

**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
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S DECISION**

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EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

On January 20, 2017, Counsel for the General Counsel filed limited cross-exceptions in this matter. Counsel hereby submits the following arguments in support of its cross-exceptions.

- 1. Counsel for the General Counsel's motion to amend the complaint to allege that Respondent unlawfully interrogated Steven Ramirez should be granted, and the Board should find that Respondent violated Section 8(a)(1) of the Act and order the appropriate remedy. (JD slip op. at 7:5-27).**
- 2. Counsel for the General Counsel's motion to amend the complaint to allege that Respondent unlawfully orally promulgated and maintained a rule that employee personnel files are confidential and any violation of that policy is a serious offense which can result in termination should be granted, and the Board should find that Respondent violated Section 8(a)(1) of the Act and order the appropriate remedy. (JD slip op. at 7:5-27).**

a. The motions to amend the complaint should be granted.

In her Decision, the judge summarily denied Counsel for the General Counsel's motion to amend the complaint based on testimony adduced at the hearing. (JD slip op. at 7:5-27). The

judge cited the applicable standard for deciding whether to allow a complaint amendment. (JD slip op at 6:5-12). As she noted, an administrative law judge has wide discretion on accepting amendments to a complaint upon terms that seem just. Section 102.17 of the Board's Rules and Regulations. The factors examined are: (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. *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1071-1072 (2006), enfd. 315 Fed.Appx. 318 (2d Cir. 2009). The judge found that factors one and three favored denying the motion, stating that Respondent was surprised to learn of the allegations after the close of its case and may have adduced further testimony or presented its case differently had it known of the amendments earlier. (JD slip op. at 7:12-23). In support, the judge cited *Consolidated Printers, Inc.*, 305 NLRB 1061, 1064 (1992) and *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 23-24 (D.C. Cir. 2015). (JD slip op. at 7:16-18).

Contrary to the findings of the judge, the motion to amend the complaint to include the allegations listed above should be granted. Initially, the amendments are not based solely on *testimony* adduced at the hearing, but they are based on documentary evidence, in the form of record exhibits, *introduced and entered by Respondent*. These amendments conform the pleadings to the proof, and involve only legal conclusions based on facts already in evidence.

At the hearing, for the first time, Respondent entered a transcript of an audio recording of Respondent's interrogation of Ramirez about September 4, 2015 (Cross-exception 1). (R. Exh. 27). The transcript is an undisputed written record of the full conversation between Ramirez and Respondent's Chief Operating Officer Fred Espinoza. The Respondent also entered a transcript of a conversation between its representative, Espinoza, and Ramirez, which shows that Espinoza orally promulgated a rule that employee personnel records are confidential (Cross-exception 2).

(R. Exh. 28). The transcript of the September 10, 2015, conversation was undisputedly a full and accurate representation of the words the parties exchanged. This is the first time Counsel for the General Counsel became aware of Espinoza's exact words during each of the conversations.

Regarding the first cross-exception, as Respondent first introduced the written document and had the opportunity to question both the General Counsel's witness and its own witness about the interrogation, the matter was fully litigated and there was no prejudice to the Respondent. The cases cited by the judge are distinguishable. The judge in *Consolidated Printers, Inc.*, 305 NLRB 1061, 1064 (1992), cited by Judge Steckler in her decision, underscored the fact that the General Counsel in that case waited until the close of the hearing to move to amend the complaint. In this case, Counsel for the General Counsel moved to amend the complaint at her earliest opportunity. Respondent's critical exhibits, 27 and 28, were entered during its case-in-chief. After Respondent rested, but before Counsel for the General Counsel presented its rebuttal witness, Counsel for the General Counsel moved to amend the complaint. (Tr. at 1210:9-12).¹ Respondent therefore had an opportunity to recall witnesses or call rebuttal witnesses to address the new allegations. Unlike *Consolidated Printers*, supra, there was no delay in moving to amend. The same is true for *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 23-24 (D.C. Cir. 2015), cited by the judge, where the court denied the General Counsel's motion to amend the complaint based on witness testimony at the *close of the hearing*, after it made and announced its decision not to call rebuttal witnesses.

Importantly, in this case, Respondent first introduced the documentary evidence supporting the allegation, and that evidence is therefore undisputed. Consequently, the matters

¹ The transcript at this citation states the following. Counsel for the General Counsel: "Your Honor, I move to [*Inaudible*], and I move to amend the Complaint to allege the following matters as violations." Where the transcript reads "inaudible," Counsel for the General Counsel stated "conform the pleadings to the proof."

were fully litigated, require only legal conclusions, and Respondent suffered no prejudice. See *Pincus Elevator & Electric Co.*, 308 NLRB 684, 684–685 (1992) (judge abused her discretion by denying the General Counsel’s motion during the hearing to add a *Johnnie’s Poultry* allegation that respondent’s counsel had improperly questioned employees about the case without giving assurances against reprisal, as the respondent’s counsel had first introduced the subject employee statement; the allegation was fully litigated; and the respondent had therefore suffered no prejudice) enfd. mem. 998 F.2d 1004 (3d Cir. 1993).

Regarding the second cross-exception, because the allegation concerns an oral promulgation of a rule that was undisputedly entered into the record by the Respondent, and the Respondent had the opportunity to question the General Counsel’s witness and its own witness about the statements, the allegation requires only a legal conclusion, the matter was fully litigated, and the Respondent suffered no prejudice. See *Pincus Elevator*, supra.

Accordingly, the Board should grant the motion to amend and find the following allegations unlawful.

b. Respondent unlawfully interrogated Steven Ramirez (Cross-exception 1)

FACTS

About the middle or end of August, or about September 4, Espinoza, Respondent’s Chief Operating Officer, pulled Ramirez from his working duties, as he was in the middle of serving customers, into a closed room at the restaurant. (Tr. 38-39; 1043). Espinoza is not typically at the restaurant; he appears around the holidays. (Tr. 1017). The conversation is transcribed in Respondent’s Exhibit 27. Espinoza did not obtain Ramirez’s consent to participate in the investigation, or assure him that he would not be retaliated against for the answers he supplied. (R. Exh. 27; Tr. 1051, 1071).

Espinoza stated at the outset, “we understand you have a lawsuit against us.” (R. Exh. 27). Espinoza asked Ramirez about whether he texted Naomi Reichman (erroneously transcribed as “Naomi Russell”), and Ramirez replied that he did do so for scheduling reasons, because Reichman used to be his manager. (R. Exh. 27). Ramirez asked to call his lawyer before answering more questions. (R. Exh. 27). Espinoza continued to ask questions, and Ramirez denied Espinoza’s allegations that he asked Reichman to steal information. (R. Exh. 27). At one point, someone entered the room where the discussion was occurring to get the order for one of the tables that Ramirez had in his hand at the time Espinoza pulled him into the private room. (Tr. 1049). Espinoza observed that Ramirez was very nervous during the discussion; Espinoza had never had a one-on-one discussion with Ramirez before this time. (Tr. 1050).

On September 10, Espinoza called Ramirez into the back room at the restaurant shortly he arrived for work. (Tr. 43). Ramirez, General Manager Rigo Romero, and Espinoza were present, and the door was closed. (Tr. 43). Ramirez was nervous and caught off guard at the time; he felt intimidated because of the lawsuit that was going on at the same time and feared termination. (Tr. 113; 1193). Espinoza stated to Ramirez, “you violated unfortunately the policies [in the employee handbook] by accessing confidential employee records. .encouraging another employee to access confidential employee records and lying to me about texting Naomi.” (R. Exh. 28).

After he was terminated, Ramirez called Naomi Reichman. (Tr. 92). Reichman told Ramirez that management had been trying to fire him since May. (Tr. 91-92).

ARGUMENT

As discussed in Counsel for the General Counsel’s post-hearing brief, particularly given that Respondent obtained the information that gave rise to its interrogations of Ramirez through

unlawful surveillance, the interrogations themselves were also unlawful. Additionally, under a totality of the circumstances, Respondent's September interrogations of Ramirez were coercive and unlawful. (R Exhs. 27, 28). As noted above, Espinoza, who was not normally present at the restaurants, came to the restaurant and pulled Ramirez from his work duties to interrogate him. (R. Exhs. 27, 28). Espinoza then, in an attempt to trap Ramirez into saying something exculpatory, ask questions about personnel files, confidential information, and text messages with Reichman. (R. Exhs. 27, 28). Espinoza undisputedly asked Ramirez to see his phone, which contained the protected conversations. (R. Exh. 27). These questions were a fishing expedition based on the information gleaned from the unlawful surveillance, and Espinoza was objectively asking directly about Ramirez's protected activity related to the lawsuit. Accordingly, Espinoza's interrogations of Ramirez on these matters were unlawful. See generally *Brighton Retail*, 354 NLRB 441, 441 fn. 4 (2009) (finding employer's questioning of employees about potential or actual lawsuit filed against employer to be unlawful interrogations).

- c. *Respondent unlawfully orally promulgated and maintained an unlawful rule that employee personnel files are confidential and any violation of that policy is a serious offense which can result in termination (Cross-exception 2)*

FACTS

On September 10, during the meeting in which Espinoza terminated Ramirez, Espinoza announced that personnel files and records are considered confidential and any violation of that policy is a serious offense which can result in termination. (R. Exh. 28).

ARGUMENT

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In

determining whether a challenged rule is unlawful, the Board must give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Lafayette Park Hotel*, 326 NLRB at 825, 827. If the rule *explicitly* restricts activities protected by Section 7, it is unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-647. Even if a rule is ambiguous, any ambiguity in a work rule that may restrict protected concerted conduct “must be construed against the [employer] as the promulgator.” *Ark Las Vegas Restaurant*, 343 NLRB 1281, 1282 (2004).

This rule is overbroad under the first prong of the *Lutheran Heritage* analysis. Broadly barring discussion, without any qualification, of “employee personnel files” would be reasonably construed to restrict discussion about terms and conditions of employment, such as compensation, with the Union or other lawful representatives. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 7, 12 (2011) (finding unlawful a handbook confidentiality rule prohibiting disclosure of information from an employee’s personnel file and also an oral rule prohibiting discussion about any matters under investigation by employer’s human resources department); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 1-2 (2014) (finding unlawful a rule instructing employees to “keep customer and employee information “secure” and that “information must be used fairly, lawfully, and only for the purpose for which it was obtained”); *MCPc, Inc.*, 360 NLRB No. 39 (2014), slip op. at 1 (finding unlawful a rule prohibiting “dissemination of confidential information within [the company], such as personal or

financial information”).² Because employees have the right to discuss wages and conditions of employment with third parties as well as each other, rules prohibiting communication of confidential information impede upon that right. *Cintas Corp.*, 344 NLRB 943, 943 (2005) (rule prohibiting the release of any information regarding employees was unlawful, because employees would reasonably construe it to restrict the discussion of wages and other terms and conditions of employment among fellow employees and with the union), *enfd.* 482 F.3d 463 (D.C. Cir. 2007). In fact, in this case, it is that very information – documentation of hours worked by employees – that forms the critical basis for the Charging Parties’ concerted activity. Therefore, the rule is overbroad and unlawful.

The rule is also unlawful under the second prong of the *Lutheran Heritage* analysis. Espinoza announced and promulgated the rule that employee personnel files are confidential for the first time in his termination meeting with Ramirez. (R. Exh. 28). The rule is not otherwise contained in Respondent’s employee handbook or policies. (GC. Exh. 15). Page 14 of Respondent’s handbook covers discussion of employee personnel files and access to the files, but does not prohibit disclosure or require confidentiality. (GC Exh. 15). Because Espinoza promulgated the rule here to terminate Ramirez, it was unlawfully promulgated in response to Ramirez’s protected activity of pursuing his FLSA claim.

3. Respondent violated Section 8(a)(1) of the Act when it unlawfully terminated Rogelio Morales for engaging in protected concerted activity. (JD slip op. at 35:11-18).

Regarding Morales’ discharge, there is no credibility issue that requires review. In fact, the judge credited Morales’ version of the events, and discredited Respondent’s neutral witness,

² *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), and *Kiauz BMW*, 358 NLRB No. 164 (2012) were issued by a panel that under *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), was not properly constituted. It is the General Counsel’s position that these cases were soundly reasoned, and the General Counsel therefore urges that the Board adopt the rationale in these cases as its own.

Karen LeBlanc, the customer who made the complaint leading to Morales' discharge. (JD slip op. at 34:27-30). Although the judge found that there was no evidence of animus, the independent 8(a)(1) violations as well as the unlawful discharges of Ramirez and Lewis amply demonstrate Respondent's animus. Further, as the judge discusses, Respondent failed to investigate (JD slip op. at 32:25-30) and disparately treated Morales as compared to other servers disciplined for similar violations (JD slip op. at 34:7-24), which shows pretext.

As discussed in Counsel for the General Counsel's post-hearing brief, Respondent unlawfully terminated Morales on August 18 in violation of Section 8(a)(1) of the Act under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The elements of protected activity and knowledge have been established. Morales joined the lawsuit about June 18. (GC Exh. 5). The same instances of animus that apply to Ramirez's termination apply to Morales, who also worked at the Sugar Land location. The timing of Morales' termination, just one month after Respondent became aware that he joined the lawsuit, is particularly suspicious. *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action").

Respondent's failure to consult the only employee witness to the incident at issue, bartender George Henderson, demonstrates pretext. See, e.g., *Escambia River Electric Cooperative, Inc.*, 265 NLRB 973 (1982) (sham investigation where employer failed to talk to key individuals). This point is disputed. Romero, who made the decision to terminate Morales, testified that he spoke to Henderson as part of his investigation. (Tr. 1136). However, Morales testified that he called Henderson after his termination, and Henderson told him that Respondent

did not ask about Morales' conduct or call him to discuss the issue. (Tr. 196, 1223). In this circumstance, an adverse inference should be drawn against Respondent. Respondent called Henderson to testify, but failed to elicit testimony that could have simply resolved the factual discrepancy that had already been presented by this point in the hearing (Morales had already testified that Henderson told Morales that Respondent did not contact him to ask him about the incident leading to Morales's termination). (Tr. 1111-1116). Further, before leaving the restaurant the day of the incident, Henderson told Morales he would vouch for him if asked. (Tr. 166). Morales also implored Romero to talk to "his witnesses" about his involvement in the incident, and Romero never affirmed to Morales that he did indeed consult Henderson or other witnesses. (Tr. 167). Consequently, credibility should be resolved in favor of Morales.

Assuming arguendo Respondent contacted Henderson, Respondent failed to show by a preponderance of the evidence that it would have taken the same action even in the absence of protected activity. To meet its *Wright Line* defense burden, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

Respondent presented evidence showing that it acted adversely against Morales because he allegedly violated company policies regarding conversations of an inappropriate, and specifically sexual, nature. (Tr.408-409; 480). Respondent maintains a progressive discipline policy and policies about sexual harassment, discussed in its handbook. (Tr. 489).

Respondent asserts that this policy is applied consistently to all employees, and that it terminated other employees for similar infractions. (R. Exh. 16; GC Exh. 15; Tr. 489).

The record shows, however, two examples where Respondent did not terminate an employee despite overwhelming evidence showing that the employee physically sexually harassed another employee. (R. Exh. 12; GC Exh. 12).

In May 2014, Respondent gave employee John Lewis a second written warning for arriving late and for complaints about sexually harassing an employee. (R. Exh. 12). Attached to his personnel form was a letter from a neutral witness, kitchen manager Fausto Zarzuela, stating that he observed Lewis approach another employee, Lacey Goodeaux, and tell her that he wanted to “grab a chunk of [her] ass.” (Tr. 493-494; GC. Exh. 12). Zarzuela approached Goodeaux and asked her if she was okay, and she said no. (Tr. 493-494; GC. Exh. 12). Quinonez’s statement that Goodeaux did not think Lewis should be fired is irrelevant; there was no claim that Lewis did not actually make the statement and Zarzuela attested to that fact. (Tr. 493-494; GC. Exh. 12).

In August 2014, Respondent issued a written warning to employee Breaux Peters for complaints made by employee Desiree Frazier. (R. Exh. 12; 489-493). The investigation included Frazier’s handwritten complaint that Peters “completely physically violated her” by forcing her into a liquor closet, where he kissed her; on another occasion, he tried to uncross her legs and she told him to stop, he then tried to put his hand down her shirt and she yelled at him to stop or she would slap him, and he laughed it off. (R. Exh. 12; 489-493). The investigation further includes Quinonez’s handwritten statements that Frazier stated that Peters was always trying to get Frazier to go into the liquor closet, that he would pass near her and “touch her butt” and give her “very affectionate hugs.” (R. Exh. 12; 489-493). Quinonez continues, Peters “tried to spread her legs or uncross them” with his knee, when Frazier screamed at him to stop; Peters then tried to put his hand down her shirt, after which Frazier pushed him away and told him that

she was going to slap him. (R. Exh. 12; 489-493). Quinonez's handwritten statement continues, "she does not feel secure around him," "she feels very uncomfortable around him," and that "the first time she felt harassed is when they were in the liquor room [and] he told her before you leave refill the mints so she went inside and he followed her [and] she tried to move out of the way [and] he just grabbed her waist and kissed her in the mouth. She pushed him away and told him don't do this ever again. He tried to kiss her again 2 or 3 times." (R. Exh. 12; 489-493).

These instances of sexual harassment are undisputed, and show that Respondent applied its policies inconsistently, specifically with regard to Morales. (R. Exh. 12; 489-493). Respondent failed to terminate two employees accused of serious, egregious, and substantiated claims of sexual harassment, and in the second instance, sexual abuse. (R. Exh. 12; 489-493). Respondent investigated these allegations by obtaining handwritten statements from other employees before deciding *not* to terminate the employees. (R. Exh. 12; 489-493). Quinonez admitted that claims of this nature are serious and expose Respondent to substantial liability. (Tr. 417; 492-493). In Morales' case, on the other hand, Respondent did not investigate the allegations fully and obtained no written statements. The ample disparity evidence demonstrates that Respondent tolerated far more severe misconduct than that which was alleged of Morales. Respondent failed to prove by a preponderance of the evidence that it would have discharged Morales even if he were not a lawsuit claimant. See, e.g., *Sunshine Piping, Inc.*, 351 NLRB 1371, 1377 (2007) (respondent's introduction of documentary evidence purporting to demonstrate its consistent application of company policy insufficient to meet rebuttal burden).

Accordingly, the Board must reverse the judge's conclusion and find that Respondent unlawfully terminated Morales for his protected activity.

4. Respondent violated Section 8(a)(1) of the Act when it unlawfully promulgated and enforced its arbitration agreement. (JD slip op. at 16:39-44).

Although the judge found that Respondent's maintenance of its arbitration agreement was unlawful, she declined to find that Respondent unlawfully promulgated or enforced the agreement, stating "General Counsel also contends that Respondent enacted the change in the arbitration agreement due to the employees' protected concerted activities of participating in a wage suit against Respondent. Respondent made the change after the employees filed their action, making it likely that Respondent took action in response to the employees' protected activities of pursuing collective action in the FLSA suit (see below). However, this additional finding would not make the arbitration agreement any more unlawful than it already is." (JD slip op. at 16:39-44).

Respondent unlawfully promulgated, maintained, and enforced its unlawful arbitration agreement when, on May 8, 2015, Respondent filed a motion to compel to arbitration based on the arbitration agreements that it had employees sign. GC Exh. 3. It is unlawful to move to compel arbitration of an FLSA claim filed by employees in district court. *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F. 3d (5th Cir. 2015) ("Respondent further violated Section 8(a)(1) of the Act when, after several employees filed an FLSA claim in Federal district court, the Respondent moved to compel arbitration of the employees' FLSA claim and dismiss their collective action, pursuant to arbitration agreements signed by the employees"). The arbitration agreement's promulgation was in direct response to the filing of the FLSA claim, and was therefore unlawful, as the judge found. Additionally, Respondent again sought to promulgate and maintain its unlawful arbitration agreement when it redistributed the agreement for signatures at the December 2015 pre-shift meeting. (Tr. 228; 333-335; Jt. Exh. 1 and 2). Accordingly, Respondent violated Section 8(a)(1) of the Act.

5. **To fully remedy the violations, the Board should order a make-whole remedy that includes compensation for all consequential economic harms as a result of Respondent's unfair labor practices. (JD slip op. at 50:18-19).**

Counsel for the General Counsel submits Steven Ramirez, Shearone Lewis, Rogelio Morales, and any other employee affected by Respondent's unfair labor practices be made whole, including reasonable consequential damages incurred as a result of Respondent's unlawful conduct. In support for this request, Counsel for the General Counsel notes that under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. See Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. E.g., *Graves Trucking*, 246 NLRB 344, 345 fn.8 (1979), enfd. as modified, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's

remedial structure is to “make whole” employees who are the victims of discrimination for exercising their Section 7 rights. See, e.g., *Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act’s “general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company’s” unlawful act).

Moreover, the Supreme Court has emphasized that the Board’s remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must “draw on enlightenment gained from experience.” *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. See, e.g., *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act’s make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), enf. denied on other grounds, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to

compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); see also *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961), quoting *Phelps Dodge*, 313 U.S. at 194; see *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act’s remedial purpose of restoring the economic status quo that would have obtained but for a respondent’s unlawful act. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.³ Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the

³ However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. See *Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).⁴

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. See *Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enfd.*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 fn. 3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 fn. 2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed);

⁴ Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

Pacific Beach Hotel, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.⁵ In *Nortech Waste*, supra, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986), and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 fn. 2. The Board explained that the special expertise of state

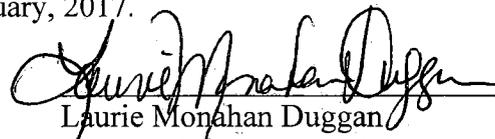
⁵ This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where – as in *Nortech Waste* – there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 fn. 3 (1985) (respondent liable for discriminatee’s consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 fn.4 (1995) (same), *enfd. mem.*, 105 F.3d 671 (11th Cir. 1996)).⁶

Conclusion

For the foregoing reasons, Counsel for the General Counsel requests that the Board grant Counsel for the General Counsel’s cross-exceptions in their entirety and issue a modified Order with the additional remedies. Counsel also requests any further relief the Board deems appropriate.

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


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⁶ The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. See *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. See *Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); see also *Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affd. mem.*, 862 F.2d 304 (2d Cir. 1988).

CERTIFICATE OF SERVICE

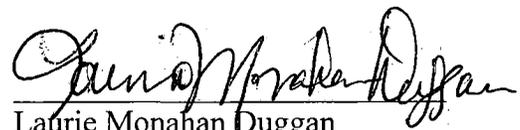
I hereby certify that Counsel for the General Counsel's Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision has been served this 20th day of January, 2017 on the following:

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