

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

CORDUA RESTAURANTS, INC.	§	
	§	
and	§	
	§	
STEVEN RAMIREZ, an Individual,	§	Case 16-CA-160901
	§	
and	§	
	§	
ROGELIO MORALES, an Individual	§	Case 16-CA-161380
	§	
and	§	
	§	
SHEARONE LEWIS, an Individual	§	Case 16-CA-170940
	§	Case 16-CA-173451

**CORDUA RESTAURANTS, INC.'S
EXCEPTIONS BRIEF TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondent Cordua Restaurants, Inc. files this Brief to its Exceptions to the Decision of the Administrative Law Judge ("ALJ").

CERTIFICATE OF SERVICE

I do hereby certify that on January 6, 2017, I caused a copy of the foregoing to be served upon the following parties:

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TABLE OF AUTHORITIES

Cases

2 Sisters Food Group, 357 NLRB No. 168 (Dec. 29, 2011) 11

Airport Distributors, 280 NLRB 1144 (N.L.R.B. 1986) 39

Alaska Pulp Corp., 326 NLRB No. 59 (N.L.R.B. 1998)..... 5

Alternative Entm't, Inc. & James Decommer, 363 NLRB No. 131 (N.L.R.B. Feb. 22, 2016)47, 48

Am. Express. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013)..... 14

Andronaco Inc., d/b/a Andronaco Industries, 364 NLRB No. 142 (2016) 46, 47, 48, 49

Ark Las Vegas Rest. Corp. v. N.L.R.B., 334 F.3d 99 (D.C. Cir. 2003)..... 29

Asarco, Inc. v. N.L.R.B., 86 F.3d 1401 (5th Cir. 1996) 21, 48

Bethel Home, Inc., 275 NLRB 154 (N.L.R.B. 1985)..... 31, 32

Birch Run Welding, 286 NLRB 1316 (N.L.R.B. 1987)..... 6

Bullock's, 251 NLRB 425 (N.L.R.B. 1980)..... 21, 23

Component Bar Products, Inc. & James R. Stout, 364 NLRB No. 140 (N.L.R.B. Nov. 8, 2016)10

Consol. Biscuit Co. & Bakery, Confectionary, Tobacco Workers & Grain Millers Int'l Union,
Afl-Cio, Clc, 346 NLRB 1175 (N.L.R.B. 2006) 30

Consol. Printers, Inc. & Graphic Communications Union, Local No. 583, Graphic
Communications Intern. Union, Afl-Cio, 305 NLRB 1061 (N.L.R.B. 1992)..... 9

D.C. Liquor Wholesalers, 292 NLRB 1234 (N.L.R.B. 1989) 40

D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344 (5th Cir. 2013)..... 14

Davis Wholesale Co., Inc., 165 NLRB 271 (N.L.R.B. 1967)..... 24

Delco-Remy Div., Gen. Motors Corp. v. N.L.R.B., 596 F.2d 1295 (5th Cir. 1979)..... 16, 27

<i>Dickerson-Chapman, Inc. & Intern. Union of Operating Engineers</i> , 313 NLRB 907 (N.L.R.B. 1994)	32
<i>Elite Ambulance Inc. & Int'l Ass'n of Emts & Paramedics (Iaep)/nage/seiu Local 5000</i> , 31-CA-122353, 2015 WL 9459716 (N.L.R.B. Div. of Judges Dec. 23, 2015)	29
<i>Fresenius Usa Mfg., Inc.</i> , 362 NLRB No. 130 (N.L.R.B. June 24, 2015).....	24
<i>Gayston Corp.</i> , 265 NLRB 1 (N.L.R.B. 1982).....	40
<i>H.C. Thomson</i> , 230 NLRB 808 (1977).....	34
<i>Hanson Material Serv. Corp. & Int'l Union of Operating Engineers, Local 150, Afl-Cio Hanson Material Serv. Corp. & Laborers Int'l Union of N. Am., Local 681, Petitioner & Int'l Union of Operating Engineers, Local 150, Afl-Cio, Petitioner</i> , 353 NLRB 71 (N.L.R.B. 2008).....	40
<i>Harvey Aluminum, Inc.</i> , 142 NLRB 1041 (N.L.R.B. 1963)	39
<i>Holiday Inn Rest. & Country Squire Rest.</i> , 172 NLRB 1384 (N.L.R.B. 1968).....	37
<i>Horizon Contract Glazing, Inc. & Dist. Council of Painters No. 16, Glaziers, Architectural Metal & Glass Workers Local Union No. 767, Int'l Union of Painters & Allied Trades, Afl-Cio</i> , 353 NLRB 136 (N.L.R.B. 2008).....	5, 6
<i>Hosp. Cristo Redentor, Inc. v. N.L.R.B.</i> , 488 F.3d 513 (1st Cir. 2007)	29
<i>Huckabay v. Moore</i> , 142 F.3d 233 (5th Cir. 1998).....	46
<i>In Re Desert Pines Golf Club</i> , 334 NLRB 265 (N.L.R.B. 2001).....	29
<i>In Re Exxon Mobil Corp.</i> , 13-CA-40976, 2003 WL 23100908 (N.L.R.B. Div. of Judges Dec. 24, 2003)	26
<i>In Re Sodexho Marriott Services, Inc.</i> , 335 NLRB 538 (N.L.R.B. 2001)	24
<i>Ingalls Steel Construction Co.</i> , 126 NLRB 584 (1960).....	36, 37, 41
<i>J.-H. Rutter-Rex Mfg. Co.</i> , 206 NLRB 656 (N.L.R.B. 1973)	16

<i>K & M Elecs.</i> , 283 NLRB 279 (N.L.R.B. 1987).....	49
<i>Kaye-Smith Enterprises</i> , 211 NLRB 1034 (N.L.R.B. 1974)	37
<i>Leath v. Am. Med. Intern. Inc.</i> , 125 F.3d 852 (5th Cir. 1997)	15
<i>Mccotter Motors Co.</i> , 291 NLRB 764 (N.L.R.B. 1988).....	22, 23
<i>MECO Corp. v. N.L.R.B.</i> , 986 F.2d 1434 (D.C. Cir. 1993).....	30
<i>Megan Sweitzer, William Maher & Denise Maher, Individuals & Owners of Retro Fitness & Pa Fit LLC & Michelle Kraus, an Individual</i> , 04-CA-139626, 2015 WL 3826821 (N.L.R.B. Div. of Judges June 19, 2015).....	18
<i>Michael Cetta, Inc. d/b/a Sparks Rest. & United Food & Commercial Workers Local 342</i> , 2-CA- 142626, 2016 WL 6833430 (N.L.R.B. Div. of Judges Nov. 18, 2016).....	19
<i>Midnight Rose Hotel & Casino, Inc.</i> , 343 NLRB 1003 (N.L.R.B. 2004).....	20
<i>Murphy Oil USA, Inc.</i> , 361 NLRB No. 72, 2014 WL 5465454 (N.L.R.B. Oct. 28, 2014)	14, 15
<i>N.L.R.B. v. Brookshire Grocery Co.</i> , 919 F.2d 359 (5th Cir. 1990).....	passim
<i>N.L.R.B. v. Saint Vincent's Hosp.</i> , 729 F.2d 730 (11th Cir. 1984).....	40
<i>New York Post Corp.</i> , 283 NLRB 430 (N.L.R.B. 1987).....	9
<i>Niswander v. Cincinnati Ins. Co.</i> , 529 F.3d 714 (6th Cir. 2008).....	25
<i>NLRB v. Esco Elevators, Inc.</i> , 736 F.2d 295 (5th Cir. 1984).....	31
<i>Nu Dawn Homes</i> , 289 NLRB 554 (N.L.R.B. 1988)	47, 48
<i>O'Day v. McDonnell Douglas Helicopter Co.</i> , 79 F.3d 756 (9th Cir. 1996).....	26
<i>Overnite Transp. Co.</i> , 336 NLRB 387 (N.L.R.B. 2001).....	42
<i>Overnite Transportation Co.</i> , 245 NLRB 423 fn. 1(1979).....	22
<i>Ozburn-Hessey Logistics, LLC v. N.L.R.B.</i> , 609 Fed. Appx. 656 (D.C. Cir. 2015).....	49
<i>Patio Foods v. N. L. R. B.</i> , 415 F.2d 1001 (5th Cir. 1969).....	10

<i>Quinlan v. Curtiss-Wright Corp.</i> , 8 A.3d 209 (N.J. 2010)	25
<i>Reef Indus., Inc. v. N.L.R.B.</i> , 952 F.2d 830 (5th Cir. 1991).....	17, 24, 26
<i>Roadway Exp.</i> , 271 NLRB 1238 (N.L.R.B. 1984)	26
<i>Stagehands Referral Serv., LLC</i> , 347 NLRB 1167 (N.L.R.B. 2006).....	8, 9
<i>Stannah Stairlifts, Inc. & Local 4</i> , 324 NLRB 914 (N.L.R.B. 1997)	37
<i>Taxman v. Bd. of Educ. of Tp. of Piscataway</i> , 91 F.3d 1547 (3d Cir. 1996)	48
<i>Tennessee Packers, Inc.</i> , 153 NLRB 1411 (N.L.R.B. 1965)	32
<i>The Fund for the Pub. Interest & Communications Workers of Am., Local 7901, Afl-Cio</i> , 360 NLRB No. 110 (N.L.R.B. 2014).....	6
<i>The New York Hosp. Med. Ctr. of Queens, Respondent & Paris Young, an Individual</i> , 29-CA- 136515, 2015 WL 9592399 (N.L.R.B. Div. of Judges Dec. 31, 2015)	30
<i>Tradesmen International</i> , in which a rule prohibiting “disloyal, disruptive, competitive, or damaging conduct” was upheld. 338 NLRB 460 (N.L.R.B. 2002)	10, 12
<i>Uniform Rental Serv., Inc.</i> , 161 N.L.R.B. 187 (1966)	31
<i>Universal Truss, Inc., A Div. of Universal Forest Products, Inc. & Cabinet Makers, Millmen & Indus. Carpenters, Local 721</i> , 348 NLRB 733 (N.L.R.B. 2006)	50
<i>Vilter Mfg. Corp.</i> , 271 N.L.R.B. 1544 (1988)	31
<i>W.R. Grace Co.</i> , 240 NLRB 813 (N.L.R.B. 1979).....	21, 23, 25, 27
<i>Wal-Mart Stores, Inc.</i> , Cases 16-CA-20298 and 16-CA-20321, 2001 WL 34050879 (Jan. 19, 2001)	19
<i>Whole Foods Market</i> , 363 NLRB No. 87	13
<i>Williams Contracting</i> , 309 NLRB 433 (N.L.R.B. 1992)	39

Windsor Redding Care Ctr., LLC & Seiu United Serv. Workers-W., Ctw, Clc, JD(SF)-60-12,
2012 WL 6755118 (N.L.R.B. Div. of Judges Dec. 31, 2012) 18

Statutes
Immigration and Nationality Act, 8 U.S.C. § 1324b 45

Other Authorities
Memorandum GC 15-04, Office of the General Counsel, March 18, 2015 10
NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (Feb. 2016) 21

Rules
NLRB Rules and Regulations, Sec. 102.45(b) 6

SUBJECT INDEX

I. Amendments 5
A. The ALJ erred in striking Respondent’s Post-Hearing Brief Exhibits 5
B. The ALJ erred in finding “[Respondent] declined to enter any relevant portions into evidence.” 7
C. The ALJ erred in finding “these amendments are properly included in this proceeding.”
8

II. Policies 9
A. The ALJ erred in finding Respondent’s policy barring “disruptive” and “non-productive” conduct unlawful. 9
B. The ALJ erred in finding Respondent’s solicitation rule violates Section 8(a)(1) of the Act. 10
C. The ALJ erred in finding “the rule limits leaving at any time, which employees reasonably would construe to prohibit Section 7 activity.” 11
D. The ALJ erred in finding unlawful Respondent’s policy prohibiting acts of dishonesty bringing the company into disrepute. 11
E. The ALJ erred in finding Respondent’s “Violence in the Workplace” policy unlawful. .. 12
F. The ALJ erred in finding Respondent’s media relations policy unlawful. 12
G. The ALJ erred in finding Respondent’s “Cellular Telephones/Pagers” policy unlawful.
13
H. The ALJ erred in finding Respondent’s arbitration agreement unlawful..... 14

III. Claimant Steven Ramirez 15

A.	The ALJ erred in stating Quinonez had possession of emails between Reichman and Ambroa, none of which were presented at hearing.	15
B.	The ALJ erred in discrediting Espinoza’s testimony due to allegedly being asked leading questions and allegedly being asked to speculate.....	15
C.	The ALJ erred in concluding the investigation of Ramirez was a sham investigation which did not provide Ramirez an adequate opportunity to tell the truth and did not support Respondent’s conclusions.	16
D.	The ALJ erred in taking an adverse inference from Respondent’s decision not to call Reichman in its case in chief or engage with her during its investigation of Ramirez.	18
E.	The ALJ erred in holding Respondent did not have a reasonable belief Ramirez engaged in, or tried to engage in, theft of information.	19
1.	The ALJ erred in failing to make a credibility finding regarding whether the text messages were from Steven Ramirez, and in failing to credit Respondent’s witnesses who had contact with the text message chain between Reichman and Ramirez, when Ramirez admitted he sent the text messages.	20
F.	The ALJ erred in holding Respondent did not demonstrate sufficient evidence Ramirez was treated similarly to other employees.	20
G.	The ALJ erred in crediting Ramirez’s testimony when he committed perjury and was internally inconsistent.	22
1.	The ALJ erred in crediting Ramirez’s claim that he only requested his own pay records from Reichman.	23
H.	The ALJ erred in finding Respondent’s discharge of Ramirez pretextual, and in failing to find Ramirez was terminated for a lawful reason unrelated to any protected activity.....	24
I.	The ALJ erred in failing to find Ramirez’s lawsuit was not a motivating factor in his termination.	27
J.	The ALJ erred in finding animus on Respondent’s part toward Ramirez.	27
K.	The ALJ erred in finding a causal link between any alleged animus of Respondent and Ramirez’s termination.	30
L.	The ALJ erred in ordering reinstatement and back pay to Ramirez.	31
IV.	Claimant Rogelio Morales	31
A.	The ALJ erred in crediting Morales’s version of the facts over a disinterested witness.....	31
B.	The ALJ erred in holding that LeBlanc’s testimony was internally inconsistent.	32
1.	The ALJ incorrectly stated LeBlanc said she would not drink more than 1.5 mimosas, yet she finished two.	32
2.	The ALJ incorrectly stated LeBlanc said she was so upset she could not eat, yet she finished her lunch.	33

3. The ALJ incorrectly stated LeBlanc was not consistent with what she told Assistant Manager Lopez.	33
C. The ALJ erred in failing to credit LeBlanc’s testimony that Morales high fived and egged on the offending server.	34
V. Alex Nguyen	35
A. The ALJ erred in finding Alex Nguyen’s statement during a December 2015 pre-shift meeting coercive.	35
VI. Claimant Shearone Lewis	36
A. The ALJ erred in finding Ambroa did not testify Lewis’s floor map represented a fair table assignment.	36
B. The ALJ erred in discrediting every witness who testified about Lewis’s misconduct.	36
C. The ALJ erred in finding statements taken by Quinonez did not support the allegations or contradicted the testimony.	38
D. The ALJ erred in discrediting Daniel Perez’s testimony.	40
E. The ALJ erred in discrediting Lucy Kline’s testimony.	41
F. The ALJ erred in finding the March 2016 investigation did not reveal Lewis cursed and subsequently concluding it was unlikely Lewis had ever cursed in 2013.....	42
G. The ALJ erred in questioning the date of Respondent’s Exhibit 6.	42
H. The ALJ erred in finding Respondent’s Exhibit 7 does not accurately reflect the incident in question.	43
I. The ALJ erred in discrediting Quinonez’s testimony that she told Lewis she was being given one last chance in December 2015.	44
J. The ALJ erred in finding Hofmann was a current employee testifying against pecuniary interests.....	44
K. The ALJ erred in finding “The evidence from [the March 2016 investigation] is non-specific” and “the complaints about Lewis’s behavior do not say when they occurred.”	45
L. The ALJ erred in finding Respondent tolerated Lewis’s misconduct, this “toleration” supported a finding of animus, and ordering reinstatement and backpay.	46
M. The ALJ erred in finding Respondent did not conduct a meaningful investigation or give Lewis a chance to explain her misconduct.....	49

STATEMENT OF THE CASE

Respondent Cordua Restaurants, Inc. (“Cordua”) operates nine South American themed restaurants in the Houston area. The relevant restaurants in this case include Churrascos River Oaks, Churrascos Sugar Land, and Artista.¹

Cordua employs roughly 720 employees.² In January 2015, Charging Party Steven Ramirez filed a Fair Labor Standards Act (“FLSA”) lawsuit against Cordua.³ At the time of hearing, twenty-seven employees had joined the lawsuit.⁴ Of those twenty-seven employees and the 720 employed by Cordua, only three brought unfair labor practice charges against Cordua after being terminated for violations of Cordua’s employment policy. The Charging Parties are Rogelio Morales, Steven Ramirez, and Shearone Lewis.

Each of their terminations was based on independent misconduct. First, Morales was terminated for engaging in an inappropriate sexual conversation with a coworker in the presence of a customer. The ALJ correctly held Morales’s termination was lawful, although she incorrectly credited his version of events rather than the disinterested customer’s testimony. Second, Ramirez was terminated because he attempted to steal company documents and lied (twice) to a supervisor about this when questioned. Despite his untruthfulness while employed by Cordua and the fact Ramirez committed perjury at the hearing, the ALJ incorrectly held Ramirez was not lawfully terminated. Third, Lewis engaged in repeated insubordination and, although given many opportunities, did not improve her behavior. Lewis disrespected, harassed, screamed at, and demeaned coworkers based on their national origin, race, and English speaking ability—this unacceptable behavior was the basis of her termination. The ALJ incorrectly held Lewis was not

¹ Hr’g Tr. vol. 4, 1002:16-19, Jun. 30, 2016. River Oaks and Sugar Land denote the location within the Houston area.

² Hr’g Tr. vol. 2, 402:9-13, Jun. 28, 2016; Hr’g Tr. 1005:17-19.

³ GC Exhibit 2.

⁴ *Id.*

lawfully terminated.

Additionally, the ALJ incorrectly held the arbitration agreement Cordua maintains is not lawful. The arbitration agreement meets the requirements under legal precedent in the Fifth Circuit, where Cordua would appeal an unfavorable ruling, because it expressly states it does not preclude an employee's Section 7 rights or prevent an employee from filing a claim with the National Labor Relations Board.

Finally, General Counsel waited until the last day of the hearing—after both cases in chief had rested—to surprise Cordua with numerous last minute amendments regarding Cordua's handbook policies. The ALJ should not have permitted these amendments because there is surprise and lack of notice, there is no valid excuse for the delay in moving to amend, and the matters were not fully litigated. Additionally, the General Counsel selectively chose fragments of policies, sometimes only single words, without reading them in context. When read in context, the policies are lawful under Board precedent and guidance.

SPECIFICATION OF THE QUESTIONS INVOLVED

I. Amendments

1. Whether the ALJ erred in striking Respondent's extra-record exhibits.
2. Whether the ALJ erred in finding Respondent failed to enter any portion of its employee handbook into evidence.
3. Whether the ALJ erred in allowing General Counsel to amend numerous new charges after Respondent had rested its case and without explaining its several month delay.

II. Policies

1. Whether the ALJ erred in finding Respondent's policy barring disruptive and non-productive conduct is unlawful.
2. Whether the ALJ erred in finding Respondent's solicitation policy is unlawful.
3. Whether the ALJ erred in finding Respondent's rule prohibiting employees from leaving company premises during their shift is unlawful.

4. Whether the ALJ erred in finding Respondent's policy prohibiting acts of dishonesty and similar acts that would bring the company into disrepute is unlawful.
5. Whether the ALJ erred in finding Respondent's detailed "Violence in the Workplace" policy is unlawful because of the single word "arguing."
6. Whether the ALJ erred in finding Respondent's media relations policy is unlawful.
7. Whether the ALJ erred in finding Respondent's "Cellular Telephones/Pagers" policy is unlawful.
8. Whether the ALJ erred in finding Respondent's arbitration agreement unlawful.

III. Claimant Steven Ramirez

1. Whether the ALJ erred in stating Quinonez had possession of emails between Reichman and Ambroa, none of which were presented at hearing.
2. Whether the ALJ erred in discrediting Espinoza's testimony due to allegedly being asked leading questions and allegedly being asked to speculate.
3. Whether the ALJ erred in concluding the investigation of Ramirez was a sham investigation which did not provide Ramirez an adequate opportunity to tell the truth and did not support Respondent's conclusions.
4. Whether the ALJ erred in taking an adverse inference from Respondent's decision not to call Reichman in its case in chief or engage with her during its investigation of Ramirez.
5. Whether the ALJ erred in holding Respondent did not have a reasonable belief Ramirez engaged in, or tried to engage in, theft of information.
 - 5a. Whether the ALJ erred in failing to make a credibility finding regarding whether the text messages were from Claimant Steven Ramirez, and in failing to credit Respondent's witnesses who had contact with the text message chain between Reichman and Ramirez, when Ramirez admitted he sent the text messages.
6. Whether the ALJ erred in holding Respondent did not demonstrate sufficient evidence Ramirez was treated similarly to other employees.
7. Whether the ALJ erred in crediting Ramirez's testimony when he committed perjury and was internally inconsistent.
 - 7a. Whether the ALJ erred in crediting Ramirez's claim he only requested his own pay records from Reichman.
8. Whether the ALJ erred in finding Respondent's discharge of Ramirez pretextual, and in failing to find Ramirez was terminated for a lawful reason unrelated to any protected activity.
9. Whether the ALJ erred in failing to find Ramirez's lawsuit was not a motivating factor in

his termination.

10. Whether the ALJ erred in failing to find a lack of animus on Respondent's part toward Ramirez.
11. Whether the ALJ erred in finding a causal link between any alleged animus of Respondent and Ramirez's termination.
12. Whether the ALJ erred in ordering reinstatement and back pay to Ramirez.

IV. Claimant Rogelio Morales

1. Whether the ALJ erred in crediting Morales's version of the facts over a disinterested witness.
2. Whether the ALJ erred in holding LeBlanc's testimony was internally inconsistent.
3. Whether the ALJ erred in failing to credit LeBlanc's testimony that Morales high fived and egged on the offending server.

V. Alex Nguyen

1. Whether the ALJ erred in finding Alex Nguyen's statement during a December 2015 pre-shift meeting coercive.

VI. Claimant Shearone Lewis

1. Whether the ALJ erred in stating Ambroa did not state Lewis received a fair assignment for the floor map Lewis provided.
2. Whether the ALJ erred in finding all witnesses testifying about Lewis' conduct demonstrated personal hostility towards Lewis and discrediting their testimony.
3. Whether the ALJ erred in finding the statements taken by Patricia Quinonez did not support the allegations or contradicted the testimony.
4. Whether the ALJ erred in discrediting the testimony of Daniel Perez.
5. Whether the ALJ erred in discrediting Lucy Kline's testimony.
6. Whether the ALJ erred in concluding the March 2016 investigation did not reveal Lewis cursed and subsequently concluding, based solely on the March 2016 investigation, Lewis could not have cursed in 2013.
7. Whether the ALJ erred in questioning the date of Respondent's Exhibit 6.
8. Whether the ALJ erred in finding Respondent's Exhibit 7 does not accurately reflect the incident in question.
9. Whether the ALJ erred in discrediting Quinonez's testimony she told Lewis she was being

given one last chance in December 2015.

10. Whether the ALJ erred in finding Hofmann was a current employee testifying against pecuniary interests.
11. Whether the ALJ erred in finding the March 2016 investigation was “non-specific” and did not say when Lewis’s misconduct occurred.
12. Whether the ALJ erred in finding Respondent tolerated the misconduct Lewis was terminated for and finding the toleration supported a finding of animus.
13. Whether the ALJ erred in finding Respondent did not conduct a meaningful investigation or give Lewis a chance to explain her misconduct.

ARGUMENT

I. Amendments

A. The ALJ erred in striking Respondent’s Post-Hearing Brief Exhibits.

The ALJ erred in striking Exhibits A, B, and C of Respondent’s Post-Hearing Brief.⁵ The ALJ concludes Respondent should have moved to reopen the record and add these documents. However, there is no blanket prohibition on extra-record evidence.

The ALJ states Respondent misplaces reliance on its case law, but she misinterprets the decisions. For instance, in *Horizon Contract Glazing, Inc. & Dist. Council of Painters No. 16, Glaziers, Architectural Metal & Glass Workers Local Union No. 767, Int’l Union of Painters & Allied Trades, Afl-Cio*, 353 NLRB 136 (N.L.R.B. 2008), the Board denied a motion to strike where challenged statements were “in the nature of arguments based either on record evidence, the judge’s decision, or reasonable interpretations of record evidence.” *Id.* at fn. 2. That case was based upon the decision in *Alaska Pulp Corp.*, 326 NLRB No. 59 (N.L.R.B. 1998), where the Board denied a motion to strike because the “record reasonably supports the factual assertions that the Respondent seeks to strike.” *Id.* at fn. 1.

The ALJ also incorrectly credits the General Counsel (“GC”)’s cases, such as *The Fund*

⁵ Decision, JD-117-16, page 5.

for the Pub. Interest & Communications Workers of Am., Local 7901, Afl-Cio, 360 NLRB No. 110 (N.L.R.B. 2014), which held a motion to strike portions of an **exceptions** brief is proper when the exceptions brief contains “facts not in evidence in support of Respondent’s arguments.”⁶ It did not discuss using extra-record exhibits containing the same facts.

Further, the ALJ incorrectly credits the GC’s use of *Birch Run Welding*, 286 NLRB 1316 (N.L.R.B. 1987), enforcement granted sub nom. *N.L.R.B. v. Birch Run Welding & Fabricating, Inc.*, 860 F.2d 1080 (6th Cir. 1988), which cited the Board’s Rules and Regulations Sec. 102.45(b) finding evidence not contained in the record was inadmissible. However, Sec. 102.45(b) expressly states “[t]he charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, . . . answer and any amendments thereto” and “the stenographic report of the hearing” are included in “the record in the case.”⁷

Here, all of the challenged exhibits are admissible under Board decisions and the Board’s own Rules and Regulations. Respondent’s Exhibit A is an e-mail sent by GC after the close of the hearing.⁸ It contains the notes GC read verbatim into the record. It is misguided to argue the e-mail sent by GC, by order of the ALJ, memorializing the exact statements read into the record, does not contain the same information already in the record. *See Horizon Contract Glazing, Inc. & Dist. Council of Painters No. 16, Glaziers, Architectural Metal & Glass Workers Local Union No. 767, Int’l Union of Painters & Allied Trades, Afl-Cio*, 353 NLRB 136 (N.L.R.B. 2008).

Respondent’s Exhibit B is the Regional Director’s notice to Respondent that certain charges had been withdrawn from Case 16-CA-160901 prior to hearing.⁹ Sec. 102.45(b) states all

⁶ *Id.* at 2.

⁷ NLRB Rules and Regulations, Sec. 102.45(b).

⁸ Counsel for the General Counsel’s Motion to Strike Extra-Record Exhibits, at 2; Respondent’s Post-Hearing Brief, Ex. A.

⁹ Respondent’s Post-Hearing Brief, Ex. B.

versions of the charge and complaint, including amendments and later versions, constitutes the record. Respondent's Exhibit B should exist in the record or, at minimum, contains the same information as the prior versions of the charge and complaint in the record. Finally, Respondent's Exhibit C contains Respondent's Statement of Position relating to the charges alleged on behalf of Steven Ramirez, Case 16-CA-160901.¹⁰ As the Board's rules require all answers and amendments to constitute the record, Exhibit C is already part of the record and should be considered.

Importantly, the ALJ during the hearing made it clear there would be nothing discussed at the hearing regarding proposed amendments. When the GC proposed amendments, the ALJ stated "[b]efore Respondent jumps up and down, this is what I'd like to do. I would like to have briefs on whether the amendments are appropriate."¹¹ When Respondent attempted to articulate its position on the record, the ALJ refused, stating, "I want to see it in writing in the briefs."¹² The ALJ refused any discussion of the amendments at the hearing, and then concluded that because Respondent's Exhibits were not in the record, they cannot be used in the briefing she herself requested regarding whether the amendments were proper. The ALJ has created a "Catch-22" scenario where she denied Respondent any opportunity to respond during the hearing and demanded a brief instead, but has now refused to allow anything not in the record to be included in Respondent's brief.

Regardless, all three exhibits clearly contain the same information already in the record. As such, the ALJ erred by striking them.

B. The ALJ erred in finding "[Respondent] declined to enter any relevant portions into evidence."

The ALJ erred in finding Respondent declined to enter "any relevant portions" of its

¹⁰ Respondent's Post-Hearing Brief, Ex. C.

¹¹ Hr'g Tr. 1214:12-15.

¹² Hr'g Tr. 1215:11-12.

Employee Handbook into evidence.¹³ Respondent entered relevant portions of the handbook in two exhibits.¹⁴ These exhibits contain the policies on immediate termination offenses, EEO, arbitration policies, corrective/preventive, standards of conduct, prohibited conduct, employee theft, confidentiality of personnel files and the proper way for employees to request review of their personnel file, harassment and sexual harassment, and violence at the workplace.¹⁵ The excerpts entered into evidence by Respondent cover the terminations of Morales,¹⁶ Ramirez,¹⁷ and Lewis.¹⁸ Specifically, when questioned about why Respondent entered in only the sampled sections, Respondent's counsel explained it entered the "excerpts of the policy relevant to this case."¹⁹

C. The ALJ erred in finding "these amendments are properly included in this proceeding."

The ALJ erred in finding the handbook amendments were properly included in the proceeding.²⁰ The ALJ cites to *Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1171 (N.L.R.B. 2006), for the three criteria: (1) whether there was surprise or lack of notice; (2) whether General Counsel offered a valid excuse for its delay in moving to amend; and (3) whether the matter was fully litigated. However, the ALJ misapplied the case law and record.

In concluding Respondent cannot claim surprise, the ALJ claims Respondent admitted fault would be found with the rules. This is not the case. Although Respondent's counsel stated in an offhand remark he believed GC would seek to find fault in the handbook, he offered to produce

¹³ Decision, JD-117-16, page 6.

¹⁴ Respondent's Exhibits 3, 15.

¹⁵ Respondent's Exhibit 15, at 1475 – 1482.

¹⁶ Morales was terminated, in part, for violating Cordua's standards of conduct, including verbal discussions of planned and actual sexual assault in front of customers.

¹⁷ Ramirez was terminated, in part, for attempted theft of other employee's confidential personnel files without their permission.

¹⁸ Lewis was terminated, in part, for racial harassment and discrimination of her co-workers.

¹⁹ Hr'g Tr. 745:1.

²⁰ Decision, JD-117-16, page 7.

it.²¹ However, GC had failed to subpoena the handbook and Respondent was not required to produce it.

Moreover, GC never explained the delay in amending. The ALJ concluded during the hearing GC “obviously had [the handbook] from whatever source” prior to the hearing and stated “it would be my understanding, based on my understanding of investigations in the NLRB, is that [GC has] already looked at this handbook.”²² Despite the ALJ concluding and even reassuring Respondent at the hearing GC had already reviewed the handbook, GC amended in the final minutes of the hearing, after Respondent had rested. The ALJ’s decision did not consider GC’s failure to timely amend.

As the Board noted in *Stagehands*, the Board will deny an amendment when GC does not explain the delay.²³ In *Consol. Printers, Inc.*, the Board rejected a last-minute amendment where GC had waited until the last minute to amend, after Respondent had cross-examined witnesses and after the “entire trial record had been made and the hearing was to be closed.” 305 NLRB at 1064. In *New York Post Corp.*, the Board rejected last-minute amendments because the Board’s Rules and Regulations permit amendments only “upon such terms as may be deemed just.” 283 NLRB at 431. GC offered no reasoning as to why it withheld the amendments until the close of the hearing, despite having the handbook through other means prior to the hearing.

II. Policies

A. The ALJ erred in finding Respondent’s policy barring “disruptive” and “non-

²¹ Hr’g Tr. 745:13-14.

²² Hr’g Tr. 1064:10-11, 18-20.

²³ See also *Consol. Printers, Inc. & Graphic Communications Union, Local No. 583, Graphic Communications Intern. Union, Afl-Cio*, 305 NLRB 1061, 1064 (N.L.R.B. 1992) (“It may not be glibly assumed that Respondent counsel’s handling of Respondent’s case would have been unchanged had he been aware of the potential new allegations. Nor may it fairly be assumed that the provision of an opportunity to defend against the allegation by simply granting the amendment at the conclusion of the record and giving Respondent additional time to prepare and thereafter to submit evidence to meet the new allegations would suffice. A trial record, like life itself, proceeds in one direction only. One may regret but cannot change what is past.”); *New York Post Corp.*, 283 NLRB 430, 432 fn. 3 (N.L.R.B. 1987) (rejecting an amendment when General Counsel waited until the final day of the hearing).

productive” conduct unlawful.

The ALJ erred in finding Respondent’s policy barring “disruptive” and “non-productive” conduct imprecise and therefore facially unlawful.²⁴ An employer is entitled to introduce rules protecting production from disruptions. *See Patio Foods v. N. L. R. B.*, 415 F.2d 1001, 1003-4 (5th Cir. 1969). The ALJ cites to *Component Bar Products, Inc. & James R. Stout*, 364 NLRB No. 140 (N.L.R.B. Nov. 8, 2016) to justify its conclusion. However, *Component Bar* also discusses another case, *Tradesmen International*, in which a rule prohibiting “disloyal, disruptive, competitive, or damaging conduct” was upheld. 338 NLRB 460 (N.L.R.B. 2002).

A rule must be read in context of the rest of the policy and other sections surrounding it. *Tradesmen Intern.*, 338 NLRB at 461. A policy is lawful when it references “illegal acts in restraint of trade and employment” in its examples. *Component Bar*, 364 NLRB No. 140. “[T]he Board has made clear that it will not read rules in isolation.”²⁵ Respondent’s policy specifically references illegal conduct as the type of conduct prohibited. In context, an employee can reasonably determine this policy is meant to discourage similar, egregious and criminal conduct.

B. The ALJ erred in finding Respondent’s solicitation rule violates Section 8(a)(1) of the Act.

The ALJ erred in finding Respondent’s solicitation rule violates Section 8(a)(1) of the Act. An employer can bar solicitation during working time. *Cooper Tire & Rubber Co. v. N.L.R.B.*, 957 F.2d 1245, 1249 (5th Cir. 1992). A policy must be read in context. *Tradesmen Intern.*, 338 NLRB at 461. The ALJ found fault with half of a sentence, taken out of context, in the sixth of twelve bullet points in the policy. Nine of these points, including both immediately preceding and following the one challenged, expressly reference working time, using phrases such as “while

²⁴ Decision, JD-117-16, page 9.

²⁵ Memorandum GC 15-04, Office of the General Counsel, March 18, 2015, at 9.

working” or “while on the clock.”²⁶ Others reference “work performance,” failure to show up to work on time, and violations of safety policies.²⁷ When read in context, this policy is not unlawful, as it is narrowly focused on behaviors during working time.

C. The ALJ erred in finding “the rule limits leaving at any time, which employees reasonably would construe to prohibit Section 7 activity.”

The ALJ erred in finding Respondent’s rule prohibiting employees to leave Company premises during their working time unlawful.²⁸ The ALJ cites to, but misapplies *2 Sisters Food Group*, 357 NLRB No. 168 (Dec. 29, 2011). A rule barring leaving work is only “unlawful if employees reasonably would read them to forbid protected strike actions and walkouts.”²⁹ If the rule does not mention “strikes,” “walkouts,” “disruptions,” or similar language, employees will not interpret this to impede their Section 7 rights and the rule will be upheld as lawful. *Id.* at 2. The ALJ ignores the similarity between *2 Sisters* and the instant case. In *2 Sisters*, the upheld rule prevented “[l]eaving a department or the plant during a working shift without a supervisor’s permission,” which is substantially the same as Respondent’s rule. *Id.* at 3.

D. The ALJ erred in finding unlawful Respondent’s policy prohibiting acts of dishonesty bringing the company into disrepute.

The ALJ erred in finding Respondent’s policy permitting immediate termination of an employee who disparages the company, lies to vendors or customers, engages in fraud, or otherwise commits acts of dishonesty that bring the company into disrepute is unlawful.³⁰ The ALJ again reads the policy out of context. The full sentence ties the “acts which tend to bring the Company into disrepute” with “acts of dishonesty towards the Company, its customers, and other Team Members.” The policy bars acts of dishonesty and other related actions that bring the

²⁶ GC Exhibit 15, at 12.

²⁷ *Id.*

²⁸ Decision, JD-117-16, page 11.

²⁹ Memorandum GC 15-04, at 17.

³⁰ Decision, JD-117-16, page 11.

Company into disrepute. The ALJ considered only the tail end of the sentence. An employee reading the policies would assume the entire sentence should be read together.

E. The ALJ erred in finding Respondent’s “Violence in the Workplace” policy unlawful.

The ALJ erred in finding Respondent’s policies on workplace violence unlawful because it contained the word “arguing.”³¹ Once again the ALJ failed to consider the policy in context. The policy in question follows a five-paragraph policy banning weapons in the workplace. The word “arguing” is part of a “Violence at the Workplace” policy barring many items deemed unlawful by the Board in the Office of General Counsel’s Memorandum GC 15-04 including threats of violence,³² displaying violent symbols,³³ and glaring.³⁴ Moreover, the policy also bans direct threats (providing the example of “I could slit her throat for saying that”), carrying weapons into company property, hitting, shoving, destruction of property, and rape.³⁵ When read in context as Board precedent requires, it is clear an employee would reasonably believe this does not infringe on any Section 7 rights. *See In Re Tradesmen Intern.*, 338 NLRB at 461.

F. The ALJ erred in finding Respondent’s media relations policy unlawful.

The ALJ erred in finding Respondent’s “Media and Press Relations” policy unlawful.³⁶ If a policy is sufficiently limited that an employee would understand the policy bars speaking on behalf of the company rather than speaking on the employee’s own behalf, it is lawful according to the Board’s interpretation.³⁷ The Board has previously held that a policy that specifically cites

³¹ Decision, JD-117-16, page 13.

³² The following policy was found lawful by the Board: “[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.”

³³ The following policy was found lawful by the Board: Any logos or graphics worn by employees “must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.”

³⁴ The following policy was found lawful by the Board: “Making inappropriate gestures, including visual staring.”

³⁵ GC Exhibit 15, at 19.

³⁶ Decision, JD-117-16, page 14.

³⁷ Memorandum GC 15-04, at 13.

to a Company's efforts to "deliver an appropriate message and to avoid giving misinformation in any media inquiry" is a lawful one.³⁸ Likewise, Respondent's policy includes the similar language "in order to ensure accuracy" and restricts the scope of the barred topics to only the Company's business. In no way does Respondent's policy forbid discussion about all topics, nor could it be read to bar discussions regarding labor and employment concerns. Respondent's policy is narrowly focused to prevent employees from speaking on behalf of the Company, following the Board's guidelines on how to structure such a policy. The ALJ erred by failing to consider and follow the Board's guidance and prior holdings.

G. The ALJ erred in finding Respondent's "Cellular Telephones/Pagers" policy unlawful.

The ALJ erred in finding Respondent's "Cellular Telephones/Pagers" policy is unlawful.³⁹ The ALJ does not cite to any case law holding that prohibiting telephones while working is itself unlawful. The ALJ cites *Whole Foods Market*, 363 NLRB No. 87, but the case does not discuss barring telephones. It discusses barring recording. A policy barring photography is only unlawful if it "would reasonably be read to prohibit taking of pictures or recordings on non-work time."⁴⁰ A policy that is appropriately limited is lawful.⁴¹

Respondent's policy is appropriately limited. The policy is narrow in targeting the use of phones and cameras where they would cause a disruption in business operations. An employee who is not working, either through a break or non-work time, would not be covered by such a policy, nor would an employee reasonably read the policy to cover such a period. It is therefore lawful under the Board's guidance.

³⁸ *Id.*

³⁹ Decision, JD-117-16, page 14.

⁴⁰ Memorandum GC 15-04, at 15.

⁴¹ *Id.*

H. The ALJ erred in finding Respondent’s arbitration agreement unlawful.

The ALJ erred in finding Respondent’s arbitration agreement unlawful.⁴² The enforceability of the arbitration clause is governed by the Federal Arbitration Act (“FAA”) rather than the NLRA or any Board decision. The Supreme Court has stated that application of the FAA may only be precluded by another statute if there is a clear “congressional command” to do so. *Am. Express. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 655, 669 (2012)). There is no such command anywhere in the NLRA.

Respondent’s Arbitration Agreement contains a waiver against collective or class actions.⁴³ Although recent Board decisions have found the NLRA takes precedence over the FAA,⁴⁴ the Fifth Circuit has rejected this position. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 362 (5th Cir. 2013) (holding that the NLRA does not take precedence over the FAA regarding arbitration agreements that waive collective and class action involvement). The Fifth Circuit has held there is no clear congressional command in the text of the NLRA, nor can one be inferred in the legislative intent of the act. As the Fifth Circuit is where Respondent would appeal a Board decision finding the arbitration agreement unlawful, its holdings are directly relevant here.⁴⁵

Both Respondent’s prior and current Arbitration Agreements explicitly inform employees they may file charges with the Board regarding any protected right.⁴⁶ “[I]t would be unreasonable for an employee to construe [the arbitration agreement] as prohibiting the filing of Board charges

⁴² Decision, JD-117-16, page 16.

⁴³ GC Exhibit 1(r), paragraph 10(a).

⁴⁴ The Board has found the NLRA takes precedence over the FAA several times in recent years. However, most notable are *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (N.L.R.B. Oct. 28, 2014), at *7; *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, at *16.

⁴⁵ Because Respondent would appeal to the Fifth Circuit, the NLRB is required to adhere to the Fifth Circuit’s rulings. *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1018 (5th Cir. 2015) (“An administrative agency’s need to acquiesce to an earlier circuit court decision when deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit”).

⁴⁶ Joint Exhibit 2, at 2; Joint Exhibit 1.

when the agreement says the opposite.” *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1019 (5th Cir. 2015). The Fifth Circuit has also held it is lawful to condition continued employment on the signing of an arbitration agreement. *Leath v. Am. Med. Intern. Inc.*, 125 F.3d 852 (5th Cir. 1997). Therefore, there was no legal basis for finding either Respondent’s prior or current Arbitration Agreements unenforceable or barred by the NLRA.

III. Claimant Steven Ramirez

A. The ALJ erred in stating Quinonez had possession of emails between Reichman and Ambroa, none of which were presented at hearing.

The ALJ’s Decision stated Quinonez had possession of emails between Reichman and Damian Ambroa (“Ambroa”), none of which were presented at the hearing.⁴⁷ The hearing transcript does not support the finding that Quinonez had possession of emails between Reichman and Ambroa. Instead, Quinonez had possession of *text messages* between Reichman and Ambroa, which *were* presented at the hearing.⁴⁸ Quinonez mistakenly referred to the text messages as emails a few times during her testimony, which may have caused the confusion.⁴⁹ Accordingly, the ALJ erred in finding Quinonez had possession of emails between Reichman and Ambroa that were not presented at the hearing, and the ALJ erred to the extent she used this erroneous finding to support any of her conclusions.

B. The ALJ erred in discrediting Espinoza’s testimony due to allegedly being asked leading questions and allegedly being asked to speculate.

This decision of the ALJ is conclusory and not supported by the evidence. The ALJ fails to identify which questions she believed were leading or speculative, rendering it impossible for Respondent to specifically address any allegedly leading or speculative testimony. Because the

⁴⁷ Decision, JD-117-16, page 22.

⁴⁸ Respondent’s Exhibit 9.

⁴⁹ Hr’g Tr. 391:3-11 (noting (sic) when Quinonez stated “email” instead of text); 397:14-18 (clarifying that Quinonez’s reference to an email was actually to a text).

ALJ fails to identify which testimony she is discrediting and how the discredited testimony affects her conclusions, her decision is conclusory and inadequate and should be rejected. *See Delco-Remy Div., Gen. Motors Corp. v. N.L.R.B.*, 596 F.2d 1295, 1308 (5th Cir. 1979) (finding that ALJ's conclusory credibility choices are not binding).

Additionally, the ALJ cites no case law to support her decision to discredit testimony when the testator was allegedly asked a leading question. Moreover, General Counsel was present to object to questions if she believed they were leading. The fact that the General Counsel did not object implies the questions were not, in fact, leading.

The only case cited by the ALJ on this issue demonstrates she erred in discrediting Espinoza's testimony. The case states a witness's testimony "was so vague and speculative that it warrants no probative value in the light of [another witness's] heretofore credited testimony." *J.-H. Rutter-Rex Mfg. Co.*, 206 NLRB 656, 658 (N.L.R.B. 1973). Espinoza's testimony was not vague, and there is no argument his testimony was vague. Additionally, there is no other "credited testimony" in opposition to Espinoza's testimony. Indeed, the only opposing testimony came from Ramirez, who is not credible because he committed perjury. Ramirez's testimony directly conflicted with the recordings of the interviews between Espinoza and Ramirez, whereas Espinoza did not commit perjury and his testimony was not contradicted by any evidence. Simply put, the evidence does not support the ALJ's credibility determinations with respect to Espinoza.

C. The ALJ erred in concluding the investigation of Ramirez was a sham investigation which did not provide Ramirez an adequate opportunity to tell the truth and did not support Respondent's conclusions.

Ramirez was given two opportunities to tell the truth to his supervisor Fred Espinoza, and chose both times to lie, which he admitted at the hearing.⁵⁰ The ALJ claims Espinoza's questions

⁵⁰ Hr'g Tr. 1185:15-17; 1186:16-23.

were misleading. Her basis for this conclusion is that Espinoza asked Ramirez whether he had text messages “to” Reichman about a flash drive, when the text message actually contained a message “from” Reichman about a flash drive.⁵¹ Implausibly, the ALJ determined Ramirez could not have told the truth when faced with such an allegedly “misleading” question. The ALJ also determined Ramirez could not have verbally told Espinoza the truth merely because Espinoza also asked him to write down the truth. The ALJ further decided that unless Ramirez was presented with the text messages, he could not have told the truth.⁵² There is no evidence to support the ALJ’s conclusion that the investigation was a sham.⁵³ The facts do not demonstrate a sham investigation, and the case law cited by the ALJ does not support her conclusion.

The ALJ cited *Reef Indus., Inc. v. N.L.R.B.* as an example of a sham investigation. 952 F.2d 830, 833 (5th Cir. 1991). In *Reef*, the employer claimed it was unaware the employee engaged in a concerted activity by sending a letter, despite signing the letter with the plural “employees.” *Id.* at 834. The ALJ found the investigation into whether other employees were involved was a sham because “there was insufficient evidence to find that Reef asked any employee other than [the claimant] about the incident.” *Id.* at 835. In this case, the facts are not analogous; Cordua was not trying to determine whether a concerted activity occurred. Instead, Cordua was investigating

⁵¹ Decision, JD-117-16, page 26.

⁵² This objection makes no sense. To determine Ramirez’s honesty, Espinoza provided him the opportunity to tell the truth. Ramirez, who did not know his supervisor possessed text messages to prove the truth, lied. Once Espinoza knew that Ramirez would lie to him, there was no point in showing Ramirez the text messages in order to hear additional lies.

⁵³ The ALJ contradictorily states that Cordua “failed to speak with Ramirez expeditiously” but also states that Cordua couldn’t question Ramirez right away because the computer investigation, which took weeks, was inconclusive. (Decision, JD-117-16, 27, 29.) After receiving the text message evidence, Espinoza asked the IT department to investigate. (Hr’g Tr. 1031:21-1032:23.) It took weeks for the IT department to reach an inconclusive result. (Hr’g Tr. 1033:1-24.) Cordua also consulted with its attorney, to ensure Ramirez was being treated fairly because he was already involved in litigation. (Hr’g Tr. 1033:25-1034:4.) Cordua also offered Ramirez two separate chances to tell the truth. (Respondents’ Exs. 27, 28.) Additionally, Cordua’s HR Director who normally handled investigations was on vacation, and it fell to the extraordinarily busy COO to do so. (Hr’g Tr. 1035:23-1036:25.) The investigation took time because it was thorough; if the investigation had been brief, surely Cordua would be accused of conducting a meaningless investigation. Cordua should not be punished for being thorough.

Ramirez's misconduct. Additionally, Cordua engaged in a full investigation by reviewing text messages from Ramirez and Reichman, requesting its IT department to investigate Ramirez's misconduct, and interviewing Ramirez twice, the only employee who could provide relevant information. *See Megan Sweitzer, William Maher & Denise Maher, Individuals & Owners of Retro Fitness & Pa Fit LLC & Michelle Kraus, an Individual*, 04-CA-139626, 2015 WL 3826821 n. 8 (N.L.R.B. Div. of Judges June 19, 2015) (holding Respondent did a sufficient investigation into allegedly harassing text messages where Respondent reviewed text messages); *Windsor Redding Care Ctr., LLC & Seiu United Serv. Workers-W., Ctw, Clc*, JD(SF)-60-12, 2012 WL 6755118 (N.L.R.B. Div. of Judges Dec. 31, 2012) (holding Respondent did a sufficient investigation by interviewing employee-witnesses, giving employee an opportunity to tell her side of the story, and reviewing seemingly credible evidence of the misconduct).

The ALJ cites no case law holding employees are only capable of telling the truth when presented with all the evidence possessed by the employer. The evidence does not support the ALJ's conclusion that the investigation was a sham. Instead, Cordua reviewed all documented evidence available, requested an investigation by its IT department, and interviewed Ramirez twice. The investigation revealed text messages from a terminated employee which established Ramirez requested confidential information of other employees, and also revealed Ramirez would lie to his supervisor.⁵⁴ For both reasons, the investigation supported Ramirez's termination.

D. The ALJ erred in taking an adverse inference from Respondent's decision not to call Reichman in its case in chief or engage with her during its investigation of Ramirez.

An adverse inference may be taken when a party has relevant evidence *within his control* which he fails to produce. *Subject: Wal-Mart Stores, Inc.*, Cases 16-CA-20298 and 16-CA-20321,

⁵⁴ Respondent's Ex. 9; Hr'g Tr. 1185:15-17; 1186:16-23.

2001 WL 34050879, at *12 n. 42 (Jan. 19, 2001). Reichman was not employed by Respondent during its investigation of Ramirez, and was not employed by Respondent at the time of the hearing.⁵⁵ Therefore, Reichman was not “within Respondent’s control” during its investigation of Ramirez or during the hearing. *See Michael Cetta, Inc. d/b/a Sparks Rest. & United Food & Commercial Workers Local 342*, 2-CA-142626, 2016 WL 6833430 n. 15 (N.L.R.B. Div. of Judges Nov. 18, 2016) (drawing an adverse inference based on restaurant’s failure to call its manager as a witness, noting the manager was still employed by the restaurant at the time of the hearing). Accordingly, the ALJ erred in drawing an adverse inference against Respondent based on any decision to call Reichman in its case in chief or interview her⁵⁶ during its investigation of Ramirez.

E. The ALJ erred in holding Respondent did not have a reasonable belief Ramirez engaged in, or tried to engage in, theft of information.

Respondent possessed text messages from Ramirez discussing storing information on flash drives.⁵⁷ Respondent also possessed text messages from Reichman directly stating Ramirez asked her if she could get other employees’ payrolls and she told him it was illegal.⁵⁸ Respondent evaluated these communications from Reichman as part of its investigation.⁵⁹ Respondent’s IT department was unable to verify whether information had been downloaded from a flash drive.⁶⁰ “[I]n order for an employer to meet its *Wright Line* burden, it does not need to prove that the employee *actually* committed the alleged offense, but must, however, show that it had a *reasonable belief* that the employee committed the offense, and that the employer acted on that belief in taking

⁵⁵ Hr’g Tr. 121:11-20.

⁵⁶ Respondent notes that it did possess communications from Reichman directly stating that Ramirez asked her if she could get other employees’ payrolls and she told him it was illegal. (Respondent’s Ex. 9.) Respondent did evaluate these communications from Reichman as part of its investigation. (Hr’g Tr. 1020:1-1023:14.) It would have been duplicative and difficult to secure additional interviews of Reichman, a terminated employee.

⁵⁷ Respondent’s Exhibit 8.

⁵⁸ Respondent’s Exhibit 9.

⁵⁹ Hr’g Tr. 1020:1-1023:14.

⁶⁰ Hr’g Tr. 1032:9-1033:21.

the adverse employment action against the employee.” *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (N.L.R.B. 2004), *aff’d sub nom. Midnight Rose Hotel & Casino, Inc. v. N.L.R.B.*, 198 Fed. Appx. 752 (10th Cir. 2006). The text messages from Ramirez and Reichman demonstrate Respondent had a reasonable belief Ramirez attempted to steal documents. In *Midnight Rose Hotel*, the claimant did *not* engage in deception (unlike Ramirez, who lied about texting Reichman⁶¹), was not given an opportunity to explain her actions (unlike Ramirez, who was provided two separate opportunities to explain), and there was no investigation (unlike the investigation performed in this case by Respondent). *Id.* The ALJ erred in finding Respondent did not have a reasonable belief Ramirez tried to steal information.

1. The ALJ erred in failing to make a credibility finding regarding whether the text messages were from Steven Ramirez, and in failing to credit Respondent’s witnesses who had contact with the text message chain between Reichman and Ramirez, when Ramirez admitted he sent the text messages.

The ALJ decided to “make no credibility finding on whether the email [sic] was from Ramirez” even though Ramirez admitted at the hearing he was the person in the text message.⁶² The ALJ erred in failing to make a credibility finding, and failing to credit Respondent’s witnesses, where the evidence clearly shows Ramirez sent the text messages and Respondent believed Ramirez sent the text messages.⁶³

F. The ALJ erred in holding Respondent did not demonstrate sufficient evidence Ramirez was treated similarly to other employees.

Board precedent clearly establishes it is reasonable – even expected – for companies to terminate individuals willing to steal information from company files. *See N.L.R.B. v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990) (holding that employer lawfully discharged

⁶¹ Ramirez admitted at the hearing that he lied. Hr’g Tr. 1184:1-1185:17; 1186:16-23.

⁶² Decision, JD-117-16, pages 21.

⁶³ Hr’g Tr. 818:7-819:23; 1184:1-6.

employee after he stole wage information from his supervisor's office); *W.R. Grace Co.*, 240 NLRB 813, 820-21 (N.L.R.B. 1979) (holding that employer lawfully discharged employee for stealing salary information from company files); *Bullock's*, 251 NLRB 425 (N.L.R.B. 1980) (holding that company lawfully discharged employee for wrongfully obtaining employee evaluations). Although it would have been appropriate to terminate Ramirez for attempting to steal *any* information from company files (such as the more innocuous employee evaluations considered in *Bullock's*), Ramirez's misconduct was far more serious: he attempted to steal employee information that included other people's Social Security Numbers.⁶⁴ He also testified he lied to his supervisor about his misconduct.⁶⁵ Termination was appropriate for this offense.⁶⁶ Cordua's policies prohibit theft and dishonesty.⁶⁷

“The [National Labor Relations] Act does not prevent an employer from disciplining an employee for violating established company rules and policies, especially when the discipline is provided in a manner consistent with discipline given for similar conduct in the past.” *Asarco, Inc. v. N.L.R.B.*, 86 F.3d 1401, 1409 (5th Cir. 1996). Cordua's history shows similar prior discipline: other employees who did not engage in protected activity, but did engage in theft or dishonesty, were terminated.⁶⁸ It is Cordua's policy to strictly prohibit theft.⁶⁹ At least four other employees have been terminated for theft.⁷⁰ The ALJ attempts to distinguish the treatment of the other employees by noting that they stole goods or money, rather than information. This distinction is

⁶⁴ Hr'g Tr. 380:5-10; 389:6-23; Respondent's Exhibit 9. The NLRB recognizes the need to keep Social Security Numbers private: its own rules prohibit Regional offices from including Social Security Numbers on any document that is or may become public. NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (Feb. 2016) § 10052.11.

⁶⁵ Hr'g Tr. 1185:15-17; 1186:16-23.

⁶⁶ Hr'g Tr. 403:19-404:4; 397:19-21; Respondent's Exhibit 15.

⁶⁷ Respondent's Exhibit 15.

⁶⁸ Respondent's Exhibit 10; Hr'g Tr. 397:22-403:17.

⁶⁹ Hr'g Tr. 397:19-21.

⁷⁰ Respondent's Exhibit 10; Hr'g Tr. 397:22-403:17.

immaterial. The fact that Ramirez may be the first employee who has tried to steal information is irrelevant; Cordua's policies do not differentiate between stealing money or goods or information. Cordua's policies simply prevent stealing, and employees who steal are terminated. Accordingly, the ALJ erred in holding Respondent did not present sufficient evidence Ramirez was treated similarly to other employees.

G. The ALJ erred in crediting Ramirez's testimony when he committed perjury and was internally inconsistent.

Ramirez demonstrated his dishonesty and willingness to commit perjury multiple times:

- Ramirez testified he gave truthful responses to Espinoza during the first interview in relation to questions regarding communications with Reichman.⁷¹ He later admitted – only after being confronted with the text messages revealing his lies – he did not give truthful responses.⁷² As such, his original testimony was perjury.
- Ramirez admitted under oath he lied to his supervisor.⁷³
- Before the recording of the interview between Ramirez and Espinoza was introduced into evidence, Ramirez falsely testified Espinoza asked him who else was involved in the lawsuit during the interview.⁷⁴ Ramirez's perjury is proven by the recordings.⁷⁵

Ramirez's testimony is not credible and cannot be the basis for finding a violation. *Mccotter Motors Co.*, 291 NLRB 764, 768 (N.L.R.B. 1988) (“The testimony of a perjurer is inherently unreliable and, absent corroboration, should not be the basis for finding a violation of the Act”).

Additionally, his testimony was internally inconsistent. *See Overnite Transportation Co.*, 245 NLRB 423 fn. 1(1979) (upholding non-reliance upon witness with internal inconsistencies in testimony). Therefore, it was error to use any of Ramirez's testimony to support a violation or a finding of animus.

⁷¹ Hr'g Tr. 108:10-16.

⁷² Hr'g Tr. 1184:1-1185:17; 1186:16-23.

⁷³ Hr'g Tr. 1184:1-1185:17; 1186:16-23.

⁷⁴ Hr'g Tr. 44:11-21.

⁷⁵ Respondent's Exhibits 27, Hr'g Tr. 28.

1. The ALJ erred in crediting Ramirez’s claim that he only requested his own pay records from Reichman.

Despite Ramirez’s perjury, the ALJ credited his claim that he only requested his own pay records from Reichman.⁷⁶ No corroboration supported this finding, as required to rely on the testimony of a perjurer. *Mccotter Motors Co.*, 291 NLRB 764, 768 (N.L.R.B. 1988). Instead, the evidence demonstrated Ramirez requested more than his own pay records: Reichman admitted Ramirez asked her to get payroll records for other employees and documents with other employees’ Social Security Numbers.⁷⁷ Not only was there no corroboration for Ramirez’s perjured testimony, the evidence demonstrated the opposite. The ALJ clearly erred in crediting Ramirez’s testimony.

Significantly, the ALJ used Ramirez’s testimony that he only requested his own pay records to differentiate Ramirez’s actions from Board precedent holding that discharging an employee for stealing confidential information is lawful. If “an employee is fired for taking confidential wage information from a company, the case should be dismissed unless the General Counsel discharges his burden of showing that the employee was not involved in any respect.” *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990) (holding that employer lawfully discharged employee after he stole wage information from his supervisor’s office); *see also W.R. Grace Co.*, 240 NLRB 813, 820–21 (N.L.R.B. 1979) (holding that employer lawfully discharged employee for stealing salary information from company files); *Bullock’s*, 251 NLRB 425 (N.L.R.B. 1980) (holding that company lawfully discharged employee for wrongfully obtaining employee evaluations).

The ALJ differentiates the facts because “Ramirez never received any information and he

⁷⁶ Decision, JD-117-16, page 25.

⁷⁷ Respondent’s Exhibit 9.

only sought information to which he was entitled.”⁷⁸ First, the only reason Ramirez did not receive information was because the person he sought it from said no; moreover, the actual receipt of information is irrelevant to whether Ramirez’s actions in seeking confidential information were outside the scope of the Act. Second, the only basis for the ALJ’s statement that Ramirez sought information to which he was entitled was Ramirez’s own testimony, which cannot be relied upon because he committed perjury and because it was directly contradicted by the evidence. “The Board has determined that employees’ concerted activity is not protected under NLRA § 7 when it is ‘so flagrant, violent, or extreme as to render [the employees] unfit for service.’” *Reef Indus., Inc. v. N.L.R.B.*, 952 F.2d 830, 837 (5th Cir. 1991). Stealing other employees’ information is not protected under the Act, and Ramirez’s attempt to do so rendered him unfit for service. The ALJ erred in accepting Ramirez’s perjured testimony, allowing him to escape the consequences for his flagrant misconduct.

H. The ALJ erred in finding Respondent’s discharge of Ramirez pretextual, and in failing to find Ramirez was terminated for a lawful reason unrelated to any protected activity.

Ramirez was terminated for lying, a lawful reason for termination unrelated to any protected activity. *Fresenius Usa Mfg., Inc.*, 362 NLRB No. 130 (N.L.R.B. June 24, 2015) (dismissing allegations that employee’s discharge violated the Act because employee was legitimately discharged for being dishonest during investigation into his misconduct); *In Re Sodexo Marriott Services, Inc.*, 335 NLRB 538, 554 (N.L.R.B. 2001) (concluding that Respondent would have terminated employee for lying even in the absence of employee’s union activities); *Davis Wholesale Co., Inc.*, 165 NLRB 271, 283 (N.L.R.B. 1967), *enforced sub nom. Food Store Emp. Union, Local 347, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v.*

⁷⁸ Decision, JD-117-16, page 28.

N. L. R. B., 413 F.2d 407 (D.C. Cir. 1969) and *adhered to sub nom. Davis Wholesale Co.*, 181 NLRB 2 (N.L.R.B. 1970) (holding that employee terminated for lying was not discriminatorily terminated, because even though Respondent displayed animus toward his union activity, his union activities did not accord the employee immunity from the company rules). In this case, Ramirez lied not only once, but twice.⁷⁹ Ramirez perjured himself at the hearing. Cordua values truthfulness in their employees; servers who interact with restaurant guests and their credit cards must be trustworthy.⁸⁰

Ramirez was also terminated for attempting to steal Cordua's confidential documents, a lawful reason for termination unrelated to any protected activity. *N.L.R.B. v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990) ("Quite simply, wrongfully obtaining information from a company's private files is not a protected activity."). It does not matter what type of information Ramirez hoped to obtain, or if his reason for stealing was to obtain documents to support his lawsuit: filching information from employer files is not a protected activity. *See W.R. Grace Co.*, 240 NLRB 813, 820 (N.L.R.B. 1979) (explaining that "even if the information as to current salaries could have been obtained through legitimate sources, e.g, other employees, an employee's surreptitious resort to employer files for such information would not be protected under the Act"); *Quinlan v. Curtiss-Wright Corp.*, 8 A.3d 209, 229 (N.J. 2010) (holding that employee's copying and removal of confidential documents to support her discrimination claim was not protected activity, and her employer was free to terminate her); *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 728–29 (6th Cir. 2008) (holding that an employee was not engaging in protected activity by taking confidential documents to support her retaliation claim, and her termination for taking the

⁷⁹ At the hearing, Ramirez admitted under oath that he lied to Espinoza, confirming that Cordua correctly concluded that he lied to Cordua on two occasions. Hr'g Tr. 1185:15-17; 1186:16-23.

⁸⁰ Hr'g Tr. 1048:9-25.

confidential documents was not pretext); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763–64 (9th Cir. 1996) (finding that an employee could be lawfully discharged for stealing sensitive personnel documents, explaining that “we are loathe to provide employees an incentive to rifle through confidential files looking for evidence that might come in handy in later litigation”).

The Board should not construe Ramirez’s attempt to steal payroll information as “part of the res gestae” of the wage-and-hour-lawsuit, because Ramirez’s actions are so egregious as to place him outside the protection of the NLRA. *In Re Exxon Mobil Corp.*, 13-CA-40976, 2003 WL 23100908 (N.L.R.B. Div. of Judges Dec. 24, 2003), *cause dismissed sub nom. Exxon Mobil Corp. & Nick Slusher*, 343 NLRB 287 (N.L.R.B. 2004), *rev'd sub nom. Slusher v. N.L.R.B.*, 432 F.3d 715 (7th Cir. 2005). Employees’ rights “are not absolute; they must be balanced against the employer's long-recognized right to maintain order and respect.” *Reef Indus., Inc. v. N.L.R.B.*, 952 F.2d 830, 837 (5th Cir. 1991). Attempting to steal from company files is so extreme and egregious it places Ramirez outside the protection of the NLRA. *Id.*; *N.L.R.B. v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990); *Roadway Exp.*, 271 NLRB 1238, 1239 (N.L.R.B. 1984) (surreptitiously resorting to the Respondent's business records for information is not protected under the Act).

The evidence establishes Ramirez attempted to steal information.⁸¹ Cordua has a right to “protect its private information by discharging employees who abuse positions of trust and take information that they know is rightfully off-limits.” *N.L.R.B. v. Brookshire Grocery Co.*, 919 F.2d 359, 365 (5th Cir. 1990). Because the General Counsel cannot sustain her burden of showing Ramirez was “not involved in any respect” with theft of confidential information, the allegation of

⁸¹ Respondent’s Exhibits 8, 9; Hr’g Tr. 1185:15-17; 1186:16-23. There was no need for Ramirez to steal payroll information to support his lawsuit, because his attorney could issue written discovery.

unlawful termination should be dismissed. *W.R. Grace Co.*, 240 NLRB 813, 820-21 (N.L.R.B. 1979).

I. The ALJ erred in failing to find Ramirez’s lawsuit was not a motivating factor in his termination.

Ramirez’s attempted theft places him outside the protection of the NLRA. Additionally, the General Counsel did not carry her burden to show Ramirez’s lawsuit was a motivating factor in his termination. General Counsel’s position is that Cordua terminated Ramirez, not for lying and attempting to steal, but for protected activity he engaged in eight months prior;⁸² that this is the case even though Cordua did not terminate twenty-four other employees who engaged in the same protected activity;⁸³ and that in the absence of Ramirez’s protected activity, Cordua would choose to employ a lying thief. This remarkable position is untenable.

J. The ALJ erred in finding animus on Respondent’s part toward Ramirez.

Cordua’s general opposition to Ramirez’s lawsuit is not evidence of animus toward his protected activity. *See Delco-Remy Div., Gen. Motors Corp. v. N.L.R.B.*, 596 F.2d 1295, 1310 (5th Cir. 1979) (opposition to unionization does not amount to anti-union animus). There is no evidence of animus on the part of Ambroa, the individual who discovered Ramirez’s misconduct, nor Espinoza, the individual who made the termination decision. *See Fresenius Usa Mfg., Inc. & Int’l Bhd. of Teamsters, Local 445*, 2-CA-39518, 2010 WL 3982219 (N.L.R.B. Div. of Judges Aug. 19, 2010), *vacated* (2014), *aff’d in part, modified in part sub nom. Fresenius Usa Mfg. Inc.*, 358 NLRB 1261 (N.L.R.B. 2012) and *aff’d sub nom. Fresenius Usa Mfg., Inc.*, 362 NLRB No. 130 (N.L.R.B. June 24, 2015) (finding no antiunion animus where the decision-maker did not make statements disparaging the union).

⁸² GC Exhibit 2 (lawsuit filed January 22, 2015); Hr’g Tr. 19:25-20:1 (Ramirez terminated September 10, 2015). Fred Espinoza, the decision-maker, learned of the lawsuit the same month it was filed. Hr’g Tr. 1015:16-21.

⁸³ GC Exhibit 5.

Ambroa discovered the text messages between Ramirez and Naomi regarding stealing confidential documents, and also received text messages from Naomi confirming Ramirez asked her to steal documents containing other employees' Social Security numbers.⁸⁴ Ambroa reported the information to his supervisor, Espinoza, who conducted an investigation and ultimately terminated Ramirez. Neither individual had animus toward Ramirez's protected activity, and the General Counsel failed to elicit any proof of animus.

No evidence or testimony established any animus on the part of Ambroa. When Human Resources Director Patricia Quinonez informed him of the wage-and-hour lawsuit, she instructed him to treat everyone equally, not to retaliate, and that everyone had the right to join the lawsuit.⁸⁵ He later inquired regarding who was in the lawsuit to confirm their payroll was being done correctly.⁸⁶ He instructed his managers to treat the employees fairly and equally.⁸⁷ Additionally, Ambroa told employees who had joined the lawsuit "if somebody owes you something, that's your money, that's what you work for. You do what you've got to do.... If they owe you those hours, they have to pay it."⁸⁸ He still manages employees at his restaurant who are in the lawsuit.⁸⁹ In fact, one employee in the lawsuit, Carlos Ayala,⁹⁰ found a different job, and Ambroa still "beg[s] him to come and help us when we have shows because he's a very good server and [Ambroa] really didn't want him to leave to find another job."⁹¹ Far from showing animus toward employees in the lawsuit, Ambroa remembered their birthdays and accommodated schedule requests.⁹²

Likewise, no evidence or testimony established any animus on the part of Espinoza. In fact,

⁸⁴ Hr'g Tr. 825:6-10.

⁸⁵ Hr'g Tr. 828:15-829:1; 378:1-13.

⁸⁶ Hr'g Tr. 829:5-19.

⁸⁷ Hr'g Tr. 832:12-833:1.

⁸⁸ Hr'g Tr. 830:15-831:19.

⁸⁹ Hr'g Tr. 833:5-20.

⁹⁰ GC Exhibit 5.

⁹¹ Hr'g Tr. 833:8-835:8.

⁹² Hr'g Tr. 926:4-927:2; 315:13-17; Respondent's Exhibits 4, 24.

the evidence shows Espinoza told Ramirez he respected Ramirez's right to file a lawsuit.⁹³ He also testified he wanted to make sure there was no retaliation against employees involved in the lawsuit.⁹⁴ Ramirez futilely attempted to show bias when he falsely testified Espinoza asked him who else was involved in the lawsuit during an interview regarding the investigation of Ramirez's potential theft.⁹⁵ Fortunately, both interviews were recorded: Ramirez's untruthfulness is proven by the recordings.⁹⁶

The evidence – or lack thereof – stands in sharp contrast to cases that did find hostility. *See Ark Las Vegas Rest. Corp. v. N.L.R.B.*, 334 F.3d 99, 104-05 (D.C. Cir. 2003) (finding hostility when employees were threatened for wearing union buttons); *Hosp. Cristo Redentor, Inc. v. N.L.R.B.*, 488 F.3d 513, 520-21 (1st Cir. 2007) (finding hostility when management made direct anti-union comments). It is noteworthy that the General Counsel had the opportunity to ask her own witness, a former Cordua manager who had been terminated for drinking on the job,⁹⁷ whether Cordua had animus toward the lawsuit or employees involved in the lawsuit, and she chose not to.⁹⁸ *See Elite Ambulance Inc. & Int'l Ass'n of Emts & Paramedics (Iaep)/nage/seiu Local 5000*, 31-CA-122353, 2015 WL 9459716 (N.L.R.B. Div. of Judges Dec. 23, 2015), *adopted sub nom. Elite Ambulance, Inc. & Int'l Ass'n of Emts & Paramedics (Iaep)/nage/seiu Local 5000*, S 31-CA-122353, 31-C, 2016 WL 453585 (N.L.R.B. Feb. 4, 2016) (when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him); *In Re Desert Pines Golf Club*, 334 NLRB 265, 267 (N.L.R.B. 2001) (an adverse inference is available against the party with the burden of persuasion on an issue).

⁹³ Respondent's Exhibit 27.

⁹⁴ Hr'g Tr. 1016:3-14.

⁹⁵ Hr'g Tr. 44:11-21.

⁹⁶ Respondent's Exhibits 27, 28.

⁹⁷ Hr'g Tr. 125:24-126:3.

⁹⁸ Hr'g Tr. 120:24-25.

K. The ALJ erred in finding a causal link between any alleged animus of Respondent and Ramirez's termination.

As already established, the General Counsel did not meet her burden to show animus. An independent investigation into Ramirez's misconduct was performed by Fred Espinoza, a supervisor with no animus. Twenty-four other employees who engaged in the same protected activity were not terminated.⁹⁹ Moreover, Ramirez's termination occurred approximately *eight months* after his protected activity, negating any inference of unlawful motivation.¹⁰⁰ See *The New York Hosp. Med. Ctr. of Queens, Respondent & Paris Young, an Individual*, 29-CA-136515, 2015 WL 9592399 (N.L.R.B. Div. of Judges Dec. 31, 2015), *adopted sub nom. The New York Hosp. Med. Ctr. of Queens & Paris Young*, 29-CA-136515, 2016 WL 555915 (N.L.R.B. Feb. 11, 2016) (stating that the four-month gap in time between employee's protected activities and the alleged discrimination against him is too remote to support an inference of a connection); *Consol. Biscuit Co. & Bakery, Confectionary, Tobacco Workers & Grain Millers Int'l Union, Afl-Cio, Clc*, 346 NLRB 1175, 1180 (N.L.R.B. 2006), *order enforced sub nom. N.L.R.B. v. Consol. Biscuit Co.*, 301 Fed. Appx. 411 (6th Cir. 2008) (dismissing complaint because the timing of employee's termination, 5 months after engaging in protected activity, does not support an inference of unlawful motive); *Cent. Valley Meat Co.*, 346 NLRB 1078, 1092 (N.L.R.B. 2006) (timing of schedule change suggested Respondent was not motivated by protected activity where employee's schedule changed 6 months after his union activity and 2 months after filing a wage and hour lawsuit); *MECO Corp. v. N.L.R.B.*, 986 F.2d 1434, 1437 (D.C. Cir. 1993) (stating that "the eight-month gap between the employees' last concerted activities and their discharge strongly militates

⁹⁹ GC Exhibit 5. Out of the twenty-seven employees who joined the lawsuit, only three were terminated and are bringing unfair labor practices complaints.

¹⁰⁰ GC Exhibit 2 (lawsuit filed January 22, 2015); Hr'g Tr. 19:25-20:1 (Ramirez terminated September 10, 2015). Fred Espinoza, the decision-maker, learned of the lawsuit the same month it was filed. Hr'g Tr. 1015:16-21.

against any inference of anti-union motivation”); *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295, 299 & n. 4 (5th Cir. 1984) (six-month time lapse between job action and employee's discharge “weighs heavily against a finding” of anti-union motivation).

L. The ALJ erred in ordering reinstatement and back pay to Ramirez.

Reinstatement is not proper where a party either has perjured himself at a hearing or taken confidential information. *N.L.R.B. v. Brookshire Grocery Co.*, 919 F.2d 359, 365 (5th Cir. 1990). Ramirez lied under oath at the hearing, and attempted to take confidential information from Respondent. Accordingly, Ramirez cannot be awarded back pay and reinstatement. *See Uniform Rental Serv., Inc.*, 161 N.L.R.B. 187 (1966), *enforcement denied on other grounds*, 398 F.2d 812 (6th Cir.1968) (holding that an employee who improperly enters her employer's private office and pilfers a letter has forfeited her right to back pay and reinstatement); *Vilter Mfg. Corp.*, 271 N.L.R.B. 1544 (1988) (denying reinstatement for a violation of the Act where an employee lied to collect unemployment compensation).

IV. Claimant Rogelio Morales

A. The ALJ erred in crediting Morales’s version of the facts over a disinterested witness.

Karen LeBlanc, a customer at Respondent’s restaurant who complained about Morales, was a disinterested witness at the hearing.¹⁰¹ Morales, on the other hand, is not a disinterested witness; “there is an obvious motive for [him] to give testimony favorable to [his] cause, without regard to the truth, if necessary.” *Bethel Home, Inc.*, 275 NLRB 154, 157 (N.L.R.B. 1985). Morales testified that he did not engage in an inappropriate conversation with another server and in fact told the other server to stop, whereas LeBlanc testified that Morales was an active participant in

¹⁰¹ Hr’g Tr. 765:18-767:11.

the lewd conversation, who refused to stop when she asked.¹⁰²

Morales had a motivation to lie about his misconduct in order to receive reinstatement and back pay. LeBlanc had no motivation; nothing to gain and nothing to lose by her testimony. The testimony of disinterested witnesses should be given greater weight because they lack any reason to give false testimony. *Id.*; see also *Dickerson-Chapman, Inc. & Intern. Union of Operating Engineers*, 313 NLRB 907, 933 (N.L.R.B. 1994) (crediting testimony of disinterested witness); *Tennessee Packers, Inc.*, 153 NLRB 1411, 1416 (N.L.R.B. 1965) (crediting testimony of disinterested witnesses). Accordingly, the ALJ erred in crediting the testimony of Morales, an interested witness with an obvious motive to give false testimony, instead of crediting the testimony of LeBlanc, a disinterested witness.

B. The ALJ erred in holding that LeBlanc’s testimony was internally inconsistent.

The ALJ impermissibly stretched LeBlanc’s testimony to force inconsistencies that did not exist. In light of the ALJ’s decision to credit Ramirez’s testimony after he committed perjury, it is the ALJ who is inconsistent, not LeBlanc.

1. The ALJ incorrectly stated LeBlanc said she would not drink more than 1.5 mimosas, yet she finished two.

LeBlanc testified she would not have had more than one and a half mimosas because she had recently purchased a new Mercedes.¹⁰³ LeBlanc testified she “had one [mimosa] and then I had another one, but I didn’t finish the second one.”¹⁰⁴ When LeBlanc was discussing her nervousness after the incident, she stated she didn’t want to stay any longer so she “finished [her] drink and the rest of [her] food.”¹⁰⁵ Presumably, this last bit of testimony is where the ALJ

¹⁰² Hr’g Tr. 161:4-8; 770:11-21; 772:19-773:6; 774:10-15.

¹⁰³ Hr’g Tr. 786:4-11.

¹⁰⁴ Hr’g Tr. 774:7-9.

¹⁰⁵ Hr’g Tr. 776:9-17.

deciphered an “inconsistency.” LeBlanc only mentioned a “drink,” not a mimosa; she could have been referring to a glass of water. Additionally, no clarifying question was asked to determine whether LeBlanc meant she finished her entire drink or simply meant she decided to be done drinking it.

Moreover, LeBlanc was testifying regarding whether she finished a drink about a year prior, in the context of an event that upset her greatly.¹⁰⁶ *Assuming arguendo* there was any inconsistency within LeBlanc’s testimony (which there was not), it was a minor irrelevancy (*i.e.*, 1½ drinks versus 2 drinks) that does not affect the substance of her testimony. The ALJ’s finding that LeBlanc’s testimony was “inconsistent” based on her contrived interpretation is erroneous.

2. The ALJ incorrectly stated LeBlanc said she was so upset she could not eat, yet she finished her lunch.

LeBlanc testified that after she reported the inappropriate conversation between Morales and another server, the server made a scene by loudly accusing her of just wanting a free meal, and LeBlanc felt threatened.¹⁰⁷ LeBlanc testified she “was very nervous and [she] just wanted to get out of there and go home” so she finished her food and left.¹⁰⁸ **Nowhere in LeBlanc’s testimony** does she state she was too upset to eat. In creating testimony out of thin air, the ALJ clearly erred.

3. The ALJ incorrectly stated LeBlanc was not consistent with what she told Assistant Manager Lopez.

No amount of manipulating or stretching LeBlanc’s testimony could create any inconsistency with what she told Assistant Manager Lopez, which follows:

Q What did you tell the manager?

A I said, “There’s a problem here because these two are talking like this.” I described what I just told you. I said, “I don’t feel comfortable coming in here with

¹⁰⁶ Hr’g Tr. 765:18-778:6-11.

¹⁰⁷ Hr’g Tr. 784:22-785:17.

¹⁰⁸ Hr’g Tr. 776:9-20.

this going on, and I think that somebody should know what they're talking about and that they're planning on doing it again.”¹⁰⁹

A She said, “I’m very sorry about this.” She said, “I’ll take care of it,” and she said, “You don’t have to pay your check today.” I said, “Are you sure?” She said, “Oh, no, don’t worry about that,” because I was getting ready to leave. I told her I was very nervous and I just wanted to get out of there and go home.

Q Okay.

A I didn’t want to stay in there any longer. I finished my drink and the rest of my food.

Q Why --

A She offered a to-go box for me and I said, “No, I don’t need one.”¹¹⁰

Q In relation to when you complained to the manager onsite that day, you were just asked about whether you complained about Mr. X. Was your complaint also against Mr. Morales?

A Well, I just explained to her that he was talking to him, that Mr. X was talking to Mr. Morales. That was where the conversation was, it wasn’t with me.¹¹¹

There is simply no inconsistency to be found. The ALJ erred in holding LeBlanc provided inconsistent testimony, and erred in discrediting her testimony on that basis.

C. The ALJ erred in failing to credit LeBlanc’s testimony that Morales high fived and egged on the offending server.

First, the ALJ incorrectly stated LeBlanc was “led to certain conclusions, such as “high fiving” or “egging on.””¹¹² However, the questions did not “suggest the answer” to LeBlanc, and were merely clarifications or expansions of her previous testimony.¹¹³

Second, the only case cited by the ALJ states that responses to leading questions should be accorded “minimal weight.” *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977). Thus, in contrast to the ALJ’s conclusion that LeBlanc’s testimony should be accorded no credence at all, she erred in not affording at least some weight to LeBlanc’s testimony. As a disinterested witness whose

¹⁰⁹ Hr’g Tr. 775:10-16.

¹¹⁰ Hr’g Tr. 776:9-20.

¹¹¹ Hr’g Tr. 788:23-789:4

¹¹² Decision, JD-117-16, page 34.

¹¹³ Hr’g Tr. 771:8-772:6; 789:8-11.

testimony was consistent and straightforward, LeBlanc's testimony should have been credited rather than Morales's testimony. The ALJ erred in crediting Morales rather than LeBlanc.

V. Alex Nguyen

A. The ALJ erred in finding Alex Nguyen's statement during a December 2015 pre-shift meeting coercive.

The ALJ erred in finding Alex Nguyen's statement during a December 2015 pre-shift meeting coercive. Neither GC witness was actually coerced in any way. Lewis wanted to speak with an attorney before signing an arbitration agreement¹¹⁴ and was able to speak with **two** attorneys before signing the agreement.¹¹⁵ She signed the agreement because she was advised by her legal counsel to do so.¹¹⁶ Hofmann also objected to signing the arbitration agreement during the meeting¹¹⁷ and, in fact, never signed it.¹¹⁸ He is still employed.¹¹⁹ He testified he never felt threatened during the meeting.¹²⁰ Both spoke out and both felt free to do exactly what they had requested: seek legal counsel or refuse to sign the agreement.

The ALJ mistakenly claims Nguyen told employees during the meeting they would be terminated for refusing to sign the agreement. However, GC's own witness Hofmann testified he only learned the agreement was a condition of employment when he met privately with Ambroa after the meeting.¹²¹ He also testified he didn't feel threatened by Ambroa's comment.¹²² Nguyen testified he never told anyone they would be fired for refusing to sign the agreement.¹²³ Even Lewis said Nguyen only made a "very suggestive statement," referring to the "bite the hand"

¹¹⁴ Hr'g Tr. 228:18-229:1.

¹¹⁵ Hr'g Tr. 325:15-16; 325:25-326:12.

¹¹⁶ Hr'g Tr. 325:18-20.

¹¹⁷ Hr'g Tr. 335:5-16.

¹¹⁸ Hr'g Tr. 341:14-18.

¹¹⁹ Hr'g Tr. 335:17-18.

¹²⁰ Hr'g Tr. 340:16-18.

¹²¹ Hr'g Tr. 336:25-337:10.

¹²² Hr'g Tr. 342:24-25.

¹²³ Hr'g Tr. 1172:8-10.

comment the ALJ has deemed coercive.¹²⁴ Since the ALJ used Ambroa's comment in deciding Nguyen's original statement was coercive, the ALJ clearly erred in her conclusion.

VI. Claimant Shearone Lewis

A. The ALJ erred in finding Ambroa did not testify Lewis's floor map represented a fair table assignment.

The ALJ erred in finding Ambroa did not state Lewis received a fair assignment on the date Lewis presented.¹²⁵ GC presented exactly one floor map allegedly showing an unfair distribution of her workload. This floor map was for November 20, 2015.¹²⁶ Respondent presented 75 floor maps, including the same November 20, 2015 floor map presented by Lewis.¹²⁷ Ambroa testified there was a fair assignment on this date as well.¹²⁸ The ALJ's finding is incorrect.

B. The ALJ erred in discrediting every witness who testified about Lewis's misconduct.

In discrediting **every** witness who testified against Lewis, the ALJ concluded every one of them demonstrated "personal hostility."¹²⁹ The ALJ cites to *Ingalls Steel Construction Co.*, 126 NLRB 584 (1960), to support her decision to discredit their testimony. However, none of the factors found in *Ingalls* or any other supporting Board decision is found here. In virtually every case where personal hostility is cited to discredit a witness, there is some prior incident revealing hostility or some demeanor or language use during testimony. For instance, in *Ingalls*, the trial examiner found the witness's demeanor, tone of voice, choice of language throughout the hearing, and prior theft and fraud against Ingalls demonstrated the witness's personal hostility affected his credibility. In other cases, pre-hearing text messages from the witness exposing deep-seated anger

¹²⁴ Hr'g Tr. 307:10-23.

¹²⁵ Decision, JD-117-16, page 39.

¹²⁶ GC Exhibit 7.

¹²⁷ Respondent's Exhibit 22, at 175.

¹²⁸ Hr'g Tr. 885:8-9.

¹²⁹ Decision, JD-117-16, page 40.

with the claimant or a witness's demeanor during testimony supported the conclusion. *See Stannah Stairlifts, Inc. & Local 4*, 324 NLRB 914, 916 (N.L.R.B. 1997) (finding hostility when “[witness], on April 19 in a mobile phone call to Edsall punctuated by his screaming and frequent use of the ‘F’ word, refused a work assignment” and made threats to destroy the company and “ruin” the company’s vice president); *Ingalls Steel Construction Co.*, 126 NLRB 584 (1960); *Holiday Inn Rest. & Country Squire Rest.*, 172 NLRB 1384 (N.L.R.B. 1968); *Kaye-Smith Enterprises*, 211 NLRB 1034, 1045 (N.L.R.B. 1974). None of that exists here.

The ALJ does not cite to any specific evidence of the witnesses’ personal hostility, with one exception. In discrediting Perez’s testimony, she concluded he must have had an “ax to grind” with Lewis because she made him carry heavy trays in his role as a busboy.¹³⁰ No evidence is cited to regarding the alleged personal hostility demonstrated by any other witness.

It is true many of the witnesses were victims of Lewis’s verbal racial abuse and testified to their experiences. However, there is no case law supporting the proposition that victims of racial discrimination lose credibility if they testify about their experiences.

Importantly, the Board in the *Ingalls* case also held that where the witness’s testimony was corroborated by other witnesses and evidence, the testimony could not be discredited. 126 NLRB at 593. **Every** witness who testified about Lewis’s conduct had their testimony corroborated by other witnesses and a lengthy document trail.¹³¹ Even GC’s **own** witness for Lewis, Bryan

¹³⁰ Decision, JD-117-16, page 41. Notably, there is no evidence that Perez ever expressed any negative opinion of Lewis aside from reporting her for verbal racial abuse, which was corroborated by many witnesses.

¹³¹ **Lewis’s misconduct towards Daniel Perez:** Hr’g Tr. 633:16-637:12 (Perez); 442:24-443:4 (Quinonez); 978:7-979:18 (Ambroa). **Lewis’s use of vulgarity in the workplace:** Hr’g Tr. 640:10-11; 651:3-4 (Perez); 433:19-22 (Quinonez); 531:11-13 (Garza); 990:10-13 (Ambroa); 695:8-9; 704:14-15 (Herrera); 796:13-20 (Kline). **Lewis’s rants about non-English-speakers:** Hr’g Tr. 640:10-11 (Perez); 704:2-6 (Herrera). **Lewis’s use of racial slurs in the workplace:** Hr’g Tr. 641:10-13 (Perez); 531:16-18, 20-21; 535:12-15 (Garza); 694:19; 695:5-7; 704:14-15 (Herrera); 796:11-16 (Kline). **Lewis’s threats to call “Immigration” on coworkers:** Hr’g Tr. 644:16; 644:16 (Perez); 695:1-3 (Herrera).

Hofmann, admitted she would get into arguments with other employees¹³² and call them names.¹³³

Many of the same witnesses had positive things to say about Lewis as well. Nguyen stated Lewis had a pleasant relationship with some co-workers and was respectful to most people¹³⁴ and she was “really good at her job.”¹³⁵ He stated her high standards of service were a reason why he asked her to train new employees.¹³⁶ Vera rated Lewis as an average server, something he is unlikely to have done if he demonstrated the hostility the ALJ contends.¹³⁷ Perez testified Lewis was a fine server when the environment was calm, but when she was overloaded with work she would become unpleasant.¹³⁸ Ambroa testified Lewis was “a very good server.”¹³⁹

It should also be noted Respondent could have presented more witnesses to Lewis’s misconduct. However, the NLRB was only willing to provide a translator for a single day.¹⁴⁰ The ALJ would not allow Respondent to provide its own translator, at its expense, for additional witnesses, and Respondent was forced to finish all Spanish-speaking witnesses in a single day of a five-day hearing.¹⁴¹

C. The ALJ erred in finding statements taken by Quinonez did not support the allegations or contradicted the testimony.

The ALJ erred in finding the statements collected by Patricia Quinonez did not support the misconduct allegations.¹⁴² The ALJ mistakenly concluded the testimony of Respondent’s witnesses is automatically contradicted if a specific piece of evidence doesn’t corroborate it,

¹³² Hr’g Tr. 337:18-22.

¹³³ Hr’g Tr. 344:19-20.

¹³⁴ Hr’g Tr. 1166:9-11.

¹³⁵ Hr’g Tr. 1167:1.

¹³⁶ Hr’g Tr. 1167:4-8.

¹³⁷ Hr’g Tr. 606:17.

¹³⁸ Hr’g Tr. 631:17-23.

¹³⁹ Hr’g Tr. 855:22.

¹⁴⁰ Hr’g Tr. 680:10-12.

¹⁴¹ Hr’g Tr. 680:18-20.

¹⁴² Decision, JD-117-16, pages 40-41.

regardless of whether or not it is corroborated by any other evidence. This is not the standard. When a witness does not testify on a matter or does not have information on a matter, it cannot be said his failure to testify to something constitutes a “contradiction” of another witness’s testimony on that subject. *See Harvey Aluminum, Inc.*, 142 NLRB 1041, 1050 (N.L.R.B. 1963); *Airport Distributors*, 280 NLRB 1144, 1149 (N.L.R.B. 1986) (holding that when witness did not testify on a matter, it neither “contradicted nor corroborated” other evidence). Without actual contradiction, the testimony and evidence should be credited. *See Williams Contracting*, 309 NLRB 433, 434 (N.L.R.B. 1992).

Specifically, the ALJ singles out Garza’s testimony that Lewis sometimes yelled at her in front of customers.¹⁴³ The ALJ mistakenly concludes that since the statement referred to the yelling as **primarily** in the kitchen, it was inconsistent.¹⁴⁴ The ALJ also mistakenly concludes Ambroa, by not overhearing some of the misconduct, “contradicts” the testimony of other employees who did overhear it.¹⁴⁵ This is logically flawed. Ambroa did not testify the misconduct did not take place, only that he did not personally witness **some** of what Vera testified to.¹⁴⁶ Moreover, witnesses testified Lewis would make the statements and threats when the managers were out of the room.¹⁴⁷ Lewis was savvy enough to comport her behavior when supervisors were present. If she had not been, her behavior would have resulted in her termination much earlier.

The ALJ also mistakenly concludes a witness contradicts his written statement when he testifies in more detail about the incident. To the contrary, the Board has time and time again held more detailed testimony is more reliable. *See D.C. Liquor Wholesalers*, 292 NLRB 1234, 1242

¹⁴³ Decision, JD-117-16, page 40.

¹⁴⁴ *Id.*

¹⁴⁵ Decision, JD-117-16, page 41.

¹⁴⁶ Ambroa did witness some of Lewis’s misconduct, though. Hr’g Tr. 839:7-11.

¹⁴⁷ Hr’g Tr. 644:12 It is worth noting that Daniel Perez answered this to Judge Steckler’s own line of questioning.

(N.L.R.B. 1989), *enforcement granted sub nom. Teamsters Local Union No. 639 v. N.L.R.B.*, 924 F.2d 1078 (D.C. Cir. 1991); *Gayston Corp.*, 265 NLRB 1, 8 (N.L.R.B. 1982), *enforcement granted in part, denied in part sub nom. N.L.R.B. v. Saint Vincent's Hosp.*, 729 F.2d 730 (11th Cir. 1984); *Hanson Material Serv. Corp. & Int'l Union of Operating Engineers, Local 150, Afl-Cio Hanson Material Serv. Corp. & Laborers Int'l Union of N. Am., Local 681, Petitioner & Int'l Union of Operating Engineers, Local 150, Afl-Cio, Petitioner*, 353 NLRB 71, 79 (N.L.R.B. 2008). The statements provided to Ambroa in October 2015 constituting Respondent's Exhibit 13 are summaries of the statements.¹⁴⁸ Those in Respondent's Exhibit 14 are short statements. However, the ALJ goes to pains to find alleged "contradictions." In one example, the ALJ considers it a contradiction when Herrera testified Lewis threw a salad in a trash can during an incident, because her statement only reported the verbal abuse and racial slurs,¹⁴⁹ despite the fact the event was corroborated by Quinonez and Ambroa.¹⁵⁰ It would be an unrealistic burden to require any written statement to include every possible detail of an incident, no matter how minor, when prepared by employees unfamiliar with the legal significance of certain facts. If anything, the testimony at trial is more reliable because the ALJ and GC had the opportunity to cross-examine the witnesses.

D. The ALJ erred in discrediting Daniel Perez's testimony.

The ALJ erred in discrediting the testimony of Daniel Perez because he allegedly "had an ax to grind against Lewis."¹⁵¹ There is no evidence Perez lied under oath because of any personal hostility towards Lewis. Even if personal hostility had reached the extreme level where a witness's entire testimony should be discredited, the Board should consider when the testimony is

¹⁴⁸ Hr'g Tr. 981:16-18.

¹⁴⁹ Decision, JD-117-16, page 41.

¹⁵⁰ Hr'g Tr. 633:16-637:12 (Perez's testimony); 442:24-443:4 (Quinonez's corroboration); 978:7-979:18 (Ambroa's corroboration).

¹⁵¹ Decision, JD-117-16, page 41.

corroborated. *Ingalls Steel Construction Co.*, 126 NLRB 584, 593 (1960). Several witnesses corroborated Perez’s testimony regarding Lewis’ specific mistreatment of Perez,¹⁵² her use of vulgarity,¹⁵³ her rants about non-English-speakers,¹⁵⁴ her use of racial slurs,¹⁵⁵ and her threats to call immigration on Spanish-speaking employees.¹⁵⁶ Unlike in *Ingalls*, there is no evidence of personal hostility. The ALJ does not conclude Perez’s demeanor, tone, or language suggested a personal hostility. Instead, the ALJ summarily concludes that because Lewis required Perez to carry heavier objects, Perez must have an “ax to grind.” The ALJ does not further explain this conclusion or why she ignores the substantial corroboration from other witnesses and record evidence.

E. The ALJ erred in discrediting Lucy Kline’s testimony.

The ALJ erred in discrediting the testimony of Lucy Kline. The ALJ discredited the testimony by claiming it related to only a few months approximately three years before Lewis’s termination and therefore it was discredited.¹⁵⁷ Kline’s testimony directly contradicts Lewis’s testimony and goes to Lewis’s character. It is therefore relevant. Lewis testified she had never cursed or called anyone a “faggot” or other slur at Artista.¹⁵⁸ Kline’s testimony contradicted Lewis by providing specific, detailed instances Lewis used discriminatory slurs against her and other employees.¹⁵⁹ Not only does Kline’s testimony contradict Lewis’s prior and subsequent¹⁶⁰

¹⁵² Hr’g Tr. 633:16-637:12 (Perez’s testimony); 442:24-443:4 (Quinonez’s corroboration); 978:7-979:18 (Ambroa’s corroboration).

¹⁵³ Hr’g Tr. 640:10-11; 651:3-4 (Perez’s testimony); 433:19-22 (Quinonez’s corroboration); 531:11-13 (Garza’s corroboration); 990:10-13 (Ambroa’s corroboration); 695:8-9; 704:14-15 (Herrera’s corroboration); 796:13-20 (Kline’s corroboration).

¹⁵⁴ Hr’g Tr. 640:10-11 (Perez’s testimony); 704:2-6 (Herrera’s corroboration).

¹⁵⁵ Hr’g Tr. 641:10-13 (Perez’s testimony); 531:16-18, 20-21; 535:12-15 (Garza’s corroboration); 694:19; 695:5-7; 704:14-15 (Herrera’s corroboration); 796:11-16 (Kline’s corroboration).

¹⁵⁶ Hr’g Tr. 644:16; 644:16 (Perez’s testimony); 695:1-3 (Herrera’s corroboration).

¹⁵⁷ Decision, JD-117-16, page 41.

¹⁵⁸ Hr’g Tr. 1219:22-23; 269:10-16.

¹⁵⁹ Hr’g Tr. 796:11-20.

¹⁶⁰ Lewis was recalled as a witness by General Counsel to rebut other allegations Kline made, but had previously testified to having never cursed or used racial slurs. Kline’s testimony contradicted Lewis.

testimony, Lewis brought her character into question by claiming she would never make such statements and they were not “her type of terminology.”¹⁶¹ When a witness brings up her character as a defense of alleged misconduct, it is admissible and relevant to present character evidence to refute. *See Overnite Transp. Co.*, 336 NLRB 387, 388 (N.L.R.B. 2001); Fed. R. Evid. 607. Kline’s testimony is relevant and the ALJ erred in discounting it.

F. The ALJ erred in finding the March 2016 investigation did not reveal Lewis cursed and subsequently concluding it was unlikely Lewis had ever cursed in 2013.

The ALJ erred in finding the 2016 investigation into Lewis’s conduct did not find any cursing.¹⁶² First, the ALJ’s definition of cursing is not mainstream. For instance, the ALJ does not believe derogatory slurs, such as “faggot,”¹⁶³ are curses. Second, the ALJ’s conclusion is factually incorrect. Four witnesses from the 2016 investigation testified Lewis cursed at work: Garza,¹⁶⁴ Vera,¹⁶⁵ Perez,¹⁶⁶ and Herrera.¹⁶⁷ Ambroa himself heard her use the words “fuck” and “shit” in the workplace on other occasions.¹⁶⁸ The witness’s testimony is corroborated several times over.

Further, the ALJ concludes, based solely on the March 2016 investigation statements, that Lewis’s character is such that she would not have cursed in 2013.¹⁶⁹ The ALJ did not consider the October 2015 investigation or the hearing testimony of six separate witnesses.¹⁷⁰

G. The ALJ erred in questioning the date of Respondent’s Exhibit 6.

¹⁶¹ Hr’g Tr. 231:16-19.

¹⁶² Decision, JD-117-16, page 41.

¹⁶³ Hr’g Tr. 1220:16-19.

¹⁶⁴ Hr’g Tr. 531:11-13.

¹⁶⁵ Hr’g Tr. 579:9-11; 584:17-19.

¹⁶⁶ Hr’g Tr. 640:10-11; 651:1-4.

¹⁶⁷ Hr’g Tr. 676:5-7.

¹⁶⁸ Hr’g Tr. 990:10-16.

¹⁶⁹ The ALJ addressed 2013 because Lucy Kline had testified to slurs and curses Lewis had used in 2013.

¹⁷⁰ As noted above, Garza, Vera, Perez, Herrera, and Ambroa heard Lewis use curse words. Lucy Kline, the witness the ALJ was discrediting, also testified to Lewis’s curses and slurs.

The ALJ erred in questioning the date of Respondent's Exhibit 6.¹⁷¹ Although Nguyen became Assistant General Manager after Reichman was terminated, he worked for Respondent for nine years.¹⁷² He was the Manager-on-Duty that night even if he was not the Assistant General Manager at this time.¹⁷³ The written disciplinary form was verified by Ambroa.¹⁷⁴ Lewis herself testified to the events in the written disciplinary form, acknowledged having refused to sign the document, and confirmed the manager that night was Nguyen.¹⁷⁵ There is no dispute the incident occurred, the date it occurred, or who was present.

H. The ALJ erred in finding Respondent's Exhibit 7 does not accurately reflect the incident in question.

The ALJ erred in concluding Respondent's Exhibit 7 does not accurately reflect the incident in question.¹⁷⁶ The ALJ confused Respondent's Exhibit 7, which is from a May 2015 incident, with the investigation in October 2015. These are separate incidents, but the ALJ's confusion has led her to mistakenly believe Respondent's Exhibit 7 contradicts the October 2015 investigation.

Respondent's Exhibit 7 is from May 16, 2015, approximately five months before the events leading to the October 2015 investigation. It involves an allegation that Lewis yelled at another server named Matthew and was sent home.¹⁷⁷ The October 2015 incident involved several Spanish-speaking employees whom Lewis used racially-insensitive language towards.¹⁷⁸

Further, the ALJ erred in finding that Respondent's Exhibit 7 incorrectly stated Lewis refused to sign. The ALJ states that Lewis testified that during the October 2015 investigation she

¹⁷¹ Decision, JD-117-16, page 42.

¹⁷² Hr'g Tr. 1151:25.

¹⁷³ Hr'g Tr. 1154:9-12.

¹⁷⁴ Hr'g Tr. 841:11-14;

¹⁷⁵ Hr'g Tr. 266:5-8; 266:23-24.

¹⁷⁶ Decision, JD-117-16, page 42.

¹⁷⁷ Respondent's Exhibit 7.

¹⁷⁸ Respondent's Exhibit 13.

was not given anything to sign.¹⁷⁹ Because the ALJ confuses the May 2015 incident with the October 2015, she mistakenly concludes that Respondent's Exhibit 7 is incorrect. Lewis herself testified that she refused to sign Respondent's Exhibit 7.¹⁸⁰ Therefore, the ALJ erred in finding the disciplinary action form did not accurately reflect the events mentioned because the ALJ confused the two events.

I. The ALJ erred in discrediting Quinonez's testimony that she told Lewis she was being given one last chance in December 2015.

The ALJ erred in discrediting Quinonez's testimony that she had told Lewis she was on her final chance. The ALJ made the determination because Ambroa stated no disciplinary action was taken in a subsequent email.¹⁸¹ However, the ALJ ignores the testimony of Ambroa corroborating the very statement.¹⁸² The ALJ overemphasizes a reference made in an email written in the witness's second language¹⁸³ to conclude that two witnesses are lying when the more reasonable assumption is simply that Ambroa did not consider the statement itself to be a "corrective action." In short, Ambroa likely did not believe Respondent's investigation into the incident and subsequent meeting with Lewis constituted a "corrective action."

J. The ALJ erred in finding Hofmann was a current employee testifying against pecuniary interests.

The ALJ erred when she found that Hofmann was testifying against pecuniary interests.¹⁸⁴ Hofman himself is a member of the same lawsuit as Lewis.¹⁸⁵ He is represented by the same attorney in a private lawsuit against the Respondent.¹⁸⁶ At best, Hofmann's interests are split: he

¹⁷⁹ Decision, JD-117-16, page 43.

¹⁸⁰ Hr'g Tr. 268:23-24.

¹⁸¹ Decision, JD-117-16, page 43.

¹⁸² Ambroa testified that "Patricia told her that it was – she cannot talk to people like that, and that was her last chance." Hr'g Tr. 855:2-4.

¹⁸³ Hr'g Tr. 842:15-16.

¹⁸⁴ Decision, JD-117-16, page 46.

¹⁸⁵ Hr'g Tr. 833:12-14; 332:16-20.

¹⁸⁶ *Id.*

is employed by Respondent, but is also suing Respondent in another matter and was recruited by Lewis and Ramirez into that lawsuit.

K. The ALJ erred in finding “The evidence from [the March 2016 investigation] is non-specific” and “the complaints about Lewis’s behavior do not say when they occurred.”

The ALJ erred in finding that the information obtained in the March 2016 investigations is “non-specific” and that “the complaints about Lewis’s behavior [in March 2016] do not say when they occurred.”¹⁸⁷ The ALJ states that the March 2016 complaints could refer to the same incidents as the October 2015 complaints. First, the October 2015 incident involved five employees only.¹⁸⁸ Further, the October 2015 incident was very specific, referring to a specific incident,¹⁸⁹ even a specific day¹⁹⁰ and time.¹⁹¹

The March 2016 statements do cover a lot more detail, but clearly describe different incidents.¹⁹² Herrera’s March 2016 statement refers to Lewis coming into the kitchen “a few days ago” threatening to call immigration on Spanish-speaking¹⁹³ employees.¹⁹⁴ Likewise, Garza’s statement also references events happening “a few days ago” when Lewis came into the kitchen screaming “there are a lot of wet backs working here, they do not knowing what they are doing in there, they don’t even speak English.”¹⁹⁵ Juan Carlos Rodriguez, a chef who did not testify, wrote in his March 2016 statement that Lewis came into the kitchen threatening to call immigration “last

¹⁸⁷ Decision, JD-117-16, pages 47-48.

¹⁸⁸ Respondent’s Exhibit 13.

¹⁸⁹ *Id.* All of the statements from October 2015 are substantially similar, referring to a time Lewis came into the kitchen and complaining that the kitchen employees could not speak English.

¹⁹⁰ *Id.* at 127. Daniel Perez’s statement is dated October 15, 2015 and refers to the events happening the night before on October 14, 2015.

¹⁹¹ *Id.* at 125. Angelica Franco’s statement references the time of 8:15.

¹⁹² Respondent’s Exhibit 14.

¹⁹³ Lewis’s actions violated the Immigration and Nationality Act prohibiting discrimination based upon citizenship, immigration status, or national origin. 8 U.S.C. § 1324b.

¹⁹⁴ *Id.* at 57.

¹⁹⁵ *Id.* at 56.

week.”¹⁹⁶ Vera testified that “last week” Lewis came into the kitchen demanding her order.¹⁹⁷ She was also screaming at him “last week.”¹⁹⁸ Adian Spognardi, a bartender who did not testify, reported that “three days ago” he had an incident with Lewis getting angry with him after Lewis failed to properly enter her drink orders¹⁹⁹ and that he had witnessed Lewis and McMillon improperly voiding customer checks on March 9, 2016.²⁰⁰

Therefore, the ALJ erred in concluding that the March 2016 investigation statements were non-specific. Many of the statements clearly show the new incidents of verbal racial abuse occurred well after the October 2015 incident. Regardless, the Fifth Circuit has previously held a victim of racial discrimination need not provide specific dates of the discrimination, only allege specific instances of discrimination. *Huckabay v. Moore*, 142 F.3d 233, 241 (5th Cir. 1998). The ALJ, however, imposed a substantially higher burden on the victims to prove their credibility than would be required for discrimination victims themselves to recover in order to find Lewis’ termination pretextual.

L. The ALJ erred in finding Respondent tolerated Lewis’s misconduct, this “toleration” supported a finding of animus, and ordering reinstatement and backpay.

The ALJ erred when the ALJ concluded that Respondent’s prior “toleration” of Lewis’s misconduct lent itself to a finding of animus.²⁰¹ The ALJ additionally erred in finding that Respondent’s stated reason for Lewis’s termination was pretextual because of Respondent’s alleged “long history” of tolerating her misconduct.²⁰² Specifically, the ALJ erred in its reliance on *Andronaco Inc., d/b/a Andronaco Industries*, 364 NLRB No. 142 (2016). Contrary to the ALJ’s

¹⁹⁶ *Id.* at 58.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 59.

¹⁹⁹ *Id.* at 60.

²⁰⁰ *Id.*

²⁰¹ Decision, JD-117-16, page 47.

²⁰² Decision, JD-117-16, page 45.

conclusion here, *Andronaco* does not support the proposition that tolerating prior misconduct suggests animus if an employer later acts on a subsequent violation.

In *Andronaco*, the Board affirmed the ALJ's²⁰³ conclusion that "[t]iming also supports finding animus" because the employer there had tolerated poor performance for a year, but terminated the employee within five days of learning of the employee's involvement in a lawsuit. 364 NLRB No. 142. The issue there was not whether prior toleration suggested a finding of animus. Rather, it was an issue of timing. When the same misconduct had been tolerated previously but an employee is suddenly and immediately terminated after engaging in protected activity, animus may be found. In the *Andronaco* matter, the ALJ also cited to other cases that found the timing important in finding animus.²⁰⁴ However, none of them found that tolerating other prior misconduct alone, without a close temporal connection to the subject termination, supports animus.

The situation in the Lewis matter could not be more distinct from *Andronaco*. First, Respondent did not "tolerate" the same misconduct Lewis was terminated for. In *Andronaco*, the Respondent had been aware of the specific performance issues for over a year. Here, Respondent first learned of Lewis's verbal racial abuse in October 2015. Although Lewis received written reprimands *prior* to October 2015, none of them involved racial slurs and covered a variety of different²⁰⁵ incidents. She was given a verbal reprimand and last chance warning in October 2015 when Respondent first learned of Lewis's verbal racial abuse towards her co-workers. October 2015 was the first time Respondent was aware of it, and it occurred four months after Lewis joined

²⁰³ The ALJ in the present matter is the same ALJ that handled the *Andronaco* case.

²⁰⁴ See *Alternative Entm't, Inc. & James DeCommer*, 363 NLRB No. 131 (N.L.R.B. Feb. 22, 2016) ("However, the timing of DeCommer's discharge shortly after Robinson's unlawfully coercive admonition provides strong circumstantial evidence of such knowledge, as well as discriminatory motive."); *Nu Dawn Homes*, 289 NLRB 554, 558-59 (N.L.R.B. 1988) ("Respondent's acknowledgment that it had erred in refusing to properly compensate for overtime preceded the discharges by only several weeks. The close nexus between these critical events undermines Respondent's argument that it had long tolerated employee criticism of its overtime policy").

²⁰⁵ One written warning was for three separate mistakes Lewis made handling customer credit cards and payment. Respondent's Exhibit 5.

the lawsuit. The next time Respondent learned of Lewis's continued verbal racial abuse was in March 2016. Upon learning that Lewis had violated the last chance warning and continued the verbal racial abuse, Respondent took the appropriate action and terminated Lewis's employment approximately 9 months after her alleged protected activity.²⁰⁶

An employee cannot simply use protected activity as a shield against termination for legitimate offenses. "To hold otherwise would give to [Lewis] a license to disregard his employer's rules and would leave the employer with no legal recourse to correct an inexcusable wrong." *Asarco, Inc. v. N.L.R.B.*, 86 F.3d 1401, 1410 (5th Cir. 1996). Title VII was written to "eradicate" discrimination. *Taxman v. Bd. of Educ. of Tp. of Piscataway*, 91 F.3d 1547, 1557 (3d Cir. 1996). Even Lewis admitted protected activity should not protect an employee from the consequences of using racial slurs.²⁰⁷ The ALJ, however, outright dismisses the substantial evidence of verbal racial abuse and discrimination, failing to recognize the serious legal and emotional threat it poses to employers and employees alike, in order to find animus.

Second, the timing does not support a finding of animus. Unlike the cases the ALJ cites to, Respondent terminated Lewis nine months after she joined the lawsuit, four months after the last employee opted-in to the lawsuit,²⁰⁸ and three months after Lewis allegedly spoke out at an employee meeting.²⁰⁹ In *Adronaco*, the employer terminated five days after the employee joined a lawsuit. In *Alternative Entertainment*, the employer terminated an employee 6 days after a supervisor issued an unlawfully coercive admonition. In *Nu Dawn Homes*, the employer terminated two employees within approximately two weeks. None of these cases support a finding that a termination between 3 and 9 months after the alleged protected activity lends itself to a

²⁰⁶ GC Exhibit 5.

²⁰⁷ Hr'g Tr. 296:11-15.

²⁰⁸ GC Exhibit 5.

²⁰⁹ Hr'g Tr. 227:23-228:24.

finding of animus. Consequently, the ALJ erred in ordering Lewis's reinstatement and backpay.²¹⁰

M. The ALJ erred in finding Respondent did not conduct a meaningful investigation or give Lewis a chance to explain her misconduct.

The ALJ erred in finding Respondent did not conduct a meaningful investigation or give Lewis a chance to explain her misconduct.²¹¹ The ALJ relies again on *Adronaco*. However, the ALJ overlooks important factual issues and distinctions in the cases.

Specifically, in *Adronaco*, the employer terminated an employee based on a letter that the employer did not even see until after the employee was terminated. From this, the ALJ concluded there was no meaningful investigation. In the cases the ALJ cited in her previous decision in *Adronaco*, no investigation whatsoever was conducted or the employer failed to get any statements from other employees. *See Ozburn-Hessey Logistics, LLC v. N.L.R.B.*, 609 Fed. Appx. 656, 658 (D.C. Cir. 2015); *K & M Elecs.*, 283 NLRB 279, 291 (N.L.R.B. 1987) ("Other than those who supported the initial complaint, Mitchell made no effort to obtain a single statement from "employees" who were on the trip and who might well have either supported Lemoine, or failed to corroborate the accusation, as had Briere").

In the Lewis matter, there were two separate investigations which required Quinonez to visit the restaurant. Five employees submitted written statements during the first incident in October 2015, while Quinonez personally interviewed 17 employees, including Lewis, during the second investigation in March 2016. After the first incident was reported in October 2015, Quinonez and Ambroa met with Lewis to hear her side of the story and gave her a last chance warning.²¹²

²¹⁰ Decision, JD-117-16, page 52.

²¹¹ Decision, JD-117-16, page 47.

²¹² Quinonez testified that she told Ambroa to collect statements from employees after the October 2015 incident but that she wanted to speak with Lewis before any termination took place. Hr'g Tr. 435:16-20. Quinonez also testified she gave Lewis a last chance warning. Hr'g Tr. 436:24-25. This was corroborated by Ambroa. Hr'g Tr. 855:2-4.

It is unreasonable to conclude that speaking with Lewis herself twice,²¹³ conducting two investigations, spending an entire day interviewing every employee²¹⁴ during the second investigation,²¹⁵ and collecting over 20 signed employee statements²¹⁶ does not constitute a “meaningful” investigation. There is no other case in which such a thorough investigation has been found not to be “meaningful.” *See Universal Truss, Inc., A Div. of Universal Forest Products, Inc. & Cabinet Makers, Millmen & Indus. Carpenters, Local 721*, 348 NLRB 733, 737 (N.L.R.B. 2006) (overturning ALJ when employer relied on solely the witness statement of a security guard in terminating a worker for misconduct). When Lewis once again engaged in verbal racial abuse, Respondent terminated her as any employer in its situation would.

Importantly, the ALJ did not consider Respondent’s good-faith belief in the numerous employee complaints, only whether the ALJ believed the reports. As the Board held in *Universal Truss, Inc., A Div. of Universal Forest Products, Inc. & Cabinet Makers, Millmen & Indus. Carpenters, Local 721*, “the issue is not whether [a coworker’s] report was true, but rather whether the report gave the Respondent a reasonable belief that misconduct had occurred.” 348 NLRB 733, 737 (N.L.R.B. 2006). Consequently, GC had the burden to prove none of the terminable misconduct occurred, which she failed to do. *Id.* at 738.

²¹³ The first conversation was after the first allegation in October 2015, while the second was interviewing Lewis during the March 2016 investigation.

²¹⁴ Hr’g Tr. 441:20.

²¹⁵ Hr’g Tr. 441:18-19.

²¹⁶ Respondent’s Exhibits 13, 14.