

**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
REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO GENERAL
COUNSEL'S CROSS-EXCEPTIONS**

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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 Reply Brief to Respondent's Answering Brief to General Counsel's Cross-Exceptions.

- I. The motions to amend the Complaint discussed in General Counsel's cross-exceptions should be granted because they were based on previously unknown information entered, by Respondent, as undisputed record evidence.**

In its answering brief, in support of its argument that the matters in Counsel for the General Counsel's ("Counsel") cross-exceptions were not fully litigated, Respondent points to a citation in the hearing record where the judge instructed Respondent to move on because Counsel had not moved to amend the Complaint. The judge's instructions were responsive to

Respondent's lengthy, cumulative line of questioning seeking to establish the supervisory status of witness Eduardo "Lalo" Vera. (Tr. at 1011-1012). The instruction to "move on" was based on the fact that Counsel had not alleged Vera as a supervisor, and that the record already contained abundant evidence regarding Vera's status. (Tr. at 615-617, judge questions Vera about supervisory status; Tr. at 618-619, Respondent questions Vera about supervisory status; Tr. at 623-624, Counsel questions Vera about supervisory status; Tr. at 624-625, judge again questions Vera about supervisory status; Tr. at 625-626, Respondent again redirects questioning Vera about supervisory status). Respondent's reference to this portion of the record to support its argument that the General Counsel's motions to amend were properly denied is bewildering, as the record shows that the judge's instruction at this juncture was categorically unrelated to any issue Counsel has raised in its cross-exceptions, namely, the unlawful interrogation and oral promulgation of an unlawful rule.

Instead, as discussed in Counsel's brief in support of cross-exceptions, the motions to amend the Complaint to include unlawful interrogation and oral promulgation of an unlawful rule should be granted. Respondent misapplies the law when it argues that the introduction of evidence regarding one allegation is insufficient to put a party on notice that the same evidence is being used for another allegation. This premise is true when the introduced evidence is oral testimony, and when there are no correlative documents that speak for themselves. In contrast, the amendments in the instant case are based on undisputed documentary evidence introduced by Respondent. Respondent's witness, COO Fred Espinoza, recorded the entirety of his "interviews" of Steven Ramirez on his phone, because he wanted it to "be documented or recorded." (Tr. at 1038). Respondent stated that it had the audio tape, and wanted to introduce it as a written transcript, as Respondent had the tape transcribed in advance. (Tr. at 1040). The

transcripts were entered by Respondent and Counsel did not object. (Tr. at 1041-1042; 1056-1057; R. Exhs. 27 and 28). In fact, Counsel was prohibited from questioning Espinoza about the transcript, which contains the testimony where Espinoza orally promulgated the unlawful rule at issue, because of Respondent's repeated objections that "the document speaks for itself" and that Counsel was "quizzing [Espinoza] about a document he didn't prepare." Tr. at 1070-1071. Espinoza stated that the transcribed exhibits were an accurate representation of the conversations he had with Ramirez, and that there was nothing else stated that was not memorialized in the transcripts. Tr. at 1071-1072. Any additional questioning by Respondent would not have altered the existence or admitted veracity of the documents in question, and additional litigation would have therefore been both futile and unnecessary.

Further, as the record shows, Counsel did not learn of the exact communications between Ramirez and Espinoza until Respondent entered its transcribed exhibits (R. Exhs. 27 and 28) at the end of the second to last day of the hearing. Respondent's assertion that Counsel knew of the unlawful interrogation nine months earlier is both impossible and specious.

II. As alleged in its cross-exception, the Board should find that Respondent unlawfully terminated Rogelio Morales in violation of Section 8(a)(1) of the Act, as Respondent conducted a sham investigation proving pretext.

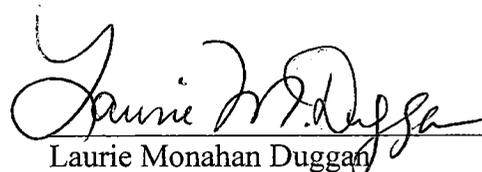
Respondent, in its answering brief, again advances the argument that it spoke to the one critical witness, bartender George Henderson, who could have resolved the issue of whether Rogelio Morales engaged in the alleged improper conduct that led to his termination. As discussed previously, this is a disputed issue of fact. 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.

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 15th day of February, 2017.



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CERTIFICATE OF SERVICE

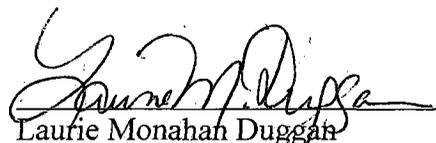
I hereby certify that Counsel for the General Counsel's Reply Brief to Respondent's Answering Brief to General Counsel's Cross Exceptions has been served this 15th day of February, 2017 on the following:

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