

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

CORDUA RESTAURANTS, INC.

and

Case 16-CA-160901

STEVEN RAMIREZ, an Individual

and

Case 16-CA-161380

ROGELIO MORALES, an Individual

and

**Cases 16-CA-170940
16-CA-173451**

SHEARONE LEWIS, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO THE RESPONDENT'S EXCEPTIONS**

**Laurie Monahan Duggan
Counsel for the General Counsel
National Labor Relations Board
Region 16
1919 Smith Street, Suite 1545
Houston, Texas 77002**

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Counsel for the General Counsel, pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, files this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision (ALJD).

The hearing in this matter was conducted before the Honorable Administrative Law Judge Sharon Levinson Steckler from June 27 to July 1, 2015. On December 9, 2015, the judge issued her recommended Decision and Order. In her Decision and Order, the judge found that the Respondent violated Section 8(a)(1) of the Act when it terminated Charging Parties Steven Ramirez and Shearone Lewis, threatened employees with reprisals for refusing to sign an arbitration agreement, promulgated and maintained an unlawful arbitration agreement, and maintained several unlawful rules in an employee handbook. The recommended Decision and

Order requires Respondent to cease and desist its unlawful conduct, offer Ramirez and Lewis reinstatement, make Ramirez and Lewis whole for any loss of earnings and other benefits as a result of the discrimination against them, and post an appropriate Notice to employees.

On January 6, 2017, Respondent filed forty exceptions to the Judge's ruling on amendments, findings of fact, and applications and conclusions of law. Respondent's exceptions should be denied because the Judge's decision is supported by credible record evidence and case law. Counsel for the General Counsel urges the Board to adopt the judge's decision, except as modified by Counsel for the General Counsel's limited cross-exceptions.

I. THE JUDGE PROPERLY EXCLUDED RESPONDENT'S POST-HEARING EXHIBITS AND ALLOWED COMPLAINT AMENDMENTS (RESPONDENT'S EXCEPTIONS 1, 2, AND 3; SECTION I)

For the reasons stated in the ALJD, the Respondent's argument in its exceptions that the judge improperly excluded Respondent's extra-record exhibit are baseless. (JD slip op. at 5:10-45, 6:1-3). In support of its exception, Respondent posits the nonsensical argument that the post-hearing, extra-record exhibits it sought to introduce were already part of the record, and thus improperly excluded by the judge. If that were true, Respondent would have no need to enter additional *extra-record* exhibits, because it could simply cite the information already contained in the record. Instead, as stated by the judge, none of the documents Respondent sought to include were based upon record evidence, a judge's decision, or any interpretation of record evidence. (JD slip op. at 5:23-24). Because the documents were patently irrelevant and contained substantial deviations from record evidence, the judge properly struck them.

The judge's statement that Respondent "declined to enter any relevant portions" of Respondent's handbook into evidence, the subject of Respondent's second exception, is without error. (JD slip op. at 6:37-38). Respondent mistakenly interprets this statement literally, noting

that it did indeed enter portions of the handbook into evidence. (R. Exh. 3, 15). However, the judge plainly meant that Respondent questioned witnesses about various substantive aspects of the rules contained in the handbook, but illogically entered only self-serving portions of the handbook into evidence such as the employee signature pages, which contained no substantive evidence relevant to, or supportive of, the evidence it adduced in questioning its witnesses.

The judge's decision to allow Counsel for the General Counsel to amend the Complaint during the hearing to allege violations of the employee handbook was also sound. First, Counsel for the General Counsel indeed subpoenaed the entire employee handbook, and Respondent failed to produce it. Second, as stated in the ALJD, Counsel for the General Counsel properly introduced the entire handbook during the hearing because it was patently relevant to the record testimony. (JD slip op at 6:36-42). Consequently, the motions to amend the Complaint to allege violations of the newly-discovered handbook were properly allowed. Section 10(b) of the Act expressly provides that a Complaint "may be amended at any time prior to the issuance of an order based thereon." Each complaint amendment therefore concerned an undisputed record fact, the matters at issue were fully litigated, and there was no undue surprise because the handbook violations alleged legal arguments, and further testimony would be immaterial to their merit.

II. THE JUDGE CORRECTLY FOUND THAT RESPONDENT'S HANDBOOK RULES AND ARBITRATION AGREEMENT ARE UNLAWFUL (EXCEPTIONS 1-8; SECTION II)

For the reasons stated in the ALJD, the judge correctly found that Respondent's policy barring "disruptive" and "non-productive, unprofessional" conduct unlawful. (JD slip op at 9:20-40). The Respondent's argument that the rule explicitly refers only to "illegal" activity is incorrect. While the rule does prohibit illegal activity, it also prohibits the ambiguously

described “disruptive” and “non-productive, unprofessional.” Consequently, the judge’s finding is correct.

The judge correctly found that Respondent’s solicitation rule is unlawful. (JD slip op. at 10). Respondent’s argument that the other bullet points expressly refer to “working time” is misleading. The fact that the other bullet points explaining other prohibited conduct refer to “working time” only supports the inference that the solicitation prohibition applies to working and nonworking time on and off the premises, because it contains no qualification about where or when it is prohibited.

The judge correctly found Respondent’s rule barring employees from leaving work at any time unlawful. (JD slip op. at 11:5-23). Respondent incorrectly and misleadingly argues that the rule in the case cited by the judge, *2 Sisters Food Group*, 357 NLRB 1816, 1817-1818 (2011), is the same as Respondent’s rule. As the judge points out, the *2 Sisters* rule barred unauthorized breaks, whereas Respondent’s rule was a blanket prohibition on leaving at any time. (JD slip op. at 11:20-23).

Contrary to Respondent’s argument that the judge read the phrase “other acts” that would bring the company into disrepute out of context, the judge correctly found that the inclusion of the phrase “other acts” was ambiguous and would therefore reasonably be interpreted to preclude Section 7 activity. (JD slip op. at 11:24-36; 12).

The judge correctly found that Respondent’s rule prohibiting arguing is overly broad because it does not specify that it prohibits only violent or physical arguing. (JD slip op. at 13:10-15). Because the phrase is so broad, “arguing” is reasonably interpreted as mere disagreement with a co-worker or with a supervisor, which is protected activity. As the judge

notes, just because the word is included in a policy that also bans possession of weapons does not mean that arguing refers only to violent argument.

For the reasons stated by the judge, her finding that Respondent's rule prohibiting contact with the media and press interfered with employees' Section 7 rights was correct. (JD slip op. at 14: 1-24). Respondent argues on exception that the rule's statement that it prohibits all company-related discussion with the press "in order to ensure accuracy" sufficiently conveys that the employee may communicate on his or her own behalf lacks merit. The rule makes no mention that employees may speak about company-related matters if it is his or her own opinion, as clarified in GC Memorandum 15-04, and the Respondent misapplies that clarification in its argument here.

For the reasons stated by the Judge, her finding that Respondent's rule regarding cell phones and pagers is unlawful should be affirmed. (JD slip op. at 14-15). Respondent argues on exception that an employee who is on break would not be covered by the policy, but the rule fails to make this clear. The ambiguity of the rule, combined with the overbroad ban on bringing a phone to work at all, renders it unlawful, as correctly found by the judge. (JD slip op. at 14:37-40).

The judge also correctly found Respondent's arbitration agreement unlawful. (JD slip op. at 15-16. Initially, she correctly points out that she is not bound by the Fifth Circuit precedent cited by Respondent. See *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993), (JD slip op at 16:35-37).

On exception, Respondent argues that the fact both versions of its agreement expressly state that the agreement will not preclude employees from filing Board charges renders the agreement lawful, citing *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). In *Murphy Oil*,

however, the Board rejected the argument that an express provision preserving certain employee rights under the NLRA cured the agreement's restriction on Section 7 rights. *Murphy Oil*, supra, slip op. at 19, citing *D. R. Horton, Inc.*, 357 NLRB No. 184, slip. op at 7 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12-60031, April 16, 2014) (an exception for NLRA rights creates, at most, an ambiguity that must be construed against the drafter; employees still would reasonably believe that they were barred from filing or joining class or collective actions, because the agreement expressly stated that employees waived the right to do so). Although the agreement contains a provision preserving an employee's right to file charges before the NLRB, it does not explicitly exclude from mandatory arbitration charges filed concertedly or challenges to the Board's decisions. Moreover, the exclusion of (at least individual) disputes before the Board, and the broader acknowledgment of employees' rights to act concertedly, do not cure the unlawfulness of the other provisions barring collective arbitral action and all judicial action (individual and collective). *Id.*

Respondent similarly asserts that the Federal Arbitration Act (FAA) trumps the NLRA where the two statutes conflict and that its arbitration agreement is thus valid. The Board has rejected this argument. See *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 7-8 (2014) (discussing the Fifth Circuit's failure to accommodate the NLRA and the FAA, and failure to acknowledge that the NLRA is "not simply another employment-related Federal statute," but rather "*sui generis*" insofar as joint and collective employee action is the heart of the Act). Consequently, the Board should adopt the judge's findings.

III. THE JUDGE CORRECTLY FOUND THAT RESPONDENT UNLAWFULLY TERMINATED STEVEN RAMIREZ (EXCEPTIONS 1¹-12, SECTION III)

Without argument, analysis, or citations to the record, Respondent argues that the judge's failure to credit some of COO Fred Espinoza's testimony was error. (JD slip op. at 26:1-11). It is well established that the Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the ALJ's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). The judge's resolutions were reasonable on these matters, as she correctly relied on Espinoza's demeanor, the fact that Espinoza's answers to certain questions were evasive, and the fact that Espinoza was asked both leading and speculative questions in making her determination. (JD slip op. at 26:1-11). Similarly, Respondent excepts to the judge's crediting of Ramirez's statement that Reichman was to obtain his pay records, which he was entitled to pursuant to Respondent's handbook. (JD slip op. at 25:43-44). Again, the judge's resolution was required by the fact that Respondent's own exhibit, R. Exh. 9, corroborates that Ramirez mentioned his payroll records to Reichman. Respondent's generalized and unsupported statements that Ramirez was internally inconsistent or perjured himself are not supported by the record.

Respondent unsuccessfully argued on exception that it could not have called Reichman because Reichman was no longer employed by Respondent, and thus not within its control. Respondent's argument plainly lacks merit, as it called Ramirez as a witness despite the same

¹ Respondent excepts to the judge's statement that "Quinonez. . . had possession of emails between Reichman and Ambroa," arguing instead that Quinonez said she had *texts* between the two. (JD slip op. at 22:45-46). Quinonez did, at one point, make this statement. (Tr. 391:3-11). Later, Quinonez again said she had "emails" between the two, but she corrected herself stating that she mistakenly said "emails," but meant "texts." (Tr. 397:14-18). The misstatement is irrelevant to the judge's analysis and thus immaterial.

circumstances. Respondent had ample opportunity to call Reichman as a witness, as she testified at length for the General Counsel. Further, Respondent even inappropriately talked to her and took down her contact information before she testified. Respondent's counsel talked to Reichman outside the presence of Counsel for the General Counsel; Reichman stated that Respondent's counsel commented on her late uncle and they talked about "travel" and "general stuff, and that Respondent's counsel wrote down her phone number. (Tr. 10-11; 120-121). Consequently, the judge's adverse inference was proper. (JD slip op. at 27:29-37).

The judge correctly found that Respondent's investigation of Ramirez was a sham. First, Respondent's failure to consult the one individual, Reichman, who would be able to verify whether Ramirez had committed misconduct proves pretext. See, e.g., *Escambia River Electric Cooperative, Inc.*, 265 NLRB 973 (1982) (sham investigation where employer failed to talk to key individuals). In addition, in finding that the investigation was a sham, the judge properly relies on several key facts not acknowledged on exception by Respondent: the gap in time between Respondent's knowledge of a possible information breach and when it actually questioned Ramirez (JD slip op. at 27:21-27, 39-42); the Respondent's failure to question Reichman, a key individual who possessed critical information about Respondent's allegations against Ramirez, as discussed above (JD slip op. at 27:29-37); and the fact that the questions Espinoza undisputedly asked Ramirez were designed to trap Ramirez, rather than discover the truth about whether information had been breached (JD slip op. at 27:42, 28:1-4).

The judge did not err in finding that Respondent lacked a reasonable belief that Ramirez engaged in, or tried to engage in, theft of information. (JD slip op. at 29:24-40). As stated by the judge, Respondent employed a technology expert who verified to Respondent that no information breach occurred. Further, the text messages cited by Respondent on exception were

incoherent, and were sent by an employee who was undisputedly terminated for being drunk on the job and thus inherently unreliable. This information required the judge to conclude that Respondent lacked a reasonable belief of wrongdoing.

Respondent's argument on exception that the judge erred in considering disparate treatment evidence in terminating Ramirez also lacks merit. (JD slip op. at 25:18-27). Respondent asserts that the judge erred in distinguishing employees who were terminated because they "stole goods or money" from Ramirez's termination. As the judge points out, the other employees at issue were terminated for stealing food from the bar and selling it to other employees and for double-cashing checks for which Respondent had photographic evidence. (JD slip op. at 25:18-27. In this case, Respondent acted upon the drunken, incoherent text of a recently-terminated employee, alleging that Ramirez asked for payroll records. The two factual circumstances are wholly dissimilar. The argument to the contrary is objectively unreasonable.

As discussed above, stated by the judge, and argued by the General Counsel in its post-hearing brief, the legal conclusions of the judge finding that Respondent unlawfully terminated Ramirez are correct. The record reveals abundant evidence of animus and other unfair labor practices. Evidence of animus includes Respondent's act of targeting Ramirez with arduous tasks and requiring him to stay for longer periods of time while he worked at the Sugar Land location from June to August; Ramirez's forced transfer to Sugar Land; Ramirez's uncontradicted testimony that Respondent called in two employees, Alex Camarena and Jackie Diago, one of whom joined the lawsuit on September 1, in the first week of September, for a lecture on bad attitudes around new employees; Ramirez's testimony regarding managers' tone and strictness in the last week of his employment; and Ramirez' testimony about Respondent's strictness after his initiation of the lawsuit with regard to clocking in and out. (Tr. 34-47

(arduous tasks); 29, 79-81 (forced transfer); 42 (coercive statements to Diago and Camarena); 40-41 (strictness in last week of employment); 25, 58 (strictness after lawsuit). Evidence of other unfair labor practices includes Respondent's unlawful terminations of Morales and Lewis, unlawful interrogations of Ramirez and other employee witnesses in October and March 2016, unlawful employee policies and rules, unlawful arbitration agreement, unlawful threats, and unlawful surveillance.

The timing of Respondent's investigation of Ramirez was also suspicious. Ambroa allegedly informed Respondent of both text messages that purported to convey misconduct, at the end of July. (Tr. 1023, 1024). Respondent did not begin investigating Ramirez until over a month later, however. (R. Exh. 27).

Respondent's reason for terminating Ramirez was a pretext, and thus Respondent is precluded from showing it would have terminated Ramirez anyway. *Rood Trucking Co.*, 342 NLRB 895, 895 (2004); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (where the evidence establishes that the reason given for the respondent's action is pretextual--that is, either false or not relied upon--the respondent fails by definition to show that it would have taken the same action for that reason).

Respondent's reasons for terminating Ramirez are a pretext because Respondent failed to meaningfully investigate the misconduct allegation, as discussed above. See, e.g., *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57, slip op. at 5 (2011), *enfd. sub nom. Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012) (a finding of pretext defeats an employer's attempt to meet its rebuttal burden). Evidence of pretext includes failure to investigate whether the alleged discriminatee engaged in the alleged misconduct justifying the adverse action. See, e.g., *W.W. Grainger, Inc. v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978).

Ambroa alerted Espinoza to Reichman's text messages with Ramirez and Ambroa. (Tr. 1023, 1024). Espinoza neither contacted Reichman to inquire further or to verify the meaning of the text, nor did he speak to anyone else, except for meeting with Ramirez a week before, during which Ramirez denied the allegations completely. (Tr. 121, 1056).

IV THE JUDGE'S CREDIBILITY DETERMINATIONS REGARDING ROGELIO MORALES AND KAREN LEBLANC SHOULD NOT BE OVERRULED (EXCEPTIONS 1-3, SECTION IV)

The judge properly credited Rogelio Morales' testimony over Karen LeBlanc's based on a consideration of internal inconsistencies, demeanor, and the form of the questions that elicited each witness' response. (JD slip op. at 34:25-39). It is well established that the Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the ALJ's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). As Respondent points out on exception, LeBlanc was testifying to events she witnessed as a customer over a year earlier, and her testimony included discrepancies. For example, LeBlanc initially testified that she heard Morales use the word "roofie" (Tr. 768:17-23), but then clarified on redirect that it was the other server who used that word (Tr. 790:15-20; JD slip op. at 32:8-9). Consequently, the judge's resolutions cannot be overruled.

V THE JUDGE CORRECTLY CONCLUDED THAT ALEX NGUYEN'S DECEMBER 2015 STATEMENT THAT HE WOULD NOT "BITE THE HAND THAT FEEDS" WAS COERCIVE (EXCEPTION 1, SECTION V)

Manager Alex Nguyen's statement to employees, during a December 2015 pre-shift meeting where Nguyen mandated that employees sign unlawful arbitration agreements, that he would not "bite the hand that feeds" the employees, was undisputed. The judge's conclusion that the statement was coercive was a legal conclusion based on well-established Board precedent,

which was cited in the ALJD. (JD slip op. at 36:12-22). Respondent's arguments that employees were not actually or subjectively coerced or threatened by the statement are a misapplication of the law.

VI. THE JUDGE CORRECTLY CONCLUDED THAT RESPONDENT FAILED TO CONDUCT A MEANINGFUL INVESTIGATION REGARDING SHEARONE LEWIS, AND HER CREDIBILITY RESOLUTIONS SHOULD NOT BE OVERRULED (EXCEPTIONS 1-13, SECTION VI)

In her conclusion, the judge relied on Respondent's pretextual investigation of Shearone Lewis, which became glaringly obvious at the hearing.

First, the judge's decision not to rely on the "statements" taken by HR manager Patricia Quinonez was proper. (JD slip op at 40:45-47; 41:1-21). The March 2016 statements taken by Quinonez must be considered inherently incredible and unlawfully obtained. (R. Exh. 14). The statements were inherently incredible because, although they appear to be drafted by the employees themselves, many of them were drafted by Ambroa and the signatures were obtained by Ambroa. (R. Exh. 14). The statements were allegedly drafted by Quinonez from notes that she took during the investigations. There was no consistent testimony about how soon after the investigations the employees signed the documents, and the statements were undisputedly filtered through Quinonez's biased perception.

In support, Eduardo Vera, kitchen manager, testified that Ambroa had him sign the written statement. (Tr. 598; R. Exh. 14). Vera previously testified that he signed the statement in March 2016, but then later could not recall whether it was days, a week, or a month after Quinonez came to the restaurant to question him that he signed the document. (Tr. 598; 611). The conversation with Quinonez took place in Spanish, Quinonez's memorialization was written

in English, Ambroa read the statement to Vera in English and then translated it into Spanish. (Tr. 613; R. Exh. 14).

Garza testified that the March 2016 statement was given to her by Quinonez. (Tr. 567). Vicente Cardenas was present during Quinonez's questioning of Garza, despite Quinonez's testimony that she questioned the witnesses individually. (Tr. 572).

Perez testified that Ambroa wrote the October 2015 handwritten statement, and Perez signed it. (Tr. 675; R. Exh. 13). Perez testified that he signed the statement the day he talked to Quinonez, which would have been impossible given that Quinonez did not type up the statements until the following day, and that Quinonez and Ambroa both testified that Ambroa obtained the signatures of the witnesses. (Tr. 663).

Herrera was not presented with the typewritten statement, which Quinonez prepared, for her signature until two or three weeks after Quinonez questioned Herrera. (Tr. 697).

Ambroa testified that Lewis did not sign the March 2016 typewritten statement that Quinonez prepared because "her complaint was about Cecilia Blanco, and Cecilia Blanco was gone." (Tr. 948). Then, Ambroa testified that he did not even show that statement to Lewis for her signature. (Tr. 990). Thus, the statements are inherently unreliable.

Next, Respondent presented a slew of patently incredible witnesses to testify about the unreliable statements. The judge correctly found that the witness testimony of Garza, Vera, Perez, Herrera, and Kline was not credible. Their testimony was inconsistent, oftentimes irrelevant, and elicited by shameless leading. It is well established that the Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the ALJ's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

The testimony of these employees must be discredited. The employees' testimony was inherently incredible given that they still work for Respondent and are thus assumed to be favorably disposed to Respondent. Further, they admitted having met with Respondent's counsel and Quinonez the week before testifying. Tr. 602 (Vera); 628 (Perez); 683 (Herrera). For example, Daniel Perez, food runner, met, by himself, with Quinonez, and Daniel Ramirez and Respondent's counsel, the week before he testified, at Respondent's corporate office. (Tr. 629; 655). Ambroa had told Vera that Lewis had filed a lawsuit against the company. (Tr. 599). Vera also met with another one of Respondent's attorneys the week before he testified. (Tr. 602).

In addition to these facts, the witness' testimony was elicited primarily through leading questions: in fact, the majority of Respondent's counsel's questions of its witnesses on direct were leading. (Tr. 1061).

Further, the testimony was internally inconsistent, and was inconsistent when compared with other witnesses. Specifically, until the Judge asked Garza about Cecilia Blanco, Garza only testified about Lewis. (Tr. 540-541). First, there is evidence that Garza herself harassed Lewis, as she admitted that she had asked Lewis about her "freaky hair." (Tr. 549). Garza has a close relationship with Ambroa, who assigns her sections to bus. (Tr. 549). Garza does not recall making the statement that Lewis told other employees that Respondent did not treat employees well, despite that that is what is written in her statement. (Tr. 555; R. Exh. 14). Garza only heard this through a friend who works for Respondent. (Tr. 555). Garza's sister also had a relationship with Nguyen. (Tr. 558). Garza stated that Quinonez did not ask her about Blanco, which demonstrates that the investigation was targeted and/or that Garza was not being truthful.

(Tr. 560). Garza is still employed by Respondent, and spoke with Quinonez the week before testifying; she did not appear pursuant to a subpoena. (Tr. 568).

Perez testified that he was not friends with his co-workers. (Tr. 660). Perez testified that he signed the statement the day he talked to Quinonez, which would have been impossible given that Quinonez did not type up the statements until the following day, and that Quinonez and Ambroa both testified that Ambroa obtained the signatures of the witnesses. (Tr. 663). Perez testified that he carools with Ruby Garza at least weekly and that they talked about Lewis. (Tr. 667-668).

The employees' testimony similarly alleged harsh and specific language used by Lewis that was absent in all other witness testimony and unsupported by character evidence of both co-workers and managers. Specifically, Herrera testified that Lewis called her a wetback, said "shit," and "fuck you" on a daily basis. (Tr. 695). Herrera testified that she complained to Ambroa often, "the whole time," about Lewis's use of racial slurs. (Tr. 705). Garza testified that Lewis said move away bitch and called her a wetback, and that Lewis used the word wetback more than 20 times. (Tr. 536; 531-532).

That Lewis would use such language on a regular basis, if at all, is improbable given the cumulative testimony of all other witnesses. First, Lewis consistently, adamantly, and credibly testified that she has never called another co-worker a racially charged name, threatened to call immigration on an employee, inquired into an employee's immigration status, or otherwise discriminated against another employee for their race or national origin, nor has she been disciplined for doing so. (Tr. 232-233; 269; 274; 277; 284; 287).

Similarly, other witnesses who would have had the opportunity to overhear such comments corroborated Lewis's testimony on the matter. For example, Vera stated that he spent

the majority of his time in the kitchen, where he would have most certainly overheard such comments, Vera never testified that Lewis called anyone a wetback or other racial name. (Tr. 577). Reichman did not recall any instances where Lewis had run-ins with other Spanish-speaking employees, besides the documented incident between Lewis and Herrera in 2014. (Tr. 147; R. Exh. 1). In the two to three years Hofmann worked with Lewis, he never heard her use a racial epithet. (Tr. 344; 346). Hofmann testified that Lewis never made derogatory remarks about anyone, and did not judge people ethnically. (Tr. 348). In all the time he worked with Lewis, Ambroa never heard Lewis use the word “wetback,” use the words “dumb fucking idiots,” use the words “dumb fucking foreigners,” or state that she would call immigration on anyone. (Tr. 976).

The testimony of Lucy Kline was not credible because it was internally inconsistent. She denied that she had any issues with other employees, but, in fact, during her transition, employees called her names and she consequently became angry. (Tr. 1225; 1236).

As discussed above, the judge’s finding that Respondent failed to conduct a meaningful investigation is both reasonable and required, given the robust evidence of incredible written statements and testimony, comprising Respondent’s “investigation,” discussed above. (JD slip op. at 47:35-42).

VII. REMEDY: THE JUDGE APPROPRIATELY ORDERED THAT RESPONDENT, HAVING UNLAWFULLY TERMINATED STEVEN RAMIREZ AND SHEARONE LEWIS, MUST OFFER THE DISCRIMINATEES REINSTATEMENT AND MAKE THEM WHOLE FOR ANY LOST EARNINGS AND OTHER BENEFITS

Respondent excepts to the backpay and reinstatement remedy for both discriminatees, Steven Ramirez and Shearone Lewis. Included in this remedy is the requirement that backpay be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the

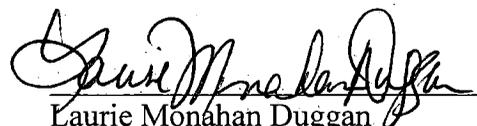
rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). (JD slip op. at 49:42-46).

Respondent's exceptions to this remedy should not be granted. Reinstatement and backpay are standard Board remedies for employees who have been found to have been unlawfully terminated. The requirement for interest at the appropriate rate, to be compounded daily, has been developed through clear Board law, and is appropriate for this particular situation. This remedy is routinely awarded in unlawful termination cases, without any need for special circumstances. Accordingly, the standard backpay remedy, supported by clear Board law, is appropriate.

VIII. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel requests that the Board deny Respondent's exceptions in their entirety, affirm the Judge's findings of fact and conclusions of law except as modified by Counsel's limited cross-exceptions, and adopt the Judge's recommended Order except as modified by Counsel's limited cross-exceptions. Counsel also requests any further relief the Board deems appropriate.

DATED at Houston, Texas this 20th day of January, 2017.


Laurie Monahan Duggan
Counsel for the General Counsel
National Labor Relations Board
Region 16
1919 Smith Street, Suite 1545
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Answering Brief to the Respondent's Exceptions has been served this 20th day of January, 2017 on the following:

DANIEL N. RAMIREZ, ATTORNEY
150 W PARKER RD
THIRD FLOOR
HOUSTON, TX 77076-2951
dramirez@montyramirezlaw.com

BRITTANY MORTIMER, ATTORNEY
150 W PARKER RD
THIRD FLOOR
HOUSTON, TX 77076-2951
BMortimer@montyramirezlaw.com

TRANG Q. TRAN, ATTORNEY
TRAN LAW FIRM LLP
9801 WESTHEIMER RD, STE 302
HOUSTON, TX 77042
TTRAN@tranlawllp.com

ROGELIO MORALES
11710 AINSWORTH DR.
HOUSTON, TEXAS 77099
Chuy1204@yahoo.com


Laurie Monahan Duggan
Counsel for the General Counsel
National Labor Relations Board
Region 16
1919 Smith Street, Suite 1545
Houston, Texas 77002