours per week. (Tr., 385). Moreover, the tape recorded conversations with Serafis indicate that he did not make such statements in those conversations. Had this “across the board” reduction actually been Respondent’s true policy in September 2015, one would presume that Serafis would have mentioned it when he suggested that Delgado might want to leave because “there’s no money for you.” (GC Ex. 4). Instead, that conversation, along with the discriminatees’ testimony demonstrates that Respondent’s true “policy” at that time was simply to target the discriminatees for reductions in hours.

Thus, Respondent has failed to demonstrate a legitimate business justification for its adverse actions against Garcia, Romero, Delgado, and Gonzaga. Instead, the evidence demonstrates that its claimed defenses are so wholly fabricated as to be pretextual and thus constitute further evidence that Respondent took these actions because of its unlawful, discriminatory animus toward the employees’ protected activities. Respondent’s disparate treatment of the FLSA plaintiffs was demonstrated by Respondent’s own records and admissions, which clearly show that these four employees were the only ones whose hours Respondent reduced, the only ones whose wage rate Respondent changed, and the only ones to experience any changes whatsoever in their working conditions in September 2015. Respondent failed to proffer any evidence to support its claimed defenses, and failed to offer any credible explanation for the adverse actions it admittedly took against the four discriminatees. Therefore, Respondent failed to satisfy its burden of showing a legitimate business justification for its action. The Judge should conclude that its asserted defenses are pretexts, which add to the

voluminous evidence showing that Respondent decreased the discriminatees' hours and discharged or caused the discharge of the four discriminatees for unlawful, discriminatory reasons.

V. CONCLUSION

The foregoing establishes that Respondent unlawfully retaliated against Justino Garcia, Miguel Romero, Jesus Delgado, and Miguel Gonzaga for their participation an FLSA suit and later, this NLRB action, by reducing their hours and then discharging each employee in violation of Sections 8(a)(1) and 8(a)(4) of the Act.

Dated at New York, New York,
August 22, 2016

Respectfully submitted,

_____/s/ Julie R. Ulmet_____
Julie Rivchin Ulmet
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278-0104
(212) 776-8650
Julie.Ulmet@nlrb.gov

Counsel for the General Counsel

TABLE 1: JUSTINO GARCIA ORIGINAL SCHEDULE AND SCHEDULE CHANGES

Day of the Week	Schedule Before Lawsuit (Tr., 23-24)	Average Tips Before Lawsuit (Tr., 30-31)	Late-August Schedule Change (Tr., 40)	New Average tips (Tr., 41)	October 10 Proposed Change (Tr., 50)	Tips (Did not work this schedule)	October 12 Proposed Schedule Change (Tr., 51)	Tips (Did not work this schedule)
Monday	8:00 a.m. to 8:00 p.m. (12 hours)	\$120-130	2:00 pm – 8:00 p.m. (6 hours)	\$60-\$70	Off	NA	Off	NA
Tuesday	7:00 a.m. to 8:00 p.m. (13 hours)	\$120-130	2:00 pm – 8:00 p.m. (6 hours)	\$60-\$70	2:00 pm – 8:00 p.m. (6 hours)	\$60-\$70	6:00 a.m. – 4:00 p.m. (counterman) (10 hours)	Unknown
Wednesday	8:00 a.m. to 4:00 p.m. (waiter) 4:00 p.m. – 8:00 p.m. (counterman) (12 hours)	\$140	2:00 pm – 8:00 p.m. (6 hours)	\$60-\$70	2:00 pm – 8:00 p.m. (6 hours)	\$60-\$70	6:00 a.m. – 4:00 p.m. (counterman) (10 hours)	Unknown
Thursday	10:00 a.m. to 4:00 p.m. (waiter) 4:00 p.m. – 8:00 p.m. (counterman) (10 hours)	\$140-150	Unchanged (10 hours)	\$140-150	Unchanged (10 hours)	\$140-150	Unchanged (10 hours)	\$140-150
Friday	Off	NA	Off	NA	Off	NA	Off	NA
Saturday	9:00 a.m. to 8:00 p.m. (11 hours)	\$220-230	Unchanged (11 hours)	\$220-230	Unchanged (11 hours)	\$220-230	Unchanged (11 hours)	\$220-230
Sunday	7:00 a.m. to 8:00 p.m. (13 hours)	\$220-230	9:00 a.m. to 8:00 p.m. (11 hours)	\$220-230	Off	NA	9:00 a.m. to 8:00 p.m. (11 hours)	\$220-230
Total hours and tips	71 hours	\$960-1010	50 hours	\$760-820	33 hours	\$480-\$520	52 hours	Unknown
Pay received from Waverly	\$120 per week (Tr., 27-28)		\$240 per week (Tr., 41 ¹)		\$240 per week (Tr., 41)		Unknown	
Total income	\$1080-\$1130 per week		\$1000-\$1060 per week		\$720-760 per week		Unknown	

¹ The transcript contains an error at page 41, line 14. The transcript reads, “He stopped paying me \$240.” This should read, “He started paying me \$240,” in order to make sense in the context (compare Tr., 27:23 (Garcia was paid \$120 per week before the changes described on page 41)) and to be consistent with Respondent’s own records in Respondent Exhibit 1, showing that the restaurant paid Garcia \$240 per week starting the week of September 7, 2015.

TABLE 2: MIGUEL ROMERO LARA ORIGINAL SCHEDULE AND SCHEDULE CHANGES

Day of the Week	Schedule Before Lawsuit (Tr., 154)	Average Tips Before Lawsuit (Tr., 155-156)	Late-August Schedule Change (Tr., 163-64)	New Average tips (not in evidence)	September Schedule Change (Tr., 164-166)	New Average weekly tips (Tr., 169)	October 13 Proposed Schedule Change (Tr., 180-181)	Tips (Cf. 155-156)
Monday	9:00 a.m. – 4:00 p.m. (7 hours)	\$60-70	9:00 a.m. – 2:00 p.m. (5 hours)	-	Off	\$360-380	Off	
Tuesday	9:00 a.m. – 4:00 p.m. (7 hours)	\$60-70	9:00 a.m. – 2:00 p.m. (5 hours)	-	10:00 a.m. – 2:00 p.m. (4 hours)		10:00 a.m. – 2:00 p.m. (4 hours)	No more than \$60-70
Wednesday	9:00 a.m. – 4:00 p.m. (7 hours)	\$65-70	9:00 a.m. – 2:00 p.m. (5 hours)	-	10:00 a.m. – 2:00 p.m. (4 hours)		10:00 a.m. – 2:00 p.m. (4 hours)	No more than \$65-70
Thursday	Off	\$0	Off	-	Off		Off	
Friday	9:00 a.m.-3:00 p.m. (6 hours)	\$65-70	9:00 a.m. – 2:00 p.m. (5 hours)	-	Off		Off	
Saturday	9:00 a.m. – 4:00 p.m. (7 hours)	\$90-100	Unchanged (7 hours)	-	Unchanged (7 hours)		Off	
Sunday	9:00 a.m.-3:00 p.m. (6 hours)	\$90-100	9:00 a.m. – 2:00 p.m. (5 hours)	-	9:00 a.m. – 2:00 p.m. (5 hours)		Off	
Total hours and tips	40 hours per week	\$430-480	32 hours	-	20 hours		8 hours	\$125-140
Pay received from Waverly	\$210 per week (Tr., 154-55)		-		\$125 per week (R. Ex. 1, line 21)		\$60 per week (Tr., 182)	
Total income	\$640-690 per week		-		\$485-505 per week		\$185-200 per week	

TABLE 3: JESUS DELGADO ORIGINAL SCHEDULE AND SCHEDULE CHANGES

Day of the Week	Schedule Before Lawsuit (Tr., 236)	Average Tips Before Lawsuit (Tr., 237 ² , 239)	September Schedule Changes (Tr., 251)	New Average tips (not in evidence)	October Schedule Change (Tr., 252)	New Average weekly tips (Not in evidence)	Second October Schedule Change (Tr., 253; GC Ex. 4)	New average weekly tips (Tr., 239)
Monday	Five days as waiter, one weekday as counterman	\$100-150	Erratic and frequent schedule changes (Tr., 251)		Three days as counterman, one day as waiter	NA	Four days as counterman	\$120-240 (four days at \$30-60 per day)
Tuesday		\$0						
Wednesday		\$100-150						
Thursday		\$30-60						
Friday		\$100-150						
Saturday		\$200-250						
Sunday		\$200-250						
Total hours and tips	72-75 hours per week	\$730-1010	55-62 hours per week				40 hours	\$120-240
Pay received from Waverly	\$200 per week (Tr., 238, 242)						\$210	
Total income	\$930-1210 per week		NA		NA		\$330-450	

² Delgado’s estimation of his tip income during the week appears to be an error. In the transcript, he states a range of \$100-\$250, but based on recollection and a range that is both reasonable and consistent with the \$50 range Delgado gave for weekends (\$200-250), it should read \$100-\$150. Of course, the amount provided in the transcript would provide an even starker disparity with the amounts Delgado earned after the lawsuit and thus an even stronger case of constructive discharge.

TABLE 4: MIGUEL GONZAGA ORIGINAL SCHEDULE AND SCHEDULE CHANGES

Day of the Week	Schedule Before Lawsuit (Tr., 332)	Average Tips Before Lawsuit (Tr., 334-35)	Late August schedule change (Tr., 338-39)	Average Tips	Early September Proposed Change (Tr., 342, 347)	Average Tips (not in evidence)	Schedule upon October 12 return to Waverly (Tr., 354)	Average Tips
Monday	9:00 a.m. – 8:00 p.m. (11 hours)	\$60	Off	\$0	Off	\$0	10:00 a.m. – 6:00 p.m. (8 hours)	\$45-50
Tuesday	Off	\$0	Off	\$0	Off	\$0	Off	\$0
Wednesday	9:00 a.m. – 8:00 p.m. (11 hours)	\$65	Off	\$0	Off	\$0	10:00 a.m. – 6:00 p.m. (8 hours)	\$45-50
Thursday	9:00 a.m. – 8:00 p.m. (11 hours)	\$65	Unchanged (11 hours)	\$65	10:00 a.m. – 6:00 p.m. (8 hours)	NA	10:00 a.m. – 6:00 p.m. (8 hours)	\$45-50
Friday	9:00 a.m. – 8:00 p.m. (11 hours)	\$70	Unchanged (11 hours)	\$70	10:00 a.m. – 6:00 p.m. (8 hours)	NA	10:00 a.m. – 6:00 p.m. (8 hours)	\$50
Saturday	9:00 a.m. – 8:00 p.m. (11 hours)	\$90-100	Unchanged (11 hours)	\$90-100	10:00 a.m. – 6:00 p.m. (8 hours)	NA	9:00 a.m. – 8:00 p.m. (11 hours)	\$90-100
Sunday	9:00 a.m. – 8:00 p.m. (11 hours)	\$90-100	Unchanged (11 hours)	\$90-100	10:00 a.m. – 6:00 p.m. (8 hours)	NA	9:00 a.m. – 8:00 p.m. (11 hours)	\$90-100
Total hours and tips	66 hours per week	\$440-\$460	44 hours per week	\$315-335	32 hours	NA	54 hours per week	\$365-400
Pay received from Waverly	\$150 per week (Tr., 332)		\$130 per week (Tr., 339)		Not in evidence		\$180 per week (Tr., 355)	
Total income	\$590-610 per week		\$445-465 per week		Not in evidence		\$545-\$580 per week	

CERTIFICATE OF SERVICE

This is to certify that on August 22, 2016, I caused the foregoing GENERAL COUNSEL'S POST-TRIAL BRIEF TO THE ADMINISTRATIVE LAW JUDGE to be served, via electronic mail, addressed as follows:

John Mitchell
Mitchell & Incantalupo, Esqs.
98-20 Metropolitan Ave.
New York, NY 11375
Email: jmitchell@miatty.com

Arthur H. Forman, Attorney at Law
98-20 Metropolitan Avenue
Forest Hills, NY 11375
Email: af@ahforman.com

Vivianna Morales
Pechman Law Group PLLC
488 Madison Avenue, 11th Floor
New York, NY 10022
Email: morales@pechmanlaw.com

Louis Pechman
Pechman Law Group PLLC
488 Madison Avenue, 11th Floor
New York, NY 10022
Email: pechman@pechmanlaw.com

____s/ Julie R. Ulmet_____
Julie R. Ulmet
Counsel for the General Counsel

Dated this 22nd day of August, 2016